

THE LAW COMMISSION

MISCONDUCT IN PUBLIC OFFICE

ISSUES PAPER 1 – THE CURRENT LAW

OVERVIEW

Our project and consultation process

The Law Commission is undertaking a review of the offence of misconduct in public office. Our reform objectives are to decide whether the existing offence of misconduct in public office should be abolished, retained, restated or amended and to pursue whatever scheme of reform is decided upon.

Misconduct in Public Office: Issues Paper 1 – the current law is the first document to be published as part of this project. It is a background document that 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 Issues Paper, accompanying appendices and summary (including Welsh language versions of the summary and overview) are available online at: <http://www.lawcom.gov.uk/project/misconduct-in-public-office/>.

The legal concepts involved in the offence of misconduct in public office are highly technical and complex and not easily accessible to non-lawyers. Furthermore 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.

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.

The first phase of consultation commences with our symposium of 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.

The second phase of consultation will set out options for what the law of misconduct in public office should be and will involve a consultative document to be published this spring. A final report will be published in 2017.

The offence and its problems

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 offence requires that: a public officer acting as such; wilfully neglects to perform his duty and/or wilfully misconducts him or herself; to such a degree as to amount to an abuse of the public's trust in the office holder; without reasonable excuse or justification.

The offence is widely considered to be ill-defined and has been subject to recent criticism by the government, the Court of Appeal, the press and legal academics.

Statistics suggest that more people are being accused of misconduct in public office while fewer of those accusations lead to convictions. One possible reason is that the lack of clear definition of the offence renders it difficult to apply.

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 “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.

Historically the offence held public officers to account for their misconduct, where there were no other adequate ways of doing so. Nowadays such misconduct will usually amount to another, narrower and better defined, criminal offence.

The problems with the present law raise the question whether the offence continues to serve a useful purpose. Arguably it does because:

- (1) alternative offences may be narrowly defined and more difficult to use;
- (2) alternative offences may not provide sufficient sentencing powers;
- (3) the offence addresses a form of wrongdoing that is distinct from those forms addressed by alternative offences;
- (4) the offence provides a more appropriate label to reflect the nature of the misconduct that it is used to prosecute; or
- (5) some forms of conduct prosecuted as misconduct in public office might not be capable of being prosecuted at all if the offence did not exist.

We hope that this paper and the symposium will provide us with an opportunity to stimulate informed debate on the problems identified, the options for reform and to engage with practitioners and experts who deal with the offence. We seek responses to the questions set out in Issues Paper 1 by 20 March 2016.