



**Law
Commission**
Reforming the law

Misconduct in Public Office Issues Paper 1: The Current Law

20 January 2016

The Law Commission

MISCONDUCT IN PUBLIC OFFICE

Issues Paper 1: The Current Law

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The Law Commission – How We Consult

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are: The Rt Hon Lord Justice Bean, *Chairman*, Professor Nick Hopkins, Stephen Lewis, Professor David Ormerod QC and Nicholas Paines QC. The Chief Executive is Elaine Lorimer.

Topic of this consultation: Analysis of the current law of misconduct in public office and the identification of associated problems.

Geographical scope: This paper applies to the law of England and Wales.

Availability of materials: The paper is available on our website at <http://www.lawcom.gov.uk/project/misconduct-in-public-office/>.

Duration of the consultation: We invite responses from 20 January 2016 to 20 March 2016.

The terms of this issues paper were agreed on 16 December 2015.

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If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

After the consultation: In the light of the responses we receive, we will produce a further consultative document on the topic of law reform options.

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The Principles are available on the Cabinet Office website at: <https://www.gov.uk/government/publications/consultation-principles-guidance>.

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THE LAW COMMISSION
MISCONDUCT IN PUBLIC OFFICE

ISSUES PAPER 1: THE CURRENT LAW

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CHAPTER 1

INTRODUCTION

- 1.1 The Law Commission is undertaking a review of the offence of misconduct in public office as part of its 11th programme of law reform.¹
- 1.2 Our reform objectives are:
 - (1) to decide whether the existing offence of misconduct in public office should be abolished, retained, restated or amended; and
 - (2) to pursue whatever scheme of reform is decided upon.
- 1.3 This background document sets out the current law of misconduct in public office, highlighting problems that arise through areas of uncertainty, as well as gaps and overlaps with alternative offences. The legal concepts involved in this offence are highly technical and complex and not easily accessible to non-lawyers. Furthermore, given that the law is so unclear and controversial, there is often some confusion between what the law is and what it should be. The question of the appropriate boundaries of criminal liability for public officials is clearly a matter of broad public interest.
- 1.4 In light of this complexity and controversy, we have divided the consultation process into two phases in an effort to expand the scope for engagement with the important issues raised in this review.
- 1.5 The first phase of this consultation commences with our symposium of pre-eminent speakers and delegates, coinciding with the publication of this paper on 20 January 2016. Our focus is on the current law and its problems. We will use the contributions from delegates at this symposium and responses to the questions in this background paper to formulate options for reform.
- 1.6 We seek responses to the questions set out in this background paper by 20 March 2016.
- 1.7 The second phase of consultation will set out options of what the law of misconduct in public office should be and will involve a consultative document to be published this spring. This will be followed by a final report to be published early in 2017.

THE COMMON LAW OFFENCE OF MISCONDUCT IN PUBLIC OFFICE

- 1.8 Misconduct in public office is a common law offence: it is not defined in any statute. It carries a maximum sentence of life imprisonment. The leading case, *Attorney General's Reference (No 3 of 2003)* ("AG's Reference"), defines the offence as follows:

The elements of the offence of misconduct in a public office are: (1) a public officer acting as such; (2) wilfully neglects to perform his duty

¹ Eleventh Programme (2011) Law Com No 330 at [2.57] to [2.60].

and/or wilfully misconducts himself; (3) to such a degree as to amount to an abuse of the public's trust in the office holder; (4) without reasonable excuse or justification.²

- 1.9 The court in *AG's Reference* provided the first comprehensive consideration of the elements which make up the offence since the case of *Bembridge* in 1783.³ Lord Justice Pill's judgment in *AG's Reference* remains the clearest statement of the elements of the offence, although subsequent Court of Appeal cases have attempted to refine or develop aspects of the offence.
- 1.10 There is a related civil tort of misfeasance in public office. We will make no recommendations in relation to the tort within this review. However, both the development and operation of the tort may assist with interpretation of the criminal offence by providing examples of the context in which it may be used. An overview of the tort is provided in Appendix B.
- 1.11 We have identified a number of problems with the offence:
- (1) "Public office" lacks clear definition yet is a critical element of the offence. This ambiguity generates difficulties in interpreting and applying the offence.
 - (2) The types of duty that may qualify someone to be a public office holder are uncertain. Whether it is essential to prove a breach of those particular duties is also unclear from the case law.
 - (3) An "abuse of the public's trust" is crucial in acting as a threshold element of the offence, but is so vague that it is difficult for investigators, prosecutors and juries to apply.
 - (4) The fault element that must be proved for the offence differs depending on the circumstances. That is an unusual and unprincipled position. .
 - (5) Although "reasonable excuse or justification" appears as an element of the offence, it is unclear whether it operates as a free standing defence or as a definitional element of the offence.

BACKGROUND TO THE PROJECT

- 1.12 In 2010 the House of Commons Committee on the Issue of Privilege ("the Committee") stated:⁴

In our view, the current law on misconduct in public office remains unsatisfactory, not least because it is punishable with up to a life sentence. We recommend that the Law Commission re-visit its 1997

² [2004] EWCA Crim 868; [2005] QB 73 at [61].

³ (1783) 3 Doug KB 327, 99 ER 679. The origins of misconduct in public office arguably date back at least as far as 1275. See Appendix A for a full analysis of the historical development of the offence.

⁴ Police Searches on the Parliamentary Estate, First Report of the House of Commons Committee on Issue of Privilege (2009-10) HC 62 at [57]. See further discussion in Appendix E.

recommendation that misconduct in public office be made a statutory offence, in the light of developments of the past dozen years.⁵

1.13 The Committee had been established in the wake of the arrest of Damian Green MP and Home Office civil servant Christopher Galley in November 2008. They were arrested on suspicion that Mr Galley had made unauthorised disclosures of confidential Government information to Mr Green. Subsequently, the Director of Public Prosecutions, took the decision not to prosecute either party on the grounds that there was no realistic prospect of conviction.⁶

1.14 Since then, misconduct in public office has rarely been out of the spotlight of legal and media attention. High profile allegations, investigations, prosecutions of the offence, and appeals in relation to its interpretation have been numerous. These include the following:

- (1) There is an ongoing prosecution of former MEP Nikki Sinclair at Birmingham Crown Court in relation to alleged irregularity in expenses claims.⁷
- (2) The former Bishop of Gloucester, Peter Ball, was convicted of misconduct in public office in relation to relationships with trainee priests between 1977 and 1992.⁸
- (3) Between 2014 and 2015, prosecutions took place of the suspects arrested as part of the Metropolitan Police investigation Operation Elveden. These concerned payments allegedly made by journalists to a variety of public officials for information to be used in news stories. In 2015 the Court of Appeal, led by Lord Chief Justice Thomas, was required to consider the ambit of the offence in the case of *Chapman*.⁹ This resulted in a Crown Prosecution Service (“CPS”) review of those cases and subsequently discontinuance of various prosecutions against journalists.¹⁰ Around 30 officials have been convicted as result of Operation Elveden.
- (4) Members of health care professions have been prosecuted for different types of misconduct in situations which have not previously been

⁵ The 1997 recommendation referred to was not in fact a formal Law Commission proposal, but was a provisional proposal made in a consultation paper published by the Committee on Standards in Public Life in July 1997 - Pamphlet “Misuse of public office: a consultation paper” accompanying the Third Report of the Committee on Standards in Public Life: Standards of Conduct of Local Government in England, Scotland and Wales Cm 3702-1.

⁶ CPS announcement *Decision on Prosecution: Mr Christopher Galley and Mr Damian Green MP* (16 April 2009). The decision not to prosecute followed the acquittal of journalist Sally Murrer, also in November 2008, in relation to information obtained from the police.

⁷ See BBC News, “Ex-MEP Nikki Sinclair denies money laundering and misconduct” (2 February 2015), <http://www.bbc.co.uk/news/uk-england-birmingham-31095363> (last visited 13 January 2016).

⁸ *Ball* (8 September 2015) (unreported, Central Criminal Court). See Chapter 2.

⁹ [2015] EWCA Crim 539, [2015] 2 Cr App R 10. See Chapter 2.

prosecuted for that offence. Two cases in particular, *Cosford*¹¹ (engaging in relationships with, and providing prohibited items to, prisoners in the care of the prison infirmary) and *Mitchell*¹² (sexual touching of a patient in an ambulance), led to important Court of Appeal decisions in 2013 and 2014 respectively.

- (5) PC Keith Wallis was convicted of misconduct in public office arising out of the “Plebgate” affair. Wallis had submitted a false statement to the investigation as to whether Andrew Mitchell MP had been abusive to police officers on duty at Downing Street.
- (6) Ali Dizaei, former Metropolitan Police Commander, was prosecuted for the offences of perverting the course of justice and misconduct in public office, between 2010 and 2012.¹³
- (7) The arrest of Damian Green MP and Home Office civil servant Christopher Galley in relation to leaking official information in 2010.
- (8) In May 2009 an unknown person in the parliamentary fees office leaked House of Commons expenses records to The Telegraph newspaper.¹⁴ This information led to the prosecution in 2010 of a number of members of the House of Commons and House of Lords for false accounting offences. The Metropolitan police declined to investigate the person responsible for the leak.¹⁵

¹⁰ See http://www.cps.gov.uk/news/latest_news/crown_prosecution_service_re_review_of_operation_elveden/ (last visited 13 January 2016).

¹¹ [2013] EWCA Crim 466, [2014] QB 81. See Chapter 2.

¹² [2014] EWCA Crim 318, [2014] 2 Cr App R 2. See Chapter 2.

¹³ [2013] EWCA Crim 88, [2013] 1 WLR 2257; BBC News, “Met Police commander jailed for corruption” (13 February 2012), <http://www.bbc.co.uk/news/uk-england-london-16979424> (last visited 13 January 2016).

¹⁴ See The Telegraph, “MPs’ expenses scandal: a timeline” (4 November 2009), <http://www.telegraph.co.uk/news/newstopics/mps-expenses/6499657/MPs-expenses-scandal-a-timeline.html> (last visited 13 January 2016).

¹⁵ See Met Police, “MPS will not investigate MPs expenses leak”, <http://content.met.police.uk/News/MPS-will-not-investigate-MPs-expenses-leak/1260267539886/1257246745756> (last visited 13 January 2016).

- 1.15 Statistics provided by the CPS and the Ministry of Justice show that in the last ten years there has been a substantial rise in the number of prosecutions for the offence.

Number of prosecutions commenced	
Year¹⁶	Prosecutions
2005	2
2006	43
2007	56
2008	68
2009	63
2010	149
2011	106
2012	96
2013	134
2014	135

- 1.16 Figures provided by the Ministry of Justice as to the number of persons convicted of the offence of misconduct in public office also show that conviction rates have decreased over the last three years, following a small rise in conviction rates between 2011 and 2012. For example, in 2011, 75% of persons charged with the offence were convicted; in 2012 the rate was 83%; in 2013 it was 55%; and in 2014 it was 37%.¹⁷ At the same time we are aware that a significant proportion of the cases result in appeals, either against conviction or sentence.¹⁸
- 1.17 There may be numerous reasons for both the disparity between prosecution and conviction rates and the need for frequent appeal. One interpretation is that there is a significant disparity between what investigators and prosecutors might consider to constitute misconduct in public office and what a jury is prepared to treat as conduct deserving a conviction for that offence. The degree of uncertainty as to its use and interpretation leads to it being susceptible to challenge.
- 1.18 In light of the above we still regard two considerations as important:

- (1) Since prosecutions in respect of misconduct in public office tend to be high profile the shortcomings of the current law are more apparent and, therefore, carry a greater risk of undermining public confidence than might be the case in respect of less newsworthy offences.

¹⁶ Data for years 2005 to 2010 was sourced from the CPS and 2011 to 2014 from the MoJ.

¹⁷ We do not suggest that the drop in convictions for misconduct in public office is necessarily undesirable – we point to the disparity between prosecution and conviction rates as a potential indicator of difficulties within the current law.

¹⁸ No exact figures are available as, before 2014, the Court of Appeal did not keep records of the number of misconduct appeals brought each year.

- (2) The operation of the offence of misconduct in public office is eminently suitable for review by the Law Commission. It could require the simplification, clarification and codification of a common law offence.
- 1.19 The need for reform of the law in this area has certainly been echoed by a number of commentators recently following extensive criticisms of prosecutions.
- 1.20 Academic commentary has observed that:
- A better CPS policy would be to stop prosecuting the misconduct offence until there has been [...] authoritative restatement, preferably by Parliament. At present the elements of the misconduct offence are so uncertain that an Article 7 challenge is a definite possibility.¹⁹
- 1.21 The Court of Appeal recently acknowledged:
- This is without doubt a difficult area of the criminal law. An ancient common law offence is being used in circumstances where it has rarely before been applied.²⁰
- 1.22 The press have suggested the offence is incoherent:
- Sometimes sources are committing crimes by leaking to journalists and taking that risk may mean they need to be paid for their information. Why is it a crime to pay a public official for information and not a crime to pay anyone else? This is inconsistent, and criminalising the act of rewarding whistleblowers undermines the protection of sources [...].²¹
- 1.23 Government ministers have also acknowledged the shortcomings:
- The existing common-law offence of misconduct in public office dates back several hundred years and is not specific either to cases of corruption or to police officers. It is not always well suited to dealing with or deterring the pattern of corruption in today's information age.²²
- 1.24 The concerns expressed as to the state of the current law, and the urgent need for reform, have been confirmed in information provided to us by key

¹⁹ S Parsons, "Misconduct in a public office – Should it still be prosecuted?" [2012] 76 *Journal of Criminal Law* 179, p 185. See also A Ashworth, "Misconduct in public office: ingredients of offence – misuse of public funds" [2010] 10 *Criminal Law Review* 779, p 780.

²⁰ *Chapman* [2015] EWCA Crim 539, [2015] 2 Cr App R 10 at [29], Lord Thomas CJ.

²¹ See Tim Crook, "Rights to freedom of expression won by journalists over centuries have been lost in a few years" *Press Gazette* (29 January 2015), <http://www.pressgazette.co.uk/content/rights-freedom-expression-won-journalists-over-centuries-have-been-lost-few-years> (last visited 13 January 2016).

²² Lord Faulks during the House of Lords debate in respect of Criminal Justice and Courts Act 2015, s 26 - *Hansard* (HL), 30 June 2014, vol 754, col 1539.

stakeholders in our preliminary fact finding discussions. We are grateful to those who have already provided us with their views on this topic.²³

THE STRUCTURE OF THIS PAPER

Chapters

- 1.25 This issues paper is structured as follows:
- (1) Chapter 1 is this introduction.
 - (2) Chapter 2 analyses the current law on the offence of misconduct in public office.
 - (3) Chapter 3 analyses the recently created offence of “police corruption” under section 26 of the Criminal Justice and Courts Act 2015. This offence was introduced amid concerns that the offence of misconduct in public office was no longer “fit for purpose”. Chapter 3 also assesses the impact of the new offence on this review.
 - (4) Chapter 4 summarises the problems we have identified with the current law.
 - (5) Chapter 5 identifies the numerous alternative and related offences that overlap with misconduct in public office, the way that misconduct relates to them and what arguments exist to justify a separate misconduct type offence. It also examines the overlap between criminal misconduct and disciplinary misconduct and potential difficulties this may cause.
 - (6) Chapter 6 describes the types of conduct that are currently prosecuted as misconduct in public office. Specifically, it seeks to identify whether there are any types of conduct that can only be prosecuted using misconduct in public office and not under any other criminal offence.
 - (7) Chapter 7 summarises our questions for consultees.

Appendices

- 1.26 In addition to the main body of this issues paper there are a number of supporting appendices available on the Law Commission website.²⁴
- 1.27 The appendices cover a number of detailed areas of research that supplement this background document:
- (1) **Appendix A: History of Misconduct in Public Office** - a detailed analysis of the history of the offence of misconduct in public office. Much of the recent criticism of the misconduct offence has been prefaced by

²³ Paras 1.28 and 1.29 below.

²⁴ <http://www.lawcom.gov.uk/project/misconduct-in-public-office/>.

references to its age.²⁵ An understanding of the origins and context of the development of the offence may assist with an understanding of its current scope and operation. An historical perspective may help when assessing whether the current law is 'fit for purpose' and how, if at all, it could be improved.

- (2) **Appendix B: The Tort of Misfeasance in Public Office** - a description of the associated tort of misfeasance in public office written by Professor Mark Aronson.²⁶ Many authorities for which are often cited in cases in respect of the criminal offence.
- (3) **Appendix C: The ECHR and Misconduct in Public Office** - an analysis of misconduct in public office by reference to the European Convention on Human Rights. Concerns raised in recent cases and commentary have focused on: (1) article 7 and the uncertainty surrounding the elements of the offence; and (2) article 10 and its use in cases where public office holders claim to have acted in the public interest by making disclosures of information.
- (4) **Appendix D: Spreadsheets Relating to Misconduct in Public Office** -
 - (a) Sheet 1: associated statutory provisions and other alternative or related offences to misconduct in public office.
 - (b) Sheet 2: unreported prosecutions for misconduct in public office since 2005.
- (5) **Appendix E: Previous Reform Proposals** - a summary of numerous previous attempts to reform the law of misconduct in public office and the issues that arose in the course of those law reform exercises.
- (6) **Appendix F: International Comparisons** - an analysis of the same or comparable offences in other countries and regions. Specifically we examine the legal position in Scotland, Australia, Canada, Hong Kong and the Caribbean states. Our choice of jurisdictions for this analysis was informed by recent cases and legal developments.

ACKNOWLEDGMENTS

1.28 We wish to thank the many people who have given up their time to either meet with us and discuss specific aspects of this project or to provide us with information and/or comments in writing, both in their personal capacity and as representatives of their organisations:

- (1) The Recorder of London, HHJ Nicholas Hilliard QC and members of the judiciary sitting at the Central Criminal Court.

²⁵ Most recently former Deputy Prime Minister Nick Clegg referred to the inadequacy of an ancient offence in cases where questions of public interest and freedom of the press are raised. See The Guardian, "Nick Clegg: reform needed on public interest defence for journalists" (30 March 2015), <http://www.theguardian.com/media/2015/mar/30/nick-clegg-public-interest-defence-journalists> (last visited 13 January 2016).

²⁶ Emeritus Professor, the University of New South Wales, Australia.

- (2) Expert practitioners: including the many Treasury Counsel with whom we met, Hugh Davies QC, David Perry QC, Michael Parroy QC, Dr Tim Moloney QC, Claire Montgomery QC and David Lusty.
- (3) Academics: Professor Andrew Ashworth QC, Professor Peter Alldridge, Professor Jeremy Horder, Professor Thomas G Watkin, Professor David Whyte, Associate Professor Simon Parsons, Dr Jonathan Rogers, Dr David Ellis and Dr Alexander Williams.
- (4) Officials: including those from the College of Policing, Court of Appeal Criminal Division, Crown Prosecution Service, Home Office, Legal Services Directorate of the Welsh Government, Ministry of Justice, Metropolitan Police Specialist Crime and Operations, National Offender Management Service, National Crime Agency, Serious Fraud Office, Standards of Conduct Committee for the Welsh Assembly, and the Standards Commissioner for the Welsh Assembly.
- (5) Organisations: including the Committee on Standards in Public Life, Independent Parliamentary Standards Authority, Independent Police Complaints Commission, Judicial Conduct Investigations Office, High Court Enforcement Officers Association and the News Media Association.
- (6) A number of legal editors from national newspapers: including The Guardian, The Telegraph and The Daily Mail.

1.29 In addition, we are particularly grateful to the following contributors to our appendices:

- (1) Professor Mark Aronson, Emeritus Professor, the University of New South Wales, Australia, for allowing us to reproduce his most recent work on the tort of misfeasance in public office as Appendix B.
- (2) Alice Irving of Merton College, University of Oxford, for her research on the law of misconduct in public office in Canada, Hong Kong and the Caribbean States which forms the basis of Appendix F.

CHAPTER 2

CURRENT LAW

- 2.1 This chapter analyses the current law relating to the common law offence of misconduct in public office. This offence is also sometimes referred to as misfeasance or misbehaviour in a public or a judicial office.²⁷
- 2.2 The current law has developed in a piecemeal fashion over many years. As a result, it is difficult to ascertain with absolute certainty where the boundaries of the offence and each of its elements lie. We examine only the modern interpretation of the law in this chapter and deal separately with its historical development in Appendix A.
- 2.3 The leading modern case is *Attorney General's Reference (No 3 of 2003)* ("AG's Reference"),²⁸ although it must be read in light of subsequent Court of Appeal decisions which have refined and developed aspects of the offence. *AG's Reference* still provides the clearest statement of the elements of misconduct in public office. Misconduct in public office involves:
- (1) a public officer acting as such;
 - (2) wilfully neglecting to perform his or her duty and/or wilfully misconducting him or herself;
 - (3) to such a degree as to amount to an abuse of the public's trust in the office holder; and
 - (4) without reasonable excuse or justification.
- 2.4 Our analysis of the offence in this chapter seeks to explain the meaning of each element. For the reasons explained above, this has not been an easy task, and we cannot be definitive about the meaning of every element.
- 2.5 We begin by placing the offence in context, before providing our detailed analysis of each element.

THE CONTEXT OF THE OFFENCE

One or more offences?

- 2.6 As we discuss further below, misconduct in public office necessarily involves a breach of a duty. That breach may arise as a result of positive conduct or by omission,²⁹ and that has led some to suggest that there are two separate

²⁷ For discussion of these different terms, see Appendix A.

²⁸ [2004] EWCA Crim 868, [2005] QB 73 at [61]. Lord Thomas CJ reiterated the importance of this authority in *Chapman* [2015] EWCA Crim 539, [2015] 2 Cr App R 10 at [19]: "In the light of the modern restatement of the law it is not necessary to refer to earlier cases as it was not suggested before us that the formulation in *AG Reference (No 3 of 2003)* was in any way inaccurate".

²⁹ See para 2.128 onwards below.

offences: “wilful misconduct” and “wilful neglect”.³⁰ The definition in *AG’s Reference*, however, suggests that the Court of Appeal identified or created a “unified offence incorporating both the former lines of authority, misfeasance and nonfeasance”.³¹ For the purposes of this Issues Paper we treat the different forms of misconduct as one, and not separate offences.

The tort of misfeasance in public office

2.7 The criminal offence is closely associated with the tort of misfeasance in public office. Indeed, authorities on the tort are sometimes cited in decisions relating to the criminal offence.³² A full account is contained in Appendix B, but in summary the ingredients of the tort are as follows:

- (1) the defendant must be a public officer;
- (2) the act or omission in issue must have been in the exercise of public functions; and
- (3) there must be an element of malice: either the defendant exercised a public power with the intention of injuring the claimant, or he or she acted:
 - (a) with knowledge of;
 - (b) reckless indifference to:
 - (i) his or her lack of authority to do so; and
 - (ii) the probable injury to the claimant.

Where the malice takes the form of recklessness, the defendant must know that his or her conduct would probably injure the claimant or person of a class of which the claimant was a member;

- (4) the claimant must have sufficient interest/standing to bring a claim; and
- (5) there must be damage or loss to the claimant.³³

³⁰ P Finn, “Official misconduct” (1978) *Criminal Law Journal* 307 (Australia); D Lusty, “Revival of the common law offence of misconduct in public office” (2014) 38 *Criminal Law Journal* 337 (Australia); T Williams, “Neglect of duty and breach of trust: ancient offences in the modern battle against impunity in the public service” (2010) *Journal of Money Laundering Control* 335; G McBain, “Modernising the common law offence of misconduct in a public or judicial office” (2014) 7(4) *Journal of Politics and Law* 46.

³¹ A Cronin, “Misconduct in public office: dishonesty is an element if misconduct amounts to theft or fraud” (2010) 74(4) *Journal of Criminal Law* 290.

³² *AG’s Reference* at [47] to [53].

³³ *Watkins v Home Secretary* [2006] UKHL 17, [2006] 2 AC 395; *Carter v Chief Constable of Cumbria* [2008] EWHC 1072 (QB) at [26]. See also *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 3)* [2001] UKHL 16, [2003] 2 AC 1.

THE ELEMENTS OF THE OFFENCE

(1) Public Office

- 2.8 Although the first element of the offence, as defined by *AG's Reference* is "a public officer acting as such" we consider that this contains two separate aspects: "public office" and "acting as such". These may involve different considerations. We will discuss the concept of public office in this section and the concept of acting as such in the next.
- 2.9 To assist the reader to navigate this section more easily, we begin by setting out a summary of our conclusions on the current law in respect of who is in public office.

(1) Public office:

- (a) **A public office is primarily defined by its functions, not its status.**
- (i) **A public office does not need to be an "office" in any technical sense nor be a permanent position.**
 - (ii) **The position does not need to be subject to specific rules of appointment, one of employment, a contractual position or remunerated.**
 - (iii) **A public office does not need to be directly linked, by way of appointment, employment or contract, in terms of status, to either the Government or the "state".**
- (b) **For an individual to be a public office holder:**
- (i) **the position must involve the individual in the performance of a duty associated with a state function; and**
 - (ii) **the duty must be one in which the public will have a significant interest in being performed (an interest beyond the interest of those who might be directly affected by a serious failure in the performance of those functions). This determines whether someone is in public office.**

- 2.10 This explanation is based on a series of questions that we consider must be answered to understand the concept of public office:

- (a) Is a public office defined by its status or its functions?
- (b) What does a function based test require?
- (c) What types of duty are necessary or sufficient to bring a person within the scope of the offence?

(a) Is a public office defined by its status or its functions?

- 2.11 Historically, the term “public office” has been defined in a number of statutes. Section 7 of the Public Bodies Corrupt Practices Act 1889,³⁴ for example, provided:

The expression “public office” means any office or employment of a person as a member, officer, or servant of [a] public body.

“Public body” was defined as:

...any council of a county or council of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under and for the purposes of any Act relating to local government, or the public health, or to poor law or otherwise to administer money raised by rates in pursuance of any public general Act, but does not include any public body as above defined existing elsewhere than in the United Kingdom.

- 2.12 However, in interpreting the common law offence of misconduct in public office, the courts have not adopted any statutory list of public offices. The courts’ approach is understandable since statutory definitions are usually framed so as to capture a specific type of officer and/or to deal with a particular problem.³⁵ In addition, statutory definitions of “public officer” based on status become less useful over time, particularly in light of the significant change in the relationship between the public and the private sector. Our 2008 report *Reforming Bribery*, for example, recognised that it was no longer sustainable or practical to separate the public from the private sector in respect of who could be prosecuted for bribery.³⁶
- 2.13 Little assistance in defining this element of the offence is derived from *AG’s Reference*. That case concerned a police officer and the court declined to give any further definition of a public office, as there could be no doubt that a police officer is a public office holder.
- 2.14 The meaning of “public office” for the purpose of the offence has been examined by the courts in numerous cases. The following, amongst others, have been held to be in “public office” for the purposes of the offence: executive or ministerial officers;³⁷ police officers, including officers in a period of suspension and former

³⁴ As amended by Prevention of Corruption Act 1916, s 4(2), “public body” includes, in addition to the bodies mentioned in the last-mentioned Act, local and public authorities of all descriptions.”

³⁵ For example, the problem in 1889 was bribery within local government. See A Doig, *Corruption and Misconduct in Contemporary British Politics* (1984). When giving evidence to the Parliamentary Joint Committee on the Draft Corruption Bill in 2003, Silber J (Law Commissioner 1994-1999) stated “much of that legislation was impulsive being prompted by contemporary problems or fears”, *Report of the Committee on the Draft Corruption Bill* (2003) HL 157, HC 705.

³⁶ *Reforming Bribery* (2008) Law Com No 313. The Bribery Act 2010 has now replaced the Public Bodies Corrupt Practices Act 1889 Act and subsequent related statutes (the Prevention of Corruption Acts 1906 and 1916) as well as the common law offence of bribery by a “public official”.

³⁷ *Friar* (1819) 1 Chit Rep (KB) 702.

officers doing part-time police work;³⁸ others working for the police, including community support officers³⁹ and those in charge of police computer systems;⁴⁰ prison officers, Independent Monitoring Board members and nurses working within a prison;⁴¹ magistrates;⁴² coroners;⁴³ county court registrars (now known as district judges);⁴⁴ Church of England clergy;⁴⁵ local councillors;⁴⁶ local authority employees;⁴⁷ army officers;⁴⁸ immigration officers;⁴⁹ and Driving and Vehicle Licensing Agency (“DVLA”) employees.⁵⁰

2.15 A number of these types of public office involve permanent “offices” or positions which exist to be filled by successive people, for example coroners and local councillors. Additionally, some are “Crown servants” appointed directly by the Crown, for example police officers and civil servants.⁵¹ This could suggest that whether someone is in public office depends on the status of his or her position. On the other hand, not all of the types of office listed have these attributes, or this “status”, for example, neither police civilian staff nor Independent Monitoring Board members do.⁵² Additionally, some observations made in cases concerning the tort of misfeasance in public office suggest that the scope of “public office” may be wider than this. These cases require consideration of the duties to which

³⁸ *AG’s Reference*. Of the reported cases, more concern police officers than any other single category of persons. *Knox* [2011] EWHC 1629 (Admin), [2011] 2 Cr App R 21; *DL* [2011] EWCA Crim 1259, [2011] 2 Cr App R 14.

³⁹ *Amar Iqbal* [2008] EWCA Crim 2066.

⁴⁰ *Gallagher* [2010] EWCA Crim 3201.

⁴¹ *Ratcliffe* [2009] EWCA Crim 1468, [2010] 1 Cr App R (S) 51; *McDade* [2010] EWCA Crim 249, [2010] 2 Cr App R (S) 82; *Jibona* [2010] EWCA Crim 1390; *Wright* [2011] EWCA Crim 1179, [2012] 1 Cr App R (S) 21; *Belton* [2010] EWCA Crim 2857, [2011] QB 934; *Cosford* [2013] EWCA Crim 466, [2014] QB 81.

⁴² *Pinney* (1832) 3 B & Ad 947, 110 ER 349 and many older cases.

⁴³ *Atkinson* (1701) 12 Mod 496, 88 ER 1472; *Scorey* (1748) 1 Leach 43, 168 ER 124.

⁴⁴ *Llewellyn-Jones* [1968] 1 QB 429, [1967] 3 WLR 1298.

⁴⁵ *James* (1850) 2 Den 1, 169 ER 393 has previously been accepted as authority on this point, albeit the indictment in that case was dismissed on other grounds. See G McBain, “Modernising the common law offence of misconduct in a public or judicial office” (2014) 7(4) *Journal of Politics and Law* 46. Most recently see *Ball* (8 September 2015) (unreported, Central Criminal Court) concerning Peter Ball, ex-Bishop of Gloucester, who pleaded guilty to misconduct in public office after Wilkie J ruled that a Church of England bishop was a public office holder. The court did not consider *James* to be clear authority on the point. Further discussed at paras 2.53 and 2.54.

⁴⁶ *Speechley* [2004] EWCA Crim 3067, [2005] 2 Cr App R (S) 15.

⁴⁷ *Bowden* [1996] 1 WLR 98, [1995] 4 All ER 505.

⁴⁸ *Whitaker* [1914] 3 KB 1283, (1914) 10 Cr App R 245, a case of common law bribery, discussed at para 2.19 below.

⁴⁹ *John-Ayo* [2008] EWCA Crim 1651, [2009] 1 Cr App R (S) 71.

⁵⁰ *Attorney General’s Reference (No 140 of 2004)* [2004] EWCA Crim 3525.

⁵¹ Crown servants are defined in the Official Secrets Act 1989, s 12(1). Civil servants would include prison officers and staff directly employed by HM Prison Service, local authority employees, immigration officers and DVLA employees.

⁵² Civilian staff are employed by area police forces and Independent Monitoring Board members are appointed as necessary by the Secretary of State for Justice under Prisons Act 1952 s 6.

an individual is subject and the functions being carried out by that person, not just his or her status.

2.16 There is a danger of confusion arising from the language in this context. We have the different concepts of duty and function, and unfortunately the courts have not adopted a consistent interpretation of the concepts, sometimes using the terms interchangeably to describe what are, essentially, functions. The risk of ambiguity is increased because we are considering the different roles of the individual and the government. For convenience we refer throughout to the “duties of an individual associated with a state function”: that is, the duty is that of an individual, while the function is that of some public authority. There may of course be many individual duties associated with a single state function.

2.17 The idea that public office should be defined by reference to the office holder’s duties as opposed to his or her status is not new. In the civil case of *Henly v Lyme Corporation*, Lord Chief Justice Best said:

In my opinion, everyone who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the Crown or otherwise, is constituted a public officer.⁵³

2.18 This approach has been noted in cases on the criminal offence, with no suggestion that the tests for the tort and the offence are different.⁵⁴ Additionally, in *Lancaster and Worrall*, Mr Justice Willes stated that “the nature of the office is immaterial as long as it is for the public good”.⁵⁵

2.19 *Whitaker* contains the most often cited common law definition of a public officer:

A public officer is an officer who discharges any duty in the discharge of which the public are interested.⁵⁶

2.20 Although *Whitaker* concerned common law bribery (which overlapped historically with misconduct), rather than misconduct in public office,⁵⁷ it is an important common law authority for the principle that a public office should be defined in terms of its functions, not status. We note however that this definition is a broad one.

⁵³ (1828) 5 Bing 91, 130 ER 995 at [107] and [108].

⁵⁴ *Bowden* [1996] 1 WLR 98, [1995] 4 All ER 505, 507; *Belton* [2010] EWCA Crim 2857, [2011] QB 934 at [21]. In *Harmon CFEM Facades (UK) Limited v The Corporate Officer of The House of Commons* [1999] EWHC Technology 199 at [246], a tort case, it was held that the meaning of public officer is the same in the tort and the crime.

⁵⁵ (1890) 16 Cox CC 739. Here the defendant, “an assistant overseer”, was found to have bribed voters in relation to a parish election.

⁵⁶ [1914] 3 KB 1283, (1914) 10 Cr App R 245 at p 1296; cited in *Belton* [2010] EWCA Crim 2857; [2011] QB 934 at [22].

⁵⁷ See further Chapter 5 and Appendix A. This is also a principle that was followed by Buckley J who referred to the Oxford English Dictionary definition of an office as including a “duty attaching to one’s position, task, function” and “position with duties attached to it, place of authority or trust or service, especially of public kind” in the first instance case of *Currie & others* (1992, unreported), decided in the Central Criminal Court and cited in C Nicholls and others, *Corruption and Misuse of Public Office* (2nd ed 2011) at [6.26].

- 2.21 More recently, the question of who is in public office has been raised in a number of Court of Appeal decisions. Most notable are the cases of *Cosford*⁵⁸ and *Mitchell*,⁵⁹ in both of which the judgments were delivered by Lord Justice Leveson.
- 2.22 In *Cosford* the court had to determine whether two nurses and a prison officer working in a nursing capacity within a prison were public officers for the purposes of the offence. The nurses argued that an “office holder”, in its narrow and formalistic sense, was different from a public employee doing work similar to that carried out by private employees. They argued that a public office was limited to a position of a particular status that carried with it “either authority over, or a fiduciary duty to, the citizen” and was “of a type that endures and has an existence independent of the person who holds it at any one time”.⁶⁰
- 2.23 Lord Justice Leveson sought to define the concept of public office by identifying relevant principles. He concluded that prison nurses are public officers (whether they are directly employed by the prison service or by a private company contracting with the prison service), while recognising the suggestion of previous authorities that the offence should be kept within strict limits. He held that any limit on the scope of who is a public office holder should not be focused on the position held by the defendant, rather:
- It should be addressed to the nature of the duty undertaken and, in particular, whether it is a public duty in the sense that it represents the fulfilment of one of the responsibilities of government such that the public have a significant interest in its discharge extending beyond an interest in anyone who might be directly affected by a serious failure in the performance of the duty.⁶¹
- 2.24 In *Cosford*, therefore, the court was concerned with whether the nurses were under a public duty to fulfil a “responsibility of government” such that the public could be said to have a significant interest in the discharge of that duty.
- 2.25 We note that the phrase “governmental responsibilities” does not appear to have any technical meaning in the context that it was used by the Court of Appeal in *Cosford*. This is discussed further below.
- 2.26 Using Lord Justice Leveson’s terminology we can determine that in *Cosford* the particular “government responsibilities” in the case included responsibilities in connection with “the proper, safe and secure running of the prison”. These responsibilities were reflected in the duties of the individual prison nurses to carry out certain activities: carrying prison keys, locking and unlocking cells and reporting security concerns. The court concluded, that the nurses’ duties were ones that the public had a significant interest in seeing fulfilled and were not just ones of nursing in general, in which the public’s interest would be equal to or less

⁵⁸ *Cosford* [2013] EWCA Crim 466, [2014] QB 81.

⁵⁹ *Mitchell* [2014] EWCA Crim 318, [2014] 2 Cr App R 2.

⁶⁰ *Cosford* at [17].

⁶¹ *Cosford* at [34].

than that of the patients themselves. Therefore the nurses were held to be public officers.

2.27 The case can be usefully contrasted with *Mitchell* concerning a National Health Service paramedic.⁶² The defendant had been travelling in the rear of an ambulance with a female patient. CCTV from the rear of the ambulance appeared to show that during the course of the journey he sexually touched the conscious patient a number of times. The Court of Appeal accepted that there were cogent reasons why Mitchell had not been charged with a sexual offence, but that given the nature of Mitchell's conduct the CPS had chosen to pursue a charge of misconduct in public office.

2.28 Returning to the question of defining a public office, Lord Justice Leveson said the proper approach involved asking three questions:

First, what is the position held? Second, what is the nature of the duties undertaken by the employee or officer in that position? Third, does the fulfilment of those duties represent the fulfilment of one of the responsibilities of government such that the public have a significant interest in the discharge of that duty which is additional to or beyond an interest in anyone who might be directly affected by a serious failure in the performance of that duty? If the answer to this last question is "yes", the relevant employee or officer is acting as a public officer; if "no", he or she is not acting as a public officer.⁶³

Mitchell was held to not to be a public officer because, though the public had a significant interest in the maintenance of a paramedic service, they did not have a significant interest in the performance of the duties of each individual paramedic.

2.29 Again we can see that the Court of Appeal adopted the language of "governmental responsibilities" used in *Cosford*, but did not define that phrase in any technical sense.

2.30 It would seem clear that the courts are not focusing on the status of the individual's post. Rather, the courts are concerned with the functions with which the individual's duties are concerned. The Court of Appeal rejected the prosecution's submission that the test should be based on a combination of both status and function, preferring instead a wholly duty/function based test.⁶⁴

2.31 We discuss this in sections (b)⁶⁵ and (c)⁶⁶ below.

⁶² [2014] EWCA Crim 318, [2014] 2 Cr App R 2.

⁶³ *Mitchell* at [16].

⁶⁴ The prosecution's argument on this case is summarised in *Mitchell* at [13].

⁶⁵ Para 2.59 and following below.

⁶⁶ Para 2.105 and following below.

WHAT ROLE IF ANY DOES THE 'STATUS' OF THE OFFICE PLAY?

2.32 The status of the office holder may, it seems, be addressed by reference to the following questions. To qualify as a public office for the purposes of the misconduct offence must the position be:

- (1) One that is designated as an office or permanent position?
- (2) Subject to specific rules of appointment, and/or a position of employment, and/or a contractual position and/or remunerated?
- (3) Directly linked by way of appointment, employment or contract in terms of status to either the Government or the "state"?

(1) Office or permanent position?

2.33 The series of cases examined in *AG's Reference* had addressed the question of what makes an office a public one, but almost none had examined what constitutes an office. References to "office" in the context of criminal law are rare.⁶⁷

2.34 The positions that have been found to be public offices demonstrate that there is no requirement that the position held be one of seniority or that the title need include the word "officer".⁶⁸ As the court observed in *Lancaster and Worrall*, "the nature of the office is immaterial".⁶⁹

2.35 Some statutory definitions of "office" have been developed for particular purposes: usually to distinguish an "office" from other types of employment, as an office can also exist without an employment, as in the case of a non-executive director of a company. In relation to income tax legislation, for example, "office" has been defined as a:

Permanent, substantive position which had an existence independent from the person who filled it, which went on and was filled in succession by successive holders.⁷⁰

2.36 These requirements have not been adopted in the offence of misconduct. In *Cosford* the Court of Appeal rejected the submission that "the office had to be of a type that endures and has an existence independent of the person who holds it at any one time".⁷¹ Therefore, for the purposes of misconduct in public office, it does not appear that the defendant need hold an office in this technical sense. A

⁶⁷ The entry for "office" in D Greenberg, *Stroud's Judicial Dictionary of Words and Phrases* (8th ed 2012) runs to over 20 numbered paragraphs, none of which refer to criminal law. The definitions in those paragraphs range from the restricted meaning in *Blackstone's Commentaries*, vol 2 (1769) p 36, in which an office is classified as a type of property, to any position of duty, such as being an executor of a will or an estate..

⁶⁸ See para 2.14 above.

⁶⁹ *Lancaster and Worrall* (1890) 16 Cox 739.

⁷⁰ *Great Western Railway Company v Bater* [1920] 3 KB 266, Rowlatt J.

⁷¹ *Cosford* at [17].

number of the positions that have been found to be a “public office” are neither permanent nor available to be filled by successive office holders indefinitely.⁷²

(2) *Appointment, employment or remuneration?*

2.37 Having regard to the positions found by the courts to be “public offices”,⁷³ there does not appear to be any common ground as to the significance of rules governing appointment. Some positions that have been caught are not “appointments” at all, for example civilian staff employed by the police and local councillors, who are elected officials.⁷⁴

2.38 It is also clear from the case law that misconduct in public office applies where a person acts as though he or she is in public office, irrespective of whether the appointment was one for which he or she was ineligible or the appointment was invalid for some reason.

In a criminal prosecution, or in an action, against a justice of peace or against a clergyman for any offences by either of them committed in their respective situations, every day's practice has settled that the exercise of their offices is, as against them, proof that they are bound to discharge their respective functions.⁷⁵

2.39 Furthermore, a number of the public offices listed in paragraph 2.13 above involve employment. It is also clear from *Cosford* that “public office” can include cases of contractors engaged by the state and their employees:⁷⁶ the concept is wide enough to include cases of appointees and elected officials. There is therefore, no requirement for formal contractual terms defining the functions of a position.⁷⁷

2.40 It is also clear that there is no need for the position to be remunerated to qualify as a public office. The fact that someone is paid may serve to confirm that he or she is in public office but it is not a necessary condition of their being so:

⁷² See para 2.14 above. The reasoning in *Cosford* also supports the earlier first instance decision reached by Buckley J in *Currie* (1992) (unreported, Central Criminal Court).

⁷³ See para 2.14 above.

⁷⁴ In contrast, there are two types of position that have clear rules of appointment. Crown servants are appointed by, and hold office at, the pleasure of the Crown (this includes civil servants and police officers) and each member of the judiciary is appointed by the Queen on the recommendation of the Judicial Appointments Commission.

⁷⁵ *Holland* (1794) 5 TR 607, 101 ER 340. See D Lusty, “Revival of the common law offence of misconduct in public office” (2014) 38 *Criminal Law Journal* 337 (Australia).

⁷⁶ *Cosford* at [37].

⁷⁷ For example, as concerns persons holding the position of “Crown servant”, it is far from clear that they are employees in the normal sense, or if so who their employer might be. In practice several features of employee status have been extended to civil servants in a piecemeal fashion. See *Civil Service Management Code* (April 2015), chs 11 and 12. The Employment Rights Act 1996, s 191 provides that, with certain exceptions, the Act applies to persons in Crown employment.

A man accepting an office of trust concerning the public, *especially if* attended with profit, is answerable criminally to the king for misbehaviour in his office.⁷⁸

- 2.41 It was held in *Belton* that an unpaid Independent Monitoring Board member at a prison held public office for the purposes of the offence.⁷⁹

(3) *Link with government?*

- 2.42 In both *Cosford*⁸⁰ and *Mitchell*⁸¹ reference was made to “responsibilities of government” but, as we discuss below, this was in respect of the performance of the public office holders’ duties, not the position itself.

- 2.43 It would seem to follow that, provided a person’s duties are associated with performing a state function, there is no need for the status of his or her position to be directly linked by way of appointment, employment or contract with a government body. Any position may suffice, the question to be considered is whether the duties of that position include “fulfilling government responsibilities”, in other words whether they are associated with a state function.

- 2.44 The case law prior to *Cosford* and *Mitchell* supports this proposition. In *Henly v Lyme Corporation* it was held that there is no requirement that a person in public office must be appointed or paid by the Crown:

If a man takes a reward — whatever be the nature of that reward, whether it be in money from the crown, whether it be in land from the crown, whether it be in lands *or money from any individual* — for the discharge of a public duty, that instant he becomes a public officer.⁸²

- 2.45 Those who are appointed or paid by the Crown are therefore, included within the term public officer, but do not define it. For example, it has always been accepted that elected local government officials hold public office. One possible justification for this is that they control local authorities that receive funding from central government grants. The receipt of remuneration is a confirming rather than a necessary condition of being in public office.⁸³

- 2.46 Likewise, the Central Criminal Court has, in the case of *Greenway*, rejected an argument that an elected member of the House of Commons is not in public office:⁸⁴

⁷⁸ *Bembridge* (1783) 3 Doug KB 327, 99 ER 679, Lord Mansfield. Emphasis ours.

⁷⁹ [2010] EWCA Crim 2857, [2011] QB 934.

⁸⁰ [2013] EWCA Crim 466, [2014] QB 81 at [34].

⁸¹ [2014] EWCA Crim 318, [2014] 2 Cr App R 2 at [16].

⁸² (1828) 5 Bing 91, 130 ER 995. Emphasis ours.

⁸³ *Bowden* [1995] 4 All ER 505, [1996] 1 WLR 98.

⁸⁴ *Greenway* (1992) (unreported, Central Criminal Court), cited in C Nicholls and others, *Corruption and Misuse of Public Office* (2nd ed 2011) at [6.26]. The text of Buckley J’s decision that an MP is a “public officer” can be found in A Bradley, “Parliamentary privilege and the common law of corruption” (1998) 24 *Commonwealth Law Bulletin* 1317.

Few are in a higher position of trust or have a duty to discharge in which the public have a greater interest, than Members of Parliament [...] Thus I am satisfied that the undoubted common law offence of bribery is not artificially limited by reference to any particular shade of meaning of the word “office”.⁸⁵

- 2.47 *Greenway* was a case concerned with common law bribery, but as we noted above at paragraph 2.20, that offence overlapped historically with misconduct to such a degree that common law bribery cases are often cited in cases involving misconduct in public office.⁸⁶
- 2.48 This decision followed much earlier confirmation by the High Court of Australia that Members of Parliament are public office holders.⁸⁷ Mr Justice Higgins stated in the case of *Boston* that “the application and the principle is not confined to public servants in the narrow sense, under the direct orders of the Crown”. The case of *Hurlburt*⁸⁸ confirmed that this is also the position for Members of the Legislative Assembly in Canada.
- 2.49 As discussed above, in some cases the duty to perform a state function may be delegated by the person on whom it was imposed to a contractor or employee. According to the test in *Henly v Lyme Corporation*, whether such a person is in public office depends on the nature of the duty delegated rather than on the constitutional nature of the person or body contracting with the delegate.⁸⁹
- 2.50 It has been further confirmed that, within the Caribbean states, the scope of public office is not limited to offices of the Crown or organs of central or local government. In *Attorney General of Trinidad and Tobago v Carmel Smith* the

⁸⁵ For further assessment of the arguments as to whether an MP is a public office holder see G Zellick, “Bribery of Members of Parliament” [1979] *Public Law* 31. The common law of bribery was replaced by the Bribery Act 2010, which applies to all elected officials including MPs, and sought in part to align UK law with the OECD *Convention on Combating Bribery of Foreign Public Officials* (1997), which includes elected persons within the definition of “foreign public official”. For further discussion see Appendix E.

⁸⁶ That the view taken in *Greenway* reflected an accurate modern view of “public office” appears to have been shared by some Parliamentarians. In giving evidence to the Joint Committee on Parliamentary Privilege on 20 January 1999, then Home Secretary Jack Straw MP indicated that the government’s thinking at that time – considering a proposal to place misconduct in public office on the statute books – was that a “there should be an offence of Misuse of Public Office which should apply to ministers, should apply to councillors, to other members of public bodies and should also apply to Members of Parliament” and “it is vitally important that the same checks on unacceptable behaviour should apply to Members of Parliament as we in Parliament impose on members of the public”: *Joint Committee on Parliamentary Privilege* (30 March 1999) HC 214-I; HL Paper 43-I para 107 and 110. It has also been indicated to us by the Standards Committee of the Welsh Assembly that Assembly Members consider themselves to be public office holders. We consider that, following *Greenway*, there would seem to be no reason why the position would not also be the same for Members of the House of Lords.

⁸⁷ *Boston* [1923] 33 CLR 386 at 411.

⁸⁸ *Hurlburt* [2012] NSSC 291. Canadian Criminal Code s 118 defines an official for the purposes of s 122, which criminalises breaches of trust by public official. It was amended by an Act (SC 2007, Ch 13) in order to implement the United Nations Convention against Corruption. The amendment added “elected officials” to s 118. See Appendix F for full discussion on the Canadian law.

⁸⁹ (1828) 5 Bing 91, 130 ER 995.

members of a lottery control board, which was an autonomous commission set up by the constitution as a body independent of political control, were held to be in public office for the purpose of civil proceedings.⁹⁰

- 2.51 Since no requirement of appointment, employment or remuneration is required, we consider that a court could find an individual working within charitable trust or company to be in public office: having a duty associated with one of the responsibilities of Government, or to perform a duty associated with a state function. In such a way, a person maintaining a ferry or a lighthouse may be in public office.⁹¹
- 2.52 The broad definition could mean that the following fall within the scope of the offence: people working within charities providing public utilities such as lifeboat rescue services, or those with supervisory and investigative functions like the RSPCA and NSPCC. We are unaware of any case involving such facts.⁹²

Conclusion

- 2.53 The discussion of these three questions suggests that the office holder's status no longer plays a part in determining whether he or she is in public office. However, discussions with those involved in misconduct prosecutions reveal that arguments are still advanced that it is a person's status, or a combination of the person's function and status, that denotes a public office holder. An example of this is the recent prosecution of the former Bishop of Gloucester.⁹³
- 2.54 The prosecution of the former bishop, under an indictment that included a charge of misconduct in public office, focused on the status of the Church of England as the established state religion in England, and the functions and duties of a bishop within that institution. The court stated that, in contrast, no ministers of any other faith, nor a minister of the Church in Wales, would be considered public office holders.⁹⁴ The case thereby combined factors of status with questions of function.⁹⁵
- 2.55 Officials of the Church of England have been held to be subject to judicial review and the Church of England held to be a public body for employment law

⁹⁰ [2009] UKPC 50.

⁹¹ By "ferry" we mean an ancient river ferry that qualifies as a public highway, which has been held to be a public office (*Blackstone's Commentaries – Volume 3* (1769) p 219; *Huzzey v Field* (1835) 2 C M & R 432, 150 ER 186), rather than a cross-Channel ferry that is simply a commercial enterprise. We are aware of at least one ferry of this kind in the UK, in Symond's Yat in the Forest of Dean.

⁹² Whether such organisations are liable in terms of criminal corporate liability is discussed later in this chapter.

⁹³ *Ball* (8 September 2015) (unreported, Central Criminal Court).

⁹⁴ The Church of England was disestablished in Wales by the Welsh Church Act 1914.

⁹⁵ The result of this ruling is that *Ball* was guilty of a criminal offence in circumstances where neither ministers of other faiths, nor ministers of the Anglican faith outside of England, would have been. In *Ball*, Wilkie J referred specifically to the unique position of the Church of England and the duties of Church of England bishops and priests under the Canons of the Church of England (7th ed): C.18, C.20 and C.24. Specifically, Wilkie J referred to the provision of spiritual guidance by the Church of England as a responsibility of government.

purposes.⁹⁶ However, as discussed below at paragraph 2.90 and following, we consider that other areas of law that refer to concepts associated with that of public office: such as “public bodies”, “public authorities” and “emanations of the state”: are of limited assistance for the purpose of defining this element of the criminal offence.

- 2.56 If we were to apply a purely function based test, as advanced by the Court of Appeal in *Cosford* and *Mitchell*,⁹⁷ then ministers of the Church of England, the Church in Wales and other faiths all could be held to be a public office holders, but only by virtue of performing discrete state functions such as marriage registration.⁹⁸
- 2.57 Prosecutors have also informed us that, in some cases, it has been argued that the status of the office, particularly given the seniority of the office holder, is an indicator of it being a public office. For example, that an officer of the armed services might be in public office but a junior rank, such as a private, would not be. The case law does not support the use of seniority of the office as a determinant of whether someone is in public office. It may however be one factor which is to be weighed alongside the others. As we discuss later in this chapter, factors connected to status are more likely to be relevant to the question how *serious* an individual’s misconduct is.
- 2.58 To summarise, we are therefore, of the view that for the purposes of the misconduct offence whether someone is in public office is *primarily* determined by reference to the functions of that office which he or she is under a duty to perform. The status of the office may be relevant to the question but will not be determinative. In summary therefore:

- (a) **A public office is primarily defined by its functions, not its status.**
 - (i) **A public office does not need to be an “office” in any technical sense nor be a permanent position.**
 - (ii) **The position does not need to be subject to specific rules of appointment, one of employment, a contractual position or remunerated.**
 - (iii) **A public office does not need to be directly linked, by way of appointment, employment or contract, in terms of status, to either the Government or the “state”.**

⁹⁶ *R (Owen) v Bishop of Stafford* [2001] ACD 14. *R (Wachmann) v Chief Rabbi* [1992] 1 WLR 1036, [1993] 2 All ER 249.

⁹⁷ See paragraphs 2.21 above and following and paragraph 2.61 below and following.

⁹⁸ Marriage registration requirements are set out in the Marriage Act 1949 ss 53, 55 and 57. Ministers from other faiths may apply to register marriages as an “authorised person”, although often the persons authorised are not ministers themselves. The Bahamian penal code includes ministers of religion in public office in exactly this way. Section 6 states “A person acting as a minister of religion or ecclesiastical officer, of whatsoever denomination, is a public officer in so far as he performs functions in relation to marriage, birth, baptism, death or burial, but not in any other respect. See Appendix F for further discussion of the law in other countries.

(b) What does a function based test require?

- 2.59 Having identified that whether someone is in public office is *primarily* determined by reference to the governmental nature or purpose of functions of that office which he or she is under a duty to perform, we must now consider what that means.
- 2.60 Our starting point for this analysis must be the recent Court of Appeal decisions regarding public office.

QUESTIONS ARISING FROM THE MITCHELL TEST

- 2.61 In *Mitchell*,⁹⁹ Lord Justice Leveson identified three questions to determine whether a position was a public office. These questions, as set out below, are derived from the quotation set out at paragraph 2.28 above and therefore adopt the language used by the court.
- (1) What is the position held?
 - (2) What is the nature of the duties undertaken by the employee or officer in that position?
 - (3) Does the fulfilment of those duties represent the fulfilment of one of the responsibilities of government such that the public have a significant interest in the discharge of that duty which is additional to or beyond an interest in anyone who might be directly affected by a serious failure in the performance of that duty?
- 2.62 Lord Justice Leveson's first question, suggests that the "status" of the office may be relevant. However, as discussed status is rarely the determining factor and is more likely to be merely a preliminary to the second and third questions.
- 2.63 The core test of public office is therefore contained in the second and third *Mitchell* questions, the second of which can be broken down into two parts: is the individual required to fulfil a governmental responsibility; and does the public have a significant interest in the individual's fulfilment of that duty?
- 2.64 What is being referred to is therefore whether the public has a significant interest in the *individual's* "duty" to fulfil a governmental "responsibility"; not whether the public has a significant interest in the governmental responsibility as such; that would be assumed in all cases.
- 2.65 If the individual has a duty associated with the state function or governmental responsibility and the public has an interest in the individual's performance of that duty, that is determinative of whether he or she is in public office. We can, for convenience refer to it as a "determinative duty". What it is necessary to explore is what is meant by, as the court called it, a "governmental responsibility", or, as we will refer to it below, a "state function".
- 2.66 The third question from *Mitchell* raises this issue", It is unclear whether a "governmental responsibility" means:

⁹⁹ [2014] EWCA Crim 318, [2014] 2 Cr App R 2; para 2.28 above.

- (1) responsibilities that can only be borne by government;
- (2) responsibilities which the government has a moral duty to bear in the last resort, if no other person or body does so;
- (3) responsibilities which are in fact currently borne by government; or
- (4) responsibilities which have, historically, been borne by government.

We return to this below.

STATE FUNCTION

- 2.67 It is not sufficient, to render someone a public officer for the purpose of the offence, that the individual's duties may have an effect on the public. If they did, very few appointments or employments would not constitute a public office.

Example 1 An accountant, A, in a private firm, working for a large public limited company, will have a duty to act with honesty and integrity in carrying out his or her duties associated with preparing client accounts. If that duty is breached, and shareholders' financial interests are harmed, the public may have an interest in that duty and its breach. The shareholders may thereafter be able to bring an action in the civil courts against A and the firm. A may be prosecuted for an offence of false accounting and the firm will be able to take disciplinary action. However, A is not in public office.

- 2.68 Likewise, a duty owed by a private individual to the public at large does not render that person a holder of public office.

Example 2 A landowner, C, owes a legal duty to a member of the public, B, in relation a public footpath crossing C's land. If B was injured on the footpath because of a danger that C knew existed, and could foresee that a member of the public may come into contact with, B may have an action in the civil courts against C. C might also be prosecuted for public nuisance. C is not in public office.

- 2.69 Following the reasoning in *Mitchell*, it is clear that what distinguishes the individuals in these scenarios from public office holders is that neither of them has a duty associated with a "state function".

(1) State

- 2.70 In *Mitchell* the Court of Appeal used the term "governmental" but we consider that this might as readily be expressed by the term "state".

- 2.71 Traditionally the word "government" has two primary meanings. One is "the Government" as embodied in the executive arm of the state, or a particular ministry in office with the authority to govern a country or state. The other is

“government” in terms of the action or manner of controlling or regulating a country or state.¹⁰⁰

- 2.72 The Government, for example, will consist of ministers of the crown appointed from the political party, or coalition, taking power following a general election. Whereas, the government or “governance” of the UK involves the operation of all arms and bodies of the state, including but not limited to the executive.
- 2.73 It seems clear that Lord Justice Leveson’s reference to “responsibilities of government” as opposed to the “responsibilities of *the* Government” was intended to refer to “government” in the wider sense. This potentially brings within the concept of public office all those persons whose office imposes individual duties associated with the “state”.
- 2.74 Very different outcomes could arise if Lord Justice Leveson’s reference was interpreted instead to mean “the Government”. That would mean the offence applied only to those whose duties were associated with functions of the Government of the day, or ultimately the Crown. This may produce results that strongly conflict with the public’s conception of public office and with case law. Most notably, Members of Parliament who are not Government ministers would not be public office holders as their positions are independent of both the Crown and the Government, and neither would any elected local government official.
- 2.75 On the basis of earlier authority, we take the view that the phrase “government” should be interpreted widely. Previous authorities have clearly stated that non-executive officials are subject to the offence of misconduct in public office.¹⁰¹ Further, we would suggest that this interpretation is more likely to produce results compatible with public expectations. To avoid potential confusion in the sense in which the word “government” is used, we therefore prefer to use the term “state”.

(2) *Function*

- 2.76 In *Cosford* the Court of Appeal identified particular duties to carry out activities performed by the nurses. These were, specifically, carrying prison keys, locking and unlocking cells and reporting security concerns.¹⁰² The individual duties to perform those activities were associated with the state function of providing a secure prison estate: they “more than amply fulfil the requirements of a public office”.¹⁰³
- 2.77 In *Mitchell*, the court also identified the individual duties of the specific paramedic: treating individual patients: as distinct from the duties to which an NHS trust would be subject: providing an emergency health care service to meet the public’s needs. Both sets of duties would be carried out by the exercise of

¹⁰⁰ See the Oxford English Dictionary, online version (last visited {X}). The concepts are subject to continued disagreement. For further discussion see Appendix A, J Shennan, *The Origins of the Modern European State 1450-1725* (1974) and M Loughlin, “The State, the Crown and the Law”, in M Sunkin and S Payne, *The Nature of the Crown: a Legal and Political Analysis* (1999).

¹⁰¹ See para 2.14 above.

¹⁰² *Cosford* at [14].

specific health care functions,¹⁰⁴ however having identified the state function, in this case the court held that individual's duties associated with it were not sufficient to place him or her in public office.¹⁰⁵

2.78 While it may often be easy to identify an individual's duties, it will often be less straightforward to identify the types of governmental responsibility or state function with which the duties must be associated.

2.79 One analysis of *Cosford*¹⁰⁶ is that public officers are those individuals who are subject to duties associated with the exercise state functions which involve coercive powers: that is to say, specific powers to deprive an individual of his or her liberty by force.¹⁰⁷ If the concept of state function was limited to coercive power in this sense there is no doubt that positions such as police, prison officers and the judiciary would be caught by the offence. Certainly there are a number of historic criminal cases involving gaolers and magistrates charged with misconduct in public office that involved such coercive powers.¹⁰⁸ The use of the concept of coercive powers as a determinative factor for public office is one that has also been raised by a number of stakeholders.

2.80 However, by no means all of the types of position that have been held to be a public office involve the exercise of coercion in this sense. For example, an administrative officer with the DVLA has been convicted under the offence.¹⁰⁹ Having regard to the case law, we do not consider that public office, under the current law, is restricted only to cases where the governmental responsibility or state function involves the exercise of coercive powers. Coercive power may be a relevant factor in the determination of what is a public office, but is not a complete answer.

2.81 If this is correct, it begs the question of how governmental responsibility or state function is to be interpreted.

2.82 In our view, the concept of "state function" could encompass any number of activities. Core amongst these would be those activities, the performance of which the state reserves to itself. For example, making declarations of war, passing legislation and levying taxes. Beyond these there are activities that the state chooses to perform either in conjunction with or through other persons or

¹⁰³ *Cosford* at [36].

¹⁰⁴ *Mitchell* at [17].

¹⁰⁵ As well as owing a common law duty of care to individual patients, a paramedic is under a duty to comply with his or her published *Standards of Proficiency* while performing his or her functions (including the duty to "respect and uphold the rights, dignity, values and autonomy of service users") published by the Health and Care Professions Council (2014).

¹⁰⁶ [2014] EWCA Crim 318, [2014] 2 Cr App R 2.

¹⁰⁷ Although coercive powers are not definitively defined in either law or common usage in this narrow fashion and some may consider that a variety powers are "coercive". For example, the power to make compulsory purchase of land, the enforcement of economic penalties and

¹⁰⁸ See Appendix A.

¹⁰⁹ *Attorney General's Reference (No 140 of 2004)* [2004] EWCA Crim 3525.

bodies. For example, the administration of justice, the maintenance of prison security, the provision of health care and education.

- 2.83 The state can perform a variety of activities in a variety of ways. There are activities that may be performed by one of the arms of the state itself, for example the legislature. Alternatively there are activities that may be undertaken by a statutory body that the state has established, or as delegated to a non-statutory body. Similarly there are activities that may be carried out by a private enterprise, albeit that in some circumstances, if that private enterprise ceased to perform the activities in question, then the state might have a duty to make alternative arrangements to ensure that they were performed.
- 2.84 It will be obvious that the types of activity that can constitute a state function is extremely wide. Unfortunately, there is little indication in either *Cosford* or *Mitchell* as to what types of governmental responsibility or state function are sufficient for the purposes of the offence.
- 2.85 The most that we can discern from the authorities is that a relatively wide interpretation is adopted. This is highlighted by *Mitchell*. In distinguishing between the duties that an NHS Trust would be subject to, as opposed to an individual paramedic, the Court of Appeal accepted that Trust's duty to provide emergency health care was of a governmental nature (albeit that the duty the individual paramedic had to fulfil did not mean that he was in public office),¹¹⁰ although in fact both public and private healthcare providers can perform that function.
- 2.86 However, there are other cases where it is unclear both what type of governmental responsibility or state function is involved and whether it is in fact sufficient for the purposes of public office. For example, it is debatable whether the provision of spiritual guidance through the Church of England is a state function in any sense other than it is one that the state has historically performed. However, Church of England clergy were held to be in public office in the recent case of *Ball*.¹¹¹ The court's reasoning in *Ball* rested on the argument that the state has a continuing obligation to abide by the canons (laws) of the Church of England and that there is, therefore, an obligation on the state to ensure that the functions required to be performed, in order to satisfy canon law duties, are in fact performed.
- 2.87 The lack of a clear definition of this concept is unsatisfactory in principle and in practical terms increases the likelihood of challenge at trial and on appeal. The problem is exacerbated by the modern day blurring of the concept of state and private functions. That particular problem is one experienced in the field of human rights.¹¹² It is now not uncommon for an activity to pass from the public to the private sector as a result of privatisation or delegation. For example, Network Rail (previously Railtrack) has passed from being a public body to being a private company and back to being a public body over the course of two decades.¹¹³

¹¹⁰ See *Mitchell* at [17].

¹¹¹ (8 September 2015) (unreported, Central Criminal Court). See para 2.54 to 2.57 above.

¹¹² See paras 2.91 and following below.

¹¹³ Reclassified as an arm's length governmental body on 1 September 2014.

- 2.88 The Law Commission has previously considered the difficulty with changing perceptions of the public-private divide when reviewing the law on corruption and bribery. Whether individuals are regarded as exercising state functions is usually governed by historical factors that may no longer be relevant to a modern concept of “state”. Our 2008 proposals rejected the usefulness of these distinctions in the context of bribery.¹¹⁴ This latter review led to the abolition of both the common law offence of bribery, which was restricted to a public officer, and the statutes collectively referred to as the “Prevention of Corruption Acts”, which were restricted to public bodies and private agents.¹¹⁵
- 2.89 Therefore, we can conclude that, in short, the case law does not provide any clear definition of what type of function can amount to a “governmental responsibility” or “state function” for the purposes of misconduct in public office. The decision in *Cosford* did clarify that, at least within the prison sector, those private *and* public sector employees performing duties associated with functions of securing prisons should be treated as public officers.¹¹⁶

OTHER AREAS OF LAW CONCERNED WITH THE PERFORMANCE OF STATE FUNCTIONS

- 2.90 There are other areas of the law in which concepts such as “public office”, “public body” and “public authority” are crucial. These illustrate some of the factors that a criminal court might find relevant for the offence of misconduct in public office and the crucial determination as to whether an individual or organisation has duties associated with a state function.¹¹⁷
- 2.91 One useful example is section 6 of the Human Rights Act 1998, which imposes a statutory duty upon all public authorities to act compatibly with the European Convention on Human Rights.¹¹⁸ The term “public authority” can be divided into two categories. There are “core” public authorities that must always act in conformity with the Convention and “functional” public authorities that must act in conformity with the Convention only when they carry out public functions. By virtue of section 6(3)(b) of the Human Rights Act 1998, “functional” public authorities include any person “certain of whose functions are functions of a public nature”. The meaning of the term “function of a public nature” is therefore crucial to ascertaining whether a body is bound to act compatibly with the Convention.

¹¹⁴ Legislating the Criminal Code: Corruption (1998) Law Com No 248; Reforming Bribery (2008) Law Com No 313 at paras 3.12 to 3.17

¹¹⁵ Public Bodies Corrupt Practices Act 1889 and Prevention of Corruption Acts 1906 & 1916.

¹¹⁶ [2013] EWCA Crim 466, [2014] QB 81 at [37].

¹¹⁷ There are types of position that are treated differently in different forums, such as employment law. For example, employees in the NHS have been held to be Crown servants performing a public function under employment law - *Wood v United Leeds Hospitals* [1974] IRLR 204 - but are not public office holders for the purpose of misconduct in a public office.

¹¹⁸ See K Gledhill, *Human Rights Acts: The Mechanisms Compared* (2015), pp 344-367 and J Wadham, H Mountfield, E Prochaska and R Desai, *Blackstone's Guide to the Human Rights Act 1998* (2014), para 3.58-3.72;

2.92 The meaning of this term has generated a great deal of controversy. In one of the leading cases, *Aston Cantlow Parochial Church Council v Wallbank*, the House of Lords held that although there is no single test, a “generously wide” interpretation should be given to the meaning of the term public function.¹¹⁹ This wide approach stood in contrast to earlier cases in which the courts focused more on the institutional features of the organisation.¹²⁰

2.93 In *YL v Birmingham City Council* a majority of the House of Lords focused heavily on the organisation’s commercial purposes in concluding that it was not exercising functions of a public nature when it provided care for elderly residents which was both arranged and paid for by the local authority.¹²¹ In his dissent Lord Bingham enunciated a non-comprehensive list of factors¹²² he believed are relevant when determining whether a private body is exercising functions of public nature:

- (1) The nature of the function.
- (2) The extent of state involvement in or responsibility for the function.
- (3) The level of public interest in the function.
- (4) The nature and extent of statutory powers and duties in relation to the function, which might illuminate state concern and responsibility, and the absence of which might support the view the activity was private.
- (5) The level of regulation by way of supervision, inspection or the imposition of criminal standards to ensure the function is performed to an acceptable standard.
- (6) The extent of state willingness to make payment for the function.
- (7) The level of risk that rights would be breached in cases where there was improper performance of that function.¹²³

2.94 Whilst not all of these factors will be applicable when determining whether an individual is in public office for the purposes of the criminal law, we do believe there are parallels between the approach used in the criminal context and the factors that are relevant under the Human Rights Act 1998.¹²⁴

2.95 A further relevant area of law is the supervisory jurisdiction of the Administrative Court exercised through judicial review. In the Civil Procedure Rules, a claim for

¹¹⁹ [2003] UKHL 37, [2004] 1 AC 546.

¹²⁰ For example, *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366; [2002] 2 All ER 936.

¹²¹ [2007] UKHL 27; [2008] 1 AC 95. The decision was in effect overturned by virtue of section 145 of the Health and Social Care Act 2008.

¹²² See the additional factors listed at pp 165-170 of *De Smith’s Judicial Review*. H Woolf, J Jowell, A Le Sueur, C Donnelly and I Hare, *De Smith’s Judicial Review* (2013),

¹²³ [2007] UKHL 27, paras [6]-[11]. Baroness Hale also dissented.

¹²⁴ The broader relationship between the European Convention on Human Rights and the offence of misconduct in public office is examined further in Appendix C.

judicial review is defined as “claim to the lawfulness of a decision, action or failure to act in relation to the exercise of a public function”.¹²⁵ The definition of “public function” is once again crucial.

- 2.96 If the source of a body’s power is derived from statute or the exercise of prerogative,¹²⁶ then it will ordinarily be considered a public body subject to the supervisory jurisdiction of the court. There is, however, an additional approach to determining which bodies are public ones, based upon the type of function performed by the decision maker.
- 2.97 When the courts enquire whether a body is exercising a public function, it is not always clear what factors are relevant or what weight is attached to those factors that are held to be relevant. In *R v Panel on Takeovers and Mergers, Ex parte Datafin Plc* Lord Donaldson MR held that, “the only essential elements are what can be described as a public element, which can take many forms, and the exclusion from jurisdiction of bodies where the sole source of power is the consensual submission to its jurisdiction”.¹²⁷ Subsequent case law has failed to elucidate a clear test.
- 2.98 It is possible, however, to glean from the case law a number of factors that will be relevant when the court is determining whether public functions are being exercised:
- (1) The court poses a hypothetical question and asks whether, but for the existence of the body, the government would itself almost inevitably have intervened to do or regulate the activity in question.
 - (2) Whether the government has acquiesced or encouraged the activities of the body under challenge by providing “underpinning” for its work.
 - (3) Whether the body exercises monopolistic powers.
 - (4) Whether there is an absence of consensual submission to be bound by the decisions of the body.
 - (5) Whether the body receives substantial government funding to carry out its activities.¹²⁸
- 2.99 The courts take a broad and flexible approach to these factors and it is often difficult to determine how much weight is attached to each one.

¹²⁵ CPR 54.1(2)(a)(ii).

¹²⁶ Prerogative powers are historical powers that were originally exercised by the reigning monarch. “The remaining portion of the Crown’s original authority”, A V Dicey, *Introduction to the study of the Law of the Constitution* (10th ed 1959). In modern times Government Ministers exercise the majority of prerogative powers. House of Commons, *The Royal Prerogative – Briefing note* (2009).

¹²⁷ [1987] 1 QB 815, at 838.

¹²⁸ H Woolf, J Jowell, A Le Sueur, C Donnelly and I Hare, *De Smith’s Judicial Review* (2013), paras 3-042 – 3-049.

- 2.100 We are not suggesting that because a body is amenable to judicial review that necessarily means that its employees will be in public office for the purpose of the criminal law as it currently stands.¹²⁹ The concept of a public body for the purposes of judicial review serves a different objective to that served by the concept of public office for the purposes of the criminal offence of misconduct. However, that amenability may be a relevant factor to take into account.
- 2.101 A further area of law that might provide useful illustrations for the criminal law interpretation of the concept of state function is EU law. Directives (a type of legislative act issued by an EU institution) can only be enforced against a member state of the EU and not against individuals.¹³⁰ The term “member state” includes, however, all organs and “emanations” of the state (bodies created for the purpose of carrying out state functions). Therefore, there exists an important body of EU case law that seeks to define what these are. The broad interpretation adopted by the Court of Justice of the European Union (“CJEU”) to define the concept of the state means that directives can be enforced against even commercial enterprises where they have some form of state participation or control.¹³¹
- 2.102 In our view the approach used within EU law to determine which bodies may or may not be subject to EU Directives does not necessarily transpose to the context of misconduct in public office in its present form. However the factors considered by the CJEU may be taken into account
- 2.103 The purpose of this section has been to demonstrate that ascertaining whether state functions are being exercised is an enquiry that is not confined to the offence of misconduct in public office. All three of the tests set out above contain elements of the “state function” test we identify above as being used for the misconduct offence. Whilst we are not suggesting that administrative and human rights law provides the answer to whether an individual is in public office for the purpose of the criminal law, the factors discussed may be a relevant consideration.
- 2.104 We therefore conclude that the function based test to be applied for the purposes of misconduct in public office requires that **the position must involve the individual in the performance of a duty associated with a state function.**

(c) What types of duty bring a person within the scope of the offence?

- 2.105 The offence of misconduct requires the defendant to be in public office. That term requires not only that he or she is, as discussed, under a duty associated with a state function, but also that the individual’s duty must be one that the public has a significant interest in seeing performed. It is worth reiterating here that the focus

¹²⁹ This is arguably too broad. To take an example, Hampshire Farmers Market Ltd has been held to be amenable to judicial review. See *R (on the application of Beer (t/a Hammer Trout Farm) v Hampshire Farmers Markets Ltd* [2003 EWCA Civ 1056; [2004] 1 WLR 233.

¹³⁰ Therefore, they have “vertical direct effect” but not “horizontal direct effect”. See P Craig and G de Burca, *EU Law* (6th ed 2015) ch 7; A Kaczorowska, *European Union Law* (12th ed 2013) ch 11.

¹³¹ P Craig and G de Burca, *EU Law* (6th ed 2015) p 204.

is on whether the public has a significant interest in the *individual's* duty; it can be assumed that the public will have a significant interest in the state function.

- 2.106 In *Mitchell*, a paramedic with identifiable individual duties to carry out activities associated with the NHS Trust's state functions in relation to emergency medical care, was held not to be in public office because his individual duties were not ones that met this threshold.

It is important to underline that the focus is on the duties and responsibilities of the relevant individual and not upon the overall responsibility of the Trust. To focus on the overarching duty of the Trust would be to mean (as the judge foresaw) that every doctor, nurse, paramedic (or indeed employee) of the Trust is a public officer; for an education authority, it would mean that every teacher, classroom assistant or other employee at a school is a public officer. This is not correct.¹³²

- 2.107 Lord Justice Leveson explained that the requirement for significant public interest in the individual's duty is "additional to or beyond an interest in anyone who might be directly affected by a serious failure in the performance of that duty".¹³³

In a general sense, of course, the public would be concerned by any example of the breach of the individual duty (such as occurred in this case) but that is not to say there is a duty to the public which is different from, or additional to, the general duty owed to the individual. There is not.¹³⁴

- 2.108 The question arising is: when does the public have a significant interest in the individual's duty? No definitive answer is derived from *Cosford*¹³⁵ or any of the earlier cases. In *Mitchell*, this potential uncertainty led counsel for the appellant to argue under article 7 of the European Convention on Human Rights¹³⁶ that the definition of public office was so unpredictable that it potentially violated principles of legal certainty and the prohibition of retroactive laws. This question was not addressed by the Court of Appeal because the conviction was quashed on the ground that Mitchell was found not to be in public office.¹³⁷

- 2.109 Following *Mitchell* the courts will examine whether public have a significant interest by assessing whether the public interest in the individual's duty is over and above that of the interest of the person affected by a breach of that duty. This does not provide any greater clarification of the issue.

- 2.110 Clearly, almost all individual duties associated with state functions will involve some public interest. This is particularly so where the person performing that duty

¹³² [2014] EWCA Crim 318, [2014] 2 Cr App R 2 at [17].

¹³³ *Mitchell* at [16].

¹³⁴ *Mitchell* at [19].

¹³⁵ [2013] EWCA Crim 466, [2014] QB 81.

¹³⁶ See Appendix C for further discussion.

¹³⁷ *Mitchell* at [21].

is remunerated by the public revenue or where any costs arising from a breach of that duty will be met from public funds.

- 2.111 Taking the facts of *Mitchell* for example, it could be argued that the public had a significant interest in the performance of the paramedic's duties, over and above that of the ambulance patient, because Mitchell was being paid from public funds to provide emergency healthcare. He was arguably neglecting his duties by engaging instead in the inappropriate conduct recorded on the ambulance's CCTV camera.¹³⁸ However, it is not only financial concerns that would generate a sufficient public interest. In *Mitchell*, for example, it could be argued that the public interest arose from the trust placed in the ambulance service to provide care to individuals who need urgent medical attention so as not to deter people from using it.
- 2.112 The decision may also be explained as one based on policy concerns about the breadth of the offence, with Lord Justice Leveson expressing the view that it would be incorrect to say that "every doctor" and "every teacher" was in public office. The decision was a pragmatic attempt to avoid a potentially over-broad conclusion that every employee of a state body with wide public duties, such as the prison or health services, is in public office. Additionally, the decision could reflect a reluctance by the Court of Appeal to encourage a prosecution for a common law offence where there was insufficient evidence to bring a specific charge of sexual assault.
- 2.113 It is interesting to compare the decision in *Mitchell* with the yet more recent case of *Ball*.¹³⁹ In *Mitchell*, it was found that a paramedic's duty to the public at large in respect of *physical* welfare was not "different from, or additional to, the general duty owed to the individual". That duty, therefore, was not one of significant interest to the public. In contrast, in *Ball* the bishop's duty of providing *spiritual* guidance was held to be of significant interest to the public at large. This went beyond his duty to individual members of the Church of England.
- 2.114 There would appear to be no clear test for deciding this element of the offence. All we can do is repeat that this interest must be beyond the interest of those who might be directly affected by a serious failure in its performance.
- 2.115 We therefore conclude that **the duty is one in which the public will have a significant interest in being performed (an interest beyond the interest of those who might be directly affected by a serious failure in the performance of those functions). This determines whether someone is in public office.** For convenience, we therefore refer to this combination of factors as a "determinative duty."

(2) Acting as such

- 2.116 The second aspect of the offence, as derived from *AG's Reference*, is that the public officer must be "acting as such" in carrying out the alleged wrongdoing. The requirement is not expressed as a separate element of the offence, but as

¹³⁸ In addition, the NHS trust would have incurred costs in assisting with the prosecution of the case.

¹³⁹ Case of *Ball* (8 September 2015) (unreported, Central Criminal Court).

part of the first. No cases have examined the concepts of public office and acting as such separately.¹⁴⁰ However, we consider that the issues deserve separate treatment, as the questions of who is in a public officer and when he or she is acting as such may be distinct.

- 2.117 The use of the phrase “acting as such” appears to confine the offence to conduct performed in the course of carrying out one of the functions of public office. Having regard to a number of cases already decided it is clear that this phrase is interpreted more broadly. There are numerous cases in which convictions have been upheld based on conduct purportedly carried out in connection with the functions of public office but which are in fact outside the officer’s authority. Examples would include the corrupt award of army contracts or a council maintenance officer directing repairs to be made to his girlfriend’s house. Acting in such a way has historically been described as acting “under colour of office”.¹⁴¹
- 2.118 To our knowledge, there has been no further analysis of the term “acting as such” in any case in England and Wales since *AG’s Reference*. It is, again, an underdeveloped element of the offence.
- 2.119 Recent cases have included convictions for misconduct committed outside working hours for personal advantage in abuse of the defendant’s position. One example is the case of *W* where a police officer used a credit card supplied to him by the police force for private purchases.¹⁴² The Court of Appeal’s decision to uphold his conviction did not specifically address the question of whether the officer was “acting as such”, as it was not a point raised in argument.¹⁴³ Although the case has been criticised on other grounds, the application of the offence of misconduct to an officer acting outside of working hours demonstrates the breadth of the requirement that the officer was “acting as such”. It appears to be sufficient that there is an improper use of the opportunity afforded by a public office. All that this element serves to exclude is an act performed by the officer in a private capacity to which his or her position is simply irrelevant.
- 2.120 Decisions on the point in other jurisdictions tend to support the view that “acting as such” is not read in a restricted fashion. As the Hong Kong Court of Final Appeal has put it:

Misconduct otherwise than in the performance of the defendant’s public duties may nevertheless have such a relationship with his public office as to bring that office into disrepute.¹⁴⁴

¹⁴⁰ One example of a case where no distinction is made between the concepts is *Mitchell* [2014] EWCA Crim 318, [2014] 2 Cr App R 2 at [17] at [19].

¹⁴¹ *Whitaker* [1914] 3 KB 1283, (1914) 10 Cr App R 245; *Bowden* [1996] 1 WLR 98, [1995] 4 All ER 505. For discussion of acting “under colour of office” see Appendix A.

¹⁴² *W* [2010] EWCA Crim 372, [2010] QB 787. The conviction was quashed and a re-trial ordered.

¹⁴³ The arguments in fact concentrated solely on the issue of the fault element to be proved by the prosecution, discussed below at paras 2.148 and 2.180 and following.

¹⁴⁴ *Sin Kam-Wah v HKSAR* [2005] 2 HKLRD 375. See Appendix F.

- 2.121 This approach has been supported by the Australian Court of Appeal in Victoria, which described the second element of the Australian common law offence as being “in the course of or *connected* to his public office” (emphasis ours). The court also concluded that there was no inconsistency between the approaches taken in England and Wales, Hong Kong or Australia in respect of this element of the offence.¹⁴⁵
- 2.122 We are unaware of any appellate decisions in England and Wales on the issue of whether conduct that brings the relevant office into disrepute (occurring within an officer’s personal life) is sufficient to amount to misconduct in public office.¹⁴⁶ There are examples of prosecutions of police officers being prosecuted for having sexual relations both during and outside working hours. These may be explained on the basis either that the officer is neglecting his or her duties or that he or she is taking advantage of the position of authority to exploit a vulnerable person.¹⁴⁷ Alternatively, it may be that such cases are based on the separate ground that the police, like some other offices, carry with them (in a code of conduct or similar) a specific duty of not performing acts which bring the service into disrepute. This extends to incidents and behaviour that occur within an officer’s personal life.
- 2.123 In similar vein, prison officers have been prosecuted for having inappropriate relationships with prisoners, usually accompanied with additional charges relating to the smuggling of restricted items into prison.¹⁴⁸ *Cosford* was an example where prison staff, other than prison officers, were prosecuted for similar conduct because their conduct gave rise to the risk of security breaches and corruption created by relationships between inmates and staff.¹⁴⁹ Recent cases suggest, however, that the breaches of duty that can be prosecuted may well be wider than those creating an immediate security risk within the particular prison where the officer works. One recent case involved an officer and an inmate based at different prisons whose relationship started before the prisoner’s time in prison began. They had regular unauthorised phone contact during that time but the officer had not provided the mobile phone used by the prisoner (an offence under section 40 of the Prison Act 1952). However, the officer had purchased credit for the phone.¹⁵⁰

¹⁴⁵ *Quach* [2010] 27 VR 310 at [36]. See also C Davids and M McMahon, “Police Misconduct as a breach of public trust: The offence of misconduct in public office” (2014) 19(1) *Deakin Law Review* 89.

¹⁴⁶ Relevant first instance decisions, and decisions from other jurisdictions are referred to above and further examples are found in our Appendix D.

¹⁴⁷ *Fletcher* [2011] EWCA Crim 1802, [2012] 1 Cr App R (S) 62 and *Stone* [2011] EWCA Crim 1602 (having sex with a vulnerable victim during working hours); Lee Wilcox [2013] <http://www.bbc.co.uk/news/uk-england-south-yorkshire-21758022> (last visited 13 January 2016) (having sex with a vulnerable victim outside working hours); Ricci Giff [2013] <http://www.bbc.co.uk/news/uk-england-london-21832148> (last visited 13 January 2016) (having sex with partner during working hours).

¹⁴⁸ Appendix D contains a table of related and alternative offences to misconduct in public office, including those specifically relating to prison staff.

¹⁴⁹ *Cosford* [2013] EWCA Crim 466, [2014] QB 81.

¹⁵⁰ *King* [2013] EWCA Crim 1599, [2014] 1 Cr App R (S) 73.

2.124 As noted above the offence applies in cases where the misconduct was perpetrated by someone who did not hold a valid position (for example, by reason of wrongful appointment) or where they have been suspended from official duties. This interpretation of the offence supports the wide interpretation of “acting as such”.¹⁵¹

Conclusion

2.125 In conclusion we therefore consider that **the requirement that the individual be a public office holder “acting as such” is unlikely to have any practical significance within the current offence of misconduct in public office, other than to exclude the cases where an officer is acting in a wholly private capacity.**

(3) Breach of duty (neglect or misconduct)

2.126 The definition in *AG’s Reference* requires that the public officer acting as such, “wilfully neglects to perform his duty and/or wilfully misconducts himself”. It is clear from this that the offence is primarily concerned with a breach of duty, and that the breach can be by act or an omission.

2.127 An office holder may well have many duties arising from the office, in addition to his or her determinative duties (those in which the public has a significant interest and which are associated with a state function). When considering the issue of breach of duty the question arises whether misconduct in public office is restricted to cases where the a public office holder breaches a *determinative duty* or whether the offence extends to a case where the office holder breaches *any* duty to which he or she is subject by virtue of that office.

2.128 Many of the early cases cited in *AG’s Reference* concern neglect, refusal or failure to perform a function of the position holder’s post. For example, an electoral registration officer who omits to register a voter.¹⁵² A more recent example is *Dytham*, where a police officer failed to intervene when a person was being kicked to death.¹⁵³ *Cosford* is another example, where the prison nurse failed to report a relationship between a second nurse and a prisoner and therefore neglected her duties to prevent potential security breaches.¹⁵⁴ In these cases the breaches committed were breaches of one of the duties associated with a particular state function.

2.129 It seems clear that a public office holder will commit the offence by breach of the determinative duty by failing to act:

- (1) within the limits of his or her authority; and
- (2) properly, in accordance with the requirements of his or her position.

¹⁵¹ See para 2.38 above.

¹⁵² *Hall* [1891] 1 QB 747: appeal allowed on other grounds.

¹⁵³ [1979] QB 722, [1979] 3 WLR 467.

¹⁵⁴ [2013] EWCA Crim 466, [2014] QB 81.

- 2.130 An illustration of a public office holder acting outside of the limits of his or her authority is the case of *Bowden*.¹⁵⁵ A council worker ordered repairs to be carried out on his partner's house, which he was not empowered to authorise.
- 2.131 An example of an official acting improperly would be where a public office holder holds a decision making power and does not exercise this impartially. For example, an individual who exercises a function of granting liquor licences. If he or she grants a licence to an applicant because he or she was promised a payment or reward for doing so then that would amount to an improper performance of that function.¹⁵⁶
- 2.132 To perform a function properly a public office holder may be required to comply with professional standards of honesty and competence in doing so. Certain public office holders may also be subject to a duty not to act in a way that brings his or her position into disrepute. For example:

Example 3 A Member of Parliament, D, is under a duty to carry out functions in respect of the representation of D's constituents and the business of Parliament. In performing this function D must abide by the requirements of the code of conduct for MPs,¹⁵⁷ to act with honesty and integrity and to not bring the House of Commons into disrepute.

- 2.133 We conclude that breaches of determinative duties, including a failure to perform such a duty properly, can be sufficient to constitute misconduct for the purposes of the offence.
- 2.134 However, while we are confident that breaches of a duty determinative of public office may be capable of amounting to misconduct for the purposes of the offence, it is less clear whether a breach of any other duty can be prosecuted as such.
- 2.135 A useful case to consider is that of *W*,¹⁵⁸ where a police officer was prosecuted for using a credit card provided to him by the police force (for work related expenses) to pay for personal expenditure incurred outside working hours. In that case the misuse of the credit card did not amount to a failure by him to carry out the functions of a police officer. It was, however, a breach of his duty of honesty and integrity under the police code of ethics.¹⁵⁹
- 2.136 To conclude that *W*'s failure to act with honesty and integrity in these circumstances could amount to a breach of duty for the purposes of misconduct in public office rests on a wide interpretation of what conduct can be subject to a

¹⁵⁵ *Bowden* [1996] 1 WLR 98, [1995] 4 All ER 505. See para 2.45 above.

¹⁵⁶ *Sainsbury* [1791] 4 TR 451. However, the authorities are quite clear that an official exercising his or her discretion properly will not be prosecuted simply for making an unpopular decision, and nor will an official who makes a genuine mistake.

¹⁵⁷ House of Commons, *The Code of Conduct* (April 2015) HC 1076.

¹⁵⁸ [2010] EWCA Crim 372, [2010] QB 787.

¹⁵⁹ College of policing, *Code of ethics* (2014).

prosecution for misconduct.¹⁶⁰ Arguably his duty to act with honesty and integrity in relation to his work expenses was not associated with the state functions that police officers contribute to: investigating crime and participating in the administration of justice. However, an alternative view may be taken: that it is essential to the proper performance of police duties associated with these functions that a police officer act with honesty and integrity at all times. Additionally, that the police have a duty not to bring the office into disrepute.

- 2.137 Unfortunately, *W* itself involved no discussion of the issue of breach of duty as it was an appeal questioning whether the judge had correctly directed the jury as to the fault element that needed to be proved by the prosecution. Therefore there is no way of knowing whether an argument that the defendant could not be guilty of misconduct in public office, because his conduct did not breach a determinative duty, would have succeeded.
- 2.138 There may be situations where an individual holding public office breaches a duty which is imposed on him or her in that position which is entirely separate from the duty that determines that he or she is a public office holder.
- 2.139 By way of example:

Example 4(a) D, an authorised person for the purposes of marriage registration, because of racist views, fails correctly to register a marriage between a British national and a non-British national. The result is that the non-British national is not granted a visa to remain in the UK and is deported.

- 2.140 D's breach is here of his or her determinative duty. His individual duty properly to record the marriage is surely one in which the public has a significant interest and it is associated with the state function of solemnising marriages generally.

Example 4(b) D, an authorised person for the purpose of marriage registration, sexually harasses another person employed by the authorised venue for the marriage.

- 2.141 D's breach here is of a duty, under his employment contract, not to subject his or her colleague to sexual harassment. It is however unrelated to the proper performance of D's duties associated with the state function of solemnising marriage.
- 2.142 When considering whether a breach solely affecting a non-determinative duty can amount to misconduct in public office the case law appears to provide no clear answer.

Conclusion

- 2.143 We therefore conclude that **a public office holder will have misconducted him or herself when he or she has breached a duty in which the public has a significant interest that is associated with a state function** (a determinative

¹⁶⁰ For criticism of the court's approach see S Parsons, "Misconduct in a public office, should it still be prosecuted?" (2012) 76 *Journal of Criminal Law* 179.

duty). **It remains unclear whether a public office holder will also be liable for the offence if he or she has breached any other duty of his or her position.**

(4) Wilfulness

2.144 Wilfulness is the “fault” element of misconduct in public office. The greater part of the judgment in *AG’s Reference* is concerned with the meaning of wilfulness and its relationship to the more common term recklessness. The term wilfulness is now understood to equate to recklessness.

2.145 The cases interpreting the concept of wilfulness in criminal law are commonly those concerning the statutory offence of wilful neglect of children.¹⁶¹ In the leading case, *Sheppard*,¹⁶² Lord Diplock, with whom the majority agreed, held that:

The proper direction to be given to a jury on a charge of wilful neglect of a child under section 1 of the Children and Young Persons Act 1933 by failing to provide adequate medical aid, is that the jury must be satisfied [...] either that the parent was aware at that time that the child’s health might be at risk if it were not provided with medical aid, or that the parent’s unawareness of this fact was due to his not caring whether his child’s health were at risk or not [...]

2.146 The court in *AG’s Reference* declined to express a view on whether the definition of wilfulness in *Sheppard* was exactly the same as the recklessness test pronounced in *G*, but doubted that there was a material difference. If there was, the court’s view was that the offence of misconduct in public office should follow the approach in *G*.¹⁶³

We do not accept the submission that *R v Sheppard* imposes a lower duty on the prosecution than does *R v G*. Indeed, we do not accept the submission that, in the present context, there is any material difference between them and, in our view, the approach to recklessness in *R v G* can be incorporated into a direction on wilfulness in relation to this offence [...]

The issue that was perceived to have caused the problem at trial, and the principal question that was perceived to have resulted from the Judge’s ruling, has, in our view, been resolved by the position in *R v G*. There must be an awareness of the duty to act, or a subjective recklessness as to the existence of the duty. The recklessness test will apply to the question whether in particular circumstances a particular duty arises at all as well as to the conduct of the defendant if it does. The subjective test applies both to reckless indifference as

¹⁶¹ Children and Young Persons Act 1933, s 1. The same phrase is used in the Mental Capacity Act 2005, s 44.

¹⁶² [1981] AC 394, [1980] 3 WLR 960.

¹⁶³ *G* [2004] 1 AC 1034 [2003] UKHL 50.

to the legality of the act or omission and in relation to the consequences of the act or omission.¹⁶⁴

2.147 Subjective recklessness is, therefore, the minimum fault requirement to be proved for the offence of misconduct in public office.¹⁶⁵ The court also made clear that the subjective recklessness test should apply to both the circumstances of the offence (namely the factual nature of D's duties but not the legal classification of those duties) and the nature of the conduct involved.

2.148 However, following *W*,¹⁶⁶ there seems to be a further aspect to the fault requirement. Where the misconduct would potentially also amount to a dishonesty based crime, such as theft or fraud. In these cases dishonesty is a requirement of the offence. *W* focused on the fact that, the judge had not directed the jury about dishonesty. The appeal was allowed on this basis. Lord Judge, then Chief Justice, stated:

Attorney General's Reference (No 3 of 2003) reinforces the requirement for some subjective mental element, appropriate to whatever form of misconduct is alleged. It would be wrong in principle to extend the ambit of an ancient common law offence by narrowing the requirements relating to the defendant's state of mind: *R v Rimmington*. Consistently with principle, and addressing the realities, it is in any event difficult to see how the defendant can have fallen so far below the standards required of him as a police officer that, in the context of the misuse of a card issued to him by his superiors for "expenses", his conduct is properly to be stigmatised as criminal, unless he was dishonest.¹⁶⁷

2.149 In other words, there is always the need for some subjective fault element. When the misconduct consists of a potential dishonesty offence, that element must take the form of dishonesty.¹⁶⁸

2.150 An additional issue arises in respect of whether a person must know that he or she is in fact in public office. *AG's Reference* did not specifically address this issue. The approach taken in *Cosford* suggests that it is sufficient for a person to be aware of the existence of the factual circumstances that allow for his or her position to be treated as a public office in law, although the person need not *know* of the facts or of the legal classification of his or her role.¹⁶⁹

2.151 Older authorities also suggest that it will not be necessary for someone in public office to be aware of each and every duty they owe by virtue of his or her position, and:

¹⁶⁴ *AGs Reference (No 140 of 2004)* [2004] EWCA Crim 3525 at [27] to [30].

¹⁶⁵ Clearly the offence will also be committed where a public office holder acted intentionally, which is a higher level of fault.

¹⁶⁶ [2010] EWCA Crim 372, [2010] QB 787.

¹⁶⁷ *W* at [13].

¹⁶⁸ This would presumably be so in all cases of dishonesty (for example, fraud), not just those involving the appropriation of property.

¹⁶⁹ *Cosford* [2013] EWCA Crim 466, [2014] QB 81.

Where a public officer is charged with a breach of duty, which duty arises from certain acts within the limits of his government, it is not necessary to aver in an indictment against him, that he had notice of those acts; he is presumed from his situation to know them.¹⁷⁰

Conclusion

2.152 In conclusion, to satisfy the wilfulness element of misconduct in public office the person in public office must act with subjective recklessness. This can be broken down into the following components:

- (a) **The person in public office must be aware of the factual circumstances existing that as a matter of law make his or her position a public office.**¹⁷¹
- (b) **He or she must be aware of that his conduct risks breaching one of the duties of that position.**
- (c) **He or she must deliberately engage in the conduct which breaches the duty in question.**
- (d) **And the decision to do so must be unreasonable in light of the facts known to him or her.**
- (e) **In certain circumstances, dishonesty is also required.**

(5) Abuse of the public's trust

2.153 The definition in *AG's Reference* requires that the neglect or misconduct must be "of such a degree as to amount to an abuse of the public's trust in the office holder". As previously stated in *Dytham*:

An element of culpability which is not restricted to corruption or dishonesty but which must be of such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment.¹⁷²

2.154 This is an aspect of a more general requirement, which may be expressed loosely by saying that the breach of duty must be "serious". In other words, culpable to an extent worthy of criminal, and not merely a civil or disciplinary, consequences.¹⁷³ It must also be more than an error of judgment, as "to condemn anyone who had fallen into error or made a mistake, belonged only to the law of a

¹⁷⁰ *Hollond* (1794) 5 TR 607, 101 ER 340. See *Russell on Crime* (12th ed 1964) vol 1, p 361.

¹⁷¹ Although this particular point was not addressed in *AG's Reference*, it would seem most unlikely that someone would not know that they were in a given position at all, although they may not be aware that legally that position was a public office.

¹⁷² *Dytham* [1979] QB 722, [1979] 3 WLR 467 at [727].

¹⁷³ See *Chapman* [2015] EWCA Crim 539, [2015] 2 Cr App R 10 at [36].

despotic state”.¹⁷⁴ However, there may be occasions where disciplinary and criminal standards overlap.¹⁷⁵

- 2.155 The importance of this element was recently emphasised by the Court of Appeal in *Chapman*.¹⁷⁶ The Lord Chief Justice, Lord Thomas, provided guidance as to how a jury should be directed in relation to the “abuse of public trust element”, with reference to the principles previously gleaned from *Dytham*, *AG’s Reference and* the Hong Kong case of *Shum Kwok Sher*.

First, the judge had to make clear that the necessary misconduct is not simply a breach of duty or breach of trust [...];

Secondly, it was necessary [...] to explain to the jury how they should approach determining whether the necessary threshold of conduct was so serious that it amounted to an abuse of the public’s trust in the office holder. Each of the cases refers [...] to that level as being one where it is calculated to injure, that is to say it has the effect of injuring the public interest so as to call for condemnation and punishment [...]¹⁷⁷

- 2.156 In relation to the second step, the court stressed that “context is important in determining how the jury should be directed” and that there were two ways in which the jury could be assisted in determining whether the conduct was sufficiently serious:

The first is to refer the jury to the need for them to reach a judgment that the misconduct is worthy of condemnation and punishment [...]
The second is to refer them to the requirement that the misconduct must be judged by them as having the effect of harming the public interest.¹⁷⁸

- 2.157 The court did not view the first of these methods as helpful. It referred to the difficulties that can arise, in terms of uncertainty and circularity, when a jury is told that the breach of duty “must be so serious as to amount to a criminal act” in cases of gross negligence manslaughter.¹⁷⁹ In other words, the breach 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 leads to inevitable uncertainty.

¹⁷⁴ *Borron* (1820) 3 B & Ald 432, 106 ER 721, one of the numerous authorities protecting public officials, in particular justices of the peace from prosecution where their actions are no more than an error or mistake. For further discussion see Appendix A.

¹⁷⁵ *Shum Kwok Sher Mason v HKSAR* [2002] 1 HKLRD 793 at [78]. For further discussion see Chapter 5.

¹⁷⁶ [2015] EWCA Crim 539, [2015] 2 Cr App R 10.

¹⁷⁷ *Chapman* at [31] to [33].

¹⁷⁸ *Chapman* at [34].

¹⁷⁹ *Adomako* [1995] 1 AC 171, [1994] 3 WLR 288 and *Misra* [2004] EWCA Crim 2375, [2005] 1 Cr App R 21.

2.158 In *Misra*, Lord Judge, the-then Lord Chief Justice, dismissed such an argument in relation to the offence of manslaughter when committed by a doctor, following the House of Lords decision in *Adomako*.¹⁸⁰ He stated:

In our judgment the law is clear. The ingredients of the offence have been clearly defined, and the principles decided in the House of Lords in *Adomako*. They involve no uncertainty. The hypothetical citizen, seeking to know his position, would be advised that, assuming he owed a duty of care to the deceased which he had negligently broken, and that death resulted, he would be liable to conviction for manslaughter if, on the available evidence, the jury was satisfied that his negligence was gross.¹⁸¹

Criticism of the offence remains, however, and it is debatable whether the decision in *Misra* should be relied on to support the creation of circular tests generally.¹⁸²

2.159 The court in *Chapman* sought to solve this difficulty by applying the second method of determining whether the conduct was “so serious”, holding 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.

The jury must, in our view, judge the misconduct by considering objectively whether the provision of the information by the office holder in deliberate breach of his duty had the effect of harming the public interest.¹⁸³

2.160 Lord Chief Justice Thomas provided two examples of the types of harm that may be caused to the public interest in cases involving the payment of public officials for information by the media. No examples were provided that are relevant to cases involving other types of misconduct.

2.161 *Chapman* clarified what has to be proved in relation to a defendant’s state of mind. Lord Thomas emphasised that the public office holder must know of the facts and circumstances that would lead “the right-thinking member of the public to conclude that the misconduct was such as is required”. However, it need not be proved that the public office holder had reached that same conclusion:

It was sufficient to prove that he had the means of knowledge available to him to make the necessary assessment of the seriousness of his misconduct; the assessment was for the jury.¹⁸⁴

2.162 Additional considerations as to state of mind apply to those charged with aiding, abetting, assisting and encouraging, or conspiring to commit misconduct in public

¹⁸⁰ [1995] 1 AC 171, [1994] 3 WLR 288.

¹⁸¹ *Misra* at [64].

¹⁸² See D Ormerod and K Laird *Smith and Hogan’s Criminal Law* (14th ed 2015).

¹⁸³ *Chapman* at [34].

¹⁸⁴ *Chapman* at [48] and [49].

office. However, these have general application to the concepts of secondary liability and conspiracy and so will not be examined here.¹⁸⁵

2.163 There are a number of factors that might assist in deciding whether the misconduct in question is serious enough to justify the use of the criminal law, including:

- (1) the likely consequences of the breach of duty;
- (2) improper motive (for example, bad faith, dishonesty, oppression or corruption); and
- (3) the other circumstances of the breach.

(a) Likely consequences

2.164 Very often, in cases of misconduct in public office, an adverse result will follow. For example, in *AG's Reference*, the death of the person arrested. The question is whether this is relevant to the definition of the offence.

2.165 The offence itself contains no requirement that the prosecution prove any particular consequence as part of the definition of the offence, it being an offence concerned with *conduct* not consequences. Thus, in *AG's Reference* itself, the existence of the offence did not depend on the fact that the person in custody died. The court made it clear that it was sufficient that the death or serious injury of the man arrested was a likely consequence of the breach of duty, whether or not it in fact occurred.

2.166 However, recklessness as to a risk of consequences occurring may be relevant to establishing the offence in other ways. A risk of adverse consequences is one factor contributing to the requirement that the breach of duty be a serious one.

2.167 In *AG's Reference* the court observed:

It will normally be necessary to consider the likely consequences of the breach in deciding whether the conduct falls so far below the standard of conduct to be expected of the officer as to constitute the offence. The conduct cannot be considered in a vacuum: the consequences likely to follow from it, viewed subjectively as in *R v G*, will often influence the decision as to whether the conduct amounted to an abuse of the public's trust in the officer.

A default where the consequences are likely to be trivial may not possess the criminal quality required; a similar default where the damage to the public or members of the public is likely to be great may do so [...] There will be some conduct which possesses the criminal quality even if serious consequences are unlikely but it is

¹⁸⁵ See D Ormerod and K Laird *Smith and Hogan's Criminal Law* (14th ed 2015) ch 8.

always necessary to assess the conduct in the circumstances in which it occurs.¹⁸⁶

- 2.168 In *Dytham*¹⁸⁷ the risk of adverse consequences (in that case, serious injury or death) was the primary factor in the court concluding that the officer's neglect of duty was one "calculated to injure the public interest". *Dytham* involved a police officer who failed to intervene in a fight that resulted in the death of one party.
- 2.169 On the other hand, if a police officer in a *Dytham* like scenario failed to intervene in a verbal argument that did not extend to physical violence, after which one party suffered a heart attack and died, then it might be argued that his or her failure to intervene (in what might have been a minor public order incident) did not amount to misconduct. This would be on the basis that there had been no serious disregard of a risk of serious physical harm by the officer.
- 2.170 In *Chapman* it was reiterated that it is not essential to the offence that a likely consequence of the breach of duty actually occurs, but the risk of adverse consequences is relevant to the question of seriousness. The case concerned alleged disclosure of information to the media by public officers under a duty not to disclose such material. In that context, the court referred to the public interest being harmed by the "ability to report information provided in breach of duty" being gained by the media. Harm could be caused if either the information itself damages the public interest (for example, a leak of budget information) or the manner in which the information is provided or obtained damages the public interest (where the public office holder is paid to provide the information). In either case, it was not necessary for the media source in question actually to report or otherwise act on the information provided, but the risk that he or she might do so made the matter sufficiently serious.¹⁸⁸
- 2.171 The lack of a consequence element is one respect in which the offence of misconduct in public office differs from the tort. The tort of misfeasance in public office, depends on the actual occurrence of adverse consequences to individuals. The same is not true of the crime.

(b) Improper motive

- 2.172 There is an apparent inconsistency in the case law on whether misconduct in public office is constituted by any wilful abuse of trust, or whether an improper motive is also required. This is illustrated by two lines of cases, mostly concerning magistrates.
- 2.173 Some cases hold that any breach of duty that is wilful and not merely technical and inadvertent is sufficient.¹⁸⁹ Others refer to a dishonest, oppressive, corrupt or

¹⁸⁶ *AG's Reference* at [58].

¹⁸⁷ *Dytham* [1979] QB 722, [1979] 3 WLR 467.

¹⁸⁸ *Chapman* at [36].

¹⁸⁹ *Sainsbury* (1791) 4 Term Rep 451; *Cope* (1827) 6 A & E 226; *Pinney* (1832) 3 B & Ad 947; *Hall* [1891] 1 QB 747.

partisan motive being required.¹⁹⁰ More recently the phrase “bad faith” was mentioned in *AG’s Reference*.¹⁹¹

- 2.174 This difference cannot be explained simply by saying that the older cases required an improper motive, whilst modern cases do not and therefore the law must have changed. Nor is it consistently true that one line of cases relates to neglect of duty and the other to active misconduct. The distinction appears to be that, where there is a clear duty with no element of discretion, any wilful breach is sufficient. However, the exercise of discretion in, for example, the grant of liquor licences, will only be criminal if the discretion was exercised in the way it was for improper motives.¹⁹²
- 2.175 This leads to the question whether, under more recent case law, impropriety of motive is an indicator of the “seriousness” of the misconduct. Alternatively it could be that the demonstration of bad faith, corruption, oppression or dishonesty is an additional element to be proved.

BAD FAITH

- 2.176 It was suggested on behalf of the defendant in *AG’s Reference* that the relevant test was one of bad faith. It was further suggested that one of the questions for determination by the court was whether it was necessary to prove bad faith and, if so, what it meant. It was held that “bad faith” was a concept appropriate to commercial dealings and was liable to create confusion in a criminal context.¹⁹³
- 2.177 The more important question is whether the misconduct offence covers a case where the officer knows that he or she is infringing the duties attached to the office but believes that it is morally justifiable to do so. One example would be a person who breaches a duty of confidentiality in order to expose a scandal. We address this question below, under the heading of without reasonable excuse or justification.¹⁹⁴

CORRUPTION, OPPRESSION OR DISHONESTY

- 2.178 *Llewellyn-Jones* concerned an allegation that a county court registrar exercised his judicial authority to gain an improper personal financial advantage.¹⁹⁵ The appeal was on the basis that there had been no express allegation of dishonesty. The court declined to answer the question as to whether dishonesty, fraud or corruption were essential elements of the common law offence. It held that dishonesty was implicit in the facts alleged and that:

¹⁹⁰ *Young and Pitts* (1758) 3 Burr 556, 97 ER 447; *Williams and Davis* (1762) 3 Burr 1317; *Baylis* (1762) 3 Burr 1318; *Davie* (1781) 2 Dougl 371; *Borron* (1820) 3 B & Ald 432; *ex parte Fentiman* (1834) 3 A & E 127.

¹⁹¹ [2004] EWCA Crim 868, [2005] QB 73.

¹⁹² See Appendix A.

¹⁹³ *AG’s Reference* at [63]. We acknowledge that “bad faith” is a concept used in respect of applications for abuse of process in the criminal courts.

¹⁹⁴ Para 2.187 and following, below.

¹⁹⁵ *Llewellyn-Jones* [1968] 1 QB 429, [1967] 3 WLR 1298.

[T]his involves an element of culpability which is not restricted to corruption or dishonesty but which must have been of such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment.¹⁹⁶

2.179 In later cases there seems to be no requirement of dishonesty or a corrupt or oppressive motive for the offence to be committed. In *Dytham*, where a police officer failed to intervene when a person was being kicked to death, it was explicitly held that wilful neglect was sufficient and that there was no need to establish a dishonest motive.¹⁹⁷

2.180 *DL* concerned a former police officer who still did some work for the police. The defendant had stored papers in his attic for a criminal contact but there was no suggestion of a dishonest or corrupt motive. The appellant himself put forward that he had no improper purpose. The court observed that:

Bearing in mind that if the jury were to conclude (as they did) that the standard of the appellant's behaviour fell far below that which was to be expected as to amount to an abuse of the public trust in him, it is impossible to see how the jury would equally not have concluded that the conduct was culpable.¹⁹⁸

The appellant's conviction was upheld.

2.181 In *AG's Reference* the court confined its comments on the matter to:

The motive with which an officer acts may be relevant to the decision as to whether the public's trust is abused by the conduct.¹⁹⁹

This presents motive as simply one of the considerations to be taken into account when assessing "seriousness". It arguably represents a change in the law from that expressed in some cases before *Llewellyn-Jones*,²⁰⁰ which frequently referred to motives such as oppression or corruption.

2.182 However, following *W*,²⁰¹ there seems to be an exception where the misconduct would potentially also amount to a dishonesty based crime, such as theft or fraud. In these cases dishonesty is a requirement of the offence.²⁰² One of the reasons relied upon by Lord Judge, in specifying a requirement that dishonesty be proved in cases that:

¹⁹⁶ The phrase "calculated to injure" has now been clarified in *Chapman* as referring to "having the effect of harming". It therefore, does not in itself relate to a question of fault, but rather the issues of seriousness.

¹⁹⁷ *Dytham* [1979] QB 722, [1979] 3 WLR 467.

¹⁹⁸ [2011] EWCA Crim 1259, [2011] 2 Cr App R 14.

¹⁹⁹ *AG's Reference* at [56].

²⁰⁰ [1968] 1 QB 429, [1967] 3 WLR 1298.

²⁰¹ [2010] EWCA Crim 372, [2010] QB 787. See para 2.148 above.

²⁰² This would presumably be so in all cases of dishonesty (for example, fraud), not just those involving the appropriation of property.

Involve the acquisition of property by theft or fraud and in particular when the holder of a public office is alleged to have made improper claims for public funds in circumstances which are said to be criminal,

was that to do otherwise would be contrary to the principle of legal certainty expressed in the case of *Rimmington*.²⁰³ However, it is arguable that the use of multiple fault requirements, for different factual examples of misconduct, may also fail to satisfy the principles in *Rimmington*. This issue is discussed further in Chapter 5.

- 2.183 The decision in *W* has been criticised as failing to recognise that, since the decision in *Dytham*,²⁰⁴ and further developed in *AG's Reference*, a new approach had begun which departed from the old cases referring to corrupt or other improper motives.²⁰⁵ Cronin argues that:

Regrettably the judgment continues to confuse the earlier distinct lines of authority, and the leading case in this area, *Attorney-General's Reference (No. 3 of 2003)*, is given but a cursory and passing glance [...] The judgment provided the clarity sought where uncertainty had previously clouded the law. It gave a thorough review of the earlier authorities, recognising that the misfeasance line of cases were all concerned to impose an appropriate *mens rea* requirement to ensure that the offence caught only truly criminal conduct. That concern was surely reflected in the Court of Appeal's imposition of the subjective mental elements which now apply to both types of behaviour [...] That mental state may or may not be accompanied by dishonesty, and, if present, dishonesty may aggravate the offence, but, according to *Attorney-General's Reference (No. 3 of 2003)*, it is no longer a necessary ingredient in any case of misconduct. Misconduct and dishonesty are distinct concepts, if dishonesty is alleged there are surely other more suitable offences to charge.²⁰⁶

We would tend to agree with this analysis.

(c) Other circumstances

- 2.184 Other circumstances may also result in the breach being viewed as more serious, such as a breach of duty by a senior public official as opposed to the same breach by a lower level official.
- 2.185 It has already been discussed that, as a matter of principle, misconduct in public office has not historically been restricted by seniority, but it could be argued that a

²⁰³ *Rimmington* [2005] UKHL 63, [2006] 1 AC 459 involved an appeal based on article 7 of the ECHR from a conviction for a different common law offence. For further discussion see Chapter 5 and Appendix C.

²⁰⁴ *Dytham* [1979] QB 722, [1979] 3 WLR 467.

²⁰⁵ See Appendix A for an analysis of the history of the offence.

²⁰⁶ A Cronin, "Misconduct in public office: dishonesty is an element if misconduct amounts to theft or fraud" (2010) 74(4) *Journal of Criminal Law* 290.

breach by a person in a senior position may be more readily perceived to amount to an abuse of trust.

Conclusion

2.186 In conclusion:

- (a) **The breach of duty must be serious enough to involve an abuse of the public's trust. That is, it must be of such a degree of seriousness that the misconduct has the effect of harming the public interest.²⁰⁷**
- (b) **The breach of duty need not have any particular consequences, though the occurrence of harm or foresight of a risk of consequences occurring may be relevant to the question of whether an abuse of trust has occurred.**
- (c) **The breach of duty need not involve an improper motive (such as bad faith, corruption or oppression) although this may also be an indicator of an abuse of trust.**
- (d) **Proof of dishonesty is required as a separate element only in particular cases involving misconduct that could potentially amount to a dishonesty offence.**
- (e) **The defendant must have knowledge of the circumstances that make the conduct sufficiently serious as to amount to an abuse of public trust. However, the defendant need not have made such an assessment.**

(6) Without reasonable excuse or justification

2.187 The final aspect of the offence, as defined in *AG's Reference*, is that the offence can only be committed "without reasonable excuse or justification".

2.188 Generally, a defence of reasonable excuse would concern the personal circumstances of a particular defendant. In contrast, a defence of justification would concern the appropriateness of a defendant's actions. One question is whether there is any need for such an element. There is an argument for saying that, where the facts which would constitute such a defence are present, then other elements of the offence are not satisfied. First, the conduct complained of may not be serious enough to constitute the offence. Secondly, an office holder is not acting wilfully where he or she believed there was a reasonable excuse for the act. A contrary argument would be that the question of reasonable excuse or justification is a separate issue.

2.189 The Court of Appeal in *DL*²⁰⁸ considered that the term "reasonable excuse or justification" had been used in the earlier cases of both *Dytham* and *Shum Kwok Sher* solely as a term to explain and expand upon the phrase "culpably

²⁰⁷ Lord Thomas CJ in *Chapman* [2015] at [34].

²⁰⁸ *DL* [2011] EWCA Crim 1259, [2011] 2 Cr App R 14.

misconducts himself". Lord Justice Leveson stated that, for the purposes of this case, it would have been appropriate for the judge to explain that the term meant no more than acting culpably or in a blameworthy fashion. In respect of Lord Justice Pill's statement in *AG's Reference*, that it would have been appropriate for the judge to explain that the term was a separate element of the offence, Lord Justice Leveson expressed the view that His Lordship in the earlier case "did not explain that the words [...] only served as an expansion of the words culpably".²⁰⁹ The court was, therefore, of the view that the decision in *DL* was consistent with the decision in *AG's Reference*.

- 2.190 In other words, the question is whether we are speaking of a true defence or whether we are speaking of an argument showing that one of the basic ingredients of the offence (such as abuse of the public's trust or fault) is not present. The different classifications have practical implications in terms of how a judge will direct them to be considered by a jury and whether the burden of proof lies with the prosecution or the defence.
- 2.191 A further issue relates to cases where the defendant mistakenly believes that there is an excuse for his or her action. As in all offences, there is a question whether that belief needs to be reasonable in order to constitute a defence, or whether it simply needs to be a genuine belief.
- 2.192 These questions have additional practical implications, both for the offence in current law and for any offence we propose to replace it. One is the question of whether the offence is committed if the defendant thought he or she was fulfilling a moral duty.

Whistleblowing

- 2.193 A whistleblower is generally understood (although there is no universally accepted definition)²¹⁰ to be an employee or organisation member who discloses illegal, immoral or illegitimate practices under the control of their employers to persons or organisations who can effect action.²¹¹ In other words, someone who reports wrongdoing within the workplace, because he or she believes it would be in the public interest to do so.
- 2.194 Several of the recent prosecutions for misconduct in public office have concerned public office holders who leaked information from police computer systems.²¹² These were mostly sentencing appeals, in which the question of justification did not arise, but in some cases the defendants have claimed that they were acting as whistleblowers.

²⁰⁹ *DL* at [12].

²¹⁰ D Lewis, "What is Whistleblowing", in *Whistleblowing at work* (2001).

²¹¹ See J Near and M Miceli, "Organisational dissidence: the case of whistleblowing" (1985) 4 *Journal of Business Ethics* 1 at [4].

²¹² *Keyte* [1998] 2 Cr App R (S) 165; *Kassim* [2005] EWCA Crim 1020, [2006] 1 Cr App R (S) 4; *Attorney General's Reference (No 1 of 2007)* [2007] EWCA Crim 760, [2007] 2 Cr App R (S) 86; *Gallagher and others* [2010] EWCA Crim 3201; *Stubbs* [2011] EWCA Crim 926, [2011] 2 Cr App R (S) 113.

2.195 The ongoing prosecution of cases arising from Operation Elveden²¹³ has involved the alleged disclosure of confidential material to journalists by police officers, prison officers, Ministry of Defence personnel and HM Revenue and Customs staff. In these cases the question of whether disclosure and publication of this material could be in the public interest has been raised in two respects:

- (1) whether the public interest in disclosing and/or publishing the material meant that the conduct of the public officer was insufficiently serious²¹⁴ as to amount to an abuse of the public's trust and, therefore, could not amount to misconduct; and
- (2) how the investigation and prosecution of public officers (sources of journalistic information on matters in the public interest) and journalists themselves, may interfere with the concept of freedom of the press and the protections provided by article 10 of the European Convention on Human Rights ("ECHR").²¹⁵

2.196 It has been suggested, in particular, that a public interest defence is necessary to protect press freedom. It is argued that it would allow public officers who observe or are made aware of wrongdoing by others to disclose this information to the press and thereby allow journalists to publish that material.²¹⁶ This would enable such allegations to be properly investigated or brought to public attention.

2.197 As the then Director of Public Prosecutions, Keir Starmer QC stated in 2009:

Some assistance on the threshold for criminal culpability [for misconduct in public office] is provided by Article 10(1) of the European Convention on Human Rights [...], which strongly protects the freedom of the press [...] Although this right is not absolute [...] where it touches on matters of public interest which the press has a legitimate interest in publishing, it attracts special protection. That is because of the well-recognised and special role of the press as a public watchdog. As a result any criminal proceedings which restrict the ability of the press to publish information and ideas on matters of

²¹³ Around 30 officials have been convicted as a result of Operation Elveden http://www.cps.gov.uk/news/latest_news/crown_prosecution_service_re_review_of_operation_elveden/ (last visited 13 January 2016).

²¹⁴ Of course in other cases a contrary argument could be made that a lack of public interest in disclosing such material may in fact make it more difficult.

²¹⁵ The journalist Sally Murrer, who was acquitted in November 2008 of a charge of conspiracy to commit misconduct in public office, successfully argued this point at trial. Additionally, the decision not to prosecute civil servant Christopher Galley and Damian Green MP in 2009 was made by the DPP Kier Starmer in reference to article 10. For further discussion see Appendix C and Chapter 5. See also *Shayler* [2002] UKHL 11.

²¹⁶ Evidence given by the Newspaper Society to the Joint Committee of the Draft Corruption Bill - *Report of the Committee on the Draft Corruption Bill* (2003) HL 157, HC 705 at ev 138. More recently see: <http://www.theguardian.com/law/2015/apr/18/dont-prosecute-journalists-who-pay-for-public-interest-leaks-says-ex-dpp> (last visited 13 January 2016). See further discussion in Appendix C.

public interest calls for the closest scrutiny. In particular, the need for a criminal prosecution must be convincingly established.²¹⁷

- 2.198 In *Chapman*²¹⁸ the Court of Appeal dealt with the issue of the public interest within the context of the assessment of whether the breach of duty alleged was serious enough to constitute misconduct. If “seriousness” is defined by reference to that which may harm the public interest, then conduct which benefits the public interest cannot logically amount to misconduct. However, the case did not address the question of “reasonable excuse or justification” in any more detail.
- 2.199 One could, however, imagine a case where a public officer leaks highly sensitive information, thereby committing a serious breach of a duty of confidentiality, but claims that there was a higher public interest in exposing a scandal.²¹⁹
- 2.200 There is a detailed regime for protecting the rights of employees not to be unfairly treated or dismissed in respect of disclosure of such information in the context of employment law. This is set out in Part IVA (sections 43A to 43L) and sections 47B and 103A of the Employment Rights Act 1996 (“the 1996 Act”).²²⁰ Briefly, there is a category of communications called “protected disclosures”. An employee must not be subjected to dismissal or other detriment on the ground of having made a protected disclosure. In effect, the characteristic of being a person who has made a protected disclosure is added to race, sex and disability as an unlawful ground for discrimination.
- 2.201 The content and the manner of a protected disclosure are both carefully circumscribed. Section 43B of the 1996 Act provides that a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to involve a specific type of information.²²¹ To then

²¹⁷ CPS, *Decision on Prosecution: Mr Christopher Galley and Damian Green MP* 16 April 2009. Mr Galley and Mr Green were arrested in 2008 in relation to confidential Government information allegedly leaked by Mr Galley, a Home Office civil servant, to Mr Green, who was then an opposition MP. Six alleged leaks had resulted in a series of articles being published in the national press between October 2007 and November 2008. Neither Mr Galley nor Mr Green were charged following a police investigation into allegations of misconduct in public office. The decision not to prosecute followed the acquittal of journalist Sally Murrer, also in November 2008.

²¹⁸ [2015] EWCA Crim 539, [2015] 2 Cr App R 10.

²¹⁹ For example, Thomas Lund-Lack, a retired officer working in a civilian capacity at Scotland Yard who leaked information regarding potential terrorist attacks on the West of England. Mr Lund-Lack initially claimed to be “morally justified” in bringing his concerns as to the effectiveness of the Counter Terrorism Command to the public’s attention and pleaded guilty to one offence of misconduct in public office on 18 June 2007. The Telegraph 27 July 2007. <http://www.telegraph.co.uk/news/uknews/1558648/Scotland-Yard-man-jailed-for-terror-leak.html> (last visited 13 January 2016). Or the disclosure of expense fraud by MPs by a civil servant to The Telegraph in 2009, discussed in Ch 1. See Met Police, “MPS will not investigate MPs expenses leak”, <http://content.met.police.uk/News/MPS-will-not-investigate-MPs-expenses-leak/1260267539886/1257246745756> (last visited 13 January 2016)

²²⁰ Inserted by the Public Interest Disclosure Act 1998.

²²¹ See Employment Rights Act 1996, s 43B(1).

qualify for protection, the worker must make the disclosure to an employer or other “responsible person”.²²²

- 2.202 A disclosure is not protected if the act of making it amounts to a criminal offence.²²³ It follows that the fact that a disclosure is protected under the 1996 Act can never be a defence to any criminal offence. Such offences include, a person leaks information protected by the Official Secrets Acts,²²⁴ information held on a computer in breach of the Computer Misuse Act 1990 or the Data Protection Act 1998. That can never be a protected disclosure and in these cases therefore, there is no defence to a prosecution under those Acts.
- 2.203 Whether a disclosure amounts to misconduct in public office will partly depend on:
- (1) whether the conduct is serious enough to amount to an abuse of the public’s trust in the office holder; or, if so,
 - (2) whether there was a “reasonable justification” for the act.
- 2.204 As discussed, it is possible to include the issue of “reasonable justification” in the consideration of both “wilfulness” and “seriousness”. However, it is difficult to conceive of a situation where someone deliberately discloses confidential material and would not be acting wilfully. The question then is: can the defendant’s claim that he or she was acting in the public interest only be assessed by the courts in the context of seriousness? Or, whether the issue can also be considered separately within the element “without reasonable excuse or justification”, in cases where the disclosure is on the face of it serious enough to be termed misconduct.
- 2.205 The Leveson inquiry into the conduct of the media, which preceded Operation Elveden, looked at the implications of a public interest defence to criminal prosecutions of journalists.²²⁵ It was suggested to the inquiry that there should be a defence to all crime committed by a journalist acting in the public interest.²²⁶
- 2.206 The Inquiry acknowledged that article 10 of the ECHR recognises the difficult position of journalists having to weigh up the personal risk of criminal prosecution when deciding whether or not to proceed with a line of inquiry or publication.²²⁷ However, the Inquiry concluded that a wholesale defence for journalists is potentially problematic. Such a defence could result in something like an immunity from prosecution because of the difficulties (for the prosecution) in proving that the activity was not in (or in fact harmed) the public interest. Additionally, it was noted that there are other mechanisms available to protect

²²² 1996 Act, s 43C.

²²³ 1996 Act, s 43B(3).

²²⁴ Official Secrets Acts 1911, 1939 and 1989.

²²⁵ The Leveson Inquiry, *An Inquiry into the Culture, Practices and Ethics of the Press* (November 2012).

²²⁶ The Leveson Inquiry, part J, para 6.2.

²²⁷ See Appendix C for further discussion on the relationship between MIPO and the ECHR.

journalists from the oppressive application of the law.²²⁸ It highlighted that the CPS Code for Crown Prosecutors²²⁹ requires that specific consideration be given to both defences based on public interest, and the public interest in bringing a prosecution.

2.207 In concluding that the additional CPS guidance on cases involving the media provides clarity in respect of such issues, the Inquiry stated:

It is beyond doubt that journalists would prefer guarantees and immunity but, put simply, that would be unjustified and would do nothing to ensure that appropriate standards of behaviour were set, encouraged, supported and enforced, not merely as a matter of criminal law but also editorial practice.²³⁰

Conclusion

2.208 In conclusion, **it is unclear whether the term “without reasonable excuse or justification” is to be considered within other elements of the offence or whether it constitutes a standalone element or defence.**

Overall conclusion

2.209 We set out the totality of our conclusions on the elements of the current law of misconduct in public office:

(1) Public office:

(a) A public office is primarily defined by its functions, not its status.

(i) A public office does not need to be an “office” in any technical sense nor be a permanent position.

(ii) The position does not need to be subject to specific rules of appointment, one of employment, a contractual position or remunerated.

(iii) A public office does not need to be directly linked, by way of appointment, employment or contract, in terms of status, to either the Government or the “state”.

(b) For an individual to be a public office holder:

(i) the position must involve the individual in the performance of a duty associated with a state function; and

²²⁸ The Leveson Inquiry, part J, para 8.2.

²²⁹ See further Chapter 5.

²³⁰ The Leveson Inquiry, part J, para 7.10.

- (ii) the duty must be one in which the public will have a significant interest seeing performed (an interest beyond the interest of those who might be directly affected by a serious failure in the performance of those functions). This determines whether someone is in public office.

(2) Acting as such:

The requirement that the individual be a public office holder “acting as such” is unlikely to have any practical significance within the current offence of misconduct in public office, other than to exclude the cases where an officer is acting in a wholly private capacity.

(3) Breach of duty:

A public office holder will have misconducted him or herself when he or she has breached a duty in which the public has a significant interest that is associated with a state function. It remains unclear whether a public office holder will also be liable for the offence if he or she has breached any other duty of his or her position.

(4) Wilfulness:

- (a) The person in public office must be aware of the factual circumstances existing (that as a matter of law make his or her position a public office).²³¹
- (b) He or she must be aware of that his conduct risks breaching one of the duties of that position.
- (c) He or she must deliberately engage in the conduct which breaches the duty in question.
- (d) And the decision to do so must be unreasonable in light of the facts known to him or her.
- (e) In certain circumstances, dishonesty is also required.

(5) Abuse of the public’s trust:

- (a) The breach of duty must be serious enough to involve an abuse of the public’s trust. That is, it must be of such a degree of seriousness that the misconduct has the effect of harming the public interest.²³²
- (b) The breach of duty need not have any particular consequences, though the occurrence of harm or foresight

²³¹ Although this particular point was not addressed in *AG’s Reference* it would seem most unlikely that someone would not know that they were in a given position at all, although they may not be aware that legally that position was a public office.

of a risk of consequences occurring may be relevant to the question of whether an abuse of trust has occurred.

- (c) The breach of duty need not involve an improper motive (such as bad faith, corruption or oppression) although this may also be an indicator of an abuse of trust.
- (d) Proof of dishonesty is required as a separate element only in particular cases involving misconduct that could potentially amount to a dishonesty offence.
- (e) The defendant must have knowledge of the circumstances that make the conduct sufficiently serious as to amount to an abuse of public trust. However, the defendant need not have made such an assessment.

(6) Without reasonable excuse or justification:

It is unclear whether the term “without reasonable excuse or justification” is to be considered within other elements of the offence or whether it constitutes a standalone element or defence.

JURISDICTION

- 2.210 As a general rule, the common law does not extend to acts done outside England and Wales.²³³ An offence will be liable to prosecution within England and Wales if either the prohibited conduct or its consequences take place there or there are substantial activities constituting the crime taking place in this country.²³⁴
- 2.211 As misconduct in public office is a “conduct crime”,²³⁵ the offence will be committed upon the carrying out of the misconduct in question. A holder of public office will, therefore, be subject to the offence if his acts or omissions, or substantial activities constituting such, occur within England and Wales.
- 2.212 Additionally, however, some statutory provisions have extended the ambit of the criminal law of England and Wales to apply to specified classes of person outside

²³² Lord Chief Justice Thomas in *Chapman*.

²³³ Criminal jurisdiction at common law extends to England and Wales and to the superadjacent airspace. It includes all English and Welsh islands but excludes Scotland Northern Ireland, the Channel Islands and the Isle of Man. See generally: Halsbury's Laws of England, *Criminal Procedure*, vol 27. See also, *Harden* [1963] 1 QB 8, [1962] 2 WLR 553; *Cox v Army Council* [1963] AC 48, [1962] 2 WLR 950; *Treacy v DPP* [1971] AC 537, [1971] 2 WLR 112. As to the common law: *Keyn* (1876) 2 Ex D 63; (1876) 2 QBD 90 and *Page* [1954] 1 QB 170, [1953] 3 WLR 895.

²³⁴ *Smith (Wallace Duncan) No 4* [2004] EWCA Crim 631, [2004] QB 1418.

²³⁵ See para 2.163 above.

the jurisdiction.²³⁶ Two of these classes of person have also been held by the courts to be public office holders.

- 2.213 Section 31(1) of the Criminal Justice Act 1948 applies to Crown servants as follows:

Any British subject employed under His Majesty's Government in the United Kingdom in the service of the Crown who commits, in a foreign country, when acting or purporting to act in the course of his employment, any offence which, if committed in England, would be punishable on indictment, shall be guilty of an offence [...] and subject to the same punishment, as if the offence had been committed in England.

- 2.214 Section 42(1) of the Armed Forces Act 2006 applies to British service personnel subject to service law, or a civilian subject to service discipline. A member of service personnel or civilian who commits a service offence under this section if he or does any act that:

(a) is punishable by the law of England and Wales; or

(b) if done in England or Wales, would be so punishable.

- 2.215 The effect of section 42 is that any serviceman –

Who is guilty of an act or omission that would be punishable by the law of England if committed in England is guilty of any offence [...] wherever he commits it, whether in some other part of the UK or elsewhere in the world.²³⁷

Although, as the offence is a “service” offence, it can only be dealt with by way of court martial.

- 2.216 Misconduct in public office is, therefore, an offence where the jurisdiction of the courts will depend on the status of a particular public office. Consequently, there will be a lack of consistency between different types of defendant, as to how and when they can be prosecuted for acts occurring outside of England and Wales.

²³⁶ These provisions are almost always restricted in application to British nationals or those domiciled in Britain.

²³⁷ Lord Roger of Earlsferry in *Spear* [2002] 3 All ER 1074; [2003] 1 AC 734, p 1088, referring to the effect of the Army Act 1955 s.70 which had essentially the same effect.

Example 5 A police officer (a Crown servant) attached to the royal family's security detail, whilst on a royal visit to the USA, leaks information to the press in that country regarding a member of the royal family. Under section 31(1) of the Criminal Justice Act 1948 the officer could be prosecuted for the offence of misconduct in public office in the United Kingdom even though the prohibited conduct does not take place here.²³⁸

Example 6 An army sergeant attached to the same security detail leaks information in the same way. As neither the prohibited conduct nor its consequences take place in the United Kingdom, he or she cannot be prosecuted for an offence here but could be subject to court martial under section 42(1) Armed Forces Act 2006.

Example 7 The Royal physician on the same trip leaks information in the same way. As neither the prohibited conduct nor its consequences take place in the United Kingdom, he or she cannot be prosecuted for an offence here.

2.217 Additionally, because of the current restriction of the offence to England and Wales, there are inconsistencies that may arise in respect of how a public office holder's misconduct is treated in different parts of the United Kingdom. For example, there is an offence in Scotland of "wilful neglect of duty by a public official". This offence is similar to the offence in England and Wales in some, but not all respects:

It is a crime at common law for a public official, a person entrusted with an official situation of trust, wilfully to neglect his duty, even where no question of danger to the public or to any person is involved.²³⁹

2.218 Consider a customs officer for HM Revenue and Customs, who has powers across the UK, who commits misconduct one day in England and in the same way the next day in Scotland. This may result in the officer being prosecuted for two different offences for the two acts, or even being prosecuted in one jurisdiction but not the other.

2.219 In contrast, a number of statutory offences, which may be considered to encompass conduct akin to misconduct in public office, have an extra-territorial ambit specified by the offence-creating statute. The justification for the wider territorial reach is usually that the nature of the offence is both serious and that the criminality is likely to cross geographical borders. Section 12 of the Bribery Act 2010 provides that acts and omissions forming part of an offence under sections 1, 2 or 6 of the Act, done or made outside the United Kingdom, can be

²³⁸ Although Criminal Justice and Courts Act 2015 s 26 would not apply, as that too is limited in its territorial ambit to England and Wales.

²³⁹ Gordon, *The Criminal Law of Scotland* (3rd ed 2001) vol ii at [44-01]. See Appendix F for further comparative analysis.

the subject of proceedings within the United Kingdom if the person who commits those acts or omissions has a “close connection” with the United Kingdom.

- 2.220 Given the similarity of misconduct in public office to many offences where jurisdiction is in fact wider, there does not appear to be any significant principle underlying the different treatment of the misconduct offence. It appears to be a historical position, which has not been considered for review at the same time that extensions in jurisdiction have been made for other offences.

LIABILITY OF SECONDARY PARTIES

- 2.221 Individuals who are not public officers may be charged as secondary parties to the offence. This could be where they either aid, abet, assist or encourage the commission of misconduct by a public office holder or conspire to commit misconduct in public office.

- 2.222 The types of people prosecuted in this way include the following:

- (1) Spouses and partners. For example, the wife of a public office holder who allows her bank account to be used for money laundering purposes.²⁴⁰
- (2) Criminal associates. For example, a drug dealer who asks an employee of the Crown Prosecution Service to obtain information relating to the police investigation of criminal activities.²⁴¹
- (3) Private contractors. For example, a local builder who gives a local councillor payments and gifts with the view to influencing decisions about the allocation of local authority building contracts.²⁴²
- (4) Journalists. For example, a journalist who offers to pay a prison guard for information about a newsworthy inmate.²⁴³

- 2.223 Most recently, as a result of the large number of journalists prosecuted as part of Operation Elveden, there has been much criticism of the prosecution of secondary parties in connection with misconduct in public office. The Court of Appeal in *Chapman* considered two appeals by journalists against convictions for both conspiracy to commit, and aiding and abetting misconduct in public office.

- 2.224 In *Chapman*, the court considered submissions that the judge in each trial had wrongly directed the jury in respect of the fault required to be proved for secondary parties to misconduct in public office. The court concluded that both juries had been correctly directed and that the established law as to the fault of

²⁴⁰ *Chapman* [2015] EWCA Crim 539, [2015] 2 Cr App R 10.

²⁴¹ See BBC News “Corrupt prosecution worker jailed” (10 January 2006) <http://news.bbc.co.uk/1/hi/england/london/4597696.stm> (last visited 15 January 2016 2015).

²⁴² See BBC News “Builder Kevin Wingrave admits bribing council boss” (10 November 2014). <http://www.bbc.co.uk/news/uk-england-devon-29992509> (last visited 15 January 2016).

²⁴³ *Chapman* [2015] EWCA Crim 539, [2015] 2 Cr App R 10.

secondary parties was applicable to misconduct in public office in the same way it was to other offences.²⁴⁴

- 2.225 Therefore, we conclude that where such charges are brought they are subject to the usual rules regarding the liability of secondary parties and there is nothing specific to the offence of misconduct in public office that causes difficulties over and above those already present in that area of law.²⁴⁵

CORPORATE LIABILITY

- 2.226 Misconduct in public office is fundamentally a crime focused on the duties of an individual in relation to the public. However, a breach of a duty could equally be committed by a number of individuals who are jointly subject to that duty:

Where a duty is thrown on a body consisting of several persons, each is individually liable for a breach of duty, as well as for acts of commission as for omission.²⁴⁶

- 2.227 We have found no authority to suggest that the ordinary rules of corporate criminal liability do not apply to misconduct in public office, assuming that a corporation is held to be in public office.²⁴⁷ A company with a distinct legal personality is capable of committing crimes, subject to the restriction of the rules of attribution where the crimes require proof of a mental element, as with misconduct in public office.²⁴⁸

Question 1

- 2.228 **Can consultees provide any further examples of the problems of interpretation with the elements of the current offence of misconduct in public office?**

²⁴⁴ *Chapman* at [41] to [69].

²⁴⁵ See *Participating in Crime* (2007) Law Com No 305.

²⁴⁶ *Russell on Crime* (1964); *Hollond* (1794) 5 TR 607, 101 ER 340.

²⁴⁷ In the same way the usual rules of legal liability would apply in respect of unincorporated associations.

²⁴⁸ See *Blackstone's Criminal Practice* (25th ed 2015) p 115-125 and *Criminal Liability in Regulatory Contexts* (2010) Law Com No 185, paras 1.60 to 1.88. We have previously recommended that corporate criminal liability should be included in a Law Commission reform programme.

CHAPTER 3

THE NEW OFFENCE OF CORRUPT OR OTHER IMPROPER EXERCISE OF POLICE POWERS OR PRIVILEGES

- 3.1 Recent years have seen a concentration by the media on what is often termed “corruption” within the police.²⁴⁹ The term is used without reference to any specific definition, but to encapsulate various types of wrongdoing including: bribery, fraud, abuse of authority, perverting the course of justice, neglect of duty and the exploitation of vulnerable people. A number of public scandals and other incidents attracting a high level of media and political scrutiny have in turn led to increased public concern regarding the integrity of both individual police officers and the police as an organisation.²⁵⁰
- 3.2 There are currently several campaigns calling for increased accountability of the police and stronger protections for the public interest, as opposed to what are seen to be the interests of the state embodied in the police force.²⁵¹ The Independent Police Complaints Commission (“IPCC”) has undertaken a number of related reviews.²⁵² The Committee on Standards in Public Life (“CSPL”) has recently published a report of its inquiry into policing accountability.²⁵³ There is

²⁴⁹ For example, Neil, Darbyshire, “The Shocking Truth about Police Corruption in Britain” (The Spectator 7 March 2015) <http://www.spectator.co.uk/features/9461322/the-shocking-truth-about-police-corruption-in-britain/> (last visited 8 January 2016); Josephine McDermott, “Metropolitan Police Suspensions near 50 over Two Years” (BBC News 3 March 2015) <http://www.bbc.co.uk/news/uk-england-london-30227354> (last visited 8 January 2016). Although there is ample evidence of police corruption throughout history and, therefore, it cannot necessarily be described as a new issue. See L Radzinowicz, *A history of English criminal law and its administration from 1750: Volume 2* (1956); P Rawlings, *Crime and Power: A History of Criminal Justice 1688-1998* (1999); A Doig, *Corruption and Misconduct in Contemporary British Politics* (1984).

²⁵⁰ Examples include: Operation Elveden (*Brooks and others* (October 2013) (unreported, Central Criminal Court); the “Plebgate” saga BBC News, “‘Plebgate’ police officers face misconduct hearings” (10 August 2015) <http://www.bbc.co.uk/news/uk-33854227> (last visited 8 January 2016); the investigation of the Met police for encouraging the withdrawal of rape allegations (IPCC, *Southwark Sapphire Unit’s local practices for the reporting and investigation of sexual offences, July 2008 – September 2009: Independent Investigation Learning Report* (26 February 2013)); the fresh independent inquiries into historic areas of concern such as the Hillsborough disaster Hillsborough Independent Panel, “Disclosed Material and Report” (Hillsborough Independent Panel) <http://hillsborough.independent.gov.uk> (last visited 8 January 2016); the murder of Stephen Lawrence (Mark Ellison QC, *The Stephen Lawrence Independent Review* (March 2014) HC 1094. The same types of behaviour are also prosecuted in other jurisdictions, see Appendix F.

²⁵¹ One example of this is the Campaign Opposing Police Surveillance (“COPS”) which called for the independent public inquiry into undercover policing operations.

²⁵² IPCC, *Corruption in the Police Service in England and Wales, Part 1* (August 2011); IPCC, *Corruption in the Police Service: Second report - a report based on the IPCC’s experiences 2008-2011* (May 2012); IPCC, *Public views on police corruption: A qualitative research study* (May 2012).

²⁵³ CSPL, *Tone from the top: leadership, ethics and accountability in policing* (2015) Cm 9057.

currently a judge-led statutory inquiry²⁵⁴ and an independent review²⁵⁵ in progress, both commissioned by the Home Office to look at police conduct.

- 3.3 Data collected as to the number of prosecutions for misconduct in public office show that these have increased markedly over the last 10 years.²⁵⁶ Research into both reported and unreported cases involving the offence indicates that a large number of these prosecutions are brought against members of the police.
- 3.4 The type of alleged misconduct covered by these prosecutions varies greatly. They include: causing the deaths of suspects in custody;²⁵⁷ conspiring to supply drugs through criminal contacts;²⁵⁸ disclosing highly confidential information from police sources;²⁵⁹ and having sexual relations with witnesses either whilst during, or outside of, working hours.²⁶⁰
- 3.5 In some cases the conduct might involve the commission of one or more criminal offence in addition to misconduct in public office. This can lead to officers facing a number of different criminal charges. They may also face disciplinary action in the relevant police area.
- 3.6 There is no doubt that a police officer is in public office for the purposes of the misconduct in public office offence.²⁶¹ The courts have made it clear that police community support officers and civilian police staff are also public office holders for these purposes.²⁶² The offence of misconduct in public office can also be committed by any holder of public office who is suspended or off duty at the time of the misconduct.²⁶³
- 3.7 Despite the availability of the misconduct offence, many cases involving allegations against police officers may be more appropriately charged as an alternative statutory offence. A statutory offence may well more accurately describe the wrongdoing. In some cases there may be procedural and/or evidential advantages in charging the statutory crime. For example, in cases of

²⁵⁴ The Home Secretary appointed Lord Justice Pitchford to lead a statutory inquiry into undercover policing. This was launched on 12 March 2015.

²⁵⁵ The Home Secretary announced an independent review of deaths and serious incidents in police custody on 23 July 2015.

²⁵⁶ See Chapter 1.

²⁵⁷ The death of Thomas Orchard; BBC News, "Thomas Orchard Custody Death: Three Police Charged" (BBC News 17 December 2014) <http://www.bbc.co.uk/news/uk-england-devon-30517290> (last visited 8 January 2016).

²⁵⁸ *Nyack* [2008] EWCA Crim 61.

²⁵⁹ PCSO Batmaz: BBC News, "Drug-dealing police community support officer jailed" (BBC News 3 May 2013) <http://www.bbc.co.uk/news/uk-22407414> (last visited 8 January 2016).

²⁶⁰ PC Rushton: BBC News, "PC Adam Rushton is Jailed for Sexual Misconduct" (BBC News 1 May 2015) <http://www.bbc.co.uk/news/uk-england-stoke-staffordshire-32551145> (last visited 8 January 2016).

²⁶¹ *AG's Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73.

²⁶² *Amar Iqbal* [2008] EWCA Crim 2066; *Gallagher* [2010] EWCA Crim 3201.

²⁶³ *King* [2014] 1 Cr App R(S) 462(73); *W* [2010] EWCA 372. See also, the case of PC Wallis, BBC News, "'Plebgate' Row: Timeline" (BBC News 27 November 2014) <http://www.bbc.co.uk/news/uk-24548645> (last visited 8 January 2016).

disclosing highly sensitive or personal information, an offence under the Official Secrets Act 1989, Computer Misuse Act 1990 or the Data Protection Act 1998 might be a preferable charge to misconduct. Conversely, there may be situations where there is either no alternative offence available or where the alternative offence would not properly reflect the misconduct in question. In such cases misconduct in public office may be the appropriate charge.²⁶⁴

- 3.8 It appears that misconduct in public office is one weapon to be used in the fight against police misconduct, within an arsenal of available criminal offences. However, in spring 2014, a number of concerns arose as to whether the existing arsenal was sufficient. The particular concern was, seemingly, whether there were gaps between existing statutory offences that misconduct in public office could not be relied upon to fill.
- 3.9 The result was the creation of a new offence under section 26 of the Criminal Justice and Courts Act 2015.

BACKGROUND TO SECTION 26

- 3.10 The Stephen Lawrence Independent Review (“the Ellison Review”), published on 6 March 2014,²⁶⁵ examined police conduct surrounding the investigation into the racist murder of Stephen Lawrence. The Ellison Review identified a number of failings by police officers including incompetence, racism and corruption. This echoed the original findings of a review conducted 15 years earlier by Sir William Macpherson (“the Macpherson Review”). The Macpherson Review found that the first investigation into Stephen Lawrence’s murder was “marred by a combination of professional incompetence, institutional racism and a failure of leadership by senior officers”.²⁶⁶
- 3.11 The Government reacted swiftly to the Ellison Review in an effort to address the perception of a threat to the integrity of the criminal justice system. In her oral statement to Parliament, the Home Secretary announced that a new offence of police corruption would be added to the Criminal Justice and Courts Bill. This new offence was said to be necessary because:

The current law on police corruption relies on the outdated common-law offence of misconduct in public office. It is untenable that we should be relying on such a legal basis to deal with serious issues of corruption in modern policing.²⁶⁷

²⁶⁴ See Chapter 5, Chapter 6 and Appendix D for more detailed consideration of related or alternative offences.

²⁶⁵ Mark Ellison QC, *The Stephen Lawrence Independent Review* (March 2014) HC 1094R.

²⁶⁶ Sir William Macpherson, *The Stephen Lawrence Inquiry* (February 1999) Cm 4262-I, para 46.1.

²⁶⁷ *Hansard* (HC), 6 March 2014, vol 576, col 1065. In response, Michael Ellis MP for Northampton North commented that the addition of an offence of police corruption was “extremely important, because the current offence of misconduct in a public office is clearly insufficient”.

- 3.12 The Home Office provided more detailed plans on 10 June 2014.²⁶⁸ Damian Green MP, then Minister for Police, Criminal Justice and Victims, stated that it was right that “the full force of the criminal law should be available to punish and deter acts of corruption by police officers”. He went on to state that the best way to do this was “to create a new offence of police corruption, solely applicable to police officers, to sit alongside the existing offence of misconduct in public office”. These plans included guidelines which outlined that the proposed offence would apply to police officers of all ranks in England and Wales including special constables.²⁶⁹
- 3.13 On 13 June 2014 the Home Office published an impact assessment outlining the policy objectives, intended effects and anticipated costs and benefits of the proposed new offence of police corruption.²⁷⁰ This stated that the new offence was necessary because there had been a number of high profile cases where it had been alleged that police officers had not acted with integrity and honesty, and:
- In addition, at least one case has been identified where the broader ‘privileges’ of a constable have been abused to obtain significant financial benefit and it was not possible to bring that behaviour within the common law offence [...] a police officer sought to abuse the privileges of his office by inappropriately seeking a discount on the purchase of a private car.²⁷¹
- 3.14 The impact assessment also anticipated that the new statutory offence would be clearer than the common law offence of misconduct. It stated that, under the proposed statute, corrupt behaviour by a police officer “will always amount to an abuse of the public’s trust”, while under the common law, “it must be proved in each case that the misconduct is to such a degree as to amount to an abuse of the public’s trust in the office holder”. It was anticipated that the new offence would replace complex components of the misconduct offence with a concept of “benefit or detriment”, which it was thought would be easier for juries to understand.²⁷²
- 3.15 However, it was made clear that, in relation to police officers, “other acts of misconduct will remain subject to ... the common law criminal offence (for serious misconduct that is not corruption)”.
- 3.16 In forecasting the effect of the proposed new offence, the impact assessment expected that neither the number of investigations nor the number of prosecutions involving police officers would change significantly. This was

²⁶⁸ Home Office and Damian Green, “Home Office Unveils New Police Corruption Offence” (Gov.uk 10 June 2014) <https://www.gov.uk/government/news/home-office-unveils-new-police-corruption-offence> last visited 8 December 2016.

²⁶⁹ Also including, British Transport Police officers, Ministry of Defence police, Civil Nuclear Constabulary officers and National Crime Agency officers with designated powers and privileges of a constable.

²⁷⁰ Home Office, *Impact Assessment: New Offence of Police Corruption* (June 2014).

²⁷¹ Home Office, *Impact Assessment: New Offence of Police Corruption* (June 2014) p 3.

²⁷² Home Office, *Impact Assessment: New Offence of Police Corruption* (June 2014) p 4.

because the “abuse of privileges” issue identified had only arisen in a very small number of cases and “the new offence covers much of the same ground as the common law offence.”

3.17 It was, therefore, envisaged that the new offence would:

- (1) apply only to police constables and special constables;
- (2) supplement rather than replace misconduct in public office, applying only to misconduct that could be described as “corruption”;
- (3) apply to all instances of police “corruption” whether or not the alleged misconduct is considered to be “to such a degree as to amount to an abuse of the public’s trust”;
- (4) specifically apply to instances where “corruption” results from police officers “abusing their privileges”; and
- (5) not result in a significant increase in either investigations or prosecutions of police constables.

PROGRESSION THROUGH PARLIAMENT

3.18 There was no debate on the new offence in the House of Commons. However, the clause was debated three times in the House of Lords. Lord Faulks QC, Minister of State for Justice, stated that the new offence was necessary because the common law offence of misconduct in public office was of significant age and was not sufficiently specific to deal with either corruption or police officers. In particular, he stated that:

- (1) misconduct in public office is “not always well suited to dealing with or deterring the pattern of corruption in today’s information age”;
- (2) as misconduct in public office requires that a public officer must be “acting as such”, some corruption by police officers falls outside its scope; and
- (3) because of the unique position of power of the police, they should be held to the highest standards of behaviour.²⁷³

3.19 The new offence was heavily criticised by those peers with extensive policing backgrounds: Lord Dear, Lord Paddick, Lord Condon and Lord Blair.²⁷⁴ Their Lordships commented that the proposed offence:

- (1) was “symbolic legislation”, “headline grabbing” and “populist”;

²⁷³ *Hansard* (HL), 30 June 2014, vol 754, col 1539; *Hansard* (HL), 14 July 2014, vol 755, col 493. Lord Kennedy of Southwark also supported the new offence on the grounds that the consequences for the victims of police corruption are very serious.

²⁷⁴ Lord Blair, Commissioner of Metropolitan Police from 2005 to 2008; Lord Paddick, Deputy Assistant Commissioner of the Metropolitan Police from 2003 to 2007; Lord Condon, a member of ACPO and Commissioner of the Metropolitan Police from 1993 to 1999; Lord Dear, Chief Constable of West Midlands Police 1985 to 1990 and HM Inspector of Constabulary 1990 to 1997.

- (2) lacked a principled reason for only applying to police officers and no other “public office”; and
- (3) was unnecessary, as misconduct in public office and other offences leave no lacuna in the law.²⁷⁵

3.20 Lord Blair also stated that:

Neither I nor the CPS, in my experience, has ever had any difficulty in framing charges under what was then the Prevention of Corruption Act, which would now be the Bribery Act 2010, or the common-law offence of misconduct in public office. The difficulty was not the charge but finding the evidence in a crime where all the participants do not want to tell anyone about it.²⁷⁶

3.21 However, one peer called for a wider offence. On 20 October 2014, in the final debate on the new offence, the Earl of Lytton suggested that section 26 should be widened to include:

Any person who is an employee or agent or acting under the authority of a constable (including in a supporting role), or is performing any function that would, if performed by a constable, fall within policing duties.²⁷⁷

3.22 This amendment was rejected on the basis that it would make the offence too broad, “extending to a group of individuals who may not have received any specific training of the type that one would expect” and for whom “it may not be clear that they fall within the definition he proposed”. An additional basis for its rejection was that there was “no public clamour for a specific anti-corruption offence” relating to such persons in the same way that the government believed there was for police officers. It was reiterated that other public officials, including police staff, would remain subject to the offence of misconduct in public office.

3.23 The Earl of Lytton was directed to this Law Commission project by Lord Faulks:

I should also point out that the Law Commission is starting a project to examine the broader issue of misconduct by public officials, including the misuse of sensitive official information. That, I suggest, is the proper place to look at misconduct and corruption in other areas of public service [...]

3.24 The Criminal Justice and Courts Act 2015 was granted Royal Assent on 12 February 2015 and the offence is now found in section 26. The offence came into force on 13 April 2015.²⁷⁸

²⁷⁵ See *Hansard* (HL) 30 June 2014, vol 754, cols 1539 to 1571; *Hansard* (HL) 14 July 2014, vol 755, cols 486 to 486.

²⁷⁶ *Hansard* (HL) 30 June 2014, vol 754, col 1571.

²⁷⁷ *Hansard* (HL) 20 October 2014, vol 756, col 491.

²⁷⁸ SI 2015 No 778, sch 1.

ELEMENTS OF SECTION 26

3.25 Section 26 of the Criminal Justice and Courts Act 2015 provides as follows –

Corrupt or other improper exercise of police powers and privileges

(1) A police constable listed in subsection (3) commits an offence if he or she —

(a) exercises the powers and privileges of a constable improperly, and

(b) knows or ought to know that the exercise is improper.

(2) A police constable guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for a term not exceeding 14 years or a fine (or both).

(3) The police constables referred to in subsection (1) are—

(a) a constable of a police force in England and Wales;

(b) a special constable for a police area in England and Wales;

(c) a constable or special constable of the British Transport Police Force;

(d) a constable of the Civil Nuclear Constabulary;

(e) a constable of the Ministry of Defence Police;

(f) a National Crime Agency officer designated under section 9 or 10 of the Crime and Courts Act 2013 as having the powers and privileges of a constable.

(4) For the purposes of this section, a police constable exercises the powers and privileges of a constable improperly if—

(a) he or she exercises a power or privilege of a constable for the purpose of achieving—

(i) a benefit for himself or herself, or

(ii) a benefit or a detriment for another person, and

(b) a reasonable person would not expect the power or privilege to be exercised for the purpose of achieving that benefit or detriment.

(5) For the purposes of this section, a police constable is to be treated as exercising the powers and privileges of a constable improperly in the cases described in subsections (6) and (7).

(6) The first case is where—

(a) the police constable fails to exercise a power or privilege of a constable,

(b) the purpose of the failure is to achieve a benefit or detriment described in subsection (4) (a), and

(c) a reasonable person would not expect a constable to fail to exercise the power or privilege for the purpose of achieving that benefit or detriment.

(7) The second case is where—

(a) the police constable threatens to exercise, or not to exercise, a power or privilege of a constable,

(b) the threat is made for the purpose of achieving a benefit or detriment described in subsection (4) (a), and

(c) a reasonable person would not expect a constable to threaten to exercise, or not to exercise, the power or privilege for the purpose of achieving that benefit or detriment.

(8) An offence is committed under this section if the act or omission in question takes place in the United Kingdom or in United Kingdom waters.

(9) In this section—

“benefit” and “detriment” mean any benefit or detriment, whether or not in money or other property and whether temporary or permanent;

“United Kingdom waters” means the sea and other waters within the seaward limits of the United Kingdom’s territorial sea.

(10) References in this section to exercising, or not exercising, the powers and privileges of a constable include performing, or not performing, the duties of a constable.

(11) Nothing in this section affects what constitutes the offence of misconduct in public office at common law in England and Wales or Northern Ireland.

3.26 The first and most obvious difference between misconduct in public office and section 26 is that the latter is restricted to a particular class of public officer, namely a police constable or a person with equivalent powers and privileges. The Government’s reasoning for this restriction is set out above.²⁷⁹

²⁷⁹ Para 3.22 above.

3.27 We will consider the key elements of the offence and their relationship with misconduct in public office. Briefly:

- (1) The conduct element of the offence is exercising a power or privilege. This includes failing to exercise or threatening to exercise or not to exercise.
- (2) The circumstance element is that the exercise is improper, that is to say, that a reasonable person would not expect the power or privilege to be exercised for the purpose of obtaining a benefit or detriment.
- (3) The fault element is satisfied if:
 - (a) the exercise of the power or privilege is for the purpose of obtaining a benefit or detriment; and
 - (b) the constable knew or ought to have known that the exercise was improper.

There is no consequence element, as the benefit or detriment need not in fact occur.

(1) The conduct element - exercising the powers and privileges of a constable

3.28 Section 26(1)(a) requires that a police constable “exercises the powers and privileges of a constable”. It would seem that the inclusion of this phrase was intended to avoid the problems associated with the scope of the requirement “acting as such” in misconduct in public office.²⁸⁰

3.29 Two questions arise:

- (a) When does a constable “exercise” his or her powers and privileges?
- (b) What are the “powers and privileges” of a constable?

(a) Exercising

3.30 Section 26 does not provide a definition of “exercising”. However, sections 26(6) and (7) set out two types of behaviour that should, under section 26(5), be “treated as” a constable “exercising” his or her powers and privileges:

- (1) failing to exercise a power or privilege; and
- (2) threatening either to exercise or fail to exercise such a power or privilege.

3.31 We are of the view that section 26(5) was not intended as an exhaustive definition of “exercising”. Rather, it was intended to extend the scope of “exercising” to include these two marginal cases, where otherwise it might be

²⁸⁰ Home Office, *Impact Assessment: New Offence of Police Corruption* (June 2014) p 3; *Hansard* (HL), 14 July 2014, vol 755, col 493.

argued that the constable was not in fact exercising any powers or privileges at all and was therefore not committing the offence under section 26.

3.32 Our reasons for this conclusion are as follows:

- (1) To interpret sections 26(6) and (7) as an exhaustive definition would produce a serious anomaly. Whilst an improper failure to exercise a power or privilege and a threat either to exercise or fail to exercise such a power or privilege improperly would constitute an offence, the positive exercise of a power or privilege in an improper manner would not.

Example 1 D arrests V because D wants uninterrupted access to V's partner, with whom D is having an affair.

That is precisely the sort of case that the offence was principally designed to catch.²⁸¹

- (2) Analysis of the Home Office impact assessment confirms that it was not the intention of the Home Office that these provisions be exhaustive.
- (3) As subsections (6) and (7) themselves use the term "exercise", interpreting them as a definition of that term would lead to circularity.
- (4) If the "first case" and "second case" were exhaustive, there would be no need for the definition of "improperly" in (4)(b), as that would be covered by (6)(c) and (7)(c).
- (5) Subsection (10) clearly speaks of exercising and failing to exercise as alternatives.

(b) Powers and privileges

3.33 The term "powers and privileges" of a constable appears in a number of statutes, dating back to the Metropolitan Police Act 1839.²⁸² In almost all²⁸³ of these statutes the phrase was used in the context of either:

- (1) conferring upon non-police constables the "powers and privileges" of a police constable. For example, the phrase was used to give park keepers, prison officers, special constables and designated National

²⁸¹ It is a general presumption of statutory interpretation that Parliament did not intend legislation to produce anomalous or illogical results. See O Jones, *Bennion on Statutory Interpretation* (6th ed 2013) p 885.

²⁸² It also appears in the longer format of "all such powers, authorities, privileges and advantages" in the Metropolitan Police Act 1829, alongside the phrase "all such duties and responsibilities".

²⁸³ An exception to this was the Juries Act 1974, sch 1, where the phrase was used to define a particular category of person unable to sit as a juror. Such persons could thereafter be easily identified by referring back to the enactments that had conferred such "powers and privileges" upon them.

Crime Agency investigators powers and privileges equivalent to those of police constables;²⁸⁴ or

- (2) assigning equal police powers and privileges to constables in different police areas. For example, an enactment that constables within the “counties of Middlesex, Surrey, Hertford, Essex and Kent” should have the same powers and privileges as the Metropolitan Police.²⁸⁵

3.34 However, no attempts were made in any of these early statutes to define what the “powers and privileges” of a constable referred to. The phrase appears to have been considered so ingrained in usage that it was assumed to be understood. In terms of conferring equal powers on other types of investigators and defining the geographical limits of police jurisdiction it was presumably felt unnecessary to provide further definition.

3.35 Section 26, however, uses the phrase “powers and privileges” in a new and different context, defining how the improper exercise of those powers and privileges may lead to criminal prosecution. In this context it is imperative that the meaning of the term is clearly understood. Police constables, like all citizens, must have clarity as to when their behaviour may leave them liable to prosecution.²⁸⁶ Juries must be capable of understanding the offence to determine guilt.

3.36 The phrase in this new context receives limited explanation, probably because it was considered to be embedded in law as well as use. Section 26(10) provides some limited assistance, stating that it includes “performing, or not performing, the duties of a constable”. However, this leaves open the question of how such powers, privileges and duties are defined. We will examine these three terms in more detail.

I. POWERS

3.37 Logically, it should be possible to discern all the powers bestowed on the police through an analysis of records of such powers granted by the state. Indeed, this has been the extent of the definition given to powers of a constable in statutory provisions which have sought to explain them. For example, section 30(5) of the Police Act 1996 provides:

In this section “powers” includes powers under any enactment, whenever passed or made.

3.38 In addition to powers granted under any enactment, the police have common law powers to keep the peace and prevent any breach of the peace.²⁸⁷ Police powers are, therefore, probably the easiest aspect to define and identify.

²⁸⁴ Parks Regulation Act 1872, s 7; Prison Act 1952, s 8; Police Act 1964, s 19 (repealed); Police Act 1996, s 30(2); Crime and Courts Act 2013, ss 9 and 10.

²⁸⁵ Metropolitan Police Act 1829, s 7 (repealed).

²⁸⁶ See analysis of article 7 of the ECHR in Chapter 5 and Appendix C.

²⁸⁷ R Card and J English, *Police Law* (13th ed 2013); P Rawlings, *Policing: A Short History* (2001).

II. PRIVILEGES

- 3.39 Whether “privileges” should simply equate to “protections” or “immunities” is not clear. The term is used separately from protections and immunities in various statutes.²⁸⁸ The law is obscure as to how the term privileges should be used because of inconsistent treatment of the concept of police powers and privileges.²⁸⁹ It is extremely difficult to either define what a police privilege may be, or find examples of privileges (separate to powers) that are conferred upon constables.
- 3.40 As with the “powers” of a constable, only brief attempts have been made to explain the use of “privileges” in statute. Under section 46(9) of the Serious Organised Crime and Police Act 2005 the terminology of section 30(5) of the Police Act 1996 (quoted above in relation to police powers) was extended to both “powers and privileges”:
- In this section references to the powers and privileges of a constable are references to the powers and privileges of a constable whether under any enactment or otherwise.
- 3.41 Privileges of a constable are, however, much more difficult to define than powers. Whilst the latter are generally understood with a degree of clarity, and well documented, there is little or no reference to what may amount to a privilege.
- 3.42 Generally speaking, police powers and privileges can be seen as correlative. Privileges usually confer a special protection on someone exercising a particular power. For example, a constable has the power to stop and search someone whom he or she reasonably suspects is in possession of illegal drugs. The privilege that accompanies that power is the protection accorded to police officers from prosecution for false imprisonment and assault. Historically, when police powers were less clearly defined, a constable’s legal protections had to be explicitly set out.²⁹⁰ More recently, the protections or immunities given to the police are more likely to be inherent in their defined powers.
- 3.43 It does not appear that the intention behind section 26 of the Criminal Justice and Courts Act 2015 was that privilege should be understood solely in terms of protections. Look, by way of illustration, at the often cited example of the type of conduct that the new offence was intended to capture – that of an officer abusing privileges by obtaining a discount on a car purchase.²⁹¹ This is clearly not a case of an officer abusing one of the legal protections the position offers him or her. It seems that what the new offence seeks to include within the ambit of “privileges” is not only any specific advantage or immunity conferred on police officers by law,

²⁸⁸ For example, the Parks Regulation Act 1872, s 7; Criminal Justice Act 1948, s 66; Criminal Justice and Immigration Act 2008, s 95.

²⁸⁹ W N Hohfeld, *Fundamental Legal Conceptions as applied in Judicial Reasoning* (1923) describes a privilege (or liberty) as something that a person *may do*, and as something distinct from rights, powers and immunities. Privileges, like rights, attach normally to powers rather than existing alone.

²⁹¹ Para 3.13 above.

but also any general (for example, social) advantage that comes with the status, or authority, of being a police officer.

- 3.44 While this may have been the intention behind section 26, it is not at all clear that the use of the word “privilege” is sufficient to achieve it. In previous statutes, such as those conferring the “powers and privileges” of a constable on various non-police officials, “privilege” is used in a narrower sense, and the terms “authorities” and “privileges” of an officer have been used separately.²⁹² It is also not clear exactly what an advantage that arises by virtue of an officer’s status would include. One example might be the advantage accorded to police officers to travel for free on public transport, which is attached to an implicit duty to keep the peace while doing so.
- 3.45 Additionally, the joint guidance on police misconduct and standards issued by the Home Office and the College of Policing makes no reference to the term privileges when considering whether an officer’s behaviour may be regarded as either disciplinary misconduct or gross misconduct. The guidance refers only to powers, duties, responsibilities and abuse of authority.²⁹³
- 3.46 Interestingly, whilst section 26 clearly focuses on creating a new offence to tackle abuses of privileges by police officers, in terms of police behaviour and conduct, the word privileges lacks definition and seems to be limited to those protections inherent in the operation of police powers. It might, therefore, have been clearer to have used the term “authority” or “position” rather than, or in addition to, “privileges”.²⁹⁴

III. DUTIES

- 3.47 Section 26(10) of the Criminal Justice and Courts Act 2013 provides that references to exercising, or not exercising, the powers and privileges of a constable include performing, or not performing, the duties of a constable. This confirms that the offence includes the performance of police duties in an improper way, including improperly failing to perform those duties or improperly threatening to perform or not perform them.
- 3.48 This subsection does not directly help in defining police powers and privileges, as it is clearly not intended as an exhaustive definition. For example, section 26 applies not only to constables but also to designated officers of the National Crime Agency.²⁹⁵ Meanwhile, the relevant statute²⁹⁶ provides that these officers have the “powers and privileges” of a constable but nowhere states that they are also to have the duties of a constable. Nor does section 26 apply to the improper

²⁹² For example, Metropolitan Police Act 1829, s 4; Prison Act 1952, s 8.

²⁹³ Home Office Guidance, *Police officer misconduct, unsatisfactory performance and attendance management procedures*, Revised May 2015. College of Policing, *Code of Ethics*, July 2014.

²⁹⁴ This would be the result of applying the mischief, or purposive approach to statutory interpretation. See note 33 above. O Jones, *Bennion on Statutory Interpretation* (6th ed 2013); O Bennion, *Understanding Common Law Legislation* (2009).

²⁹⁵ Criminal Justice and Courts Act 2013, s 26(3)(f).

²⁹⁶ Crime and Courts Act 2013, ss 9 and 10.

performance of the specific duties of these officers, as distinct from improper exercise of the powers and privileges which they share with constables.

- 3.49 Police “duties” can generally be separated into operational duties and ancillary duties. By operational duties we mean duties that derive from the powers officers have been granted by statute. By ancillary duties we mean those that explain how the constable should behave in his or her position. For example, an officer has a duty to provide reasons for an arrest when exercising the power of arrest²⁹⁷ and also has a duty to act in accordance with police codes of practice and professional standards when doing so. We assume that “duties”, as used in section 26, includes both operational and ancillary duties, although this is not set out.
- 3.50 There are statutes governing police conduct and both the common law and police codes and manuals²⁹⁸ set out the remit of a constable’s operational duties and provide guidance as to conduct and disciplinary standards. It would seem that an officer’s duty should be identifiable in any given case without too much difficulty.

(2) The circumstances element - improperly

- 3.51 Section 26(4) defines “improperly” in terms of “benefit” and “detriment” (neither of which need be financial in nature) and as conduct that falls below what a “reasonable person” would expect of a police officer in the circumstances. Although this is a wide definition, we believe section 26 still captures a narrower set of behaviours than those captured by misconduct under the common law. The concepts of benefit and advantage have been recognised as narrower than the concept of misconduct in previous law reform projects.²⁹⁹
- 3.52 Additionally, although the body of section 26 concentrates on improper behaviour, the term “corrupt” is used in both the title of the offence and extensively throughout the documents underpinning it. It is particularly referred to in the Home Office impact assessment and the House of Lords debates.³⁰⁰ A strong focus of the provision, therefore, could be seen as the need to address “corruption” within the police.³⁰¹

²⁹⁷ Police and Criminal Evidence Act 1984, s 28.

²⁹⁸ See for example *Home Office Guidance: Police Officer Misconduct, Unsatisfactory Performance and Attendance Management Procedures* (July 2014); College of Policing, *Code of Ethics* (July 2014).

²⁹⁹ In evidence to the Joint Parliamentary Committee on the Draft Corruption Bill Mr Justice Silber (Law Commissioner 1994 to 1999) stated that “the big difference between [misfeasance in public office and corruption] is that in corruption there is a benefit being offered or conferred”, Report and Evidence of the Joint Committee on the Draft Corruption Bill (2003) HL 157, HC 705.

³⁰⁰ See paras 3.13 and 3.18 above.

³⁰¹ There may be a conflict here between the mischief (or “purposive”) approach and the literal (or “plain meaning”) approach to statutory interpretation. The former would rely on the focus given to “corruption”. The latter would rely on the use of the word “improper” in the legislation rather than the use of the word “corrupt” in the title and the underlying focus on that type of misconduct. See O Jones, *Bennion on Statutory Interpretation* (6th ed 2013) and O Bennion, *Understanding Common Law Legislation* (2009).

- 3.53 Corruption, as previous attempts to define it have found, is a term without an agreed legal meaning. The most functionally significant meaning is a dishonest intention to weaken the loyalty of an agent to his or her principal.³⁰² For example, bribery is the most recognisable and often cited example of corrupt conduct.³⁰³ Corrupt activity, therefore, is most often associated with a person benefiting from performing his or her duties, or applying influence, in a particular way. That benefit is usually also understood in financial terms: whether for money or for goods or for services.³⁰⁴ That said, the term used within section 26(1), and thereafter defined in section 26(4), is not “corruptly” but “improperly”. Whilst the offence originally appeared to have had corruption as its focus, any such limitation was removed at the stage that the Bill was drafted.
- 3.54 The fact that the title of the offence uses the term “corrupt” might lead to it being interpreted as an offence primarily focused on financial gain or loss.³⁰⁵ The labelling of a criminal offence, as discussed in Chapter 5, is often important in establishing how that offence will both be understood and used.
- 3.55 It might seem anomalous, for example, to describe officers who have consensual but exploitative sexual relations with people they meet in the course of their duties as “corrupt”.³⁰⁶ We have found, when discussing this issue with stakeholders that opinions vary as to whether this type of behaviour would be caught by section 26. The impact assessment and Parliamentary debates do not assist in this respect because they did not expressly consider this type of conduct.
- 3.56 We will consider the elements of improper conduct in more detail.

³⁰² *Lindley* [1957] Crim LR 321, followed in *Callard* [1967] Crim LR 236 and referred to in *Legislating the Criminal Code: Corruption* (1998) Law Com No 248 at para 2.29 and 5.65.

³⁰³ Common law bribery was an offence for hundreds of years, see Appendix A. Bribery is now a statutory criminal offence under the Bribery Act 2010, which applies to a wide variety of persons (including police officers) and corporate bodies who might be tempted to allow a “financial or other advantage” to influence how they perform their duties.

³⁰⁴ The World Bank definition of corruption is “the abuse of public office for private gain” but modern commentators advocate widening this to capture the “worrying aspect” of the practices complained of. See D Beetham, “Moving beyond a narrow definition of corruption”, in D Whyte, *How corrupt is Britain?* (2015).

³⁰⁵ Principles of statutory interpretation state that “a heading within an Act...may be considered in construing any provision of the Act, providing due account is taken of the fact that its function is merely to serve as a brief, and therefore, necessarily inaccurate, guide to the material to which it is attached” however, “where general words are preceded by a heading indicating a narrower scope it is legitimate to treat the general words as cut down by the heading”. O Jones, *Bennion on Statutory Interpretation* (6th ed 2013) section 255, p 694 and 695; *Inglis v Robertson* [1898] AC 616 at [624] and [630]; *Montila* [2004] UKHL 50, [2004] 1 WLR 3141.

³⁰⁶ Although, the IPCC took the view that “in the context of the police service this behaviour is also a form of corruption” – IPCC, *Abuse of police powers to perpetrate sexual violence* (September 2012) p 2.

(a) Benefit or detriment

- 3.57 The terms “benefit” and “detriment”, as discussed above, were introduced into section 26(4)(a) in the hope that they would be more easily understood by a jury than the “complex concepts” required to prove misconduct in public office.³⁰⁷
- 3.58 The use of the concept “with the purpose of achieving” a benefit or a detriment appears to be designed primarily to replace the questions in the common law offence of whether a public officer’s conduct (1) is wilful; and (2) can be said to amount to an abuse of the public’s trust (the seriousness test).³⁰⁸ The Home Office impact assessment was particularly concerned with problems raised by that question.³⁰⁹
- 3.59 The fact that the offence can be committed without proof that the improper behaviour is of a serious nature has important consequences. It removes any dividing line between behaviour that should be prosecuted and behaviour that should be dealt with purely through disciplinary processes.³¹⁰
- 3.60 On a natural interpretation of the section, any exercise by a constable of his or her powers, privileges or duties with the purpose of obtaining a benefit or achieving a detriment, no matter how small, will render him or her liable for prosecution. The rationale for this is stated to be that, as holders of coercive state powers, police officers should be held fully accountable for any instance of corrupt or improper behaviour on their part.³¹¹ In other words, misconduct by a police officer is serious *per se*.
- 3.61 In theory, therefore, the offence extends the scope of the criminal law. Police officers engaged in far lower-level wrongdoing than that which could be prosecuted as misconduct in public office may now be prosecuted for a serious criminal offence.³¹² For example, a police station custody officer who provides a prisoner with cigarettes in return for the prisoner being well-behaved could be subject to prosecution rather than a disciplinary warning.
- 3.62 Section 26 is triable in the Crown Court only, as is misconduct in public office. Decisions to prosecute must be taken in accordance with the Code for Crown Prosecutors, in particular the principle of proportionality.³¹³ The consideration of whether an officer’s behaviour is serious enough to merit criminal sanction under

³⁰⁷ Home Office, *Impact Assessment: New Offence of Police Corruption* (June 2014) p 4.

³⁰⁸ *AG’s Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73 at [61]. The fault element of s 26 will be discussed later in this chapter.

³⁰⁹ Home Office, *Impact Assessment: New Offence of Police Corruption* (June 2014) p 4.

³¹⁰ As we discuss in Chapter 5, there is difficulty in setting this dividing line even with the assistance of a seriousness threshold in respect of misconduct in public office.

³¹¹ Home Office, *Impact Assessment: New Offence of Police Corruption* (June 2014), p 4.

³¹² A police officer who may have previously been disciplined for misconduct, or who may have been prosecuted for a summary only offence such as section 55 Data Protection Act 1998.

³¹³ CPS, *The Code for Crown Prosecutors* (7th ed January 2013). The principle of proportionality is addressed at para 4.12(f) of the Code. See Chapter 5.

section 26, as opposed to disciplinary proceedings, will, therefore, still fall to be considered by prosecutors.³¹⁴

- 3.63 There is a risk here that prosecutors, on considering the much reduced level of misconduct that needs to be proved under section 26, will exercise their discretion in a way so as to increase the number of prosecutions being brought against police officers. The predictions of the Home Office impact assessment, that prosecutions largely will stay the same, may, therefore, be doubted.

(b) Reasonableness

- 3.64 The requirement in section 26(4)(b), that the constable's conduct must *also* be such that a reasonable person would not expect the power or privilege to be exercised for the purpose of achieving that benefit or detriment, serves as an important limitation on the scope of the offence.
- 3.65 Virtually every exercise of a police officer's operational duties will inevitably benefit someone or be detrimental to someone else. In many cases this is the legitimate purpose of the police officer's actions.

Example 2 A police officer who opposes the grant of bail to a defendant necessarily intends a detriment to that defendant, in the form of a loss of liberty.

Section 26(4)(b) excludes cases of this kind from the scope of the offence.

- 3.66 Additionally, there is nothing within section 24(4)(a) that prevents the officer being found to have improperly obtained a benefit or detriment by way of using a privilege of his or her position within a wholly private capacity.

Example 3 An officer signs up to an online dating site for uniformed personnel. He or she gains a benefit as a result of being able to exercise the privileges of a police officer (depending on how a privilege is interpreted) to wear a police uniform.

- 3.67 It cannot be right that simply because an officer acts in such a way he or she is acting improperly. It seems likely that the reasonableness test in section 26(4)(b) was envisaged to avoid a prosecution in this sort of innocent situation. Indeed the effect of section 26(4)(b) is that the officer would not be committing an act that amounts to an offence unless a reasonable person would not have expected him or her to act in that way.
- 3.68 It is unlikely that it was intended to do much more. The examples provided in the House of Lords debates and the expressions in the impact assessment seem to demonstrate that the intention was for every instance of corrupt behaviour by a constable to amount to an offence.³¹⁵

³¹⁴ See further discussion in Chapter 2.

³¹⁵ See paras 3.13 and 3.18 and following above. Again this would be the result of the mischief, or purposive, approach to statutory interpretation. See O Jones, *Bennion on Statutory Interpretation* (6th ed 2013).

3.69 In practice, the “reasonableness test” might produce quite different outcomes. Jurors deciding whether an officer’s conduct was “reasonable or not” will be required to make a qualitative assessment of the officer’s conduct. In considering what factors make the officer’s conduct “reasonable”, juries may potentially focus on matters such as whether the conduct in question is likely to have serious consequences. This could lead to inconsistent decisions, and would in effect introduce a seriousness test, such as exists for misconduct in public office, into the section 26 offence “through the back door”.

(3) The fault element

3.70 The mental element for the offence is in two parts, set out in sections 26(1)(b) and 26(4)(a). The drafting renders their application rather complex.

(a) Knows or ought to know that the exercise is improper

3.71 Section 26(1)(b) requires that a constable “knew or ought to have known” that the exercise of his or her powers would be improper. As stated above, “improper” here means that:

- (1) he or she purposely acts to achieve a benefit or detriment, and
- (2) a reasonable person would not expect him or her to act with that purpose.

3.72 The officer must necessarily know his or her purpose in exercising the power or privilege. It follows that, in practice, this mental element means only that the officer must know that a reasonable person would not expect him or her to act with that purpose.

3.73 The requirement that a constable either knew or ought to have known encompasses not just the situations where the constable intends his or her actions to be improper. Where those words are used in other legislation they have been interpreted as imposing an objective standard of liability: a failure to act in accordance with what is expected amounts to a criminal act. It applies:

- (1) to those officers who are reckless as to whether their actions are improper, and
- (2) to those who did not know their actions were improper but should reasonably have known.

3.74 The introduction of an objective fault element seems to be another way in which section 26 intended to significantly lower the threshold of police conduct that could be prosecuted as a criminal offence. A subjective fault requirement of “wilfulness” is required to prove misconduct in public office.

3.75 It is unusual for an objective fault element to be used in an offence that carries a high maximum sentence of 14 years’ imprisonment.³¹⁶ In general terms, acts of

³¹⁶ For example, Road Traffic Act 1988, s 3 contains the offence of careless driving, a negligence based offence, which carries a maximum penalty of a fine and endorsements.

negligence are less serious, being less culpable, than acts of intention or recklessness and are, therefore, subject to much lower levels of punishment.

(b) Purpose of achieving a benefit or detriment

- 3.76 Under section 26(4)(a) a constable must act “for the purpose of achieving either a benefit for himself or herself or a benefit or a detriment for another person”.
- 3.77 Purpose is usually construed in the criminal law as meaning that a person acted in order to bring about a particular result.³¹⁷ Consequently, section 26(4)(a) can be interpreted to require that the constable acted in a particular way in order to gain a benefit or detriment. For example, a police station custody officer who fails to complete a scheduled check on a prisoner because he or she is making a private phone call can be said to have purposely acted in a way to gain a benefit. Confusion may, however, arise where a defendant claims that the *purpose* of his or her actions is something other than to obtain a benefit or achieve a detriment. This is compounded by the requirement that the benefit or detriment in question must be a benefit or detriment either for the police officer him or herself or another person.
- 3.78 It is unclear whether the phrase “another person” was intended to refer only to identifiable individuals, or whether it was intended to include wider groups, sections of the public or even the public in general. If the phrase has a narrow meaning this will have a significant effect in respect of those cases to which it will and will not apply.

Example 4 An officer (D) leaks highly sensitive information online (but not through a media outlet that may profit from its circulation) regarding a potential terrorist attack in a major city. The information was obtained by D in the course of being deployed to the area. D’s purpose is stated to be to alert the public to the threat as D believed the public had a right to the information and that the police investigation was compromised by the incompetence of senior officers. The result of leaking this information is widespread panic. The police officers in the city are then unable to assist with the investigation of the terrorist threat as they are engaged in responding to emergency calls within and outside the city. No terrorist attack takes place but it is unclear whether that is because the warning was false or because of the resulting public disorder.

- 3.79 In such a scenario there would appear to be:
- (1) no benefit or detriment to the officer personally in taking this action; and
 - (2) no benefit or detriment to an identifiable person, though there is detriment to members of the public.
- 3.80 If a narrow view of the phrase “another person” is taken, whether or not there may be a benefit or detriment to the public would be irrelevant as the public is not another person. Therefore, there would appear to be scenarios not covered by

³¹⁷ *Smith and Hogan*, p 116 and following.

section 26 where an officer acts with the purpose of obtaining a benefit for, or causing a detriment to, anyone other than an identifiable natural or legal person. As there would seem to be no sound reason for not holding to account an officer who intends to harm the public at large, it would seem that this was an unintended consequence of section 26.

- 3.81 In any event, D will almost certainly argue that causing a benefit or detriment to either D or another person was not the *purpose* D sought to achieve through the disclosure. Accordingly, as the offence is concerned with direct and not oblique (indirect) intention,³¹⁸ D's conduct may not be caught under section 26.³¹⁹ Nevertheless, the nature of the information disclosed and the potential consequences of disclosing it are such that in our view many people would find this behaviour so reprehensible as to require a criminal sanction.³²⁰

(c) The combined effect

- 3.82 In summary, the elements of the offence require that a constable when exercising his or her powers or privileges must:
- (1) act with the purpose of achieving a benefit or causing a detriment; and
 - (2) have known, or ought to have known, that a reasonable person would not expect him or her to seek to achieve such a benefit or detriment.
- 3.83 Whilst, initially, the introduction of an objective fault element into an offence of police corruption under section 26(1)(b) may seem unusual, the effect of the operation of section 26(4)(a) is to temper the requirement. The result is that certain types of behaviour, which might be considered worthy of criminal sanction, may not be captured by section 26 as demonstrated in Example 4 above. We are unclear whether this was the intention.

RELATIONSHIP BETWEEN SECTION 26 AND MISCONDUCT IN PUBLIC OFFICE

- 3.84 As with all closely aligned alternative offences,³²¹ the overlap between section 26 and misconduct in public office may make it difficult for investigators and prosecutors to decide which offence to charge. Here this problem may be further complicated by the uncertainties surrounding the definitions in the statutory offence.

³¹⁸ Oblique intention refers to the situation where a person does not act with the purpose of bringing about a particular consequence, but knew that that consequence would be a result of his or her actions: *Woollin* [1999] 1 AC 82, [1998] 4 All ER 103. Oblique intention is in principle applicable to a number of criminal offences where the mental element is phrased as 'intent', though most reported cases concern murder.

³¹⁹ Although in this situation D may also be prosecuted under the Official Secrets Act 1989.

³²⁰ The situation may be different where D receives payment for the revelation: that being a strong indicator that D was acting with the purpose of obtaining a specific benefit. Although, in this situation D could also be prosecuted under the Bribery Act 2010.

³²¹ See Chapter 5, 6 and Appendix D for further discussion of other overlaps with misconduct in public office.

3.85 Bearing in mind the charging implications, we will now contrast the two offences. To do so we will first use an example given as a situation where the common law was felt to fail: that of an officer who abuses his or her authority to obtain a discount on a car.

(1) The abuse of authority example

3.86 We have already discussed, at paragraph 3.13, that the use of the phrase “police powers and privileges” in section 26 was designed to capture a car discount scenario.³²²

We have been made aware of other cases where the existing offence has not been applicable, which was why the Government have brought forward this offence. Such conduct includes one former senior officer who attempted to obtain a discount on a new car because of the office he held at the time.³²³

3.87 We examine below whether that conduct can be successfully prosecuted under either section 26 or misconduct and a number of different factual scenarios that may also arise.

(a) Under section 26

3.88 It seems clear that if a police officer were to try to obtain a discount on a purchase through an exercise or threatened exercise of official functions this would be an exercise of a power by him or her. For example, if the officer carried out unannounced inspections of the car dealer’s premises and stock to try and force the dealer to offer a discount. This would not seem to be the scenario section 26 was created to address, however, as the discussion in the Home Office impact assessment specifically focuses on the term abuse of privileges not abuse of power.³²⁴

3.89 In any event, offences such as bribery, blackmail and fraud may be available where there is an abuse of power of this nature. Likewise, if an officer has acted dishonestly at any stage then he or she will be subject to the general criminal law. The officer could be prosecuted for either theft or fraud, subject to available evidence, and therefore, neither section 26 nor misconduct in public office would be needed (though both offences would certainly have been committed).

3.90 Consequently, section 26 seems to have been intended to have specific application in the car discount scenario, where the officer requests a discount but has acted neither coercively nor dishonestly in doing so. Nevertheless, it is uncertain whether on such facts the section 26 offence is in fact committed. Applying the elements of the offence to the case:

- (1) The police officer is certainly not exercising (or failing to exercise, or threatening to exercise or not exercise) any of the powers of a constable.

³²² Home Office, *Impact Assessment: New Offence of Police Corruption* (June 2014), p 3.

³²³ As stated by Lord Faulks, *Hansard* (HL), 14 July 2014, vol 755.

³²⁴ Home Office, *Impact Assessment: New Offence of Police Corruption* (June 2014).

- (2) In a loose sense, he or she could be considered to be taking advantage of the authority of a constable, referring to the advantageous position of being a constable. However, it is unclear whether the term “privilege” used in the legislation includes the concept of authority as opposed to a specific legal power or immunity.
- (3) The officer does intend detriment to the dealer, in the form of a reduced profit; and benefit to him or herself, if the car is for private use.
- (4) It will be for the jury to decide whether the exercise is improper. This may depend on a number of factors, for example, whether the car was for official use or for the officer’s personal use. Even in the second case the jury may take the view that the dealer is operating a legitimate discount scheme to create good relations with the local community.³²⁵

(b) Under misconduct in public office

- 3.91 In contrast, we may consider the correctness of an assumption made in the Home Office impact assessment. It was assumed that the requirement of misconduct in public office that the officer was “acting as such” meant that an officer who uses his authority to request a discount on a car could not be prosecuted.³²⁶
- 3.92 As Chapter 2 demonstrated, misconduct in public office applies to any conduct: whether by act or omission. Likewise, abuse of authority or status has regularly been successfully prosecuted under the common law offence. We also discuss in Chapter 2 that all that is apparently excluded by the “acting as such” requirement is an act performed by the officer in a private capacity to which his or her position is simply irrelevant.
- 3.93 In *W*³²⁷ a police officer used a credit card, issued to cover his official expenses, for private expenditure. In that case he was accepted to be acting as a public office holder. Following this, it would seem entirely possible for an officer misusing his authority to obtain a discount on a car to be deemed to be “acting as such” for misconduct in public office, whether the misconduct occurred in or out of working hours.
- 3.94 Of course, whether an individual officer seeking a discount on a car is considered to be acting as a public office holder in any particular case will depend on the factual circumstances.
- 3.95 In each of the following scenarios the officer in question (P) informs the car salesperson that he or she is a police officer when requesting a discount.

³²⁵ The offence is clearly committed if the police officer purports to be buying the car for official use but in fact uses it as his or her private vehicle. But in that case other offences, such as fraud, will also have been committed.

³²⁶ Home Office, *Impact Assessment: New Offence of Police Corruption* (June 2014).

³²⁷ *W* [2010] EWCA Crim 372, [2010] QB 787.

Scenario 1: P attends the car showroom during working hours and makes the request in respect of a vehicle that P will be able to use in his or her role as a police officer.

Scenario 2: P attends the car showroom outside of working hours and makes the request in respect of a vehicle that P will be able to use in his or her role as a police officer.

Scenario 3: P attends the car showroom during working hours and makes the request in respect of a vehicle for P's personal use.

Scenario 4: P attends the car showroom outside of working hours and makes the request in respect of a vehicle for personal use.

3.96 In each of these cases we see no difficulty in P being held to be “acting as such” under the misconduct offence. In Scenarios 1 to 3, the connection to P's public office is clear. In Scenario 4 the decision of *W* could be applied.

3.97 The main difficulty in prosecuting P for seeking a discount under the common law offence may in fact lie in establishing that P's conduct was serious enough to amount to criminal misconduct.

3.98 If P simply suggests that a car dealer gives him or her a discount because P is a police officer, rather than threatening or pressurising the dealer into doing so, there is potentially a real question as to whether that behaviour should and could be viewed as criminal.³²⁸ Much will depend again on the circumstances of the transaction, and a number of factors may make the case more or less serious. For example:

(1) More Serious:

- (a) P acts dishonestly;
- (b) the benefit is solely for P;
- (c) the discount is significant;
- (d) P hides his or her conduct; and/or
- (e) the obtaining of a discount creates a conflict of interest with P's duties. If, for example, P turns a “blind eye” to potentially criminal activities at the car dealership in the future.

(2) Less Serious:

- (a) there is no dishonesty;
- (b) the benefit is also for the public, for example the car is an operational one and the police force will, therefore, save money;

³²⁸ Threatening conduct could potentially amount to an offence of blackmail under the Theft Act 1968, s 21.

- (c) the discount is insignificant;
- (d) P has discussed obtaining the discount with the police force and/or they have authorised his or her actions; and/or
- (e) the obtaining of a discount is purely a commercial transaction. If, for example, the car showroom owner decides that having a car from his or her stock being driven by a police officer would be a good advertisement for the business.

3.99 It can be seen from the factors above that the case where an officer obtains a discount for a car through the use of his or her status or authority will never be a clear case of misconduct in public office, unless complicated by further factors such as dishonesty or threats. This is not because of the “acting as such” requirement, but because the conduct is not serious enough to justify criminalisation. In some respects, where, for example, the discount saves the public money, it could be argued that the use of his or her status is beneficial to the public interest.

3.100 In reality, private citizens benefit every day from commercial decisions or from a well-intentioned favour. A famous footballer might obtain discount on a car because the car dealer feels this will be a good advertisement for the business. Alternatively, an NHS nurse asks for and is offered a discount because the car dealer feels that nurses are undervalued. Of course, nurses and footballers possess no coercive powers equivalent to those of a police officer, who could use such powers to try to make the car dealer act as they wish. This may justify holding the police to a different standard, but presumably only where there is a threat that those powers will be misused.

3.101 The really problematic situation is likely to be where an officer seeks to obtain a benefit for him or herself. The mere fact that he or she is a police officer may carry an implied threat to use coercive powers and may intimidate or persuade the car dealer to agree to the discount. Such situations would need to be considered on a case by case basis.

(c) Different factual scenarios

3.102 Looking beyond the car discount scenario we can also conceive of other circumstances where section 26 may not be easy to apply.

3.103 If the new statutory offence was intended to include cases like *W*, we can see that the problems identified above with the definition of powers and privileges of a constable, may create difficulty. In *W*, as the credit card balance was paid out of public funds this was an advantage that the officer had by virtue of his public office. Where it is unclear, given the above discussion, whether this advantage, like the concept of authority, would be interpreted to be a “privilege” of a constable under section 26.

- (1) First, if privileges are concerned with powers and protections then such an advantage would not necessarily fit within that term. Advantage is also

a separate term used in statutes dealing with police powers and privileges.³²⁹

- (2) Secondly, it is very difficult to differentiate in this situation between a police constable and an employee or contractor of a public body who may have access to a credit account for expenses, paid for with public funds, incurred in the course of their duties. Therefore, the question arises as to whether the advantage attaches specifically to the position of being a constable or more generally to any position defined by appointment, employment or contract.

- 3.104 There may also be a question as to whether the phrase powers and privileges of a constable would extend to other types of misconduct currently prosecuted. In particular, cases that straddle the divide between an officer's duties and his or her private life.

Example 5 An off-duty police officer learns information of media interest while listening to other off-duty officers talking in the pub and later chooses to sell this to a newspaper.

- 3.105 Is the officer here exercising the powers or privileges of a constable? Or, is the officer performing or failing to perform the duties of a constable? Would it matter if bar staff had overheard the same information allowing them to act in the same way? There appears to be no clear answer.
- 3.106 In practice, as seen above,³³⁰ the requirement under section 26(4)(a), that it must be a purpose of the officer acting in the way that he or she did to achieve a benefit or detriment for either him or herself or another person, may also cause difficulties with the prosecution of certain types of conduct. By contrast, misconduct in public office may well apply in those scenarios.
- 3.107 Using Example 4 above,³³¹ D's disclosure of information on a potential terror attack would be liable to prosecution for misconduct in public office. D's actions were wilful, in the sense that it was a deliberate act done in the knowledge that D had a duty to maintain the confidentiality of police intelligence. D's actions are also an abuse of the public trust, as a police officer's disclosure of sensitive information will almost always be serious. Additionally, the severity of the consequences of D's actions could also be taken into account when assessing whether those actions amounted to an abuse of the public's trust.
- 3.108 It may be, therefore, that the issues surrounding abuse of privileges cases are not easily solved by the new offence. The question of whether a constable is exercising powers or privileges raises more difficulties than the requirement that a public officer be acting as such for the purposes of misconduct in public office.

³²⁹ Metropolitan Police Act 1829, s 4.

³³⁰ Para 3.76 and following.

³³¹ Para 3.78.

(2) Other differences between the offences

(a) Consequences

- 3.109 It is important to note that section 26 is not a “consequence crime”. In other words, no result from the conduct of the constable must be proved for the offence to be made out. The offence focuses solely on the conduct of the constable in question and his or her purpose – it is a “conduct crime”. Misconduct in public office is also a conduct crime but there is scope to consider potential consequences when assessing the seriousness threshold. Section 26 does not have such a threshold, though it is possible that a jury will consider this while applying the reasonableness test.

(b) Improper motive

- 3.110 Section 26 focuses on corruption - the term is used in the title of the offence. In contrast, we have seen that a corrupt motive is just one possible factor that could lead to a public office holder’s conduct being deemed serious enough to amount to misconduct. *Llewellyn-Jones*³³² suggests that the offence of misconduct in public office does not require proof of a corrupt or oppressive. Certainly, a number of the cases prosecuted as misconduct involve very different conduct.

(c) Defences

- 3.111 It is of note that section 26 makes no provision for a specific defence of reasonable excuse or justification akin to misconduct in public office. For the reasons given in Chapter 2, the potential for “whistleblowing” issues arising in cases of either misconduct in public office or police corruption is significant and important. However, as with misconduct in public office, section 26 has no clear provision to address these concerns.
- 3.112 It is right to say that any consideration of the reasonableness test in section 26(4)(b) is likely to include a consideration of the reasons behind the officer’s exercise of his or her powers. However, it might seem unsatisfactory to leave such important considerations to be dealt with as part of a single generalised requirement of unreasonableness, rather than as an explicit element or defence.
- 3.113 Likewise, a jury may be able to consider the issue of motive in deciding whether or not a constable acted with the purpose of achieving a benefit or detriment. However, it may be argued that there is an inherent risk that the jury may not give sufficient weight to important matters where elements of, and defences to, an offence are conflated.

(d) Jurisdiction

- 3.114 A further difference between the two offences is that of territorial jurisdiction. As discussed in Chapter 2, holders of certain public offices can be held to account for misconduct in public office even when the actions took place outside the United Kingdom. This rule would apply to police officers, as Crown servants.
- 3.115 Other modern statutory provisions with the aim of tackling corruption have similarly expanded territorial jurisdiction rather than reduced it, for example

section 12 of the Bribery Act 2010. In contrast, section 26(8) restricts the operation of the offence to the United Kingdom. Consequently, any police officer exercising his or her powers or privileges improperly outside the United Kingdom would not be subject to section 26, but still could be prosecuted for misconduct in public office and/or bribery.

IMPACT OF SECTION 26 ON THE REVIEW OF MISCONDUCT IN PUBLIC OFFICE

- 3.116 Police officers make up a large recognised group of those in “public office”. The enactment of an offence dealing specifically with police corruption and other improper behaviour potentially removes numerous concerns as to whether misconduct in public office is a suitable vehicle to deal with police wrongdoing. If the offence is effective, there would no longer be any need to use the misconduct offence in respect of police officers.
- 3.117 The sentiment behind the creation of the new offence was a desire to address a perception of deep-rooted corrupt practices within the primary law enforcement agency. This is, no doubt, one with which the public can empathise.
- 3.118 Section 26 sought to widen the ambit of the criminal law to include all forms of corrupt behaviour by police officers, regardless of seriousness. However, section 26 also has a narrower scope than the common law offence in a number of other ways: both in terms of definition and application. Accordingly, as can be seen from the preceding paragraphs, it was predicted during the conception of the new offence that misconduct in public office would continue to play a significant part in holding the police, their agents and employees to account.
- 3.119 Our analysis of the individual elements of the new offence seems to show that prosecutions under section 26 are likely to pose definitional challenges. As is sometimes the case with statutory offences there are a number of ambiguities in the drafting. As a result, the offence, as yet undeveloped in case law, may be just as prone to difficulties as misconduct in public office. If that is the case, there is a risk that prosecutors will adopt a policy of charging both the statutory and common law offences so that they can rely on the other if one fails. It seems likely that the application of the new offence will need to be considered by the appellate courts in due course.

Question 2

- 3.120 **Can consultees provide further examples of the problems with the offence of “corrupt or other improper exercise of police powers and privileges” under section 26 of the Criminal Justice and Courts Act 2015?**

³³² [1968] 1 QB 429, [1967] 3 WLR 1298.

CHAPTER 4

SUMMARY OF PROBLEMS WITH THE OFFENCE AND CONCLUSIONS

- 4.1 The analysis in Chapter 2 identified a number of problems with the offence of misconduct in public office. These were discussed further in Chapter 3, where the offence was contrasted against section 26 of the Criminal Justice and Courts Act 2015. These problems generate numerous questions that must be considered.
- 4.2 In this chapter we summarise these problems and the conclusions arising from them. We consider this to be a useful exercise given the detailed content and length of the previous two chapters.

PROBLEMS

- 4.3 We have identified a number of problems with the offence:
- (1) “Public office” lacks clear definition yet is a critical element of the offence. This ambiguity generates significant difficulties in interpreting and applying the offence.
 - (2) The types of duty that may qualify someone to be a public office holder are ill-defined. Whether it is essential to prove a breach of those particular duties is also unclear from the case law.
 - (3) An “abuse of the public’s trust” is crucial in acting as a threshold element of the offence, but is so vague that it is difficult for investigators, prosecutors and juries to apply.
 - (4) The fault element that must be proved for the offence differs depending on the circumstances. That is an unusual and unprincipled position.
 - (5) Although “without reasonable excuse or justification” appears as an element of the offence, it is unclear whether it operates as a free standing defence or as a definitional element of the offence.

Problem 1

Public office: a critical element which lacks clear definition

- 4.4 In Chapter 2 we discuss the current legal definition of public office in detail. The fact that 22 pages of our analysis of the current law are concerned with this single element of the offence illustrates the problem.
- 4.5 The issue has been the subject of scrutiny in previous law reform projects. Since the mid-20th century various attempts have been made to review the common law offence but, to date, none of these have resulted in clear law reform proposals.³³³ One of the main reasons for this has been the difficulty of defining

³³³ See Appendix E for a full discussion of the previous reform projects that have reviewed misconduct in public office.

public office. In 1998 a letter sent by the then Home Secretary, Jack Straw MP, to the Chairman of the Joint Committee on Parliamentary Privilege referred to the discussions of an inter-departmental group examining misconduct in public office at that time:

This is proving particularly tricky and no decision has yet been taken on which categories of public servant might be included.³³⁴

- 4.6 Subsequently, no substantive reform proposals were forthcoming, although the Home Secretary stated in evidence to the same committee that the idea of creating a new statutory offence of “misuse of public office” received overwhelming support in the responses to a recent public consultation exercise.³³⁵
- 4.7 The problem of identifying a public office has been made more difficult by the increasingly blurred divide between public and private positions and services. This was recognised as long ago as 1976 by the Salmon Commission: “the boundaries of the public sector will, in the last resort, be arbitrary and there are bound to be some perplexing cases at the fringes”.³³⁶
- 4.8 More recently, we summarised the position by saying “the distinction between public and private can no longer be regarded as a simple dichotomy: rather, it is a spectrum”.³³⁷

STATUS VS FUNCTION

- 4.9 The courts in recent years have moved away from defining a public office in terms of the status of the holder and towards a functional definition. However, despite detailed analysis in Lord Justice Leveson’s judgments in *Cosford*³³⁸ and *Mitchell*,³³⁹ important matters remain unresolved.
- 4.10 In *Mitchell* the appellant went so far as to advance an argument before the Court of Appeal under article 7(1) of the European Convention of Human Rights, the prohibition on retroactive criminalisation. However, no ruling was made on this point as the appellant succeeded on his primary ground of appeal.
- 4.11 We explain in Chapter 5 and Appendix C that the European Court of Human Rights does not necessarily view common law development of legal principles as

³³⁴ Letter sent to the then Attorney General Dominic Grieve QC in July 2009 reproduced in House of Commons, *Briefing Note on Misconduct in public office* (2009) SN04909.

³³⁵ Joint Committee on Parliamentary Privilege Report Volume 2 (1998-99) HC 214-I/HL43-I, p 41. The consultation was published by the Committee on Standards on Public Life, “Misuse of public office: a consultation paper” and accompanied the *Third Report of the Committee on Standards in Public Life: Standards of Conduct of Local Government in England, Scotland and Wales* Cm 3702-I.

³³⁶ Report of the Royal Commission on Standards of Conduct in Public Life (1976) Cmnd 6524 (“The Salmon report”) at [50].

³³⁷ *Legislating the Criminal Code* (1998) Law Com No 248 at [3.25]. For commentary on modern practising of employing public sector workers in the private sector see D Whyte, *How Corrupt is Britain?* (2015).

³³⁸ *Cosford* [2013] EWCA Crim 466, [2014] QB 81.

³³⁹ *Mitchell* [2014] EWCA Crim 318, [2014] 2 Cr App R 2.

contradictory to the need for legal certainty. However, in our view, the lack of clarity surrounding the element of public office does mean that it is hard to predict whether a person could be liable for prosecution for misconduct. Therefore, the current law may be incompatible with article 7.

- 4.12 There is a possible disparity between what the criminal courts are treating as “public office” and the public perception of who is a public office holder. The arguments put forward by the nurses in *Cosford*, and the paramedic in *Mitchell*, were underpinned by the fact that these individuals would probably not have considered themselves to be in public office.
- 4.13 Additionally, despite the clear indication from the Court of Appeal that the test is based on function, we are aware that arguments based on “status” continue to be raised in the courts and the concept of status may fall to be used as a determinative factor in difficult cases.³⁴⁰ In our view the fact that such arguments continue to be made risks confusing the law further.
- 4.14 There is continued ambiguity over what public office means. The main aspects of the public office element were not clearly defined in the most recent Court of Appeal decision (*Mitchell*) dealing with that issue. This may have been because the Court of Appeal was concerned to address what it felt were urgent policy concerns. As a result, the decision highlighted conflicting views as to what should suffice as a duty that determines who is in public office.
- 4.15 In *Mitchell*, the Court of Appeal was keenly aware of the far-reaching implications of interpreting the earlier decision in *Cosford* to mean that every person working in, or on behalf of, the public sector is potentially a public officer holder.³⁴¹ Taking a wide view of the *Cosford* decision, every NHS employee and every employee of the state school education system could be liable for prosecution for misconduct in public office. This was clearly something that the Court of Appeal wished to avoid. However, the majority of stakeholders we have spoken to expressed disagreement with the decision reached on the facts of *Mitchell*.
- 4.16 On the one hand it is not difficult to see why many people might regard the concept of public office as wide enough to include an NHS paramedic and state school teacher. That view is based on the reasoning that both individuals could be considered to be subject to duties (which the public have a significant interest in seeing performed properly) associated with state functions. However, the Court of Appeal’s view was that, as the public could only be said to have a “significant interest” in the performance of the duty where that interest went beyond that of an individual significantly affected by a failure to perform the duty, neither an NHS paramedic nor a state school teacher would be subject to a determinative duty.

³⁴⁰ See Chapter 2.

³⁴¹ *Mitchell* at [17]. See further discussion in Chapter 2.

- 4.17 Since neither the types of functions or duties that determine when an individual is a public office holder were defined further in *Mitchell*, nor have they been since, the position remains uncertain as to what may amount to a determinative duty.³⁴²

ACTING AS SUCH

- 4.18 *AG's Reference* did not specify that “public office” and “acting as such” were separate elements of the offence, instead describing “a public officer acting as such” as a single element. We considered in Chapter 2 however that the two concepts may be distinct, however, in practice they have not been considered separately by the courts in England and Wales.
- 4.19 The question of whether an individual “is acting as such” (as a public office holder when the misconduct occurs) is usually answered by determining the duties to which he or she is subject as a result of being required to carry out a state function. Therefore, it is debatable whether the requirement that a public office holder be acting as such at the time of his or her misconduct has any practical significance within the current offence of misconduct in public office, other than to exclude the cases where an officer is acting in a wholly private capacity.³⁴³
- 4.20 We discuss further below that the merger of the two the concepts, so that “acting as such” is absorbed into “public office”, may also have an effect on the question of how a breach of duty should be defined.

Conclusion

- 4.21 There are the following specific difficulties with the definition of public office:
- (1) There are difficulties in defining a public office by status (to the extent that considerations of status remain relevant) and in defining a public office by function.
 - (2) There is no definition of what amounts to a governmental responsibility or “state function”.
 - (3) There is no definition of the types of duties in which the public have a significant interest (beyond an interest of those who might be directly affected by a serious failure in the performance of those duties).
 - (4) It is unclear whether the following questions are ones of law or fact:
 - (a) To what duties is an individual subject?
 - (b) What types of “state functions”, associated with an individual’s duties, are capable of determining that an individual is a public officer holder?

³⁴² Additionally, the recent decision in *Ball* (8 September 2015) (unreported, Central Criminal Court) regarding the Church of England clergy appears to suggest a different approach to determining what duties the public may have a significant interest in, combining the concepts of status and function.

³⁴³ See discussion in Chapter 2.

- (c) When does the public have a significant interest in the performance of the duty that individual has (that is associated with a state function)?
 - (5) It is difficult to predict whether the current definition of public officer satisfies the requirements of article 7 of the ECHR.
 - (6) It is debatable whether the requirement that a public office holder be “acting as such” has any practical significance within the current offence of misconduct in public office, other than to exclude the cases where an officer is acting in a wholly private capacity.
- 4.22 We conclude that the first element of misconduct in public office set down in *AG’s Reference*,³⁴⁴ which requires the individual prosecuted to be a public officer acting as such, is ill-defined and vague. The lack of legal clarity has already resulted in a number of appeals being brought where an appellant disputes the finding that he or she was in a public office. We also identified in Chapter 1 evidence that may indicate a significant disparity between what investigators and prosecutors might consider constitutes misconduct in public office and what a jury is prepared to treat as conduct deserving a conviction for misconduct in public office.
- 4.23 In our view, unsuccessful prosecutions, appeals and potential challenges under the ECHR are likely to continue if the law remains unclear.

Question 3

- 4.24 **Can consultees provide further examples of the problems with the current definition of “public office”?**

Question 4

- 4.25 **Do consultees have any views on whether the requirement that a public office holder is “acting as such” at the time of his or her misconduct has any practical significance within the current formulation of misconduct in public office?**

Problem 2

Breach of duty: ill-defined and unclear what must be proved

- 4.26 As discussed in Chapter 2, there is concern as to the lack of clarity regarding whether a breach of *any* one of the many duties to which a public office holder may be subject can potentially constitute misconduct in public office.
- 4.27 There is a risk that the offence is wide enough to include cases where the duty breached is not one in which the public has a significant interest, associated with a state function (a determinative duty). The case law offers no clear guidance. At present there are three possible interpretations of the law.

³⁴⁴ *AG’s Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73.

- (1) That there must be a breach of a duty (in which the public has a significant interest) associated with a state function (a determinative duty) to constitute misconduct in public office.
- (2) That a breach of *any* duty the public office holder is subject to, whether a determinative duty or not, can amount to misconduct in public office.
- (3) That (1) above is generally correct, however, for certain office holders a breach of *any* duty may amount to misconduct in public office.

4.28 By way of example of these approaches:

Example 1(a) D, an authorised person for the purposes of marriage registration, because of racist views, fails correctly to register a marriage between a British national and a non-British national. The result is that the non-British national is not granted a visa to remain in the UK and is deported.³⁴⁵

4.29 D's breach is of a determinative duty: assuming that the performance of the duty is one in which the public has an interest (it is clearly associated with a state function of marriage registration). It may seem correct therefore, in this situation that D could be prosecuted for misconduct in public office.

Example 1(b) D, an authorised person for the purpose of marriage registration, sexually harasses another person employed by the authorised venue for the marriage.

4.30 D has breached a duty owed to the employee of the venue, but not a determinative duty. Under the current law it is uncertain whether or not D could be prosecuted for misconduct in public office. However, in our view, there would appear to be an instinctive objection to including the person in Example 1(b) within the ambit of the offence.³⁴⁶

4.31 Some individuals may take the view that a person authorised to conduct marriages is someone who holds a type of office where a serious breach of *any* of his or her duties may amount to misconduct in public office whether related to his or her functions or not. Taking a wide view of the present law this would appear to be a possible result.

³⁴⁵ For discussion of the position of the clergy see Chapter 2. We note that in the case of the Church of England or the Church in Wales, where the minister performing the ceremony is also the authorised person for the purposes of marriage registration, then there the difficulty would more likely arise in terms of the minister refusing to perform the ceremony.

³⁴⁶ Additionally, applying general criminal law principles, a breach of contract would not usually suffice to make an act criminal, especially a serious criminal offence carrying a sentence of imprisonment. Professor Glanville Williams condemned the inference from breach of a contractual duty to breach of duty in criminal law as "impermissible reasoning". See G Williams, "What should the code do about omissions?" (2006) 7(1) *Legal Studies* 92. That said, there are a number of exceptions to this principle in practice, for example where breaches of contract lead to death, as in some cases of gross negligence manslaughter. Ashworth describes this as the obligation of life and death, see A Ashworth, *Positive obligations in Criminal Law* (2013). This may therefore, suggest that what should be considered is not the type of duty being breached, but the seriousness of the breach, including its consequences.

- 4.32 The recent case involving the former Bishop of Gloucester is worth considering here. The court held that it was not just the duties to undertake marriage registration activities of the Church of England clergy that resulted in their being holders of public office. The court considered that the Church of England's provision of spiritual guidance was a function of government, based on its status as the established Church in England. It concluded that the duties of Bishops within the Church of England to provide spiritual guidance were ones that determined that they were public office holders. Following *Mitchell* the court must therefore have assessed those duties as ones in which the public had a significant interest, although those exact words were not used.³⁴⁷
- 4.33 We are not clear, however, whether in this situation the Bishop's actions in engaging in sexual activity with young men, including trainee priests, could also be said to amount to breach of a determinative duty.³⁴⁸ The question of the nature of the breach does not appear to have been a question considered by the court.
- 4.34 We consider that one of the reasons why there are difficulties in determining the types of breach of duty that can amount to misconduct arises from conflation of the "public office" and "acting as such" elements. The merging of these two concepts risks criminalising a breach of any duty to which an individual is subject, once that individual has been held to be in public office.

Conclusion

- 4.35 Under the current law it is unclear whether the only breaches that can potentially amount to misconduct in public office are those of a duty that is determinative of a person being in public office. Some may take the view that this would be a sensible limitation of the offence.

Question 5

- 4.36 **Can consultees provide further examples of problems arising from a lack of clarity as to what types of breach of duty are sufficient to establish the offence of misconduct in public office?**

Problem 3

Abuse of the public's trust: crucial as a threshold element but unworkably vague

- 4.37 As discussed in Chapter 2, some of the difficulties posed by the third element of misconduct in public office were the subject of the Court of Appeal's deliberations in the recent case of *Chapman*.³⁴⁹ The Lord Chief Justice indicated that both the trial judge and the jury would have benefited from additional assistance in

³⁴⁷ As we note in Chapter 2 the result of this case is that Ball was convicted of a criminal offence in circumstances where a minister of another faith, or an Anglican minister outside of England (for example within the disestablished Church in Wales), would not be. It is also different result to that reached in *Mitchell*, where the paramedic's duties towards an individual's physical welfare (which it was alleged he breached by sexually touching a patient) were not held to be duties that the public had a significant interest in albeit they were associated with state functions

³⁴⁸ Case of *Ball* (8 September 2015) (unreported, Central Criminal Court). See Chapter 2.

considering how the element “abuse of the public’s trust” should be interpreted.³⁵⁰ The Director of Public Prosecutions (“DPP”) echoed this sentiment.³⁵¹

- 4.38 We discuss in Chapter 2 the uncertainty about the level of seriousness that must be proved within the test for misconduct in public office. This problem is similar to that faced in cases involving the offence of gross negligence manslaughter.
- 4.39 In our view, the problem may be compounded by the fact that, as well as being asked to make a circular assessment of whether an individual’s breach of duty is serious enough to be criminal (as in gross negligence manslaughter), the jury is also being asked to do so without any clear indication of what *could* amount to serious (and therefore, criminal) misconduct. In manslaughter cases the jury at least have an indicator of seriousness, in the form of a serious consequence (death) that has resulted. This is a requirement of the offence. In misconduct in public office, there is no requirement of consequence. Therefore, it may be even more difficult for a jury to assess the seriousness of a defendant’s breach of duty in misconduct cases than to assess a serious breach of a standard of care leading to death.³⁵² This would especially be so if the jury has no experience of the type of behaviour alleged to be criminal, for example, where a senior civil servant is alleged to have awarded military defence contracts in a corrupt manner.
- 4.40 The court in *Chapman* sought to solve this difficulty by holding that the misconduct must be assessed by a jury as having the effect of harming the public interest before a defendant could be convicted of the offence.
- 4.41 The Lord Chief Justice also made a number of comments relating to the distinction to be drawn between criminal and disciplinary misconduct. Specifically in relation to the facts of cases like *Chapman*:

The provision of the information may well in such a case be an abuse of trust by the office holder to his employer or commanding officer, even if the disclosure of the information may be in the public interest. It may therefore, result in disciplinary action and dismissal of the officer holder. That is because the abuse of the trust reposed in the office holder by the employer/commanding officer in such a case is viewed through the prism of the relationship between the office holder

³⁴⁹ [2015] EWCA Crim 539, [2015] 2 Cr App R 10.

³⁵⁰ *Chapman* at [29].

³⁵¹ *Chapman* led to a review of all ongoing Operation Elveden prosecutions concerning the payment of public officials by journalists for information. In a statement issued on 17 April 2015 the DPP said that “the use of Misconduct in Public Office in these unique circumstances was a new use of a complicated area of the law”.

³⁵² Of course, where gross negligence manslaughter is alleged to have been committed by a public officer the two offences may overlap (as in *AG’s Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73). However, it is notable that since 2003 there have been very few prosecutions for gross negligence manslaughter where misconduct in public office was an alternative count on the indictment. For one example see the case of *Kingshott, Tansley and Marden*, due for trial in January 2016, involving the death in custody of Thomas Orchard in 2012.

and his employer or commanding officer. That is not the prism through which a jury should approach the issue of the abuse of the public's trust in an office holder.³⁵³

- 4.42 The question of duties owed to the public, as opposed to duties owed primarily to an employer, is central to the issue of "seriousness". However, it remains unclear what role, if any, factors such as the risk of harmful consequences and impropriety of motive, discussed in Chapter 2, will now play in the assessment of what constitutes "harm to the public interest", as referred to in *Chapman*.
- 4.43 In relation to the risk of harmful consequences, in the context of the case, the court referred to the public interest being harmed by the "ability to report information provided in breach of duty" being gained by the media. Harm could be caused if either the information itself damages the public interest (for example, a leak of budget information) or the manner in which the information is provided or obtained damages the public interest (where the public office holder is paid to provide the information). In either case, it was not necessary for the media source in question actually to report or otherwise act on the information provided, but the risk that he or she might do so made the matter sufficiently serious.³⁵⁴ Therefore "harm to the public interest" need not involve the occurrence of any consequences, only a risk that certain consequences may occur: it was held to be enough that the public office holder's actions would give rise to a risk of sensitive information being published.³⁵⁵
- 4.44 Unfortunately, however, no further definition of "harming the public interest" was provided outside of the context of the misuse of information by public office. This leaves open the question, in other types of cases, of whether a risk of particular types of harm being caused would be sufficient to amount to a breach of the public's trust.³⁵⁶
- 4.45 In addition the court did not refer at all to what part, if any, motive might play in the assessment of seriousness or abuse of the public's trust.³⁵⁷

Conclusion

- 4.46 Difficulties arise for investigators, prosecutors, judges and juries in the absence of comprehensive guidance as to the considerations that should be taken into account when assessing whether a breach of duty is so serious that it would amount to criminal misconduct. These were clearly demonstrated by the appeal of *Chapman* and the subsequent CPS review of Operation Elveden prosecutions, which resulted in the cases against nine defendants being discontinued.

³⁵³ *Chapman* at [33].

³⁵⁴ *Chapman* at [36].

³⁵⁵ *Chapman* at [36].

³⁵⁶ On the basis of previous case law we might be able, however, to identify certain types of harm that would suffice, for example, the death of a person in police custody. See AG's Reference (*No 3 of 2003*) [2004] EWCA Crim 868, [2005] QB 73.

³⁵⁷ *Chapman* at [18], referring to Sir Anthony Mason's judgment in the Hong Kong case of *Shum Kwok Sher* [2002] 5 HKFAR 381.

Question 6

- 4.47 Do consultees have any views on whether a lack of clarity regarding what can constitute an “abuse of the public’s trust” generates problems in providing a workable “seriousness” threshold for the offence?

Problem 4

The fault element: unprincipled variability

- 4.48 As discussed in Chapter 2, it has been argued that *AG’s Reference* effectively specified a single subjective fault element to be applied in all cases of misconduct in public office, unifying what had previously been different concepts of fault applied in different cases.³⁵⁸ That fault element was specified as subjective recklessness as to both the breach of duty and the circumstances that make that breach serious.
- 4.49 However, the case of *W* did not follow this approach.³⁵⁹ Instead, Lord Judge Chief Justice, as he then was, expressed the view that *AG’s Reference* simply reinforced “the requirement for some subjective mental element, appropriate to whatever form of misconduct is used”. In *W* that mental element was dishonesty. The Court of Appeal did not simply regard dishonesty as an “improper motive” that could be taken into account when assessing the seriousness of the misconduct, but referred to it as a separate fault requirement.
- 4.50 In our view, it is wrong in principle for a single offence to have additional fault elements which must be proved if and only if specific factual circumstances arise. It complicates and confuses the law, making it difficult for judges and juries to understand and for individuals and their lawyers to predict when an offence may be committed. This situation is clearly distinguishable from those offences which contain alternative levels of fault within a single charge applicable to all factual scenarios. For example, criminal damage, which requires a defendant to have acted either intentionally or recklessly.³⁶⁰
- 4.51 There are practical difficulties in requiring additional fault requirements for different species of the same offence dependent on the facts of individual cases. One of these is that the existence of possible, additional fault elements requires prosecutors to try and predict to what factual scenario (apart from specific cases such as *W* already decided) these may apply. Another is that the use of multiple fault requirements for factually different types of misconduct offends the principle that the law should be simple, accessible and consistent.

Conclusion

- 4.52 Following *W*, it is unclear whether it was the intention of the Court of Appeal in *AG’s Reference* to create a single unified fault element, namely subjective recklessness, for all types of misconduct in public office.

³⁵⁸ A Cronin, “Court of Appeal (Criminal Division): Misconduct in Public Office: Dishonesty Is an Element if Misconduct Amounts to Theft or Fraud” (2010) *Journal of Criminal Law* 74 (290). See further Chapter 2.

³⁵⁹ *W* [2010] EWCA Crim 372, [2010] QB 787.

³⁶⁰ Criminal Damage Act 1971, s 1.

Question 7

- 4.53 **Can consultees provide further examples of problems arising from the existence of variable fault elements for different species of misconduct in public office?**

Problem 5

Without reasonable excuse or justification: defence or definitional element?

- 4.54 As discussed in Chapter 2, the question is whether we are describing a defence or circumstances that point against one or more of the basic ingredients of the offence being present. This distinction can be shown by reference to the following example:

Example 2 A police officer (X), in a violent disorder situation, causes injury to a member of the public also present. If this is done:

1. within the boundaries of X's powers of arrest, the officer will be able to rely on a defence of justification;
2. because X faces threats of immediate violence and has no other option in order to prevent those threats from being carried out, X may be able to rely on a defence of self-defence; or
3. accidentally, X will be able to claim that X was not at fault for X's actions and that an element of the offence is not proved.

- 4.55 In practice the "without reasonable excuse or justification" element of the offence is rarely distinguished from other elements of the offence in the way that they were separated by the court in *AG's Reference*. There is an argument for saying that, where the facts constituting a defence are present, the conduct complained of is not serious enough to constitute an offence, or that where the defendant believes those facts are present he is not acting wilfully.
- 4.56 It is also unclear whether the concept of "without reasonable excuse or justification" might relate differently to neglect and other forms of misconduct. It is possible to describe someone as failing to perform a duty for a valid reason but it is harder to see how someone's conduct can be justified, or reasonably excused, active misconduct. One example of a situation where a person's positive actions may be justified may be where the public officer claims that he or she was acting out of necessity.

Example 3 A public health officer (P) discloses information to the public about a major environmental disaster expected to occur. P's superior (Q) refuses to release the same information because it would harm the share value of the company responsible for the disaster, and Q holds shares in that company.

- 4.57 As also discussed in Chapter 2, it has been argued that the law on misconduct in public office should provide a general defence where the office holder acts in the public interest. The object would be to enable the courts to consider any benefit

to the public arising from the nature of the misconduct, the motives of the person disclosing it as well as the harm which it was likely to cause, with more clarity.³⁶¹ Those who support the inclusion of such a defence would argue that there are important rights and freedoms requiring protection that the current law cannot give.

Conclusion

- 4.58 It is arguable that insufficient consideration has been given, in the evolution of the offence, to the question of whether available defences to the offence of misconduct in public office need to be clearly specified.

Question 8

- 4.59 **Can consultees provide further examples of problems arising from a lack of clarity as to the operation of the “without reasonable excuse or justification” element of the offence?**

³⁶¹ CSPL, *Misuse of Public Office: A Consultation Paper* (1997), published as a pamphlet accompanying the Third Report of the CSPL, *Standards of Conduct of Local Government in England, Scotland and Wales* (1997) Cm 3702-I.

CHAPTER 5

OVERLAPS WITH OTHER FORMS OF LEGAL ACCOUNTABILITY

- 5.1 This chapter considers the overlap between misconduct in public office and other forms of legal accountability, primarily:
- (1) alternative or related criminal offences; and
 - (2) disciplinary procedures.
- 5.2 Historically, misconduct in public office developed at common law to ensure that a public office holder could be held accountable for serious breaches of a legitimate expectation as to how he or she would discharge the functions of that office.³⁶² At that time few alternative forms of legal accountability were available in relation to such conduct.
- 5.3 As this chapter explains, a great many types of behaviour that are now capable of being prosecuted as misconduct in public office typically also fall within the scope of other offences. This chapter examines the reasons that could justify the continued existence of misconduct in public office, notwithstanding the availability of alternative offences. It also considers the overlaps and threshold between misconduct in public office and disciplinary sanctions.

ALTERNATIVE OR RELATED CRIMINAL OFFENCES

- 5.4 In many instances a public office holder's wrongdoing may amount to a crime that is wholly unrelated to the duties of his or her public office. An example would be when a public office holder commits an offence against a person.³⁶³ In these cases the other statutory or common law offences will apply and misconduct in public office will not be an appropriate charge. We need not deal with these further.
- 5.5 Historically some offences have been so closely allied to misconduct in public office that it is difficult to describe them as separate offences. The distinctions are solely a question of labelling. Examples include common law cheat (when committed by public office holders), fraud by colour of office, oppression by colour of office, or contempt of statute.³⁶⁴ We discuss these in Appendix A.
- 5.6 More commonly the conduct prosecuted as misconduct in public office also constitutes a more specific criminal offence (under either the common law or statute) which may or may not be connected with the office held. It is then a matter of prosecutorial discretion whether misconduct is charged. These types of case generally fall into two categories:

³⁶² See Appendix A for further discussion on the historical development of the offence.

³⁶³ See Chapter 2 for discussion of the current law requirements that a person in public office was "acting as such" and that he or she commit a breach of duty.

³⁶⁴ The first of these, was the foundation for Chief Justice Mansfield's second principle in *Bembridge* [1783] 3 Doug KB 327, 99 ER 679. See Appendix A.

- (1) Offences dealing with particular types of conduct such as bribery (statutory) or perverting the course of justice (common law).
- (2) Offences dealing with particular types of officer. An example would be a government minister, and member of the House of Commons, who submits a false expenses claim, which is an offence under section 10 of the Parliamentary Standards Act 2009.

5.7 We examine how the common law misconduct offence relates to the offences that could be charged in the alternative, focussing on two issues:

- (1) The principle of legal certainty.
- (2) Whether a statutory offence should be preferred over a common law offence.

Common law offences and the principle of legal certainty

5.8 Criminal offences must be reasonably accessible and foreseeable in order to meet requirements of legal certainty. However, this requirement is not infringed merely because a citizen needs to seek legal advice or a court ruling on the interpretation of a law.³⁶⁵

5.9 We consider here whether common law offences such as misconduct in public office infringe this principle of legal certainty. Underlying this question is the assumption that common law offences tend to be broad and ill-defined and therefore inherently uncertain and lacking clear boundaries rather than being “clear, precise, adequately defined and based on a discernible rational principle”.³⁶⁶ Statutory offences, it is assumed, will be more likely to respect legal certainty.

5.10 This issue was addressed by the House of Lords in *Rimmington* where the court concluded that while legal certainty is a fundamental principle:

It is accepted that absolute certainty is unattainable, and might entail excessive rigidity since the law must be able to keep pace with changing circumstances, some degree of vagueness is inevitable and development of the law is a recognised feature of common law courts.³⁶⁷

5.11 The European Court of Human Rights has also found that common law offences, do not in principle infringe article 7 of the European Convention on Human Rights (ECHR).³⁶⁸ Consequently, there is no principle that common law offences are by nature so uncertain that they fail to satisfy requirements of legal certainty.

³⁶⁵ *Sunday Times v UK (No 1)* (1979-80) 2 EHRR 245.

³⁶⁶ *Rimmington* [2005] UKHL 63, [2006] 1 AC 459 at [36], Lord Bingham.

³⁶⁷ *Rimmington* at [35], Lord Bingham.

³⁶⁸ *Sunday Times v UK (No 1)* (1979-80) 2 EHRR 245 at [48].

- 5.12 Further, the fact that common law offences remain subject to development by the courts does not of itself mean that they infringe certainty principles, in either domestic law or under the ECHR:

Article 7 of the Convention (ECHR) 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.³⁶⁹

- 5.13 Other broad common law offences have survived scrutiny when challenged for legal certainty. One clear example is the offence of conspiracy to defraud. In the recent case of *Evans*, Mr Justice Hickinbottom explained that “whilst no one would demur from the proposition that the offence is ‘exceptionally broad’, that is not the same thing as an offence without boundaries.”³⁷⁰
- 5.14 However, in relation to misconduct in public office we anticipate that there may be specific concerns to address when considering challenges based on legal certainty. In Chapter 2 we discuss at length the difficulties surrounding the definition of “public office”. The lack of clarity in defining this core term generates uncertainty for both prosecutors and suspects to determine in advance who could be liable for prosecution under the offence.
- 5.15 Similarly, as discussed in Chapter 4, the uncertainty that surrounds other elements of the offence, including the fault element and that of “abuse of the public’s trust”, give rise to the potential for inconsistent prosecution decision making. A possible consequence of the ambiguities is that where the prosecution are unsure whether the charge might appropriate and/or successful a practice of charging both misconduct in public office and a narrower offence in the alternative might develop. This in turn may lead to the over complication of trials and an increase of difficult issues for a jury to decide.

Must a statutory offence always be charged in preference to a common law offence?

- 5.16 Are there constraints on charging a common law offence, such as misconduct in public office, instead of an available statutory offence when one is available? This question was examined by the House of Lords in *Rimmington*, a case which concerned the common law offence of public nuisance.³⁷¹

Public nuisance

- 5.17 Public nuisance is a common law offence that has received extensive criticism on the basis that it is so vague and covers so many different types of action that it

³⁶⁹ *SW and CR v United Kingdom* (1995) 21 EHRR 363 (App Nos 20166/92 and 20190/92), at [34] and [36]. See Appendix C for further discussion of the ECHR.

³⁷⁰ *Evans* [2014] EW Misc 5, [2014] 1 WLR 2817 at [35]. See also C Montgomery and D Ormerod, *Fraud: Criminal Law and Procedure* (2008), ch D7 for a detailed analysis of the offence.

³⁷¹ *Rimmington* [2005] UKHL 63, [2006] 1 AC 459.

cannot be considered a coherent offence.³⁷² All, or most, instances of public nuisance are adequately covered by other offences or statutory mechanisms, however, as we noted in our consultation paper on this subject in 2010 (in our account of the reasoning in *Rimmington*):

It does not follow from this that the law of public nuisance is now a dead letter and that the offence has ceased to exist, or even that it cannot lawfully be used when a statutory offence is available.³⁷³

We restated this view in our recently published report on the topic.³⁷⁴

5.18 In *Rimmington*, Lord Bingham stated:

I would not go to the length of holding that conduct may never be lawfully prosecuted as a generally-expressed common law crime where it falls within the terms of a specific statutory provision, but good practice and respect for the primacy of statute do in my judgment require that conduct falling within the terms of a specific statutory provision should be prosecuted under that provision unless there is good reason for doing otherwise.³⁷⁵

5.19 There is, therefore, a presumption that a statutory offence will be prosecuted in preference to a common law offence, unless there is “good reason” to prefer the latter. However, there is no mandatory rule to this effect. This presumption has been analysed in two recent cases in relation to two other offences.

Conspiracy to defraud

5.20 Common law conspiracy to defraud remains available despite the Fraud Act 2006 having introduced wide statutory fraud offences to replace those previously set out under the Theft Acts 1968 and 1978.³⁷⁶ In the overwhelming majority of cases, conduct that can be prosecuted as conspiracy to defraud can also be prosecuted as a Fraud Act offence or a statutory conspiracy to commit a Fraud Act offence.³⁷⁷ Nonetheless, the drafters of the Fraud Act 2006 did not adopt the Law Commission’s proposal from 2002 that the common law offence of conspiracy to defraud should be abolished.³⁷⁸ The Government was reluctant to abolish the common law offence in case the Fraud Act offences left gaps that had not been anticipated when they were introduced. Abolition of conspiracy to

³⁷² J Spencer, “Public nuisance – a critical examination” [1989] 48(1) *Cambridge Law Journal* 55.

³⁷³ Simplification of Criminal Law: Public Nuisance and Outraging Public Decency (2010) Law Commission Consultation Paper No 193, [4.18].

³⁷⁴ Simplification of Criminal Law: Public Nuisance and Outraging Public Decency (2015) Law Com No 358, [3.32].

³⁷⁵ *Rimmington* [2005] UKHL 63, [2006] 1 AC 459 at [30].

³⁷⁶ Theft Act 1968, ss 15 and 16 and Theft Act 1978, ss 1 and 2.

³⁷⁷ Charged under the Criminal Law Act 1977, s 1. Conspiracy to defraud is expressly retained in s 5(2). It carries a maximum sentence of 10 years’ imprisonment under Criminal Justice Act 1987, s 12(3).

³⁷⁸ Fraud (2002) Law Com No 276. The argument is that the offence is unfairly uncertain, and wide enough to have the potential to catch behaviour that should not be criminal.

defraud could create considerable risks for the effective prosecution of fraud cases.³⁷⁹

- 5.21 The subsequent guidance issued by the Attorney General on the continued use of the common law offence emphasised that “the expectation now is that the common law offence will be used to a significantly lesser extent once the Fraud Act 2006 has come into force”.³⁸⁰ However, the guidance also stated that “there may be cases where the interests of justice can only be served by presenting to a court an overall picture which cannot be achieved by charging a series of substantive offences or statutory conspiracies”.³⁸¹
- 5.22 In some instances the prosecution’s decision to rely on the common law has been condemned. For example, in *Dady* Mr Justice Coulson recently held that the defendant in that case ought to have been charged with a statutory conspiracy, rather than the common law offence of conspiracy to defraud.³⁸² The court decided it was wrong as a matter of principle to permit the prosecution to avoid the safeguards contained within the statutory form of conspiracy in the Criminal Law Act 1977. Nonetheless, almost 10 years since the enactment of the Fraud Act 2006, the offence remains in frequent use.

Cheating the public revenue

- 5.23 The common law offence of cheating the public revenue was retained by the Theft Act 1968 and was not repealed by the Fraud Act 2006,³⁸³ despite it being argued that common law cheat is over-broad and lacks legal certainty.³⁸⁴ In *Dosanjh*, the Court of Appeal confirmed that the offence of conspiracy to cheat the public revenue may be used to supplement the statutory offences that could be charged in similar circumstances. Lady Justice Hallett held that the offence:

Is recognised as the appropriate charge for the small number of the most serious revenue frauds, where the statutory offences will not adequately reflect the criminality involved and where the sentence at large is more appropriate than one subject to statutory restrictions.³⁸⁵

- 5.24 Lady Justice Hallett also stated that:

³⁷⁹ Fraud Act 2006, Explanatory Notes, para 6.

³⁸⁰ This guidance is in line with the decision in *Rimington* [2005] UKHL 63, [2006] 1 AC 459 at [35], discussed below and was reiterated in the case of *Dady* [2013] EWHC 475.

³⁸¹ Attorney General’s Office, *Use of the common law offence of conspiracy to defraud* (2007), last updated 29 November 2012. Conspiracy to defraud is also demonstrative of a situation where attempts to prevent overlap with statutory offences are often problematic: see *Ayres* [1984] AC 447, [1984] 2 WLR 257. The result was reversed by Criminal Justice Act 1987, s 12(1). Between 1984 and 1987 prosecution for conspiracy to defraud was not possible if a statutory offence existed.

³⁸² *Dady* [2013] EWHC 475.

³⁸³ Theft Act 1968, s 32(1)(a).

³⁸⁴ D Ormerod, “Cheating the public revenue” (1998) *Criminal Law Review* 627. See also *Fraud* (2002) Law Com No 276.

³⁸⁵ *Dosanjh* [2013] EWCA Crim 2366, [2014] All ER (D) 33, at [33].

We are entirely confident that as far as Parliament is concerned, the offence of conspiracy to cheat the public revenue retains its established and clearly understood role in the prosecution of revenue cases.³⁸⁶

- 5.25 In some cases therefore a common law offence can be preferred over a statutory offence, provided there is good reason for doing so. In *Dosanjh*, the good reason was the fact that the relevant statutory offence did not adequately reflect the defendant's criminality.

Choosing to charge misconduct

- 5.26 The sufficiency of the reasons for preferring charges under offences at common law over those in statutory offences may be worth exploring further. Such an assessment could help explain why misconduct is relied on where alternative offences are available. In particular, it may be considered whether this is for purely practical reasons or because the offence signals a form of wrongdoing that is distinct from that which is the principal target of the statutory offence.

Practicalities

- 5.27 Our research shows that in recent years the number of prosecutions for misconduct in public office has risen significantly, although these form a minute fraction of overall criminal offending.³⁸⁷
- 5.28 The CPS has published charging guidance detailing when it will be appropriate to charge misconduct in public office. Consistent with the principles in *Rimmington*,³⁸⁸ this provides:

Where there is clear evidence of one or more statutory offences, they should usually form the basis of the case, with the "public office" element being put forward as an aggravating factor for sentencing purposes.³⁸⁹

- 5.29 Where, however, no alternative offence is available, misconduct in public office may properly be charged, and often is as we discuss below. Even in cases where alternatives are available, there may be other reasons in practice for misconduct

³⁸⁶ *Dosanjh* at [33].

³⁸⁷ For example, CPS data sources (quoted in Chapter 1) record that in 2004 there were 13 prosecutions for misconduct in public office, by 2008 that had increased to 68 and by 2011 to 149 prosecutions. The CPS no longer collate statistical data however, MOJ data sources record that there were 135 prosecutions in 2014. Police officers and prison officers are prosecuted in the greatest numbers. Prosecution figures have been obtained from both the Ministry of Justice and the CPS, as also described in Chapter 1. Additionally, our research shows that at least 79 police officers and 84 prison officers were prosecuted between 2005 and 2014, see the table of unreported misconduct prosecutions included in Appendix D.

³⁸⁸ *Rimmington* [2005] UKHL 63, [2006] 1 AC 459.

³⁸⁹ http://www.cps.gov.uk/legal/l_to_o/misconduct_in_public_office/ (last visited 13 January 2016).

being preferred. These were discussed in *Rimmington*³⁹⁰ and are referred to in the CPS charging guidance.

- (1) In some instances common law misconduct may have been selected as the preferred charge because the alternatives are narrow and specialised ones or are offences that pose greater difficulties of proof.
- (2) Alternatively, or in addition, it may be that the other possible charges carry more limited sentence options, and that the higher maximum sentence attached to the common law offence is necessary adequately to punish the alleged conduct.
- (3) A single charge of misconduct may more readily capture the nature or range of the conduct, particularly where there is a series of actions or a complex pattern of behaviour that would have to be prosecuted as a series of separate counts for other offences.

5.30 We identify scenarios illustrating each of these justifications for misconduct prosecutions.

5.31 In respect of (1) above:

Example 1 A member of police staff (C) has authorisation to use the police national computer (PNC) for the purposes of updating prosecutors as to the previous convictions of defendants appearing before the courts. While performing this task C also uses the PNC to search for the current address of an ex-partner. In this situation, because C has been authorised to use the PNC it might be difficult to prosecute C for an offence under the Computer Misuse Act 1990 (which relates to unauthorised access).³⁹¹

5.32 In respect of (2):

Example 2 A member of the independent monitoring board for prisons (M) strikes up a friendship with a prison inmate (N). M agrees to smuggle a mobile phone into the prison for N. N later persuades M to provide further mobile phones that can be traded to other inmates and the activity continues for a number of months. M receives no payment or advantage from his or her actions except for enhanced reputation with inmates. Members of prison staff are made aware of this and decide to engage in similar activities.³⁹² M could be prosecuted for an offence under section 40C Prison Act 1952, conveyance of prohibited articles, for which the maximum sentence is 2 years' imprisonment. However, in order to reflect the prolonged duration of the conduct and the corrupting effect it has on

³⁹⁰ [2005] UKHL 63, [2006] 1 AC 459.

³⁹¹ See *DPP v Bignell* [1998] 1 Cr App R 1; [1998] Crim LR 53.

³⁹² Without entering into a conspiracy.

both the prison population and other staff, a prosecutor may decide that the most appropriate charge is misconduct in public office.³⁹³

5.33 In respect of (3):

Example 3 A Crown Prosecution Service worker (S) regularly leaks personal information sourced from prosecution files to criminal associates, in exchange for class B drugs. It would be possible to charge S with offences of possessing drugs under the Misuse of Drugs Act 1971 (maximum sentence 5 years) and others under the Data Protection Act 1998 (maximum penalty a fine) but even together they are unlikely to sufficiently reflect the seriousness and context (a breach of duty by a person in a position of public trust) of the wrongdoing involved.³⁹⁴

5.34 As these cases demonstrate, in practice misconduct in public office may be a useful tool for prosecutors when other alternative offences are not adequate in terms of: breadth or gravity, available sentence and/or, the label given to the misconduct concerned. In particular, an offence that can only be committed by those who hold public office may fulfil an important role from the perspective of fair labelling and this will be discussed further below.

Question 9

5.35 We identify three potential practical reasons that may exist for prosecuting misconduct in public office where alternative offences are available.

- (1) The alternatives are narrow and specialised ones or are offences that pose greater difficulties of proof.
- (2) The other possible charges carry more limited sentence options.
- (3) A single charge of misconduct may more readily capture the nature or range of the conduct.

Can consultees provide further examples of reasons that may exist for prosecuting misconduct in public office where there are alternative offences available?

Misconduct in public office labelling a distinct form of wrongdoing

5.36 As discussed above, there may exist numerous statutory offences with which public office holders can be charged depending on the circumstances of the particular case. One reason for the continued use of misconduct charges when

³⁹³ Recent prosecutions involving similar behaviour by prison officers include the cases of Jodie Pugh and Danielle Ofkants, convicted and sentenced in 2012, see BBC News, “Two Redditch female prison officers jailed over conduct” (23 July 2012) <http://www.bbc.co.uk/news/uk-england-hereford-worcester-18934884> (last visited 13 January 2016).

³⁹⁴ Recent prosecutions involving similar circumstances include *Stubbs* [2011] EWCA Crim 926, [2011] 2 Cr App R (S) 113 (a police officer). See also the case of *Land* [2006] EWCA Crim 2856, [2006] All ER (D) 333 involving a CPS case worker.

others are available is because misconduct in public office may be considered by prosecutors to criminalise a distinctive form of wrongdoing which merits its own label.

A DISTINCT WRONG

- 5.37 The moral content of a given criminal offence can be divided into three basic elements: culpability, harmfulness and moral wrongfulness. As Stuart Green has explained, culpability reflects the mental element with which the offence is committed. Harmfulness reflects the degree to which a criminal act causes, or at least risks causing, harm to others or to self. Finally, moral wrongfulness reflects the way in which the criminal act involves the violation of a specific moral norm, or set of norms.³⁹⁵
- 5.38 Given the fact that most types of conduct criminalised by misconduct in public office could fall within the scope of a criminal offence of general application, it is necessary to consider:
- (1) whether the misconduct offence really does encapsulate a harm or moral wrongfulness which is distinctive from the harms and wrongs in the other offences; and
 - (2) whether that distinctive harm/wrong merits criminalisation.
- 5.39 By way of example, if the CEO of a defence contractor, V, offers a senior civil servant a personal payment in order to ensure that his or her company obtains a lucrative defence contract, V could be charged with bribery. The actions of the CEO are indeed harmful. It has been argued that bribery is harmful to society because it corrupts political and commercial life by inviting inappropriate grounds for decision making. In terms of the moral wrongfulness of the CEO's conduct, V has induced another to breach a duty of loyalty by offering them something of value in return for doing so.³⁹⁶
- 5.40 Given that the CEO does not hold a public office, he or she could not be charged with misconduct in public office. The senior civil servant who accepts the bribe, on the other hand, could not only be charged with bribery but also with misconduct in public office. This example highlights the issue: does the civil servant's conduct involve harms and/or wrongs that are sufficiently distinct from those of the CEO. If so, the question arises whether such harms and wrongs justify the existence of a separate offence (in this case an alternative to bribery) that only applies to those who occupy a public office, or whether, in the example given, the offence of bribery sufficiently encapsulates the senior civil servant's wrongdoing.
- 5.41 It could be argued that there is something sufficiently distinctive about the moral content of the behaviour that is currently prosecuted as misconduct in public

³⁹⁵ Stuart P Green, "Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offences" (1997) 46 *Emory Law Journal* 1533.

³⁹⁶ For discussion, see Stuart P Green, "What's Wrong With Bribery" in R A Duff and Stuart P Green (eds) *Defining Crime: Essays on the Special Part of the Criminal Law* (2005).

office that is not encapsulated by an offence of general application, such as bribery.

- 5.42 If the senior civil servant accepts payment from a defence contractor in order to ensure the contractor is awarded a lucrative contract, he or she could be charged with misconduct in public office. The civil servant occupies a public office and has committed a serious breach of one of the duties intrinsic to that office. As we have explained elsewhere, the public have a legitimate expectation as to how public office holders will perform duties associated with state functions they are engaged in. Further, as we discuss in Chapter 4, whilst not every failure to attain the requisite standard of conduct will warrant condemnation and criminal punishment, some will.³⁹⁷
- 5.43 If we accept that there are cases involving public officer holders that may involve distinctive harms or wrongs, the question then arises whether those distinctive harms or wrongs merit criminalisation.
- 5.44 If a public office holder commits a serious breach of a determinative duty, it could be argued that this is a distinct form of wrongdoing because it is an abuse of the trust the public implicitly places in those who hold public office. “Abuse of trust” was also the language emphasised in *AG’s Reference*.³⁹⁸ It is difficult, however, to define what the concept of “abuse of trust” covers.
- 5.45 Academic scholars have sought to clarify the concept. For example, David Hoekema has argued that not all abuses of trust are, or should be, deserving of punishment. The breaches of trust that Hoekema believes ought to be criminalised are those that take place in the context of “involuntary trust relationships”. For him, the less voluntary the trust relationship (on the part of the person placing trust in another), the greater the interest the state has in preserving and enhancing trust within it. It is this, rather than the gravity of the harm caused, that justifies punishment. Hoekema argues that the reason the law does not punish a failure to take a friend to hospital, for example, is that it is not interested in the degree to which one relies on friends and other intimates. The law’s interest is in preserving the trust upon which contractual and other non-intimate relationships are contingent. This is characterised as “the trust that strangers extend to each other in order to make life in society possible”.
- 5.46 We consider that this has resonance when considering the wrongdoing involved when a public office holder commits a serious breach of a determinative duty. The trust that citizens place in public office holders is not voluntary, suggesting that this is a trust relationship the state has a significant interest in preserving and enhancing.
- 5.47 It is for this reason it could be argued there is a distinct wrong committed when a holder of public office commits a serious breach of a determinative duty. It can also be argued that such a wrong merits criminalisation and separately from an offence of general application, such as bribery or fraud.

³⁹⁷ As we explain earlier, criminalisation may be appropriate when the breach is a serious one and is reckless.

³⁹⁸ [2004] EWCA Crim 868, [2005] QB 73.

FAIR LABELLING

- 5.48 According to James Chalmers and Fiona Leverick, fair labelling is “concerned with the way in which the range of behaviours that is deemed to be criminal is divided into individual offences”.³⁹⁹ It is also concerned with “the names or shorthand descriptions that are attached to these offences for recording purposes.”
- 5.49 One of the considerations often taken to underpin fair labelling is the need to differentiate between different forms of wrongdoing. As a result of this it is necessary to determine how narrow the categorisation of offences has to be in order to be considered “fair”. Chalmers and Leverick argue that to answer this question it is necessary to consider why labelling matters. They suggest a number of reasons why fair labelling is considered to be an important principle of the criminal law.
- 5.50 It is generally accepted that one important consideration in this regard is the merit of particularity versus breadth. Chalmers and Leverick suggest that broad labels can conflict with the fair labelling principle. This is because such offences undermine why fair labelling is considered to be a foundational principle of the criminal law. They also recognise, however, that defining offences at too high a level of detail is equally problematic, because it overcomplicates the law.
- 5.51 Another relevant consideration is the need to ensure that the label communicates the seriousness and emphasises the wrongdoing of the offender’s conduct. If the offence is defined in broad terms, then it might not communicate the seriousness of the offender’s conduct and it may be difficult to ascertain the precise nature of the offender’s wrongdoing.
- 5.52 As we have already explained, in the vast majority of cases, an individual who has been charged with misconduct in public office could be charged with a better defined statutory offence. These offences are, however, of more general application than misconduct in public office: they are not confined to holders of public office.
- 5.53 It is necessary to consider the extent to which these better defined statutory offences of general application symbolise the degree of condemnation that should be attributed to a public holder who commits a serious breach of a determinative duty more accurately than the broad offence of misconduct in public office.
- 5.54 As discussed above it may be argued that there may be a distinctive wrong inherent in a public office holder committing a serious breach of a determinative duty. If such an individual were simply to be charged with fraud, for example, this might not accurately convey the distinctive nature of the wrong inherent in the fact he or she committed a serious breach of the duties associated with his or her office.
- 5.55 It could be argued, therefore, that an offence that can only be committed by those who hold public office fulfils an important role from the perspective of fair

³⁹⁹ J Chalmers and F Leverick, “Fair Labelling in Criminal Law” (2008) *Modern Law Review* 217.

labelling. This is another reason why retention of some form of misconduct offence might be thought to be justifiable.

Question 10

- 5.56 **Do consultees have any views on whether the offence of misconduct in public office reflects a distinctive wrong?**

Question 11

- 5.57 **Do consultees have any views on whether the offence of misconduct in public office fulfils an important role from the perspective of fair labelling?**

THE TORT OF MISFEASANCE IN PUBLIC OFFICE

- 5.58 The criminal offence of misconduct in public office also overlaps with the corresponding tort of misfeasance in public office. Generally speaking, it will be the more serious instances of wrongdoing that are prosecuted: those that cannot adequately redressed through compensation alone. However, there will be overlaps with the tort as there are with many other crimes, as for example with false imprisonment, which as a crime overlaps with the tort of the same name.
- 5.59 As noted in Chapter 2, for a civil action of misfeasance to succeed there must be proof of damage. Therefore, the crime and the tort have different aims and functions. The tort focuses on whether a breach of duty by a public office holder has caused harm to another and whether they should be compensated. Conversely, the criminal offence is concerned with culpability of the defendant's conduct. The tort is discussed in detail in Appendix B.

DISCIPLINARY PROCEDURES

- 5.60 Instances of conduct by office holders that are being considered as potentially worthy of prosecution as misconduct in public office will also have implications for the disciplinary regime to which the individual is subject by virtue of his or her office. The lack of clarity and certainty in the definition of the offence may render it difficult to discern a clear dividing line between conduct which should be prosecuted and conduct which could be satisfactorily dealt with by disciplinary sanction.
- 5.61 General overlap between criminal and disciplinary processes is a relatively modern phenomenon. This is equally true of the overlap for misconduct. Historically, public officers would have been answerable directly to Parliament, the executive or the judiciary and their functions and duties would have been laid down in statute.⁴⁰⁰ Since 1900 there has been mass proliferation of administrative regulation and the increased delegation of functions by the state. This has made

⁴⁰⁰ See A Ogus, *Regulation: Legal Form and Economic Theory* (1994). Also see Appendix A.

direct control by the state of public officers much more difficult and has led the state to create new ways of ensuring accountability.⁴⁰¹

5.62 Formal industrial and professional regulation, disciplinary processes and standards are a creation largely of the latter half of the 20th century. Usually these consist of:

- (1) legislation containing overarching objectives and principles and establishing supervisory bodies;
- (2) statutory instruments setting out more detailed regulations as to the processes to be followed;
- (3) codes of practice defining duties and establishing standards; and
- (4) guidance as to how these should be applied.⁴⁰²

5.63 In many instances these processes are adequate to deal with the alleged wrongdoing. The question arises: when is it necessary to rely on the criminal law, and in particular the misconduct offence, rather than (or in addition to) these disciplinary measures?

5.64 It is clear, as the law currently stands, that not every instance of misconduct would or should trigger criminal liability. That would be disproportionate. As the court observed in *Shum Kwok Sher*:

There must be a serious departure from proper standards before the criminal offence is committed; and a departure not merely negligent but amounting to an affront to the standing of the public office held. The threshold is a high one requiring conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder. A mistake, even a serious one, will not suffice.⁴⁰³

Drawing a line

5.65 There are three broad categories of conduct which show the potential extent of the overlap between criminal and disciplinary misconduct proceedings. Where a public officer holder 's misconduct⁴⁰⁴ can and should be dealt with

⁴⁰¹ In the 19th century this led to the creation of administrative tribunals, see C Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (2006). Since the 1960s it has also led to the creation of the Ombudsman system, see T Buck et al, *The Ombudsman Enterprise and Administrative Justice* (2011).

⁴⁰² A Ogus, *Regulation: Legal Form and Economic Theory* (1994).

⁴⁰³ *Shum Kwok Sher* [2002] 5 HKFAR 381. For further discussion on the problems with over-criminalisation and on the principle of minimum criminalisation see A Ashworth and J Horder, *Principles of Criminal Law* (7th ed 2013) pp 22 to 23 and 52. Also D Husak, *Overcriminalization: the Limits of the Criminal Law* (2008).

⁴⁰⁴ Most regulations and codes distinguish here between unsatisfactory performance and breach of duty with the former always falling within (2) and the latter potentially falling within either (2), (3) or (4).

- (1) by way of disciplinary processes alone, for example a police officer who is regularly late for his or her shift.
 - (2) by disciplinary processes but which *could* also amount to a criminal offence and be the subject of prosecution, for example a soldier who is drunk and disorderly within an army base.
 - (3) by *both* disciplinary processes and criminal prosecution, for example a judge sexually assaulting a member of court staff.⁴⁰⁵
- 5.66 In category (3) in addition to any narrower statutory offences that might be charged there is the potential for misconduct in public office charges. A breach such as this is likely to be serious enough to reach the “abuse of public trust calculated to injure the public interest” threshold set down in *AG’s Reference*.⁴⁰⁶
- 5.67 Some cases in category (2) might also warrant prosecution for misconduct in public office.
- 5.68 However, as we discuss in Chapter 2, we consider that the offence of misconduct in public office lacks definition and is difficult to assess in practice when it might apply. Even where an organisation, considering whether or not a criminal referral for misconduct in public office is necessary, has produced its own guidance as to what amounts to misconduct, gross misconduct and possibly a criminal charge, it will be a difficult decision to make given the current lack of clarity in the law.

The decision to prosecute

- 5.69 When the disciplinary investigation into an office holder’s alleged misconduct leads to the conclusion that referral to the police, or another investigation agency, is necessary, that investigation will generate the evidence which will feed into a criminal investigation. Internal investigators and the relevant police/investigatory agency will then consult as to whether there is sufficient evidence for the matter to be referred to the Crown Prosecution Service (or other appropriate prosecution authority) for a charging decision, or whether additional investigation is required.
- 5.70 The guidance on the exercise of prosecutorial discretion contained in the Code for Crown Prosecutors,⁴⁰⁷ as to whether or not allegations of criminal conduct should be prosecuted, applies to all prosecution agencies. The Code Prosecutors sets out a two stage test (the “full code test”):
- (1) Is there sufficient evidence to provide a realistic prospect of conviction?
 - (2) Is a prosecution required in the public interest?

⁴⁰⁵ Most disciplinary regulations and codes distinguish between unsatisfactory performance and breach of duty, with the former always falling within (1) and the latter potentially falling within either (1), (2) or (3).

⁴⁰⁶ [2004] EWCA Crim 868, [2005] QB 73.

⁴⁰⁷ CPS *Code for Crown Prosecutors* (7th ed January 2013).

- 5.71 The existence of prosecutorial discretion provides an opportunity to ensure that not every alleged instance of misconduct that gives rise to disciplinary proceedings is automatically treated as the crime of misconduct in public office.
- 5.72 In applying the full code test, prosecutors will also have regard to the published CPS charging guidance for misconduct in public office, which likewise states that “the Court of Appeal has made it clear that the offence should be strictly confined”.⁴⁰⁸

The evidential test

- 5.73 All of the elements of the misconduct offence must be considered by the CPS when making a decision whether there is sufficient evidence to provide a realistic prospect of conviction. This is not a straightforward task in light of the current difficulties with defining the current offence. Particular problems are caused by the application of the “seriousness threshold” of the current misconduct offence. This requires the CPS to consider whether there is sufficient evidence to prove that an accused’s conduct “had the effect of harming the public interest”.
- 5.74 As described in Chapter 2, there are many factors that may be relevant to this element. Potential considerations are the likely consequences of the conduct and the defendant’s motive. In theory the assessment of “seriousness” should operate as one filter by which certain types of misconduct fall outside the criminal law.⁴⁰⁹ As the Lord Chief Justice stated in the recent case of *Chapman*:

The jury must, in our view, judge the misconduct by considering objectively whether the provision of the information by the office holder in deliberate breach of his duty had the effect of harming the public interest. If it did not, then although there may have been a breach or indeed an abuse of trust by the office holder vis à vis his employers or commanding officer, there was no abuse of the public’s trust in the office holder as the misconduct had not had the effect of harming the public interest. No criminal offence would have been committed.⁴¹⁰

- 5.75 The lack of certainty as to the definition of this element means that in practice this is likely to be ineffective.

The public interest test

- 5.76 It has never been the rule that a prosecution must automatically take place once the evidential stage is met.⁴¹¹ In relation to the second limb of the full code test, there are a number of factors a prosecutor should consider to determine where the public interest lies:

- (1) How serious is the offence?

⁴⁰⁸ http://www.cps.gov.uk/legal/l_to_o/misconduct_in_public_office/ (last visited 13 January 2016).

⁴⁰⁹ See Chapter 2.

⁴¹⁰ *Chapman* [2015] EWCA Crim 539, [2015] 2 Cr App R 10 at [36].

⁴¹¹ CPS Code, paras 4.7 to 4.8.

- (2) What is the level of culpability?
 - (3) What are the circumstances of the offence, and the harm caused?
 - (4) Was the suspect under the age of 18 at the time of the offence?
 - (5) What is the impact on the community?
 - (6) Is prosecution a proportionate response?
 - (7) Do sources of information require protecting?
- 5.77 This test applies to the consideration of any criminal offence referred to the Crown Prosecution Service, but additional considerations apply where misconduct in public office and its associated overlap with disciplinary sanctions is being considered.
- 5.78 The proportionality of a prosecution is an important consideration. It cannot always be assumed that criminal prosecution is the more onerous sanction. Disciplinary processes can result in potentially very severe sanctions. Sanctions can include dismissal, disqualification or exclusion from holding public office in the future. A criminal conviction or a police caution⁴¹² meanwhile will not necessarily result in dismissal or disqualification. A Member of Parliament, for example, will not be disqualified and subjected to the mandatory re-election procedure unless: convicted of an offence and sentenced to imprisonment for more than 12 months, or where the misconduct relates to corrupt election practices.⁴¹³ In some cases the prospect of disciplinary sanction may weigh heavily as a factor in the public interest assessment.
- 5.79 Additionally, any of the public interest factors considered by prosecutors when exercising their prosecutorial discretion are factors that are relevant to the consideration of whether the conduct is serious enough to amount to an abuse of the public's trust for the purposes of that element of the offence of misconduct in public office.⁴¹⁴ It is clear that many of the same considerations are required under both the evidential test, regarding the seriousness threshold, and the public interest test.⁴¹⁵

⁴¹² MOJ statistical data show that at least seven persons received a police caution for misconduct in public office between 2010 and 2014. Our own research, however, has concluded that at least 14 persons were cautioned for the offence within this period.

⁴¹³ Representation of the People Act 1981, s 1 and Representation of the People Act 1983, s 173.

⁴¹⁴ See Chapter 2.

⁴¹⁵ See D Lusty, "Misconduct in Public Office" [2009] 173 *Criminal Law & Justice Weekly* 437, on how the circumstances of leaked information could be considered in prosecutorial decision making. Misconduct in public office is not the only offence where there is double consideration of a seriousness threshold. This also occurs in other offences involving a breach of duty, such as gross negligence manslaughter, where it is for the jury to decide whether the breach of the duty owed to the deceased is gross or serious enough to trigger criminal liability. See *Misra* [2005] 1 Cr App R 21, [2005] Crim LR 234, where the court agreed with the direction by the judge that the term "reprehensible" would be apt to describe the nature of the conduct.

5.80 In relation to misconduct in public office, this double consideration recognises the need for care when assessing whether or not a public officer holder has committed a criminal offence. Such people need to be able to act in good faith and use appropriate discretion without fear of unmerited criminal sanction.

To punish as a criminal, any person who in the gratuitous exercise of a public trust may have fallen into error or mistake belongs only to the despotic ruler of an enslaved people [...]⁴¹⁶

5.81 In *AG's Reference*, Lord Justice Pill acknowledged the influence of such factors, stating that a "failure to confine the test of misconduct as now proposed, would place a constraint upon the conduct of public officers in the proper performance of their duties which would be contrary to the public interest".⁴¹⁷

5.82 It should also be noted that misconduct in public office is not an offence which requires the consent of the Director of Public Prosecutions. Such consent requirements seek to secure consistency in prosecution decision-making. They also prevent abuse or the law being brought into disrepute⁴¹⁸ and enable account to be taken of mitigating factors which may vary so widely from case to case that they are not susceptible to statutory definition. In addition, such provisions provide some central control over the use of the criminal law when it has to intrude into areas which are particularly sensitive or controversial and also ensure that prosecution decisions take account of important considerations of public policy.⁴¹⁹

5.83 In the case of misconduct in public office these considerations are incorporated to an extent into the consideration of seriousness, even though no consent is required before prosecution, and will also form part of the public interest test.

5.84 The practical question is how disciplinary bodies and prosecution authorities apply these filters in assessing which cases should be subject to prosecution. Any assessment necessarily involves a difficult weighing up of those factors that make the offence more serious against those that make it less so. Internal guidance provided by regulators, independent complaint services and disciplinary bodies will play a large part of such decision making. It is important for internal investigators and disciplinary staff to have a proper understanding of the considerations of the prosecution tests. This will enable them to make appropriate referral decisions and not waste resources.

5.85 Prosecutors, police, internal investigators and policy staff will be required to work closely together to make robust decisions in individual cases. It is inevitable, however, that in dealing with "borderline" cases prosecutors and staff with organisational responsibility for discipline will sometimes disagree. In some cases, internal investigators may believe strongly that a particular public officer

⁴¹⁶ *Borron* (1820) 106 ER 721, 3 B & Ald 432 at 434.

⁴¹⁷ *AG's Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73.

⁴¹⁸ Particularly where the offence is a kind which may result in vexatious private prosecutions. See *Consents to Prosecution* (1998) Law Commission Report LC 255, para 5.14.

⁴¹⁹ CPS guidance on consents to prosecute, http://www.cps.gov.uk/legal/a_to_c/consent_to_prosecute/ (last visited 13 January 2016).

should face criminal prosecution. In contrast the prosecution may determine, following independent analysis, that the case is either insufficiently serious to reach the evidential threshold or that it is not in the public interest to prosecute under the Code for Crown Prosecutors.⁴²⁰ In some cases the opposite result may occur, particularly where the misconduct in question comes to the prosecutor's notice by way of an external referral.

5.86 Our discussions with stakeholders have highlighted particular issues that can arise from the decision making process. These are:

- (1) Whether the criminal law can legitimately be extended to cover conduct that might otherwise not reach the current "seriousness" threshold for misconduct in public office.
- (2) Whether the current law fails to provide a clear guide as to when a prosecution should be brought and therefore generates inconsistency in decision making about prosecutions of different groups of public officers and types of conduct.
- (3) Whether the criminal process is relied upon by certain sectors to "fill the gaps" where disciplinary processes and standards for public office holders are either not as robust as they might be or where they do not apply to certain types of office holder.

NOMS: an example of the challenges faced

5.87 The difficulties experienced by stakeholders can be highlighted through the use of an example. We consider that this would serve two purposes:

- (1) To illustrate the impact felt by certain bodies, involved in the investigation of misconduct by public office holders, as a result of the uncertainty in the law; and
- (2) To illustrate the practical implications of negotiating the dividing line between internal disciplinary proceedings and criminal prosecution.

5.88 A good example of an organisation which deals with these decisions on a regular basis is the National Offender Management Service (NOMS)⁴²¹. Recent years have seen a large number of prosecutions brought against prison officers and other prison staff members.⁴²² Our research indicates that in 2014 these usually involved either prison officers engaged in relationships with prisoners or the sale of information to journalists. A number of these prosecutions have been the subject of criticism in respect of the gravity of the misconduct prosecuted.⁴²³

⁴²⁰ CPS, *The Code for Crown Prosecutors* (7th ed January 2013).

⁴²¹ NOMS oversee the running of HM Prison Service and the National Probation Service.

⁴²² See Appendix D.

⁴²³ For example, see *King* [2014] 1 Cr App R (S) 462 (73), [2014] 21 *Criminal Law Week* 10.

- 5.89 From preliminary consultation with NOMS, it is clear that the decision as to whether an individual's misconduct should be referred for criminal prosecution, specifically as misconduct in public office, causes significant practical problems.

Internal Procedures

- 5.90 All prison service staff directly employed by NOMS are subject to various professional standards.⁴²⁴ Key amongst these is the Prison Service Instruction on Conduct and Discipline ("the Instruction"), which includes the Professional Standards Statement ("the Statement"), provides detailed guidance on areas of misconduct.⁴²⁵
- 5.91 The Instruction is specific to the behaviour of prison staff. It provides that there are seven "NOMS Values" applicable to the work of the Service and all staff are expected to act in accordance with them. The Instruction goes on to outline what would amount to a breach of acceptable standards of behaviour applying those values.⁴²⁶
- 5.92 The Instruction sets out the mandatory requirements for internal investigations into alleged breaches of the required standards of behaviour by those directly employed by NOMS. The disciplinary investigation culminates with a formal assessment being made as to whether the behaviour in question would constitute either "misconduct" or "gross misconduct".⁴²⁷
- 5.93 The Instruction makes clear that not every breach of the required standards will lead to formal disciplinary action but sets out a number of examples of what could constitute misconduct for disciplinary purposes. The examples conclude with "any behaviour which is not specifically mentioned [...] but which is in clear breach of established standards of conduct expected of members of staff".
- 5.94 "Gross misconduct" is defined as misconduct that is serious enough to "make any further relationship and trust between NOMS and the member of staff concerned impossible", and therefore, ends any contract between them. There are a number of available sanctions falling short of dismissal for those found to have committed either misconduct or gross misconduct. Staff can however, be dismissed without notice for a first offence of gross misconduct. In determining what level of misconduct the alleged behaviour constitutes, the Instruction requires that the

⁴²⁴ Including the staff handbook which is founded on the numerous Prison Service Orders and Prison Service Instructions, which regulate the operation of the prison service and the Civil Service Code.

⁴²⁵ National Offender Management Service, *Prison Service Instruction on Conduct and Discipline PSI 06/2010* (July 2013).

⁴²⁶ There are also specific provisions as to certain types of conduct found in NOMS, *Prison Service Instruction on Conduct and Discipline PSI 06/2010* (July 2013); NOMS, *Conveyance and Possession of Prohibited Items and Other Related Offences PSI 10/2012* (March 2012); and HM Prison Service, *Anti-Fraud Strategy Prison Service Order PSO 1310* (April 2008). Staff are also under a duty to report wrongdoing by others under NOMS, *Reporting Wrongdoing PSI 21/2013* (December 2014).

⁴²⁷ If at an early stage the line manager or investigator concludes that the behaviour was concerned solely with unsatisfactory performance then it would fall to be dealt with under the Prison Service performance management policy. The level of misconduct determines the form of the disciplinary hearing that will occur.

member of staff's current disciplinary record and any existing penalties for the same type of misconduct should be considered.

- 5.95 If evidence of a possible criminal offence comes to light during an investigation, or if an allegation of a criminal offence is made against a member of staff, the regulations require the internal investigator and a relevant manager to liaise regarding the necessity for referral to the police. The Instruction includes no criteria or guidance as to how such a necessity should be determined.⁴²⁸
- 5.96 In relation to misconduct in public office, we have highlighted that there are two clear challenges to an organisation's ability to accurately assess whether a prosecution should be brought. These are whether the misconduct alleged is serious enough, and whether it would be in the public interest to pursue a criminal conviction.⁴²⁹

Seriousness

- 5.97 Particular difficulty in assessing the seriousness of a breach of duty in the context of the prison service lies in the fact that in almost every case the potential consequences will be very serious. The development of a personal relationship, for example, between a staff member and a prisoner creates a significant conflict of interest with the staff member's duty to enforce prison rules and discipline. Such a relationship opens the staff member to persuasion, or exploitation, to act in a manner contrary to prison rules and discipline and therefore, to corruption. This creates a security risk in a system where security is integral to the functions being performed. This was the case in *Cosford*.⁴³⁰
- 5.98 However, even acknowledging the potential gravity of any misconduct in such an environment, there must be a threshold below which the behaviour concerned can be adequately dealt with through disciplinary processes.
- 5.99 An example of a case which has received criticism⁴³¹ as to the gravity of the conduct concerned is *King*.⁴³² Rebecca King was a prison officer who had begun a relationship with an ex-prisoner. She did not report this to her superiors. When King's partner was later arrested and held on remand, at a prison where King did not work, she continued regular telephone contact with him. Contact was via a mobile phone her partner had obtained in prison and which he would credit with

⁴²⁸ Where a member of staff is convicted of a criminal offence outside the workplace, internal disciplinary action will depend on the circumstances leading to the police investigation and/or court appearance and its subsequent conclusion will be determinative. An investigation may not be necessary and the summary dismissal procedure may be used.

⁴²⁹ We also understand from NOMS that the lack of clear definition of public office also causes significant difficulty in relation to predicting the result of the evidential test. *Cosford* is an example of a case in which an individual working in a prison who was not a prison officer was found to be in public office. This is often a difficult matter to predict.

⁴³⁰ [2013] EWCA Crim 466, [2014] QB 81.

⁴³¹ J Richardson QC, "Misconduct in public office: comment" [2014] 21 *Criminal Law Week* 10.

⁴³² [2014] 1 Cr App R (S) 462 (73), [2014] 21 *Criminal Law Week* 10.

“top up” codes King purchased and sent to him via text message.⁴³³ King was charged with misconduct in public office in relation to her unauthorised contact with her partner and her financing of his mobile phone.⁴³⁴

The public interest test

5.100 In some cases relating to relationships between prison staff and inmates, we are aware of instances where it was decided not to prosecute the staff member for misconduct in public office. This may have been because the officer resigned prior to the charging decision being made and therefore it could be argued that a prosecution was not a proportionate response.⁴³⁵ However, it is not clear to what extent the prosecution authorities take into account the fact that an officer may no longer pose a risk to the NOMS environment, as a result of having either resigned or been dismissed following disciplinary action, when exercising prosecutorial discretion. This uncertainty poses additional problems for the investigators making the referral decision.

5.101 There is some concern therefore, as to:

- (1) whether there is inconsistency in assessing whether a case might be serious enough to satisfy evidentially the seriousness element of the offence (because of a lack of legal clarity on this issue); and
- (2) whether there is inconsistency in assessing whether the public interest is best met through disciplinary measures or criminal sanction.

STAFF NON-DIRECTLY EMPLOYED BY NOMS

5.102 There are further issues faced in light of increasing privatisation and use of contractors. This is a problem faced by NOMS, in addition to other organisations. NOMS have raised particular concerns regarding the difficulty in holding to account those who are “non-directly employed”⁴³⁶ by them, and therefore not subject to NOMS standards and disciplinary procedures.⁴³⁷ This may be because

⁴³³ There were three misconduct charges in total. For two of these she was sentenced to 12 months’ imprisonment and for the third she was sentenced to three years’ imprisonment (all concurrent). This sentence was later reduced to 27 months on appeal.

⁴³⁴ King was additionally found in possession of an amount of cash, which she knew or believed to be the proceeds of criminal conduct and charged with concealing criminal property in relation to that money. She received 12 months’ imprisonment for that offence.

⁴³⁵ A number of these cases are referred to in Appendix D.

⁴³⁶ A term used by NOMS. For example, NOMS’ employment relationship with sub-contractors, employees of contractors and agency staff. An example of a “non-direct” worker would be a plumber who is employed by an external plumbing contractor to carry out repairs and maintenance within one or more prisons.

⁴³⁷ NOMS does, however, retain the right to refuse contracted members of staff access to the prison estate, even where staff are not subject to the NOMS code of discipline. NOMS, *Exclusion of Personnel on Grounds of Misconduct PSI 42/2014* (October 2014). This PSI allows for the creation of a list of all directly and non-directly employed NOMS staff and contractors.

the contract does not hold the individual subject to the procedures.⁴³⁸ NOMS suggests that such persons should be subject to prosecution under the misconduct offence so as to fill this gap.

- 5.103 Given that the prospect of disciplinary sanctions or exclusion from the service might be considered relevant to a decision whether or not to prosecute, it may be asked whether other considerations apply when the individual is not a direct subject to the NOMS disciplinary regime.
- 5.104 The question arises: where no disciplinary sanctions are available are those accused of misconduct more likely to be prosecuted? The research we have conducted on this point is inconclusive. However, if the number of prison officers prosecuted, in comparison to the number of other NOMS staff, is any indicator it would appear that the answer is no. Few examples can be found of other NOMS staff prosecuted for misconduct.⁴³⁹
- 5.105 A second question follows: even if it does not at present, *should* the lack of available disciplinary sanction make prosecution more likely to be in the public interest? Difficulties arise in ensuring equal treatment of misconduct committed by those directly employed by NOMS and those not.⁴⁴⁰
- 5.106 These problems pose even greater difficulty, when the public officer is a private contractor performing public functions.

Conclusion on the overlap with disciplinary procedures

- 5.107 This analysis has shown that there is significant difficulty in determining whether particular conduct should be subject of criminal prosecution, or whether disciplinary procedures are sufficient. This may cause inconsistent decision making and wasted resources as the following questions cannot easily be answered:
- (1) When do internal disciplinary procedures consider it appropriate to refer a case to a prosecuting authority?
 - (2) When is a case serious enough to satisfy evidentially the seriousness element of the offence?
 - (3) When does the public interest require a prosecution when a disciplinary sanction is also available?
- 5.108 There are two potential solutions to this problem:

⁴³⁸ In general if the member of staff is not directly employed by NOMS, the Service does not have jurisdiction over the staff member's conduct and discipline. Where issues of conduct are raised against such workers, they are dealt with by their direct employer. There may, however, be contractual terms or local protocols between NOMS and the contractor about how to handle potential misconduct cases.

⁴³⁹ See table of unreported misconduct prosecutions included in Appendix D.

⁴⁴⁰ See A Ludlow, *Privatising Public Prisons: Labour Law and the Procurement Process* (2015) and D Whyte, *How Corrupt is Britain* (2015).

- (1) Improvement of internal disciplinary procedures.⁴⁴¹
- (2) Reform of the law of misconduct in public office.⁴⁴²

Both may be necessary for misconduct to be dealt with proportionately and effectively.⁴⁴³ In the absence of a comprehensive review of the disciplinary regimes for every public office the most that can be stated is that it is possible that the criminal process is relied upon by certain sectors to fill the gaps where disciplinary processes and standards for public office holders are weak or absent, although there is no clear evidence as to this taking place.

⁴⁴¹ Recent political concern as to the effectiveness of police disciplinary procedures in dealing with police misconduct has resulted in a raft of reforms to the existing system. The Home Office consulted on the proposed reforms to the disciplinary system between December 2014 and February 2015: Home Office, *Improving police integrity: reforming the police complaints and disciplinary systems* (March 2015) Cm 9031.

⁴⁴² Concerns regarding police corruption also led to the creation of the new police corruption offence under section 26 of the Criminal Justice and Courts Act 2015. See Chapter 3.

⁴⁴³ In the context of prisons, in the advent of the 2015 general election the Conservative party made a commitment to address corruption in prisons: Conservative Party Manifesto 2015. Additionally, two other major political parties made a similar commitment.

CHAPTER 6

CONDUCT PROSECUTED AS MISCONDUCT IN PUBLIC OFFICE

6.1 In Chapter 5 we consider the alternative forms of redress and accountability that might apply in cases where misconduct in public office is also a potential charge. This chapter considers circumstances where if misconduct in public office were abolished without replacement there would be no other offence available, or at least the offences available would not be as appropriate.

6.2 We deal separately with two categories:

- (1) Conduct that can only be prosecuted as misconduct in public office. Our research suggests that this arises in relation to small number of very narrow categories of conduct.
- (2) Conduct that is prosecuted as misconduct in public office, but could be prosecuted as an alternative criminal offence. This is, we suggest, a more common scenario.

CONDUCT THAT CAN ONLY BE PROSECUTED AS MISCONDUCT IN PUBLIC OFFICE

6.3 We have identified five types of conduct that have been held, in certain circumstances, to constitute misconduct in public office that would not fall within the scope of another offence.

- (1) Public office holders who exploit their positions to facilitate a sexual relationship.
- (2) Public office holders who use their positions to facilitate a personal relationship which may create a conflict with the proper performance of the functions of their office.
- (3) Public office holders who deliberately act in a prejudicial or biased manner or under a conflict of interest.
- (4) Neglect of duty by public office holders which results in serious consequences, or a risk of serious consequences arising.
- (5) Public office holders who fail properly to protect information that comes into their possession by virtue of their positions.

6.4 We will refer to these five types of conduct as conduct that “can only be prosecuted as misconduct in public office”. We emphasise that this is not necessarily an exhaustive list of categories.⁴⁴⁴

⁴⁴⁴ This term is used for convenience. We appreciate and detail below how these categories contain both conduct that can only be prosecuted as misconduct in public office and conduct which can be prosecuted as other offences too.

6.5 It is also worth clarifying that we are not confirming that these forms of conduct ought to be criminalised. Our aim is to highlight to consultees that abolition of misconduct in public office, without replacement, would have the effect of decriminalising conduct that can lead to a criminal conviction under the current law, in certain circumstances.

(1) Public office holders who exploit their positions to facilitate a sexual relationship

6.6 This category involves criminalising a public office holder for misconduct where he or she exploits his or her position to facilitate a sexual relationship.

6.7 We use the term “exploit” to mean that the public office holder makes use of a situation in order to gain an improper advantage for him or herself.⁴⁴⁵ We use this general definition of exploitation because it appears to be the most appropriate way of describing the conduct that is the subject of recent and current prosecutions. There are other technical legal definitions of exploitation in the criminal law, for example under section 3 of the Modern Slavery Act 2015, but these do not assist us in describing what is currently prosecuted under the misconduct offence. Those definitions could, however, assist in shaping the law reform options that will be the substance of our next paper.

6.8 People may exploit the position they hold for a wide variety of reasons. Financial gain is one, which we deal with later in this chapter.⁴⁴⁶ Another strong motivator may be sexual interest. Although instances of exploitative conduct are not limited to those with a sexual element, our research has shown that prosecutions for misconduct based on exploitation of position usually are limited to such conduct.⁴⁴⁷

6.9 While the criminal law may already provide a specific means of addressing the wrongdoing involved in certain types of exploitation by public office holders,⁴⁴⁸ this may not be the case where the exploitative conduct has a sexual purpose.

6.10 Our research shows that convictions for misconduct in public office are commonplace where the public office holder has, or seeks to have, consensual sex with an adult of full mental capacity and the public office holder used his or her position to form that relationship.⁴⁴⁹ This usually happens in one of two ways.

⁴⁴⁵ The relevant Oxford English Dictionary definition of exploitation is: “The fact of making use of a situation to gain unfair advantage for oneself.” Oxford Dictionary, “Exploitation” (Oxford Dictionary) <http://www.oxforddictionaries.com/definition/english/exploitation> (last visited 7 January 2016).

⁴⁴⁶ Para 6.52 and following below.

⁴⁴⁷ See Chapter 1.

⁴⁴⁸ For example, the Fraud Act 2006, s 4 does for cases of financial exploitation.

⁴⁴⁹ We note, however, that given the definition of consent contained in the Sexual Offences Act 2003 s 74 and the recent decision *Ali and Ashraf* [2015] EWCA Crim 1279; [2015] 2 Cr App R 33, it is arguable that at least some of these cases could be prosecuted as either rape or sexual assault under the Sexual Offences Act 2003 because there may be no *genuine* consent.

- (1) Where D meets X whilst carrying out the functions and duties of his or her public office.
- (2) Where D misuses information made available through his or her public office.

6.11 Two examples which draw from typical cases are given below.

Example 1 A police community support officer (“PCSO”) (F) responds to an emergency call from a victim of domestic violence (S). When F’s shift ends, F returns to the address and engages in consensual sexual activity with S. S later complains that he or she only consented because he or she felt obliged given that F was a member of the police.

Example 2 A probation officer (K) uses information obtained through his or her work with the probation service to try to identify vulnerable adults who may be susceptible to sexual exploitation. K uses this information to contact a number of such people with a view to engaging in consensual sexual activity.⁴⁵⁰

6.12 During our preliminary discussion with stakeholders, some regarded the availability of a prosecution for misconduct in public office as important. They included the National Offender Management Service (“NOMS”), the Crown Prosecution Service (“CPS”) and the College of Policing. The most common reasons given for the use of the misconduct offence in such situations are listed below.

- (1) The public office holder’s conduct amounts to “taking advantage of” an adult who has the necessary mental capacity to consent to sexual activity but is nonetheless vulnerable.
- (2) The conduct may have an effect on other matters such as the integrity of prison security or possible prejudice to the administration of justice through the creation of a conflict of interest.
- (3) The relationship may make it more likely that there is further “corruption” of the public office holder and his or her engagement in other criminal offences (such as, perverting the course of justice, the conveyance of prohibited articles into prison or fraud).

6.13 In recent years, the majority of misconduct prosecutions with a sexual context have been brought against members of the police and the prison service, with a

⁴⁵⁰ We note here that in some circumstances this type of conduct could be prosecuted using another offence. For example, if the information came from a public office holder’s misuse of computer systems then it could be prosecuted as an offence under the Computer Misuse Act 1990, ss 1-2. Alternatively, if the officer’s actions involve a course of conduct that amounts to harassment of another then the officer could be prosecuted for an offence of harassment under the Protection from Harassment Act 1997, s 2.

much smaller number of prosecutions brought against probation officers.⁴⁵¹ Similar concerns may also be relevant in other sectors where individuals come into contact with vulnerable persons. Health care, social work and education are examples of professions where this might arise (assuming that the individuals in these roles are public officer holders). However, it should be noted that in those sectors tailored offences are available.⁴⁵²

6.14 The power imbalance in these exploitation cases can work both ways. It may be instinctive to think that the public office holder is the one taking advantage. However, there are also cases where an individual takes advantage of a public office holder. Examples include where a person arrested, a prison inmate or an offender subject to a probation supervision order influences the behaviour of the police, prison or probation worker.⁴⁵³ Where exploitation is on the part of the suspect, inmate or person serving a community sentence, then it may be that the public office holder's breach of duty will neither:

- (1) be considered wilful; nor
- (2) be considered serious enough to constitute misconduct.

6.15 However, even where the exploitation is of the public official, he or she may still be prosecuted if the relationship was conducted in a way that seriously prejudices the duties of that public office. This scenario is discussed below.

(2) Public office holders who use their positions to facilitate a personal relationship which may create a conflict with the proper performance of the functions of their position

6.16 As noted above, there may also be scenarios that can arise where the public office holder commits a wilful and serious breach of duty that merits prosecution under misconduct in public office, but either:

- (1) it is not clear that there is any exploitation involved in the relationship; or
- (2) the exploitation is not being conducted by the public office holder.

6.17 These scenarios usually involve a public office holder who has a duty to report any relationship with a person that has arisen by virtue of his or her position.⁴⁵⁴ For example, in *Cosford*⁴⁵⁵ the nurse who had a relationship with a prisoner was under a duty to report any such relationship to her superiors under the Prison Service Instruction on Conduct and Discipline.⁴⁵⁶ Her claim that she was the victim of exploitation by the inmate in question was rejected as a defence. Her

⁴⁵¹ See Appendix D for tables of relevant prosecutions.

⁴⁵² See for example the Sexual Offences Act 2003, s 16-19, set out in Appendix D.

⁴⁵³ The way in which cases are viewed may sometimes depend on implicit gender bias: that a female prison officer, for example, would be more likely to be subject to the control of a male prisoner while a female prisoner would be more likely to be "taken advantage of" by a male prison officer.

⁴⁵⁴ See Appendix D.

⁴⁵⁵ [2013] EWCA Crim 46; [2014] QB 81.

failure to report the relationship (coupled with her conveyance of prohibited articles into prison for the prisoner) was found to be both wilful and serious in the circumstances.

- 6.18 There are two further examples. First, the type of case illustrated by *King*,⁴⁵⁷ where a prison officer had a relationship with an inmate from another prison, which began before the inmate was imprisoned. The defendant had purchased credit for the inmate's mobile telephone. Secondly, where a police officer engages in a relationship with a witness to an offence that he or she is investigating, and the existence of that relationship itself may compromise the integrity of the prosecution case.
- 6.19 These types of cases, in our opinion, do not fall into the same category of wrongdoing as that discussed above under exploitative relationships. The only link between them is the fact that sexual conduct is involved in each. The cases described under the previous section involve, as we have stated, the public office holder gaining an unfair advantage as a result of his and her position. These latter types of relationship involve either a conflict of interest or the creation of a risk that a conflict might arise.

(3) Public office holders who deliberately act in a prejudicial or biased manner or under a conflict of interest

- 6.20 When considering prejudice, bias or conflict of interest, it is common to do so in relation to public office holders who are decision makers with a duty to act impartially. A judge is one example of such a decision maker who is in public office.
- 6.21 Of course, where misbehaviour by a member of the judiciary amounts to a criminal offence other than misconduct in public office, he or she can be prosecuted for that.⁴⁵⁸ A member of the judiciary can, for example, be prosecuted under the Bribery Act 2010 where he or she accepts a financial or other advantage from another party to act, or with a view to acting, in a particular way.⁴⁵⁹ However, cases where a judge acts on the basis of bias are not limited to those where he or she is given, offered, receives or accepts a financial or other advantage. Cases of bias could also include those where a judge acts partially because of prejudice or a conflict of interest: for example, racism, homophobia, politics or personal animosity.
- 6.22 In respect of judges, we are unaware of any cases where a member of the judiciary has been prosecuted because of impropriety in decision making that is

⁴⁵⁶ See further discussion in Chapter 5.

⁴⁵⁷ *King* [2013] EWCA Crim 1599, [2014] 1 Cr App R (S) 73, also discussed in Chapter 2.

⁴⁵⁸ Most recently see *Briscoe* [2015] EWCA Crim 1334 concerning the conviction of a part-time judge for perverting the course of justice. See also, *Crickmore* [2014] EWCA Crim 1499 (involving a coroner) and Office for Judicial Complaints, *Statement – Mr James Allen QC* (2 November 2011). Judges may also be removed from office as a result of more minor convictions, see Office for Judicial Complaints, *Statement – Mrs Nadine Radford QC* (2 February 2012).

unconnected to obtaining a personal advantage. Such alleged behaviour can, however, be found in Judicial Conduct Investigations Office (“JCIO”) disciplinary statements and the media.⁴⁶⁰ In fact, we are unaware of any prosecutions of members of the judiciary for the misconduct offence since 1966.⁴⁶¹

- 6.23 Allegations of improper decision making, resulting in prosecutions for the misconduct offence, may also arise against other types of public office holders: for example, government ministers; ombudsmen; professional regulators; assessors of state benefits; examiners marking or moderating national examinations; and planning officers. One recent example is the prosecution of three local authority members from Caerphilly, who were alleged to have improperly awarded themselves pay rises.⁴⁶² However, the charges were dismissed following legal argument in court.
- 6.24 The use of the criminal law to prevent prejudice, bias or conflicts of interest from unduly influencing the proper performance of a public office holder’s functions may extend beyond those who make decisions individually. Local councillors, for example, cast votes in meetings – they are not making decisions individually, but their collective vote makes the decision. Further, this category may also include those who have the power to influence decisions.
- 6.25 Where the conduct involved amounts to bribery, any of these office holders may be liable to prosecution under the Bribery Act 2010.⁴⁶³ However, as the Government commented in 1997:

There may also be situations where persons use their position to obtain an unfair advantage for themselves or another, which may fall within the common law offence of Misconduct in Public Office. For example; if an officer of a committee of a local authority influenced or

⁴⁵⁹ Section 2.

⁴⁶⁰ See JCIO, “Disciplinary Statements” (JCIO 2015) <http://judicialconduct.judiciary.gov.uk/975.htm> (last visited 7 January 2016), including the following decisions relating to magistrates: Mr Ayisi-Biney JP for acting in an abusive and threatening way to other members of the tribunal; Mrs Poole JP for failing to declare a personal interest; Mr Sharif JP for making inappropriate comments outside of the courtroom. A further example is the resignation in December 2014 of District Judge Hollingworth, who allegedly made racist comments during a court hearing. Additionally, it has been a number of centuries since a judge has been impeached (tried before Parliament), see discussion in Appendix A.

⁴⁶¹ *Llewellyn-Jones* [[1968] 1 QB 429. Llewellyn-Jones was a County Court registrar (now called a District Judge) who made court orders with the intention of obtaining a personal advantage.

⁴⁶² All three remain under internal investigation. See BBC News, “Charges against Three Caerphilly Council Bosses ‘Dropped’” (BBC News 20 October 2015) <http://www.bbc.co.uk/news/uk-wales-south-east-wales-34583463> (last visited 7 January 2016).

⁴⁶³ Sections 1-2.

encouraged a member to vote in a particular way, the acts would be corrupt but bribery would not necessarily be involved.⁴⁶⁴

6.26 In relation to members of a local authority, section 34 of the Localism Act 2011 now creates specific offences relating to the failure to declare pecuniary interests on taking office and in local authority meetings. These deal, to a limited extent, with financial conflicts of interest in respect of local government officials.⁴⁶⁵

6.27 We can conceive of situations where the conflict involved is not a result of bribery, is not a financial one and/or which involves types of public office holder other than local government officials. Examples include the following (we assume for these purposes that the positions referred to are public offices).

Example 3 In advance of a close run general election, an Ombudsman (W) dismisses a serious complaint, supported by good evidence, against an MP in a marginal seat (Y). W supports the political party Y represents and believes there to be a significant risk that Y will lose the election if W finds Y to have committed a serious breach of professional duty. This belief led the ombudsman to dismiss the complaint.

Example 4 A GCSE examiner (J) is assigned an examination script which is identifiable as that of the son of a close friend. J awards a higher grade than the examination script deserves.

6.28 In neither Example 3 nor Example 4 is bribery committed. Bribery offences require one person to act with the intention of inducing another to act improperly, or to reward another for improper actions. However, both of the examples above demonstrate that a person may act upon, or as a result of, bias and conflict of interest just as easily in cases where no other party either encourages or rewards it. The wrongdoing is the public office holder's alone and the only offence available is misconduct in public office.

6.29 However, as we have stated in previous chapters, it is not the case that every public office holder could be potentially criminally liable every time he or she makes a decision that affects the public interest. There is a long line of case law that establishes, for the purpose of misconduct in public office, that the exercise of discretion will only be criminal if it was exercised for improper motives.⁴⁶⁶ The authorities are quite clear that an official exercising his or her discretion properly will not be prosecuted simply for making an unpopular decision and that neither

⁴⁶⁴ Home Office, *The Prevention of Corruption: Consolidation and Amendment of the Prevention of Corruption Acts 1889 – 1906: A Government Statement* (June 1997) at para 8.58.

⁴⁶⁵ Section 34 is limited in extent because it only applies in relation to financial conflicts of interest of the member him or herself and their spouse or civil partner. One stakeholder indicated that while such cases are not uncommon in local councils, prosecutions under the Localism Act 2011 are rare. A possible view is that any failure to declare a conflict of interest not caught under this act is permissible. In our view, in fact, such conduct could fall under the Fraud Act 2006, ss 1, 4 (fraud by abuse of position).

⁴⁶⁶ See Appendix A for further discussion.

will an official who makes a genuine mistake. We noted previously that decision makers need to be able to act in good faith and use appropriate discretion without fear of unmerited criminal sanction. As Chief Justice Abbott stated in *Borron*:

To punish as a criminal, any person who in the gratuitous exercise of a public trust may have fallen into error or mistake belongs only to the despotic ruler of an enslaved people [...]⁴⁶⁷

(4) Neglect of duty by public office holders which results in serious consequences, or a risk of serious consequences arising

- 6.30 The fourth category of case we identify as criminal only by virtue of the offence of misconduct in public office is where a public officer neglects his or her duty in circumstances where serious consequences, or a risk of serious consequences, arise.
- 6.31 The most commonly cited misconduct cases concerning neglect of duty are those where death results, for example *Dytham*⁴⁶⁸ and *AG's Reference*.⁴⁶⁹ There are recent examples where a death has occurred in police or prison custody, and misconduct in public office was charged. As an illustration, the case of *Percy* concerned a husband and wife, both employed as prison officers, who failed to ensure proper checks were carried out on a prison inmate, who committed suicide.⁴⁷⁰ We are also aware of cases arising where manslaughter and misconduct are tried together on the same indictment.⁴⁷¹
- 6.32 One reason for using the misconduct offence in such cases may be because it is broader than other alternative offences,⁴⁷² including gross negligence manslaughter. Gross negligence manslaughter requires proof of an obvious risk of death arising from the defendant's actions.⁴⁷³ In some cases this will not be capable of being proved. Some stakeholders have expressed to us the view that misconduct in public office serves an important role in these circumstances to

⁴⁶⁷ *Borron* (1820) 106 ER 721, 3 B & Ald 432 at 434.

⁴⁶⁸ *Dytham* [1979] QB 722, [1979] 3 WLR 467.

⁴⁶⁹ *AG's Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73.

⁴⁷⁰ They received 12 month suspended sentence orders in September 2012: BBC News, "Preston Cell Death Officers Given Suspended Sentences" (BBC News 27 September 2012) <http://www.bbc.co.uk/news/uk-england-lancashire-19748290> (last visited 7 January 2016).

⁴⁷¹ For example, CPS, "Police Officers Charged Following Death of Thomas Orchard in Exeter" (CPS 17 December 2014): http://www.cps.gov.uk/news/latest_news/police_officers_charged_following_2012_death_of_thomas_orchard_in_exeter/ (last visited 7 January 2016). Often, in such cases, the offence of police misconduct under Criminal Justice and Courts Act 2015, s 26 would not apply as the defendant is not a police constable but a civilian custody detention officer.

⁴⁷² Other offences may also be available regarding particular types of duty situations. For example, the offence of "ill treatment or wilful neglect by a care-worker" under the Criminal Justice and Courts Act 2015, s 20 and the offence of "cruelty to persons under 16" under the Children and Young Persons Act 1933, s 1". See further examples in Appendix D.

⁴⁷³ For discussion of the elements of gross negligence manslaughter see D Ormerod and K Laird, *Smith and Hogan's Criminal Law* (14th ed 2015) p 636 and following. In respect of the risk needing to be one of death see *Yaqoob* [2005] EWCA Crim 2169.

avoid gaps in the law where the breach of duty involved was sufficiently serious to warrant criminal punishment.⁴⁷⁴

- 6.33 However, other stakeholders are ambivalent as to whether the prosecution would be necessary in cases where there was no obvious risk of death and hence gross negligence manslaughter was not an available charge. They regard disciplinary sanctions as an appropriate penalty in such cases.⁴⁷⁵ Arguably, if the misconduct offence is used in cases where the negligent conduct does not reach the high threshold for gross negligence manslaughter, it is being used to circumvent the important qualifications integral to that offence.
- 6.34 Aside from cases in which the neglect leads to death, some stakeholders have raised particular concerns about the need for a criminal offence in two scenarios. First, cases where, although no death occurs, serious physical harm results, or where there is a risk that such consequences could result. Secondly, cases where serious consequences other than physical harm do occur, or are at risk of occurring.
- 6.35 In those circumstances we have found a number of examples where misconduct could be prosecuted in the absence of any other offence. In each example given below the public office holder is assumed to be acting with subjective recklessness as to the existence or risk of serious consequences occurring, the fault element of misconduct in public office.

Example 5 A prison governor (E) is made aware of allegations of ongoing systematic abuse occurring in the prison. E fails to take any action to investigate the allegations or otherwise prevent the alleged abuse from occurring with the result that more people are physically and psychologically harmed.⁴⁷⁶

- 6.36 A final example of misconduct involving neglect of duty is that where a public office holder takes unauthorised time off work. A striking illustration of this is *Giff* which concerned an armed diplomatic protection group police officer who left his patrol to have sex with his lover.⁴⁷⁷ At the trial, HHJ Anthony Pitts held that the

⁴⁷⁴ This is also the case where it may not be possible to prove manslaughter because of issues of causation. In *AG's Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2004] QB 73 at [64], Pill LJ said, as a non-binding part of his judgment, that a charge of misconduct in public office should not be "routinely added, as an alternative" to the indictment in every case of gross negligence manslaughter "on the basis that it might be difficult to establish causation" for the latter.

⁴⁷⁵ In addition, health and safety offences or, if the perpetrator is a corporation, the offence of corporate manslaughter could be used in some cases. For the latter, see Corporate Manslaughter and Homicide Act 2007, s 1.

⁴⁷⁶ The then Director of Social Services for South Glamorgan was prosecuted for misconduct in public office in such circumstances in 1999: Local Government Chronicle, "Ex South Glamorgan Social Services Director Faces Trial" (LGC 26 February 1999) <http://www.lgcplus.com/ex-south-glamorgan-social-services-director-faces-trial/1429153.article> (last visited 7 January 2016). He was acquitted by the jury on the facts of the case.

⁴⁷⁷ BBC News, "Diplomatic Protection Officer Jailed for Sex on Duty" (BBC News 18 March 2013) <http://www.bbc.co.uk/news/uk-england-london-21832148> (last visited 7 January 2016).

wrongdoing was the compromising of Giff's ability to respond to emergency calls.⁴⁷⁸ This type of misconduct is not dependent on what the public office holder is doing when neglecting his or her duty.⁴⁷⁹

(5) Public office holders who fail properly to protect information that comes into their possession by virtue of their positions

- 6.37 Misconduct in public office is also charged when public officers fail to properly protect information that comes into their possession by virtue of their position.
- 6.38 The misconduct offence overlaps with statutory offences that criminalise the misuse of information. Such offences fall into one of two categories: those that depend upon the information falling into a protected category or those that do not.
- 6.39 However, despite the availability of statutory offences directed at those who fail properly to protect information, there are still cases where misconduct in public office is charged because it is the only offence that can be. Such cases occur because each of the different relevant statutory regimes have specific limitations.
- 6.40 The offences contained within the Computer Misuse Act 1990 criminalise a broad range of information misuse provided the information is stored digitally.⁴⁸⁰ These offences are limited in a number of ways, however. For example, they are not applicable when the individual in question had authorisation to access the relevant information stored on the computer, albeit for a different reason.⁴⁸¹ This is not a limitation placed upon the operation of the misconduct offence.
- 6.41 There are two further statutory regimes that criminalise the misuse of information that are of relevance here: the Data Protection Act 1998 and the Official Secrets Act 1989. These are in one sense narrower than the offences contained in the Computer Misuse Act 1990, since they only encompass certain categories of protected information.
- 6.42 First, by virtue of section 55 of the Data Protection Act 1998 it is an offence to knowingly or recklessly obtain or disclose either personal data or the information contained in personal data; or to procure the disclosure to another person of the information contained in data.⁴⁸² Under section 55, it is also an offence to offer to sell personal data procured in these circumstances.
- 6.43 Likewise, the Official Secrets Act 1989 contains a number of offences that criminalise the unauthorised disclosure of specified categories of protected

⁴⁷⁸ See further discussion in Chapter 2.

⁴⁷⁹ It would, for example, be equally applicable if the police officer neglected his or her duties to go shopping.

⁴⁸⁰ As amended by the Serious Crime Act 2015 part 2. See D Ormerod and K Laird, *Smith and Hogan's Criminal Law* (2015) ch 30.

⁴⁸¹ See *DPP v Bignell* [1998] 1 Cr App R 1, [1998] Crim LR 53.

⁴⁸² See P Carey, *Data Protection: A Practical Guide to UK and EU Law* (2015). The maximum penalty for this offence is a fine not exceeding the statutory maximum (£5,000).

information.⁴⁸³ The use of misconduct in public office to prosecute the misuse of information is not, however, restricted to particular categories of information.

- 6.44 Additionally, most of the offences under the Official Secrets Act are in one sense narrower again than those contained in the Data Protection Act, since they can only be committed by specified categories of person.
- 6.45 It may be the case that, although the individual was in public office, he or she did not come within one of the categories of office regulated by a particular offence in the Official Secrets Act 1989. For example, section 1(1) of the 1989 Act applies in relation to a person who is a member of the security services or who is otherwise notified that he or she is subject to the provisions of the Act. The other relevant offences contained in the Official Secrets Act, apart from that in section 6(2), apply to those who are or have been Crown servants or government contractors.⁴⁸⁴ The definition of “public office” is much wider than this.⁴⁸⁵
- 6.46 Consequently, we can identify very narrow sets of circumstances where an individual who misuses information could not be prosecuted under any of the three regimes described above.⁴⁸⁶ This would leave misconduct in public office as the only charge available.⁴⁸⁷
- 6.47 There are also cases of this nature where misconduct is charged, not because it is the only available offence to prosecute, but because it is considered to be the more appropriate offence to prosecute as a matter of prosecutorial discretion. We deal with this latter type of case in the second part of this chapter.

Question 12

- 6.48 We have identified five types of conduct which can only be prosecuted as misconduct in public office under the current law.
- (1) Public office holders exploiting their positions to facilitate a sexual relationship.
 - (2) Public office holders who use their position to facilitate a personal relationship which may create a conflict of interest with the functions of their position.
 - (3) Public office holders who act in a prejudicial or biased manner, or under a conflict of interest.

⁴⁸³ The relevant offences are contained within the Official Secrets Act 1989, ss 1-6.

⁴⁸⁴ There are also offences that criminalise the receipt of protected information and the failure to safeguard protected information in s 6(2) and s 8 respectively.

⁴⁸⁵ See Chapter 2.

⁴⁸⁶ For example, where the material is not digital and is not of a protected type; where the material is digital, but there was authorised use of the computer, and the material is not of a protected type; where the material is not digital, is not personal data, is of a protected type under the OSA but the person disclosing it is not of a type listed in the OSA.

⁴⁸⁷ There may be instances when the converse is true. A government contractor may not be in public office, but could commit an offence contrary to Official Secrets Act 1989, s 1(1) if he or she has been notified that he or she is subject to the provisions of the Act.

- (4) Neglect of duty by public office holders which results in serious consequences, or a risk of serious consequences arising.
- (5) Public office holders who fail properly to protect information that comes into their possession by virtue of their positions.

Can consultees provide further examples of types of conduct, which presently can only be prosecuted as misconduct in public office, where there is no alternative offence available?

CONDUCT THAT IS PROSECUTED AS MISCONDUCT IN PUBLIC OFFICE BUT COULD BE PROSECUTED AS AN ALTERNATIVE CRIMINAL OFFENCE

- 6.49 Prosecutions are often brought under the misconduct offence that could be prosecuted as another, more precise, offence. This may lead some to the false assumption that the pool of misconduct that can only be prosecuted as misconduct in public office is wider than it actually is. In reality, it may be that the misconduct offence is being used because it is considered, by those using it, to be a more appropriate offence to prosecute.
- 6.50 As we discussed in Chapter 5, the CPS may prefer to charge, as a matter of prosecutorial discretion, misconduct in public office over an alternative available charge for a number of reasons, including:
- (1) evidential or other difficulties in using the alternative offence;
 - (2) misconduct provides a more appropriate maximum penalty; and/or
 - (3) a single charge of misconduct more readily captures the nature or range of the conduct involved.
- 6.51 We consider five examples here to illustrate this category of conduct.
- (1) Public office holders who exploit their positions to facilitate financial gain.
 - (2) Payments accepted by an individual in advance of becoming a public office holder where the payment would cause a conflict with their future functions as a public office holder.
 - (3) Interference with evidence by public office holders.
 - (4) Conveyance of non-prohibited, but potentially harmful or disruptive, articles into prison by public office holders.
 - (5) Public office holders who fail to properly protect information that comes into their possession by virtue of their positions.

(1) Public office holders who exploit their positions to facilitate financial gain

- 6.52 This category involves public office holders who exploit their positions to facilitate financial gain. We use the concept of exploitation here in the same way that it was used in the first part of this chapter.

6.53 Exploitative relationships between vulnerable people and those who purport to be a friend in order to enrich themselves are sometimes referred to as “mate crime”.⁴⁸⁸ We can envisage exploitation of this nature arising as a result of a public holder’s access to confidential information.

Example 6 An administrator within the Department for Work and Pensions (C) is tasked with placing printed benefit letters into envelopes ready for posting. As a result C is aware of the dates on which disability benefits are paid to those receiving the letters as well as the names and addresses of the recipients. C later decides to use this knowledge to befriend a learning disabled person (B). C visits B each week, on the day of the benefit payment, and encourages B to give or spend the money on C during those visits.

6.54 Although misconduct in public office may be an available charge in such circumstances, we consider that alternative criminal offences may also be available.

- (1) Fraud by abuse of position.⁴⁸⁹ This offence may apply because an employee of the Department for Work and Pensions is in a position in which C “is expected to safeguard, or not to act against, the financial interests of another person”.⁴⁹⁰
- (2) Theft.⁴⁹¹ Theft is the dishonest appropriation of another’s property. Following the decision of the House of Lords in *Hinks*,⁴⁹² theft may arise even where property is given willingly, where it was given by a vulnerable donor. The appropriation is, therefore, dishonest.
- (3) Unlawfully obtaining or disclosing personal data.⁴⁹³ This offence requires C to obtain the data concerned “without the consent of the data controller” (a person who determines the purposes for which and the manner in which any personal data are, or are to be, processed in an organisation). Here the data controller has given consent for C to view

⁴⁸⁸ See D Rose, “Mate Crime: the Grooming of Vulnerable People” (Ouch Blog, BBC News 29 October 2013) <http://www.bbc.co.uk/news/blogs-ouch-24651327> (last visited 7 January 2016).

⁴⁸⁹ Fraud Act 2006, s 4. This offence has also been subject to criticism as one that is framed very widely, see C Montgomery and D Ormerod, *Montgomery and Ormerod on Fraud* (2009) at D.2.316 and following. It differs from misconduct in that it is a statutory offence.

⁴⁹⁰ See our report Fraud (2002) Law Com No 276, part 7, para 36. See also *Valujevs* [2014] EWCA Crim 2888, [2015] 3 WLR 109 concerning gang masters’ fraud committed against employees with whom they had a relationship of trust. Likewise, in *Gayle (Diego)* [2008] EWCA Crim 1344 the fraud was committed against the defendant’s employer.

⁴⁹¹ Theft Act 1968, s 1.

⁴⁹² *Hinks* [2001] 2 AC 241, [2001] 1 Cr App R 18.

⁴⁹³ Data Protection Act 1998, s 55. If the defendant intentionally accessed information on a computer in an unauthorized manner then an offence under the Computer Misuse Act 1990 may also be available to prosecute.

the personal data in the course of C's work.⁴⁹⁴ However, dishonest intent at the time of viewing the personal data could vitiate that consent.

- 6.55 It is, therefore, likely that in these circumstances the misconduct offence is charged because there is felt to be another reason to use it. For example, it carries greater sentencing powers and/or it may be considered to be a better label for the offending.

(2) Payments made or received in advance of an individual becoming a public office holder

- 6.56 An interesting scenario that raises issues as to the limits of the current law is that which arose in the recent Hong Kong case involving property developer Thomas Kwok.⁴⁹⁵ Hong Kong uses the common law offence of misconduct in public office, as originally developed by the courts in England and Wales.⁴⁹⁶ Mr Kwok made a number of payments to Mr Hui. In March 2005 Mr Hui was tipped to be appointed as the new Chief Secretary of the Hong Kong Special Administrative Region ("HKSAR") and was personally made aware that he was due to be so appointed. He was not formally sworn into that office until 30 June 2005. The first payment (\$5 million) made to Mr Hui was dated April 2005 and the second June 2005, before his being sworn in. The prosecution case was that the payments were a "sweetener" for Mr Hui to be, in general, favourably disposed to Mr Kwok's business interests while he was Chief Secretary.
- 6.57 Mr Hui and Mr Kwok could not be prosecuted for a bribery offence because, under the Hong Kong Prevention of Bribery Ordinance, bribery can only be committed in relation to a person who actually holds the position of a "public servant".⁴⁹⁷ There was also a question as to whether Mr Hui could be charged with misconduct in public office, given that he had not yet taken up his position at the time the payments were made. The prosecution chose to charge conspiracy to commit misconduct in public office.⁴⁹⁸ In December 2014 Mr Hui was convicted of two of the three charges.
- 6.58 On applying for leave to appeal Mr Kwok argued that no conspiracy to commit misconduct had been committed. Misconduct in public office requires the act or omission amounting to misconduct, and therefore the object of the conspiracy, to be a "specific act committed by the public official that constitutes a serious abuse of power, duty or responsibility exercisable by him in the public interest". Merely "being or remaining favourably disposed" to Mr Kwok's business interests was, therefore, insufficient to constitute the conduct for the offence.⁴⁹⁹ Mr Justice

⁴⁹⁴ Although, here the administrator only decides later to misuse the data then he or she would have no dishonest intent at the time of actually viewing the data and may then not be guilty of the offence.

⁴⁹⁵ *HKSAR v Kwok Ping Kwong Thomas* [2015] HKCA 132.

⁴⁹⁶ See Appendix F for further discussion of international comparisons.

⁴⁹⁷ Hong Kong Prevention of Bribery Ordinance 1971, ch 201. The offence of bribery of a public servant is set out in s 4 and the definition of a public servant can be found in s 1.

⁴⁹⁸ It is entirely possible to have a conspiracy to do an act that will be criminal when a future circumstance arises. For example two people might conspire to kill a child once it is born.

⁴⁹⁹ *HKSAR v Kwok Ping Kwong Thomas* [2015] HKCA 132, Yeung J at [46].

Yeung concluded, that a payment made by way of a “general sweetener” should and did fall within the ambit of misconduct in public office.⁵⁰⁰ The court held that:

The suggestion that it is lawful and not wrong or improper for a senior official to be favourably disposed in a general way towards private interests in return for money paid to him, albeit a few days or a few hours before his actual appointment, but nevertheless in relation to his public office, is not convincing.⁵⁰¹

6.59 The application for leave to appeal was rejected, but Mr Kwok made a second application which was granted in September 2015⁵⁰² and a full appeal is now due to be heard in 2016.

6.60 Two points of interest arise from *Kwok*.

- (1) Would Mr Hui, as the public office holder, have been guilty of misconduct in public office under the law of England and Wales?

In our view this would depend on two things. First, whether the acceptance of a “sweetener” payment will amount to misconduct for the purposes of misconduct in public office following the reasoning in *Kwok*. Stakeholders have informed us that recent developments of the offence in Hong Kong have resulted in the offence broadening. Secondly, timing may be in issue because Mr Hui had not formally been appointed at the time of the payments.

Alternatively, it is conceivable that Mr Hui could be prosecuted for conspiracy to commit misconduct in public office, as he was in Hong Kong. In this jurisdiction, the Lord Chief Justice recently stated that conspiracy charges do present “additional complexities” for juries and the use of charges of conspiracy to commit misconduct in public office has been criticised as a course of action that “should if possible be avoided”.⁵⁰³

- (2) Would Mr Hui have been guilty of any other offence under the law of England and Wales?

Mr Hui could have faced prosecution under section 2(2) of the Bribery Act 2010 for accepting a financial advantage intending that, in consequence, a relevant function or activity should be performed improperly. The offence is committed as soon as a person accepts the financial advantage with the requisite intention. There is, therefore, no need for Mr Hui actually to have performed a relevant function improperly. We believe that the offence is sufficiently wide to encompass the individual who accepts a financial advantage before he or she is in public office. The crucial point is that, in this instance, there is no gap to

⁵⁰⁰ *Kwok Ping Kwong Thomas* at [73] to [79].

⁵⁰¹ *Kwok Ping Kwong Thomas* at [76].

⁵⁰² *Kwok Ping Kwong Thomas*.

⁵⁰³ *Chapman* [2015] EWCA Crim 539, [2015] 2 Cr App R 10, Lord Thomas CJ at [68].

be filled by misconduct in public office. In Hong Kong, the reason why the defendants could not be charged with bribery is because bribery can only be committed by a “public servant”. There is no such requirement contained in the relevant offences in the Bribery Act 2010.

- 6.61 Our conclusion is that such conduct could be prosecuted under the Bribery Act 2010, without reliance on misconduct in public office.

(3) Interference with evidence

- 6.62 If an individual, in whatever capacity, commits an act with the intention of interfering with the course of justice, such as interfering with evidence that might form part of either criminal or civil proceedings, he or she will commit the common law offence of perverting the course of justice.⁵⁰⁴
- 6.63 It has been suggested to us that situations may arise whereby an act is done that has the effect of interfering with evidence, but cannot be prosecuted under that offence because, at the stage that the interference occurs, no “course of justice” exists.
- 6.64 However, the recent case of *T*⁵⁰⁵ appears to have widened the concept of “the course of justice” beyond the previous authorities.⁵⁰⁶ In *T*, the Court of Appeal upheld the conviction of a woman who discovered child pornography on her husband’s computer and deleted it. At the time of the deletion there was no police investigation ongoing into his suspected offence. Despite there being no live investigation, the court held that this was an act of perverting the course of justice. If that decision is correct, then we can envisage few, in any, situations that may arise where a public office holder intentionally adversely interferes with potential evidence that would not amount to the perverting offence.

Example 7 A PCSO (H) is conducting an extra marital relationship with a fellow officer (P). H visits P at home when H is supposed to be working. On leaving P’s address H is involved in a road traffic accident. P learns of this accident over the police radio. The accident leads to a police investigation. P attends the scene where he or she retrieves H’s mobile phone from his or her pocket and deletes a text message that shows that H and P were at P’s home earlier, so that H’s partner does not see it.

- 6.65 It might be argued that in Example 7, P may nevertheless be guilty of perverting the course of justice.
- 6.66 However, we note that it has been suggested that the decision in *T* strains the limits of the perverting offence and the implications of the decision have been

⁵⁰⁴ See P Richardson (ed), *Archbold: Criminal Pleading, Evidence and Practice* (2016 edition) at para 28-1 (“*Archbold*”); *Vreones* [1891] 1 QB 360; *Andrews* [1973] QB 422.

⁵⁰⁵ [2011] EWCA Crim 729. See *Archbold* at para 28-23 and (2011) 15 *Criminal Law Week* 6.

⁵⁰⁶ *Selvage* [1982] QB 372, [1981] 3 WLR 811 and *Rafique* [1993] QB 843, [1993] 3 WLR 617. The course of justice does not include disciplinary proceedings only judicial proceedings.

heavily criticised.⁵⁰⁷ Therefore, again, the misconduct offence may be the preferred charge in such circumstances.

(4) The conveyance of non-prohibited, but potentially harmful or disruptive, articles into prison

- 6.67 The Prison Act 1952, criminalises the conveyance of certain articles into prison.⁵⁰⁸ These articles are included in specific “lists” which include alcohol and controlled drugs. In *Olawale*⁵⁰⁹ a prison nurse sought to smuggle both Zopiclone and whisky into a prison. He was charged with misconduct in relation to the first because Zopiclone is an anti-insomnia drug that is not prohibited under of the Prison Act 1952 (sections 40A to 40C). However, the “tablets, when combined with alcohol, can affect the emotional state of the consumer”.⁵¹⁰ Accordingly, the conveyance of such a substance into a prison is potentially harmful and/or disruptive.
- 6.68 In light of the fact that Parliament has created a list of prohibited articles, but has not included Zopiclone, the question arises: should the conveyance of such items into prison be prosecuted as misconduct in public office? The misconduct offence carries a much higher maximum penalty than sections 40A to 40C.⁵¹¹ Parliament has declared which articles have the potential to be most harmful or lead to disorder in prison and prohibited their conveyance through the Prison Act. If Parliament had wanted to add to the list of prohibited substances it could have done through secondary legislation.
- 6.69 It could well be argued that the reason Zopiclone is not a prohibited article is because it is not a drug that has sufficiently serious effects to merit criminal regulation. That may be why Parliament omitted it from the list of prohibited articles,⁵¹² and on that argument it might seem unjustifiable to use misconduct in public office as a vehicle to impose a criminal sanction.
- 6.70 We can conceive of similar situations arising with other non-prohibited articles. Where, for example, a prison cook gives a prisoner yeast in order to allow the

⁵⁰⁷ See *Criminal Law Week* 15 August 2011. The editors point out that it could be argued that at the stage Mrs T deleted the images there was only a fanciful prospect of any investigation occurring (Mr T did have a previous conviction for a similar offence which had resulted in his being on the Sex Offenders’ Register, but that does not seem to have formed part of the reasoning of the CACD in upholding his wife’s conviction). They also ask, if Mrs T was guilty of perverting the course of justice by deleting the pornographic files from her husband’s computer before the police had become involved, then why wouldn’t a mother who discovers drugs in the pocket of her teenage son’s coat also commit the same offence if she disposes of the drugs without informing the police? (The answer seems to be that the parent, by disposing of evidence of a crime, would be guilty).

⁵⁰⁸ Prison Act 1952, ss 40A to 40C, as amended by Offender Management Act 2007, s 22.

⁵⁰⁹ [2010] EWCA Crim 1390.

⁵¹⁰ *Olawale* at [3]. Toulson J.

⁵¹¹ Within s.40 the categories of prohibited items are divided into: category “A”, carrying a maximum penalty of 10 years’ imprisonment for their conveyance; category “B” carrying a maximum of 2 years’ imprisonment; and category “C” carrying a maximum penalty of a fine. Misconduct in public office is punishable by up to life imprisonment.

⁵¹² Parliament could also have included it under the new offence of “throwing items into prison” in the Serious Crime Act 2015, s 79.

prisoner to brew beer in his or her cell (not because the prisoner had asked them to, but because the cook hoped to ingratiate him or herself with the prisoner).

- 6.71 It is useful to consider whether the only available charge would have been misconduct had the defendant only been caught in relation to the Zopiclone.
- 6.72 It is possible that the offence of conspiracy to defraud (with a maximum sentence of life imprisonment, like misconduct in public office) could have been charged. At first sight a fraud offence may not appear to fit the scenario of a public officer conveying items into a prison, and we consider that such a prosecution would be most unlikely. However, conspiracy to defraud is not limited to the prejudice of another's economic rights. Conspiracy to defraud can also be committed where there is an agreement to deceive another into acting contrary to his or her public duty. As stated in *Scott*, no actual deception is necessary, and:

Where the intended victim of a 'conspiracy to defraud' is a person performing public duties as distinct from a private individual it is sufficient if the purpose is to cause him to act contrary to his public duty, and the intended means of achieving this purpose are dishonest. The purpose need not involve causing economic loss to anyone.⁵¹³

In this way, all dishonest agreements to obtain official documents amount to conspiracies to defraud.

- 6.73 The offence could apply to a situation where there is an agreement between a prisoner and a prison nurse to induce another member of prison staff into permitting the nurse to enter the prison in possession of an item that they intend to pass to a prisoner. This would be the case where, if the officer holder had known the true situation, they would have been under a duty to prevent that access.⁵¹⁴
- 6.74 Of course, any charge of conspiracy to defraud would only apply to cases where there had been an agreement to carry out the deception (between a prison worker and a prisoner, or between two or more prison workers). We see little potential for a prison worker to convey non-prohibited articles into a prison without such an agreement being in place. However, if that scenario arose then there may be good reason for charging misconduct in public office rather than the conspiracy offence.

⁵¹³ Lord Diplock in *Scott v Metropolitan Police Commissioner* [1975] AC 819, (1974) 60 Cr App R 124. See also C Montgomery and D Ormerod, *Montgomery and Ormerod on Fraud: Criminal Law and Procedure* [2008] at para D.7.19.

⁵¹⁴ *Prison Service Instruction on Conduct and Discipline PSI 06/2010* (July 2013) specifies that "bringing into, or carrying out of, a prison establishment, without proper authority, any items for or on behalf of a prisoner or ex-prisoner; or knowingly condoning such action" would amount to unprofessional behaviour and liable to investigation as professional misconduct. See further discussion in Chapter 5.

(5) Public office holders who fail properly to protect information that comes into their possession by virtue of their positions

- 6.75 We have already discussed this type of conduct above.⁵¹⁵ In some circumstances this will include types of conduct that can only be prosecuted as misconduct in public office. However, we consider that it also merits further consideration as conduct that is sometimes prosecuted as misconduct even though it would also amount to an alternative criminal offence.
- 6.76 The misuse of information by public office holders is a good example of how the same type of conduct can be considered to fall into either category, depending on the specific circumstances in which it occurs.
- 6.77 It is important to bear in mind that it is not contrary to principle to charge a common law offence instead of an available statutory offence provided there is “good reason” to do so, as described in Chapter 5.
- 6.78 It is for this reason that misconduct in public office, where there has been misuse of information by a public office holder, can be considered as an alternative charge to an offence under either the Computer Misuse Act 1990, the Data Protection Act 1998 or the Official Secrets Act 1989.
- 6.79 An example of a good reason might be where a prosecution under the 1990 Act would face difficulties because, although it is alleged that the public office holder’s computer access to the information stored on the computer was unauthorised, there is insufficient evidence to prove that it was.
- 6.80 Another good reason may be that misconduct in public office provides more appropriate sentencing powers than an alternative statutory offence. By way of example, the effectiveness of the Data Protection Act 1998 provisions have been the subject of scrutiny by the Justice Committee of the House of Commons.⁵¹⁶ In 2013, in evidence given before the Justice Committee, it was stated that the fines imposed for this offence “are simply too low to amount to a deterrent against misusing personal data.” If the individual who disclosed the personal data occupied a public office at the time of the disclosure, charging him or her with misconduct in public office could be a way of avoiding the problem brought to the attention of the Justice Committee. Indeed, the Government accepted that there are suitable alternative offences that can be charged and listed misconduct in public office as one of them.⁵¹⁷

⁵¹⁵ See para 6.37 and following.

⁵¹⁶ Justice Committee of the House of Commons, Ninth Report of Session 2013-14, *The functions, powers and resources of the Information Commissioner*, HC 560 (2013), chapter 2.

⁵¹⁷ Ministry of Justice, Government Response to the House of Commons Justice Committee Ninth Report of Session 2010-12: *Referral fees and the theft of personal data*, Cm 8240, December 2011, p 4.

6.81 There are also a number of good reasons why misconduct in public office might be charged instead of an offence under the Official Secrets Act 1989.⁵¹⁸ These include:

- (1) Absence of defence. It is a defence under the Official Secrets Act 1989 for the defendant to prove that at the time of the alleged offence he did not know, and had no reasonable cause to believe, that the information, document or article in question related to a protected category of information or that its disclosure would be damaging.⁵¹⁹ As there is no such defence available to a charge of misconduct in public office, the Crown could consider it advantageous to charge the common law offence rather than one of the offences contained in the 1989 Act.
- (2) Available sentence. The maximum sentence available on indictment for an offence contrary to the Official Secrets Act 1989 is two years' imprisonment or a fine. If tried summarily, the maximum sentence is 6 months' imprisonment or a fine.⁵²⁰ Given that the maximum sentence available for misconduct in public office is unlimited, it could be thought that the common law offence more accurately reflects the harm caused by the unauthorised disclosure of sensitive information.

6.82 Misconduct in public office is used to supplement those statutory offences that exist to criminalise the misuse of information. As we have discussed in this section, there are a number of "good reasons" why it might be thought preferable to charge misconduct in public office instead of an available statutory offence.

⁵¹⁸ There are a number of recent examples of individuals being charged with misconduct in public office for the unauthorised disclosure of sensitive information. Examples include prosecutions following Operation Elveden and Thomas Lund-Lack who pleaded guilty to misconduct in public office for disclosing sensitive documents to a journalist from the *Sunday Times*. See Megan Levy and agencies, "Scotland Yard Man Jailed for Terror Leak" (The Telegraph 27 July 2007).

⁵¹⁹ The Official Secrets Act 1989, s.1-6, contains its own version of the defence.

⁵²⁰ Section 10.

CHAPTER 7

QUESTIONS FOR CONSULTEES

CHAPTER 2: THE CURRENT LAW

Question 1

Can consultees provide any further examples of the problems of interpretation with the elements of the current offence of misconduct in public office?

Paragraph 2.228

CHAPTER 3: THE NEW OFFENCE OF CORRUPT OR OTHER IMPROPER EXERCISE OF POLICE POWERS OR PRIVILEGES

Question 2

Can consultees provide further examples of the problems with the offence of “corrupt or other improper exercise of police powers and privileges” under section 26 of the Criminal Justice and Courts Act 2015?

Paragraph 3.120

CHAPTER 4: SUMMARY OF PROBLEMS WITH THE OFFENCE AND CONCLUSIONS

Question 3

Can consultees provide further examples of the problems with the current definition of “public office”?

Paragraph 4.24

Question 4

Do consultees have any views on whether the requirement that a public office holder is “acting as such” at the time of his or her misconduct has any practical significance within the current formulation of misconduct in public office?

Paragraph 4.25

Question 5

Can consultees provide further examples of problems arising from a lack of clarity as to what types of breach of duty are sufficient to establish the offence of misconduct in public office?

Paragraph 4.36

Question 6

Do consultees have any views on whether a lack of clarity regarding what can constitute an “abuse of the public’s trust” generates problems in providing a workable “seriousness” threshold for the offence?

Paragraph 4.47

Question 7

Can consultees provide further examples of problems arising from the existence of variable fault elements for different species of misconduct in public office?

Paragraph 4.53

Question 8

Can consultees provide further examples of problems arising from a lack of clarity as to the operation of the “without reasonable excuse or justification” element of the offence?

Paragraph 4.59

CHAPTER 5: OVERLAPS WITH OTHER FORMS OF LEGAL ACCOUNTABILITY**Question 9**

We identify three potential practical reasons that may exist for prosecuting misconduct in public office where alternative offences are available.

- (1) The alternatives are narrow and specialised ones or are offences that pose greater difficulties of proof.
- (2) The other possible charges carry more limited sentence options.
- (3) A single charge of misconduct may more readily capture the nature or range of the conduct.

Can consultees provide further examples of reasons that may exist for prosecuting misconduct in public office where there are alternative offences available?

Paragraph 5.35

Question 10

Do consultees have any views on whether the offence of misconduct in public office reflects a distinctive wrong?

Paragraph 5.56

Question 11

Do consultees have any views on whether the offence of misconduct in public office fulfils an important role from the perspective of fair labelling?

Paragraph 5.57

CHAPTER 6: CONDUCT PROSECUTED AS MISCONDUCT IN PUBLIC OFFICE

Question 12

We have identified five types of conduct which can only be prosecuted as misconduct in public office under the current law. Namely:

- (1) Public office holders exploiting their positions to facilitate a sexual relationship.
- (2) Public office holders who use their position to facilitate a personal relationship which may create a conflict of interest with the functions of their position.
- (3) Public office holders who act in a prejudicial or biased manner, or under a conflict of interest.
- (4) Neglect of duty by public office holders which results in serious consequences, or a risk of serious consequences arising.
- (5) Public office holders who fail properly to protect information that comes into their possession by virtue of their positions.

Can consultees provide further examples of types of conduct, which presently can only be prosecuted as misconduct in public office, where there is no alternative offence available?

Paragraph 6.49