Reforming Misconduct in Public Office
A Consultation Paper
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 Phil Golding.

Topic of this consultation: Misconduct in Public Office. This consultation paper sets out options for reforming the law of misconduct in public office and seeks consultees’ views on these.

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

Availability of materials: The consultation paper and accompanying documents (including a Welsh translation of the summary and overview of the paper) are available on our website at http://www.lawcom.gov.uk/project/misconduct-in-public-office/.

Duration of the consultation: We invite responses from 5 September 2016 to 28 November 2016.

Comments may be sent:

By email: misconduct@lawcommission.gsi.gov.uk
By post: Justine Davidge, Criminal Law Team, Law Commission of England & Wales, 1st Floor Tower, 52 Queen Anne’s Gate, London, SW1H 9AG.
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By fax: 020 3334 0201

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 decide on our final recommendations and present them to Government.

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

## REFORMING MISCONDUCT IN PUBLIC OFFICE

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BACKGROUND TO THE PROJECT

1.1 A review of the offence of misconduct in public office was included in our 11th Programme of law reform.\(^1\) Our terms of reference 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 we decide to recommend. In this consultation paper, we set our provisional proposals for the reform of misconduct in public office.

History of the offence and calls for reform

1.2 The offence is of significant age.\(^2\) The most well-known statement of the offence was made in 1783, by Chief Justice Mansfield in the case of *Bembridge*.\(^3\) The offence fell largely into disuse between the late 18th century and the beginning of the 21st century, except for the occasional high profile case. It is probably unsurprising, therefore, that many people, including judges and lawyers, were unsure of the definition of the offence.

1.3 There have been numerous calls for reform from academics, judges, lawyers, Government ministers and the media. The Court of Appeal recently stated:

> 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.\(^4\)

1.4 Concerns about the state of the current law and the urgent need for reform have been confirmed in the discussions we have had with some of the people and organisations with experience of the offence and its operation. These include Government departments, prosecutors, academics, barristers with expertise in defending and prosecuting the offence, independent bodies and legal representatives of the press.

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1 Eleventh Programme (2011) Law Com No 330. Work on the review was thereafter halted due to demands of other, urgent projects and began again in January 2015.


3 *Bembridge* (1783) 3 Doug KB 327, 99 ER 679.

THE BACKGROUND PAPER AND THE FIRST PHASE OF CONSULTATION

1.5 On 20 January 2016 we published *Misconduct in public office: Issues paper 1 – The current law* (“the background paper”). This was a background paper for our review of the offence of misconduct in public office, which set out the current law and identified a number of problems with it.

1.6 The background paper asked consultees to respond to twelve questions relating to the many areas of uncertainty surrounding the offence. This was to enable us to gather views on the operation of the offence and take them into account in framing our provisional proposals for reform. The vast majority of consultees who responded to the background paper agreed that the need to reform the offence of misconduct in public office was pressing. This consultation paper sets out our provisional law reform proposals.

1.7 The following members of the Law Commission’s criminal law team have contributed to the work on this paper: Justine Davidge (criminal team lawyer) Simon Tabbush (criminal team lawyer), Sarah Taylor (criminal team research assistant), Gethin Thomas (criminal team and public law team research assistant), Katie Jones (criminal team research assistant), Laura McDavitt (criminal team research assistant) and Jessica Ugccioni (criminal team manager).

THE SYMPOSIUM AND RESPONSES TO THE FIRST PAPER

1.8 In addition to publishing our background paper on 20 January, we launched our consultation with a symposium held at the Dickson Poon School of Law, King’s College London. The event was attended by approximately 100 delegates from a variety of backgrounds and provided stimulating discussion of some of the key issues raised in our paper. We would like to thank the following people for agreeing to speak at the symposium: Rosemary Ainslie (Crown Prosecution Service), Lord Bew (Chair of the Committee on Standards in Public Life), Gerard Elias QC (Commissioner for Standards to the Welsh Assembly), Sarah Green (Deputy Chair IPCC), Rt Hon Dominic Grieve QC MP, Liz Hartley (Associated Newspapers), Jamas Hodivala (2 Bedford Row), Eleanor Hoggart (Lawyers in Local Government), Detective Superintendent Ray Marley (College of Policing), Clare Montgomery QC (Matrix Chambers), Clive Nicholls QC (3 Raymond Buildings), Professor A T H Smith (Cambridge University) and Professor David Whyte (Liverpool University).

1.9 The background paper received a total of 36 consultation responses. We are extremely grateful to the following individuals and bodies who took the time to respond in writing:

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Legal practitioners and members of the judiciary: the Council of HM Circuit Judges, the Law Society, the London Criminal Court Solicitors' Association, Michael Parroy QC, Alec Samuels, Keir Monteith QC and Lucie Wibberley.

Government agencies: the Crown Prosecution Service (CPS), the Service Prosecuting Authority (SPA), the National Offender Management Service (NOMS) and the Ministry of Defence (MOD).

Independent bodies: the Committee on Standards in Public Life (CPSL) and the Independent Police Complaints Commission (IPCC).

Academics: Simon Parsons (formerly of Southampton Solent University), Professor Mark Knights (University of Warwick), Professor Mark Philp (University of Warwick), Catarina Sjolin Knight and Helen Edwards (both of Nottingham Trent University).

Organisations that represent persons who are public office holders: the High Court Enforcement Officers Association and Public Concern at Work.


Members of the public: Joe Sweetinburgh, Juliet Crowson, Fiona Watts, Barry Faith, Paul Williams, Sabine McNeill, Dr Minh Alexander, Christine England, Daphne Havercroft, A Kampalis, Mike Paley, Lesley McDade and Ismail Bhamjee.

Police Officers: Ryan Mackenzie and Scott Pavitt.

1.10 As part of this initial phase of the consultation process we met with a number of organisations and individuals directly. We would like to thank the following for providing their insight in this way:

Representative stakeholder group: the Local Government Association, the National Association of Probation Officers, the Church of England, Public Concern at Work, Lawyers in Local Government, the Registration, Celebratory and Coroners Service and the Coroners Service.6

Academic advisory group: Professor Stuart Green, Professor Peter Alldridge, Dr Ashley Savage, Dr Jonathan Rogers, Dr Alexander Williams and Alice Irving.7

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6 Meeting took place on 23 February 2016.
7 Meeting took place on 5 May 2016. We are also grateful to Professor Jeremy Horder and Professor Anthony Duff, both of whom provided written comments on parts of our draft consultation paper.
1.11 The contributions made at the symposium, the consultation responses received and the input we have had as a result of the above meetings have provided us with a wealth of material that we draw upon in constructing our proposed law reform options.

1.12 We are grateful for the careful attention given to the background paper and the thoughtful responses that it produced.

THE STRUCTURE OF THIS PAPER

1.13 This paper is structured as follows:

(1) Chapter 1 is this introduction.

(2) Chapter 2 is a summary of our background paper and the responses to it. It highlights the most significant issues raised by consultees as well as how the law has operated since publication and how these matters affect the substance and structure of this paper. At the end of Chapter 2 we conclude that retention or simple codification of the current law would be unacceptable.

(3) Chapter 3 is a discussion of the harms and wrongs that could be considered to underlie the offence of misconduct in public office. This provides the theoretical understanding necessary to ensure that any offences that might replace it are soundly based.

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8 Meeting took place on 12 May 2016. We are also grateful to Cheema-Grubb J and Jamas Hodivala, who were unable to attend the meeting for providing us with comments in writing.

9 Meeting took place on 8 July 2016. We are also grateful to members of the Home Office Police Integrity and Powers Unit who were unable to attend the meeting for providing us with comments in writing. Likewise, we are grateful to the Sentencing Council for providing us with their comment on relevant parts of the draft paper.

10 Meeting took place on 27 July 2016. We are also grateful to David Prince (former member of CPSL, former managing director of the Audit Commission and former chief executive of the Standards Board for England) who was unable to attend the meeting for providing us with comments in writing.
Chapters 4 to 7 set out our proposals for reforming the law on misconduct in public office. We propose three law reform options. All three involve abolishing the current common law offence of misconduct in public office. Options 1 and 2 each involve replacing it with a new statutory offence while Option 3 proposes that the offence be abolished without replacement.

(a) In Chapter 4 we discuss possible ways of defining public office for the purpose of any reformed offences, such as those proposed under Options 1 and 2.

(b) In Chapter 5 we discuss Option 1, consisting of a new offence addressing types of public office holder who breach particular duties concerned with the prevention of harm, held by virtue of their positions, and either cause, or risk causing serious consequences.

(c) In Chapter 6 we discuss Option 2, consisting of a new offence addressing types of public office holder who abuse their positions to obtain a personal advantage or cause another person a disadvantage.

(d) In Chapter 7, we discuss Option 3, the abolition of the common law offence without replacement.

Chapter 8 discusses two additional legal reforms that could complement any of the three options, namely:

(a) reform of the sexual offences regime to address the issue of exploitation of a position to facilitate a sexual relationship; and

(b) making provision, for the fact that the offender is a public office holder to be taken into account as an aggravating factor in determining the sentence to be passed in relation to any criminal offence.

Chapter 9 collates a number of provisional proposals and questions, which arose within the previous chapters, to which we ask for consultees’ responses.

In the remainder of this chapter we will explain in brief the approach we have adopted to constructing our law reform proposals. We conclude the chapter with an outline of our law reform proposals.

**OUR APPROACH TO CONSTRUCTING LAW REFORM PROPOSALS**

**Analysing harms and wrongs**

In Chapter 3 we analyse how the academic debate about the reasons and justifications for creating criminal offences applies to misconduct in public office. For those whose interest is not primarily in this particularly
theoretical aspect of our consultation paper, we provide a brief summary here.

1.16 Broadly, an activity should not be made criminal unless:

(1) it does some harm (or at least, harm would result from failure to criminalise that activity); and

(2) according to generally accepted moral standards, it is wrong.

1.17 Legal theorists differ widely in their views about the relative importance of these two requirements, about their exact meaning and about the use to be made of these concepts in defining an offence.

1.18 Against this theoretical backdrop, we discuss possible rationales for the current offence of misconduct in public office, and identify three possibilities:

(1) corruption, meaning the abuse of the opportunities afforded by a position;

(2) misgovernment, meaning the oppressive or extortionate use of state power;\textsuperscript{11} and

(3) breach of the trust of the public.

We explain these concepts fully in Chapter 3.

1.19 The third is the usual explanation for the current offence. However,

(1) there is a category of cases involving neglect of duty which does not obviously fit into any of the three: it could be described as either breach of trust in a weak sense (failure to do something where there is an expectation to do it) or a negative variant of misgovernment (failure to use state power when required). Further,

(2) there are many individuals whose office or functions may provide an opportunity for corruption or breach of public trust. These are not necessarily confined to public officials. For example, a teacher or a paramedic could reasonably be considered to be in a position of public trust, so there is an argument for a broader offence. In Chapter 3 we consider in detail the arguments for and against an offence confined to public officials.

1.20 We then test our conclusions by considering five categories of behaviour in which charges of misconduct in public office are sometimes brought and no other offence is available to prosecute:\textsuperscript{12}

\textsuperscript{11} We explain in ch 2 of the background paper that misgovernment has been put forward as the rationale for the related tort of misfeasance in public office. For further discussion of the tort see Appendix B to the background paper.
(1) The use of a position as a public office holder to facilitate a sexual relationship.

(2) Engaging in a relationship (not necessarily sexual) that could give rise to a conflict of interest.

(3) Acting under the influence of a conflict of interest or of a bias or prejudice.

(4) Neglect of duty giving rise to a risk of serious harm, to individuals or to the public interest.

(5) Misuse of official information.

There is some overlap among the five categories.

1.21 Our views on the harms and wrongs involved in the five categories are as follows:

(1) There is no intrinsic link between wrongdoing in the first category, concerning sexual relationships, and the fact of being in public office. However, if an offence criminalising official corruption (Option 2, discussed in Chapter 6) was to be introduced, then this could apply to cases where a public office holder abuses his or her position to gain an advantage of a sexual nature. We further suggest a possible offence of sexual exploitation of a vulnerable person to whom one has a duty of care, whether by reason of public office or otherwise, could be included in a future review of sexual offences (discussed in Chapter 8).

(2) The second category, concerning relationships that could give rise to a conflict of interest, should be addressed by disciplinary and public law remedies rather than the criminal law, unless the conflict of interest results in further wrongdoing.

(3) The more serious cases in the third category, concerning decisions taken for corrupt rather than merely prejudiced reasons, could be included in an offence of official corruption (Option 2, discussed in Chapter 6).

(4) The fourth category could be the basis of a new offence criminalising breaches of duty that risk serious consequences (Option 1, discussed in Chapter 5), provided that:

(a) the definition of the offence includes acts as well as omissions (and therefore the conduct is more accurately described as breach, rather than neglect, of duty); and

12 See ch 3.
(b) both the types of individual that can commit the offence and the type of harm caused or risked are well defined.

(5) The fifth category is properly the subject of offences concerning misuse of data and official secrets, and is to be part of a separate Law Commission review on the protection of government data.

**OUR LAW REFORM PROPOSALS**

1.22 We set out in Chapters 4 to 8 our alternative proposals for reforming the offence of misconduct in public office. These are based on the conclusions reached in Chapter 3. We present three options, along with two additional legal reforms that could complement any of those three options. All three options involve abolishing the current offence of misconduct in public office. Options 1 and 2 each involve replacing it with a new statutory offence while Option 3 proposes that the offence be abolished without replacement.

1.23 As the concept of “public office” will need to underlie, at least at a basic level, any new offence we propose, we discuss ways in which this concept could be defined (in Chapter 4) before describing Options 1, 2 and 3. Finally we discuss (in Chapter 8) two additional, potentially complementary, legal reforms.

**Public office**

1.24 In summary:

(1) There are at least four possible ways of defining public office:

(a) by way of status or in institutional terms;

(b) by way of identification of a determinative duty;\(^{13}\)

(c) by way of performance or exercise of a public function; or

(d) by way of performing a public function whilst under a duty to act in a certain way.

(2) Once a conclusion is reached on which type of test to adopt in respect of “public office” there are three options as to how that test can frame the definitional element of a new offence:

(a) we could place that test on a statutory footing, to be applied by the courts in individual cases;

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\(^{13}\) The “determinative duty test” is how we have been best able to explain how public office is defined under the current law. For discussion of “determinative duties” please see ch 2 of this paper, as well as ch 2 of the background paper.
(b) we could use that test to create a statutory list to identify relevant public office holders within primary legislation; this could be either:

(i) a list of factors to be considered in determining whether a position is a public office, such as the type of function exercised; or

(ii) a list of particular positions constituting a public office.

1.25 We ask for consultees’ views on the preferred ways of defining public office and transposing that definition into statute.

Option 1: a new offence based on breach of duty

1.26 This first option, discussed in Chapter 5, involves replacing the current law with a new statutory offence addressing only the harms and wrongs underlying our Category 4 conduct – breach of duty by a public office holder leading to or risking serious harm. This could be harm either to the public, or to individuals where the act or omission constitutes breach of a public duty requiring a public office holder (D) to take care to avoid causing harm to a person in the position of the victim (V).

1.27 The wrong which underpins this offence may be regarded as either a breach of trust (in the weak sense of a failure to perform a duty as expected) or a negative form of misgovernment.14

1.28 There is one major difference between Option 1 and the current offence:15 the requirement of proof that, at least, a risk of serious consequences arises from the public office holder’s breach of duty. This significantly narrows the scope of the Option 1 offence in two ways:

(1) It allows us to devise a closer definition of the type of conduct to which it applies; in particular, by limiting it to conduct which causes, at least, a risk of specified serious consequences.

(2) It allows us to limit the type of public office holder to whom it applies, in particular, by confining it to those public office holders in positions subject to particular duties concerned with the prevention of specified serious consequences.

14 See para 1.18 above and, for more detailed discussion of these terms, please also see ch 3.

15 The elements of the offence of misconduct in public office are: a public officer acting as such; wilfully neglects to perform his duty and/or wilfully misconducts himself; to such a degree as to amount to an abuse of the public’s trust in the office holder; and without reasonable excuse or justification. Attorney General’s Reference (No 3 of 2003) (“AG’s Reference”) [2004] EWCA Crim 868, [2005] QB 73 at [61]. See further ch 2.
1.29 In this way, Option 1 could lead to a significantly narrower and more focused offence targeted at breaches of duty committed by a smaller, more clearly defined pool of people.

1.30 The offence under Option 1 would be committed when:

1. a public office holder subject to a particular duty concerned with the prevention of harm (defined in statute), either because:
   1. a he or she has powers of physical coercion such as arrest, detention or imprisonment; or
   2. b he or she performs functions connected with the protection of vulnerable individuals from harm (as defined in statute);
2. breaches that duty;
3. leading to the occurrence, or risk, of any of the following types of harm:
   1. a death or physical injury;
   2. b false imprisonment;
   3. c serious harm to public order; or
   4. d serious harm to the administration of justice.

Option 2: a new offence based on abuse of power, authority or position

1.31 In Chapter 3, we observe that there is no single wrong that underlies the current misconduct in public office offence. We identify the two types of wrong covered by the current offence as those involving:

1. breach of duty giving rise to serious harm or the risk of it, which may be regarded as either breach of trust in the weak sense or a negative form of misgovernment (addressed by Option 1 above); and
2. undue gains, causing detriment to another, conflict of interest and similar behaviour, which may be regarded as reflecting a wrong of either abuse of position (breach of public trust in the strong sense) or positive misgovernment.\(^\text{16}\)

\(^{16}\) The obtaining of an undue gain is an abuse of position, whilst causing a detriment to another or a conflict of interest are forms of positive misgovernment. We consider that both of these wrongs constitute the broad wrong of “corruption” and could be criminalised by a single offence. We therefore refer to both of these specific wrongs as a single wrong of “corruption”.

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1.32 Both of these wrongs undermine public confidence in our governing institutions, and this constitutes a harm to the public interest generally. However, wrong (1) above is solely concerned with causing direct harm, or a risk of harm, to individuals. Therefore, our provisional Option 1 seeks to address only this particular wrong and would significantly narrow the scope of the offence. It would only apply where there is a direct harm, or risk thereof, caused by a public office holder breaching a particular duty.

1.33 We recognise that some consultees may be concerned about replacing the present offence with a much narrower model which is focused on only one of the two wrongs currently underpinning misconduct in public office (Option 1).

1.34 This could be considered problematic, as the wrong that falls outside the remit of Option 1 is particularly concerned with acts of corruption by officials: the making of undue gains, causing detriment to another, conflict of interest and similar behaviour.

1.35 We therefore see the possibility for creating an offence that addresses the second wrong identified in our analysis of the current misconduct in public office offence. This offence would need to define, with certainty and predictability, to whom and to what it applied. This is our Option 2.

1.36 The offence under Option 2 would be committed when:

(1) a public office holder (as defined in statute);

(2) abuses his or her position or a power or authority held by virtue of that position;

(3) by exercising that position, power or authority with the purpose of achieving an advantage for the office holder or another or causing detriment to another; and

(4) the exercise of that position, power or authority for that purpose is seriously improper.

Option 3: abolition of the current law without replacement

1.37 The final option would be to remove the common law offence of misconduct in public office altogether from the law of England and Wales and not replace it. In order to obtain a full range of responses we include this option within the consultation, although our provisional proposal is that the current offence should not be abolished without any new offence being introduced to replace it.

1.38 We expect outright abolition, without the creation or amendment of specific offences, will be the preferred option for those who consider that:

(1) The mischief the common law offence seeks to protect against is adequately encompassed by available alternative or related
offences. This might include the use of secondary liability and inchoate offences.\(^\text{17}\)

(2) Where misconduct arises that cannot be prosecuted by way of any offence other than misconduct in public office, there are a range of other proportionate sanctions available to redress this behaviour adequately, without needing to resort to the criminal law.

1.39 The argument against abolition, meanwhile, has three parts:

(1) some conduct that justifies criminal sanction can only be prosecuted using the offence;

(2) the offence serves a potentially important communicative purpose in terms of fair labelling;\(^\text{18}\) and

(3) there are other practical reasons for retaining the offence.

For one or more of these reasons, it may be undesirable to abolish the offence of misconduct by a public office without replacing it in some way.

**Other complementary legal reforms**

1.40 In addition to establishing the basis on which the offence of misconduct in public office should be reformed, Chapter 3 also highlights two other issues, which may need to be addressed alongside replacement of the misconduct offence with one, or two, new, narrower statutory provisions. There may be a need to consider:

(1) A review of the sexual offences regime to assess whether additional sexual offences should be created to address certain conduct. For example:

(a) an offence of obtaining sex by improper pressure (the types of pressure would need to be further defined), analogous to the old offences of obtaining sex by threats or deception;\(^\text{19}\) and/or

(b) more specifically, an offence of sexual exploitation of a vulnerable adult person for whom D has responsibility (analogous to sections 16 to 19 of the Sexual Offences Act

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\(^{17}\) Secondary liability applies to people who assist or encourage the commission of criminal offence by a principal offender. An inchoate offence is an offence that an offender intends to commit, but does not complete. For example, attempted murder is an inchoate offence.

\(^{18}\) Fair labelling is “concerned with the way in which the range of behaviours that is deemed to be criminal is divided into individual offences”, see J Chalmers and F Leverick, "Fair Labelling in Criminal Law" (2008) 72(2) The Modern Law Review 217 at 222. For further discussion on the meaning of fair labelling, please see ch 7.

\(^{19}\) Under the Sexual Offences Act 1956, ss 2 and 3.
2003 which created an offence of “abuse of trust” applying to 16 and 17 year olds).

(2) The creation of other ways in which the wrongfulness of a public officer committing, for example, fraud or a sexual offence, can be communicated through the criminal process.

For example, this could be achieved by way of ensuring that “public office” can be treated as an aggravating feature for the purposes of sentencing.

THE SECOND PHASE OF CONSULTATION

1.41 This consultation paper sets out our provisional proposals and asks a number of consultation questions. We emphasise that the reform options we put forward in Chapters 4 to 8 represent our preliminary view, and the publication of this paper marks the beginning of the second phase of consultation in this project. The deadline for submitting a consultation response is 28 November 2016.

1.42 Following the conclusion of our second phase of consultation, we will analyse the responses we receive and produce a final report that will contain our recommendations for law reform. We aim to publish our final report in spring/summer 2017.
CHAPTER 2
SUMMARY OF ISSUES PAPER 1 AND RESPONSES

INTRODUCTION
2.1 This chapter is divided into four parts:

(1) The first part is a summary of our Issues Paper¹ on misconduct in public office published on 20 January 2016 (“the background paper”).

(2) In the second part we describe the responses we received to the specific questions we asked.

(3) The third part sets out a number of recurring key issues that arose throughout our consultation process, including any comments we received that did not specifically address the consultation questions we posed in the background paper.

(4) The fourth part briefly summarises how the results of the consultation affect the scope of the law reform options we will propose.

SUMMARY OF THE BACKGROUND PAPER
2.2 The first part of this chapter is split into four sections:

(1) The current law.

(2) Problems identified with the current law.

(3) Overlaps with other methods of accountability.

(4) Conduct prosecuted as misconduct in public office.

Within each section we will summarise what we said in the background paper.

The current law
2.3 Misconduct in public office is a common law offence: it is not defined in any statute. It carries a maximum sentence of life imprisonment.

2.4 The current law has been developed in a piecemeal fashion by the courts over many years. It is difficult to see with absolute certainty where the boundaries of the offence and each of its elements lie. The leading modern case is Attorney General’s Reference (No 3 of 2003) (“AG’s Reference”),² in which the Court of Appeal stated that the elements of the offence of misconduct in public office are:

(1) a public officer acting as such;

(2) wilfully neglects to perform his duty 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; and

(4) without reasonable excuse or justification.³

2.5 We summarise below our conclusions as to how each of these elements is defined. However, the ambiguities of the present law mean that we have been unable to reach firm conclusions on some aspects of it.

**(1) A public officer acting as such**

2.6 Although AG’s Reference does not separate the concepts of “public office” and “acting as such” we found it helpful to consider them separately.

PUBLIC OFFICE

2.7 “Public office”, for the purpose of the offence, is primarily defined by the functions a person is under a duty to perform and not by the status of the post held. We have found that the term “public office” is understood broadly. In particular, it is unnecessary:

(1) to establish an “office” in any technical sense or any kind of permanent position;

(2) for the position to be subject to specific rules of appointment, a position of employment, a contractual position or remunerated; or

(3) to establish that a public office is directly linked, by way of appointment, employment or contract, in terms of status, to either the Government or the state.⁴

2.8 To qualify as a public office holder a person’s position must involve the performance of a duty associated with a state function. The law is unclear as to what amounts to a state function. One relevant consideration for the court is whether the office holder exercises coercive powers (we interpret this as being a sufficient but not a necessary condition).⁵

2.9 There is a further important aspect of this element of the offence. The individual’s duty associated with a state function must be one in which the public has a


⁴ For discussion of the difference between the two concepts see the background paper, ch 2.

⁵ An example of a coercive power is the police power of arrest under Police and Criminal Evidence Act 1984, s 24. See further discussion in the background paper, ch 3.
significant interest. This goes beyond an interest of those who might be directly affected by a serious failure in the performance of those functions.\(^6\)

2.10 For convenience, we refer to the types of duties associated with state functions and which have the relevant degree of public interest to make the individual a public office holder as “determinative duties”. This is because they will determine whether a person is in public office.

**ACTING AS SUCH**

2.11 A public officer must be “acting as such” when he or she performs the misconduct alleged. The practical significance of this is unclear.

(2) Wilfully neglects to perform his duty and/or wilfully misconducts himself

2.12 Again, although AG’s Reference does not separate the concepts of “neglect or misconduct” and “wilfulness”, we examine them separately.

**BREACH OF DUTY (NEGLECT OR MISCONDUCT)**

2.13 If the breach of duty, whether by act or omission, is a breach of a determinative duty then that breach will *usually* be sufficient to amount to misconduct in public office, subject to it being serious enough. If the duty breached is a non-determinative duty owed by the person then it *may* in some circumstances be sufficient for the misconduct in public office offence provided it is serious enough.\(^7\)

**WILFULNESS**

2.14 The state of mind (or “fault element”) required by the offence is that the defendant acted “wilfully”. This requires the prosecution to prove that the defendant:

(1) was aware of the circumstances existing that made his or her position a public office;

(2) was aware that a situation might have arisen calling for one of the duties of that office to be fulfilled;

(3) engaged in the conduct which breached the duty in question; and

(4) the decision to do so was unreasonable in light of the facts known to the defendant.

(3) Abuse of the public’s trust

2.15 The wilful breach of duty must be serious enough to amount to an abuse of the public’s trust. That is, the breach of duty must meet a threshold of seriousness such that the misconduct has the effect of harming the public interest. We call this the “seriousness test”.

\(^6\) Mitchell [2014] EWCA Crim 318, [2014] 2 Cr App R 2. at 60, Leveson LJ.

\(^7\) For examples of the practical significance of this distinction see the background paper, ch 2.
2.16 To be guilty of the offence it must also be proven that the public office holder was aware of the circumstances existing that made his or her breach of duty serious. It is not, though, a requirement that he or she had in fact concluded that it was serious.8

(4) Without reasonable excuse or justification

2.17 The final aspect of the offence is that it must be committed in circumstances where the defendant had no reasonable justification or excuse for his or her conduct. It is unclear whether the term “reasonable excuse or justification” constitutes a stand-alone defence to a charge of misconduct in public office (as opposed to simply allowing for denial of another element of the offence).

Problems identified with the current law

2.18 We have identified numerous problems with the current formulation of the common law offence that make it difficult to use.

(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 fault element that must be proved for the offence differs depending on the circumstances. That is an unusual and unprincipled position.

(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 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.

(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.

Lack of clear definition of “public office” and “acting as such”

2.19 This element of the offence is the most difficult to understand. As this is one of the core elements of the offence it is a fundamental failing.

2.20 Our research reveals that there are the following, amongst other, specific difficulties with the definition of public office:

(1) There are difficulties both 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.

(4) It is debatable whether the requirement that a public officer 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.

2.21 We are aware that many prosecutions for misconduct in public office result in legal challenges at trial and on appeal as to whether the defendant is in public office. In at least one case it has been argued that the uncertainty renders the offence so vague as to infringe article 7 of the European Convention on Human Rights (“ECHR”).

2.22 One of the main difficulties with deciding who is and is not in public office is the blurring of the distinction between the public and private sectors. This problem has increased in recent decades as functions that were traditionally performed by the state through government or public bodies are now often performed on behalf of the state by arm’s length bodies or private organisations. One example is the partial privatisation of the prison system. Further, many public bodies perform other functions in addition to the state responsibilities they were established to satisfy. An NHS trust, for example, in addition to providing public health care, may also provide private health care services.

2.23 We conclude that the element of misconduct in public office described in AG’s Reference, which requires the individual to be “a public officer acting as such”, is ill-defined and vague. In our view unsuccessful and/or unmerited prosecutions, appeals and potential challenges under the ECHR are likely to continue if the definition of public office is not clarified.

Lack of clarity as to the fault element required

2.24 The fault element of misconduct in public office is “wilfulness”. The term has the same meaning as subjective recklessness as clarified in AG’s Reference.

2.25 The Court of Appeal in AG’s Reference appeared to create a single fault element for all types of misconduct in public office. However, there is an apparent inconsistency in the earlier case law as to whether misconduct is constituted by any wilful abuse of trust, or whether an improper motive is also required. Some

9 For example, the recent unreported case of Ball (8 September 2015) Central Criminal Court (unreported), where Wilkie J found that the former Bishop of Gloucester had been a holder of public office.


11 Mitchell [2014] EWCA Crim 318, [2014] 2 Cr App R 2 at [21], although the Court of Appeal did not consider this point in detail as the appellant succeeded on his first ground of appeal that a paramedic was not a public officer. Article 7 prohibits the creation of retroactive law, see Appendix C to the background paper for further discussion, available at http://www.lawcom.gov.uk/wp-content/uploads/2016/01/apc_echr.pdf.


cases hold that any breach of duty that is wilful and not merely inadvertent is sufficient; \(^{14}\) others refer to a dishonest, oppressive, corrupt or partisan motive being required. \(^{15}\)

2.26 If the court in AG’s *Reference* did intend to apply a single fault requirement to all types of misconduct in public office, at least one later case did not follow that approach. The Court of Appeal in the case of *W* held that where the allegation of misconduct would also amount to a dishonesty based offence (such as theft or fraud) then both wilfulness and dishonesty must be proved as separate elements. \(^{16}\) That decision has been roundly criticised. \(^{17}\)

2.27 There are difficulties in principle and in practice in requiring additional fault requirements for different species of the same offence, dependent on the facts of individual cases.

**Lack of clarity as to whether the offence requires breach of a particular type of duty**

2.28 The offence of misconduct in public office is primarily concerned with a breach of duty whether by act or omission. The question that arises is whether the offence applies only in cases where the duty breached is a determinative duty (see paragraph 2.10 above), or whether a breach of any duty to which the office holder is subject may suffice.

2.29 Analysis of the case law suggests that a breach of a determinative duty is usually sufficient for this element. \(^{18}\)

**Example 1(a)** An authorised person for the purposes of marriage registration (D) has a determinative duty to perform his or her marriage registration function, and to do so properly. On the basis of racist views, D fails to register a marriage correctly between a British national and a non-British national. The result is that the non-British national is not granted leave to remain in the UK and is deported.

\(^{14}\) Sainsbury (1791) 4 Term Rep 451; Cope (1827) 6 A & E 226; Pinney (1832) 3 B & Ad 947; Hall [1891] 1 QB 747.

\(^{15}\) Young and Pitts (1758) 3 Burr 556, 97 ER 447; Williams and Davis (1762) 3 Burr 1317, 97 ER 851; Baylis (1762) 3 Burr 1318, 97 ER 851; Davie (1781) 2 Doug KB 588, 99 ER 371; Borron (1820) 3 B & Ald 432, 106 ER 721; ex parte Fentiman (1834) 3 A & E 127, 111 ER 49.

\(^{16}\) W [2010] EWCA Crim 372, [2010] QB 787. *W* concerned a police officer who was accused of misusing a credit card provided to him by the police force for the purpose of paying work-related expenses.


2.30 D’s breach is of a duty that is determinative of D being a public office holder. In this situation D could, subject to the seriousness test and fault element, be prosecuted for misconduct in public office.19

2.31 The law is, however, even less clear as to which, if any, breaches of non-determinative duties will suffice. Some of the cases suggest that a breach of any duty can amount to misconduct in public office, at least for certain office holders.

Example 1(b) D, the authorised person for the purposes of marriage registration, is also an employer and has a duty to pay the caretaker employed by the authorised venue for the marriage. D fails to do so.

2.32 In Example 1(b) above, D has breached a duty owed to D’s employee, but not a duty that is determinative of D being in public office. It is unclear whether this would be an offence of misconduct in public office.

2.33 One view expressed by some stakeholders is that public office holders should generally only be held criminally liable for breaches of their determinative duties, but that the liability of specified public office holders should extend further. For example, some stakeholders have expressed the view that members of the police or the prison service are types of office holder where a serious breach of any of their duties may amount to misconduct in public office, whether related to that individual’s state functions or not.

Lack of clarity as to what can constitute an “abuse of the public’s trust”

2.34 The “seriousness test” 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”. In other words, the breach must be one which merits criminal prosecution, and not merely civil law or disciplinary proceedings.20

2.35 There are a number of factors that can assist in deciding whether the misconduct in question is serious enough to justify the use of the criminal law:

(1) The likely consequences of the breach of duty. The offence itself contains no requirement that the prosecution prove any particular consequence; the offence is concerned with conduct. However, the existence of a risk of adverse consequences is relevant to the determination of whether the breach of duty is a serious one.21

(2) The existence of improper motive (for example: bad faith, dishonesty, oppression or corruption) may also be relevant. Some early cases refer to a dishonest, oppressive, corrupt or partisan motive being required as a separate element of the offence.22 However, the later cases contain no

19 Although, there are specific offences relating to the failure to register a marriage under the Marriage Act 1949, s 76(1) and (2).
22 See para 2.25 above.
such requirement. Motive may simply be one consideration to be taken into account when assessing “seriousness”.

(3) 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.

2.36 The Lord Chief Justice, Lord Thomas, reiterated recently in the case of Chapman that the legal position is that an “abuse of the public’s trust” is one that has the effect of harming the public interest. However, it remains unclear what role, if any, factors such as consequences and impropriety of motive will play in the assessment of “harm to the public interest”. We consider that the difficulties currently experienced with the definition of “seriousness” in the offence are unlikely to be resolved by the courts without a more fundamental review of this element of the offence.

2.37 There are two problems with this element. First, the jury is being asked to make a circular assessment of whether an individual’s breach of duty is serious enough to be criminal (it is criminal because it is serious, it is serious because it is criminal). Secondly, this may be compounded by the fact the jury is being asked to do so without any clear indication of what could amount to serious, and therefore criminal, misconduct.

2.38 The lack of comprehensive guidance as to what makes misconduct “serious” causes difficulties for investigators, prosecutors, judges and juries. It is particularly difficult in terms of making decisions as to where the line should be drawn between disciplinary and criminal proceedings.

Lack of clarity as to the operation of “reasonable excuse or justification”

2.39 It is unclear whether the element of “without reasonable excuse or justification” provides true defences to a charge of misconduct in public office or merely allows for denial of another element of the offence.

References


24 As discussed above there still seems to be an exception, following the case of W [2010] EWCA Crim 372, [2010] QB 787 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.


26 This issue is similar to that faced in cases involving the offence of gross negligence manslaughter. However, this matter is potentially more difficult for the misconduct offence as in manslaughter cases the jury have an indicator of seriousness, in the form of a serious consequence (death) that has resulted, and which is a requirement of the offence. In misconduct in public office, there is no requirement of consequence.

27 This was clearly demonstrated by the appeal of Chapman [2015] EWCA Crim 539, [2015] 2 Cr App R 10 and the subsequent Crown Prosecution Service review of Operation Elveden prosecutions. The review resulted in the cases against nine defendants being discontinued.
2.40 Arguably, in the context of misconduct in public office, the existence of facts which would constitute such a defence would preclude proof of the elements of the offence, so no defence is necessary. In particular, where a defendant has a reasonable excuse or justification:

(1) the conduct complained of may not be serious enough to constitute the offence; or

(2) the defendant may not have acted wilfully.

2.41 The case law shows that the “without reasonable excuse or justification” element of the offence is rarely distinguished from other elements of the offence in the way that it was separated by the court in AG’s Reference.28

**Overlaps with other forms of accountability**

2.42 The offence of misconduct in public office overlaps with a number of other methods of holding public officers to account, including:

(1) other criminal offences; and

(2) disciplinary procedures.29

**Other criminal offences**

2.43 The conduct alleged in a prosecution for misconduct in public office will very often also constitute at least one other offence.30 An example of this is a public office holder who accepts a payment to influence a decision he or she has to make, who may be guilty of both bribery and misconduct in public office.31 The reason for choosing a charge of misconduct or an alternative or related offence may vary depending on a number of factors.

2.44 In many cases it may be more appropriate to charge a specific offence. This may be because the specific offence more accurately describes the wrongdoing and/or because there are procedural and/or evidential advantages in doing so. In cases of disclosing highly sensitive or personal information, for example, an offence under the Official Secrets Act 1989 or the Computer Misuse Act 1990 might be a preferred charge to misconduct in public office.

2.45 Criticism of broad common law offences is often based on the premise that such offences are inherently uncertain and lack clear boundaries when in fact the law

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29 In addition there are clearly overlaps between criminal misconduct and the tort (civil action) of misfeasance in public office; see Appendix B to the background paper available at http://www.lawcom.gov.uk/wp-content/uploads/2016/01/apb_tort.pdf.


31 For example, see *Patel* (October 2011) (unreported), which concerned a court clerk who accepted bribes from motorists due to be subject to points on their driving licences.
should be “clear, precise, adequately defined and based on a discernible rational principle”.32

2.46 However, there is no absolute rule that the use of a broad common law offence offends against legal certainty.33 There must be good reason for using a broader common law offence rather than either a narrower common law one (for example, perverting the course of justice) or a statutory one.34 The offence must be applied in a way that is not unexpected and therefore retroactive in effect.35 There may be good reasons for using a broader common law offence where:

1. the alternatives are narrow specialised offences that pose greater difficulties of proof;

2. the seriousness of the wrongdoing merits a particular sentence that cannot be accommodated by the alternative offences; and/or

3. a single charge of misconduct may more readily capture the nature or range of the conduct.

2.47 The lack of clarity of the current law of misconduct may render it more difficult for prosecutors to determine in advance who could be liable for prosecution. This risks inconsistent prosecutorial decision making.

2.48 Some stakeholders, such as the Crown Prosecution Service (CPS), have expressed the view that, as a matter of principle, a conviction for misconduct in public office describes a distinctive form of wrongdoing.36

2.49 It is arguable that a distinct wrong is committed when a holder of public office commits a serious breach of a determinative duty.37 It can also be argued that such a wrong merits criminalisation separate from an offence of general application, such as bribery or fraud.

SECTION 26 OF THE CRIMINAL JUSTICE AND COURTS ACT 2015

2.50 Section 26 of the Criminal Justice and Courts Act 201538 provides a new offence which overlaps with misconduct in public office: corrupt or other improper exercise of police powers and privileges.

2.51 In recent years police corruption has been a matter of government and public concern. The section 26 offence is designed to fill gaps that may have existed

33 Rimmington [2005] UKHL 63, [2006] 1 AC 459 at [52].
34 Rimmington at [30].
35 SW and CR v United Kingdom (1995) 21 EHRR 363 (App Nos 20166/92 and 20190/92), at [34] and [36].
36 For further detail see chs 7 and 8.
37 See para 2.10 above and, for further detailed discussion of determinative duties see ch 2 of the background paper.
38 Section 26 came into force on 13 April 2015, SI 2015 No 778, sch 1.
between existing statutory offences.\textsuperscript{39} However, on analysis of the provision we consider that prosecutions under section 26 are likely to suffer from as many difficulties in practice as prosecutions for misconduct in public office. In our view, a number of the elements of this new offence are just as ambiguous as the elements of misconduct in public office.

**Disciplinary matters**

2.52 There are overlaps between criminal misconduct and misconduct in an employment or disciplinary context. Almost all public office holders will be subject to codes or regulations governing conduct. Where there is an allegation that a public office holder has misconducted him or herself, the public officer is likely to be subject to internal disciplinary procedures.

2.53 Questions arise as to where the line should be drawn between criminal misconduct and other lesser types of misconduct. Criminal prosecution should be reserved for the most serious kinds of wrongdoing because a conviction is the most severe legal sanction that can be imposed.

2.54 There are, however, difficulties in drawing a clear line. Our research has shown that these difficulties may be exacerbated by the lack of definition surrounding the individual elements of the misconduct offence. This is further complicated by the fact that different public office holders are subject to different types of disciplinary regime.

**Categories of conduct prosecuted as misconduct in public office**

2.55 In our background paper, we identified some types of conduct that are currently prosecuted as misconduct in public office because no other offence is available. We also identified circumstances in which alternative offences that criminalise the same or similar types of conduct as misconduct in public office are available but where misconduct may be considered to be a more appropriate offence to prosecute.

2.56 Having examined the cases that can only be prosecuted as misconduct, we concluded that there was only a small number of such cases. These can be grouped into five non-exhaustive categories:

(1) Public office holders who exploit their positions to facilitate a sexual relationship.

(2) Public office holders who deliberately use their positions to facilitate a personal relationship which may create a conflict with the proper performance of 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.

\textsuperscript{39} For discussion of s 26 and its background see ch 3 of the background paper.
2.57 Some may argue that these instances of misconduct, which would not otherwise be caught by other offences, nonetheless deserve to be criminalised. This could be either as misconduct in public office or some specifically created offence. To clarify, we are not necessarily agreeing that this is conduct that ought to be criminalised. Our aim is to highlight that abolition of misconduct in public office, without replacement, would have the effect of decriminalising some conduct that can currently be the subject of prosecution. We consider these categories in more detail in Chapter 3 below.

2.58 In the background paper we also considered the numerous types of conduct that are prosecuted as misconduct in public office but that could be prosecuted under an alternative offence. In such cases, the selection of the charge of misconduct in public office may be for a number of reasons of practical prosecutorial discretion. Examples of such conduct include:

(1) Public office holders who exploit their positions to facilitate financial gain. This could in some cases also be prosecuted under section 4 of the Fraud Act 2006.

(2) Payments accepted by an individual in advance of becoming a public office holder where the payment would cause a conflict of interest with the public office holder's functions. This could in some instances also be prosecuted under section 2(2) of the Bribery Act 2010.

(3) Interference with evidence by public office holders. This could often also be prosecuted as perverting the course of justice.

(4) Conveyance of non-prohibited, but potentially harmful or disruptive, articles into prison by public office holders. This could in some limited circumstances also be prosecuted as conspiracy to defraud.

(5) Public office holders who fail properly to protect, or who exploit, information that comes into their possession by virtue of their positions. This could in many cases be prosecuted under the Computer Misuse Act 1990.

SUMMARY OF RESPONSES TO THE BACKGROUND PAPER

Consultation Question 1

2.59 Can consultees provide any further examples of the problems of interpretation with the elements of the current offence of misconduct in public office?\(^40\)

\(^40\) Background paper, para 2.228.
Responses to Consultation Question 1

2.60 The majority of consultees could not provide any further examples in answer to this question. The London Criminal Courts Solicitors’ Association (LCCSA) stated that “the consultation has provided a comprehensive overview so we cannot provide any further examples”. Consultees generally indicated agreement that the offence has significant problems in terms of interpretation of its elements.

2.61 The National Offender Management Service (NOMS) provided an example of a case they have investigated which exemplifies the practical impact of the problems with the offence. This case concerned a prison officer who received a two year suspended prison sentence for having a relationship with an ex-prisoner. The sentencing judge stated that a longer sentence would have been imposed had the case been brought to court earlier. NOMS submitted that the delay was due to the lack of clarity with misconduct in public office and how it is enforced.

Consultation Question 2

2.62 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?41

Responses to Consultation Question 2

2.63 Responses to this question were limited by the infancy of the offence and the absence of experience of its practical operation at the time of the consultation. Those consultees who did respond to this question were critical of the offence.

2.64 The Independent Police Complaints Commission (IPCC) was concerned about the overlap with misconduct in public office and which offence would be the most appropriate to prosecute. The IPCC was particularly concerned about the potential breadth of the offence: “it is possible the new offence will be used more widely than intended” because it does not “have a similar seriousness threshold or requirement of ‘bad faith’” to the offence of misconduct in public office. They submitted that “this could potentially criminalise conduct which would normally be investigated as misconduct but not criminality.”

2.65 The CPS stated that “it is not an offence that prosecutors have had recourse to as we have found misconduct in public office meets the criminality of the offending behaviour with which we are presented. We respectfully agree with the analysis in your report about the challenges posed by the offence.”

2.66 The Law Society agreed that the “expression ‘police powers and privileges’ is very unhelpful in s.26 of the Criminal Justice and Courts Act 2015, and that ‘position or authority’ would have been much clearer.”

2.67 We are not aware of any prosecutions that have been brought using this offence, although it has been in operation since April 2015.

41 Background paper, para 3.120.
Consultation Question 3

2.68 Can consultees provide further examples of the problems with the current definition of “public office”?\(^{42}\)

Responses to Consultation Question 3

2.69 Without exception, all respondents to the consultation and participants at the symposium\(^{43}\) considered this to be a highly problematic area of the current law. Few, however, were able to offer further examples of problems with the definition of public office above and beyond those we had set out in the background paper.

2.70 The High Court Enforcement Officers Association (HCEOA) found our analysis at paragraphs 1.16 to 1.19 of the background paper helpful to clarify the approach a court might take in determining whether a person holds public office. They stated that “use of this ‘determinative duties’ test provides clarity but a fuller definition of ‘public office’ is really needed if the offence is to be restated.”

2.71 The Council of HM Circuit Judges stated that: “it is apparent to us that the uncertain scope of this offence can lead to dependence on prosecutorial discretion and policy rather than clearly defined law.” However, the CPS submitted that the risk that these difficulties will result in inconsistent charging decisions “appears to be offset in part by the application of the CPS Guidance, which sets out the limited circumstances when the offence should be charged and invites prosecutors to consider seeking the advice of the Director’s Legal Adviser to resolve any uncertainty as to whether it would be appropriate to bring such a prosecution.”

2.72 The CPS also provided examples of factors that are important when making a charging decision in more difficult cases: did the person swear an oath to the Crown? Were they a civil servant? Were they subject to the Official Secrets Act? Were they vetted for security clearance? Did they have a CRB check? Were they paid by public funds? In the specific context of nursing, they considered whether the individual’s responsibilities go “so far beyond the ordinary duties or responsibilities of nurses working in a hospital as to be considered of substantial importance to the public at large”.

2.73 A number of issues were raised in relation to the “public/private divide”. Broadly, respondents thought that even where a service is undertaken by a private company it could still amount to performance of a public function. The Committee on Standards in Public Life noted the difficulty in defining the term “public office” and “public office holders”:

> There is an increasingly blurred distinction between public and private and voluntary sectors. The Committee’s own remit has been widened

\(^{42}\) Background paper, para 4.24.

\(^{43}\) Law Commission Symposium on Misconduct in Public Office, 20 January 2016, at Dickson Poon School of Law, King’s College London.
to make clear that the Seven Principles\textsuperscript{44} apply to any organisation delivering public services ... The question of whether the offence of misconduct in public office should apply to, for example, higher education institutions or housing associations, sport, or even to fully privatised entities such as the utilities remains pertinent. What is clear to this Committee is that the public want all providers of public services to adhere to and operate by common ethical standards, regardless of whether they are in the private, public or voluntary sectors.

2.74 Ryan Mackenzie\textsuperscript{45} submitted that clarification is required in relation to those working in the criminal justice system, as to whether employees of private companies (to which public services have been outsourced) are included within the definition. For example, detention officers employed by G4S.

2.75 Scott Pavitt\textsuperscript{46} felt that this element should rely on the question “does the person carry out a role on behalf of the public?”, accordingly making a public private divide irrelevant where private companies and individuals carry out tasks for public organisations.

2.76 Professor Mark Knights, of Warwick University, indicated that the difficulty in discerning a line, or even the desirability of such a distinction, has been an issue for centuries. Professor Knights outlined a number of historical organisations which he defines as “semi-private”, including the East India Company, and concludes that “the principle was thus established in the common law that public office was not limited to those receiving a salary from the Crown/state but included those acting in a capacity of entrusted public power.” He notes that in most cases an alternative crime was charged but that misconduct in public office has “been a reserve, catch-all but limited category, useful perhaps because of its elasticity which an attempt to codify its definition in statute might undermine”.

2.77 Most consultees who considered this question also considered the question of whether in principle the problem could be solved, but were reluctant to commit themselves to a firm position on how this could be achieved. The Council of HM Circuit Judges thought that “it is a matter of policy and therefore one primarily for Parliament to determine which offices should come within the scope of the offence and which should not”. They suggested that a schedule of offices could be created that could include at a minimum: the judiciary, the police, members of either House of Parliament, the European Parliament or local authorities and anybody connected with the administration of justice but not actually performing a judicial function. Additionally, “it should probably cover the emergency services”.

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\textsuperscript{44} The “seven principles of public life” were established by the Committee on Standards in Public Life’s first report, published under the chairmanship of Lord Nolan: First Report of the Committee on Standards in Public Life (May 1995) Cm 2850-I.

\textsuperscript{45} Police Constable, Fraud Investigation Team, Serious Crime Division, Greater Manchester Police.

\textsuperscript{46} Detective Constable, Specialist Crime and Operations, London Prison Anti-corruption team.
Some individual members of the public felt able to be more definite in offering a definition of public office. Mike Paley suggested that public office could be defined as:

A position where a person carries out a duty on behalf of the State – such as a civil servant. This includes the cleaner (that misappropriates cleaning materials) right up to the monarch. They work (whether paid or not) for a public-funded organisation.

Christine England highlighted that in her view (if they are not already covered by the existing offence) government ministers, any person appointed to be a regulator to protect the public, any member of an NHS Trust or any post holder acting for any of the above should all be public officers. Beyond those positions she offered criteria for determining a public office:

The criteria should be that the responsibilities of the post involve performing duties funded by public funds, or which are intended to protect the public interest, even if the funding source is not directly from Government.

Compassion in Care submitted that the law should include “private companies who conduct publicly funded activities ie care homes providing local authority funded care, and therefore they are acting in place of the state”.

Unfortunately, there was no clear consensus on the question of how to define a public office and the opinions of many individuals were limited by their own personal experiences.

Consultation 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?

Responses to Consultation Question 4

The majority of consultees did not have a view on the practical significance of the “acting as such” requirement. The LCCSA stated:

Our view is that acting as such is an important ingredient of the offence as it ensures the offender is guilty of an offence only if the conduct or rather misconduct arises out of the discharge of his duties. Arguably the wording is required so that the office holder’s conduct is distinguished from anything which is done in his or her capacity as a private citizen.

47 Member of the public.
48 Member of the public.
49 A charity whose purpose is to expose the abuse of vulnerable people within the healthcare sector.
50 Background paper, para 4.25.
2.84 In contrast NOMS was strongly of the opinion that the current application of this requirement is problematic in practice. They provided two case examples which illustrate, in their view, the inconsistent interpretation of this element:

(1) The CPS refused to charge a prison officer who had conducted a sexual relationship with a serving prisoner in part because the alleged misconduct had taken place whilst the officer was off-duty, whilst the prisoner was on release from the prison on licence.

(2) An agency worker (not directly employed by NOMS) was convicted of misconduct in public office for engaging in a relationship with a serving prisoner. The evidence consisted of the defendant meeting with the prisoner whilst the prisoner was on release on licence. The judge in this case stated that “the public trust in the MOJ would have been damaged as a result of her misconduct” and that she breached the trust placed in her.

Consultation Question 5

2.85 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?\(^{51}\)

Responses to Consultation Question 5

2.86 Although no consultees could provide further examples, the HCEOA agreed with our suggestion in the background paper that only a breach of determinative duties should be the starting point for the offence.

2.87 The CPS stated that “under the current formulation, analysis of the type of duty breached cannot be severed from consideration of the seriousness of the misconduct; there must be a direct link between the alleged misconduct and an abuse, misuse or breach of the specific powers or duties of the officer or the position. The difficulty frequently lies not in the identification of the duty but whether the breach is such that it amounts to the requisite abuse of trust.”

Consultation Question 6

2.88 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?\(^{52}\)

Responses to Consultation Question 6

2.89 Opinions as to the requirement that misconduct must amount to an “abuse of the public’s trust” varied. Of those who responded to this question, most felt that the element is unworkably subjective:

\(^{51}\) Background paper, para 4.36.

\(^{52}\) Background paper, para 4.47.
“‘Seriousness’ should be based on a much more objective test than ‘abuse of the public’s trust’ and must always come up to the criminal standard of proof.” (HCEO)A

NOMS provided examples of investigations which they believe show that this element is interpreted inconsistently in cases concerning sexual relationships between persons working in a prison and prisoners.

Scott Pavitt agreed that the element is interpreted inconsistently where breaches of duty by prison staff are concerned.

Michael Parroy QC agreed with our analysis of this element in the background paper and concluded that this element is “a woolly test which may mean very different things to different people.”

The CPS indicated that often the difficulty with the offence lay with the question of seriousness. They gave some specific examples of matters relevant to whether conduct is serious enough to reach the high threshold for charging the criminal offence of misconduct in public office.

Two respondents specifically referred to the argument that this element requires a “circular” assessment of the misconduct:

(1) The Law Society agreed that the circularity of this test and lack of comprehensive guidance as to what makes conduct “serious” are “significant defects”. They state that this assessment “is no easy exercise, other than in the most egregious of cases” which is partly a result of the relatively few prosecutions such as to be points of reference for prosecutors when making charging decisions.

(2) Simon Parsons suggested that the circularity of this test may result in issues of legal uncertainty and therefore failure to comply with article 7 of the ECHR. Further, he questioned whether the decision in Chapman had resolved the uncertainty.

In contrast, the Council of HM Circuit Judges did not agree that the uncertainty of this element causes insurmountable problems as it requires a similar assessment by a jury as other such concepts including reasonableness, recklessness dangerousness and dishonesty. They stated that “in our experience they do so without difficulty and reach rational conclusions on the evidence.” Further, they suggested that “it may be that a test similar to that of dangerous driving, i.e. that it falls far below the standard of acceptable conduct by a person holding such office would provide some assistance.”

Consultation Question 7

2.92 Can consultees provide further examples of problems arising from the existence of variable fault elements for different species of misconduct in public office?\(^{54}\)

Responses to Consultation Question 7

2.93 No consultee provided any further examples of problems arising from the variable fault elements under the current offence of misconduct in public office. The CPS felt “that the situation in W is probably, if not confined to its own facts, then at least of limited applicability because cases involving dishonesty would normally be charged under other statutes.”

Consultation Question 8

2.94 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?\(^{55}\)

Responses to Consultation Question 8

2.95 The CPS were of the view that “the test must be objective” and that “in practice it does appear to operate as relevant evidence to the test of seriousness, making the conduct less culpable and so less serious, rather than as stand-alone defence”. They informed us that this issue has been raised in a trial forthcoming in 2016.

2.96 The Law Society agreed with our analysis of this element in the background paper and added that “it is … unclear whether its absence is required to be proved beyond reasonable doubt by the prosecution, or raised by the defence on the balance of probability.”

2.97 Ryan Mackenzie felt “that it should be considered as an element of the offence. The reasoning being that people in the public office make many decisions that could be described as contentious, but upon closer examination are the production of the incident and follow a logical process. Making the ‘without reasonable excuse or justification’ aspect as part of the definition would allow more power to remain with the investigator rather than being forced to charge and it being raised as a defence at court or as part of the CPS process.”

2.98 Barrister Alec Samuels commented that “reasonable excuse or justification” seems to be a general defence, and the suggestion that it may apply to only a part of the offence “seems to be inventing difficulties”.

Consultation Question 9

2.99 We identify three potential practical reasons that may exist for prosecuting misconduct in public office where alternative offences are available.

\(^{54}\) Background paper, para 4.53.

\(^{55}\) Background paper, para 4.59.
(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?  

Responses to Consultation Question 9

2.100 The Council of HM Circuit Judges were of the opinion “that all these are proper reasons for prosecuting misconduct in public office rather than alternative offences” and were unable to provide any further examples. The CPS also thought that the paper had covered all the relevant reasons.

2.101 Alec Samuels did not think that examples (1) and (2) were acceptable reasons for prosecuting misconduct in public office. He submitted that it was the role of Parliament to prescribe the limits of offences and set the maximum sentences “using MIPO because an existing statute in the judgment of CPS does not go far enough is unacceptable.”

2.102 NOMS were of the view that “when there are several statutory offences identified it may be easier to prove one offence of MiPO”.

Consultation Question 10

2.103 Do consultees have any views on whether the offence of misconduct in public office reflects a distinctive wrong?

Responses to Consultation Question 10

2.104 Opinions were split amongst consultees as to whether the offence reflects a distinctive wrong and what they felt that wrong was if one existed.

2.105 Those who felt that the offence reflects a distinctive wrong included:

(1) The CPS: “Whilst the factual basis of the offence can differ widely, the wrong and the harm caused are essentially the same. It is the undermining of public confidence in the institutions in which, as a society, we place our trust, caused by those who voluntarily accept the burden of the responsibility of the trust we place on them failing, through their own culpable weakness, to meet the high standards necessary for those institutions to function … The offence is an invaluable tool that captures the nature of the wrong done and the harm caused.”

56 Background paper, para 5.35.

57 Background paper, para 5.56.
(2) The Council of HM Circuit Judges were of the view that the offence should be limited to conduct that relates to the office itself and stated: “we do not agree with outright abolition of the offence and simply leaving the misconduct to be dealt with by charging other offences … We think that the offence should be retained in order to ensure that public confidence in those who hold such office is maintained.”

(3) The LCCSA: “the public have an expectation that the holders of public office discharge their duties in an appropriate manner and do not abuse their position even if there is concern as to what this exactly entails.”

(4) The HCEOA: “It is interesting that the offence fell into disuse between the late 18th century and the beginning of the 21st century. Clearly, since then, it has been felt that there is a gap in the criminal law. It is, in our view, a distinctive wrong, which requires re-definition.”

(5) Paul Williams\textsuperscript{56}: “I … believe that it is important to have a criminal offence that applies when there is a serious breach of a determinative duty even if that offence potentially occurs in parallel to other offences.”

2.106 However, the IPCC felt that the narrow range of circumstances in which the IPCC tends to encounter the offence “may suggest that the offence, as it stands, does not so much reflect any distinctive wrong as fill what are considered certain gaps in the criminal law.”

2.107 Whilst not giving an answer to this question specifically, the Law Society reminded us that the offence of torture, under section 134 of the Criminal Justice Act 1988, can only be committed by a public office holder.

2.108 This is an example of an act being considered to be a distinct form of wrongdoing when, and only when, it is committed by a public office holder. The intentional infliction of pain or suffering on another by anyone other than a public office holder would amount to an offence against the person, but not torture. The offence would appear to suggest that specific forms of conduct can be categorised differently when they are performed by persons carrying out “official duties” to reflect that distinctive wrong.

Consultation Question 11

2.109 Do consultees have any views on whether the offence of misconduct in public office fulfils an important role from the perspective of fair labelling?\textsuperscript{59}

Responses to Consultation Question 11

2.110 A number of consultees expressed the view that wrongdoing by a public office holder deserved a different label from wrongdoing committed by another person. We are grateful to Simon Parsons for expressing the point concisely:

\textsuperscript{56} Member of the public.

\textsuperscript{59} Background paper, para 5.57.
The label applied to an offence ought fairly to represent the offender’s wrongdoing. Which means if it is possible to reform the misconduct offence so that it satisfies the principle of legal certainty then the status of the public officer should have an important role in that definition.

2.111 The CPS thought the offence “fulfils an important role in communicating the nature of the wrongdoing”. The LCCSA felt “that the offence of misconduct in public office fulfils an important role from this perspective. It is an offence which can undermine public confidence in public office holders and hence it is important that the labelling is correct. We appreciate that the offence can potentially cover a range of circumstances but the same applies to any other category of offence.”

2.112 However, the IPCC was of the view that “the role that the current offence plays in ensuring that such conduct is subject to criminal sanction is more important than the question of fair labelling. Moreover, any labelling function that the current offence does perform is less important than what members of the public may perceive to be a lack of consistency in how the offence is applied … For example, members of the public may be surprised that medical professionals caring for a patient could not be found guilty of misconduct in public office in circumstances in which police officers may be.”

2.113 The Council of HM Circuit Judges thought it was important that the name of the offence made clear that it covers both serious omission as well as positive misconduct and supported the word “misconduct” over “misuse” for this reason.

Consultation Question 12

2.114 We have identified five types of conduct which can only be prosecuted as misconduct in public office under the current law.61 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?62

Responses to Consultation Question 12

2.115 We were gratified to find that most consultees responded to this question by highlighting the fact that the background paper contained a comprehensive and very detailed analysis of the law in relation to this area.

2.116 Suggestions of potential gaps in the law were:

(1) The CPS cited two cases which may not be covered at all, or sufficiently:

60 See, for example, Mitchell [2014] EWCA Crim 318, [2014] 2 Cr App R 2.
61 See para 2.56 above.
62 Background paper, para 6.48.
(a) A police officer who strip searches young men and subjects them to close physical inspection which can be considered “bullying, oppressive, humiliating and well beyond the powers that could properly be exercised in the pursuance of his duties.”

(b) Perverting the course of justice where there is no positive act by the suspect. Although the CPS considered this may be covered by Category 4.

(2) Paul Williams stated that although “(reckless imperilment of children) … would probably fall within [category (4)] it isn’t clear that such misconduct is always characterised as ‘neglect’.”

(3) The Law Society suggested “public office holders who abuse their position for personal advantage”. This could, however, in part be covered by our Category 3 conduct.

(4) The IPCC gave two examples of cases which would probably not be covered by an alternative offence if misconduct in public office was to be abolished without replacement. They fell within our Categories of conduct 1 and 4: “where there is a serious and wilful neglect of the police service’s duty to protect the public from violence – as in the recent and tragic case of Bijan Ebrahimi – or where a police officer uses their position to sexually exploit a vulnerable victim or witness, there is a strong argument that criminal sanction should at least be a possibility.”

2.117 A range of other comments were received in relation to the five categories of conduct we identified as only capable of being prosecuted by way of misconduct in public office. Where appropriate we will refer to those comments in the following two chapters.

KEY ISSUES ARISING FROM CONSULTATION

2.118 In what follows we discuss a number of recurring key issues that arose throughout our consultation process, albeit in a form that did not specifically address the consultation questions we posed in the background paper.

The need for reform

2.119 Our analysis in the background paper, together with the responses to consultation received, leads us to conclude that there is a pressing need for reform of the offence of misconduct in public office. With a single exception, all who expressed a view on the reform of the offence considered that it could and should not be retained in its current form. We consider that this must be right, given the multiple difficulties that we have identified arising from the current law.

2.120 Many agreed with the view that the offence is outdated and that review is long overdue as “it doesn’t fit the bill in modern times” and “we are badly in need of

63 These were the facts of the case of Hutchings http://news.bbc.co.uk/1/hi/england/hampshire/7392154.stm (last visited 19 July 2016).

64 Detective Superintendent Ray Marley - College of Policing, speaking at the symposium.
clarity and review”. The Right Honourable Dominic Grieve QC MP, former
Attorney General, stated at our symposium that “the current offence is plainly
flawed, it needs replacing”.

2.121 The Law Society agreed in its response to our consultation:

At this early stage in the Law Commission’s deliberations, the Society
would welcome reform to put the offence on a clearer statutory
footing. We agree that the existing complexity and uncertainty
inherent in this common law offence are such that that the need for
reform is indeed pressing.

2.122 The only dissent to this came from Professor Mark Knights:

The decision about when the public trust had been breached must
rest with the public and hence the common law, rather than statute
law, was [historically] the better route. There is still a good deal to be
said for this position.

2.123 There is therefore almost unanimous agreement that the current misconduct
offence lacks clarity and is without clear boundaries. This is a view shared by
judges, practitioners, academics, government officials, prosecutors, the police,
those who represent individuals who have already been identified as public office
holders and persons who have otherwise been involved in misconduct in public
office prosecutions. Within that agreement there are however differing views as to:

(1) what purpose the current offence serves;
(2) whether that purpose is necessary; and
(3) if so, the extent to which the existing offence needs amendment or
replacement to meet that purpose.

The mischief to be addressed

2.124 One of the most notable features of both the debate engendered by the
symposium and the responses received to our consultation, was the lack of
consensus as to the nature of the rationale justifying an offence of misconduct in
public office. It appears that the core ideas underpinning misconduct in public
office are not easily defined by legal theory, but ones that many feel are
instinctive.

2.125 Professor Antony Duff expressed the view that the offence was not one that
easily fitted into the theoretical analysis of “harms and wrongs” applied to most
criminal offences (see Chapter 3), but potentially addressed an important
“mischief”. Professor ATH Smith agreed at our symposium that there is
“undoubtedly a mischief here” but offered no view on what that was.

65 Rosemary Ainslie, Senior Crown Prosecutor – CPS, speaking at the symposium.
66 Professor Duff provided comments on a draft version of this paper.
A number of potential rationales for the offence were alluded to by consultees and those who attended our symposium. For example, abuse of the public’s trust, betrayal of public expectations, abuse of power, preventing harm to the public interest and/or damage to public confidence. However, none of these were well-defined. It may be that the law alone lacks capacity to describe this mischief.

Professor Mark Knights,67 provided an overview of the historical context of the important 18th century decision in *Bembridge*.68 Professor Knights suggests that *Bembridge* is “in many ways an odd one to act as the foundation of common law” because it is firmly rooted in its particular context and was “always a political as well as legal decision.”69 The key points are:

(1) It arose during a heightened public concern about public expenditure in the wake of the war with the American colonists.

(2) It was a case about intended fraud, rather than larger notions of misconduct.

(3) The defendant was re-employed prior to the trial, causing significant political unrest. This resulted in debate as to what is in the public interest to prosecute.

(4) The case was rooted in concepts of trust specifically in relation to public money.

(5) The prosecution was a way to prosecute for the failure to reveal financial fraud, something not covered by other legislation at the time.

(6) Conceptions of “public office” were very different in the 18th century – office-holding was highly personalised, conduct in office was governed by social and cultural expectations. *Bembridge* was in part an attempt to delineate a boundary between the private and public sectors, arguing that the public interest overrode personal relations when public money was involved.

Professor Knights suggested that “these contexts probably limit the implications of the case more generally.”

67 Professor of history, specialising in corruption.

68 (1783) 3 Doug KB 327, 99 ER 679.

69 The defendant in *Bembridge* was an accountant within the receiver and paymaster general’s office of the armed forces. He was alleged to have concealed, from a government auditor, knowledge that certain entries were omitted from a set of final public accounts. This was “contrary to the duty of his office”. For further detail of the case and its context see Appendix A to the background paper, available at [http://www.lawcom.gov.uk/wp-content/uploads/2016/01/apa_history.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2016/01/apa_history.pdf).
A useful tool for protecting vulnerable individuals

2.128 A number of consultees, including the CPS, NOMS, the College of Policing and the IPCC, emphasised the role that misconduct in public office plays in protecting vulnerable individuals. Specifically, all of these organisations raised concerns in respect of vulnerable individuals being sexually exploited by public office holders. An additional number of consultees also indicated that this type of behaviour, if not already caught by a sexual offence, deserves to be treated as criminal.\(^70\)

2.129 An interesting alternative argument was put forward by a number of other consultees.\(^71\) They suggested that misconduct in public office also seeks to protect the vulnerable by way of ensuring a check on state power more generally. It was emphasised that, in a general way, every individual citizen is in a vulnerable position in comparison to an agent of the state.

The communicative purpose of the offence

2.130 A number of speakers and delegates at the symposium expressed the view that the offence was an important one, in that it was an important symbol of accountability and performed a useful labelling function.

2.131 In advocating a statutory offence, the CSPL stated that the “Committee is not suggesting that this would necessarily lead to frequent prosecutions, or that misconduct in public office is something that occurs so regularly that urgent steps must be taken. On the contrary, we believe the actual standards of public officials to be generally high, notwithstanding public perceptions. It may however help achieve greater consistency across all public bodies, and to signal clearly the unique responsibilities of public offices.”

2.132 Likewise, the vast majority of consultees were concerned that abolition of the offence might lead to a reduction of accountability amongst those performing public functions, something that many considered to be weak in any event, and send the wrong message – that public accountability was of little consequence.

Whether there are any other accessible and effective methods of accountability that address serious misconduct by public office holders

2.133 One of the recurring concerns expressed by members of the public who responded to our consultation was that, either with or without the offence, it can be extremely difficult to access effective methods of holding public office holders to account for instances of serious misconduct.

2.134 In contrast, however, a small number of consultees did express the view that a criminal offence would not be necessary if other forms of redress could be used more effectively, for example, disciplinary or complaints processes. They further suggested that deeper, more fundamental cultural changes in respect of

\(^{70}\) Including the Council of HM Circuit Judges and Caterina Knight and Helen Edwards, two academics from Nottingham Trent University.

\(^{71}\) Including Paul Williams and Daphne Havercroft; members of the public.
accountability would be likely to have the most impact if these could be achieved.\textsuperscript{72}

2.135 Professor Mark Philp, Chair of the CSPL Research Advisory Board, submitted: “I’d want to press hard the question of whether we need something in addition to the range of offences people can commit, and these more informal non-judicial ways of dealing with things”.

2.136 Consultees also highlighted the fact that disciplinary processes are not always considered sufficient to deal or effective in dealing with official misconduct. Paul Williams felt that issues regarding legal certainty were not the core issue, as his impression was that “cases are not pursued even when there is no question that the person held a Public Office and statutory duties [or] where there is clearly serious abuse of the public’s trust.” He added that it was his impression “that Misconduct in Public Office is disproportionately applied to the Police and Prison services and that there is a significant reluctance (or refusal) to investigate and pursue Misconduct in Public Office cases in other areas of Government; such as children’s Social Services but more generally. The criminal offence is essential and provides a vital safety measure where there is serious wrongdoing particularly if the part of the State (where the wrongdoing occurs) would like to cover up the wrongdoing or where disciplinary or complaint procedures are inadequate or inadequately applied”.

2.137 Daphne Havercroft\textsuperscript{73} was particularly concerned about the effectiveness of disciplinary procedures. She submitted that regulatory bodies and organisations have various flaws in their investigation of complaints. One particular concern was raised in relation to the independence of supposedly independent bodies.

2.138 Christine England submitted that “it is not sufficient to use internal employment disciplinary procedures to deal with such people because often this has led to wrongdoers leaving on the pretext of early retirement, with pensions and doctors’ merit awards, intact.”

2.139 Barry Faith\textsuperscript{74} described why individual members of the public affected by such misconduct may not be able to seek civil remedies or why such remedies may not be adequate.

**The form a reformed offence should take**

2.140 There was no consensus amongst consultees as to what could be done to make the offence clearer or more effective.

2.141 The widest divergence of opinion remained in respect of who should be subject to the current offence and/or any future replacement (assuming one is proposed). The opinions of individuals were clearly affected by their own personal experiences, where that was applicable. For example, those involved in campaigns to bring greater transparency and accountability to the health service

\textsuperscript{72} Including Joe Sweetinburgh.

\textsuperscript{73} Member of the public.

\textsuperscript{74} Member of the public.
thought it important that everyone involved in the proper management and regulation of the service as well as the treatment of patients should be included.75

2.142 A number of consultees suggested that the offence, in whatever form, should be placed on a statutory footing (Alec Samuels, Simon Parsons, the Council of HM Circuit Judges, the Law Society and CSPL). More specific suggestions as to the form a new offence should take were:

1. The offence should be replaced with specific statutory offences relating to offices based on status (Simon Parsons).
2. The offence should be made triable either way (the Law Society).76
3. The offence should not be punishable by imprisonment because the conduct concerned is non-violent (Lesley McDade).77

THE SCOPE OF THE OPTIONS PRESENTED

2.143 We set out in the following chapters our proposals for reforming the offence of misconduct in public office. These proposals do not include, as law reform options either:

1. retention of the present common law offence; or
2. simple codification of the current law into statute.

2.144 Following the conclusions reached in the background paper, as well as the responses and other input received during our consultation period, we now conclude that we could not sensibly recommend either of these options.

Discussion

2.145 That the law is uncertain and difficult to use is a view shared by all of the consultees who responded to the background paper, particularly those with experience of the offence in practice. The Law Society summed up the position as follows:

From a prosecution perspective this old common law offence is a challenge. The ingredients of the offence are unclear, as is their interrelation with the available defences. There are also anomalies over its limitation to public officials, and the relationship with employment law and with the right to freedom of expression in Article 10 of the European Convention on Human Rights.

All of these factors, from the perspective of those engaged in the charging decision making exercise, make the offence problematic;

75 Including Barry Faith, Daphne Havercroft, Fiona Watts and Christine England.
76 A triable either way offence is one that can be tried in either the magistrates' court as a summary only offence (with a maximum possible sentence of 6 months imprisonment) or in the Crown Court as an indictable offence (with a higher maximum sentence).
77 Legal activist.
and other than in the most egregious cases, it is difficult to understand with certainty what the offence alleged is.

2.146 None of the consultees who responded proposed that the offence could or should be retained without amendment, although some consultees indicated that they considered there to be some useful aspects of the offence. These included NOMS, who considered the breadth of the misconduct offence to be an advantage. Likewise, other consultees and speakers at our symposium were of the view that the more flexible definitional aspects of the offence, such as the question of “seriousness”, posed no more of a difficulty for the courts than other fact-specific determinations that might arise in other types of cases. For example an assessment of “reasonable self-defence”. Both Gerard Elias QC, the Independent Commissioner for Standards to the Welsh Assembly, and Colin Nicholls QC were of this view.

2.147 Professor Mark Knights, did express the view that the common law may be an appropriate vehicle for developing an offence based on the concept of “public trust” but also emphasised that one difficulty with the current law is that it is based on a specific historical set of circumstances. In modern times the criminal law is not the only way through which those in a position of public trust can be held to account.

2.148 Consultees agreed with our identification of the five matters above78 as the most significant problems with the offence. Additionally, NOMS highlighted that the uncertainty with, and complexity of, the offence leads to the effect of delaying cases.

Conclusion

2.149 Given the extent and fundamental nature of the problems with the current offence our provisional view is that we should not propose, as reform options, either its retention or codification. This is because we could not be confident that the courts would be willing and able to resolve all of the deficiencies of the elements of the current law promptly and effectively.

78 Para 2.18 above.
CHAPTER 3  
CRIMINALISATION: HARMS AND WRONGS

INTRODUCTION

3.1 In this chapter we summarise the academic debate on the theoretical reasons and justifications for creating criminal offences, before examining the offence of misconduct in public office within that theoretical framework. In simple terms, our focus in this Chapter is to ask and answer the questions: “what type of conduct is deserving of criminalisation?” and “how might the identity of the person committing the conduct (such as a public office holder) affect that assessment?”

3.2 To understand why we are proposing the law reform options set out in Chapters 4 to 8, it will be important for consultees to know what our conclusions are on this debate. For ease of reference we set these out below.1 This is intended to give an overview of the issues for those whose interest is not primarily in the theoretical aspects. The more detailed theoretical discussion throughout the rest of the chapter will be of most interest to those consultees with a legal academic background.

3.3 Theories of criminalisation concern the proper scope of the criminal law and the principles that might define it. They are used as an analytical framework through which behaviour, which is already the subject of a criminal offence or which is being considered for inclusion within an existing or proposed offence, can be assessed in terms of whether or not it ought to be criminal.

3.4 There are various theories of criminalisation. Legal commentators have debated at length what exactly makes conduct “criminal”, in the sense that it is deserving of public censure and punishment.2 Most of these theories are concerned with restricting the limits of the criminal law and with maximising individual freedom.3 It is a recognised concern that there is a tendency in modern law towards over-criminalisation.4

3.5 In our Issues Paper5 (“the background paper”), we referred to Stuart Green’s description of the moral content of any given criminal offence. Green states that crimes can be divided into three basic elements: culpability, harmfulness and moral wrongfulness. Culpability reflects the mental element (fault or blameworthiness) with which the offence is committed. Harmfulness reflects the

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1 Para 3.10 below. For a briefer summary, see ch 1.

2 See for example essays in R A Duff and S Green (eds), Defining Crimes: Essays on the Special Part of the Criminal Law (2005); R A Duff and S Green (eds), Philosophical Foundations of Criminal Law (2011); and in A Ashworth, L Zedner and J Tomlin (eds), Prevention and the Limits of the Criminal Law (2013).

3 See the discussion in L Farmer, “Criminal Wrongs in Historical Perspective” in R A Duff et al (eds), The Boundaries of the Criminal Law (2010).


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.6

3.6 In very general terms, in order to merit criminalisation, behaviour must involve (at least potentially) harmful conduct7 that is wrongful and a degree of fault on the part of the person engaging in that behaviour.8 It is the first of these two aspects, that conduct should only amount to a crime where it involves both harms and wrongs, that may in principle lead law makers to conclude that a particular type of behaviour is deserving of criminalisation. The issue of culpability is a separate one which serves to define further the precise circumstances in which an individual should be held responsible for the wrongful and harmful act caused.9

3.7 In this form, the requirements of both harms and wrongs are cautions against creating offences that are unnecessary, or that are unnecessarily wide. To punish behaviour where there is no harm is an unwarranted interference with freedom, and to punish behaviour where there is no wrong is unjust. That is to say, identifying a harm and an associated wrong is necessary for the purposes of criminalisation but may not be sufficient.10

3.8 The requirement of a wrongful fulfils one further purpose. Criminal law serves an important communicative function in classifying and labelling different types of wrongdoing. Stuart Green11 argues for a requirement of moral clarity: that is, the boundaries of particular offences should as far as possible reflect types of wrong recognised by the public. For this reason, an offence such as “theft” has a far clearer communicative effect than one of “unlawfully causing economic disadvantage” covering theft and fraud.

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7 Including cases where harm is caused not by the individual act but by a situation where acts of that kind are permitted and therefore become prevalent. For example, for the harm in rape see J Gardner and S Shute, "The Wrongness of Rape" in J Horder (ed), Oxford Essays in Jurisprudence (4th series 2000).


3.9 In this chapter we discuss the harms and wrongs which could underlie, or be associated with, the offence of misconduct in public office and any offences that might replace it. The issue of culpability will be considered in Chapters 5 and 6, when considering law reform options.

3.10 To make the discussion easier to follow, we provide a brief outline of the argument advanced in this chapter:

(1) The offence is unlikely to fit neatly within current theories of criminalisation as it is an offence that evolved over centuries. Indeed, at the time the offence took its present form there was not the same level of sophisticated analysis of “harms” and “wrongs” (the usual term for discussion was simply “mischief”).

(2) The relevant distinction was, rather, between private wrongs, justifying a civil remedy, and public wrongs, justifying a criminal offence, and this is still a relevant consideration.

(3) The offence as now defined does have a rudimentary harm requirement: “harm to the public interest”, in particular the undermining of public confidence in governing institutions. However, there is a major ambiguity as to whether the function of this requirement is:

(a) to provide a rationale for the offence, namely breach of public trust; or

(b) simply as a measure of seriousness, designed to exclude cases that are too minor to be worthy of criminalisation.

(4) The harm of “harm to the public interest” will need to be borne in mind in drafting any new offence. However, it is likely to be too broad to be translated into elements of an offence.

(5) A misconduct offence could in principle reflect any of the following wrongs:

(a) abuse of position for personal advantage;

(b) misgovernment; and

(c) breach of public trust.

The last of these comes closest to accounting for the offence in its present form, though it may not cover all instances of the offence. In

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12 Para 3.12 below.
13 Para 3.13 below.
14 Para 3.17 to 3.18 below.
15 Para 3.18 to 3.21 below.
16 Para 3.44 below.
17 Para 3.44 and following, below.
particular there is a category of cases involving neglect of a duty rather than a positive breach of trust.

(6) The “breach of public trust” concept is worth considering as the rationale for a reformed offence or offences, while bearing in mind the facts that:

(a) all governmental authorities are in a position of trust; but

(b) not all people in a position of trust, even where the trust is a public one, are governmental authorities.\(^{18}\)

(7) Breach of public trust, though important as the rationale for an offence, is likely to be too broad and uncertain a concept to be a defining element of any particular offence.\(^{19}\)

(8) The fact that D holds a public office (however this may be defined currently, or in a reformed offence) is not in itself crucial to the harms and wrongs in cases covered by the offence. It may, however, be used as an indication of cases where it is likely both that a public trust is involved and that the harm is a public one.\(^{20}\)

(9) At the very least, any new offence should contain more precise definitions of both the types of position and the types of harm covered by the offence. The terms of those definitions will be discussed in Chapters 4, 5 and 6.

3.11 In the first part of this Chapter, we discuss these matters in general terms. In order to test our conclusions, we then discuss specific categories of case in which the offence of misconduct in public office has been used. These categories are the five identified by us in the background paper as examples of conduct that can only be prosecuted as misconduct in public office. In particular, we consider whether there are distinguishing harms and wrongs specific to those categories or whether the same harms and wrongs run through them all.

IDENTIFYING HARMS AND WRONGS IN THE EXISTING OFFENCE

3.12 The offence of misconduct in public office is not a modern one. The seminal formulation was laid down in 1783.\(^{21}\) As at least one commentator has acknowledged, the current approaches for determining whether a form of behaviour can justify criminalisation are inevitably very different from those that were applied in previous centuries.\(^{22}\)

3.13 Before the 19th century, legislators and judges did not clearly distinguish between “harms” and “wrongs” as possible reasons for criminalisation. Rather, the relevant distinction was between private wrongs, justifying a civil remedy, and

\(^{18}\) Para 3.55 and following, below.

\(^{19}\) Para 3.120 and following, below.

\(^{20}\) Para 3.132 and following, below.

\(^{21}\) Bembridge (1783) 3 Doug KB 327, 99 ER 679.

public wrongs, meaning breaches and violations of public rights and duties owed to the whole community,\(^{23}\) which justified a criminal offence. This approach is still used by some legal commentators today. For example, the idea that in order to amount to a crime, wrongful behaviour must involve some other “public” dimension is advanced by Antony Duff: “wrongs that are ‘public’ in the sense that they are the business of the whole polity and require a public response from the polity”.\(^{24}\)

**Harms in the existing offence**

3.14 Offences are often aimed at preventing some kind of harm to individuals or to the public (whether or not they also address a specific wrong). The underlying harm which an offence is designed to prevent is easy to identify in cases where the definitional elements of the offence spell out a proscribed result. For example, the crime of murder where the proscribed result is the death of another person. Offences of this kind are known as “result crimes”.

3.15 In other cases, the definition of an offence may require the risk of a given type of harm, or intention to cause that harm, without requiring that the harm actually occurs. An example of an offence requiring risk is exposing children to danger.\(^{25}\) An example of an offence requiring intention is administering noxious substances with intent to injure or annoy.\(^{26}\)

3.16 In yet other cases, the harm forms part of the rationale of the offence but is not part of its definition.\(^{27}\) For example, the offences relating to firearms and offensive weapons: the offences are designed to reduce the danger that the weapons will be used to cause death or injury, but it is not a requirement of the offences that that danger is present in the circumstances. Offences of this kind are known as “conduct crimes”.

**Harm or risk of harm?**

3.17 Misconduct in public office is generally considered to be a “conduct crime” rather than a “result crime”: it therefore most closely aligns with the third group discussed above.

3.18 As noted in Chapter 2, *Bembridge*\(^{28}\) made no reference to any requirement of consequences, or even the risk of consequences, as being part of the offence. The risk of particular consequences, or harm, is just one factor in assessing the third element of the offence, namely whether the extent of the misconduct is sufficient to amount to a breach of the public’s trust (“the seriousness threshold”).

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\(^{23}\) *Blackstone’s Commentaries on the Laws of England*, (vol 4 1765-9) p 5. What commentators considered to be “public wrongs” also evolved over time.


\(^{25}\) Offences Against the Person Act 1861, s 27.

\(^{26}\) Offences Against the Person Act 1861, s 24.


\(^{28}\) (1783) 3 Doug KB 327, 99 ER 679. Although harm was in fact caused in that case, as public money had been disposed of by a superior officer (the subject matter of Bembridge’s failure to account).
In other words, if a breach of official duty does not risk harm on a significant scale, this may indicate that it is too minor to deserve criminalisation and should be dealt with through civil or disciplinary procedures.29

3.19 Sir Anthony Mason in Shum Kwok Sher stated (quoting from the case of Dytham), as an element of the offence, that “[t]he misconduct impugned is calculated to injure the public interest.”30 The term “calculated” in this context does not imply either that the public interest was in fact injured or that there was any intention of injuring it.31 The requirement is that the conduct was of such a nature as potentially to do so.

3.20 On the other hand, it is arguable that the recent case of Chapman may have inadvertently imported into the offence a requirement of actual harm to the public interest in each case. Chapman concerned a prison officer who sold information about prisoners to the newspapers. The Court of Appeal said:

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.32

3.21 On a narrow reading, the view expressed in Chapman may be regarded as peculiar to cases concerning the disclosure of information. Particularly when the disclosure is for journalistic purposes, the right to freedom of expression will be involved.33 It therefore needs to be shown that D's conduct was a breach of the trust of the public, as well as of the employer. Harm to the public interest is one way of showing this: for example, if the information was of a damaging nature, or was obtained in a damaging manner (for example for payment).34

3.22 It is not clear why the disclosure of information for payment is necessarily harmful to the public interest in each case. The harm would appear, rather, to consist of the existence of a situation in which such conduct is prevalent and acceptable. Accordingly, even if Chapman is not restricted to disclosure of information cases, the logic suggests that it is sufficient that the misconduct is of a type which is harmful to the public interest in principle. This is enough to demonstrate that the trust betrayed is that of the public and not only of the particular employer.

29 Whether the “seriousness threshold” has another function, in indicating that “breach of the public’s trust” is the wrong underlying the offence, is discussed below: paras 3.120 to 3.123.


31 The Shorter Oxford Dictionary defines “calculated” as “fitted, suited, apt; proper or likely [to]”, and this is the sense in which the word is invariably used in, for example, the Offences Against the Person Act 1861.


3.23 A further uncertainty is whether the requirement of risk of harm applies equally to all categories of case. We draw a distinction below between cases involving neglect of duty and cases involving breach of trust by way of abuse of position for personal advantage.\textsuperscript{35}

3.24 In neglect of duty cases, such as \textit{Dytham}\textsuperscript{36} and \textit{AG’s Reference (No 3 of 2003)}\textsuperscript{37} ("\textit{AG’s Reference}"), there is a clear requirement of serious harm or the risk of it. The failure to guard against that harm is what the neglect consists of.

3.25 It is less clear whether there is a similar requirement in cases involving breach of trust by way of abuse of position. On the one hand, no such risk was held to be present or needed in \textit{W},\textsuperscript{38} concerning a police officer who bought petrol for his personal use on his work credit card. The “breach of trust” consisted of the fact that he was profiting from an advantage gained by virtue of his position and there was no separate requirement of proof of harm. The thinking appears to be that the making of an unauthorised gain is a wrong in itself, from which the likelihood of harm (for example, loss of public confidence in governing institutions) is to be presumed.

3.26 On the other hand, in \textit{Chapman}\textsuperscript{39} more than a simple breach of duty or breach of trust was required. It was held that the jury must find that the misconduct had the effect of injuring the public interest so as to call for condemnation and punishment.

\textit{Harm to the public or to individuals?}

Another uncertainty concerns the type of harm. Several modern cases speak of harm to the public interest as a requirement of the offence.\textsuperscript{40} However, in many reported cases, the actual harm that occurred was to an individual. For example, in both \textit{Dytham}\textsuperscript{41} and \textit{AG’s Reference}\textsuperscript{42} the consequence of the offence was the death of an individual.

3.27 A possible resolution of this uncertainty is that the relevant harm, in cases like \textit{Dytham} and \textit{AG’s Reference}, is not simply the death or injury of the individual in question. There is also harm to the public interest, namely the impairment of public confidence in the type of public office holder concerned which will result if such cases occur and are not criminalised.

\textsuperscript{35} Para 3.86 and following, below.
3.28 There is a vast body of literature on whether potential harms of this kind can, and should, justify criminalisation. Ultimately, however, a large number of criminal offences do rest on such harms and distinguished commentators have argued that:

It is enough to meet the demands of the harm principle that, if the action were not criminalized, that would be harmful … Non-instrumental wrongs, even when they are perfectly harmless in themselves, can pass this test if their criminalization diminishes the occurrence of them, and the wider occurrence of them would detract from people’s prospects – for example, by diminishing some public good.43

**Harm to the public interest**

3.29 Unfortunately, as we discussed in the background paper, none of the cases have sought to define the concept of “harm to the public interest” in any principled way.44 The “public interest” is a notoriously wide and unclear concept. It is one that is commonly employed in a number of different areas including law, politics and journalism for different purposes.

3.30 It is, however, one type of harm that has been put forward as a potential theoretical justification for criminalising particular forms of behaviour.

3.31 Joel Feinberg, in writing about the types of harm prevention that may justify criminalisation, notes that public interest can be interpreted in two ways.45 First, as a collection of specific interests of the same kind possessed by a large and indefinite number of private individuals. The interests in the collection do not necessarily belong to everyone at the same time, but could belong to anyone. For example, an interest in your own health and well-being. Activities that cause a “common danger” to all individuals within a community, such as dropping poison into a public water supply, therefore amount to a “public” harm.

3.32 Feinberg alternatively explains that public interest can be viewed as a “‘common’, or widely shared, specific interest … that all or most persons in a community have in one and precisely the same thing”.46 Examples given by Feinberg include economic prosperity, the prevention of disasters and the maintenance of public services.47 The difficulty is, as Feinberg points out, that not all people share a common interest to the same degree. The question then arises as to how far interests shared by some members of society and not others should constitute a “public” interest. Answering this question involves weighing competing subjective values against each other and therefore the answer will differ depending on which individual or group has undertaken the weighing exercise.


44 Background paper ch 2.


3.33 Recent misconduct in public office prosecutions do not make it clear whether the requirement of an abuse of public trust means that public confidence in state authorities must be shown to be actually impaired, or only that the conduct is of a nature likely to do so. No doubt the difficulty lies in the fact that the offence applies to so many different variations of misconduct, some of which may cause direct harm to individuals (sexual exploitation of a vulnerable person) and some of which will not (disclosure of non-personal government information). Likewise, it applies to some forms of misconduct that actually undermine public confidence and some that do not.

**Harm to public confidence in governing institutions**

3.34 Historically, prosecutions for misconduct in public office appear to have concentrated on one particular type of harm to the public interest, that being harm to the public's confidence in terms of their expectation of, and belief in, the integrity of the institutions that govern them. As part of our conclusions on the historical development of the offence, in Appendix A to the background paper, we said:

The mischief to be addressed was misconduct, in both a positive and negative form, by officers who performed functions under powers on behalf of the state. This included the judiciary and other officers independent of the Crown and the executive.

Specifically, the offence was addressed to officers who might not otherwise be made accountable for their actions and where the functions being performed had the potential to affect the public interest.

Therefore, the principle underlying the offence was one of accountability for a serious breach of a legitimate expectation held by the public as to how an individual would perform those functions.48

3.35 The contention that this type of harm to public confidence is still central to the offence has been advanced by academic commentators. Davids and McMahon have explained that:

Public knowledge of improper conduct by parliamentarians, local elected officials, and public officials at various levels (public or civil servants), can lead to a reduced level of confidence and trust in democratic institutions and, in extreme cases, to an erosion of their claims to legitimacy.49

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3.36 Damage caused to public confidence “in those who exercise state power”,\(^{50}\) is also the primary focus of misconduct in public office type offences in other countries, such as Canada and Australia.\(^ {51}\)

3.37 This may suggest that the primary harm underlying the offence is that of undermining public confidence in those performing state functions. However, this may be too narrow a view.\(^{52}\) In our review below of the categories of cases in which the offence has been used,\(^ {53}\) we identify several other harms that may underlie the offence.

3.38 Identifying the harms may also be relevant to establishing who may commit the offence. For example, if the harm consists of injury to public confidence in governing institutions, it makes sense that only those exercising state functions can commit the offence. This is relevant both to interpretation of the existing offence and to setting the boundaries of any new offence or offences that may be proposed to replace it.\(^ {54}\)

**Harms in the existing offence: Conclusion**

3.39 The primary function of the “harm principle” is as a filter: conduct where no harm or risk of harm can be identified ought not to be criminal. It does not follow that, where there is harm or risk of harm, the conduct ought to be criminal: other factors, such as the likelihood or degree of harm, the wrongfulness of the conduct and questions of public policy, will also be relevant. Our discussion so far only establishes that the present offence does address a potential harm, and therefore passes this filter (though there will be others).

3.40 The primary harm addressed is “harm to the public interest”, in particular the undermining of public confidence in governing institutions, though we will identify other harms in our discussion of the particular categories of case below. These harms will need to be borne in mind in drafting any new offence. However, they are likely to be too broad to be translated into elements of an offence. Whilst prevention of such harms can quite properly justify criminalisation, any new offence will need more precise specification.

3.41 We do not intend to suggest that this identified harm of impairment of public confidence in governing institutions should be the deciding factor in whether behaviour merits criminalising. Misconduct by those in public office will often cause additional harms or the risk of them, which we describe below in discussing particular forms of misconduct. Further, from that theoretical point of view, breach of the trust of the public is wrong in itself. Holding that the only reason for punishing such conduct to be that news of it may leak out and impair public confidence may amount, in effect, to saying that wrongdoing is not really wrong if it is successfully concealed. This is an unduly cynical view.

\(^{50}\) *Boulanger* [2006] 2 SCR 49, [2006] SCC 32.


\(^{52}\) Discussed further at para 3.41 below.

\(^{53}\) Para 3.151 and following, below.

\(^{54}\) Para 3.138 and following, below.
Wrongs of the existing offence

3.42 The identification of particular harms is not of itself sufficient to justify the criminalisation of a particular form of conduct. For a type of conduct to merit criminalising it must also be clearly wrongful. Can we identify a clear wrong underpinning misconduct in public office and, if so, is that wrong (together with the harm just identified) sufficient to could justify the offence? Here the definitional elements of the offence provide little assistance. The current offence requires either “misconduct” or “neglect of duty” by a public office holder acting as such. Therefore, the offence only criminalises conduct which is in fact wrongful in some way, but it does not point to any particular wrong. The definition amounts to little more than “there must be some wrong, potentially causing some harm, in an official context”.

3.43 As stated above, the requirement of wrongfulness has two separate functions: a filtering function, ensuring that conduct should not be punishable if it is not in fact wrongful, and a communicative function, of announcing to the public the particular wrong to be avoided. The definition of the current offence fulfils the first function but not the second.

3.44 The basic problem is that there are at least three possible rationales for the current offence of official misconduct:

(1) The wrong of abuse of position for a personal advantage.

(2) The wrong of misgovernment, or abuse of power and authority; in particular the use of governmental powers for improper motives, or in an oppressive or extortionate way.

(3) The wrong of breach of the public's trust.

3.45 In what follows, we consider whether any of these rationales is sufficient, on its own, to account for the existing offence, or whether different rationales may be relevant in different categories of cases. We then consider these rationales as the basis for a possible new offence or offences.

Abuse of position

3.46 The wrong here might be described as the exploitation of a position for personal advantage, or so as to cause detriment to another person, contrary to a duty not to do so. This wrong could be regarded as a form of corruption.

3.47 In one respect, this wrong would appear to be too wide to form the rationale of

55 Paras 3.7 and 3.8 above.

56 Compare our conclusion about harms at paras 3.39 and following, above. The offence fulfils the harm requirement, in the minimal sense that it does not criminalise conduct where there is no harm, but it does not communicate the type of harm which should be avoided.
the existing misconduct offence, as there are many other positions which ought not to be exploited for personal gain. The obvious example is that of a trustee or fiduciary, which we discuss below.\footnote{Para 3.61 and following, below.} Even apart from these cases, many employments are subject to a duty not to exploit them for private advantage, or not to allow a conflict of interests to arise: this duty may be set out in the terms of employment or a code of ethics.

3.48 This rationale therefore does not explain why the offence needs to be restricted to public office holders. This is not a fatal objection to this rationale for the offence. Many offences, for reasons of convenience, have limitations that cannot be deduced from the underlying wrong. However, it may be a reason for preferring a rationale that goes some way towards explaining why the offence is so restricted.

3.49 In another respect, this wrong is too narrow to explain the existing offence. Many instances of misconduct in public office involve failure to carry out a duty. For example, a police officer who fails to intervene in a fracas and leaves V at risk of death or injury.\footnote{As in Dytham [1979] QB 722, [1979] 3 WLR 467. Other examples are discussed later on in this chapter.} It is hard to see how this can be regarded as exploiting a position of duty for personal advantage, except on the rather strained argument that it is a form of exploitation to receive pay for an employment without doing anything in return. Nor is it exploitation for the detriment of another, unless D actually intended V to be injured.

3.50 This above argument establishes only that abuse of position cannot be regarded as the unifying wrong, underpinning and justifying all instances of the current offence. It is still an important factor in many instances of the offence: we discuss, below, whether it should form the basis of a new offence or offences.

\textit{Misgovernment}

3.51 This rationale is one that some consultees referred us to in our first public consultation. This wrong involves abuse of power or authority in the sense of the use of governmental powers for improper motives (which may overlap with the wrong of abuse of position) or in an oppressive or extortionate way. It might overlap to some extent with the wrong of abuse of position described above, at least where the purpose of the abuse of position is to cause detriment. However, it begs the question of whether “abuse of power or authority” is a single wrong, which could be committed in a number of different ways, or whether in fact each of these examples represents a different type of wrong. Although this uncertainty has been discussed by commentators analysing misconduct in public office,\footnote{P Finn, “Public Officers: Some Personal Liabilities” [1977] 51 \textit{Australian Law Journal} 313 and D Lusty, “Revival of the common law offence of misconduct in public office” (2014) 38 \textit{Criminal Law Journal} 337 (Australia).} it remains unresolved.

3.52 As a rationale for the existing offence of misconduct in public office, this wrong has the advantage of being unequivocally confined to government officials. However, it does not account for the range of conduct covered by the existing
offence. For example, no element of misgovernment was present on the facts of W,60 concerning a police officer who used his work credit card to purchase petrol for private purposes. While that was an abuse of an opportunity afforded by his position, it was not an abuse of police or governmental powers to the detriment of the governed.

3.53 Commentators61 have also highlighted that not all misconduct cases are concerned with misgovernment in the sense of the improper use of governmental powers. At least as many cases are concerned with deliberately neglecting to use those powers when required. This could be regarded either as a separate wrong or as a negative form of misgovernment.

Breach of public trust

3.54 A number of commentators on misconduct in public office identify abuse of the public’s trust as the rationale for the offence.62 However, it is less clear whether this wrong is limited to those who exercise state powers and authority, as with misgovernment, or whether it applies more widely.

3.55 The argument that “breach of public trust” is the rationale for the misconduct offence is supported by historical legal sources.63 It is the rationale that we have heard repeated by almost all of the consultees who responded to the background paper, and by experts dealing with the offence.

3.56 To assess this argument, we must consider two questions:

(1) Is it correct to treat public office as involving a relationship of trust?

(2) If so, is there any principled basis for distinguishing public office from other trust relationships?

MEANING OF “TRUST”

3.57 One element of the offence, as set out in AG’s Reference,64 is that “the extent of the misconduct is sufficient to amount to a breach of the public’s trust”. Trust, in this context, could have two meanings:

(1) In a weaker sense, “trust” means little more than expectation or confidence. People are “trusted” to do their job if there is confidence that they will do it properly without supervision. This implies both belief in the jobholder’s honesty or good intentions and belief in their competence, and presupposes that there is some discretion in how the job is performed.

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61 P Finn and D Lusty at para 3.51, above.
62 Para 3.65 and following, below.
(2) In a stronger sense, “trust” depends on a duty of loyalty. That is, people are in a position of trust if they have a duty to use some power or discretion selflessly and in the best interests of another individual, the public or some overriding purpose, for example achieving justice. (It is not relevant for this purpose whether the duty is set out in statute, a person’s terms of employment or a code of conduct: it is the content, rather than the source or enforceability, of the duty that determines its character.) One consequence of this duty is that one must not exercise that power or discretion for the benefit of oneself or a person other than the person in whose interests one is supposed to be acting, or allow oneself to be in a position of conflict of interest.

There may therefore be a distinction made between relationships of trust and confidence and trust relationships.

3.58 There is a substantial overlap between the concept of breach of trust in the stronger sense and the first suggested rationale for the offence, namely abuse of position. However, the concepts are not identical. Every trust relationship involves a duty not to profit from one’s position, but not every duty not to profit from one’s position arises out of a trust. Further, a trust relationship involves many duties: the duty not to make unauthorised profits is only one of them.

3.59 Every instance of misconduct in public office necessarily involves a breach of the trust and confidence of the public in the weaker sense. This amounts to little more than saying that the office holder has not performed his or her job as expected. However, this wrong is clearly not sufficient to ground the offence or every dereliction of duty would become criminal. Is, therefore, breach of trust in the stronger sense the wrong underlying the current offence?

3.60 Concepts similar to trust in the stronger sense, as we have defined it, exist in other areas of the criminal law.

(1) For example, the Bribery Act 2010 speaks of being in a position of trust, being expected to perform a function impartially and being expected to perform a function in good faith.65

(2) Similarly the offence of police corruption, under section 26 of the Criminal Justice and Courts Act 2015,66 speaks of the improper use of a power or privilege for the purpose of obtaining a benefit for oneself or another or causing detriment to another. In Chapter 6 (Option 2) we consider this formulation as the basis of a possible new offence.

3.61 Civil law recognises a category of fiduciary duties,67 including duties owed by trustees to beneficiaries, agents to principals, solicitors to clients, company...

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66 Discussed in the background paper, ch 3.

directors to companies and partners to each other.\textsuperscript{68} One common factor is that the person owing the fiduciary duty has a discretion or power to affect the interests of the other party; often, but not always, this other party will be in a vulnerable position in relation to the person owing the duty.\textsuperscript{69}

3.62 These relationships all impose a duty of loyalty,\textsuperscript{70} by virtue of which one party is entitled to expect that the other will act selflessly and in the interests of the first party.\textsuperscript{71} In particular, the fiduciary:

(1) must avoid conflicts between duty and interest, or between one duty and another; and

(2) must not make an unauthorised profit from his or her position: if he or she does, this may give rise to a right to an account of profits, or a constructive trust.

3.63 Most commonly, these duties concern financial interests and have consequences that are not relevant in the present context. Also, other people, such as doctors, may be expected to put the public interest or the interests of the patient before their own without being fiduciaries in the technical sense.

3.64 Nevertheless, the law concerning fiduciaries provides useful analogies by which to explain the type of relationship of trust which we are now discussing.

PUBLIC OFFICE AS A PUBLIC TRUST

3.65 It is sometimes said that the duty of a civil servant to the Crown is one category of fiduciary duty,\textsuperscript{72} or that a public officer is a trustee for the public.\textsuperscript{73} For example:

(1) Lord Mansfield, in \textit{Bembridge}, said:

\ldots a man accepting an office of trust concerning the public … is answerable criminally to the King for misbehaviour in his office.\textsuperscript{74}

(2) In the context of the common law offence of bribery, Mr Justice Yates said that a person \textit{in the position of a trustee} for the performance of

\textsuperscript{68} Law Com No 350 (above), para 3.15.
\textsuperscript{69} Law Com No 350 (above), paras 3.21 and 3.22.
\textsuperscript{70} \textit{Bristol and West Building Society v Mthew} [1998] ch 1, [1997] 2 WLR 436 at [18].
\textsuperscript{71} P Finn, \textit{Fiduciary Obligations} (1977) para 15; \textit{Arklow Investments Ltd v Maclean} [2000] 1 WLR 594 at [596].
\textsuperscript{73} Particularly in relation to civil servants, see Fiduciary Duties of Investment Intermediaries (2014) Law Com No 350, para 3.15.
\textsuperscript{74} (1783) 3 Doug KB 327, 99 ER 679 at [332].
public functions would commit a misdemeanour if he took a bribe for the corrupt exercise of his public duty.\footnote{Vaughan (1769) 4 Burr 2494, 98 ER 308 at [2501].}

(3) In modern times, Paul Finn supports the idea of a special or enhanced trust relationship between the government and the governed:

It is a living tenet of our society and not mere rhetoric that a public office is a public trust.\footnote{P Finn, “Public officers: some personal liabilities” [1977] 51 Australian Law Journal 313, quoting from Nuesse v Camp 385 F 2d 694 (1967) at [706]. See also D Lusty, “Revival of the common law offence of misconduct in public office” (2014) 38 Criminal Law Journal 337 (Australia) and C Davids and M McMahon, at para 3.35, above.}

(4) Similarly, David Lusty\footnote{D Lusty, “Revival of the common law offence of misconduct in public office” (2014) 38 Criminal Law Journal 337 (Australia), 338.} states that “persons entrusted with [powers of government] owe a fiduciary “duty of loyalty” to the public” and draws on philosophical and political theory to support the assertion.\footnote{Including the writings of John Locke, Aristotle, Plato and Cicero. John Locke’s views have been summarised as “The power of both an executive and the legislature represents a fiduciary trust”: E Mabry Rogers and S B Young, “Public office as a public trust: a suggestion that impeachment for high crimes and misdemeanors implies a fiduciary standard” (1974) 63 Georgia Law Journal 1025.}

3.6.6 The same concept has been relied on in the United States and in Australia, in two contexts:

(1) In the United States the courts have recognised that there is a specific idea of loyalty and trust underpinning the relationship between the governed and those governing:

It has long been agreed that public officials occupy positions of public trust ... The relationship between a State official and the State is that of principal and agent and trustee and [beneficiary].\footnote{Fuchs v Bidwill (1975) 334 NE 2d 117 (Ill App Ct).}

Because of this, government officials are considered to be fiduciaries of the public trust, and the idea of a public office holder as a specific category of fiduciary has been considered in discussions of how to embed ethics into government:

Courts have not imposed the fiduciary obligation in every context where one party trusts another. But they have consistently imposed it on government employees who exercise discretion on behalf of the government.\footnote{K Clarke, “Do we have enough ethics in government yet?: An answer from fiduciary theory” (1996) University of Illinois Law Review 57, 69 (n 59).}

(2) The existence of this special relationship is often considered by Australian commentators and the courts in that jurisdiction to be sacrosanct:

75 Vaughan (1769) 4 Burr 2494, 98 ER 308 at [2501].
78 Including the writings of John Locke, Aristotle, Plato and Cicero. John Locke’s views have been summarised as “The power of both an executive and the legislature represents a fiduciary trust”: E Mabry Rogers and S B Young, “Public office as a public trust: a suggestion that impeachment for high crimes and misdemeanors implies a fiduciary standard” (1974) 63 Georgia Law Journal 1025.
79 Fuchs v Bidwill (1975) 334 NE 2d 117 (Ill App Ct).
The public is entitled to expect that public officials entrusted with [powers and duties for the public benefit] exercise them for the public benefit. Public officials are therefore made answerable to the public in a way that private actors may not be.81

3.67 On this reasoning one could regard public officers as a specific type of fiduciary: agents acting on behalf of a principal. Public officer holders can be described as agents for the public, acting not just on our behalf but in our name: hence the concept of a “civil” servant.82 Nevertheless, this concept of agency, however valid in moral and political terms, should not be taken literally as denoting agency in the legal sense: legally, a civil servant is an agent of the Crown rather than of the public at large.

3.68 Similarly, the references quoted cannot be interpreted as meaning that civil servants and public officers are trustees in the same sense as a person administering a trust fund.83 The point is rather that an analogy can be drawn. Just as a trustee must use the trust property for the benefit of the beneficiary and not of the trustee, so too must a public office holder use the powers and discretions committed to him or her for the benefit of the Crown or the public and not for his or her own benefit. This is exactly the “stronger sense” of the concept of trust that we discussed above, as found in the law concerning fiduciaries.

3.69 There is therefore a powerful case for considering breach of the trust of the public, in the strong sense, as the wrong underlying misconduct in public office. The fiduciary analogy, if correct, would lead us to expect two particular forms of the offence: acting under a conflict of interests, and obtaining unauthorised benefits from one’s position.

3.70 There are, however, two counter-arguments against breach of trust in the strong sense being considered the rationale for the current offence:

(1) There are individuals who are not public officer holders but are in a position of trust for the public, who are not covered by the offence. In this respect, the “breach of public trust” rationale is too broad to fit the offence.

(2) In another respect, the rationale is too narrow. There are instances of the offence that do not have any flavour of fiduciary or similar obligations and only involve a “breach of trust” in the weak sense, of breach of a duty which the public expects to be performed.

We discuss these counter-arguments further below.

81 Boulanger [2006] 2 SCR 49, [2006] SCC 32 at [52].
82 We are grateful to Professor Antony Duff for highlighting this point in comments provided on a draft version of this paper.
83 For example, in Tito v Waddell (No 2) [1977] Ch 106, [1977] 2 WLR 496 Megarry J held that the Government owed no fiduciary duty to the Banaban islanders, because the “trust” referred to in the relevant ordinance was a non-justiciable moral obligation rather than a trust in a legal sense.
DISTINGUISHING PUBLIC OFFICE FROM OTHER TRUST RELATIONSHIPS

3.71 A duty of public trust, in the strong sense, can be understood as an obligation an individual owes to the public to put the public's interests before his or her own. In particular, the individual subject to that trust must avoid conflicts of interest and must not make an unauthorised gain out of his or her position. This is true of public officials, but may be true of some other individuals as well.

3.72 To some extent the law already acknowledges this, in that the category of “public office holders” is somewhat wider than officers of the Crown. In *Bembridge* Lord Mansfield said:

> 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. 84

3.73 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. 85

3.74 In short, a public office holder need not be remunerated by the Crown, or remunerated at all. However, as explained in the background paper and in Chapter 2, there must be some link with state functions. It is not sufficient that the office holder performs some function from which the public benefits.

3.75 Accordingly, one problem with adopting a rationale based on public office holders being in a position of trust is that, even if all governing authorities are in a position of trust, not all persons in a comparable position of trust are governing authorities. This is so even if the discussion is confined to trusts for the public. For example, whilst a solicitor may be subject to a private, fiduciary duty to his or her client, he or she is also in a position of trust as an officer of the court, which is of a much more public nature. A stronger instance is a trustee of a charity, who is a trustee in the full legal and financial sense of the word, having a requirement of acting for the “public benefit” as enforceable by the Attorney General.

3.76 The same point is still stronger if one interprets “public trust” in a more inclusive and less technical sense. Public office holders are not the only people who are trusted by the public to act in the public interest. Non-public office holders such as doctors, paramedics and teachers may also be expected, when carrying out the functions of their positions, to put the public’s interests before their own. Alternatively, such people may be considered to be in a position of public trust because they are able, by virtue of their position, if they choose to do so, to exercise influence over people otherwise dependent on them, such as a patient or a pupil. 86

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84 (1783) 3 Doug KB 327, 99 ER 679 at [332].
85 (1828) 5 Bing NC 91, 130 ER 995 at [107], (emphasis added).
86 If so, then there is a further analogy to be drawn here with the civil law doctrine of “undue influence”.
3.77 The identification of a public office as a position of public trust does not therefore completely explain why public office holders who breach such duties might be subject to the criminal law, when non-public office holders, subject to apparently similar duties, are not.

3.78 One possibility is that the limitation to public officers exists for the sake of precision. As pointed out above, the scope of an offence does not always match the scope of the underlying wrong, as the wrong may be too wide and vague to form part of a definition. On this reasoning the wrong of breach of public trust justifies an offence limited to public office holders, where that wrong will certainly be present, even though the offence may exclude some other cases where the same wrong is also present. In other words, public office holders are targeted because they are the most obvious example.

3.79 This may well be correct as an account of the historical evolution of the offence, as discussed in Appendix A to the background paper.\(^\text{87}\) It does not follow, however, that it is a valid justification for the offence as it now exists: as shown in the background paper and in Chapter 2 of this paper, “public office” does not in fact add much precision to the boundaries of the offence.

3.80 Another possibility is that, in the case of public office holders, the wrong of breach of public trust, and the harm potentially flowing from the breach, are present in an especially high degree. The public may have an expectation that anyone who is in a position that places them under a duty to act in the public interest will perform his or her functions in accordance with that duty. That expectation is enhanced where the person is exercising governmental functions.

3.81 Unfortunately, however, the assumption that public office holders are in a special position is usually made without any analysis of why that is the case. This makes any assessment of the strength of the underlying rationale difficult.

3.82 One possible justification is that breach of trust by public office holders, as compared with other fiduciaries, is more likely to cause substantial harm to the public. Therefore, public office holders should be held to a higher standard of account than those who do not hold such a position.

3.83 It is a generally accepted position that those performing public functions and providing public services should be held to a higher standard of account than those performing and providing wholly private functions and services. This is confirmed by the existence of specialist codes of conduct and codes of ethics applicable to those performing public functions and providing public services, for example the Civil Service Code. Additionally, this position is supported by the continued operation of the Committee on Standards in Public Life. The Committee was established in 1994 and exists to monitor and report to the Prime Minister on issues relating to the standards of conduct of all people in the public service.\(^\text{88}\) However, a requirement for more stringent professional standards

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\(^{88}\) The first Committee report, known as the “Nolan Report” was published in 1995 and concluded that those in “public life” should be held to a higher standard of conduct than those providing wholly private services. First Report of the Committee on Standards in Public Life (1995) Cm 2850-I.
within the public service does not necessarily justify the imposition of criminal sanctions on public office holders in circumstances where such sanctions would not be imposed upon non-public office holders.

3.84 More recently, the Supreme Court of Canada has explained why a criminal offence applying only to public office holders, which is in Canada is codified in the Canadian Criminal Code and known as “breach of trust by a public officer”, is important:

It gives concrete expression to the duty of holders of public office to use their offices for the public good. This duty lies at the heart of good governance. It is essential to retaining the confidence of the public in those who exercise state power.\(^{89}\)

3.85 However, none of the explanations as to why public office holders might be held to a higher standard of account than other persons in a position of public trust support a clear cut distinction between persons in public office and other persons in a position of public trust. They amount to little more than a statement that the trust imposed on persons in public office is of particularly high importance.

OTHER BREACHES OF DUTY

3.86 The other problem with explaining misconduct in public office as reflecting a wrong of breach of public trust, in the strong sense, is that not all instances of the offence need involve such a breach.

3.87 The discussion above establishes that public officers are in a position of public trust and have duties similar to those of fiduciaries. However, it does not follow that every duty owed by public office holders is of this type; just as it is recognised that a fiduciary can owe both fiduciary and non-fiduciary duties.\(^{90}\) For example, a director of a local authority who harasses a member of staff is in breach of an employment law duty but is not in breach of a fiduciary duty, as he or she has not been disloyal to the public.

3.88 Many instances of misconduct in public office involve neglect of duty: for example Dytham\(^{91}\), where a police officer failed to intervene in a fight, and AG’s Reference\(^{92}\), where police failed to monitor the condition of a person confined in the cells, resulting in his death. Likewise Giff\(^{93}\), where an SO6\(^{94}\) officer failed to answer police radio calls and Duffy and Passmore\(^{95}\), where a police officer and a police community support officer (“PCSO”) failed to act on complaints of harassment from a member of the public who was later killed by his harasser. In cases of this kind there may well be a breach of trust, in the strong sense, in relation to the individual affected, as one important indicator of a relationship of

\(^{89}\) Boulanger [2006] 2 SCR 49, [2006] SCC 32 at [1].


\(^{94}\) SO6 Diplomatic Protection Group, Metropolitan Police.

trust is the fact that the affected individual was in a vulnerable position. However, these cases do not necessarily involve breach of a duty of loyalty to the public. As pointed out in our discussion of the abuse of position rationale, the police officers in these cases cannot be regarded as receiving an unauthorised benefit from their position. Nor are the police officers in a position of conflict of interest.

3.89 In short, these cases only involve “breach of the trust of the public” in the weaker sense, of failing to carry out a duty which the public expects. This is arguably a separate wrong from the one we have been discussing; though undoubtedly every breach of trust in the stronger sense (loyalty) is also a breach of trust in the weaker (duty in general).

3.90 Would it be possible, then, to identify breach of trust in the weaker sense as the underlying wrong? It is certainly a common factor in all instances of the offence, but is altogether too bland and general to justify an offence: it amounts to little more than saying that misconduct is misconduct.

3.91 Nor is breach of trust in the weaker sense in fact sufficient to constitute the offence. In cases such as Dytham and AG’s Reference, the requirement that the breach of duty must be “sufficient to amount to a breach of the trust of the public” appears to refer to the seriousness of the consequences, actual or risked. That is, it was the risk of death or serious injury that lifted those cases from the merely disciplinary to the truly criminal.

3.92 In short, all cases of misconduct in public office do involve “breach of the trust of the public” in one sense or another. However, treating this as the single wrong underlying the offence is unconvincing, and provides little assistance in identifying a solid rationale for a new offence to replace it.

**Wrongs of the existing offence: Conclusion**

3.93 In conclusion, there is no unified wrong underlying the current offence. Cases divide into two categories:

1. Those involving undue advantages, conflict of interest and similar, which may be regarded as reflecting a wrong of either abuse of position or breach of public trust in the strong sense.

2. Those involving neglect of duty giving rise to serious harm or the risk of it, which may be regarded as either breach of trust in the weak sense or a negative form of misgovernment.

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96 Para 3.49 above.
97 Para 3.59 above.
100 For whether there is a similar requirement of harm in public trust cases, see para 3.23 above.
101 Para 3.46 and following, above.
102 Para 3.88 and following, above.
This analysis is consistent with the view of James Fitzjames Stephen\textsuperscript{104} and Terrence Williams\textsuperscript{105} that there are in fact two separate offences of breach of trust and wilful neglect of duty. Without going that far, we can say, on a harms and wrongs based analysis, that they are two branches of the same offence. Further, that the attempt to define them by a common formula in AG’s Reference\textsuperscript{106} is not altogether successful, as it requires the same phrase (“to an extent amounting to a breach of the trust of the public”) to be interpreted in two different ways.

**SHOULD THE HARMS AND WRONGS OF THE EXISTING OFFENCE FORM THE BASIS OF A NEW OFFENCE OR OFFENCES?**

To sum up our conclusions so far:

1. The main harm underlying the existing offence is “harm to the public interest”, in particular (though not limited to), impairment of public confidence in governing institutions.\textsuperscript{107}

2. The main wrong underlying the existing offence lies in breach of public trust (in the stronger sense) or abuse of position, though this does not necessarily account for a category of cases involving neglect of duty.\textsuperscript{108}

3. Neglect of duty may amount to a breach of trust in the weaker sense or a negative form of misgovernment.

4. Further harms and wrongs may be identified in our discussion of particular categories of case, below.

The next question is whether in principle these harms and wrongs deserve criminalisation.

Some consultees indirectly addressed this question in their responses to the background paper. For example, the response of the Crown Prosecution Service (CPS) to Question 10\textsuperscript{109} of the background paper:

> Whilst the factual basis of the offence can differ widely, the wrong and harm caused are essentially the same. It is the undermining of public confidence in the institutions in which, as a society, we place our trust, caused by those who voluntarily accept the burden of the responsibility of trust we place on them failing, through their own

\textsuperscript{103} Para 3.53 above.
\textsuperscript{104} *A Digest of the Criminal Law (Crimes and Punishments) (1877)* ("Stephen’s Digest"), Part III, pp 73 to 75, arts 121 and 122.
\textsuperscript{105} T F Williams, “Neglect of Duty and Breach of Trust: Ancient offences in the modern battle against impunity in the public service” (2010) 13(4) *Journal of Money Laundering Control* 336.
\textsuperscript{107} Para 3.39 above.
\textsuperscript{108} Para 3.93 above.
\textsuperscript{109} Question 10 of the background paper: Do consultees have any views on whether the offence of misconduct in public office reflects a distinctive wrong?
culpable weakness, to meet the high standards necessary for those institutions to function … For all its faults and difficulties, the offence is an invaluable tool that captures the nature of the wrong done and the harm caused.

3.98 Whatever answer we arrive at may not be sufficient for the purpose of establishing the boundaries of any new offence. The identified reason for creating an offence, in the sense of the general mischief it is designed to combat, cannot always be translated into a defined element of that offence. It is often necessary to define more limited and precise categories “by way of particular determination”.¹¹⁰ For example, false imprisonment, kidnapping and holding in slavery or servitude are all offences against personal freedom; but each of them defines a particular type of attack on freedom, as “infringing personal freedom” is too vague to be an offence.

3.99 On this principle, any new offences may apply to more limited forms of conduct, or more limited categories of potential offender, than can be justified solely by consideration of the general harms and wrongs (for example breach of trust). However, these factors could still be relevant, either as ingredients in the new offences or as aggravating factors, even if we conclude that they are too imprecise to bear the whole burden of defining an offence. In the same way, dishonesty is a factor in the offence of theft connected both to the wrongfulness of the offence and to the issue of culpability, though it would not be feasible in drafting terms to create a stand-alone offence of “being dishonest”.

3.100 We propose to discuss these issues in the following order:

(1) Is harm to the public interest a suitable basis for an offence or should the type of harm be further refined?

(2) Are any of the wrongs identified by us (abuse of position; misgovernment; breach of trust) a suitable basis for an offence?

(3) If the answer to either of these questions is affirmative, should the offence apply to a wider group than public office holders as currently defined, for example:

(a) All persons in a position of trust?

(b) Persons in a position of public trust?

(4) What reasons of principle are there for distinguishing breach of the duties of a public office from other breaches of public trust?

Harms

3.101 We argue, above, that while harm to the public interest may well be the theoretical harm underlying the offence, it is not an element in its definition. In the cases concerning neglect the obvious harm caused was direct harm to an individual: for example a person dying in police custody. In other cases, for

¹¹⁰ Aquinas, Summa Theologiae, 1a 2ae q 95 a 4.
example those concerning unauthorised gain, the wrong of breach of trust is regarded as sufficient, without the need to demonstrate any risk of direct harm.

3.102 In both cases, the risk that this harm, or this wrong, will undermine public confidence in the police or other governing institutions is not an additional element to be proved, but is presumed from the nature of the case.

3.103 This is, therefore, an example of a harm which may form part of the rationale for an offence but is too uncertain to be one of its ingredients.\footnote{Paras 3.14 to 3.16 above.} If the other elements of the offence are certain enough, the risk of harm may be left as purely implicit, as in the case of most “conduct crimes”. For example, an individual, X, is in possession of a bladed article in a public place. The risk of harm which the offence exists to guard against is primarily one of physical injury, but this is not mentioned anywhere in the definition of the offence. In the weapons offence, this omission is not a problem, as the forbidden conduct is clearly defined. In the case of misconduct in public office, by contrast, the wrong is as uncertain as the harms that could be caused; and the other elements of the offence, for example the pool of potential offenders, do not provide further certainty. One way of adding certainty to a new offence would be by specifying a detailed list of the types of harm risked.

3.104 In the neglect cases, the risk of harm to individuals may be regarded as sufficient to justify an offence, though the type of harm may need to be more closely defined. If so, it would be unnecessary to incorporate any element in the offence to reflect the remoter harm to the public interest.

3.105 The more important question is whether, in cases involving breach of trust in the stronger sense (for example unauthorised gains), the law should regard that breach as a wrong in itself, sufficient to justify criminalisation without proof of harm. There also exists the question of whether to introduce an alternative stronger harm requirement. One argument for regarding the breach of trust as sufficient is that, if such conduct is prevalent without being criminalised, this fact in itself constitutes harm to the public interest. On the other hand, the harm potentially caused may be a useful guide to the importance of the trust broken.

3.106 Rather than attempting to answer this question at this stage as a matter of abstract principle, we think it preferable to consider particular categories of cases involving such conduct. We analyse below five categories of cases in which prosecutions for misconduct in public office have been brought. This analysis may cast some light on the question of what types of harm are most likely to arise, and therefore be of some assistance in arriving at a list of potential harms for use in any new offence. Detailed proposals for such a list are discussed in Chapter 5.

**Wrongs**

3.107 We argued above that there are three possible rationales for the existing offence: abuse of position; misgovernment; and breach of the trust of the public. We now turn to consider the suitability of each of these as the basis for a new offence or offences.
Abuse of position

3.108 A new offence based on this wrong could cover any use of the opportunity afforded by a position, for the purpose of an undue advantage to oneself or another or a detriment to another. Section 4 of the Fraud Act 2006 (fraud by abuse of position) provides an example of an offence using a similar definition. However, in that offence the intended benefit and detriment are confined to “gain” and “loss” or “exposure to a risk of loss” and the interests to be safeguarded are property-based. In these definitions, the intention to gain advantage or cause detriment is the main wrong which the offence seeks to capture: it is not just a reason for holding that D is to blame for what happened.

3.109 This form of the principal Fraud Act 2006 offence demonstrates that the concept of abuse of position in criminal offences is not necessarily dependent on the offender being a public office holder. It would be equally possible to use the wrong of abuse of position as the basis of a wider offence including professionals and employees of all types, not restricted to the public sector. Alternatively, it would be possible to restrict it to categories of persons where abuse of position is particularly undesirable, or particularly prevalent.

AN OFFENCE APPLYING TO BOTH PUBLIC AND PRIVATE SECTORS

3.110 One possibility is to abandon any attempt to distinguish between public and private sectors, and to create an offence of abuse of position for personal advantage. This offence would apply to all types of employment, whether public or private, involving a duty not to use one’s position for this purpose. This approach was adopted in our reform of the offence of bribery.

3.111 Before the Bribery Act 2010, there was a common law offence of bribery, which could only be committed where the person bribed was a judge or public official. The Public Bodies Corrupt Practices Act 1889 also only applied to public sector persons or bodies. By contrast, the Prevention of Corruption Acts extended to bribery of “agents” whether in the public or the private sector.

3.112 In our report on bribery we argued that there was no need to distinguish between the public and the private sector and, in fact, it might prove impossible to do so given the increased permeation of the public/private divide. Within that offence we concluded that the distinction could not and should not be maintained. Rather, the conditions for bribery should be that the person bribed should:

1. be performing a relevant function or activity; and

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112 Section 4(1) states: a person is in breach of this section if he: (a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person, (b) dishonestly abuses that position, and (c) intends, by means of the abuse of that position [to either] (i) make a gain for himself or another, or (ii) to cause loss to another or to expose another to a risk of loss.


be expected to perform that function or activity in accordance with a duty of impartially or to do so in good faith, or that that person should be in a position of trust by virtue of performing it.

The wrong involved in bribery would then be the breach of that expectation or trust. These recommendations were implemented by the Bribery Act 2010.117

3.113 Another example of this approach was in our report on fraud, where we included a recommendation that an offence of “abuse of a position of trust” be included in legislation.118 Such an offence is now contained in section 4 of the Fraud Act 2006.119 This offence was not restricted to either persons in a named position (such as public office holders) or to those under one of the settled types of fiduciary defined by the civil courts. We concluded that this was because the wrong committed by fraud in abuse of a position, and which justified criminalisation, was not restricted to those positions.120

3.114 On the analogy of the new offences of bribery and fraud, it would be possible to take the view that the wrong identified in misconduct in public office justifies criminalisation, but applies to a much wider pool of people than those public office holders currently covered by the offence. That is, the wrongs identified by us do not depend on D’s position as a public office holder but do depend on the fact that D is in a position of trust, or is expected to act impartially or in the best interests of another. This might suggest the creation of a broader offence of abuse of position by anyone in a position of trust or who is expected to act impartially or in the best interests of another.

3.115 There are two arguments against creating such an offence. First, it would be almost indistinguishable from the existing offence of fraud by abuse of a position of trust. Secondly, it does not capture the harm to the public identified in our previous discussion, in particular the impairment of public confidence in governing institutions.

3.116 We therefore advise against an offence of abuse of position covering a wider pool of people than public office holders, and proceed to consider the other two rationales, which are connected to public office or positions of public trust.

**Misgovernment**

3.117 A new offence based solely on this wrong would only apply to people exercising “state power”. It would be much narrower than the existing offence: for example,

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117 Bribery Act 2010, s 3.


119 In its passage through Parliament this provision was criticised as “woolly”: Hansard HC 12 June 2006 col 549 and Standing Committee B, 20 June 2006 col 25. One particular criticism concerns the lack of precision about what types of “position” can be abused: D Ormerod and D Williams, Smith’s Law of Theft (9th ed 2007), para 3.162.

120 As with bribery, it has been argued however that the true wrong committed in such fraud cases is one of a breach of loyalty. See J Collins, “Fraud by abuse of position: theorising section 4 of the Fraud Act 2006” (2011) Criminal Law Review 513.
it would not cover cases concerning exploitation of opportunity as opposed to abuse of power. Such an offence might be hard to define, as it arguably covers several different wrongs, including an abuse of position with the purpose of causing another person detriment. These could even be reflected in a series of separate offences: oppression; extortion; use of governmental powers for improper motives; and deliberate neglect of those powers.

3.118 As discussed above, this category covers many of the prosecutions for neglect of duty under the existing offence. They could be regarded either as a breach of trust in the weak sense or as a negative form of misgovernment, but it is the risk of serious harm that makes the conduct serious enough to merit criminal prosecution. In Chapter 5 we discuss the possibility of an offence covering these cases, including the question of what types of harm should be envisaged in such an offence.

3.119 An offence of this kind would clearly be limited to public office holders, as only they have governmental powers which can be abused or neglected. However, it would then be necessary to devise a satisfactory definition of “public office”, to replace the rather vague concept in the current offence. An alternative approach would be to confine the offence to one or more limited types of public official, based on the particular harm caused or risked. For example, an offence based on the risk of false imprisonment could be confined to police and prison officers and others who have the power of detention. These possibilities are all discussed in Chapter 5.

Breach of public trust

3.120 The discussion above leads us to conclude that the idea of trust in a strong sense, involving a special fiduciary-type relationship between the public and individuals performing state functions, is still relevant today.

3.121 However, the concept of trust, while an intuitive one, can have different meanings in a legal context. It can also have different meanings amongst legal

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123 Para 3.53, above; para 3.86 and following, above.

124 The phrase in civil law is primarily used to describe a legally enforceable fiduciary duty, as discussed. In criminal law contexts it is usually used in relation to dishonesty offences. See Stephen, A History of the Criminal Law of England (1883) Chapter XXXI p 250 to 255, 309 to 310. At p 127: “The expression “criminal breach of trust” is liable, owing to one of the leading peculiarities of the law of England, to be misunderstood, as it includes two totally different kinds of offences; namely, first, breach of confidence, as when a borrower makes away with something lent to him, and secondly the misbehaviour of a trustee, who is the full legal owner of the subject-matter of the trust for the benefit of some other person”.
commentators.\textsuperscript{125} Susan Dimmock suggests that the violation of conditions of basic trust in a community is the characteristic wrong which all criminal behaviour involves.\textsuperscript{126}

3.122 The boundaries of “trust” are very hard to draw and therefore the gravity of the wrongdoing that could justify a criminal offence is very difficult to define. We distinguish above between a “weak sense”, meaning an expectation that a duty will be performed, and a “strong sense”, involving a duty of acting selflessly and in the exclusive interests of a person or purpose.\textsuperscript{127}

3.123 As argued above, a wrong may constitute the rationale of an offence even though it is not precise enough to form part of its definition. Breach of trust may well be the wrong underlying a new offence; only, for the offence to be precise enough, it cannot be the sole basis of the way the offence is defined. We therefore turn to the question of how wide a category of positions of trust should be covered.

**AN OFFENCE APPLYING TO POSITIONS OF PUBLIC TRUST BUT NOT LIMITED TO PUBLIC OFFICE HOLDERS**

3.124 We rejected, above, an offence of abuse of position applying to both public and private sectors.\textsuperscript{128} A less radical possibility would be to create an offence applying only to breach of trust where the trust is a public one. This would be narrower than an offence applying to positions of trust generally, but broader than an offence restricted to public office holders.

3.125 One justification for this could be the distinction, drawn above,\textsuperscript{129} between private and public wrongs. In nuisance, for example, harm to a limited number of individuals gives rise only to a civil cause of action, while harm to a section of the public also constitutes an offence.

3.126 The disadvantage of this option is that it would still criminalise a very wide range of people, including charity workers, as every charity is in a sense a trust for the public. It could also be argued that professionals subject to duties to the public under an oath or a code of ethics (such as doctors, and public sector employees dealing with the public, such as paramedics) are also in a position of public trust.

3.127 If this option were to be chosen, it would be necessary to restrict the scope of potential defendants in some way, even if not by restricting it to public office holders in the current sense. One relevant factor might be whether members of the public have a choice of whether to engage with a particular functionary.

\textsuperscript{125} For example see C Baier, “Trust” \textit{The Tanner Lectures on Human Values}, delivered at Princeton University, March 6 to 8 1991; D A Hoekema, “Trust and Obey: Toward a New Theory of Punishment” [1991] \textit{Israel Law Review} 332; S Dimock, “Retributivism and Trust” (1997) 16 \textit{Law and Philosophy} 37. What unites them is that, in each, the role trust plays in justifying punishment does not rely on the severity of the harm involved in the breach. Even if the tangible harm was relatively trivial, punishment would still be justified.

\textsuperscript{126} S Dimmock, “Retributivism and trust” (1997) 16 \textit{Law and Philosophy} 37.

\textsuperscript{127} Para 3.57 above.

\textsuperscript{128} Para 3.110 and following, above.

\textsuperscript{129} Para 3.13 above.
David Hoekema describes the breaches of trust that ought to be criminal as those that take place in the context of “involuntary trust relationships”. For him, the less voluntary the trust relationship, the greater the interest the state has in preserving and enhancing trust within it. An example would be the relationship between a police officer and a member of the public who calls the police to attend an emergency.

However, whether a clear line can be drawn between involuntary and voluntary trust relationships may be open to doubt. For example, a person treated by a doctor in a police station cell may voluntarily submit to that treatment and therefore create a relationship of trust with the doctor. Is that trust relationship a voluntary one as a result of the person consenting to treatment, or is it involuntary as he or she has no choice over who provides it, just whether to accept it or not?

Another difficulty with applying this analysis to misconduct in public office is that Hoekema concentrates on the individual’s interest in seeing that his or her trust is not violated. However, the misconduct offence is concerned with a breach of public trust that goes beyond any one individual.

Another factor might be whether the individual is likely to be in a vulnerable position in relation to the person in a position of trust, giving rise to a corresponding duty of care for that individual. These possibilities are discussed further in our consideration of particular categories of case, in particular in Category 1 involving sexual relationships.

Reasons for distinguishing cases involving public office

Finally, a new offence involving breach of trust could follow the existing offence by being confined to breaches of duty arising from a public office. There are various possible reasons for regarding breach of a duty arising from a public office as more serious than breach of other positions of trust.

The greater likelihood of harm

In the background paper we concluded that whilst the ambit of the English and Welsh offence was no longer restricted to those individuals holding positions with a direct link to the government or state, it remained applicable only to those carrying out particular state functions: those that the public have an interest in seeing discharged properly. This is in accordance with the view, described above, that the harm the offence currently seeks to address is harm to the public interest, in terms of public confidence in those exercising such state functions.

We further argued that the type of harm to the public interest to be addressed by the misconduct offence may be narrower than “harm to the public interest”. It may be better described in terms of “harm to public confidence in governing institutions”. If so, this articulation of the harm may provide a basis for any proposed law reform options.


131 See ch 2.
However, in present conditions, where so many public functions have been contracted to private bodies and the distinction between public and private sectors is ever less clear, it is uncertain whether harm to the public interest, even in this narrower sense, can only be caused by the conduct of those currently identified as public office holders. As we explained in our work on bribery, the 20th century saw a reduction in the distinction between the public and private sectors and increased proliferation of public service provision. This makes it extremely difficult to conclude that potential harm to the public interest can only occur, or is qualitatively different, when the conduct is performed by public officials.\textsuperscript{132} If harm to the public interest can be caused by persons other than public office holders, through the performance of certain conduct, then why should public office holders be the only people subject to a criminal sanction for that conduct?

In its response to the background paper, the Committee on Standards in Public Life made an observation that is most relevant here:

\begin{quote}
There is an increasingly blurred distinction between public and private and voluntary sectors. The Committee’s own remit has been widened to make clear that the Seven Principles apply to any organisation delivering public services …

The question of whether the offence of misconduct in public office should apply to, for example, higher education institutions or housing associations, sport, or even to fully privatised entities such as the utilities remains pertinent. What is clear to this Committee is that the public want all providers of public services to adhere to and operate by common ethical standards, regardless of whether they are in the private, public or voluntary sectors …

So whilst the Committee understands completely the difficulty in defining the terms “public office” and “public office-holder”, we would welcome a broader definition to encompass all those whose role impacts on national, public life.
\end{quote}

The Committee’s views appear to be that an offence applying to individuals in positions of public trust would be preferable to one limited to public office holders. However, as we discuss above, it is questionable whether the category of person engaging in behaviour risking this type of harm can be sufficiently well defined to ensure legal certainty. Additionally, there may be reasons for distinguishing those whose role “impacts on national, public life” from those who exercise state functions. The issue of who performs those state functions – in either the private or public sectors – is a different one and restricting an offence to those defined as “public office holders” would not necessarily exclude individuals in the private sector.

\textit{Public office as an indicator of likely harms and wrongs}

As argued above, the fact that D is in public office is not necessary either for the primary identified harm (harm to the public interest, in particular loss of

\textsuperscript{132} Reforming Bribery (2008) Law Com No 313.
confidence in governing institutions) or for the primary identified wrong (breach of public trust). Nevertheless, the breach of a duty may be thought far more likely to satisfy both conditions together in cases where D’s duty is concerned with state functions. A requirement that D is in public office is therefore a good, though not perfect, indication that these harms and wrongs are likely to be present.\textsuperscript{133} The imperfections lie, we would suggest, in its potential to be over-inclusive in terms of including individuals based on their status but who in fact owe no real duty to fulfil a public trust.

3.139 Furthermore, the uncertainty about who is and is not in public office is one of the principal defects in the existing offence, and devising a rigorous definition might be a task of some difficulty. This difficulty is discussed in Chapter 4.

\textit{Public office as an aggravating factor}

3.140 It could further be argued that, though the basic harms and wrongs may depend mainly on the trust reposed in D (by the public or by V), the behaviour acquires an additional character of wrongfulness when D is a public office holder.

3.141 Some have expressed the view that when wrongdoing is committed by someone who is entrusted to carry out a certain functions on behalf of the state it instinctively feels as if there is something about the person’s position which either imbibes that wrongdoing with a different quality or makes it more serious. This has been conveyed to us in the consultation meetings we have had\textsuperscript{134} and at our public symposium.\textsuperscript{135}

3.142 There is also a public expectation that the person entrusted to carry out such functions will do so in accordance with other specific duties of his or her position. Therefore, the feeling of wrongfulness particularly arises when D commits an offence when he or she is acting in the course of performing the functions of his or her position, or purporting to do so.

3.143 As we explained in Appendix F to the background paper, it is common for the criminal law of other jurisdictions to provide offences specifically related to abuse of, or misconduct in, “public office”, based on the concept of someone who performs functions on behalf of the state.\textsuperscript{136}

3.144 It is also common for there to be international obligations placed on states to recognise that criminal activities by public officials should be treated more severely. For example, the EU Directive on Preventing and Combating Trafficking in Human Beings and Protecting Victims (2011/36/EU), requires member states to:

\textsuperscript{133} See ch 2 of the background paper.

\textsuperscript{134} Representative stakeholder group meeting took place on 23 February 2016; Academic advisory group meeting took place on 5 May 2016; Judicial and practitioner advisory group meeting took place on 12 May 2016.

\textsuperscript{135} Law Commission Symposium on Misconduct in Public Office, 20 January 2016, at the Dickson Poon School of Law, King’s College London.

\textsuperscript{136} For example the offence under Criminal Law Consolidation Act 1935 division 4 (South Australia), see background paper Appendix F, para F.143 and following, available at http://www.lawcom.gov.uk/wp-content/uploads/2016/01/afp_international.pdf.
(1) criminalise human trafficking; and

(2) ensure that an offence of human trafficking as committed by public officials in the course of their duties is treated as an aggravating feature of the offence.  

3.145 The United Nations Convention against Corruption meanwhile includes recommendations that member states consider implementing a number of specific corruption offences to address corruption by public officials, which are not repeated for the private sector. For example, article 19: “abuse of functions” by a public official.  

3.146 In conclusion, conduct may be harmful, and wrongful, whether or not it is performed by public officials in the purported course of their duties. However, there is often a justification for considering that conduct more harmful and wrongful when it is so performed.

How that aggravating factor should be reflected in practice

3.147 The fact that D is in public office could therefore be a factor making D’s conduct additionally wrongful in any, or all of, the five cases discussed below. The question then arises as to how that wrongfulness should be reflected in practice.

3.148 It could be treated as simply an aggravating factor for sentencing purposes, either within any existing offence (for example rape) that has been committed or within any recommended new offence based on breach of trust (but not on public office as such).  

Note: To this end Scotland, in drafting the Human Trafficking and Exploitation (Scotland) Act 2015, included at s 7 a statutory provision stating that the fact that the defendant was a public official was an aggravating factor. Public official is defined in s 7(5). In contrast, a similar provision was not included in the Modern Slavery Act 2015 – either because it was considered that the law of England and Wales can adequately incorporate the aggravation within sentencing, and/or because misconduct in public office is also available as a charge.  

Note: When committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity”. Public official is defined in art 2 of the Convention.

Note: Interestingly, looking at the Sentencing Council’s Guidelines it appears that “public office” has never been listed as a specific aggravating feature, but both “abuse of power” and “position of trust” have been. This option should not be combined with the creation of an offence based on being in public office, as public office cannot feature simultaneously as an aggravating factor in one offence and an ingredient of another offence that is otherwise identical: O’Leary [2015] EWCA Crim 1306, [2016] 1 Cr App R (S) 11.
even if D were not in public office, but the fact of public office might justify an additional offence.  

3.149 The most important question is whether the distinct wrong justifies an offence covering conduct which, were it not for the fact of public office, would not be criminal at all, as in many instances of the existing offence of misconduct in public office.

**Conclusion on public office as a factor in an offence**

3.150 The discussion above leads us to the following conclusions:

1. The wrong underlying much of the existing offence, namely breach of a public trust, is defensible as the rationale for an offence. However, it is not certain enough to be used, without further specification, in the definition of an offence.

2. An offence, however defined, that can be committed by any person "in a position of public trust" would be too wide and uncertain.

3. A clear requirement that D must be in a public office (or a similar position with a different label), with a suitably rigorous definition of what public office consists of, would be useful in giving certainty to any new offence, if such a definition can be found.

4. Alternatively, new offences could be based on particular categories of public office holder where a rigorous definition is clearly possible.

**CATEGORIES OF CONDUCT PROSECUTED AS MISCONDUCT IN PUBLIC OFFICE**

3.151 We now turn to consider the harms and wrongs involved in several particular types of case to inform the decision whether there should be one new offence or several.

3.152 In Chapter 6 of the background paper we identified five categories of behaviour which, in certain circumstances, could constitute misconduct in public office but would not fall within the scope of another offence. These are as follows:

1. Public office holders who exploit their positions to facilitate a sexual relationship.

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140 For example, the offence of torture can only be committed by a public official acting, or purporting to act, as such. See Criminal Justice Act 1988, s 134; United Nations Convention against Torture 1987. There is no definition of public official in the Act and only one individual has been prosecuted for the offence: http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/153/153we10.htm (last visited 29 June 2016). Where actions equivalent to torture are carried out by any other person they constitute offences of violence, such as grievous bodily harm under section 18 of the Offences Against the Person Act 1861. However, torture is widely regarded as a distinct and qualitatively different form of wrongdoing.

141 For example, as already mentioned, the common law offence of bribery only covered the bribery of judges and other public officials. Before 1906 the bribery of private employees gave rise only to civil liability (if any at all).

142 See background paper para 6.3.
(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 misuse, disclose or fail properly to protect information that comes into their possession by virtue of their positions.

3.153 In what follows, we discuss these categories of behaviour as test cases to explore whether the current offence of misconduct in public office captures harms and wrongs that are not covered by other offences. For each category, we describe the conduct in question and discuss:

(1) what cases within that category are covered by other offences, and what cases are not;

(2) what are the distinctive harms and wrongs of conduct falling within that category (over and above those reflected by the other offences if any);

(3) for those cases which are not covered by other offences, whether those distinctive harms and wrongs justify the existence of a criminal offence; and

(4) whether, even in cases where there is an alternative offence, those harms and wrongs justify criminalisation on the ground that the alternative offence does not capture the full mischief.

3.154 In the background paper\(^\text{143}\) we identified some examples of further forms of behaviour which are sometimes wrongly identified as conduct that can only be prosecuted as misconduct in public office although they do in fact also fall within other offences. Here too there is the need to discuss whether there are distinctive harms and wrongs, arising from the fact that D is a public office holder, that are not captured by the alternative offences. These other categories of conduct will be discussed briefly below.

3.155 The results of this discussion may influence the choice of law reform options as follows:

(1) If, in all five categories, there are no identified harms and wrongs that are not captured by alternative offences, there would be an argument for abolishing the offence of misconduct in public office without replacement.

(2) If there are identified harms and wrongs, but these are different in each category of case, there would be an argument for one or more targeted offences addressing specific categories.

\(^{143}\) Background paper para 6.49 and following.
(3) If there is a substantial overlap between the harms and wrongs identified in different categories of case, there would be an argument for a broader offence addressing those shared harms and wrongs.

Issues common to all five categories

3.156 The five identified categories were arrived at by classifying a sample of cases in which public office holders were charged with misconduct in public office and could not have been charged with another offence. However, after further examination, we are of the view that each of the categories potentially covers a much wider spectrum of behaviour.

3.157 Some of the conduct falling within these descriptions does also constitute another offence. For example, some cases in which public office holders exploit their position for sex may amount to rape or another sexual offence.

3.158 Additionally, each category of conduct is described as being engaged in by a public office holder; however, analogous forms of behaviour, with similar harms and wrongs, may be engaged in by people in other positions, especially where these are positions of trust.

3.159 In our discussion of each of the categories, we will identify any behaviour that can be prosecuted using alternative offences before identifying harms and wrongs arising from any residual conduct. In each case, the question is whether the identified harms and wrongs are either dependent on, or exacerbated by:

(1) the fact that D is in a public office; or

(2) the fact that D is in a position of trust (whether or not this is a public office).

3.160 Our analysis of these categories will be used to test the conclusions of the general discussion above, namely that:

(1) In most of these instances, the basic wrong is one of breach of trust (whether this is a public trust or the trust reposed in D by V as an individual is a further issue).

(2) The fact that D is in public office is not essential to the wrongfulness of the conduct, but is an aggravating factor.

(3) However, “breach of trust” is an insufficient basis for defining an offence unless the definition is made more precise, for example by restricting it to a particular pool of people and/or requiring particular harms or the risk of them.

CATEGORY 1: PUBLIC OFFICE HOLDERS WHO EXPLOIT THEIR POSITIONS TO FACILITATE A SEXUAL RELATIONSHIP

Describing the conduct

3.161 The first category of behaviour we identified in Chapter 6 of the background paper as one which can only be prosecuted as misconduct in public office is
where a “public office holder exploits his or her position to facilitate a sexual relationship”.

3.162 In Appendix D of the background paper\textsuperscript{144} we collated the details of a large number of unreported misconduct in public office prosecutions and their facts, where we could establish them. These have since been supplemented by further information provided to us by the CPS. The perpetrators in these cases are generally police officers or staff, prison officers or staff, immigration detention staff or probation officers. However, in one instance the defendant was a clergyman. Of course, for the reasons set out in Appendix D, we can never guarantee that we have identified all relevant prosecutions or therefore that we have identified all of the different types of public office holder prosecuted for this type of behaviour.

3.163 There is an additional concern. Although it is primarily police and prison staff who are prosecuted in these circumstances, there is no reason to suppose that they are the individuals most likely to engage in this form of behaviour. The more likely reasons for this prevalence are, first, that they are they are easily identifiable as public office holders and, secondly, that they have more extensive powers over individuals who may be in a vulnerable position.

3.164 The cases we have found may for convenience be divided into the following groups:

(1) Cases where V feels some degree of pressure to enter into or remain in a consensual sexual relationship, for example because of some one or more of:
   (a) D’s perceived authority;
   (b) V’s “vulnerable” situation; and/or
   (c) the hope that D will perform his or her official functions for V’s benefit.

(2) Cases where the relationship may give rise to a conflict of interest.

(3) Cases where D’s conduct involves his or her misuse of information obtained by virtue of D’s position, though there are no perceived threats or inducements.

(4) Cases where D’s conduct involves him or her meeting V within the course of carrying out the functions of his or her position, but none of the factors in (1) to (3) is present.

Does that conduct amount to another offence?

3.165 In some cases within group (1) above, the facts may amount to a sexual offence such as rape or sexual assault. This will be so if:

(1) the type and degree of pressure as perceived by V was such that V did not genuinely consent to the sexual activity in question; and

(2) D did not genuinely and reasonably believe that V gave free consent or had not taken reasonable steps to find out if this was so.\footnote{Sexual Offences Act 2003, ss 74 to 76.}

3.166 All of the cases we have identified as prosecuted using misconduct in public office involve people described by either the courts or the CPS as being in a vulnerable position. In some cases this is because D is in a position of authority in relation to V, for example a prison officer or probation officer with responsibility for V. In others V might be in an emotionally vulnerable situation, for example when being interviewed by police shortly after being the victim of a crime. In many of them, V felt pressure to comply, in the same way as if a threat had been made or an inducement had been held out. For example, a police officer had oral sex with a prostitute after giving her three choices: arrest, a fine or letting her go dependent on what she could do for him. She then complained that she felt obliged to do so because he was a police officer.

3.167 It is therefore possible that many of the misconduct in public office cases identified by us may have involved conduct amounting to a non-consensual sexual offence: that is, if the pressure vitiated V’s consent and D had no reasonable belief that V was consenting.\footnote{The Bribery Act 2010 may in fact also apply to a scenario where a public office holder accepts or is offered an advantage of a sexual nature in return for improper performance of a public function. The Bribery Act offences refer to both financial and other advantages. In the scenario involving the prostitute described above, however, the victim had no intention of either inducing the officer to, or rewarding him for, performing a relevant function or activity improperly. Her behaviour was, arguably, coerced.} However, both of these questions would need, ultimately, to be resolved by a jury. A jury could equally take the view that the pressure was not sufficient to deprive V of freedom of choice, or that may have D reasonably believed in V’s consent.

3.168 There will also be cases where there is no question but that V consented, though V would rather that the situation had not arisen.

**Example 1** V is the victim of a crime, and D is a police officer or PCSO who is called to V’s address to take V’s statement. V feels anxious about his or her safety and whether the case will be dealt with diligently. V might agree to have sex with D because he or she thinks that D will be extra vigilant to ensure V’s safety and that the case is properly dealt with; or V might be worried that if he or she refuses, D will not investigate the case properly or will use his or her authority to V’s detriment. D is aware both that V is vulnerable and that V would be unlikely to consent to sex were it not for these reasons.\footnote{For examples of actual prosecutions involving police officers acting in the way described see Appendix D to the background paper.}

**Harms and wrongs**

3.169 For convenience we divide the following discussion into:
(1) Whether there are harms and wrongs common to all or most instances of conduct within this category.

(2) Harms and wrongs arising only when V is in a position of vulnerability.

(3) Other harms and wrongs that may arise in particular cases.

Harms and wrongs common to all or most cases

3.170 In all cases where a public office holder uses his or her position to bring about or perpetuate a sexual relationship, he or she is obtaining a private advantage from a position of trust. There is therefore a potential wrong of abuse of position or breach of public trust.

3.171 This wrong only exists when the advantage is unauthorised. It is difficult to identify what can be said to be wrongful about consensual sexual activity that occurs between two adults where one may be encouraged to have sex with the other because of a factor such as what they do for a living. If D met V in a bar and informed V that D worked with the police, with the result that V was induced to have sex with D because V felt safer with D around, what would be wrongful if they later had consensual sex? We consider that there is nothing intrinsically wrong with this conduct.

3.172 Accordingly, D's position as a public officer, and the fact that in a particular case it influenced V's consent to sexual activity, are unlikely to be sufficient to make the sexual activity wrongful. They may however contribute to making that conduct wrongful when found together with other factors. For example, in some cases this conduct will be contrary to a specific duty, imposed under an oath of office, Code of Conduct, Code of Ethics, employment contract, not to engage in such relationships.

3.173 Where such factors are present, this is sufficient to make the advantage unauthorised, so that the conduct is a breach of a trust for the public. We raised above the question of whether this is in itself sufficient to justify an offence or whether some harm needs to be demonstrated.

3.174 There will certainly be harms arising in particular categories of cases, such as where V is in a position of vulnerability, and we discuss these below. The only harm that we can identify that is common to all cases consists of the undesirable social consequences of a situation in which such behaviour is prevalent and not criminalised. However, there are two arguments against this:

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148 Anything else would of course constitute another criminal offence.

149 Such duties could be explicit, such as those contained in the Hippocratic oath taken by doctors, or those set out in specific ethical requirements pertaining to a position. See for example College of Policing, Code of Ethics: A Code of Practice for the Principles and Standards of Professional Behaviour for the Policing Profession of England and Wales (July 2014). Para 2.3 imposes a specific duty on police officers not to “establish or pursue an improper sexual or emotional relationship with a person with whom you come into contact in the course of your work who may be vulnerable to an abuse of trust or power”. This is part of the overarching duty to abide by the standard of professional behaviour “Authority, respect and courtesy”.

150 Para 3.105 above.
Where the conduct is contrary to a code of professional conduct, the disciplinary sanctions available, up to and including dismissal, will often be an adequate social condemnation.\textsuperscript{151}

Many codes of conduct, including the police code, confine the condemnation to cases involving other factors, such as exploitation of a vulnerable person. The argument for criminalising these cases is considered below, but it does not warrant criminalising all cases involving improper relationships whether those factors are present or not.

\textit{Harms and wrongs in relation to a vulnerable person}

3.175 We are here considering cases where V entered into, or remained in, a relationship with D as a result of perceived pressure associated with D’s position of authority or V’s vulnerability, though that pressure was not sufficient to vitiate V’s consent.

3.176 In its response to the background paper, the CPS indicated that it is precisely this factor that often indicates to prosecutors that the conduct involved is serious enough to justify prosecution as misconduct in public office:

[T]he existence of certain circumstances will very likely lead to the view that the misconduct is sufficiently serious to amount to an abuse of trust to the requisite degree. A prime example is vulnerability of the other party, whether as a result of being a victim of domestic violence or sexual abuse, or because of mental health problems, or because they are a suspect being detained in police custody.

3.177 By contrast:

If the other party is not vulnerable and all bar the earliest contacts is off-duty, or if the contact is a blurring of professional boundaries rather than the pursuit of sexual contact, it will very likely to considered insufficiently serious to amount to an abuse of trust to the requisite degree.

3.178 As the response indicates, “vulnerability” can take several forms. In some cases V may be intrinsically vulnerable, for example by being ill or mentally distressed. In others, V may be in a vulnerable position in relation to D, for example by being an arrested suspect or a prisoner. A further factor is whether D, by virtue of his or her position, has a duty to look after V, specifically because of that vulnerability.

3.179 The main harm in these situations is that V may feel that the perceived pressure to enter into or remain in the relationship violates his or her sexual autonomy.\textsuperscript{152}

\textsuperscript{151} That is, where breach of a code of ethics is the only wrong, and other reasons for criminalisation, such as exploitation of a vulnerable person, are not present.

\textsuperscript{152} Violation of sexual autonomy is of course a harm in itself, whether or not V feels this to be so. Our reason for emphasising the feeling is that, where there is actual violation of sexual autonomy, the case is likely to amount to rape or another non-consensual sexual offence.
even where it was not sufficient to vitiate consent. Knowingly causing this kind of harm is wrong in itself.

3.180 This harm, and therefore this wrong, are independent of D's position as a public office holder. Arguably, the only relevance of D's position as a public office holder is as part of the background. That is, on the particular facts, it was only because of D's position that V felt pressure to comply, even though there was not such a degree of pressure as to vitiate his or her consent. There might equally be instances of pressure not involving a public office holder, such as cases where D is V's employer, a human resource manager or a famous film star.

3.181 In most of these cases, there is a breach of the trust of V as an individual. As discussed above, the fact that V is in a position of vulnerability in relation to D's position is in itself a powerful indication of the existence of a relationship of trust, in the stronger sense. This wrong will apply not only when D is a public office holder but also when D is a relevant professional, for example a doctor, nurse, paramedic, psychotherapist, teacher, solicitor or barrister. The law already recognises this wrong in the form of various offences of abuse of a position of trust in relation to children and persons with a mental disorder: the question here is whether the protection should be extended to other forms of vulnerability.

3.182 In all or most of these cases, not only is V in a position of “vulnerability” (either absolutely or in relation to D) but D also has a professional duty to respect and safeguard those in that position. Exploiting that vulnerability for sexual advantage is a breach of trust (both V’s trust and the trust of the public), whether or not any tangible harm to V results.

3.183 In these situations, there may also be harm to the public interest, for example impairment of public confidence in the governmental institution in question. Whether or not this harm flows from any particular instance of misconduct, it is clearly likely to result from a situation in which this kind of conduct occurs and is not criminalised.

3.184 In our view, however, the public harms and wrongs are secondary to the harms and wrongs to V as an individual. That is, the impairment of sexual autonomy and breach of V's trust may in themselves be sufficient to justify an offence, whether or not the public harms and wrongs are present.

3.185 The nature of the wrongs in the examples discussed could justify offences of a different kind, for example:


154 Para 3.61 above.

155 Sexual Offences Act 2003, ss 16 to 19.

156 Sexual Offences Act 2003, ss 38 to 41.

(1) an offence of obtaining sex by improper pressure (the types of pressure would need to be further defined), analogous to the old offences of obtaining sex by threats or false pretences;\(^{158}\) or

(2) more specifically, an offence of sexual exploitation of a vulnerable person for whom D has responsibility.

3.186 These are both essentially sexual offences, unrelated to the fact of public office, and therefore fall outside the scope of this project; in Chapter 8 we discuss the possibility of a future project to consider the reform of the sexual offences legislation along these lines. The current use of misconduct in public office to prosecute such cases is fundamentally a stop-gap, caused by an arguable lack of a suitable sexual offence.

**Other harms and wrongs**

**POTENTIAL BREACH OF IMPARTIALITY**

3.187 There may be additional wrongs, such as breach of a duty of impartiality and objectivity in dealing with members of the public, as this duty may be compromised by allowing oneself to form too close a relationship with an individual with whom it is one's duty to deal. It may be perceived, rightly or wrongly, that D is unlikely to treat V equally to other people in V's position with whom D does not have a relationship.

3.188 An example of this wrong may be found in the case of an employer or manager who has sexual relations with employees or a teacher who has sexual relations with students. This is widely perceived as unfair both to those who are the object of the employer's or teacher's interest and to those who are not.\(^{159}\)

3.189 This wrong also arises when police officers form relationships with potential witnesses or suspects. As well as compromising the police officer's own impartiality, the danger is that the legal and investigative process, including the evidence of such persons, may be distorted.

3.190 These cases too may be regarded as involving a breach of public trust. The duty of impartiality is one form of the duty of acting selflessly, though in this case in accordance with a value (namely justice) rather than in the best interests of an individual. Cases of this kind properly belong in Category 2, relating to potential conflict of interest. As in other cases in Category 2, the wrongfulness of this conduct does not depend on the police officer "using" his or her position in order to form the relationship; the danger lies in the relationship itself, however it came about.\(^{160}\)

**MISUSE OF INFORMATION**

3.191 A further factor present in many cases is that D used confidential official information, such as a police database, as a means of identifying individuals who might be open to D’s overtures. This is clearly a breach of the trust of the public,

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\(^{158}\) Under the Sexual Offences Act 1956, ss 2 and 3.


\(^{160}\) Para 3.202 below.
in that D is exploiting the opportunities of his or her position to obtain an unauthorised personal advantage.

3.192 In these cases too, the main reason for prosecution is that individuals so identified are likely to be vulnerable. The other wrongful aspect of this conduct, namely the misuse of confidential information, is adequately reflected in existing offences concerned with computer misuse. The wrong of misuse of information is discussed below, under Category 5.

Do these harms and wrongs justify a criminal offence?

3.193 The main wrong in these cases is the sexual exploitation of people in a vulnerable position. This has no necessary connection with the fact that D is in public office and would be better addressed by a suitable addition to the existing range of sexual offences.

3.194 In such cases there is clearly a breach of the trust of V. There will also usually be a breach of the trust of the public (strong sense), in that D is gaining an unauthorised advantage from his or her position: particularly when there is misuse of information or breach of a duty of impartiality.

3.195 Category 1, taken on its own, does not supply a sufficient argument for introducing an offence based on breach of public trust (strong sense), as in most cases this wrong is secondary to the main wrong of exploiting a vulnerable person. However, if the introduction of an offence of breach of public trust is found to be justified on other grounds (see the discussion in relation to Categories 3 and 4 below), it will sometimes be appropriate to charge it in Category 1 cases.

CATEGORY 2: PUBLIC OFFICE HOLDERS WHO ENGAGE IN A PERSONAL RELATIONSHIP WHICH MAY CREATE A CONFLICT WITH THE PROPER PERFORMANCE OF THE FUNCTIONS OF THEIR OFFICE

Defining the behaviour

3.196 The second category of behaviour that we described in the background paper as conduct that can only be prosecuted as misconduct in public office was “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”.

3.197 We now consider that this formulation is too narrow. If “personal relationship” means a sexual relationship, it looks like a mere subset of Category 1. The formulation also excludes many cases where:

(1) the relationship was not started on the initiative of the public office holder; or

(2) the parties did not meet in the course of D’s duty and the public office was not a factor in the formation of the relationship.

However, in these cases the potential conflict of interest still exists. In addition, this potentiality could also exist in the case of many non-sexual relationships, such as business relationships.
In practice, however, most of the cases in this category have involved sexual relationships, most commonly with prisoners. A good example of this type of behaviour is Cosford.\textsuperscript{161} In that case, a nurse had a sexual relationship with a prisoner and her colleagues had platonic relations with him (knowing, and concealing the fact, that Cosford and the prisoner were lovers). Both the nurse, Cosford, and her colleagues were under duties not to have personal relationships with prisoners that might interfere with the proper discharge of their duties.\textsuperscript{162} They were also under associated duties to report any such relationships that might arise. The claim that Cosford was the victim of exploitation by the prisoner in question was rejected as a defence. All of the defendants’ involvements with the prisoner, together with their failures to report, were found to be both wilful and serious in the circumstances.\textsuperscript{163}

Another group of cases is where police officers have relationships with potential witnesses or suspects. As argued above,\textsuperscript{164} the danger here is not so much the exploitation of the individual in question as distortion of the investigative or legal process, for example by inducing the police officer to favour that individual or by influencing the way the individual gives evidence.

The form of behaviour with which we are examining here is therefore entirely different from that in Category 1. Category 1 was concerned with the sexual exploitation of a vulnerable person. In the current example, there may be no exploitation of the other person at all; in fact it is more likely that the other person is exploiting the public office holder. In some of the cases in our sample, prisoners have persuaded prison officers or visitors to provide them with mobile phones, not to report prisoners’ wrongdoing or to provide favourable references for parole hearings.

That being so, it is inappropriate to describe the other party to the relationship as the “victim” or to refer to him or her as “V”. For convenience, we shall refer to this individual as “X”. The real victim in such cases is the public service itself.

It is also possible that the relationship pre-existed the position of duty being held by D or the consequent risk of conflict of interest. In that case D’s misconduct consists not of entering into the relationship but of:

1. accepting the new position, in the knowledge that a conflict of interest could arise; and/or
2. allowing the relationship to continue, without either reporting it or asking to be reassigned.

Category 2 is more closely related to Category 3, concerning public office holders who deliberately act in a prejudicial or biased manner or under a conflict of interest. The difference is that, in Category 2, it is sufficient for the public holder

\textsuperscript{161} [2013] EWCA Crim 466, [2014] QB 81.
\textsuperscript{162} NOMS, \textit{Prison Service Instruction on Conduct and Discipline PSI (Revised Version for F&S) 06/2010} (July 2013).
\textsuperscript{163} Each of the defendants was also accused of concealing the fact that the prisoner had an unauthorised mobile phone with him in prison, and supplying “top up” credit for that phone.
\textsuperscript{164} Para 3.189 above.
to put himself or herself in a position where the conflict of interest may arise; in Category 3 the conflict of interest must in fact influence D’s behaviour.

**Conclusion**

3.204 We can describe the conduct as follows: D is under a duty not to have a relationship with X, where there is a risk of a conflict with other duties to which D is subject by virtue of his or her position. D is also under a duty to report any such relationship that does occur in the appropriate manner. D enters into such a relationship, or allows the relationship to continue, either knowing that it risks creating a conflict with his or her duties or being aware that such a risk might arise. D additionally fails to report its existence thereby breaching his or her duties.

**Does that conduct amount to another offence?**

3.205 This conduct will not normally amount to an offence other than misconduct in public office. In practice there may be specific offences dealing with other conflicts of interest where they attach to particular positions and involve financial interests. For example, it is a crime under the Localism Act 2011 for a local government official to fail to declare a financial interest that might conflict with his or her duties. The provisions of the Localism Act deal, to a limited extent, with financial conflicts of interest in respect of local government officials. However, there are no criminal offences that we are aware of that target conflicts of interest arising from personal relationships where the interest is not a financial one.

3.206 If, as a result of that conflict of interest, D engages in further misconduct (for example supplying forbidden articles to a prisoner) this may constitute an offence in its own right. This discussion properly belongs under Category 3 below.

**Harms and wrongs**

**Wrongs**

3.207 From the cases prosecuted, we can discern one basic wrong and two additional wrongs involved in this type of behaviour.

**BASIC WRONG**

3.208 The form of behaviour with which we are concerned is that D, being in a position where he or she has a duty not to put him or herself at risk of a conflict with other duties of that position, nevertheless places himself or herself in a position where a risk of a conflict arises.

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165 Localism Act 2011, s 34.

166 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 and 4 (fraud by abuse of position).

167 The offence of bribery can involve non-financial benefits. However, the mere existence of a conflict of interest cannot amount to bribery; and once the conflict of interest results in further improper conduct (whether bribery or not) the case falls in Category 3 and not Category 2.
3.209 In any position of trust, and any position where there is a duty of impartiality or of acting in the best interests of another, there is an implicit duty not to place oneself in a position of conflict of interest. In addition, in particular posts there may be an explicit duty expressed in a code of conduct or similar document. For example, the College of Policing’s Code of Ethics requires officers to “ensure that any relationship at work does not create an actual or apparent conflict of interest”.

3.210 This suggests that the wrong is simply breach of that duty. However, examining the cases more carefully, the wrong seems to be more nuanced than that.

ADDITIONAL WRONGS

3.211 A duty to avoid a conflict of interest may give rise to certain associated duties. One of these is the duty to disclose potential conflicts of interest to one’s employer or superiors. Again, this might be an explicit duty set out in a code of conduct,\(^{168}\) or an implied one.\(^{169}\) In all of the cases prosecuted this associated duty was also breached.

3.212 In some cases the main relevance of the fact of non-disclosure in the prosecuted conduct lies in establishing that the behaviour was wrongful. This will often be so in the situation, described above, where the relationship precedes acceptance of the position in question. It will also be so where the potential conflict of interest does not exist either when the relationship starts or when D’s employment starts, and only arises out of later developments. For example, D is a prison officer and D’s long-standing partner is later committed to the prison in which D works. In such cases D has a choice: to end the relationship, to resign from the prison service, to apply to be assigned to another prison or at the very least to consult D’s superiors about what should be done. It is D’s deliberate failure to do any of these things that tends to demonstrate that D is knowingly remaining in a position of potential conflict.

3.213 In some other cases, there is a duty to disclose potential conflicts of interest, even where there is no absolute duty to withdraw from the situation following disclosure. For example, where a judge has shares in a company which is a party to a case which he or she is hearing: the judge is not necessarily disqualified, but must disclose the fact to the parties and ask if they are content to proceed. Similarly there may be cases where D genuinely does not know whether it is ethically acceptable to be in a position of official duty while in a relationship with X (for example when X is a colleague), but is clearly obliged to consult his or her superiors or employers as to this question.

3.214 A final wrong exists if D chooses to act contrary to a duty of his or her position as a result of that conflict. D will have allowed him or herself to be corrupted by that conflict of interest. An example would be if a prison healthcare worker chose to smuggle unauthorised prescription drugs to an inmate with whom he or she had a close relationship.

\(^{168}\) The Code of Conduct for prison officers requires prison staff to “bring any potential conflicts of interest to the attention of a Senior Manager [etc]”.

\(^{169}\) The police Code of Ethics contains no such explicit requirement, but an implicit one may be read into the use of the word “ensure”.
SUMMARY OF WRONGS

3.215 The general wrong involved in Category 2 is D knowingly allowing himself or herself to be placed in a situation where a conflict of interest may arise. In particular cases there may be the following two further wrongs:

(1) D deliberately failing to disclose a potential conflict of interest, or seek ways of mitigating or avoiding it, once it has arisen.

(2) D engaging in further wrongful conduct as a result of that conflict of interest.

3.216 These are all forms of the wrong of breach of trust and, in the case of a public office holder, breach of the trust of the public.

Harms

3.217 As with Category 1, the question is whether this wrong is sufficient in itself for criminalisation or whether some harm needs to be identified.

3.218 The possible harms resulting from this category of conduct may be classified as follows:

(1) The danger that a person in a position of conflict of interest may make wrong decisions or commit acts of misconduct as a result of that position.

(2) The remoter social consequences of a situation in which such conduct is prevalent and is not criminalised.

3.219 It could, however, be argued that:

(1) Creating a criminal offence because of the danger of misconduct, as opposed to actual misconduct, is altogether too inchoate and risks creating a “thought crime”.

(2) The remoter social consequences equally arise in other instances of professional misconduct, which are adequately addressed by disciplinary or civil procedures and which there has never been a proposal to criminalise.

Do these harms and wrongs depend on the fact that D is a public office holder?

3.220 Fundamentally, the harms and wrongs identified do not apply only to public office holders as they are currently defined.

3.221 Many people who are not considered to be public office holders are, or would be considered to be, under specific duties not to allow a risk of a conflict of interest to arise. For example, a doctor, a solicitor or barrister or a director of a private company.

3.222 Nor is it certain that members of the public in fact have more “trust” in public office holders than in other categories of persons. V may have more trust in a doctor, or a barrister, not to allow a conflict of interest to occur, or act upon such a conflict, than in a prison or probation officer.
3.223 While the basic wrong of breach of trust does not depend on the fact that D is a public office holder, we do accept that this may be an aggravating factor, given the importance of public officers being impartial (and being seen to be impartial).

**Do these harms and wrongs justify a criminal offence?**

3.224 In cases where D is not a public office holder, no criminal offence of exposing oneself to a conflict of interest currently exists and we see no clear justification for creating one. The remedy for this kind of conduct would appear to be a contractual or disciplinary one, for example dismissal.

3.225 While we accept that the existence of a public office or a public trust is an aggravating factor, we do not consider that the wrong is fundamentally different in nature. Again, we regard the wrong as primarily disciplinary rather than criminal. For a prison officer to enter into a sexual relationship with an inmate is no doubt very reprehensible, but in most cases the solution lies in dismissal. If the disciplinary processes to be applied are considered lacking, then that will be a separate issue and will need to be addressed as such.

3.226 The one exception would be in cases where D has committed some further act of misconduct at the instance of X. That misconduct must be assessed as it arises: for example, there are existing offences of conveying forbidden articles into prisons. These would seem adequate for all or most of the more serious cases we have encountered in our research, though a final answer must depend on our conclusions concerning Category 3, acting in a prejudiced manner or as a result of a conflict of interest.

3.227 One example of this distinction is the case, discussed above, of a police officer who enters into a relationship with a suspect or prospective witness. This behaviour should be avoided because of the risk to the conduct of the investigation or the risk that the witness will falsify or suppress evidence. However, it is sufficient to prosecute such cases once such distortions arise: both the police officer and the witness or suspect may be charged with attempting to pervert the course of justice. There is no clear justification for an offence of placing oneself in a position where perversions of the course of justice may arise in the future.

**CATEGORY 3: PUBLIC OFFICE HOLDERS WHO ACT IN A PREJUDICED OR BIASED MANNER OR UNDER A CONFLICT OF INTEREST**

3.228 The third category of behaviour that we described in the background paper as conduct that can only be prosecuted as misconduct in public office was “public office holders who act in a prejudicial or biased manner or under a conflict of interest.”

**Defining the behaviour**

3.229 We said in Chapter 6 of the background paper that, 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. Judges are the obvious example, as exemplified by the case of *Llewellyn-Jones*, a County Court registrar.
(now called a District Judge) who made court orders with the intention of obtaining a personal financial advantage.\textsuperscript{170}

3.230 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; local councillors; ombudsmen; professional regulators; assessors of state benefits; examiners marking or moderating national examinations; and planning officers. Not all of these individuals will have a duty of impartiality, but all will have a duty not to act under a real or perceived conflict of interest.

3.231 For example, two local authority members from Caerphilly, who were recently cleared of allegations that they improperly awarded themselves pay rises, were under duties to declare apparent conflicts of interest in respect of decisions to be taken within Council meetings. However, as members of the political party with control of the authority, they were not under a general duty of impartiality in the same sense as a judge.\textsuperscript{171}

3.232 The conduct in question is distinct from, though closely related to, that described in Category 2. Two differences arise:

(1) In Category 2 it is sufficient that the public office holder placed himself or herself in a position where a conflict of interest may arise. In Category 3 the public office holder actually makes a decision whilst subject to conflict or bias.

(2) In Category 2 the conflict of interest arises from a relationship between D and another person. Category 3 extends beyond actions influenced by a conflict of interest to actions influenced by bias, which need not arise from the existence of a relationship between D and any other person. It could arise from another source, for example, D's religious belief or experience of particular groups.

3.233 The behaviour can be described in more detail as follows:

(1) First, D may be influenced either by objective facts involving a conflict of interest or by subjective attitudes such as prejudice against particular groups.

(2) In addition, there may be cases where, given the existing conflict of interests, it is wrong for D to act in the matter at all, because of an appearance of conflict or bias, even though D's act or decision is otherwise impeccable. We consider that this last group of cases might involve different considerations in respect of harms and wrongs.

(3) This type of conduct is only criminal if the position held involves a clear duty not to allow the decision making process to be influenced, or appear to be influenced, by bias, prejudice or a conflict of interests.

\textsuperscript{170} Llewellyn-Jones [1968] 1 QB 429, 3 WLR 1298. Llewellyn-Jones released monies held in a trust so that the recipient trustee could lend those monies to Llewellyn-Jones.
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. The cases are quite clear that an official exercising his or her discretion properly will not be prosecuted simply for making an unpopular decision and neither will an official who makes a genuine mistake. Decision makers need to be able to act in good faith and use appropriate discretion without fear of unmerited criminal sanction.

Does that conduct amount to another criminal offence?

Of course, if the misbehaviour amounts to an existing criminal offence then the public office holder may be prosecuted for that other offence. For example, where the conduct involved amounts to bribery, any of these office holders may be liable to prosecution under the Bribery Act 2010.

Additionally there are alternative offences concerning corrupt conduct applicable to specific public office holders. The obvious example is the offence of police corruption under section 26 of the Criminal Justice and Courts Act 2015, as discussed in Chapter 3 of the background paper.

However, we can conceive of situations where the conduct involved is a result of conflict of interest or bias but does not amount to bribery or corruption. A person’s conduct may be influenced by bias or conflict of interest just as easily in cases where no other party deliberately either encourages or rewards it. For example, an immigration officer with a bias against Muslims may refuse visa applications from persons from particular countries. One academic on our advisory board mentioned an example from the USA, where a staff member, and political appointee of the Governor of New Jersey, closed down half the lanes on George Washington Bridge, allegedly by way of retribution for the local mayor failing to support the Governor’s ambitions to be nominated as the Republican candidate for President.

In these cases the wrongdoing is the public office holder’s alone and the only offence available is misconduct in public office. We can also envisage situations where the instances of corrupt conduct (not amounting to bribery) involve types of public office holder other than police. Some of these situations may involve a personal relationship between a public office holder and another individual as discussed in Category 2 above.

173 Sections 1 and 2.
174 We thank Professor Stuart Green for this example, also known as the Fort Lee lane scandal. For more detail see http://www.nytimes.com/interactive/2014/02/04/nyregion/Timeline-George-Washington-Bridge-Scandal.html?_r=0##time302_8369 (last visited 20 July 2016). Arguably in this case the harm did not primarily consist of the fact that the perpetrator was an official, except in the sense that it was only the official position which gave him the opportunity to close the bridge. In England and Wales this conduct would constitute public nuisance.
Harms and wrongs

Harms or risks of harm

3.238 Cases in this category of behaviour fall into two groups:

(1) In some cases, conduct performed or a decision taken under the influence of conflict of interest, bias or prejudice may be wrong in itself; for example, a judge or planning officer makes a wrong decision in favour of a personal friend, or a prison officer conveys unlawful articles to a prisoner with whom he or she has a relationship.

(2) In others, the conduct or decision may be lawful and correct in itself, but the appearance of bias is in itself so undesirable in its consequences (for example in undermining public confidence) that D should not have acted in the matter at all (this case is closely related to Category 2).

3.239 The public harm common to all cases is the impairment of public confidence in the justice system or other branch of public service. In addition, in the first group of cases there are:

(1) the public harm consisting of the fact that objectively wrong decisions are being made and implemented; and

(2) the physical, psychological or economic harm caused to individuals adversely affected by those decisions.

Wrongs

3.240 Again we must distinguish between two groups of cases. In one, the bias, prejudice or conflict of interest leads D into conduct that is wrong in itself, and would be wrong even if no bias, prejudice or conflict of interest were present. In the other, the act or decision may have been correct in itself, but D was wrong to act at all given the appearance of bias.

3.241 In all these cases there is the basic wrong of breach of the duty not to allow the decision making process to be influenced, or appear to be influenced, by bias, prejudice or a conflict of interests. This is a breach of public trust in the stronger sense. Where the act in question is a judicial or administrative decision, there is also breach of a duty of actual or perceived impartiality.

3.242 If D is in a relationship giving rise to a conflict of interest, and makes a wrong decision under the pressure of that conflict, it will be a decision in favour of the other party to the relationship, and possibly against someone with a better right. This falls within the rationale of abuse of position, in that the powers of that position have been exploited for the advantage to D or another or to the detriment of another. It could also be described as a positive form of misgovernment, in those cases where the abuse of position has the purpose of causing detriment to another.

3.243 In addition, in the first group of cases there will be, first, corruption and, secondly, whatever wrong is involved in the particular conduct in question. This may take any form whatever – injustice to individuals, breach of prison discipline, violence,
fraud, oppression. The only common factor is that the bias, prejudice or conflict of interest has motivated D to do “something wrong”.

3.244 In all these respects, the wrongs involved in this form of conduct are very closely related to those in bribery.

**Do these harms and wrongs depend on the fact that D is a public office holder?**

3.245 The harms and wrongs identified do not apply only to public office holders as they are currently defined. Fundamentally, they apply to all cases where D occupies a position where he or she is trusted to act, and be seen to act, in the best interests of another (usually the parties seeking D’s decision or the public) or has a duty to act impartially (again because it is in the public interest to do so).

3.246 Many people who are not considered to be public office holders are, or would be considered to be, under specific duties not to act in a biased or prejudiced manner or under the actual or apparent influence of a conflict of interest. Examples are doctors, solicitors, barristers, trustees and company directors.

3.247 Furthermore, it is not certain that members of the public in fact have more trust in public office holders than in other categories of person. V may have more trust in a doctor or teacher not to act with bias or prejudice, or allow a conflict of interest to occur, or act upon such a conflict, than in a local councillor or a judge.

3.248 While all this is theoretically true, we consider that in practice such cases are far more likely to arise, and have serious consequences, in public and official contexts. It could also be argued that there is a distinct wrong of “official corruption”, going beyond the breach of fiduciary duties in general for which civil remedies will usually be adequate.

**Do these harms and wrongs justify a criminal offence?**

3.249 A number of consultees have raised with us particular concerns regarding this type of conduct. Specifically individual consultees have expressed the view that decision-makers, whose role is to investigate and adjudicate complaints from the public in relation to particular types of professional misconduct, often lack independence from that profession and thereby are influenced into making partial decisions. Mrs Daphne Havercroft\(^{175}\) stated:

> When an employing organisation agrees to investigate a complaint that an employee carrying out a public function has misconducted him/herself the process is often flawed … There is no independence in the commissioning and conduct of the investigation. For example the individuals who are the subject of the complaint may commission the investigation and appoint the investigation panel, despite actual and perceived conflicts of interest … Investigations which are stated to be “independent” rarely are. Instead they are biased and fail to follow proper investigation processes.

\(^{175}\) Member of the public.
3.250 From discussions with the Committee on Standards in Public Life we are also aware of concerns in respect of local authority decision makers who act whilst subject to an actual or apparent conflict of interest.

3.251 There would appear therefore to be a perception amongst at least some members of the public and interested organisations that this type of conduct is prevalent and is currently inadequately dealt with through disciplinary and regulatory processes.

3.252 Nonetheless there have been few misconduct prosecutions of decision-makers for acting under an actual, or perceived, conflicts of interest. One was the case of Speechley,\(^{176}\) where a council leader made a decision as to a new road layout, which benefited him personally. Another was the recent, unsuccessful prosecution of two senior Caerphilly local authority members and a local authority lawyer who were accused of improper behaviour when making a decision as to the remuneration of senior local authority members.\(^{177}\)

3.253 There have been even fewer prosecutions in relation to judicial officers, the last being Llewellyn-Jones.\(^{178}\) As we highlighted in the background paper, this is likely because of the development and greater use during the 20th century of alternative forms of redress, which can rectify an erroneous decision and sanction the decision-maker’s conduct. For example:

1. judicial review proceedings;
2. civil law claims; and/or
3. regulatory and disciplinary sanctions imposed by professional bodies or independent adjudicators.

3.254 We also clearly stated that, in line with the principle of minimal criminalisation, it is clear as the law currently stands that not every instance of misconduct would or should trigger criminal liability. This led us to conclude that in many instances processes other than the criminal law may be adequate to deal with the alleged wrongdoing.

3.255 We are still to be persuaded that this view was incorrect, and consider that it would apply in respect of most types of wrongful decision-making (whether the decisions are wrong in themselves or are correct decisions tainted by the existence of bias or a relevant conflict). The reality is that most such cases are dealt with without recourse to the criminal law. This was acknowledged by one member of the public who responded to the background paper, Mr Joe Sweetinburgh.

I also question why it has to be a criminal offence, which may be disproportionate to curing the immediate harm by way of compensation to the affected parties and dismissal from office. I perceive the central problem are being one of ‘culture’.


\(^{177}\) See para 3.231 above.

\(^{178}\) [1968] 1 QB 429, 3 WLR 1298.
However, we are aware that many of the same consultees as referenced above also expressed anxiety that complaints processes, which could give rise to disciplinary or regulatory action against the decision-maker, are in fact inadequate as a means of holding the decision-maker to account.

My observations and experience and those of many members of the public, including victimised whistleblowers, lead me to conclude that these processes are rarely if ever adequate to deal with alleged wrongdoing because those who have a public duty to follow the processes repeatedly fail to do so, with impunity.\(^\text{179}\)

Additionally, most were concerned that civil or administrative law remedies were beyond the means of most members of the public who might be affected by wrongful decision-making. Mr Barry Faith commented:

There must be a way for members of the public to bring publicly appointed/paid officials to account without having to bear the cost of doing so. The cost of taking someone to court is prohibitive when faced with a publically appointed/paid official who can call on the services of their organisation’s legal adviser for opinion/advice…

These are obviously important points to be considered, however the inadequacies or otherwise of regulatory or civil law sanctions are outside the scope of this particular project. We cannot recommend how access to civil justice can be increased,\(^\text{180}\) or how employers, regulators and independent adjudicators can be made more effective. Nor is it the function of criminal law to compensate for the deficiencies in the availability of civil sanctions.

**Conclusion**

Our law reform proposals should only consider inclusion of this type of misconduct within any new offence, or offences, replacing misconduct in public office if it can be shown that it involves harms and wrongs that justify criminalisation.

In many cases the conduct in this category will constitute a form of bribery. Alternatively, in those cases where D is motivated to perform an act or make a decision which is wrong in itself without external influence, there may be other specific offences, such as perverting the course of justice\(^\text{181}\) or conveying prohibited items into prison.

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\(^\text{179}\) Daphne Havercroft.


\(^\text{181}\) Whilst the offence of perverting the course of justice cannot be committed by way of omission, a public office holder who has the discretion to act or not act in a particular way and makes a decision not to act that either must have been perverse, or it was done for an improper motive, may be found to have both acted in a way that tended to pervert the course of justice and with the requisite intention. *Ward* [1995] Criminal Law Review 398, following *Coxhead* [1986] RTR 411, [1986] Criminal Law Review 251.
3.261 However, the wrongs identified in Category 3, where no alternative offences are available to prosecute, appear to us to be too broad to justify a comprehensive criminal offence, whether applying to public office holders only or to all persons in a position of trust. An offence of this kind would be essentially an attempt to criminalise “corruption” as such. We discussed the possibility of a wide “breach of duty” offence in our consultation paper on corruption, but rejected it in the later report for that very reason.

3.262 Indeed, on a broad interpretation this form of conduct could go well beyond corruption as commonly understood and encompass cases of unconscious bias. Like “breach of trust”, “infringement of liberty” and “dishonesty”, “corruption” is a good rationale for an offence, and could form part of the fault element, but cannot provide a precise definition of the conduct to be targeted.

3.263 There is a case for an offence specifically targeting official corruption. The range of conduct covered would have to be narrower and more tightly defined than simply acting for improper reasons, such as conflict of interest or bias. An example is the existing offence of police corruption, which requires the officer to act with the purpose of obtaining an advantage for himself or another or causing detriment to another. In Chapter 6 we discuss the possibility of an offence on these lines applying to a wider class of public officials.

**CATEGORY 4: NEGLECT OF DUTY**

3.264 The fourth category of behaviour we identified in Chapter 6 of the background paper as one which can only be prosecuted as misconduct in public office is “a public officer who neglects his or her duty in circumstances where serious consequences, or a risk of serious consequences, arise”. The obvious example of this is AG’s Reference concerning a neglect of duty resulting in a person dying in police custody.

**Defining the behaviour**

3.265 There are a number of cases which have been the subject of successful prosecution for misconduct in public office for this type of conduct. In all the reported cases, the defendants have been police officers, PCSOs and prison

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182 Legislating the Criminal Code: Corruption (1997) Law Commission Consultation Paper No 145, paras 5.1 to 5.4. Even in its broadest form, this proposal only related to breach of duty by “agents”.


184 That is, the office holder would have to know that he or she had biased attitudes, but might not know that those attitudes influenced the particular decision.

185 Para 3.98 to 3.99 above.


187 Background paper paras 6.30 to 6.36.


officers. We are aware of an ongoing police investigation into failures by public bodies and clergymen to act to prevent child abuse within the Church of England.

3.266 Although the decided cases have so far concerned a very narrow pool of officers, as observed by Superintendent Ray Marley at the symposium, this may be because it is very easy to identify a “public office” in relation to these positions. Accordingly, it may be that this type of behaviour could extend to any number of different positions that may be found to be in public office.

3.267 In these cases the defendant is under a duty by virtue of his or her position as a public office holder to act in one or more specific ways to prevent a risk of serious consequences occurring. The duties may include, for example, preventing a breach of the peace or other crimes, ensuring medical attention is obtained for a person in need, responding to/investigating calls for help, carrying out proper checks on people detained in custody and maintaining complete accurate records for use by others likewise tasked with safeguarding the welfare of either the public or individuals.

3.268 Those duties are neglected by, for example, failing to intervene in a violent altercation, failing to be available to answer distress calls, failing to request medical assistance for persons in need, failing to carry out proper checks and failing to complete accurate records.

3.269 As a result of the neglect of duty, serious consequences, or a risk of serious consequences, arise. These may include, but are not limited to, death, serious physical or psychiatric harm. Other cases we are aware of have involved risk of harm to public order and safety or the administration of justice.

3.270 In its response to the background paper, the CPS highlighted in particular the fact that there may be an identifiable sub-category of this type of conduct affecting the administration of justice. This is behaviour that tends to pervert the course of justice but cannot be prosecuted as the common law offence of perverting the course of justice because it involves no positive act.191 We also note that the statutory offence of concealing evidence192 would only be available where the person concealing evidence either accepts or agrees to accept some consideration (some benefit) for his actions.

**Negative or positive?**

3.271 An important question arises. Is neglect of duty limited to omissions or can it also encompass positive acts, which by their commission result in a duty not being met?

3.272 The cases in the sample analysed by us (in Appendix D of the background paper193) all concerned omissions only, with two apparent exceptions:

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192 Criminal Law Act 1967, s 5.

In some cases, a police officer, during working hours, engaged in sexual conduct, watched a film or otherwise engaged in private activities, and in doing so failed to take emergency calls or attend crime incidents. However, in each case the substantive complaint was neglect of the duty he or she was supposed to be performing. The nature of the activity engaged in instead, which distracted the officer from that duty, is of secondary, if any, importance (for example, it may amount to an excuse for the failure to perform the duty).

In *Duffy and Passmore*\(^{194}\) (a case that resulted in the death of a disabled man at the hands of his neighbour) one of the defendants was a PCSO. The conduct for which he was convicted of misconduct in public office included both positive acts and omissions:

(a) The positive act: the PCSO completed false patrol reports stating that he had patrolled the area more thoroughly than had in fact been the case.

(b) The omission: he failed to fulfil his duty to properly patrol an area following distress calls from a member of the public who was afraid for his safety. Again, the main complaint was the failure to patrol the area: the subsequent act of covering up this failure is secondary.

Both (a) and (b) could be described as neglecting a duty.

3.273 Conceptually the distinction between acts and omissions is far from watertight. If a person performs a duty in a dangerous way and causes an injury, this could equally be described as performing a dangerous act (an act) and as failing to take proper care in performing a duty (an omission).

3.274 Further, the fact that the cases in our sample all involve omissions rather than acts may be only because this category is a residual one. That is, positive acts are more likely to fall in one of the other four categories, or to constitute another offence. For example, a positive act resulting in injury to an individual will (subject to establishing the required fault element) constitute an offence under section 20 or 47 of the Offences Against the Person Act 1861. Once we have analysed the harms and wrongs in this category, we will have to address afresh the question of whether those harms and wrongs could also arise from positive acts.

**Conclusion**

3.275 We can describe the conduct as follows: D is a public office holder and is under a duty by virtue of his or her position to act in a particular manner to prevent a risk of serious consequences from occurring. By omitting to act in the required manner D fails to fulfil that duty. The duty is thereby neglected and serious consequences or a risk of serious consequences arise.

Does that conduct amount to another criminal offence?

3.276 There will be some cases where this conduct amounts to an offence other than misconduct in public office. For example, when the neglect results in the death of V it is possible that D is guilty of manslaughter, on the basis of gross negligence or recklessness. Similarly, there could be cases where D’s conduct causes serious injuries and amounts to the offence under section 20 of the Offences Against the Person Act 1861.

3.277 This will not however cover all cases in which neglect of duty gives rise to these serious consequences. A police officer might fail to attend a crime incident, with the result that a member of the public is killed or seriously injured. That does not in itself make the officer guilty of manslaughter or the section 20 offence, as it is unlikely that the fault element of either offence is satisfied.

3.278 Furthermore, it is not necessary for misconduct in public office that the serious consequences actually occur: it is sufficient that a risk of them arises. The law of England and Wales does not contain any general offence of causing danger to life or danger of serious injury. There do exist, however, particular offences of causing such risks by poisons and explosives and in connection with railways and offences concerning health and safety in particular contexts such as places of work.

Harms and wrongs

3.279 In the cases in our sample there is always either harm to individuals or the risk of such harm. The harm caused or risked is usually death or serious injury; however there is no reason in principle showing that harms of other kinds, such as damage to property, are not included in the existing offence. There may, however, be good reasons of policy for not imposing criminal liability, as discussed further in Chapter 5.

3.280 In the existing offence, this harm is relevant in two ways. First, the duty breached in a particular case may consist of a duty to take care concerned with the prevention of harms to particular individuals, such as persons in custody. The occurrence of such harms may therefore be evidence that this duty has been breached. Secondly, the occurrence or known risk of such harms may give rise to wider public harms, including impairment of confidence in the public service, and show that the misconduct in question reaches the “seriousness threshold”.

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196 For a full discussion, see Reform of Offences against the Person (2015) Law Com No 361, ch 7.

**Wrongs**

3.281 We can discern, from the cases prosecuted, the following wrongs involved in this type of behaviour:

(1) It is an intentional, or wilful, failure by D to fulfil the duties of a position he or she has voluntarily accepted and where the public has a legitimate expectation that such duties will be properly performed.

(2) D is aware that there is a risk of serious consequences arising by neglecting the duty but nevertheless does so.

3.282 This does not necessarily amount to a breach of public trust in the stronger sense.\(^19\)\(^8\) The breach of the officer’s duty to the public is more akin to negligence than to disloyalty. Nor is there a wrong of abuse of position: the police officers in *Dytham*\(^19\)\(^9\) and *AG’s Reference*\(^20\) were not acting with the purpose of gaining to an advantage for themselves or causing detriment to another, except in the sense that it is a “benefit” to save oneself the trouble of intervening.\(^20\)\(^1\)

3.283 In such cases there is almost certainly a breach of the trust of the individual affected, because that individual was in a vulnerable position and the officer was responsible for that individual’s safety. It is also true that any member of the public could find himself or herself in that position and thus experience a breach of his or her trust. However, these potential breaches of individual trust do not add up to a breach of the trust of the public; just as harm to the public interest requires more than the sum of potential harms to the individuals principally affected.\(^20\)\(^2\)

3.284 Nor is the conduct in question an instance of the wrong of misgovernment, in the sense of abuse of power or oppressive or extortionate behaviour, as there need be no intention to cause harm to the individuals in question. Rather, it is a negative form of misgovernment: failure to use governmental powers when required. In the language of our earlier discussion, this is one form of breach of the trust of the public, in the weaker sense of “trust”.

**Do these harms and wrongs arise in the case of acts as well as omissions?**

3.285 So far, we have described the conduct in question as “neglect of duty”. The question is whether this should be broadened to “breach of duty”, subject to the requirement of risk of harm.\(^20\)\(^3\)

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\(^{19}\) Para 3.88 above.


\(^{20\)\(^1\)} Para 3.49 above.


\(^{20\)\(^3\)} The concept of breach of duty, as we use it, is wider than the concept of neglect of duty because the former concerns both acts and omissions whilst the latter only concerns omissions.
As argued above, the reason that the cases we have discovered in this category involve omissions rather than acts is that acts are more likely to fall within other offences, or the other categories discussed in this chapter. There is nothing in the harms and wrongs listed above that in principle arises only in the case of omissions and not in the case of acts. It would be illogical to criminalise a case in which D allowed harm to occur by omission but to exempt a case in which D caused the same harm by his or her own act, where that act is equally a breach of the duties of D's position.

Do these harms and wrongs depend on the fact that D is a public office holder?

The harms identified do not arise only because of the fact that D is a public office holder as currently defined. Many people who are not considered to be public office holders under the current law are under duties to the public that if neglected could result in serious consequences to individuals; for example, a doctor or a lawyer.

By contrast, the identified wrongs do depend on D occupying some sort of position of public trust or at least public duty. Removing this requirement would be to expand the offence to a general offence of endangerment.

In our report on offences against the person we argued that it was undesirable to create a general offence of causing danger of death or serious injury, as this would intrude into people's private lives to an unacceptable degree and create what was often a victimless offence. We conceded that endangerment offences could be justified where:

1. D voluntarily engaged in exceptionally hazardous activities, such as handling explosives;

2. V was exceptionally vulnerable (as in the offence of exposing children to danger);

3. D's conduct caused risk to a substantial section of the public (as in the offence of public nuisance).

As stated above, the identified cases in this category all involve the risk of either (a) harm to the public interest and/or (b) breach of a public duty concerned with the prevention of harm to individuals. There are, of course, exceptional cases in other areas of the criminal law, where offences exist although the only duty involved is one owed to the person affected. For example, a parent's duty to his or her child, the breach of which could lead to an offence of child neglect. This example may also suggest that the wrong inherent in neglecting a duty is not limited to public office holders as presently defined.

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205 Offences Against the Person Act 1861, s 27.
207 Children and Young Persons Act 1933, s 1.
In general, however, we believe that a public harm or the risk of it, including a breach of public duty resulting in harm to an individual or the risk of it, should be required for this behaviour to be criminal. In the absence of exceptional factors, where the only duty breached is one owed to an individual civil remedies should be sufficient.

**Conclusion**

From the harms and wrongs identified we can describe the primary mischief that this category of behaviour involves as follows: by virtue of D’s position, D is under a particular duty to the public, which if not fulfilled could give rise to a risk of serious consequences occurring. D is aware of this duty but nevertheless neglects to fulfil that duty.

**Do these harms and wrongs justify a criminal offence?**

We have argued that:

1. the harms and wrongs in question can arise from either an act or an omission;
2. they exist when the act or omission constitutes a breach of the duties of D’s position; and
3. the act or omission must cause, or risk causing, either harm to the public interest or harm to V; in the latter case, the act or omission must constitute breach of a public duty requiring D to take care to avoid harm to persons in V’s position.

An offence on these lines would be virtually indistinguishable from the existing offence of misconduct in public office, except that the type of position that D must occupy might be differently defined. As argued in the general part of this chapter, to do otherwise may be unacceptably wide: the requirements of harmfulness and wrongfulness would be satisfied, but both the type of harm and the type of wrong is likely to be too general to be useful in drafting an offence.

The type of wrong could be made more definite by a clearer list of the types of position that D must occupy: this list could be based either on something like the existing concept of public office (we discuss this possibility in Chapter 4) or on some more narrowly defined group of positions (discussed in Chapter 5). The wrong would then consist of breach of particular duties of one of those positions; though again there may need to be clarification of what kind of duty, as “duties of a position” may be interpreted in different ways.

Similarly the types of harm could be limited. The cases identified in our sample typically involve one or more of the following:

1. danger to life;
2. risk of serious injury;
3. danger to public order; and/or
4. potential harm to the administration of justice.

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This list could be justified as including the most serious harms that are likely to occur. Other possible harms include damage to property and financial loss to the public purse. We discuss the question of what harms to include in more detail in Chapter 5 below.

**CATEGORY 5: MISUSE OF INFORMATION**

3.297 The fifth category of behaviour we identified in Chapter 6 of the background paper as one which can only be prosecuted as misconduct in public office concerned “public office holders who fail properly to protect information that comes into their possession by virtue of their positions”.

3.298 One particular example of such behaviour concerns police officers and others who use their privileged access to databases to identify potential sexual partners. In the background paper we treated this as a subspecies of Category 1. There are in fact two different types of wrong involved. So far as the wrong concerns misuse of confidential information, these cases belong in Category 5. Where it also concerns sexual exploitation of someone in a vulnerable position, the cases also belong in Category 1. In such cases the fact that the people were found by using a police database is not relevant to the main wrong of sexual exploitation.

3.299 We are not aware of any decided cases of misconduct in public office which specifically concerned this type of behaviour and could not have been prosecuted using any other offence. There have been numerous successful prosecutions relating to police staff accessing the Police National Computer (PNC) for unauthorised purposes, however, all of these could have been prosecuted as Computer Misuse Act 1990 offences and/or Data Protection Act 1998 offences. Notably, where the misuse of information leads to consensual sexual activity, then misconduct in public office is used to mark the totality of the behaviour, the latter aspect not being available to be prosecuted under any other offence.

3.300 Additionally there are various other reasons that misconduct in public office may be the preferred charge, even though another offence is available, whether or not the case involved a sexual relationship. They include the fact that most alternative offences carry much lower sentencing powers (for example, the Data Protection Act offence is only punishable by way of a fine) and that some may give a defendant the opportunity to argue a defence that is not available on a charge of misconduct in public office (the Data Protection Act contains a specific public interest defence, unlike misconduct in public office).

3.301 Since publishing the background paper we have commenced a separate law reform project in respect of protection of official Government data. That project will examine the effectiveness of the laws governing the protection of official data, and research options for improving the protection of official information. The aim of the project is to provide an effective and coherent legal response to unauthorised disclosures and those who illegitimately obtain or attempt to obtain official information.

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208 See the background paper, paras 6.37 to 6.47.
3.302 Although that project does not review every current criminal offence relating to misuse of official information, it has given us the opportunity to research in more detail the range of alternative offences available for this category of conduct. There are over 130 of these criminalising the unauthorised access, use and disclosure of various categories of information. Some of these offences have been recently reformed and amended, such as the computer misuse regime, amended by part 2 of the Serious Crime Act 2015 (sections 41 to 44). Examples of behaviour within this category which cannot be prosecuted under any other offence will therefore be at least extremely rare.

3.303 We therefore do not propose to consider any further Category 5 scenarios as part of the review of misconduct in public office and we would refer consultees to our consultation on breaches of protected Government data, which is due to be published in September.210

GENERAL CONCLUSIONS ON HARMS AND WRONGS

3.304 On analysing the five categories of behaviour described in Chapter 6 of the background paper, we came to the following conclusions.

(1) The harms and wrongs in Categories 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) and 3 (Public office holders who deliberately act in a prejudicial or biased manner or under a conflict of interest) do not depend on D being in public office though some of them depend on D being in a position of trust or having a duty to act impartially or in the best interests of another.

(2) The harms and wrongs in these separate categories do not justify separate offences, though those in Category 1 may indicate the need for revision of the Sexual Offences Act 2003 to include offences of obtaining sex by threats, deception or abuse of position.

(3) There is a case for an offence specifically targeting official corruption. The range of conduct covered would have to be narrower and more tightly defined than simply acting for improper reasons, such as conflict of interest or bias. This would primarily include cases falling within Category 3, but may also include particular cases falling within Category 1.

(4) At the very least, Category 4 (neglect of duty by public office holders which results in serious consequences, or a risk of serious consequences arising) suggests the need for an offence of breach of duty leading to or risking harm to the public interest, or to individuals where this breaches a public trust. However, this should be confined to the duties of clearly identified positions, and clearly identified types of harm, to be discussed in Chapters 4 and 5. Where a risk of serious injury results from sexual conduct that breaches a public trust then those instances of Category 1 behaviour could be caught by such an offence.

(5) There is unlikely to be need for an offence to cover the conduct in Category 5 (public office holders who misuse, disclose or fail properly to protect information that comes into their possession by virtue of their positions) as this is adequately addressed by existing offences and we would refer consultees to our consultation on breaches of protected Government data, which is due to be published following this paper, also in autumn 2016.

**Cases where the harms and wrongs are covered by other offences**

3.305 Chapter 6 of the background paper also lists other additional categories of case, where misconduct in public office is often charged although other offences are available. These too are derived from the sample of cases analysed in Appendix D to that paper. These categories are:

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.

3.306 In these cases there is no absolute need for an offence equivalent to misconduct in public office, as other offences are available and usually carry adequate powers of punishment. However, there is an argument that, even when another offence is available, an offence specifically reflecting the fact of abuse of a position as a public office holder is desirable in labelling terms, to reflect the full wrongfulness and gravity of the conduct in question. We discuss this argument in detail in Chapter 7 below.

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212 Background paper para 6.51.
CHAPTER 4
LAW REFORM OPTIONS: PUBLIC OFFICE

INTRODUCTION

4.1 As the length and complexity of the arguments in the previous chapters demonstrate, constructing law reform options to deal with the mischief to be addressed by the current offence of misconduct in public office is not an easy task. The difficulties experienced in constructing law reform options are not dissimilar to those faced in our work in our bribery consultation paper, as summarised by Professor Peter Alldridge in his response to that paper.¹

4.2 First there are key areas where there is no consensus as to what the law should be, specifically: what types of “misconduct” should be criminalised and to which individuals any offence criminalising such conduct should apply.

4.3 Secondly, “a law that sets out to inform people, in advance, what they are and are not allowed to do is far more difficult to formulate than one that is designed to adjudicate after the fact whether or not conduct that has already occurred was criminal”.² In respect of the latter Professor Alldridge says that “all that is necessary is a gateway … and a general flexible criterion by reference to which the outstanding questions can be resolved, the former requires far more precision”.³

4.4 A particular criticism that has been levelled at misconduct in public office is that its lack of clarity renders it hard to predict whether a person could be liable for prosecution. Any new offence will need to be defined with a great deal more precision.

4.5 However, whilst Professor Alldridge was of the opinion that, in relation to bribery, a lack of certainty in the pre-existing law “does not seem to have mattered much”, the same cannot be said for misconduct in public office. Our first period of consultation has reinforced our view that there are significant problems with the operation and understanding of the current law and we are acutely aware that (as with bribery) “in spite of the small number of prosecutions and convictions involved … law reform has great political significance”.⁴

4.6 This chapter begins by summarising our reform proposals for the offence of misconduct in public office. We consider these proposals to be the most appropriate way of meeting the problems faced by the current law. The chapter then explains why we consider that the concept of public office will need to


³ Professor Alldridge explains this with reference to the previous law on bribery under the Prevention of Corruption Acts 1889-1916: the principal-agent relationship and the advantage was the “gateway” and the flexible criterion used was “corruptly”. See p 672.

underlie any new offence we propose to replace misconduct in public office, before considering in detail how that concept could be defined.

REFORM OF MISCONDUCT IN PUBLIC OFFICE

4.7 There are three reform proposals set out in the following chapters. Each of the first two involves the creation of a new offence to replace misconduct in public office.

(1) Option 1, addressed in Chapter 5 – addressing public office holders who:

(a) by virtue of their position owe a duty concerned with the prevention of particular forms of harm;

(b) are in breach of that duty; and

(c) in doing so cause or risk causing serious consequences.

(2) Option 2, addressed in Chapter 6 - addressing public office holders who:

(a) abuse power or authority, obtained by virtue of their position;

(b) in order to obtain a personal advantage or cause detriment.

As each of these proposed offences addresses different wrongs and harms, consultees may prefer one or the other or, alternatively, see potential for them to work in conjunction with each other.

(3) Option 3, discussed in Chapter 7, involves the abolition of the offence without replacement, and we reserve discussion of that until after examining the two options that involve replacing the common law offence.

4.8 Irrespective of which of these three options is preferred, there may be a need for complementary legal reforms to address two other issues that might arise if the offence of misconduct in public office is abolished in its present form, namely:

(1) review of the current sexual offences regime to include additional offences involving the exploitation of vulnerable individuals; and/or

(2) making provision for the courts to treat public office as an aggravating factor for the purposes of sentencing in other offences.

We discuss these complementary reforms in Chapter 8.

4.9 Inevitably, as our conclusions in Chapter 3 demonstrate, the harms and wrongs that could underpin any replacement offence are both too remote and too uncertain to form definitional elements of any particular offence. We argue in that chapter that breach of public trust causing public harm may be an important rationale for a new offence addressing this conduct. However, it is likely to be too broad a concept to be a defining element in any statute.

4.10 We would not be prepared to propose an offence unless its boundaries and elements were clear. As explained in Chapter 2, we are determined that the
current law should not be replaced by any offence that would be as uncertain as the present offence of misconduct in public office. Indeed, any new offence will need to be a great deal clearer and more precise.

4.11 There was a consensus amongst consultees who responded to the background paper,5 our symposium delegates and a number of academics, judges and practitioners, with whom we have had consultation meetings,6 as to the need for clarity in this area of law.

4.12 We concluded in Chapter 3 that, at the very least, any new offence should contain more precise definitions of:

1. the categories of people who can commit the offence (for example, the meaning of “public office”); and
2. the harm or risk of harm, if any, required for the offence to be made out.

4.13 It is also apparent from the arguments in Chapter 3 that the concept of “public office” will need to underlie, at least at a basic level, any new offence we propose under Options 1 and 2. There are three reasons for this:

1. Although all of the harms we identified in Chapter 3 and the wrong of breach of public trust – including abuse of position – cannot be limited to conduct that is performed by public office holders, the wrong of misgovernment is limited to individuals who perform state functions. Different forms of this latter wrong overlap with the former.

2. Public office is a good indicator both that D is in a position of public trust and that a risk of public harm is likely to exist if D engages in wrongdoing. In addition, the fact that someone is a public office holder may serve to aggravate the harms and wrongs identified as arising from breaches of public trust.

3. For reasons of legal certainty, it may be necessary to define with precision a category of potential offenders, even though the underlying rationale of the offence may also apply in some cases outside that category.

4.14 That is not to say that either of our new proposed offences need apply to all public office holders as currently defined, because:

1. The existing definition of public office is lacking in precision. We therefore need to devise a clearer and more predictable definition.

2. The proposed offences need not apply to all people in public office, even within the new definition. In Option 1, for example, we propose that the offence can only be committed by public office holders with powers of coercion or the duty of protecting vulnerable people.


6 See ch 1 above for details of the meeting attendees.
4.15 Consequently, in this and the following chapters we describe the elements of our proposed new offences, alongside the relevant fault requirements, in the following order:

(1) The definition of “public office”: a necessary element of both of them.

(2) Option 1 in terms of its other proposed elements (Chapter 5).

(3) Option 2 in terms of its other proposed elements (Chapter 6).

PUBLIC OFFICE

4.16 We described in Chapter 3 how officials exercising public functions are often considered to be in a special position compared with individuals only exercising private ones. However, in legal terms it is difficult to explain exactly why this is the case. Our discussion focussed on the notion that a public office is a position of public trust but pointed out that positions of public trust are not limited to public office holders. We drew an analogy with the civil law concept of fiduciaries, but explained that this could not provide a complete answer. Primarily this was because both “public trust” and “fiduciary”, as concepts, lack clear boundaries.

4.17 The rationale of public office is not therefore entirely accounted for by notions of trust (specifically public trust), in either the general or technical, legal sense. It requires a further link with governmental or state functions.

4.18 We also indicated that, whilst a body like the Committee on Standards in Public Life would like to see all providers of public services classified as public office holders, it is questionable whether this category of person can be sufficiently well defined to ensure legal certainty. There may be reasons for distinguishing those who exercise state functions from the more general category of those whose public service role “impacts on national, public life”.

4.19 As explained in the background paper, the concept of public office is notoriously difficult to define.\footnote{A number of previous law reform projects examining misconduct in public office have either failed or been abandoned because of this hurdle. All of the previous attempts at law reform, carried out in England and Wales, are described in Appendix C to the background paper available at \url{http://www.lawcom.gov.uk/wp-content/uploads/2016/01/apc_echr.pdf}.} We consider that there are a number of ways in which it could be attempted for the purposes of a new offence. We set out below those methods of definition that we consider to be the most feasible, based on responses to the background paper and other contributions received during the consultation period. Thereafter we explain how these methods could be used as the basis for drafting a statutory provision applying any new offence to “public office holders”.

4.20 We do not propose here to go as far as producing draft legislation for consultation but ask consultees to indicate which method of definition they prefer, both in terms of content and in terms of level of generality.

Options for defining public office

4.21 Despite the increased discussion of an ongoing erosion of the public-private divide there remain a number of legal provisions, across many areas, which use
the idea of a function or service being of a “public” nature to justify its different legal treatment.

4.22 Unsurprisingly, a number of consultees have suggested to us the possibility of using concepts similar to public office which are already used in other areas of law, for example public law, to help define who is a public office holder for the purposes of a new offence.

4.23 We will discuss below four possible tests for defining public office. Some of these were discussed in the background paper when analysing the current law, whilst others are based on other tests used in different legal areas or provisions. Public office could be defined by way of:

(1) status or in institutional terms;
(2) identification of a determinative duty;
(3) performance or exercise of a public function; or
(4) performing a public function whilst under a duty to act in a certain way.

4.24 Once we decide which of the four approaches gives the most suitable pool of public office holders, we will then have to decide on a statutory drafting technique, for example:

(1) devising a single statutory test for who is in public office;
(2) setting out a list of factors to be taken into account in deciding who is in public office; or
(3) a list of positions qualifying as public office.

**Different tests for public office**

**STATUS**

4.25 In the background paper we began our analysis of the current law of misconduct in public office with the question of whether public office is presently defined in terms of “status” or by “function”. We took as a starting point the types of position that had been held by the courts to be a public office. We then proceeded to analyse the case law in more detail to establish whether any particular factors, which would endow a position with a particular type of “status”, could determine the existence of a public office. We reached the conclusion that an office holder’s status no longer plays a significant part in determining the question of public office (if indeed it ever did).

4.26 However, consultation discussions with those involved in misconduct prosecutions revealed that arguments were still advanced (in response to our consultation and in trials for the offence) on the basis 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 was the recent prosecution of the former Bishop of

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8 Background paper, para 2.11.
Gloucester. Our final conclusion was that the status of the office may be relevant to the question of who is in public office, but will not be determinative of that fact.

4.27 On one hand adopting a status based or institutional approach would be the most straightforward way of defining public office. Whether an individual was a public office holder would depend on whether his or her position was one that had an institutional or employment link to the one or more of the arms of the state. On the other hand the approach also has significant disadvantages. It can give rise to some clearly arbitrary results, as was demonstrated in Ball. Following the reasoning of the court that Bishops of the Church of England are in public office because of the unique position of the Church in relation to the state, no minister of any other faith (regardless of seniority), including the Church in Wales, could have been prosecuted for misconduct in public office for the same activities as Ball.

4.28 The position of trust occupied by a senior official within the Anglican Church was elevated by this decision above that of a variety of other professionals such as paramedics, nurses, doctors, teachers and lawyers.

4.29 During our consultation process Dr Alexander Williams summarised the arguments against this approach to public office concisely:

> While relatively workable, the institutional approach can be criticised as being both over- and under-inclusive. It is over-inclusive because it takes all functions performed by core organs of state to be public, notwithstanding that from time to time they will perform functions that are not realistically describable as such. The Home Office, police constabularies and local authorities are all undoubtedly core organs of state, but functions such as cleaning offices or disposing of land are more comfortably described as private. The institutional approach is also under-inclusive because it overlooks that public functions may be performed by private organisations as well as public ones. One example is the exercise by a private psychiatric hospital of statutory powers to detain and treat inpatients against their will, under the Mental Health Act 1983.

4.30 Although defining the concept of public office by way of status or institution may be superficially attractive, in reality it would result in distinctions being drawn between individuals in similar yet different positions that would be unworkable in modern life. In our view adopting such a test would render the offence worse than the current position.

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9 Ball (8 September 2015) CCC (unreported).
10 Ball (8 September 2015) CCC (unreported) See the background paper, paras 2.53 to 2.58.
12 These issues were certainly ones that the Court of Appeal was alive to when it reached its decisions on the boundaries of public office in the cases of Cosford [2013] EWCA Crim 466, [2014] QB 81 and Mitchell [2014] EWCA Crim 318, [2014] 2 Cr App R 2.
DETERMINATIVE DUTIES

4.31 The alternative approach to a status-based public office test is a function-based test. We outlined in the background paper how this has been developed in the current law. However, there remain significant problems with the present formulation of public office. Specifically it rests on a core concept that has no firm definition: duties that the public have a “significant interest” in seeing performed.

4.32 The current formulation of public office requires not only that the public office holder is 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 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 in every case.

4.33 Unfortunately there is no definitive answer to the question of when the public has a significant interest in the performance of the individual’s duty. In Mitchell, this potential uncertainty led counsel for the appellant to argue under article 7 of the European Convention on Human Rights (“the ECHR”) that the definition of public office was so unpredictable that it potentially violated principles of legal certainty and the prohibition on retrospective laws. Following Mitchell the courts will examine whether the public have a significant interest by assessing whether the public has an interest in the individual’s duty over and above the interest of any person affected by a breach of that duty. However, this does not provide any greater clarification of the issue.

4.34 Clearly, almost all individual “duties associated with state functions” will involve some public interest. This is particularly so where the person performing that duty is remunerated out of the public revenue or where any costs arising from a breach of that duty will be met from public funds. What can and cannot constitute a duty of significant public interest therefore, is inevitably vague.

Conclusion

4.35 The key aspect of the current definition of public office is fundamentally flawed. For the purposes of the criminal law, which requires maximum legal certainty and predictability, we cannot envisage any feasible way of clarifying exactly what amounts to a duty that the public has a “significant interest” in seeing performed, without the definition of public office being framed so widely as to be unprincipled.

PERFORMANCE OR EXERCISE OF A PUBLIC FUNCTION

4.36 As explained in the background paper and above, it is common for other areas of law to use concepts such as “public authority” to define which individuals and

14 See ch 2 above and the background paper, paras 2.59 to 2.104.
16 For further discussion see Appendix C to the background paper available at http://www.lawcom.gov.uk/wp-content/uploads/2016/01/apc_echr.pdf.
18 Paras 4.22 and 4.23 above.
bodies are subject to legal liability in circumstances where others would not be. For example:

1. Human Rights jurisprudence uses the term “public authority”, defined by reference to bodies which exercise public functions. The phrase is used in the Human Rights Act 1998 to define who must act in conformity with the ECHR.\(^{19}\)

2. The European Union (“EU”) law refers to an exercise of state, or public, power to identify “emanations of the state” (bodies that exercise special powers conferred on them by the state).

3. The notion of a “public function”, is also used by the administrative courts to define those who can be subject to Judicial Review proceedings.\(^{20}\)

4.37 We concluded the explanation in the background paper by noting that these concepts could not provide an answer to the question of public office in the current law.

4.38 The concepts used above are purposely broad and flexible in nature, allowing the courts a wide discretion in how to apply the law. None of the respective bodies of case law in these areas has yet elucidated a definitive test as to what, respectively, is a “public authority”, an “emanation of the state” or a “public function”.\(^{21}\) Arguably, all three concepts are wider in application\(^{22}\) than the current offence of misconduct in public office.

4.39 Whilst a particular degree of definitional flexibility may be both desirable and sustainable within the realm of public law, the criminal law requires a greater degree of certainty. This is because the criminal law punishes individual wrongdoing through sanctions, up to and including imprisonment, and marks the individual’s actions with the highest level of public censure available. The concepts above, as developed for the purposes of human rights legislation, judicial review and EU law, also serve a different objective to that served by the notion of public office for the purposes of the criminal offence.

\(^{19}\) Human Rights Act 1998, s 6(3), see the background paper, para 2.91.

\(^{20}\) Background paper, para 2.95 and following.

\(^{21}\) In one of the leading cases under the Human Rights Act 1998, Aston Cantlow Parochial Church Council v Wallbank [2003] UKHL 37, [2004] 1 AC 546 at [11], 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. In respect of Judicial Review, in R v Panel on Takeovers and Mergers, Ex parte Datafin Plc [1987] 1 QB 815, at [838]. 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”.

\(^{22}\) To take an example, Hampshire Farmers Market Ltd has been held to be amenable to judicial review and to be a public authority under the Human Rights Act 1998. 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. Another example is the ruling of the Court of Appeal that a school governing body was an emanation of the state in National Union of Teachers v Governing Body of St Mary’s Church of England junior school The Times 16 Dec 1996, [1996] EWCA Civ 1194.
4.40 That said, we also concluded in the background paper that, if an individual was considered to be exercising either a state power or a public function, then that may be a relevant factor to reaching an answer. If a public law style test based on either one, or a combination of, these notions could be refined so as to define a public office holder more closely for the purposes of a proposed new offence, then it could be a preferable option to the current law.

4.41 We discuss below the concepts of both a public function and state or public power and whether we could base a new offence replacing misconduct in public office on them.

Public functions

4.42 Following the arguments in Chapter 3, everyone who either performs public functions and/or provides services to the public could be considered to be in a position of public trust. However, as also discussed in Chapter 3, a new offence that applied to everyone holding a position, which carried with it a responsibility of providing services to the public or some section of it, would be far too wide for our purposes and extremely difficult to define.

4.43 There may however be an important distinction to be made between those who perform public functions, including the provision of public services, and those who only provide services to the public. In broad terms, the role of the state is to govern. The performance of public functions is the means by which that governance is achieved. This concept may provide an effective means of delimiting the scope of a criminal offence that applies only to public office holders. On this analysis, whether or not an organisation or body is of a “public” nature is determined by what they do, and how they do it, rather than whether they are publicly or privately created or constituted (rejecting the traditional concepts of the “public” and “private” sectors).

4.44 To explain further, the distinction between public functions and the provision of services to the public reflects two different roles of the state:

(1) The first role concerns the regulation of society. This might be identified as the minimal function of the state. Regulation can be generally applicable to all citizens, such as criminal offences, or applicable to specific sections of the citizenship, as with county specific by-laws or administrative law requirements applicable to the providers of particular services.

The regulatory role of the public sector goes beyond the setting of regulation, however, and requires more active participation. The purpose of most regulations is to achieve particular goals, considered to be beneficial to society as a whole. One such goal would be to enable citizens to live their lives with the maximum possible freedom from interference from others, which arises from a desire (in the UK) to govern in line with liberal social values. For example, criminal offences prohibiting D from assaulting V, damaging V’s property or stealing V’s belongings, seek to enable V to live free from D’s interference, but the achievement of that goal would also require further action to be taken, such as the creation and use of a police force to investigate allegations of criminality.
(2) The second role concerns the direct provision of goods and services to the public. As a result of performing its regulatory function, or for some other reason, the public sector may find itself providing goods and services directly to the public, such as lawyers to prosecute or defend criminal cases. This role is, by nature, the most variable. The number and type of goods and services that the state will provide directly to the public at any one time will depend on political, economic and social policies adopted at any given time.

4.45 It is in the second role that the boundary between the public and private sectors blurs most markedly. As we explained in the background paper, many services that were previously provided to the public on a communal basis, and paid for through taxation and other public revenues, are now provided by commercial organisations and financed by way of private funds. Conversely a number of previously private services are now run by public bodies. The example we gave was the network of rail tracks and stations operated by Network Rail, which was at first a nationalised service before being privatised and then re-constituted as a government body.

4.46 There are a number of factors that could mandate state provision (either directly or indirectly through the use of a third party) of a particular good or service as opposed to purely private provision via the free market.

4.47 Peter Jones argues that within the totality of goods and services provided to the public a core of “public” goods (and services) exist. These might be described as those goods and services that the state is required to provide to satisfy its function of regulating society, such as services involving the administration of justice. Jones also suggests that they could be described as goods and services that are “inherently better” if they are provided in a communal way and paid for with public funds. For example, it may be that there is an intrinsic need for goods and services to be provided on a monopoly basis because they need to be paid for and administered by an independent body that is less likely to be corrupted. As impartiality is a fundamental part of certain decision-making roles, it is desirable that decision-makers with a duty of impartiality should be appointed and paid a salary by an impartial body. For such decision makers to be appointed or remunerated by a private body may give rise to the temptation, or the perceived temptation to act in a partisan fashion.

4.48 Goods and services that are, but need not necessarily be, provided by the state may still be provided to the public or any part of it. These would not however be “public” goods and services in the true sense. The state may choose to provide such goods, because it is either politically or economically expedient to do so, but will not be satisfying a public function when doing so. An example would be the British steel and car industries in the mid-20th century, which were primarily nationalised in line with socialist values requiring national control of production.

4.49 We consider that an important distinction can be made between those who perform public functions, including the provision of “public” services, and those who only provide services to the public:

(1) Someone who is in a position in which they perform a public function is performing that function on behalf of the state to fulfil its regulatory role.

(2) Someone who is providing “public” services will, by virtue of providing those services, also be performing a public function as those services are ones that require state provision (either directly or indirectly through the use of a third party).

(3) However, someone providing services to the public, which do not require state provision, would not necessarily perform such a function.

4.50 To explain this more clearly, while the performance of a public function can be seen as a function of government, those providers of services to the public who do not also exercise a public function are not involved in governance in any meaningful sense. For example, local authorities provide services to the public as well as exercising public or governmental functions, but a refuse collector only provides that service. Another way to put this is that, while “regulation” of a service provided to the public is a function of a governmental nature, the provision of that service, in itself, is not. Therefore we could create an offence that would only apply to performers of public functions but not public service providers. This offence would be of much narrower application than the current law.

4.51 This distinction could have the following practical effects:

(1) A Government minister or civil servant exercising public functions, for example, those relating to procurement of government contacts, would be caught by the offence as they would be performing a public function.

(2) A public body or private organisation or individual performing public services, for example military or policing services, would likewise be performing a public function and caught by the offence.

(3) A teacher or nurse providing services to the public (whether in a state or a private institution) would be doing so without any public function actually being performed, and would not be caught by the offence. In contrast a body performing a public function by way of either orchestrating (an education authority or NHS trust) or regulating the provision of those services (Ofsted or the General Medical Council) could be caught.

4.52 In legal terms, although challenging, it is possible to define public functions in a principled way. In his dissent in *YL v Birmingham City Council*, Lord Bingham identified a number of factors which he considered were relevant in determining whether a body is exercising functions of a 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.25

4.53 In our view, considering what we discussed in the background paper about the performance of state, or public, functions determining public office, a distinction between public functions and services provided to the public is one that could reasonably be made for the purposes of a new offence. The notion of a conceptual distinction between a public function and services provided to the public is not novel. It has already been made in other areas of law and other legislation. Where such a distinction is made, the people or bodies that exercise public functions are subject to more onerous obligations and greater accountability than providers of services to the public (even if those services are funded by government).

4.54 For example, the Equality Act 2010 recognises that public functions and the provision of services to the public are distinct but overlapping concepts. Section 149 of the Act places a specific “equality duty” on individuals and organisations who exercise public functions, different to those imposed under sections 20 to 29 (relating to reasonable adjustments), which apply to both public functionaries and providers of services to the public.

4.55 Public functions are performed primarily for the benefit of the public at large and, unlike private functions, or the provision of services to the public with no connection to a public function, need a positive justification for their existence. At the very least certain functions require justification because otherwise they would involve infringement of the rights of others. That justification is the fact that the state has legally empowered someone to perform them. It is therefore the fact that a function is necessarily being performed under a power granted by the state (a public power) that makes the function itself “public”.

Public power

4.56 For a number of consultees the concept of public officer holders holding, and having the potential to abuse or misuse, some sort of public power, by virtue of their position, is at the heart of the offence. At our symposium Dominic Grieve QC MP stated that the offence is important because “the nature of the state’s power – coercive powers, taxes, powers of arrest and entry – is entirely different from anything else”. The exercise of a public function, as being regulatory in nature, will involve the use of a public power.

4.57 A public power in this context can be described as a power conferred on D by the state. There may be various possible ways of encapsulating that notion. One – borrowed from the European Union case law on the concept of an “emanation of the state” – is to describe the power in question as a special power going beyond those which arise out of the ordinary rules applicable to relations between individuals.\textsuperscript{26}

4.58 Defining with more specificity what public power means will depend on one’s particular political/philosophical ideology. The problem this presents is, in part, solved by the fact that the United Kingdom’s system of government already reflects a particular ideology (or set of ideologies) about what the state should do. There therefore exists, to at least some extent, a normative dimension to determining a “public function”. A definition of “public power” should reflect the role of the state, as it is currently (and has been historically) performed in the United Kingdom, as best as possible. This exercise will inevitably therefore involve both principle and pragmatism. The main point is that the function must relate to governance.

4.59 The most obvious example of a grant of public power is a power granted by way of a statute. For example, the powers of a police constable to arrest or detain. Statute is not the only way that a power can be granted, the state may designate individuals to carry out public functions in other ways including through appointment to particular positions or through contracts.

4.60 In both public law, and in terms of the offence of misconduct in public office, there are obvious and core examples of individuals performing under public powers: Government ministers, civil servants, police officers, Members of Parliament, judges and so on. The difficulty lies in determining marginal cases. Such difficulty does not mean that the use of “public power” as a criterion should be rejected when there are clear central examples. The potential breadth of the category of persons affected by a decision may be a further factor in determining whether or not a particular power is public in nature.

4.61 The fact that a service, such as the provision of a legal defence in court or spiritual guidance, is carried out by a large number of individuals in different positions and in a variety of ways may be a good indicator that it does not amount to a public function performed under a public power. This is so even if in some contexts it is the state that provides the service (for example, through the use of a public defender system).

Conclusion

4.62 The approach to defining public office by way of performance or exercise of a public function, as suggested by several consultees, would appear an attractive one. Nonetheless we retain a concern as to whether in fact, for the purposes of the criminal law, the notions of a public function being exercised pursuant to a state or public power can be defined in precise terms. As yet, neither the administrative courts, the Court of Justice of the European Union, nor the European Court of Human Rights have been able to settle a definitive test for

\textsuperscript{26} Kampelmann v Landschaftsverband Westfalen-Lippe Case C-253/96 [1997] ECR I-6907 at [46].
concepts of state power and public function. It might be optimistic to expect that we can do better.

PERFORMING A FUNCTION OF A PUBLIC NATURE WHILST UNDER A DUTY TO ACT IN A CERTAIN WAY

4.63 If we are concerned about precision in terms of the criminal law, it may be most helpful to consider examples already existing within that area. One piece of domestic legislation which uses the concept of a public function to describe to whom a criminal offence applies is the Bribery Act 2010.27

The Bribery Act test

4.64 The Bribery Act 2010 uses the phrase “any function of a public nature” to describe one type of function, improper performance (or anticipated improper performance) of which, in return for a financial or other advantage, could amount to the offence of bribery.

4.65 The Act uses a two stage test to determine who could be convicted of accepting, or agreeing to receive a bribe. First, under section 3(2) of the Act, D must be someone who carries out a relevant function or activity. One of these functions or activities is a “function of a public nature”. Secondly, D must also satisfy one of the conditions in section 3(3) to (5): that he or she is either expected to perform the function in good faith or to perform it impartially, or that D is in a position of trust by virtue of performing it. The explanatory notes to the Act explain that the phrase “any function of a public nature”:

is the same phrase as is used in the definition of “public authority” in section 6(3)(b) of the Human Rights Act 1998 but it is not limited in the way it is in that Act.28

4.66 The offences within the Act do not differentiate between public and private functions or activities, nonetheless it still incorporates a test that is reminiscent of public office in respect of one type of individual it applies to.

4.67 We could, we think, quite easily apply the two stage test of an individual carrying out a function of a public nature, who is also expected to perform the function in good faith or to perform it impartially, or where D is in a position of trust by virtue of performing it, and arrive a similar (if not exact) pool of individuals to those currently in public office for the purposes of the criminal law.

4.68 Although the Bribery Act adaptation of the Human Rights Act “public authority” test might suggest (on the basis of relevant case law) that bribery applies to a wider group of people than misconduct in public office, the second limb of the test has the effect of narrowing it substantially. The three duties that must also apply to the defendant’s position before he or she can be found guilty of a bribery offence reflect to a large degree the wrongs we identified as underpinning the misconduct offence. As we noted in Chapter 3, not all individuals performing state functions will be in a position of trust, nor will they be in a position where they have a duty of impartiality or to act in good faith. However, where anyone of

27 Bribery Act 2010, s 3.

28 See the explanatory notes to the Bribery Act 2010, s 3.
these one factors combines with the exercise of a public power through a public function then the individual in the resulting position could most likely be described as holding public office.

**Conclusion**

4.69 The Bribery Act test therefore combines a public law style “public function” test with an additional element – one that indicates that the perpetrator was at the time of performing the relevant function under a duty of loyalty held by virtue of that position.

4.70 We consider that a two stage cumulative test to define who an offence applies to is potentially appealing. It has the advantage of defining the pool of applicants gradually and in identifiable stages. However, as with all of the other tests referred to above, there remains a difficulty for transposing a Bribery Act style to a new offence created to replace misconduct in public office. Specifically, some of the terms used within it: “good faith”, “impartiality” and “position of trust”: are not defined. The Bribery Act purposely left a significant amount of discretion to the courts, which must interpret these terms in individual cases.

4.71 A degree of discretion as to the pool of individuals to whom an offence should apply may be justifiable where an offence (like bribery) closely prescribes a type of conduct to be criminalised. This permits a degree of flexibility for future legal development, whilst ensuring that the law cannot “creep too far” because it is restricted by the bounds of the acts of bribery themselves. In contrast, as we have said a number of times, the notion of “misconduct” by a public officer is extremely wide.

4.72 If this approach to defining public office were to be preferred then we may need to consider how to define further the concepts of “good faith”, “impartiality” and “position of trust”, although this may not be necessary if the course of conduct covered by any new proposed offence is itself much more closely defined. We therefore cannot definitively say, at this stage, whether such definitions would be required. It would depend on the scope of any new offence underpinning our final proposals.

**CONCLUSION ON THE WAYS OF DEFINING PUBLIC OFFICE**

4.73 Any one of the four approaches outlined above could be utilised for the purposes of defining public office for a new offence replacing the misconduct in public office. For the reasons given above however, it is our provisional view that we could not propose adopting either a status-based approach or one based on the current law test (which we refer to as the determinative duty test). We invite consultees’ views as to which of the four tests described above they consider would be the most effective way of identifying public office holders.

**Consultation question 1**

4.74 For the purposes of a reformed offence or offences to replace misconduct in public office, should “public office” be defined in terms of:

(1) a position involving a public function exercised pursuant to a state or public power; or
a position involving a public function which the office holder is obliged to exercise in good faith, impartially or as a public trust?

Provisional proposal 2

For the purposes of a reformed offence or offences to replace misconduct in public office, “public office” should not be defined in terms of:

(1) a position with an institutional or employment link to one of the arms of the state; or

(2) a position where the person occupying it has a duty associated with a state function, which the public has a significant interest in seeing performed.

We discuss below how any of these four tests could be formulated as part of a new statutory provision.

Framing the definitional element of public office in a new offence

Once a conclusion is reached on which type of test to adopt in respect of “public office” there are three options as to how that test can frame the definitional element of a new offence:

(1) we could place that test on a statutory footing, to be applied by the courts in individual cases; or

(2) we could use that test to create a statutory list to identify relevant public office holders within primary legislation: this could be either:

(a) a list of factors to be considered in determining whether a position is a public office, such as the type of power exercised; or

(b) a list of particular positions constituting public office.

A number of consultees (including the Council of Her Majesty’s Circuit Judges) made the point clearly that the question of who should be in public office for the purposes of a new offence is a matter of policy, and that policy is a matter for Parliament. Under any of the options here presented, the ultimate decision as to who should be included on any list would be for Parliament to make. The difference would be that under option (2) we would propose a draft list, as a guide for legislators, as part of our formal law reform proposals.

We also discuss some compromises between these approaches, for example:

(1) combining a general definition of public office with a non-exhaustive list of factors or positions given by way of example; and

(2) giving the Secretary of State the power to create or supplement the list identifying relevant public office holders by secondary legislation (which would require Parliamentary approval under the affirmative procedure).
4.80 The first choice is between placing a broad test for public office on a statutory footing and creating a list to assist with identification of relevant public office holders. There may of course be more than one way of creating such a list.

A STATUTORY TEST

4.81 This would be a broad and flexible approach to definition, leaving the final question of who is subject to the offence to be determined by the court on a case by case basis. Whether it is sufficient to draft a statutory provision, by reference to whichever test for public office we conclude would be most effective, is debatable.

4.82 Predicting which individuals would be caught by the offence as a result of any one of the sorts of test discussed above is unlikely to be straightforward. The test may be good enough to produce a guiding principle to be used in drafting legislation but not certain enough to be used as a legislative formula in itself. This approach may not produce sufficient clarity for the offence to operate effectively. It could also leave the ambit of the offence inappropriately wide.

4.83 Jamaica is one jurisdiction that applies a type of statutory test, rather than a list, to define the pool of officials subject to specific (in this case corruption) laws. This illustrates that general definitions of public office occur and are not universally considered to be too difficult. Section 14 of the Jamaican Corruption (Prevention) Act 2001 includes five offences that apply only to public servants. That term is defined by sub-section 2(2) of the same act as any person:

(1) employed in the public service of Jamaica;

(2) any person employed in the service of a statutory body or government company; or

(3) any person engaged to perform a public function.

4.84 McKoy has commented on the very wide scope of the definition of “public servant” in Jamaican legislation.29 In particular, he notes that the class of persons characterised as public servants extends to include employees of government companies. This is significant, because the Jamaican government extensively delegates state functions to the private sector. Therefore, many employees of private companies may find themselves classified as public servants and subject to the provisions of the Corruption (Prevention) Act 2001.30

A STATUTORY LIST OF FACTORS OR POSITIONS

4.85 Under this approach the new provision would contain a list providing details of what needs to be established before an individual can be held to be in public office. This list could take two forms:

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30 The Corruption (Prevention) Act 2001 (Jam).
(1) A list of indicative factors that determine public office, which would vary according to the test adopted. For example: a list of public functions D can be “empowered by the state to perform”; or a list of “functions of a public nature” where D would be under a duty to act in a certain way.

(2) A list of positions/individuals who are considered to meet the criteria of the relevant test.

4.86 There are also several ways in which such a list could be presented:

(1) There could be an exhaustive list laid down in statute.

(2) There could be a general definition of public office, as in the first option, supplemented by a list (of factors or positions) given by way of example.

(3) In either case, there could be power to add to the list; for example, by order of the Secretary of State approved by the affirmative parliamentary procedure.

List of functions

4.87 In relation to the first approach, by more clearly defining the type of public functions that individuals must either exercise or perform before they can be held subject to any new offence, it might be hoped that many of the difficulties of defining public office could be avoided. The final decision as to whether an individual in a particular position is a public office holder for the purposes of the offence would lie with the court, but firm boundaries as to the scope of the offence would have been set by the list of public functions.

4.88 This approach is commonly found in the laws of other countries. For example, most of the Australian territories that have codified their criminal law and retained an offence addressing misconduct by public office holders have adopted a list identifying factors that indicate a public office. For example, the Western Australia Criminal Code Act Compilation Act 1913, section 1, includes factors such as “a person exercising authority under a written law” and “a person authorised under a written law to execute or serve any process of a court or tribunal”.

4.89 Whilst increased clarity would be a significant advantage of a list-based approach to defining public office, on the other hand it would also have a number of disadvantages, two in particular:

(1) The restricted nature of the list could prevent the law addressing conduct that justifies criminalisation when committed by individuals with particular public functions, if those functions only came into being after the list was created.

(2) There would still remain the potential for factual and legal dispute as to whether or not an individual in a given position performs a particular function.

31 The Western Australia Criminal Code Act Compilation Act 1913, s 1.
The first of these difficulties is a potential disadvantage of all list-based definitions, and we discuss it further below.

**List of positions**

4.90 The second of these problems could be addressed by adopting an even narrower approach to defining public office by list. To provide the maximum amount of legal certainty a new offence could list each and every position Parliament considers to amount to a public office for the purposes of the offence.

4.91 In considering examples from laws in other countries we have yet to find a definition of public office that rests on a completely exhaustive list of positions and/or individuals. Many of the list-based approaches do include particular positions as a matter of course: member of the legislature, executive or judiciary and police officers; but none of those lists are exhaustive.32

4.92 Exhaustive lists would clearly provide the most certainty as to the types of individual who would be defined as public office holders under a new offence and there would be no need for decisions to be made in court as to whether or not the offence applied to certain individuals. In its consultation response, the Council of Her Majesty’s Circuit Judges agreed with this approach:

The solution that we suggest for the future is for a statute to contain a schedule of offices to which the offence applies. This could be altered by means of a statutory instrument requiring an affirmative resolution. By way of suggestion it should include for a start the judiciary, the police, and members of either House of Parliament or the European Parliament or local authorities. In addition we think that anybody connected with the administration of justice but not actually performing a judicial function should come within the scope of the offence so that for example a court clerk who deliberately falsified court records other than in return for payment could be prosecuted. It should not extend to the independent professions such as law, medicine or accountancy. Criminal misconduct by such professionals almost always amounts to fraud bribery or perverting the course of justice and can be prosecuted as such. It should probably cover the emergency services (e.g. fire and rescue) to deal with a totally unjustifiable refusal to send a crew to the scene of an emergency.

4.93 This option would also, however, be most at risk of suffering from the disadvantages of rigidity. If it were to be an exhaustive list it would be the least able to evolve or adapt to changes in structure within particular sectors. For example, in 1967, traffic wardens were the first non-police constables to be designated as persons with certain powers of policing.33

4.94 However, with the advent of Police Community Support Officers and the outsourcing of traffic control powers to local authorities, as of 2015, there remained only 18 appointed traffic wardens in England and Wales. The current

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33 Road Traffic Regulation Act 1967, s 81. These powers were given further statutory expression in the Road Traffic Regulation Act 1984, ss 95 and 96.
Policing and Crime Bill\textsuperscript{34} now seeks to abolish traffic wardens, and also to replace the four different types of volunteer support workers within the police with a single “policing support officer”. If there had been an offence containing a definition of public office by way of list of positions, and if that list originally included traffic wardens, the offence would have required regular amendment to ensure that it remained up to date with both the structural changes in the police and the development of local authority traffic control measures. In such circumstances, where the criminal offence did not keep pace with regulatory change, a disparity could result between the treatment of those positions listed and those not listed.

CLOSED OR OPEN LIST?

\textit{List of examples}

4.95 As discussed above, the disadvantage of a closed list, whether of functions or of positions, is that it would not include types of function or position not in existence at the time the provision was drafted. To alter the list to reflect the new situation would require further action on the part of Parliament. This inevitably means that there would be delay between a problem with the scope of the offence being identified and that problem being rectified.

4.96 One possible way of addressing this problem would be to combine a general definition of public office, as in the first option, with an \textit{inexhaustive} list of particular functions or positions, given by way of example only.

4.97 For example, the Australian Capital Territory, in section 359 of the Criminal Code 2002, has a statutory offence of abuse of public office. The Code defines "Public official" as a person having public official functions, or acting in a public official capacity.\textsuperscript{35} A non-exhaustive list is then given, which includes: a member of the legislature, executive or judiciary of the Commonwealth, a state or another territory; an officer or employee of the Commonwealth, a state, another territory or a local government; and a contractor who exercises a function or performs work for the Commonwealth, a state, another territory or a local government.

4.98 The advantage of using a general definition supplemented by an inexhaustive list (of functions or positions) would be flexibility, allowing the law to adapt to structural changes within different sectors within the constraints of the statutory offence and its intention. The disadvantage would be that there could remain, at least initially, a degree of uncertainty as to who is and is not subject to the offence, although the list itself could assist to clarify the general definition with uncertainty being resolved in the courts over time.

\textit{Power to supplement the list by order}

4.99 A compromise between these two positions would be to adopt an “affirmative resolution” approach, as taken, for example, in section 40 of the Prison Act 1952. This section prohibits the conveyance of listed articles into the prison estate, but allows (under section 52(2A) and 52(2B)) the Secretary of State to add articles to this list, by way of secondary legislation, when needed. In that way the list can be updated as and when required without primary legislation. Affirmative resolution

\textsuperscript{34} The Police and Crime Bill 2016, cl 3(1).

\textsuperscript{35} (Australian Capital Territory) Criminal Code Act 2002, s 300.
procedure within a new offence would still require some positive action to be taken by the Secretary of State to extend the offence, should it become clear that some power or function, which should be caught, is not.

4.100 Like the proposal for a fixed statutory list, this approach has the disadvantage that amendments to the list can only occur “after the event”. That is, cases will occur where a person is acquitted because he or she, though obviously performing a public function of some kind, does not come within the statutory list because the position is a new one. Amending the list to include that position will ensure that future cases are caught, but the original defendant will have escaped punishment. The main advantage of amending the list by way of secondary rather than primary legislation, is simply that it can be done more quickly. The procedure for making and introducing secondary legislation is generally speaking less slow and cumbersome than the passing of primary legislation.

Consultation questions 3 and 4

4.101 For the purposes of a reformed offence or offences to replace misconduct in public office, should the statutory definition of public office take the form of:

(1) a general definition;

(2) a definition of public office as any position involving one or more of the functions contained in a list;

(3) a list of positions constituting a public office; or

(4) a general definition, supplemented by a non-exhaustive list of functions or positions given by way of example?

4.102 If the definition of public office includes a list of functions or positions, should there be power to add to the list by order subject to the affirmative resolution procedure?

Summary of conclusions on public office

4.103 We therefore conclude that:

(1) The concept of “public office” will need to underlie, at least at a basic level, any new offence we propose.

(2) There are at least four possible ways of defining public office:

(a) by way of status or in institutional terms;

(b) by way of identification of a determinative duty;

(c) by way of performance or exercise of a public function; or

(d) by way of performing a public function whilst under a duty to act in a certain way.
(3) Once a conclusion is reached on which type of test to adopt in respect of “public office” there are three options as to how that test can frame the definitional element of a new offence:

(a) we could place that test on a statutory footing, to be applied by the courts in individual cases;

(b) we could use that test to create a statutory list to identify relevant public office holders within primary legislation; this could be either:

(i) a list of factors to be considered in determining whether a position is a public office, such as the type of power exercised; or

(ii) a list of particular positions constituting public office.
CHAPTER 5
LAW REFORM OPTIONS – OPTION 1: THE BREACH OF DUTY MODEL

INTRODUCTION
5.1 In Chapter 3 we examined the possible theoretical foundations of the current offence of misconduct in public office. Chapter 4 began by explaining briefly how that theoretical understanding of the offence can assist in our reform proposals. Chapter 4 then explained why the concept of public office would be a necessary element of those reform options involving the creation of a new statutory offence to replace misconduct in public office and how the concept could be defined.

5.2 In this and the following three chapters we present our law reform options. Each of the first two proposes the introduction of a new statutory offence to replace the current common law offence of misconduct in public office. These options are based on the harms and wrongs identified in Chapter 3. Option 3 is the abolition of the current offence without replacement, and is discussed in Chapter 7. Chapter 8 discusses some complementary reforms which could be combined with any of the three options.

5.3 In this chapter we explain Option 1, which involves replacement of the current law with a new statutory offence addressing only the harms and wrongs underlying the Category 4 conduct discussed in Chapter 3 – breach of duty by a public office holder leading to or risking serious harm. This could be harm either to the public, or to individuals where the act or omission constitutes breach of a public duty requiring D to take care to avoid harm to persons in V's position.

OUTLINE OF THE PROPOSAL
5.4 We think that a distinct mischief arises when, by virtue of D's position of public office, D is under a particular duty to act, which if not fulfilled could give rise to a risk of serious consequences occurring and D is aware of this duty but nevertheless fails to fulfil that duty. In Chapter 3 our overall conclusion was that, at the very least, an offence is merited to deal with Category 4 conduct.

5.5 Superficially, a new offence addressing breaches of duty by public office holders would seem to be indistinguishable from the current law. There is, however, one major difference between Option 1 and the current offence: the requirement of proof that, at least, a risk of serious consequence arises from the public office holder's breach of duty. This significantly narrows the scope of the Option 1 offence (by comparison with the present law) in two ways:

1. It allows us to devise a closer definition of the type of conduct to which it applies; in particular, by limiting it to breaches of duty which cause at least a risk of specified serious consequences.

2. It allows us to limit the type of public office holder to whom it applies, in particular by confining it to those public office holders holding positions in which they are subject to particular duties concerned with the prevention of specified serious consequences.
5.6 In this way, Option 1 could lead to a much narrower and more focused offence targeted at breaches of duty committed by a smaller, more clearly identifiable pool of people than all “public office holders” (however we might define them). This group would effectively constitute a sub-set of public office, however we consider it should be defined, using one of the methods described in Chapter 4. We will refer to these people initially as “public office holders subject to a particular duty concerned with the prevention of harm”.

5.7 We discuss the ingredients of the offence in the conventional order, namely conduct; circumstances; consequences, in each case considering both the external and the fault elements.

5.8 All provisional proposals and consultation questions in this chapter refer to the new proposed offence in respect of breaches of duty, causing or risking serious consequences, by public office holders with particular duties concerned with the prevention of harm.

THE CONDUCT ELEMENT

5.9 Under Option 1 the conduct element of the new offence replacing misconduct in public office would consist of any conduct amounting to a breach of a particular duty concerned with the prevention of certain types of serious consequence. (We discuss later in this chapter what types of consequences should be included in defining that duty. To anticipate our conclusions, they are death or serious injury, false imprisonment, serious harm to public order and safety or serious harm to the administration of justice).

5.10 There are three particular questions to be addressed within this element:

(1) Should “breach of duty” include both acts and omissions?

(2) Should the offence be limited to breaches of those duties of the public office holder’s position specifically concerned with the prevention of harmful consequences, or should it extend to breaches of other duties?

(3) What should D’s mental state be in respect of his or her breach of duty?

Act or omission

5.11 When we considered the concept “neglect of duty” in Chapter 3 we focused on cases where an individual failed to do something that he or she had an obligation to do. The paradigm of this form of conduct is encapsulated in the case of Dytham,¹ where a police officer watched a member of the public being kicked to death by a group of men and made no move to either intervene or call for assistance.

5.12 In a more recent case, which involved the tragic death of a disabled man,² one of the police officers charged with misconduct in public office (PC Duffy) was alleged to have ignored the deceased’s requests for assistance, whilst another

(PCSO Passmore) was alleged to have wilfully failed to have carried out a patrol around the victim’s address.

5.13 Our analysis in Chapter 3 of the harms and wrongs of this type of conduct demonstrates that, in principle, those harms and wrongs do not arise only in the case of omissions but also in the case of acts. Hence we concluded that this category of conduct should more appropriately be described as “breach of duty”, and not “neglect”. It would be illogical to criminalise a case in which an individual (D) allowed harm to occur by omission but to exempt a case in which D caused the same harm by his or her own act, where that act is equally a breach of the duties of D’s position.

5.14 For example, in the above case of Duffy and Passmore, PC Duffy was also alleged to have instructed other officers not to act on the victim’s messages and PC Passmore altered paperwork to conceal the fact that he had not patrolled the area as required. These positive acts are no less harmful or wrongful than the officers’ omissions to act.

5.15 An approach including both positive acts and omissions, and therefore based on breach of duty rather than just neglect, would be in line with the Scottish criminal offence that is comparable to misconduct in public office. The offence there appears to focus on “wilful neglect” rather than misconduct by way of a positive act.

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.

5.16 In fact, however, it encompasses both acts and omissions. Hume and MacDonald state that, under Scots law:

Any flagrant neglect of duty by judges and magistrates or other officials, or refusal to execute duty, or encouragement by magistrates of offences against the peace, or the like, are punishable at common law.

5.17 As this passage indicates, in Scotland, the offence is not restricted to omissions; positive acts are also included within the scope of the offence. This is confirmed by cases such as Thomas Black Webster (a doctor appointed to carry out

4 We understand from our research that charges of perverting the course of justice were not pursued in respect of these acts as no ‘course of justice’ existed at the time they were committed. See Archbold, Criminal Pleading, Evidence and Practice (64th ed 2016) at 28.22 for discussion of “the course of public justice”.
vaccinations falsely granting a vaccination certificate) and Donald Smith (a postal worker involved in the opening of letters). Effectively, a public officer can neglect a duty by committing an act that proves contrary to it.

5.18 Additionally, a number of Commonwealth jurisdictions include both acts and omissions within the conduct element of offences that seek to address misconduct by public officials.

5.19 In general terms, it is usually easier to justify the criminalisation of positive acts on the grounds of identifiable harms and wrongs than it is to justify the criminalisation of omissions. It would therefore appear incongruous if we were to recommend an offence that criminalised omissions, because we considered that the harms and wrongs arising from the conduct involved justified criminalisation, but we did not recommend that positive acts, involving the same harms and wrongs, should also be criminalised.

Provisional proposal 5

5.20 The offence should encompass both positive acts and omissions and the conduct element should refer to a “breach of duty” to reflect this.

Limiting the offence to breaches of particular duties

5.21 We discussed at length in the background paper the fact that the current offence of misconduct in public office is not restricted to breaches of particular types of duty. Specifically, the offence is not limited to breaches of the duties that determine that D’s position qualifies as a public office. In fact, once D is determined to be a public office holder then, conceivably, any breach of any one duty that D holds as a result of his or her office could potentially result in a criminal prosecution.

Example 1 D is a marriage registrar who is held to be in public office by virtue of a relevant duty – to perform marriage registration functions. By virtue of D’s position, D is also subject to other duties: in relation to the treatment of co-workers and work attendance.

Under the present law D’s potential criminal liability is not limited to improper performance of a marriage registration function. It could also include breaches of other duties D has by virtue of his or her position.

5.22 The danger of this position is that, in reality, duties that D may be subject to, which do not determine that he or she is in public office, may have little or no relation to the duty that does. The effect of this is that D could be prosecuted for a failure to attend work regularly or harassment of a colleague when a non-public...
office holder would not be. This seems to be patently unfair, with the offence becoming misconduct by a public officer rather than misconduct in public office.

5.23 A number of consultees who responded to our background paper considered a lack of connection between the relevant duty and the breach that amounts to the misconduct to be problematic. In the view of some, this could be rectified by developing the, as of yet, little used concept of “acting as such” introduced into the offence by AG’s Reference,11 but not otherwise discussed by the courts in England and Wales.

5.24 The London Criminal Courts Solicitors’ Association was of the view that:

Acting as such is an important ingredient of the offence as it ensures the offender is guilty of an offence only if the conduct or rather misconduct arises out of the discharge of his duties. Arguably the wording is required so that the office holder’s conduct is distinguished from anything which is done in his or her capacity as a private citizen.

Likewise, Michael Parroy QC of 3 Paper Buildings, thought “this could be an important filtering point.”

5.25 Whilst the notion of associating the breach of duty with the circumstances of public office has not been explored by the courts in this country, it has been substantially considered by the courts in Australia, Hong Kong and Canada.12 The Court of Appeal of Victoria, Australia described the second element of the (Victorian) common law offence as being “in the course of or connected to his public office”.13 The Hong Kong cases make reference to duties “so closely connected to the public office” that breaches of them “bring the public office into disrepute”.14 However the ambit of the element is still relatively unclear in these jurisdictions. In our view this formulation of “acting as such” is only a little better than that used in England and Wales.

5.26 There would be an advantage of significant clarity if we were to recommend adopting an approach that more clearly linked the duty breached to the fact of D’s holding a position in which he or she is subject to the offence. Rather than using the “acting as such” concept to achieve this we could specify that breaches of duty would only fall within any new offence replacing misconduct in public office if they were breaches of the “particular duty” concerned with preventing the occurrence or risk of specific types of consequence which determined D’s position in the first place. This would significantly narrow the offence from its current scope.


5.27 We consider that taking this approach would avoid problematic cases such as W,\textsuperscript{15} where the misconduct alleged is only peripheral to the duties that place D in a position of public trust.\textsuperscript{16} W was a police officer who used a credit card provided to him for work related expenses for personal purchases. Such cases would be better prosecuted as fraud instead of under any existing or new misconduct offence.\textsuperscript{17}

5.28 We give an example of how a new offence, which applied only where the duty breached was a “particular duty”, would apply:

**Example 2** Social worker M performs functions the purpose of which is to protect vulnerable adults within his or her caseload from harm. M therefore has a commensurate duty to prevent serious injury to any such adults. One vulnerable adult, N, confides in M that he or she is subject to familial abuse. M fails to take action in relation to this. M is, in these circumstances potentially in breach of a particular duty of his or her position for the purposes of a new offence.

If on the other hand M also has a separate duty, by virtue of being a local authority employee, to file accurate expenses forms in respect of home visits conducted with N and fails to do so, M is not in breach of a relevant type of particular duty, namely the duty to protect vulnerable people from injury. M would therefore not be guilty of the new offence.\textsuperscript{18}

5.29 Under a reformed offence, D would no longer be liable for misconduct in public office in respect of every breach of a duty held by virtue of his or her position as a relevant public office holder. Liability would depend on the type of duty breached, as described above. It would also depend on the consequences caused or risked by D’s conduct, as discussed below.

**Provisional proposal 6**

5.30 The offence should be limited to breaches of particular duties concerned with the prevention of harm.

**Fault as to conduct**

5.31 The final aspect of defining the conduct element of a proposed new offence involves analysis of what an individual’s (D) mental state must be in respect of his or her breach of duty.

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\textsuperscript{16} W had breached the officer’s duty to act with honesty and integrity under the Police Code of Ethics (2014) but not a duty that was determinative of his public office.

\textsuperscript{17} The decision in W has been criticised because, on one view, it seems that the misconduct in public office charge was being used to circumvent perceived difficulties in proving either a theft or fraud offence.

\textsuperscript{18} In either case the social worker would be likely to face disciplinary proceedings.
5.32 Most serious criminal offences, in addition to setting out the prohibited conduct, require proof of fault. When we speak of the “fault element” of an offence, this generally refers to the state of mind (or lack of it) required to make the offender worthy of blame for the fact that the prohibited conduct occurred. The state of mind in question may be expressed either in cognitive terms, for example knowledge or belief, or in volitional terms, for example intention, wilfulness or recklessness.

5.33 The present offence has a general fault requirement of “wilfulness”, which is generally interpreted as meaning recklessness.\(^{19}\) Recklessness, in turn, is a composite state of mind: the requirements are:

1. that the conduct was voluntary;
2. that D was aware of the risk that certain consequences might follow that conduct, or that certain circumstances existed;
3. that, in light of the facts as D knew or believed them to be, it was unreasonable to engage in that conduct.

5.34 In relation to conduct, the question of D’s mental state is dealt with quite simply. Generally speaking, the only fault requirement that the law imposes in relation to the nature of a person’s conduct is that D’s physical actions were voluntarily performed.\(^{20}\) That is, culpability for acts and omissions will not arise, in contrast, if a person’s conduct is involuntary, as in a case of insanity or automatism.\(^{21}\) We do not propose that the position should be different in the new offence.

5.35 There is more room for debate about D’s state of mind in relation to the remaining ingredients of the offence, namely circumstances and consequences. For example, the fault element in the new offence could be made more stringent, by requiring intention or knowledge rather than recklessness; or less stringent, by requiring no more than negligence or indeed imposing strict liability. We discuss these possibilities under the heading of circumstances and consequences, below.

THE CIRCUMSTANCE ELEMENT

5.36 We consider that it should be a requirement of the new offence under Option 1 that:

1. D should be a public office holder;
2. D’s position should involve a particular duty concerned with the prevention of certain types of serious harm; and
3. the occasion for performing that duty must have arisen in the particular case.

\(^{19}\) See ch 2.

\(^{20}\) This is explained in the Draft Criminal Code and Commentary of the Criminal Law Codification Advisory Committee of the Republic of Ireland (2010) DC/04, Head 1109 and explanatory notes.

The requirement that D should be a public office holder, and how public office should be defined for this purpose, are discussed in Chapter 4. We discuss the other two requirements in the following part of this chapter.

5.37 We also discuss, below, what fault element should be applicable to these requirements; for example, whether D needs to “know” or “suspect” that he or she is a public office holder under a particular duty concerned with the prevention of harm, within that definition.

Public office holders under a particular duty concerned with the prevention of harm

5.38 In Chapter 3 we suggested that criminalisation of breaches of duty may be particularly justified in the case of public office holders who are under a duty to safeguard against public harm and breach that relevant duty, causing or risking serious consequences. This is because the causing or risking of certain serious consequences is a good indicator of the occurrence of public harm, the main harm we identified as arising from Category 4 conduct.

5.39 One way of defining an offence to address this type of harm would therefore be by restricting the pool of potential offenders to individuals who are under such duties by virtue of the position they hold. This group of people would be a sub-set of public officeholders (as potentially defined in one of the four ways described in Chapter 4). For the purposes of the new offence, the prosecution would be required to prove that:

1. D was a public office holder in the sense set out in the provision of the new statutory offence; and
2. D was also under a particular duty concerned with the prevention of harm in the sense set out in the provision of the new statutory offence.

5.40 Accordingly, the new offence would need to contain a definition of the group of persons who are under that particular duty. We discuss below the details of that definition in the following order:

1. We analyse the types of serious consequence, or risks of serious consequence, which most commonly arise in the cases prosecuted, which could amount to indicators of public harm for the purposes of the offence.
2. We discuss how to identify the types of position within which individuals are subject to specific duties to prevent, or at least not cause, these forms of harm.
3. We discuss how our conclusions on (1) and (2) can be reflected within a statutory provision (for example, whether the statute should simply define the type of harm or also attempt to list the positions involving a duty concerned with its prevention).

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22 See para 3.322, above.
Types of serious consequence

5.41 We know, from our research into recent and ongoing prosecutions, published as part of our background paper, that the majority of prosecutions for misconduct in public office are brought against individuals in the following types of position:

(1) Police officers, PCSOs and other members of police staff.
(2) Prison officers and prison staff.
(3) Immigration officers (formerly border agency officers) and immigration detention centre staff.
(4) Probation officers.

5.42 At our symposium, held on 20 January 2016, Superintendent Ray Marley, of the College of Policing, made the interesting point that the reason why most of the recent prosecutions related to police officers might be that the police are most clearly identifiable as being in public office. Another possible explanation, supported by material shared with us by the CPS, is that police, prison and immigration staff, given the nature of their functions, are more likely to be at risk of causing or allowing particular types of harm when they misconduct themselves. That is, when those affected are in custody there is a greater likelihood of physical harm, and the harm is more likely to meet the “seriousness threshold” for misconduct in public office. In contrast, misconduct by other types of public office holder may not reach that threshold because the functions and duties those individuals perform are such that breaches of them do not usually result in serious harm to the public interest.

5.43 Specifically, we can identify four different types of harm, which are at least a consequential risk in the cases that can only be prosecuted using misconduct in public office. These cases include cases involving the risk of:

(1) Death or serious injury (including psychiatric illness).
(2) False imprisonment.
(3) Harm to public order and safety.
(4) Harm to the administration of justice.

5.44 We will discuss each of these types of harm below, in our discussion of the consequence element of the proposed new offence. We will also discuss two further forms of harm that have been suggested to us by consultees as consequences that a new offence should seek to prevent:

(1) Damage to property.

24 For discussion see para 5.161 below.
25 We adopt the same definition of “serious injury” as used in our recent report on Reform of Offences against the Person Law Com No 361.
(2) Economic loss.

Positions subject to duties concerned with the prevention of these types of consequence

5.45 Our research has shown that the first four types of consequence identified above are most likely indicators of the occurrence of public harm – the primary harm to be prevented by a new offence. In seeking to define the pool of individuals who should be subject to the offence, reliance can be placed on the existence of any such duties concerned with the prevention of these specific types of consequence, where they arise by virtue of a particular position (within the constraints of public office described in Chapter 4).

5.46 It is possible to identify some types of position, the occupants of which are always subject to a duty concerned with the prevention of one of the above listed types of serious consequence. These types of public office holder are those who either:

(1) exercise powers of arrest or detention or powers to otherwise deprive an individual of his or her liberty; and/or

(2) perform functions with the purpose of protecting vulnerable individuals from serious harm.

5.47 We discuss below, first, these two types of public office holder. Thereafter, we discuss what is meant by a “particular duty” concerned with the prevention of specified serious consequences.

POWERS OF PHYSICAL COERCION

5.48 On one hand it may be relatively easy to identify some of those who we consider should be included in a new offence. They are the types of public office holder who are most commonly prosecuted using misconduct in public office: police officers, members of the prison service and the immigration service.

5.49 These positions can together be described as those carrying a power of physical coercion, in terms of arrest, detention or some other form of deprivation of liberty. We concluded in the background paper that the exercise of physical coercive powers is, under the current law, a highly relevant factor in determining who is and is not in public office.26

5.50 We also think that, where an individual exercises powers of physical coercion as a function of his or her position, he or she will always be under a commensurate duty to prevent, or at least not cause, public harm when exercising those powers. That is, public harm consisting of at least one of the four types of consequence outlined above.

5.51 For example, in the case of Driver27 a police officer was prosecuted for misconduct in public office after failing to take appropriate steps to check on the

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well-being of two intoxicated men who had collapsed in the street in extremely cold conditions. The officer had assisted another intoxicated male in an appropriate manner a short while earlier, but had only made very limited attempts (by kicking one or both of them) to rouse and/or move the two men he came across subsequently. The case demonstrates that a police officer owes a duty to those individuals whom he or she comes across in the course of his or her duties and who require assistance, in order to protect them from danger. That is, a police officer’s duty to preserve life is not limited to a duty to prevent death caused by crime. It extends to a duty to “rescue” a person who is in need of assistance, where the officer is aware that circumstances have arisen where that person requires “rescuing”.

5.52 These obligations arise both from the officer’s function of preventing crime and from his or her obligation to uphold fundamental human rights.²⁸ Both of these are explicit from the attestation taken by all police officers,²⁹ and underpinned by the police standards of professional behaviour³⁰ and the police code of ethics.³¹ Similarly the police are required to preserve public order and safety.

5.53 A police officer is subject to duties to protect a person from false imprisonment, in two respects. First, the police are required to abide by limitations on their own powers of arrest and detention. Secondly, the police have a duty to protect people from false imprisonment by any person, as part of the general duty of preventing crime. The police attestation imposes an explicit duty to prevent all offences and the Police and Criminal Evidence Act 1984 Codes of Practice contain specific procedures for police officers and other police staff to follow in respect of arrest and detention.

5.54 Finally, a police officer has additional responsibilities in respect of preventing harm to the administration of justice when exercising his or her coercive powers. In addition to the requirement that police officers “discharge all the duties thereof faithfully according to law”³² officers have a duty under the code of ethics not to “undermine public confidence in policing”.³³

5.55 Of course, it may not be the case that all individuals exercising powers of physical coercion owe duties to guard against the occurrence of all of these types of harm. Individuals working within the prison estate will only hold responsibilities in respect of the proper administration of justice to a lesser extent. A particular duty concerned with the prevention of any one of the four types of consequence

²⁸ Art 2 of the European Convention of Human Rights protects the right to life, and art 5 protects the right to liberty and security of person.
²⁹ The full attestation reads: “I do solemnly and sincerely declare and affirm that I will well and truly serve the Queen in the office of constable, with fairness, integrity, diligence and impartiality, upholding fundamental human rights and according equal respect to all people; and that I will, to the best of my power, cause the peace to be kept and preserved and prevent all offences against people and property; and that while I continue to hold the said office I will to the best of my skill and knowledge discharge all the duties thereof faithfully according to law”.
³⁰ Police Conduct Regulations 2012 (amended 2015), sch 2.
³² Police attestation, see note 29 above.
would, in our view, suffice to bring an individual in such a position who is a public office holder within the ambit of a new offence.

5.56 We feel confident therefore that both police officers and individuals who hold similar duties related to exercising powers of physical coercion can, and should, be included in any new offence. In addition to the police and persons working within the prison estate there may also be other public office holders who exercise specific, physically coercive powers by virtue of their positions. Examples include mental health professionals authorising detention in secure institutions and local authorities providing secure residential facilities for looked after children.

5.57 Individuals holding positions accompanied with such powers would no doubt fall within any reformed definition of public office holders, but not all public office holders would have coercive powers. Therefore these individuals would be one “sub-set” of the newly defined “public office”: public office holders with powers of physical coercion.

Provisional proposal 7

5.58 The category of public office holders under a particular duty concerned with the prevention of harm should be defined to include public office holders with powers of physical coercion, (whether or not it also includes any other public office holders).

FUNCTIONS WITH THE PURPOSE OF PROTECTING VULNERABLE INDIVIDUALS

5.59 To restrict our reform proposals to only those individuals who exercise powers of physical coercion would result in the creation of an offence that would be too narrow to capture the mischief that needs to be addressed.

5.60 For example, there are a variety of individuals who would be within the definition of public office, who do not possess powers of physical coercion, but who are subject to duties to prevent harm in the same way as those who do. Examples include Police Community Support Officers, operational support grades in the prison service, health care professionals in the prison service and the holders of similar positions in the immigration service.

5.61 Additionally, the “powers of physical coercion” description does not cover all those who have been either investigated or prosecuted under this offence, even within Category 4 alone (neglect of duty causing or risking public harm). Those prosecuted have included probation officers, a director of social services and a court appointed guardian in a child custody case. With each of those offices a breach of their duty has the potential to cause one of the four types of consequence identified above. This would suggest that there are very likely to be further positions, other than those associated with coercive powers, to which a new offence seeking to protect against public harm should apply.

34 Mental Health Act 1983, s 3.
35 Children Act 1989, s 25(1).
Considering carefully the analysis we set out in Chapter 3, we would now describe these positions as positions in which D exercises a function, the purpose of which is to protect vulnerable individuals from harm (in the sense of one of the specific consequences described above). Therefore, these individuals would represent another “sub-set” of the newly defined “public office”. This gives rise to two additional questions:

1. What do we mean by “performing a function, the purpose of which is to protect vulnerable individuals” (for convenience referred to below as a function with a protective purpose)?

2. What do we mean by, and how can we define, “vulnerable individuals”?

**Performing a function with a protective purpose**

5.63 We use the concept of “protection” here deliberately, because we are specifically concerned with the prevention of harm to vulnerable individuals. Various other concepts are used to describe processes, the objective of which is to care for vulnerable people, but these all involve more than prevention of harm. For example, the term “safeguarding” is often used in this context. However, whilst that term includes action taken to protect an individual, or group of individuals, from maltreatment, it also includes action taken to promote individual welfare.37

5.64 A function that is performed in order to protect vulnerable individuals will, in our opinion, always carry with it an inherent, particular duty not to cause harm while performing it, and indeed to protect those individuals from the risk of death or serious injury. Therefore, as with a public office holder exercising coercive powers, we consider that those performing functions with a protective purpose can, and should, be included in any new offence proposed to replace misconduct in public office. For ease of reference we will refer to these individuals as public office holders with a duty of protection.

**Consultation question 8**

5.65 Should the category of public office holders under a particular duty concerned with the prevention of harm be defined to include those public office holders with a duty of protection in respect of vulnerable individuals (whether or not it also includes any other public office holders)?

**Vulnerable individuals**

5.66 In Chapter 3 we describe what we understand vulnerability to mean in the context of misconduct in public office and one approach to defining “vulnerability” would be to adopt that description here. The description reflects others provided to us by consultees, including the CPS and academics Catarina Knight and Helen Edwards from Nottingham Trent University:

Vulnerability can take several forms. In some cases V may be intrinsically vulnerable, for example by being ill or mentally distressed.

37 This distinction can be demonstrated by contrasting the regimes that exist for child “protection” under the Children Act 1989 and for the “safeguarding” of children under the Children Act 2004. Part V of the Children Act 1989 requires child protection measures to be used where a child is either “suffering, or is likely to suffer, significant harm”.
In others, V may be in a vulnerable position in relation to D, for example by being an arrested suspect or a prisoner.38

Unfortunately, while this is a good expression of the rationale of the new offence, it may be too wide and vague to form part of a statutory definition. In the context of a new offence replacing misconduct in public office, it may therefore be necessary to define “vulnerability” more closely, for the sake of legal certainty.

5.67 There are various statutory definitions of vulnerability. For example:

(1) The Safeguarding Vulnerable Groups Act 2006 defines “vulnerable adult”, by way of an exhaustive list in section 59, as including both those who are intrinsically vulnerable and those who may be vulnerable due to the occurrence of temporary factors.39

(2) In relation to the sexual offences regime, the protection of vulnerable individuals is limited to:

(a) children under the age of 16;40

(b) young adults under the age of 18 in particular positions of vulnerability;41 and

(c) adults with a mental disorder.42

5.68 The difficulty with adopting too narrow a definition of vulnerability is that it would fail to provide the level of protection afforded by the present offence. It would exclude cases where the vulnerability of the adult individual involved either is not intrinsic in nature or does not arise by virtue of one of the listed positions of vulnerability. An example might be those individuals who are vulnerable by virtue of being a victim of crime.

5.69 In the discussion of vulnerability in Chapter 3, we also included people who are in a temporary position of vulnerability in relation to D, for example by being a suspect arrested by a police officer. For present purposes, it does not matter whether such people are included in any statutory definition of vulnerability. In these cases D has powers of coercion and is therefore a relevant public official within the first limb. D therefore has a duty of guarding against harm to V, whether or not V is classified as a vulnerable person.

5.70 Catarina Knight and Helen Edwards have suggested that an approach to defining vulnerability similar to that which criminalises sexual abuse of young people by

38 See ch 3.
39 Section 59 includes: adults in residential accommodation; adults receiving domiciliary and health care; adults detained in lawful custody; adults under probation supervision; adults receiving welfare or other services for their particular needs as defined in s 59(9); adults receiving payments for necessary community care services; and adults who require assistance with the conduct of their own affairs as defined in s 59(10).
40 Sexual Offences Act 2003, ss 5 to 15 and 45 to 51.
41 Sexual Offences Act 2003, ss 16 to 24.
42 Sexual Offences Act 2003, ss 30 to 44.
those charged with their care could be appropriate in the context of misconduct in public office. Positions of trust are defined in section 21 of the Sexual Offences Act 2003 by reference to situations where D might most able to able to unduly influence V. These include situations where: V is detained in an institution by virtue of a court order or an enactment; V is being supervised under a court order made in criminal proceedings; V is looked after in local authority accommodation; V is looked after in a hospital, clinic, care or children's home; V is attending an educational institution or receiving education and training service; V is being looked after in respect of family court proceedings. This definition of vulnerability is not dissimilar to that used under the Safeguarding Vulnerable Groups Act 2006, in relation to adults.

Consultation question 9
5.71 Should the category of vulnerable individuals be defined:

(1) in the same way as in the Safeguarding Vulnerable Groups Act 2006; or

(2) in some other, and if so, what way?

Particular duties concerned with the prevention of specified serious consequences
5.72 We have identified above some examples of particular duties concerned with the prevention of public harm (as defined with reference to specific types of serious consequence) that may arise in relation to those public office holders who either exercise powers of physical coercion or perform protective functions. The question of how to identify such duties for the purpose of a new offence deserves further discussion. We also need to examine the question of whether the duty should be limited to one not to cause particular types of serious consequences from occurring, or whether it should be framed more widely as a duty to prevent those consequences from occurring.

IDENTIFYING A PARTICULAR DUTY
5.73 The “neglect of duty” form of the current offence of misconduct in public office sometimes involves breach of a legally enforceable duty, whether imposed by statute or arising under the common law (such as a duty of care). For example, in AG’s Reference, Lord Justice Pill referred to the fact that police officers are subject to a common law duty of care in respect of those in their charge:

Clearly in the present case, the police officers owed a duty of care to a person in their custody. The moral basis of the offence is the protection of the public against the disregard by public officers of duties imposed upon them.43

5.74 However, the criminal offence is not limited to breaches of general common law duties or statutory duties, though we do not suggest that it extends to the breach of purely moral duties that are legally unenforceable. Cases prosecuted have concerned a variety of duties, arising in a number of different ways including:

(1) Oaths of office.\textsuperscript{44}
(2) Terms of appointment to a position.\textsuperscript{45}
(3) Contracts of employment.\textsuperscript{46}
(4) Contracts to provide goods or services.\textsuperscript{47}
(5) Regulatory standards, codes of conduct or ethics, where the individual is required to act in accordance with their provisions.\textsuperscript{48}

5.75 All of the above involve duties that are legally enforceable in some way: either through civil, regulatory or disciplinary processes. They are also duties that are expressed in writing. It is likely that the majority of cases prosecuted involve written duties because it is easier, by their nature, to prove their existence. Framing an offence to address specific, written sources of duties would however have some substantial disadvantages.

5.76 First, it would place a higher burden on those sectors that seek to comply with good practice by ensuring that individuals carrying out functions in that sector both have clearly defined duties and are informed of the same. In contrast, sectors which do not define the duties of their individual members and/or encourage compliance with those duties through awareness and training are less likely to be identified as subject to the offence.

5.77 Secondly, different positions, even if they involve the performance of similar functions or the provision of similar services, inevitably impose different duties on the individuals holding them and impose them in different ways. There are diverse types of appointment and contractual terms that may be used to define an individual’s duties. Likewise there is a vast array of regulatory standards and codes of conduct that can be applied to different positions. The variability of duties imposed in different positions may give rise to some fairly arbitrary results if a criminal offence is dependent on a list of such duties.

5.78 A clear example of a type of duty that would be likely to produce arbitrary results if relied upon to establish misconduct, is an official oath. Mr Joe Sweetinburgh, in

\textsuperscript{44} We are aware that prosecutions have been brought against police and judicial officers that refer to the respective oaths of office taken by the holders of those posts.

\textsuperscript{45} In the recent case of Ball (7 October 2015) CCC (unreported), the terms upon which a Bishop is appointed were held to include a duty of public trust to protect spiritual wellbeing.

\textsuperscript{46} We are aware that in investigations pursued by NOMS a critical factor often used to by investigators assess whether there has been a breach of duty for the purposes of misconduct in public office, is whether or not the staff member has a contract of employment that contains specific duties alleged to have been breached, which may amount to an abuse of public trust.

\textsuperscript{47} In other investigations carried out by NOMS into misconduct by staff within the prison estate, where there is no contract of employment, as the accused person is a not direct employee of NOMS, investigators will base their cases on the existence of similar duties contained within the contracts through which the individual supplies services to NOMS.

\textsuperscript{48} Most commonly, allegations of misconduct made against police officers refer not to any common law or statutory duty owed by the officer but to the officer’s duties under the Police Conduct Regulations 2012 (amended 2015) or College of Policing, \textit{Code of Ethics} (2014).
his response to the background paper, expressed the view that it may be sufficient, dealing with misconduct if public office by all judicial officers, to refer to the terms of the judicial oath (albeit he did not think that a breach of the judicial oath should result in criminal liability – see further below):

I will do right to all manner of people after the laws and usages of this Realm without fear or favour, affection or ill will.

5.79 However, not all holders of judicial office are formally sworn into office, and therefore not all swear this particular oath. Individual members of a variety of tribunals are appointed to their judicial position without being sworn in.49 Other than for judicial and police officers, oaths are not a common way of setting out the duties incumbent in a particular position and tend to be of historic and symbolic, rather than practical, significance.

5.80 If the existence of duties laid down in writing were to be an explicit, or implicit, condition of criminal liability, this might make it too easy to avoid liability.50 If a particular sector wished to avoid liability then it could seek to do so by simply not making any clear written statement of what duties its individual members are subject to, or by omitting certain duties from those statements.

5.81 In any event, some very important duties associated with a person’s functions are not explicitly set out in writing or in any one place. Rather, as mentioned above, they are common law duties evidenced by different sources. For example, there is no statutory provision in England and Wales imposing an explicit duty upon the police to protect the lives of intoxicated members of the public who may fall asleep outside, in very cold conditions.51 However, in the case of Driver52 a police officer was prosecuted for misconduct in public office for failing to take appropriate steps to check on the well-being of two men in just such a position.

5.82 Therefore, we consider that attempting a precise definition of every type of duty that might be the subject matter of an offence replacing misconduct in public office might be both unnecessary and unwise. In our view therefore the important identifying feature of the duty is that it is legally enforceable, rather than it taking any particular form. The question then is whether every breach of a legally enforceable duty concerned with the prevention of harm should be potentially subject to a new offence under Option 1, or whether the offence should be restricted further.

49 One such tribunal is the Police (Discipline) Appeals Tribunal. Reliance on the judicial oath, therefore, a way of identifying what duties a judicial officer is subject to would therefore be of limited assistance.

50 This point was made in relation to the reform of bribery by Professor Aldridge. See “Reforming Bribery: Law Commission consultation paper 185: (1) Bribery reform and the law – again” (2008) 9 Criminal Law Review 671.

51 It is however a duty imposed upon police in Scotland and Northern Ireland: Police (Northern Ireland) Act 2000, s 32; Police (Scotland) Act, s 17.

Consultation question 10

Should the offence be defined to include the breach of every legally enforceable duty concerned with the prevention of relevant types of harm, or should there be a more restricted definition of the nature of the duty involved?

PREVENTING OR NOT CAUSING?

We have so far considered breach of a duty concerned with the prevention of certain harms. An important question that arises is whether that is the best formulation, or whether the conduct element of the offence should be more limited, for example to:

1. a duty to prevent serious consequences; or
2. a duty not to cause such consequences.

(A duty to prevent would include a duty not to cause, as a person who has knowingly or recklessly caused serious consequences has certainly failed to prevent them.)

The category of person subject to the offence has already been defined as consisting of those public office holders who have a particular duty concerned with the prevention of harm. Such persons will also have duties not to cause harm and it would be logically conceivable to create an offence restricted to breach of these latter duties. However, we believe that it would be preferable in practical terms (as well as being neater) for the offence to consist of breach of the same duty as that which defines the category of potential offenders.

A duty to prevent serious consequences would be based on the premise that the aim of the offence is to maximise the prevention of harm. It would include both:

1. cases where a public office holder is under a duty to guard against the danger of harm to the public, or an individual (where that would amount to harm to the public interest); and
2. cases where a public office holder is under a duty to intervene in a situation, not of his or her making, where either the public or a relevant individual might be harmed.

In contrast, an offence based on a duty not to cause serious consequences would be defective, in that it would concentrate on acts rather than omissions. An offence based on a duty of not causing harm would cover three types of cases:

1. cases where the harm was actually caused: these would generally be covered by offences under the Offences Against the Person Act 1861, so an offence of misconduct would be unnecessary;
2. cases where the harm was intended but not caused: these would constitute an offence of attempt; and
cases where D was reckless as to the risk of harm, but no harm actually occurred: an offence covering these facts would be essentially an offence of endangerment rather than of breach of duty.

5.88 The breach of duty cases previously prosecuted using misconduct in public office, such as *Driver*\(^3\), *Dytham*\(^4\) and *AG’s Reference*\(^5\) all involved omissions and would not be caught by an offence based on a duty not to cause harm. This would suggest that, in order to meet the harms and wrongs arising, the offence should be framed in terms of harm prevention. Certainly, following the discussion in Chapter 3, there is a strong argument that a breach of duty can justify criminalisation when public office holders fail to take steps to prevent harm to individuals, even if a non-public office holder could not be considered criminally liable in the same circumstances.

5.89 We therefore conclude that the particular duty D should be subject to for the purposes of the offence should not be formulated as a duty not to cause specific consequences.

5.90 This leaves the choice between “duty to prevent” specific consequences and the wider formulation, “duty concerned with the prevention” of those consequences. Many positions involve duties to comply with explicit fixed instructions, such as to keep accurate records, turn off machinery at particular times and make sure that doors are locked or monitored. These duties exist for the purpose of preventing harm, but cannot be described simply as a “duty to prevent harm”. That is, it is not the responsibility of the person in question to assess the risk of harm and decide on the best way to prevent it. The duty is limited to abiding by the instructions, and must be performed whether there is any actual risk of harm or not. Nevertheless, if serious consequences are in fact risked, and D is aware of that risk, we consider that breach of this kind of duty should fall within the offence just as much as breach of a broader duty of care.

5.91 We therefore conclude that the offence should consist of the breach of “duties concerned with the prevention of harm” rather than of “duties to prevent harm”.

**Provisional proposal 11**

5.92 The offence should be defined as consisting of breach of a particular duty concerned with the prevention of specified harms.

*Defining public office holders with a particular duty concerned with the prevention of harm within a statutory provision*

5.93 The final question that now arises is: how can the identification of those individuals be framed in a statutory definition for the purposes of a new criminal offence?


5.94 As with the concept of public office, discussed in Chapter 4, we consider that there are three possible ways of doing this:

(1) By way of a statutory test specifying that the persons subject to the offence must either:

   (a) exercise powers of physical coercion; or

   (b) perform functions with a protective purpose.

This wide approach to definition would mean leaving the final question of who is subject to the offence to be determined by the court on a case by case basis.

(2) By way of a statutory provision referring to a list of relevant powers and functions fulfilling these conditions. This narrower approach would still leave the final question of who is subject to the offence to be determined by the court on a case by case basis, but the court’s decision would be made by reference to the list of defining functions.

(3) By way of a statutory provision referring to a fixed list of positions. This closed approach would leave no discretion to the courts.

5.95 Also as with the definition of public office, two compromise solutions are possible:

(1) There could be a general statutory test as in possibility (1), supplemented by a list of powers, functions or positions given by way of example.

(2) The Secretary of State could have the power to add to the list by order, subject to the affirmative parliamentary procedure.56

5.96 We explained above that there are various advantages and disadvantages to the various options. The use of a statutory test would necessarily leave the greatest degree of discretion to the court, and therefore the greatest degree of uncertainty. The use of a statutory list would create a much clearer, but much more rigid, definition of who the offence would apply to, making it the least flexible option, particularly where the list is of specific positions rather than indicative powers or functions.

5.97 One other point can be made here. It would not necessarily be the case that both types of public office holder subject to the offence under this option (those exercising powers of physical coercion and those performing functions with a protective purpose) must be identified using the same method. For example:

(1) As powers of physical coercion will generally be granted by statute (the police also hold some residual common law powers of arrest and detention)57 then it may be unnecessary to define the pool of people exercising such powers any further, as those individuals holding such powers can be relatively easily identified.

56 As explained in ch 4.

57 Every police constable and citizen has the common law right to arrest an individual for breach of the peace, *Albert v Lavin* [1982] UKHL; [1982] AC 546.
(2) Conversely, as functions with the purpose of protecting vulnerable individuals from harm is a much wider concept, involving the consideration of more than one issue (which functions qualify? what is meant by vulnerable?) then it may be necessary to define the pool of people performing such functions much more closely. A list of qualifying functions could, for example, be created for this purpose.

Consultation questions 12, 13, 14 and 15

5.98 Should the definition of the category of public office holders with powers of physical coercion take the form of:

(1) a general definition;

(2) a definition of that type of public office as any position involving one or more of the functions contained in a list;

(3) a list of positions constituting that type of public office; or

(4) a general definition, supplemented by a non-exhaustive list of functions or positions given by way of example?

5.99 If the definition of that category (public office holders with powers of physical coercion) includes a list of functions or positions, should there be power to add to the list by order?

5.100 Should the definition of the category of public office holders with a duty of protection take the form of:

(1) a general definition;

(2) a definition of that type of public office as any position involving one or more of the functions contained in a list;

(3) a list of positions constituting that type of public office; or

(4) a general definition, supplemented by a non-exhaustive list of functions or positions given by way of example?

5.101 If the definition of that category (of public office holders with a duty of protection) includes a list of functions or positions, should there be power to add to the list by order?

Conclusions on public office holders under a particular duty concerned with the prevention of harm

5.102 To summarise our discussions above, we conclude that:

(1) One way of creating an offence to address “public harm”, in terms of specific serious consequences, would be to restrict its application to public office holders who, by virtue of the position they hold, are under particular duties concerned with the prevention of those types of consequence.
(2) Some types of position always involve a duty concerned with the prevention of one of the above listed types of consequence. These types of public office holder are those who:

(a) exercise powers of arrest or detention or powers to otherwise deprive an individual of his or her liberty (powers of physical coercion); and/or

(b) perform functions with the purpose of protecting vulnerable individuals from serious harm (as specified) (a duty of protection).

Collectively we refer to these individuals as office holders with a particular duty concerned with the prevention of harm.

(3) The category of individuals capable of committing the new offence could be defined in any one of the following three ways:

(a) by a provision stating that the person in question must occupy a position involving powers of physical coercion or duties of protection (and this test may or may not be supplemented by an illustrative list of examples);

(b) by a provision stating that the person in question must occupy a position involving any one or more of the powers and functions set out in a statutory list; or

(c) by a provision stating that the person in question must occupy one of the positions set out in a statutory list.

(4) The types of public office holder subject to the offence (those with powers of physical coercion and those with duties of protection) could be identified using different methods. For example, those exercising powers of physical coercion could be identified by a simple statutory definition while those performing protective functions could be identified by a list of functions or positions.

The occasion for performing the duty

5.103 The duties with which we are here dealing are duties concerned with the prevention of certain serious harms. In general terms, the duty therefore arises when the risk of those harms is present. However, the existence of the risk of harm forms part of the consequence element of the offence. Including it in the circumstance element, as a condition of the existence of the duty breached, would result in duplication.

5.104 However, the risk of harm is not in itself sufficient to impose a duty to act. Depending on the terms of D’s employment, there may be other conditions. For example, D must be on duty at the time,58 and the particular harm must fall within D’s area of responsibility. Also, as explained above, many duties consist not of general duties to take care to avert harm or danger but rather of fixed

58 This is not true of all employments. A doctor or a police officer may have a duty to save life no matter when the incident occurs.
instructions. These duties fall within the scope of the offence, as they exist for the purpose of preventing harm; but they are not simply “duties to prevent harm”. It may therefore be necessary in some circumstances to prove breach of these specific instructions, rather than simply failure to avert the risk of harm.

Fault as to circumstances

5.105 In the background paper we concluded that the current offence requires recklessness both as to the fact of being in public office and of the existence of circumstances that meant that D’s conduct would result in a breach of duty.

5.106 Therefore, when drafting a new offence to replace the common law offence there are two aspects of the fault element as to circumstances that we need to examine:

(1) What should D’s mental state be in respect of the nature of his or her position?

(2) What should D’s mental state be in respect of circumstances that indicate the occasion may have arisen for D’s particular duty not to cause public harm (in the sense of one of the four consequences identified previously) to be exercised?

5.107 In relation to both questions, however, there is a degree of common ground. We discuss this before proceeding to a brief consideration of the questions separately.

Knowledge or awareness?

5.108 There may be a number of mental states that could apply in respect of whether D was aware of circumstances that made his or her act or omission sufficient to establish an offence.

(1) It could be a requirement that D must know that such circumstances existed. This would be the highest level of fault that could be imposed.

(2) D could be required to be aware that such circumstances might exist. Awareness in this sense is an element within subjective recklessness.

(3) The offence could impose liability even if D is unaware that such circumstances might exist. This would be the case if the fault element were one of objective recklessness or negligence, or if the offence were one of strict liability.

5.109 We believe that, in general, the fault requirement for any new offence should not be set lower than either the current common law offence of misconduct in public office, or the tort. (We discuss this question in more detail below, when considering fault as to consequences.) It would seem therefore that our choice as to the fault requirement for the circumstance element of a new offence is between (1) and (2).

59 Para 5.90 above.
In our view, there are a number of difficulties in including a requirement of knowledge within a new offence. Not least of these is that the mischief the offence would seek to address includes reckless (wilful) neglect of a duty of public trust, not just intentional breaches of duty. Lord Justice Pill, in AG’s Reference emphasised the need for the criminal law to address not just acts and omissions committed with the knowledge that a duty existed that would be breached by the act or omission in question, but also a public office holder’s “disregard” of the need to act in accordance with those duties.60

Another difficulty would be that it may be difficult to prove in particular cases that D had actual knowledge, as opposed to general awareness, of the circumstances that made his or her act or omission sufficient to establish an offence. Again, the case of Driver61 is a good example of this. The officer did not himself know that the two men he was required to assist were close to death or suffering serious injury, but that was only because he did not take the appropriate steps to establish their condition. He was nonetheless aware of the risk that people in their situation (intoxicated, not fully conscious, lying on the street in winter and wearing inadequate clothing for the weather) would be in this kind of danger.

The culpability of the officer rested not in his knowledge of the circumstances surrounding his breach of duty, but in his failure to act having appreciated that risk. We would therefore suggest that limiting the mental state that must be proven in respect of the circumstances surrounding D’s breach of duty to knowledge of those circumstances would result in conduct that justifies criminalisation not being caught by a new offence. We would propose instead that the fault element in relation to the circumstances of a proposed new offence should be satisfied by either knowledge that D is subject to a particular duty or awareness that he or she might be so subject. A requirement of awareness captures both those states of mind.

Awareness of the circumstances that determine public office

It may be considered self-evident that an individual who neither knew nor was even aware of a risk that he or she might be in public office should not be held liable for breaches of duty that would otherwise not amount to a criminal offence. To hold otherwise would be to make an individual liable for a non-culpable act or omission.

However, there must be a distinction made between an absence of culpability and ignorance of the law. That is, the individual need not know whether, as a matter of law, his or her position constitutes a public office. But he or she must be aware of:

(1) those factual circumstances which make the position a public office; and
(2) those factual circumstances that bring the position into the category of positions involving powers of coercion or functions of protection.

This test may be simpler to apply if the definitions of relevant public offices take the form of a list: it is comparatively easy to establish whether D knew that he or she occupied one of the listed positions.

5.115 This part of the circumstance element can be most easily expressed by saying that there should be no requirement on the prosecution, under a new offence, to prove that D knew that his or her position was, in law, a public office involving the exercise of powers of physical coercion or a duty of protection. It is sufficient for the prosecution to establish that D was aware of the factual circumstances that made it one.

**Fault as to the circumstances surrounding the breach of duty**

5.116 The offence is defined as breach of a particular duty concerned with the prevention of certain types of harm. D will be aware that the occasion for performing that duty has arisen if he or she is aware that:

1. there is a risk of one or more of those types of harm occurring; and
2. the situation, and its attendant risk, fall within D’s area of responsibility on that occasion.

5.117 The first of these concerns the potential consequences of D’s conduct rather than the circumstances attending it. It therefore forms part of the consequence element of the proposed offence, and is discussed below under that head. Accordingly, we propose that awareness of risk should be a condition of liability for the new offence. This should be the case even if the duty is a fixed one and does not itself depend on the existence of the risk or D’s awareness of it.

5.118 The second simply means that D must be aware of the content of his or her duties, including what particular harms, in what particular circumstances, those duties relate to. Once more, this does not mean awareness that these duties are binding on D as a matter of law. Rather, it means awareness of any facts relevant to the content of those duties: for example, a contract of employment, a staff handbook, a code of practice or professional ethics or the specific instructions in force at the time.

**Provisional proposals 16 and 17**

5.119 There should be no requirement on the prosecution to prove that D knew that his or her position was, in law, a public office involving the exercise of powers of physical coercion or a duty of protection. It is sufficient for the prosecution to establish that D was aware of the factual circumstances that made it one.

5.120 There should be a requirement that D is aware of the circumstances relevant to the content of any particular duties of his or her office concerned with the prevention of harm. For example, what types of harm the duties require D to prevent and in what circumstances.

**THE CONSEQUENCE ELEMENT**

5.121 Even if a public office holder can be proven to have breached a “particular duty” of his or her position, not every breach of such a duty will justify criminalisation.
We discussed, in Chapter 3 above, the fact that criminal law is the most severe legal sanction available and should therefore usually be reserved for the most harmful forms of wrongdoing.

5.122 As highlighted in Chapter 3, misconduct in public office is traditionally considered to be a “conduct crime” rather than a “result crime”. However, we consider that there is at least one primary, significant harm that a new offence addressing breaches of duty by public office holders should seek to address: causing or risking harm to the public (or individuals where that also amounts to harm to the public interest). A consequence element is therefore required, in our view, to reflect the need for the offence to be harm, as well as conduct, focused.

5.123 We concluded in Chapter 3 that “public harm” was both too remote and uncertain to form a definitional element of an offence. Therefore, as it is almost impossible to base an offence on the actual occurrence of “public harm” in every case we will need to be much more specific as to the types of consequence that could occur and cause that remote form of harm.

5.124 On the one hand we recognise that introducing a consequence element to a new offence addressing breach of duty would mean that the new offence would differ significantly from the current law. Misconduct in public office has, historically, been primarily concerned with the accountability of the defendant for his or her misbehaviour, whether or not specific consequences result or are likely to result.

5.125 On the other hand, the added certainty that this approach could provide may be extremely welcome: a requirement of consequence, or risk of consequence, substantially narrows the type of breach of duty that could be prosecuted. Additionally, the concept of serious consequences is not completely unknown to the misconduct offence.

5.126 We described in detail in the background paper how the occurrence and/or the risk of serious consequences is a matter that can make an instance of misconduct in public office more serious. We also discussed in Chapter 3 how the Court of Appeal in Chapman62 may have inadvertently imported a “hidden” consequence element into the offence. It also appears that, in practice, prosecutorial decision making has become more “harm” focused following Chapman.63

5.127 The introduction of a consequence element into misconduct in public office requires three matters to be addressed:

(1) Should the consequence element include both actual and potential harm?

(2) What level of consequence should the element address?

(3) What types of consequence should the element address?


Actual or potential consequences

5.128 There would be two possible approaches we could adopt to add a consequence element to a new offence dealing with breaches of duty:

(1) to focus on actual consequences caused by the breach of duty; or
(2) to include consideration of both actual and potential consequences.

5.129 Extending a new criminal offence to include cases where the risk of specified harmful consequences arises would (as we noted above) amount to the creation of an “endangerment” type offence. In our recent report on reforming the law of offences against the person we considered, briefly, the case for creating a general endangerment offence covering instances of recklessly causing danger of injury. We concluded in that report that an endangerment offence of general application was unnecessary from a practical point of view and would “expand the reach of the criminal law into people’s lives to an unacceptable degree”. We used the example of disease transmission as a test case in reaching that conclusion.

5.130 We did nonetheless consider that there are circumstances where it is justified to create specific endangerment offences. First, in relation to intrinsically dangerous activities which D undertakes through choice. Secondly, where the danger is of an exceptionally high degree, and thirdly, if the potential victim is particularly vulnerable.

5.131 In the context of replacing misconduct in public office with an offence addressing breaches of duty we do not recommend including a test based solely on the actual results of the breach. We are instead of the opinion that an offence under Option 1 can justifiably include both breaches of duty that cause actual harmful consequences and those that give rise to a risk of consequences. There are a number of reasons for this.

5.132 First, the types of breaches of duty we identified in Chapter 3 as justifying criminalisation are not confined to cases where actual consequences result. In some they do, for example AG’s Reference and the cases of PC Driver, PC Duffy and PCSO Passmore but in others they do not. These cases include those like Giff where police officers failed to answer emergency and urgent

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64 All practical instances of dangerous behaviour deserving criminalisation appear to already be covered by existing statutory offences addressing discrete types of risk. See Reform of Offences Against the Person (2015) Law Com No 361 at 7.28.


66 Reform of Offences Against the Person (2015) Law Com No 361 at 7.34.


70 www.bbc.co.uk/news/uk-england-london-21832148 (last visited 21 July 2016).
calls whilst on duty, and those like Coleman-Farrow\textsuperscript{71} and Smith\textsuperscript{72} where police and prison officers failed to investigate serious crimes reported to them. Consequently, to limit a new offence to actual consequences would fail to address the harms and wrongs we identify in Chapter 3 as justifying criminalisation.

5.133 Secondly, the occurrence, or risk, of specific types of serious consequence is not to be considered in isolation. The purpose of including this element within the proposed new offence is to show that the more remote “public harm”, which justifies the offence, has been caused. For the reasons discussed in Chapter 3 we consider that both the actual and potential occurrence of particular serious consequences can amount to “public harm” in this remote sense.

5.134 Thirdly, we are of the view that our proposed restriction on the offence, namely the limited category of individuals who can commit it, means that it is more justifiable to include within it “risks” of harmful consequences. We argued previously that the primary rationale for restricting the offence to those with either coercive powers or a duty of protection is that breaches of a duty committed by those people are the most likely to cause the types of serious consequence identified, and therefore public harm. It is arguable that the offence will only apply where either the danger is of an exceptionally high degree or if the potential victim is particularly vulnerable – two possible justifications we gave in our report on offences against the person for creating a specific endangerment type offence.

5.135 In conclusion we think that the preferable approach here is to focus on the potential results of the breach of duty: that is, the breach is serious if it creates a risk of serious consequences. On this approach, the actual occurrence of such consequences would be relevant only as showing that the risk must have existed.

Provisional proposal 18

5.136 The offence should include both actual and potential consequences.

Types of consequence

5.137 Result crimes, as opposed to conduct crimes, normally specify a particular result, such as physical injury or damage to property, as the harm at the heart of the offence: it is not simply a test of the seriousness of D’s conduct. An offence requiring the occurrence of “harm”, without stating what that “harm” consists of, is not satisfactory as a result crime and would suffer from the same problems of definition as the seriousness threshold does in the existing offence of misconduct in public office.\textsuperscript{73}

5.138 For the purposes of these discussions we have already highlighted the most likely potential harms to be covered by Option 1, in our discussion of the

\textsuperscript{71} https://www.theguardian.com/uk/2012/sep/12/met-police-officer-rape-cases (last visited 21 July 2016).


\textsuperscript{73} See ch 2.
circumstance element. These are harms we identified from analysis of recent cases prosecuted using misconduct in public office.

5.139 As discussed in Chapter 3 there is some ambiguity as to whether the current offence, when it applies to our Category 4 conduct – breach of duty causing or risking serious consequences – is limited to harms to individuals, or includes forms of public harm, specifically, the erosion of public confidence in essential “public goods” like public safety and the administration of justice.74

5.140 In addition, during the consultation phase stakeholders have suggested additional harms for our consideration, albeit that we have not found any recent cases prosecuted using these types of harm.

5.141 Therefore we consider that harms to individuals that have formed the basis for recent prosecutions are core harms, which should be covered by a new offence addressing breach of duty, and we discuss these first in what follows below. We will then discuss and ask consultees for their views as to whether certain other types of harm involved in recent prosecutions should be covered by the offence, before discussing and asking consultees for their views on types of harm not recently prosecuted.

Harms to individuals – recent prosecutions

DEATH AND SERIOUS INJURY

5.142 As noted, usually in the “neglect” type of misconduct cases, the serious consequences involved are concerned with the death of or danger to an individual. AG’s Reference75 is one example. Others are Dytham,76 PC Duffy and PCSO Passmore77 and Driver.78

5.143 Considering death or risk of death as a serious consequence that can amount to a public harm is, we think, uncontroversial. The loss of human life is generally regarded as the most serious type of harm possible. We would therefore consider it axiomatic to say that death, or risk of death, should be a consequence protected against by any new offence that seeks to prevent public harm.

5.144 However, the mischief that a new proposed offence is required to address cannot be limited to death and death alone, or even the danger of death. We can envisage, with relative ease, circumstances that may arise that where the consequence caused or risked would fall short of death but would nevertheless deserve prosecution. It would be incongruous therefore to suggest that a new offence should be limited to risk of death. For example, it would seem wrong if PC Driver could have only been prosecuted for failing to assist the victim who died as a result of his breach of duty, and not the victim who suffered serious

74 See ch 3.
physical injury. Liability that is limited solely to a consequence of death may be criticised as being arbitrary.\textsuperscript{79}

5.145 The fact that one victim may die in circumstances where another survives will often be the result of a number of factors outside of D’s control, and those factors do not lessen D’s culpability for his or her actions in any way. We can give other examples of circumstances where either death or serious injury could arise and where D would be equally culpable.

\textbf{Example 3} D, an immigration detention officer, is aware that a detainee, A, has threatened to harm him or herself and has been designated high risk, meaning that A should be checked every 15 minutes. D chooses not to make the checks and A attempts suicide, either succeeding or causing him or herself serious injury.

\textbf{Example 4} D, a prison officer, is aware that prisoners B and C have a hostile relationship and have expressed intentions to cause each other injury. D allocates B and C to the same cell with the result that B either kills or causes serious injury to C.

\textbf{Example 5} D, a prison governor releases E, a prisoner, on a home detention curfew. E is a danger to his or her ex-partner, F. D knows this, but nonetheless approves the release because D has a personal connection to E’s family. On release E kills or seriously injures F.

5.146 There is another good reason for considering that risk of serious injury should be included within an offence replacing misconduct in public office, in addition to the risk of death. This is because, as explained in Chapter 3, where death occurs and there was an obvious risk that it might, then it would be possible to prosecute gross negligence manslaughter. Where only serious injury occurs there is usually no alternative offence available.

5.147 We would define serious injury here in the same way that we defined it in our report on Reform of Offences against the Person: as really serious injury. For the sake of completeness we make clear that in speaking of serious injury we would include within this injuries of both the physical and mental kind. As we explained in our recent report on reforming the law of offences against the person, the criminal law recognises psychiatric injury as a form of bodily harm, for the purposes of offences against the person, but distinguishes this from psychological harm and “mere emotions” such as fear, distress or panic.\textsuperscript{80} An example involving psychiatric harm can also be given.

\textsuperscript{79} J Horder (ed), \textit{Ashworth’s Principles of Criminal Law} (4th ed 2016).

Example 6  D, a local authority social worker working with a residential care home for under 18s becomes aware that J, a 16 year old resident, is regularly leaving the care home to be sexually abused by a number of adults. D takes no action to stop J leaving and J suffers serious psychiatric harm as a result of the abuse.81

FALSE IMPRISONMENT

5.148 We also consider that a new offence addressing public harm would encompass harm caused to individuals by way of false imprisonment or unlawful deprivation of liberty (as defined by the criminal, rather than the civil law). We discussed in Chapter 3 the case of Inspector Hutchings,82 who subjected young men to unauthorised strip searches when they attended the police station.

5.149 It might be difficult, in circumstances where no physical harm occurred or sexual activity took place, to prove that in that case the young men were placed at risk of any sort of physical or mental injury. However, as we argued in our report on the law of kidnapping, unlawful deprivation of liberty is a harm in and of itself, and a serious one at that.83 Where Inspector Hutchings was detaining his victims for periods when he was not authorised to do so (for example one of the victims had not been arrested and detained, but had attended the police station to take part in an identity parade) they could be said to have been falsely imprisoned.

5.150 We would suggest that false imprisonment would be another serious consequence that could evidence public harm for the purposes of a new offence.

Provisional proposal 19

5.151 The risk of the following two types of consequence:

(1) death and serious injury (including both physical and psychiatric harm); and

(2) false imprisonment;

should be regarded as public harm for the purposes of a new offence replacing misconduct in public office.

Other harms – recent prosecutions

SERIOUS HARM TO PUBLIC ORDER AND SAFETY

5.152 Another form of harm that we have identified as arising from historic and recent prosecutions is that of harm, or risk of harm, to public order and safety. For example, Giff84 was an SO6 officer with responsibility for security at 10 Downing Street. He failed to respond to a number of emergency response calls because

81 We consider that "sexual harm" would be included within the notion of either physical or mental injury.
84 www.bbc.co.uk/news/uk-england-london-21832148 (last visited 21 July 2016).
he had left his post to have sex with a partner. When sentencing Giff, the court highlighted that his conduct constituted a serious risk to public order and safety.

You are there as part of a unit in a designated area, on call ready to respond immediately to an incident of extreme urgency. That is your job.

5.153 Additionally, a significant number of much earlier cases from the 18th and 19th centuries concerned the failure by justices of the peace to prevent crime and disorder and safeguard the public.\(^85\) In a modern context comparable examples, provided to us in the consultation meeting we held with academic experts, related to officials who took improper or no action in relation to instances of public disorder. General examples given included situations where public demonstrations could be allowed to develop into riots or where large crowds at public events might be deliberately, inappropriately managed.\(^86\)

5.154 Another example that was suggested to us in our consultation meeting with academics was that of the American “Fort Lee lane” scandal where workers at the Port Authority of New York and New Jersey shut down two of three access lanes from Fort Lee to the toll plaza of the George Washington Bridge for several days starting on 9 September 2013.\(^87\)

5.155 They allegedly did so acting on orders from high ranking officials of the New Jersey side of the agency, who were in a political dispute with the mayor of Fort Lee. The backup of cars on one of the busiest weeks of the year (it included the start of the school year, a religious holiday and the anniversary of the 2001 terrorist attack on the World Trade Centre) clogged the streets of Fort Lee blocking emergency vehicles as well as commuters and school buses. Lower-level New Jersey officials were instructed not to tell Fort Lee police officers or public officials about the closure before it happened. Concerns were raised about public safety and the lanes were reopened after four days, after which it was apparent that there was no genuine reason for the closure (originally scheduled for one month) but that the decision appeared to be motivated by hostility between the two districts.

5.156 Again, we consider a risk of serious harm to public order or safety to be one of consequences that could result in the type of public harm that a new offence would seek to guard against. However, we also note that a risk to public order and safety will also involve a risk of some other kind of harm, including physical injury.

\(^85\) *Pitts & Young* (1758) 1 Burr 556, 97 ER 447. These cases usually concerned the justices’ failures to put down riots by way of enlisting the help of the local militia.

\(^86\) No doubt the recent inquest verdicts in respect of the Hillsborough tragedy were present in consultees’ minds at the time. https://www.theguardian.com/football/2016/apr/26/hillsborough-families-27-year-struggle-for-truth-vindicated (last visited 21 July 2016). We consider that the new Option 1 offence we propose could and should include at least some of the types of alleged conduct involved in that case. Of course, that offence would only apply to future cases of breach of duty. It would not have retrospective effect.

\(^87\) We again thank Professor Stuart Green for this interesting example.
Consultation question 20

Should the risk of serious harm to public order and safety should be regarded as public harm for the purposes of the offence?

SERIOUS HARM TO THE ADMINISTRATION OF JUSTICE

One other form of potential harm common to some misconduct in public office prosecutions is that of damage caused to the administration of justice. It has also been raised as a concern in some of the consultation responses submitted.

For example, a number of consultees made reference to the importance of holding members of the judiciary and other public office holders who administer justice, to account. The responses expressed concern that any neglect of a judicial duty could lead to individual unjust decisions, legal processes being unfairly administered and a "culture" of reduced integrity. Consultees highlighted the importance of public confidence in the decisions of the judiciary and the operation of the justice system. Although consultees did not necessarily consider that members of the judiciary should face criminal sanction for breaches of judicial duty.

One of the same consultees who highlighted concern over judicial officers neglecting their oaths also considered the imposition of a criminal sanction for judicial misconduct to be generally undesirable.

I also question why it has to be a Criminal Offence, which may be disproportionate to curing the immediate harm by way of compensation to the affected parties and dismissal from office.88

We can envisage that some cases of wrongdoing on the part of public office holders involved in the administration of justice may also result in one of the more direct forms of harm identified above: death or serious injury; false imprisonment or harm to public order and safety. For example, a police officer who arrests a suspect for oppressive reasons, or a prison governor who improperly authorises the day release of a dangerous individual. However, not all of the cases prosecuted as misconduct in public office involve these types of harm. Some involve a less direct harm: to public confidence in the administration of justice.

A relatively recent example of a case involving this type of consequence is that of Elaine Hemblade. Mrs Hemblade was a jury officer tasked with the organisation of jury selection. She created false juror reference numbers for two of her neighbours and her son, who each attended court purporting to be answering a jury summons.89 Ms Hemblade’s neighbours were selected to sit on a jury panel and her son was also selected but discharged during the trial. One consequence of her actions was that a convicted defendant sought to rely on the unlawfulness

88  Mr J Sweetinburgh.
89   http://www.telegraph.co.uk/news/uknews/law-and-order/5569106/Court-official-fixed-jury-selection.html (last visited 21 July 2016). Under the Juries Act 1974, s 6 the court has the power, where if it appears to the court that a jury required to try an issue before it will be incomplete, to summon any person within the vicinity of the court to sit on the jury and make its numbers up to the number needed, without written notice. However in the case of Ms Hemblade there was a sufficient number of jurors to hear the cases being tried without the addition of her neighbours and son.
of the jury selection process to seek leave from the Court of Appeal to appeal his conviction, undermining the integrity of the jury process.

5.163 For the purposes of considering whether harm to the administration of justice might be a sufficient form of harm to include within a new offence we would make the following observations:

(1) Where misconduct that harms the administration of justice does not amount to an alternative offence it would usually amount to a form of wrongdoing based on a potential, rather than actual conflict of interest. We have discussed in Chapter 3 why we consider that the harms produced by potential conflicts of interest do not themselves generally justify criminal, as opposed to disciplinary or civil sanction.

(2) The cases prosecuted also emphasise the importance of making a clear distinction between those judicial officers who intentionally or recklessly breach a duty of their position and thereby undermine the correct administration of justice, and those who make decisions that might prove unpopular or arrive at incorrect decisions by reason of an error or mistake.

For good reason, scenarios involving office holders who make either unpopular decisions or erroneous decisions in good faith have never been able to be prosecuted as misconduct in public office.90 To do otherwise would be to leave judicial decisions subject to unwarranted interference from those who disagreed with them on subjective (including political) grounds and thereby undermine the independence of the judiciary.

(3) In addition to the types of conduct described above, however, there are a number of cases involving failures to carry out duties that cause a risk of harm to the administration of justice. For example, police officers who fail to carry out criminal investigations91 and court enforcement officers who fail to execute court orders.92

Conclusion

5.164 We consider that a risk of harm to the administration of justice could evidence a risk of public harm for the purposes of any new offence but we would adopt the distinction already made by the courts, between acts that intentionally or recklessly breach a duty of D’s position and those that are simply negligent. We discuss the question of the fault element for the circumstance and conduct separately in this chapter.


91 DC Coleman-Farrow who pleaded guilty to 13 counts of misconduct in public office as a result of failing to investigate 10 allegations of rape and 3 of sexual assault: www.bbc.co.uk/news/uk-england-london-19567298 (last visited 21 July 2016).

92 The earliest example of this is Wyatt (1705) 11 Mod Rep 53, 88 ER 880. Wyatt had been ordered by a Justice of the Peace’s warrant to levy a fine against an individual penalised for deer stealing. Wyatt failed to do this and was therefore fined himself.
Consultation question 21

5.165 Should the risk of serious harm to the administration of justice be regarded as a consequence that would be likely to cause a risk of public harm occurring for the purposes of the offence?

Other harms – no recent prosecutions

DAMAGE TO PROPERTY

5.166 This form of harm was suggested to us by David Perry QC, on the basis that, where the law seeks to identify potential consequences arising from criminal conduct it usually does so with reference first to physical harms and thereafter to non-physical ones. Damage to property is a clearly identifiable physical harm and therefore logic would suggest that it should be included as a harm to be protected against by our new offence.

5.167 Even so, we would respectfully suggest that this is not a form of harm that would need to be included within our proposal. There are two reasons for our position:

1. First, we have seen no examples in our research of cases brought where harm to property was an actual or potential consequence arising from the misconduct of a public officer. David Perry QC gave an example of a local authority planning officer allowing the unlawful demolition of a building, but nothing comparable to this has been prosecuted as far as we are aware.

2. In any event intentional and reckless instances of unlawful destruction or damage of property will always amount to another offence.

   a. Section 1(1) of the Criminal Damage Act 1971 prohibits the intentional or reckless destruction or damage of property without lawful excuse. A public office holder who acts in a way that is intended to assist or encourage another person intentionally or recklessly causing unlawful damage could well be prosecuted under section 47 of the Serious Crime Act 2007.

   b. Where the damage to property is intended to result in a financial gain to D, or a loss to another, and D’s actions have abused a position of trust in which D is expected to safeguard the financial interests of another, then D will be liable to a prosecution for fraud. Section 4 of the Fraud Act 2006 is wide enough to apply to anyone in a position of employment, or anyone who employs others, not just public office holders.

3. Negligent actions leading to the destruction of property could meanwhile be redressed through civil law processes by way of an award of compensation.

5.168 We should also note that we see no special case for including a narrower form of harm relating to just “public” property within a new offence. Such damage could still be prosecuted as criminal damage or under section 4 of the Fraud Act 2006.
Consultation question 22

5.169 Should the risk of serious harm to property be regarded as a consequence that would be likely to cause a risk of public harm occurring for the purposes of the offence?

ECONOMIC LOSS

5.170 This was suggested as a possible type of harm that a new offence should prevent against by both an academic and a practitioner during our consultation meetings. It could take one of two forms: loss to a private individual or loss to public funds: although the sorts of cases prosecuted as misconduct in public office thus far have only concerned the latter.

5.171 One example of a misconduct in public office prosecution involving economic loss to public funds is Bowden. The defendant was a local authority employee who arranged for repairs to take place on his partner’s home, although he had no power to authorise that expenditure. Another example is the case of W, where a police officer used a credit card, provided to him in relation to work expenses, for personal expenditure.

5.172 Following what we said above in respect of damage to property, we cannot envisage a situation arising where an existing offence such as fraud could not encompass culpable conduct resulting in economic loss. Specifically, the common law offences of conspiracy to defraud and cheating the public revenue are of wide application. Together with the wide nature of the statutory fraud offences (specifically section 4 of the Fraud Act 2006), they provide extensive protection against economic loss caused by dishonest acts of public office holders. Both Bowden and W, for example, could have been prosecuted under the Fraud Act 2006.

5.173 We are not aware of any prosecutions brought using misconduct in public office where economic loss has been result and where the public office holder has been alleged to have acted in any way other than dishonestly.

Consultation question 23

5.174 Should the risk of serious economic loss be regarded as a consequence that would be likely to cause a risk of public harm occurring for the purposes of the offence?

Conclusion on types of consequence

5.175 We identify above four types of serious consequence, identified from previous prosecutions for misconduct in public office, the occurrence or risk of which would, in our view, indicate a likelihood of public harm arising. We propose that, at the least, those that involve harm to individuals should be included within the consequence element of a new offence proposed under Option 1. We ask for views as to whether the other types of harm identified should also be included.

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93 [1996] 1 WLR 98.
95 The prosecution of W for misconduct rather than fraud has been repeatedly criticised by commentators.
We also identify two further forms of consequence that we do not think need to be protected against by any new offence replacing misconduct in public office. In our view there are sufficient alternative offences available to address damage to property and economic loss (including loss to the public purse) in the contexts that they arise where they might be prosecuted using misconduct in public office.

The types of consequence identified above of course do not represent the totality of different possible types of harm that could be caused by a public office holder’s breach of duty. However the remaining types of harm are much more speculative, given the lack of prosecutions concerning such matters and the more remote forms of harm (for example harm to national security). We therefore consider it appropriate to only consider in detail those consequences referred to above.

**Level of consequence**

Even following the introduction of a consequence element within a new offence, there will be a wide range of breaches of duty caught within it. Those breaches can vary in seriousness. It is our view that a new offence should not include every possible level of consequence within it. Specifically, only serious consequences (or the risk of them) can justify criminal prosecution in this context.

Our reason for this conclusion is that the specific types of consequence, listed within the proposed consequence element of the offence, are included only for the purpose of evidencing the wider “public harm” that the offence seeks to address. As we state in Chapter 3, public harm almost certainly constitutes more than harm to particular individuals. It constitutes harm that affects the public: harm to individuals is only sufficient where its occurrence harms the public interest. That harm itself might take various forms: harm to public confidence in governing institutions was the main form we identified in Chapter 3. In turn, we conclude that public harm can only confidently be evidenced by specific consequences, such as physical injury, where those consequences are serious in nature.

Of course some cases at the lower end of the scale would already be excluded from the scope of a new offence by:

1. the limitation of the offence to breaches of specific duties to prevent serious consequences; and/or
2. the fault requirement in relation to the circumstance element of the offence (we argue, above, that the fault element should require at least awareness of a potential breach of duty).

However, we consider that there are cases which certainly concern breaches of specific duties, and certainly meet the test of intention or recklessness, but are still too unimportant to justify criminal processes.

**Example 7**

D is a public office holder with a duty to prevent harm to children in his or her care. While D is looking after child M, D breaches his or her duty to protect M from harm. D chooses to go for a coffee rather than supervise M playing in the park and M falls and grazes his or her knee.
Liability should only be imposed where a risk of serious consequence arises.

Fault as to consequences

There are three possible ways of dealing with the issue of a defendant’s mental state as to the consequence element of a new offence.

1. We could require proof of negligence in relation to consequences. This approach would criminalise breaches of duty which result in serious consequences or a risk of the same, as long as it can be shown that a reasonable person in D’s position would have been aware that serious consequences, or a risk of them, could occur.

2. We could require proof of recklessness in relation to consequences. This would limit liability to only those cases where D both breached a duty of his or her position and was aware that there was a risk that the consequences would arise or that a danger would be created of them arising but nonetheless went on unjustifiably to create that danger or cause that consequence.

3. We could require proof of intention in relation to consequences (this would introduce an ulterior intent element into the offence). This final approach would result in the offence applying only to those defendants who both breached a duty and intended that the result of that breach would be one of the types of serious consequence listed.

Negligence

As stated, our law reform proposals are based on the harms and wrongs identified from the residual category of conduct named in Chapter 3 as “breach of duty” (Category 4).

In the background paper, however, this category of conduct was referred to as “neglect of duty”. This is relevant because, just as that name might imply that any new offence created to replace misconduct in public office should be solely focused on omissions to act (an implication that we reject both in Chapter 3 and again in paragraphs 5.14 and following, above), it may also appear to imply that a certain type of fault element is to be required.

Essentially, neglect of duty may be thought to equate with a negligence fault standard and this is an association that was highlighted by a number of consultees attending our consultation meetings. It is arguable that, at least as concerns the branch of the present offence addressing failure to perform a duty, as opposed to positive acts resulting in a breach of trust, negligence is at the heart of the offence.

5.187 We would nevertheless reject any assumption that a negligence fault standard should apply to any of the elements of a new offence replacing the common law misconduct offence. There are several reasons for this.

5.188 First, the current law has never sought to punish public office holders who fail to perform duties of their position as a result of negligence, carelessness or incompetence. The duty breached may indeed be a duty of care. However, it needs to be shown, not only that D did not exercise due care, but also that D’s failure to do so was wilful. Wilfulness is something additional to the breach of the duty.

5.189 A standard of fault consisting of negligence as to consequences would have the effect of criminalising professional negligence, which in most other contexts gives rise to civil liability only. We consider that the fault requirement for any new misconduct offence should not be any lower than that for the existing common law offence.

5.190 Secondly, intention or recklessness is normally required in criminal offences involving a serious moral stigma, such as offences of violence, dishonesty or corruption. Creating too many offences with a negligence standard of fault has the undesirable effect of diluting the communicative effect of the criminal law, by lessening the stigma attached to “real” crime.

5.191 Although there has been an increase in recent years of criminal offences with lesser fault requirements, offences of negligence have generally been limited to three categories:

(1) Some are offences within a limited field of activity, designed to protect the public from a particular danger: an example is the offence of driving without due care and attention.

(2) Related to these are corporate offences where no more than negligence is required on the part of the company. Examples are corporate manslaughter and failure of care providers to prevent ill-treatment or wilful neglect.

(3) Finally, there are offences that require no more than negligence as to one external element because they require intention as to another, or are

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99 For a full discussion, see D Ormerod and K Laird, Smith and Hogan’s Criminal Law (14th ed 2015) p 166 and following.

100 Corporate Manslaughter and Corporate Homicide Act 2007.

offences of ulterior intent. An example is the offence of corrupt or improper use of police powers discussed in the background paper.\textsuperscript{102}

5.192 Misconduct in public office does not fall into any of these categories. It is a wide-ranging offence carrying a considerable stigma, and it is right in our view to require subjective moral fault. It is for similar reasons that the House of Lords in G\textsuperscript{103} rejected the test of “objective recklessness”.

5.193 Thirdly, we recognise that negligence, as a standard of fault, has not had easy treatment within the criminal law. It is generally considered to be an unsatisfactory concept in terms of definition and clarity, and leads to circular assessment.\textsuperscript{104} For example, in Chapter 2 of the background paper we discuss the difficulties that can arise, in terms of uncertainty and circularity, in cases of gross negligence manslaughter.\textsuperscript{105}

5.194 The final difficulty with adopting a negligence standard is, in our view, the fact that the tort of misfeasance in public office requires a higher standard of culpability than this: negligence alone, however gross, is not sufficient to satisfy it.\textsuperscript{106} As a matter of general principle, a higher standard of culpability should be required for criminal rather than civil liability. In some cases, such as public nuisance, the standard of culpability is the same in the crime and the tort.\textsuperscript{107} at all events, the standard of culpability for the crime should not be the lower.

\textit{Recklessness}

5.195 Recklessness, as a fault element, is most commonly found in so-called “result crimes”. That is, a prohibited result must in fact occur; and D must have been aware of the risk of its occurrence. (Also, it must have been unreasonable for D to engage in that conduct while aware of that risk.) A typical example is criminal damage under section 1(1) of the Criminal Damage Act 1971, where property must in fact be destroyed or damaged, and D must either intend or be reckless about that destruction or damage.

5.196 In other offences, recklessness as to consequences is a free-standing element, though the consequence in question need not occur. An example is the offence under section 1(2) of the Criminal Damage Act 1971, where D destroys or damages property, intending or reckless as to the destruction of or damage to other property or danger to the life or another. The same is true of “endangerment offences”, such as dangerous driving. In these offences, the

\textsuperscript{102} Criminal Justice and Courts Act 2015, s 26. The fault element is knowledge or negligence as to the impropriety of the exercise of those powers, combined with the purpose of achieving benefit for himself or another or loss or detriment to another.

\textsuperscript{103} [2003] UKHL 50, [2004] 1 AC 1034.

\textsuperscript{104} D Ormerod and K Laird, Smith and Hogan’s Criminal Law (14\textsuperscript{th} ed 2015) ch 6, in particular p 169 and following.


\textsuperscript{107} In our report on this offence, we argue that the fault element for the offence of public nuisance should be raised to subjective recklessness.
requirement of recklessness takes exactly the same form as in result crimes. D must be aware of the risk; D must engage in the conduct in spite of that awareness; and doing so must be unreasonable, on the facts as D knows or believes them to be.

5.197 The offence proposed under Option 1 is not exactly an endangerment offence, as it is based on a breach of duty and consists of failing to guard against a risk of harm rather than creating that risk. Nevertheless it falls within the same broad category and a recklessness standard of fault seems appropriate.

5.198 In our report on offences against the person\textsuperscript{108} we concluded that endangerment offences could only be justified in a limited number of cases. However, as discussed above,\textsuperscript{109} the proposed new offence, framed as it is now, is only concerned with criminalising a number of specific types of serious consequences caused by breaches of duty committed by those holding positions whilst exercising certain powers or performing certain functions. Because of the nature of these powers and functions being exercised or performed the danger arising is of an exceptionally high degree or the potential victim is particularly vulnerable. On that basis an endangerment offence could be justified here.

\textit{Intent}

5.199 The third possibility may be referred to as the “ulterior intent model”.\textsuperscript{110} An offence of ulterior intent is one where D must intend a particular result to occur, but it need not occur in fact. Nor need there even be a risk that that result will occur. One example is attempt, for example attempted murder, in which D must intend the death of V but V need not die. Another is the offence of administering noxious substances with intent to injure or annoy.\textsuperscript{111}

5.200 The offence here proposed is designed to cover cases within Category 4, namely breach of duty with the risk of serious consequences.

5.201 These cases include not just breaches of duty committed with an improper motive, such as gaining a personal advantage or causing a detriment to another, but also those cases where D fails to give proper concern as to whether serious consequences will in fact be caused or risked.\textsuperscript{112} Therefore a model where an additional form of fault as to consequences, such as intention, is required to be proven would be unlikely to provide sufficient protection from the type of public harm the proposed new offence seeks to address.

5.202 Another argument against an ulterior intent model is that the proposed offence is limited to cases where a risk of serious consequences exists in fact: this risk is the main mischief targeted. In offences of ulterior intent, the main mischief is D’s

\textsuperscript{108} Reform of Offences against the Person (2015) Law Com No 361, para 7.34.

\textsuperscript{109} Para 5.128 and following, above.

\textsuperscript{110} A crime of ulterior intent requires not only fault as to both the circumstance and conduct elements of the offence but also a requirement that the defendant intends to produce some further consequence in addition to the conduct and circumstances of the crime in question.

\textsuperscript{111} Offences Against the Person Act 1861, s 24.

intention to cause harm, and the offence is therefore committed even if there is no chance at all that the harm will occur. A fault element of ulterior intent is therefore inconsistent with the external elements of the proposed offence.

**Conclusion on fault as to consequences**

5.203 Our provisional view therefore is that the fault requirement in relation to the consequence element of the new offence should be one of “recklessness as to consequences”.113

**Provisional proposal 25**

5.204 The fault element of the offence should include recklessness as to the risk of specified consequences as defined above. The offence should not contain an ulterior intent element.

**DEFENCES**

5.205 The current offence of misconduct in public office includes, as a final element, a requirement that the defendant's actions be “without reasonable excuse or justification”. In the background paper we criticised the current law for a lack of clarity in how this element operates: whether it constitutes a standalone defence or is simply a factor to be taken into account when assessing whether the defendant’s misconduct is either wilful and/or serious. In light of this we mooted the question whether it was necessary to retain this element.114

5.206 Consultees tended to agree with us that the relevance of this element had been obscured within the current offence. The Law Society agreed with our analysis of this element and added that “it is … unclear whether its absence is required to be proved beyond reasonable doubt by the prosecution, or raised by the defence on the balance of probability.”

5.207 Theoretical writers on criminal law tend to classify defences into three categories:

1. Exemptions operate where the defendant cannot be held responsible for his or her actions in general.

2. Justifications operate to negate blame where the defendant acts in a way that the law regards as permissible.

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113 We are grateful to the academics who met with during our consultation process who considered this question and expressed the view that for the purposes of a new offence replacing misconduct in public office, an endangerment model could be justified. These academics included Professor Stuart Green, Professor Peter Alldridge and Dr Jonathan Rogers.

114 In *L* [2011] EWCA Crim 1259, [2011] 2 Cr App R 14, where a retired police officer had passed on confidential information to a criminal contact, it was held that, on the evidence, the judge was justified in withholding the defence of reasonable excuse or justification from the jury.
(3) Excuses operate in a way where a responsible defendant ought not to be held criminally responsible despite having acted in an impermissible way.\textsuperscript{115}

5.208 We are only concerned here with justifications and excuses, relied upon by responsible persons. What justifications and excuses have in common is that "excuses and justifications are putative rational explanations of the wrong doing of the wrong or mistake, and rational explanation is explanation in terms of the reason the agent had, and acted upon".\textsuperscript{116} How they differ, on the other hand, is a subject of much debate. In fact, the classification of various defences into justifications and excuses in England and Wales has been criticised as breeding "needless confusion".\textsuperscript{117}

5.209 We noted in the background paper that the simplest way of interpreting this element was as meaning, simply, "all the usual defences apply", such as duress and necessity. If viewed in that way the element is simply a gateway to those common law defences that are applicable to all criminal offences and as such it might be unnecessary to retain it.\textsuperscript{118} Removing the element would not mean that the usual common law defences would no longer apply.

5.210 Our provisional view is that, if the actual purpose this element serves is to provide access to common law defences on a charge of breach of duty then there would appear to be no good reason to retain that provision. That access would be available with or without the inclusion of this element. However we would particularly welcome consultees' views on whether or not they agree with this provisional view.

5.211 On this point Mr Ryan Mackenzie, in responding to the background paper said:

that ["without reasonable excuse or justification"] should be considered as an element of the offence. The reasoning being is that people in the public office make many decisions that could be described as contentious, but upon closed examination are the production of the incident and follow a logical process. Making the 'without reasonable excuse or justification' aspect as part of the definition would allow more power to remain with the investigator rather than being forced to charge and it being raised as a defence at court or as part of the CPS process.

\textsuperscript{115} See V Tadros, Criminal Responsibility (2005) p 117.
\textsuperscript{118} A number of consultees did however expressed strong views that, if either a reformed offence of misconduct in public office was to continue to apply to misuse of information, or a new offence replacing it were to do likewise, then it would be important for a specific "public interest" defence to be available to a prosecution under either of those offences. We conclude however that misuse of information no longer needs to be included within the ambit of any proposals we make here. We refer consultees to our related, but separate project of the protection of official government data, see http://www.lawcom.gov.uk/project/breaches-of-protected-government-data/.
In our view, however, in the type of case Mr Mackenzie describes the public office holder would not fall to be prosecuted under the new offence being proposed in this chapter. The public office holder in “following a logical process” has not in fact acted with the required level of fault to incur liability. That is, the public office holder has not acted in a reckless manner in respect of a potential risk of serious consequences.

Provisional proposal 26

The offence should exclude the element of “without reasonable excuse or justification” but retain the availability of relevant common law defences where it is prosecuted.

SUMMARY OF PROVISIONAL PROPOSALS

There should be an offence of breach of duty by a public office holder with a particular duty concerned with the prevention of harm.

Those public officers should be defined as including:

(1) those occupying positions carrying powers of physical coercion; and
(2) those occupying positions including a duty of protection.

Collectively we refer to these as office holders with a particular duty concerned with the prevention of harm.

The definition could take the form either of a general test, such as that in the previous paragraph, or of a list of particular powers, functions and positions.

The offence should be restricted to breach of the office holder’s particular duty concerned with the prevention of harm, and therefore only cover cases where such harm occurs or is risked.

The type of harm, both for the purpose of identifying the relevant public office holders and for the purpose of defining the breach of duty, should be restricted to:

(1) death;
(2) serious physical or psychiatric injury;
(3) false imprisonment;
(4) serious harm to public order and safety; and/or
(5) serious harm to the administration of justice.

The fault element of the new offence should be one of:

(1) Knowledge or awareness of:
   (a) the circumstances that would mean that D held a public office; and
(b) the circumstances relevant to the content of any particular duties of that office concerned with the prevention of harm.

(2) Subjective recklessness as to the risk that D’s conduct might cause one of the types of harm listed above.

Consultation question 27

5.220 Should an offence of breach of duty by a public office holder (subject to a particular duty concerned with the prevention of harm as described in the foregoing provisional proposals) be introduced?
CHAPTER 6
LAW REFORM OPTIONS – OPTION 2: THE CORRUPTION BASED MODEL

INTRODUCTION
6.1 In this chapter we examine a different model of offence to replace misconduct in public office, namely an offence based on a corruption rationale. This form of offence could be adopted either alone or alongside Option 1: they are not mutually exclusive. The discussion in Chapter 4 regarding the different approaches to defining public office is equally applicable here.

HARMS AND WRONGS
6.2 In Chapter 3, when examining the theoretical foundations of the current offence, we observed that there is no single wrong that underlies the current offence of misconduct in public office. We concluded that there are two types of wrong covered by the current offence:

(1) Those involving breach of duty giving rise to serious harm or the risk of it, which may be regarded as either breach of trust in the weak sense or a negative form of misgovernment.

(2) Those involving undue gains, deliberate infliction of detriment, conflict of interest and similar behaviour, which may be regarded as reflecting a wrong of either abuse of position (breach of public trust in the strong sense) or positive misgovernment.¹

6.3 Both of these wrongs undermine public confidence in our governing institutions, and this constitutes a harm to the public interest generally. However, wrong (1) is concerned solely with the causation of any direct harm, or risk of harm, to individuals. As Option 1 above only seeks to address this particular wrong it would, therefore, significantly narrow the scope of the offence. It would only apply where there is a direct harm, or risk thereof, caused by a public office holder breaching a particular duty.

Does the remaining “corruption” wrong warrant criminalisation?
6.4 We recognise that some consultees may be concerned about replacing the present offence with a much narrower model which is focused on only one of the two wrongs currently underpinning misconduct in public office (Option 1). There is no doubt that that would reduce the scope of criminal liability for public office holders engaging in misconduct in the performance of their duties.

¹ Strictly speaking, this type of wrong can be further subdivided into two discrete wrongs: abuse of position and positive misgovernment. The pursuit of an undue advantage is an abuse of position, whereas causing a detriment to another or conflict of interest are forms of positive misgovernment. We consider that both of these wrongs constitute the broad wrong of “corruption” and could be criminalised by a single offence in a coherent way. We therefore refer to both of these specific wrongs as a single wrong of “corruption”.

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6.5 This could be considered to be problematic because the wrong that would not be covered by Option 1 is specifically concerned with corruption by officials: the making of undue gains, infliction of detriment, conflict of interest and similar behaviour. Therefore, the reduction in the scope of criminal liability would risk decriminalising corrupt behaviour by public officials. This might arguably remove a strong deterrent for public officials not to abuse their positions in this way.

6.6 In many other jurisdictions, misconduct in public office offences are primarily aimed at addressing this particular wrong and do not require direct harms to be caused or risked to individuals. For example, in Hong Kong, there have been a number of cases involving public officials who have abused their position or power that are not easily categorised as involving the breach of duty wrong (wrong (1) above). This means that such cases would not necessarily be caught by Option 1. For example, public officials have been successfully prosecuted for:

1. failing to disclose a conflict of interest contrary to civil service rules and subsequently using a position to give preferential treatment;
2. helping contractors to cheat on an examination required in order to compete for contracts; and
3. advising would-be criminals as to how the police generally responded to certain unlawful activities, how they could evade or reduce the difficulties this might cause for their unlawful business, and how they might best hide their unlawful activities.

6.7 We also briefly discuss, in the first part of Chapter 3, the concept and importance of fair labelling in the criminal law. We return to this issue in Chapter 7, where we discuss the possibility of abolishing misconduct in public office without replacement. This appears to be an important consideration for those consultees who indicated that they considered misconduct in public office as being primarily based on a corruption rationale.

6.8 The second wrong we have identified, of corruption, addressing abuse of position for personal advantage and positive misgovernment, may be sufficient to justify criminalisation. The wrong may justify criminalisation even where it can only give rise to a remote harm. There are a number of offences based on this type of harm, an obvious one is bribery. Another recent offence to consider, that mirrors our proposed Option 2, in terms of the harms and wrongs it addresses, is section 26 of the Criminal Justice and Courts Act 2015, which we discuss below. We can therefore see merit in proposing a second option for an additional offence.

6.9 We pause here to consider the question of how desirable it is for Option 2 to overlap with other offences, such as bribery. In Chapter 7 we discuss how the

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3 In ch 3 we use the term “remote harm” to describe a harm which does not necessarily follow from each instance of a particular form of conduct but would follow from a situation in which such conduct is prevalent and not criminalised.

4 Bribery Act 2010.
concept of fair labelling may both justify and require the creation of more than one offence for the same conduct. However, we are aware of the problems associated with overlapping offences, in terms of creating uncertainty over which offence should be preferred where more than one is applicable. Concerns have been raised by some consultees in this regard. We therefore consider that whilst there is no principle that prohibits the creation of new offences that overlap with pre-existing ones, overlap should be kept to a minimum wherever possible.

6.10 Law reform Option 2 is based primarily on our Category 3 conduct (acting under a conflict of interest or in a prejudiced or biased manner), is not aimed at cases of bribery. In Chapter 3, our discussion of Category 3 conduct focused on individuals who act in a prejudiced manner or under a conflict of interest, without the provision or offer of a bribe from another party. There is a relatively recent statutory provision which addresses bribery and we would not seek to undermine the use of the Bribery Act or cause confusion as to which offence prosecutors should charge. This possibility should, however, be resolved through the issuing of prosecution guidance on any new offences that may be implemented following this review. We are aware that the Crown Prosecution Service is sensitive to the need for clear and comprehensive guidance in this area.

6.11 In contrast Option 2 would address the majority of conduct already caught by section 26 of the Criminal Justice and Courts Act 2015. The only conduct Option 2 would not address, which is within the scope of section 26, is conduct that we do not think (following our conclusions in Chapter 3) should be subject to criminal sanction. In Chapter 3 of the background paper we concluded that one of the deficiencies with section 26 is that it has potential to be of overly wide application. One of the consequences of Option 2 might be that section 26 is made redundant and we could recommend it be repealed. This would reduce any potential future confusion as to whether prosecutors should choose to prosecute the Option 2 offence or section 26 where they overlap (where a police officer abuses his or her position for personal gain or to cause detriment to another).

6.12 As our two options for offences address different wrongs and harms, consultees may prefer one or the other or, alternatively, see potential for them to work in conjunction with each other. There is an argument that all of the harms and wrongs currently addressed by misconduct in public office could only be met by the replacement of that offence with both of the proposed new offences.

6.13 On the latter point, in both the background paper and in Chapter 3 we acknowledged that misconduct in public office has sometimes previously been considered to comprise two distinct offences. Commentators, from James Fitzjames Stephen to Terrence Williams, have suggested there are in fact two separate offences, of breach of trust and wilful neglect of duty. On a harms and wrongs based analysis, we can say that they are two branches of the same

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5 A Digest of the Criminal Law (Crimes and Punishments) (1877) ("Stephen's Digest"), Part III, pp 73 to 75, articles 121 and 122.

offence. However, in order to address all of the harms and wrongs involved it may be more appropriate to create two separate offences.

6.14 We see the possibility for creating an offence that addresses the second wrong we have identified in our analysis of the current misconduct in public office offence; this would define its scope with certainty and predictability. To illustrate this it is useful to discuss the section 26 offence further.

**Section 26 of the Criminal Justice and Courts Act 2015**

6.15 Section 26 of the Criminal Justice and Courts Act 2015 criminalises the “corrupt or other improper exercise of police powers and privileges” by police constables. The offence was enacted to deal with what was considered to be a specific problem of abuse of both power and position within the police. It was also intended to complement, rather than replace, the misconduct offence. In summary, the offence requires that:

(1) a police constable;\(^7\)

(2) exercises\(^8\) the powers and privileges of a constable improperly;

(3) namely, by:

(a) exercising that power or privilege for the purpose of achieving:

(i) a benefit for himself or herself; or

(ii) a benefit or a detriment for another person;\(^9\) and

(4) a reasonable person would not expect the power or privilege to be exercised for the purpose of achieving that benefit or detriment.\(^10\)

6.16 In the background paper, we outlined a number of problems with section 26 as currently drafted. In summary, these problems are:

(1) There is no principled reason for restricting the offence to police constables.\(^11\)

(2) The type of improper conduct the offence applies to is unclear. One way of clarifying this would be to replace the phrase “powers and privileges of

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\(^7\) Defined in s 26(3).

\(^8\) Defined in s 26(5) to (8) as exercising, failing to exercise, threatening to exercise or threatening to fail to exercise and as including acts and omissions. Section 26(10) also states that exercising or failing to exercise powers and privileges includes performing or not performing the duties of a constable.

\(^9\) Section 26(4)(a).

\(^10\) Section 26(4)(b).

\(^11\) The offence also covers people who are designated as having the powers of a police constable for certain purposes as defined in section 26(3). These are defined by way of a definitive list and include special constables, National Crime Agency officers, Ministry of Defence officers, British Transport police officers and the Civil Nuclear Constabulary.
a constable”, in the body of the offence, with the term “powers, duties and authority of a relevant position”.

(3) The fault element of the offence is overly complex.

(4) The offence contains no “seriousness threshold”. This means that, in theory, even minor infringements of police duties could fall to be prosecuted, although the “reasonable person” test in section 26(4)(b) could, in part, perform the function of filtering out cases undeserving of prosecution.

6.17 Nonetheless, as section 26 targets conduct that is wrongful on the basis of corruption, it serves as a useful starting point in determining how a broader statutory offence could cover that wrong. We now consider below how the approach taken in section 26 could be refined in order to produce a more effective offence, which we refer to as our Option 2. The proposed offence under Option 2, like other offences, may be analysed as three elements:

(1) what type of conduct it should target (the conduct element);

(2) who it should apply to (the circumstance element); and

(3) the consequences contemplated as a result of the conduct performed (the consequence element).

6.18 All provisional proposals and consultation questions in this chapter refer to a new proposed offence in respect of abuse of position by a public office holder, for the purpose of either obtaining a personal advantage or causing detriment to another.

**THE CONDUCT ELEMENT OF THE OFFENCE**

What type of conduct should the offence include?

6.19 The corruption wrong we identified in Chapter 3 concerns cases involving undue advantage, infliction of detriment and conflict of interest. This can be regarded as reflecting a wrong of abuse of position or power, and a breach of public trust in the strong sense. Where the purpose is to inflict detriment, it is also positive misgovernment. We therefore consider that the conduct that should be criminalised is the improper exercise by a public official of his or her power, authority or position to gain a personal advantage of any kind, or to cause a detriment of any kind. This would also cover the sufficiently serious cases of conflict of interest where a gain or detriment is caused.

**Improper exercise of position, power or authority**

6.20 Section 26 of the Criminal Justice and Courts Act 2015 provides a useful starting point. It currently describes this conduct in the way set out in paragraph 6.15 above.

6.21 We consider that this formulation of the criminal behaviour can be significantly improved. The term “police powers and privileges” should be replaced by the phrase “powers, duties and authority of a relevant position”. We prefer the latter formulation because, as discussed in Chapter 3 of the background paper, the
word used to describe abuses of position by police officers, “privileges”, lacks definition. It seems to be limited to immunities or protections inherent in the operation of police powers. It would, therefore, be clearer to use the term “authority” rather than “privileges”. A number of consultees agreed with this point in their responses to the background paper. The Law Society said:

We agree that expression “police powers and privileges” is very unhelpful … and that “position” or “authority” would have been much clearer.

6.22 There is a significant advantage to formulating the offence in this way. It more closely ties the conduct that warrants criminalisation to the public office. There is no need to retain the requirement in the current offence of misconduct in public office that a public officer commits the relevant conduct whilst “acting as such”, or to assess whether or not the conduct breached a “determinative duty”. This is because it is the abuse of a position, authority or power that a person has only by virtue of being a public office holder that constitutes the criminal conduct.

6.23 For example, an immigration official who refused entry to an immigrant who would not bribe him or her would be causing a detriment to another by improperly exercising his or her position. The function of permitting people to enter the United Kingdom is closely connected to the governance of the country, and is therefore public. It is only by abusing this public function that the border official is able to cause detriment to the immigrant. The offence would not cover all detriment or gains caused by a person in public office in any way. It must be by way of the improper exercise of a public position, authority or power. In other words, only abuses of public functions unique to public office holders are caught by the offence. This narrows and clarifies the scope of the offence.

6.24 By way of a further example, we would not anticipate that the conduct of the defendant in W, who misused his police credit card for personal gain, would be criminalised under this formulation of the conduct. This is because the defendant has not abused his public position, authority or power. Using a credit card for work purposes is not exercising a public function he is tasked with by virtue of his position as a police officer. It is common for private companies to provide staff with a company credit card. The use or abuse of that facility is in no way related to a public function. By way of contrast, the defendant in W did not, for example, use his position to advise would be criminals how to avoid being caught. We consider that clarifying the conduct to be addressed by the offence in this way is more coherent, and will enable the offence to be applied with a greater deal of predictability.

How serious does the misconduct need to be?

6.25 It is important to ensure that the offence criminalises abuses, but not all misuses, of a public position, power or authority. Whether or not a position has been abused or misused will depend on how serious the relevant behaviour was. We observed previously that some consultees may consider the harm of the prevalence of corruption to be too remote as the basis of a criminal offence.

Instead, it should be dealt with by other means of achieving accountability of public officials. Our view is that only serious misconduct that cannot be adequately addressed, or deterred, by lesser forms of redress should be criminalised. We therefore consider it necessary to prescribe an explicit seriousness threshold as part of the second element of the offence.

SERIOUSNESS IN THE CURRENT OFFENCE

6.26 In Chapter 2 of the background paper, we explained that the current offence of misconduct in public office does require that the relevant breach of duty is sufficiently serious as to amount to an “abuse of public trust”. In Chapman, the Lord Chief Justice, Lord Thomas, provided guidance as to how a jury should be directed in relation to this element, stating that:

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 that it has the effect of injuring, the public interest so as to call for condemnation and punishment.13

6.27 The difficulty with the way in which the seriousness element is defined is that it risks uncertainty and circularity, as a jury may essentially be directed that the conduct “must be so serious as to amount to a criminal act”. In other words, the conduct is serious and therefore criminal; criminal and therefore serious. The notion of injury to the public interest provides some limited assistance. However, this also risks circularity: a breach of a duty to act in the public interest is serious because it has the effect of injuring the public interest.

6.28 The fundamental problem with the current misconduct in public office offence is that the criminal conduct and the seriousness of the conduct are defined in the same way. That is, “breach of the trust of the public” is used both to define the nature of misconduct and as a measure of how serious it needs to be to amount to an offence. It is therefore unclear what kind of conduct would fall below the seriousness threshold.

6.29 There should be two distinct requirements before behaviour is criminalised. First, there must be a breach of duty (in other words, an improper exercise of power, position or authority) and, secondly, that breach must have been serious. It is not, and indeed should not be, the case that all improper exercise of power, position or authority warrants criminalisation. In our view, the seriousness element of a new corruption based model of offence will provide a filtering mechanism to ensure that the offence only applies where appropriate. We now turn to consider how a separate seriousness threshold could be defined.

SERIOUSNESS THRESHOLDS IN OTHER JURISDICTIONS

6.30 Different approaches to defining a seriousness threshold have been taken in other jurisdictions that more clearly separate out the conduct to be criminalised and the seriousness threshold of the offence. This has the effect of ensuring that

where a public officer abuses his or her position with the purpose of making an undue gain to himself or herself, for example, that misconduct would not be automatically criminalised. The misconduct must be serious. In Appendix F to the background paper, we set out the approaches of different jurisdictions to misconduct in public office offences in detail. Here we consider the approaches in Hong Kong and Canada to demonstrate how an effective seriousness threshold could be drawn.

**Hong Kong**

6.31 In Hong Kong, misconduct will only be criminalised where it meets a high threshold. What is required is conduct so far below acceptable standards as to amount to an abuse of the public’s trust in the office holder. It was established in *Shum Kwok Sher*\(^{15}\) that, in determining whether or not misconduct was serious, regard must be had to the responsibilities of the office and the officeholder, the importance of the public objects which he or she served and the nature and extent of the departure from those responsibilities. However, Sir Anthony Mason emphasised that this qualification should not be taken as the dividing line between the offence of misconduct in public office and disciplinary offences, as:

> There is no doubt a borderland in which the common law offence and disciplinary offences overlap.\(^{16}\)

6.32 Although there is not a clear dividing line, the seriousness qualification nonetheless enables the distinction to be more clearly identified. The Court of Final Appeal have explained that whilst the offence is focused on the public officer’s conduct, consequences are relevant in determining whether or not that conduct is sufficiently serious.

6.33 In *Ho Hung Kwan*\(^{17}\) a doctor employed by the Hospital Authority booked appointments in the names of his parents and son for consultation at the clinic, prescribed medicine for his parents and son, and obtained this medicine. His parents and son never attended the clinic. The defendant claimed that he had diagnosed his parents over the phone, and his son at home, and he thought that he had to follow the clinic’s consultation procedure in order to obtain medicine for family members. He had therefore misused his position (by manipulating the booking system) to make undue gains for himself. The prosecution also argued that in misusing his position in this way, the defendant had caused detriment to individuals by denying other patients a fair opportunity to use those appointments in a health care system high in demand.


\(^{15}\) *Shum Kwok Sher v HKSAR* [2002] HKCFA 27, [2002] 2 HKLRD 793. This approach was reaffirmed in *Chan Tak Ming v HKSAR* [2010] 13 HKCFAR 745, [2011] 1 HKLRD 766.


\(^{17}\) *HKSAR v Ho Hung Kwan Michael* [2013] HKCFA 83, (2013) 16 HKCFAR 525.
6.34 His conviction for misconduct in public office was quashed on the basis that the defendant’s misconduct was not serious enough to call for criminal sanction. The court held that:

1. Where corruption, dishonesty or other illegal practices are involved, it is not necessary specifically to consider the consequences of the misconduct in deciding whether it is serious enough to constitute the offence of misconduct in public office. The misconduct speaks for itself: the seriousness of the consequences of such corrupt, dishonest, or illegal practices will be obvious.

2. Where corruption, dishonesty, or other illegal practices are not involved, the consequences of the misconduct will be a factor which is relevant when considering whether the misconduct is serious enough to merit criminal sanction.18

6.35 The Court of Final Appeal, applying a seriousness threshold, concluded that the defendant’s misconduct was appropriately dealt with by disciplinary, rather than criminal, sanctions.

Canada

6.36 A similar approach has been taken in Canada. The breach of public interest must be a "serious and marked departure from the standards expected of an individual in the accused's position of public trust".19 In the leading case on this issue, Boulanger, the defendant was a public safety director when his daughter was involved in a car accident. A police report was completed. Mr Boulanger however required the police to write a second, more detailed, report on the basis of which his daughter was found by her insurance company not to be responsible for the accident, and Mr Boulanger did not have to pay $250. The second report was in no way false, but would not have been written but for Mr Boulanger using his influence to request it. Mr Boulanger therefore used his position as a public officer to make an undue gain.

6.37 Chief Justice McLachlin stated that:

It cannot be that every breach of the appropriate standard of conduct, no matter how minor, will engender a breach of the public’s trust ... Such a low threshold would denude the concept of breach of trust of its meaning. It would also overlook the range of regulations, guidelines and codes of ethics to which officials are subject, many of which provide for serious disciplinary sanctions ... The conduct at

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19 Boulanger [2006] 2 SCR 49, [2006] SCC 32 at [58], by McLachlin C.J. Stephen’s Digest, Part III, pp 73-75, included an offence of “neglect of duty” at Article 122, however this was not included in the Canadian Criminal Code RSC 1985, ch C-46.
issue … must be sufficiently serious to move it from the realm of administrative fault to that of criminal behaviour.20

6.38 The public may well consider that the defendant’s exercise of his position was unreasonable or unfair, as a member of the general public would not have been able to gain special treatment from the police in that way. However, the defendant in Boulanger had his conviction quashed in part on the grounds that his conduct was not a “serious and marked departure from the standard expected of an individual in the accused’s position of public trust” and in part because there was insufficient proof that he acted with the required level of fault.21

6.39 As in Hong Kong, Canadian courts will consider whether the departure from the standard of behaviour expected from the public official was serious by drawing on relevant professional codes of ethics. It must have been so far below the standard expected as to constitute an abuse, rather than a misuse, of the defendant’s position.

CONCLUSION: SERIOUSNESS THRESHOLD

6.40 Our provisional view is that an explicit seriousness threshold should form part of a new offence. We consider that this will ensure that the offence only applies to public officials whose conduct warrants criminalisation. This is ultimately a question of fact for the jury. The conduct could be framed as follows:

(1) A public official commits the offence if he or she abuses his or her position, power or authority.

(2) That is to say, if:

(a) he or she exercises that power, position or authority for the purpose of achieving:

(i) a benefit for himself or herself; or

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

(b) the exercise of that power, position or authority for that purpose was seriously improper.22

6.41 The requirement of purpose properly forms part of the fault element in relation to consequences, and is discussed below.23 The above definition anticipates the result of that discussion, because this is necessary to give the background for the requirement of impropriety.


22 We emphasise here that “seriously improper” could easily be substituted with another form of words, such as (for example) “fell far below the standards of expected propriety”. We welcome consultees’ comments on this point.

23 Para 6.72 and following, below.
In determining whether or not the behaviour was seriously improper, there will be a number of relevant factors for a jury to consider. These may include the seriousness of the consequences of the misconduct and the seniority of the defendant’s position. Of course, the culpability of the defendant will also be relevant to determining the seriousness of the conduct. We now turn to consider how the offence should define the type and level of fault required for this element of the offence.

**Fault as to conduct**

As explained in Chapter 5 in connection with Option 1, the fault requirement of an offence usually consists of a state of mind (such as intention, recklessness, knowledge, or belief) concerning the circumstances or consequences of D’s conduct. As concerns the conduct itself, the only requirement is that it should be voluntary. The same explanation applies to the proposed offence under Option 2.

**Dishonesty**

A number of Australian jurisdictions, which operate abuse of position offences based on the corruption model described in Option 2, have included a requirement of dishonesty within the statutory definitions of those offences. This might indicate that such a provision could be a further defining element of the proposed new offence dealing with corruption. The question can, we think, be dealt with briefly.

The requirement in the proposed offence that D be proven to have acted with an improper purpose makes the concept of doing so dishonestly redundant. Dishonesty is a moral attribute, the existence of which may make otherwise acceptable conduct morally unacceptable. Equally, the concept of a public office holder acting with the purpose of achieving a personal benefit (or causing a detriment), where that is also contrary to a duty to act in the public interest, makes otherwise legitimate conduct illegitimate.

The Australian states, which make proof of dishonesty a requirement of an offence of abuse of position, do so not in conjunction with a fault element of purpose, but a wider one of intention. The Australian offences could therefore in principle include cases where D acts for proper or even laudable purposes, but knows that some detriment to another is an inevitable if undesired consequence. The dishonesty requirement serves to eliminate these cases. However, we argue below that the fault element in the proposed offence should be purpose rather than intention. The problem of oblique intent therefore does not arise, and a dishonesty requirement is not necessary in order to deal with it.

Oblique intent refers to the situation where a person does not act with the purpose of bringing about a particular consequence, but foresaw as virtually

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24 For discussion see ch 5.

25 See for example Commonwealth Criminal Code Act 1995, s 142(2) and the Queensland Criminal Code Act 1899, s 92A.

26 Para 6.75 and following, below.
certain that that consequence would be a result of his or her actions. 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.27

6.48 The proposed offence under Option 2 contains a requirement that the use of position, power or authority for those purposes is seriously improper. This too will eliminate cases where D’s conduct is not worthy of serious blame, and therefore removes any need for a dishonesty test. We discuss below the question whether there should be a requirement that D is aware of that impropriety.28

6.49 Consequently, an additional requirement of dishonesty would add nothing to the offence we propose.

Provisional proposal 28

6.50 The offence should address the following conduct:

   (1) D commits the offence if he or she abuses his or her position, power or authority.

   (2) That is to say, if:

      (a) he or she exercises that position, power or authority for the purpose of achieving:

         (i) a benefit for himself or herself; or

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

      (b) the exercise of that power, position or authority for that purpose was seriously improper.

In the next section we discuss who might be subject to this offence, or in other words who D might be.

THE CIRCUMSTANCE ELEMENT OF THE OFFENCE

Who can commit the offence?

6.51 As discussed in Chapter 4, both of our law reform options are underpinned by the concept of public office, albeit that we seek to define this in a much clearer way than under the current law. Section 26 provides no assistance in answering this question because it only applies to police constables and, as we explained in the background paper, we can ascertain no principled reason as to why it should be so limited. We therefore need to answer this question from first principles.


28 Para 6.80 and 6.81 below.
Defining public office

6.52 The cornerstone of the "corruption" wrong is that the position abused is a public office. In Chapter 4 we outlined four approaches that could be taken to defining public office. We considered that the preferable approach is one which involves the definition of public office holders as performing state, or public functions or holding public power. This is because the performance of a public function, and the exercise of public power, are inherently governmental in nature. We consider that Option 2 should apply to public office holders within this definition, that is to say performers of public functions.

6.53 We explained previously that public functions are performed primarily for the benefit of the public at large. The state has empowered someone to perform them and the public have a legitimate expectation of their being so exercised. It is the fact that a function is being performed by someone entitled to do so under a power granted by the state (a public power) that makes the function itself “public”.

6.54 It is the public nature of a public officer’s position that justifies the criminalisation of their misconduct in certain cases, but not similar conduct by private individuals. Private individuals are not in the same type of position of public trust and do not exercise public functions. It is the fact that a public office holder improperly exercises public functions and powers that provides the core rationale for criminalisation.

Ensuring an offence based on “public office” is workable

6.55 There are two major criticisms of the definition of “public office” in the current offence: it is unclear and excessively broad. In our view, these problems can be resolved. First, as discussed in Chapter 4, there are several workable approaches to defining public office. This definition could be implemented in statutory form in general abstract terms, by way of a list of relevant functions or positions or by some combination of both these approaches. This would make the definition of “public office” significantly clearer.

6.56 Moreover, the lack of clarity as to the definition of public office in the current offence is exacerbated because each of the other elements of the offence is also unclear. An additional crucial difference under this option is that the offending behaviour would be set out in unequivocal terms. This would make the offence much clearer overall, and greatly assuage concerns about the definition of “public office”.

6.57 Secondly, our proposed definition of public office also explicitly narrows the possible pool of offenders to people who have public functions or powers. For example, if our proposed definition is embodied in a new offence, providers of services to the public employed by the state (who do not exercise public functions), such as doctors or teachers, would (as at present) not be prosecuted. Moreover, the introduction of a seriousness threshold will necessarily further limit the scope of the offence.

6.58 Therefore, we consider that the circumstance element of a corruption based model of offence under Option 2 should be that it only applies to public officials, without further restriction.
Provisional proposal 29

6.59 The offence should apply to all public office holders, without further restriction.

Fault as to circumstances

Awareness of being in public office

6.60 As with Option 1 it is our view that D must at least have subjective awareness of the circumstances from which, as a matter of law, a court would determine him or her to be in a position of public office.

6.61 We would therefore propose that an appropriate fault requirement is one that D either knows or is aware of the circumstances existing, from which, as a matter of law, a court would determine that an individual is in public office.

6.62 This task becomes simpler if the statutory definition of public office takes the form of a list of positions. If D knew or was aware that he or she was in a particular position, which has for the purposes of a new provision been defined as a public office, at the time of committing the conduct proscribed by the offence then that would be sufficient to prove this part of the first element of the offence. He or she need not also know that the position is in fact a listed public office for the purposes of the offence.

Provisional proposal 30

6.63 The offence should not include a requirement that the public office holder, as well as being aware of the circumstances which determine that the position in question is a public office, was also aware that his or her position was, in law, considered to be a public office.

Awareness of the duties of that office?

6.64 We argue in Chapter 3 that the reason a public office holder should potentially be made subject to an offence criminalising “corrupt” conduct is because of the “public” nature of the functions he or she performs. The nature of these functions gives rise to a legitimate expectation, on the part of the public, that D will act in a way that puts the public interest before his or her own. In particular, this implies:

(1) a duty not to use the opportunities afforded by being in that office for private purposes such as advantage for oneself or another or detriment to another; and

(2) a duty not to place oneself in a position of conflict of interest.

6.65 The question that consequently arises in the context of the mental element of an offence under Option 2 is: must it be established that (in addition to either knowing or being aware of the circumstances that make his or her position a public office) D either knew, or was at least aware that his or her public office required him or her to abide by such a duty?

6.66 On the one hand it could be argued that it is difficult to consider someone criminally liable for acting on a conflict of interest unless they knew, or were aware of a duty not to do so. On the other, it can be said that the very fact that D
is in public office should be sufficient to notify him or her that such a duty does exist.

6.67 A requirement to act in the public interest is a fundamental part of the question of public office. Thus, in our view, it would undermine the purpose of the offence proposed in Option 2 to require both that D knew or was aware that he or she was in public office and that he or she was aware that this position carried with it a duty to act in the public interest.

6.68 On the other hand, it would be possible to require that D be aware that an occasion for that duty has arisen, for example that a proposal made to him or her could entail an improper gain for D or another. That, however, is necessarily implied in the remaining part of the fault element, namely the purpose of achieving that benefit or detriment.

THE CONSEQUENCE ELEMENT OF THE OFFENCE

6.69 Unlike Option 1, Option 2 is primarily based on a wrong rather than a harm: the mischief to be punished is not that D has failed to prevent an undesirable result but that D has engaged in corrupt behaviour. The harm targeted is a remote one, namely that it would be unacceptable for a social situation to exist in which this kind of behaviour is prevalent and not penalised. There is no need for particular harmful consequences to be linked to particular instances of the offence.

6.70 For this reason, the proposed offence requires a purpose of achieving a benefit or causing detriment, but does not require any benefit or detriment to occur. Nor does it require a risk of harm to exist. These factors may possibly be relevant to the question whether the exercise of power for those purposes was “seriously improper”, but should not be explicit ingredients of the offence. In this sense, the proposed offence has no consequence element: it is a “conduct crime” rather than a “result crime”.

6.71 So far as the offence refers to consequences, these are consequences contemplated rather than consequences achieved. This type of offence is known as an offence of ulterior intent. We discuss D's required attitude to consequences in the following section.

Fault as to the achieving of a benefit or detriment

6.72 The primary fault requirement to be applied in the type of offence proposed under Option 2 is that relating to the public office holder’s abuse of his or her position, power or authority. As set out above, D abuses his or her position (or a power or authority derived from it) when he or she uses it to gain a personal advantage or cause detriment. This purpose is a state of mind in itself: there is no need for an additional fault element of awareness of that purpose. There may however be alternatives to the word “purpose” in describing this part of the fault element.

6.73 As explained in Chapter 3, an intention or purpose to gain advantage may be integral to characterising the wrong behind an offence. That is certainly the case with our proposed Option 2. The offence is concerned with deliberate, not reckless nor careless, actions on the part of the public office holder. Consequently, we do not consider that it would be sufficient for the purposes of the offence to require that D used his or her position either:
(1) being reckless as to the likelihood that he or she might obtain an advantage (or cause detriment) from doing so; or

(2) negligently, that is in circumstances where he or she was not himself or herself aware that a personal advantage (or detriment) might result but a reasonable person in his or her position would have been so aware.

6.74 The discussion to be had, in our view, is whether the fault requirement should be phrased in terms of purpose or whether intention is a more appropriate term.

**Purpose or intention**

6.75 Purpose is usually construed in the criminal law as meaning that a person acted in order to bring about a particular result. In contrast, offences simply requiring “intent” will encompass oblique intent\(^{29}\) as well as purpose.

6.76 For example, in Chapter 3 of the background paper we discussed the view that section 26(4)(a) of the Criminal Justice and Courts Act 2015 can be interpreted to require that the constable acted in a particular way in order to gain a benefit or detriment. 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. Accordingly, as the offence is concerned with purpose and not oblique (indirect) intent, D’s conduct may not be caught under section 26.\(^{30}\)

6.77 Therefore, the difference between using purpose and using the wider form of intention in a new offence proposed under Option 2 would be that with the latter, a wider pool of conduct would be caught within the offence.

6.78 Based on arguments in Chapter 3 regarding harms and wrongs, it would appear that a principled approach would require the use of a purpose requirement rather than an intention requirement. This would exclude from the ambit of the offence any persons who, whilst they may gain an advantage by using their positions in a certain way, only gain that advantage as a by-product. The true motivation for their actions may be nothing to do with obtaining a benefit or causing a detriment and may be entirely laudable in nature. In these circumstances it is difficult to see how the actions can be truly regarded as “corrupt” and/or cause harm in the sense of prevalence of corruption.

6.79 We would therefore propose that in respect of the second element of an offence proposed under Option 2, the fault requirement be one of purpose, and not simply intention.

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\(^{29}\) Oblique intent 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 intent is in principle applicable to a number of criminal offences where the mental element is phrased as “intent”, though most reported cases concern murder. See also para 6.47, above.

\(^{30}\) Although in this situation D may also be prosecuted under the Official Secrets Act 1989.
Fault as to impropriety

6.80 The proposed offence includes a requirement that the use of the position, power or authority for the purpose of achieving an advantage or detriment is seriously improper.

6.81 We consider that there is no need for a separate requirement of fault in the form of awareness of that impropriety. The fact that the position ought not to be used for that purpose is implicit in the fact of holding a public office, and is in any case a proposition of law. Similarly the measure of seriousness is for the jury to decide upon having regard to all the circumstances of the case, including D’s mental state; there is no need for a further requirement that D knew or believed the misconduct to be serious.

Provisional proposal 31

6.82 The fault element of the offence should include the purpose of achieving an advantage for the office holder or another or a detriment to another. There should be no additional requirement of awareness that acting with that purpose was seriously improper.

DEFENCES

6.83 The question of defences under Option 2 can be dealt with fairly shortly. The new offence proposed deals with a very specific type of conduct and is restricted further, in terms of the wrongs and harms it addresses, by virtue of a stringent fault requirement to be proven in relation to that conduct, namely the purpose of achieving an advantage or causing detriment. In particular, we have proposed a requirement that the exercise of that power, position or authority for that purpose was seriously improper.

6.84 In our view, given the restrictions on the type of conduct this offence applies to, special defences for this offence, such as “reasonable justification or excuse”, are not needed. The desired effect is achieved by the requirement of serious impropriety: if there is a justification or excuse for D’s conduct, then by definition it is not seriously improper. Nevertheless, as with Option 1, in general terms the usual common law defences such as necessity and duress would apply.

6.85 We are aware that Division 4 of the South Australian statute, Criminal Law Consolidation Act 1935, contains an offence relating to public officers at section 251. The offence criminalises improper behaviour by a public office holder. Section 238 defines “improper” and includes the following subsection:

(3) Without limiting the effect of subsection (2), a person will not be taken to have acted improperly for the purposes of this Part if—

(a) the person acted in the honest and reasonable belief that he or she was lawfully entitled to act in the relevant manner; or

(b) there was lawful authority or a reasonable excuse for the act; or

(c) the act was of a trivial character and caused no significant detriment to the public interest.
Additionally, Western Australia’s Criminal Code Act Compilation Act 1913 contains an offence of corruption of a public officer at section 83 that includes within its elements a requirement that D acts without lawful authority or reasonable excuse.

The notable point about both of these offences is that neither includes any form of “seriousness threshold”. Therefore, the concept of “lawful authority or reasonable excuse” is being utilised not as a specific defence, but as a filter, to remove any cases not deserving of criminalisation from the ambit of the offence.

Our research into the law in other countries has revealed no examples where any other specific defences have been adopted in a statute criminalising abuses of official positions.

**Provisional proposal 32**

**Common law defences should apply. There should not be further defences.**

**CONCLUSION**

We have identified two distinct wrongs in the existing offence of misconduct in public office, namely breach of duty causing a risk of serious consequences and breach of public trust; the latter can also be described as corruption or abuse of position. These are reflected in Options 1 and 2 respectively. We have however left it open, at this stage of the consultation, whether offences are needed to cover both those wrongs.

**SUMMARY OF PROVISIONAL PROPOSALS**

The offence should address the following conduct:

(1) D commits the offence if he or she abuses his or her position, power or authority.

(2) That is to say, if:

(a) he or she exercises that position, power or authority for the purpose of achieving:

   (i) a benefit for himself or herself; or

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

(b) the exercise of that power, position or authority for that purpose was seriously improper.

The offence should apply to all public office holders, without further restriction.

The offence should not include a requirement that the public office holder, as well as being aware of the circumstances which determine that the position in question is a public office, was also aware that his or her position was, in law, considered to be a public office.

The fault element of the offence should include the purpose of achieving an advantage for the office holder or another or a detriment to another. There should
be no additional requirement of awareness that acting with that purpose was seriously improper.

6.95 Common law defences such as necessity and duress should apply.

Consultation questions 33 and 34

6.96 Should a corruption based model of offence, applying to public officials, as described in the foregoing provisional proposals, be introduced?

6.97 If such an offence is introduced should it be introduced on its own or in conjunction with the proposed offence described in Option 1?
CHAPTER 7
LAW REFORM OPTIONS – OPTION 3: ABOLITION WITHOUT REPLACEMENT

INTRODUCTION

7.1 In the previous two chapters we have set out the options for replacement offences. In this chapter we consider our final option: to remove the common law offence of misconduct in public office altogether from the law of England and Wales and not replace it.

7.2 No one who responded to our consultation provided comprehensive arguments that supported outright abolition of the current offence. However, neither did we specifically ask consultees the question whether or not they thought that the offence should be abolished outright. The background paper concentrated on the current law and its problems, not how these problems should be resolved.¹

7.3 A number of consultees did advocate abolition of the common law offence but, also, either:

(1) indicated support for the creation of new criminal offences to fill any gaps that abolition might leave; or

(2) restricted their response to only some of the categories of conduct we had identified.

7.4 An example of the first type of response was provided by a member of the public, Mike Paley. Mr Paley’s response began with a statement in support of abolition but then went onto indicate that he would support an offence addressing neglect of duty, applying to the police in particular.²

7.5 An example of the second type came from the News Media Association ("NMA"). This response was solely directed at one category of conduct identified by us, namely Category 5 (misuse of official information). Within that category, the response was focused on only one type of conduct: disclosure of official information to journalists.

In the NMA’s view, the offence of misconduct in public office should be abolished. If a new offence is postulated, then it must define with precision. It must not regulate the disclosure or acquisition or publication of information. It must not regulate journalistic activities or journalistic sources. It should not be framed to overlap or add to the existing law that impacts upon these areas. It should include public interest defences. It must be Article 10 compliant.


² Criminal Justice and Courts Act 2015, s 26 may go some way to addressing Mr Paley’s concerns, but as we highlighted in ch 3 of the background paper, it does not apply to police community support officers, special constables or other police staff, and its definitional elements are somewhat ambiguous.
No comment was made in the NMA response as to whether or when any of the other four categories of conduct, identified by us as only capable of being prosecuted as misconduct in public office, deserved criminalisation.

7.6 As explained in Chapter 3, we no longer consider that the conduct identified in Category 5 needs be included within the ambit of any proposals we make in the context of reforming misconduct in public office. We would refer consultees to our related, but separate project on misuse of official data.3

7.7 We set out the arguments for and against outright abolition of the offence of misconduct in public office below.

DISCUSSION

7.8 We expect that outright abolition, without the creation or amendment of specific offences, will be the preferred option for those who consider that:

(1) the mischief the common law offence seeks to protect against is adequately encompassed by available alternative offences, possibly including the use of secondary liability and inchoate offences; or

(2) where misconduct arises that cannot be prosecuted by way of any offence other than misconduct in public office, there are a range of other proportionate sanctions available to redress this behaviour adequately, without needing to resort to the criminal law.

7.9 A number of the consultation responses referred to the possibility of prosecuting alternative offences and/or using alternative methods of redress. Professor Mark Philp, Chair of the Committee on Standards in Public Life Research Advisory Board, remarked:

I’d want to press hard the question of whether we need something in addition to the range of offences people can commit, and these more informal non-judicial ways of dealing with things.

7.10 Professor Mark Knights, of Warwick University, whilst supporting the concept of criminal liability for misconduct in public office, recognised that the criminal law is not necessary in all cases and changes to administration may be sufficient. He noted that breach of public trust is generally tackled without recourse to a specific criminal offence of misconduct.

The administration of government was reformed in the period 1780-1850 … through a series of measures that sought to deal with the cause of the misconduct (the salary/fee structure; pensions; perquisites etc) and mostly considered governmental departments on a case by case basis.

7.11 He suggests that:

There may be grounds for thinking that this successful strategy of administrative, departmental reforms that helped introduce standards of conduct could be applied to the NHS, the police and so on today.

7.12 The Law Society stated, with reference to Appendix D to the background paper, which provides an overview of unreported prosecutions for misconduct in public office:

Without exception, the conduct alleged would also amount to gross misconduct in employment law leading to summary dismissal. This is a very serious sanction for a career civil servant. If the applicable pension scheme rules permit it could also involve a reduction in accrued pension rights. If no other discrete offence other than misconduct in public office could be charged it is arguable that a prosecution is rarely essential in addition to summary dismissal.

7.13 The argument against abolition has three parts:

(1) Some conduct that justifies criminal sanction can only be prosecuted using the offence.

(2) The offence serves a potentially important communicative purpose in terms of fair labelling.

(3) There are other practical reasons for retaining the offence.

For one or more of these reasons, it may be undesirable to abolish the offence of misconduct in public office without replacing it in some way.

Some conduct that justifies criminal sanction can only be prosecuted using the offence

7.14 Chapter 3 identifies some circumstances in which a criminal offence may be justified in this context. In the background paper we identify five categories of conduct which are capable of being prosecuted as misconduct in public office but not as any other offence. Abolition without replacement would have the effect of de-criminalising each of those five categories of conduct. Most consultees expressed concern that abolition without a replacement offence to address those mischiefs would leave an undesirable gap in the law.

7.15 Two of the consultation responses indicated that the authors considered that all of these forms of conduct should remain subject to the criminal law: the Council of HM Circuit Judges and the London Criminal Courts Solicitors’ Association (“LCCSA”). A number of other consultees indicated that they considered at least some of the categories of conduct to merit criminalisation. These included the Crown Prosecution Service (“CPS”), National Offender Management Service

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Additionally, the Independent Police Complaints Commission (“IPCC”) gave two examples of cases which would probably not be covered by an alternative offence if misconduct in public office was to be abolished without replacement: “where there is a serious and wilful neglect of the police service’s duty to protect the public from violence – as in the recent and tragic case of Bijan Ebrahimi – or where a police officer uses their position to sexually exploit a vulnerable victim or witness, there is a strong argument that criminal sanction should at least be a possibility.”

In Chapter 3, we disagree with the view that all five of the identified categories merit criminalisation. Our overall conclusion is that an offence is merited to deal with Category 4 – breach of duty by public office holders leading to or risking serious consequences. Additionally, an offence may be merited to address other “corrupt” conduct on the part of public office holders, which primarily falls within Category 3 – acting under a conflict of interest or in a prejudiced or biased manner.

In conclusion, abolition of the existing offence without replacement would mean that conduct in Categories 3 and 4, which we think justify criminalisation by way of an offence replacing it, could not be prosecuted at all. As already noted, there was one exception to our conclusions in relation to Category 1 – exploitation of a position to facilitate a sexual relationship. There we considered that the nature of the wrongs in certain examples discussed could justify not a new offence replacing misconduct in public office (although some cases might be caught by a offence targeting corrupt public office holders) but reform of the current sexual offences regime to include additional offences. We discuss the possibility of a wider reform of the sexual offences regime further in the next chapter.

**Fair labelling**

In the background paper, we raised the possibility that, even if certain types of conduct can be prosecuted using an alternative offence (for example fraud or bribery) there may nonetheless exist a distinct wrong to be addressed by misconduct in public office. That is, a given instance of misconduct in public office may also constitute another offence, but the fact that it occurs in the context of public office may (on this view) give rise to a wrong that merits criminal sanction, separate from and beyond that other offence. The High Court Enforcement Officers Association (“HCEO A”) stated that “it is, in our view, a distinctive wrong, which requires re-definition.”

In Chapter 3 we considered three potential wrongs that may underpin the offence: abuse of position; misgovernment; and breach of trust. These wrongs are, we think, now addressed by our law reform Options 1 and 2 above in Chapters 5 and 6. We concluded that there is no one clear rationale to be

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6 Member of the public.

7 For further detail on the case of Bijan Ebrahimi see http://www.bbc.co.uk/news/uk-england-bristol-35130753 (last visited 21 July 2016).
applied, as the three wrongs identified all overlap to a greater or lesser extent without entirely coinciding. It is therefore not clear that there is a single distinctive wrong to be addressed by misconduct in public office, requiring its own label.

7.21 On the other hand, prosecution practice indicates that there is a perceived need for misconduct in public office as a label, even where another offence is available. That is, where misconduct and another offence overlap, it is not only possible to prosecute misconduct in public office instead of a narrower offence, it is possible to prosecute both. This may indicate that the offence does address a discrete mischief.

7.22 For example, if a security guard in an immigration removal centre has non-consensual sex with a detainee he has committed two separate offences: rape and misconduct in public office and can be charged with and prosecuted for both. The rape charge is targeted at the guard’s violation of the detainee’s sexual autonomy whilst the misconduct in public office charge reflects the guard’s breach of a duty of trust not to abuse detainees.

7.23 In their response to the background paper, the CPS referred to this possibility:

In accordance with the principle set out in Rimmington, the usual approach is to charge the statutory offence and the presence of a misconduct offence alongside will typically reflect a different alleged factual basis or will be an alternative … [In other cases] we are of the view that it is proper to indict both misconduct and a statutory offence … as it correctly labels the offending and describes the behaviour in the context of the abuse of his position. It is not intended to be an alternative to the [statutory] charge. 8

7.24 In most cases, however, only one or other charge is actually brought by the prosecution, as the exercise of prosecutorial discretion requires consideration of the principle of proportionality. The approach of the prosecutor in such cases is usually determined by reference to any available charging guidance. The CPS guidance on misconduct in public office states:

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. 9

7.25 A large number of consultees emphasised that they considered the offence to be totemic in terms of public accountability and should not be abolished. Mr Paul Williams, a member of the public, felt that “the offence of Misconduct in Public Office is an essential part of the legal framework that holds Government and public officials accountable”. Meanwhile, the LCCSA stated that:

We would tend to agree that the offence of misconduct in public office does potentially reflect a distinctive wrong. The public have an

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expectation that the holders of public office discharge their duties in an appropriate manner and do not abuse their position even if there is concern as to what this exactly entails ... there are a number of scenarios where without the application of this offence ... conduct [that deserves to be criminal] could go unpunished.

7.26 When speaking at our symposium on 20 January 2016, the Rt Hon Dominic Grieve QC MP explained that in his view the offence was important because “the nature of the state is entirely different from anything else. They have special immunities and privileges.” These are:

of immense public importance [and] should be seen to be carried out to very high standards and if that standard is diverted from, by a wilful disregard of duties placed on individual, not only has impact on individuals affected but there is a wider effect on public confidence on the way the state functions.

7.27 Professor A T H Smith, Goodhart Visiting Professor, University of Cambridge, also commented that he “[did] not think it can be abolished without replacement. There is undoubtedly a mischief here.”

7.28 We noted in Chapter 3 that some commentators consider that the law should not only define what is prohibited with legal clarity, it should also seek to reflect moral clarity as far as possible. The need for a criminal offence to communicate the seriousness and emphasise the wrongdoing of the offender’s conduct is the primary consideration of the principle of fair labelling. 10

7.29 A number of consultees regarded misconduct in public office as important in terms of accurately communicating wrongdoing. The CPS thought the offence “fulfils an important role in communicating the nature of the wrongdoing”. The LCCSA felt “that the offence of misconduct in public office fulfils an important role from this perspective. It is an offence which can undermine public confidence in public office holders and hence it is important that the labelling is correct. We appreciate that the offence can potentially cover a range of circumstances but the same applies to any other category of offence.”

7.30 To dispense entirely with an offence, which has as its purposes the protection of the public from breaches of duty by those in a position of public trust and the prevention of harm to the public interest, could send an undesirable message that official misconduct is no longer a problem or a priority.

7.31 In contrast, the IPCC were of the view that: “the role that the current offence plays in ensuring that such conduct is subject to criminal sanction is more important than the question of fair labelling. Moreover, any labelling function that the current offence does perform is less important than what members of the public may perceive to be a lack of consistency in how the offence is applied … For example, members of the public may be surprised that medical professionals

10 Fair labelling is concerned “with the way in which the range of behaviour that is deemed to be “criminal” is divided into individual offences and the names or shorthand descriptions that are attached to these offences for recording purposes”: J Chalmers and F Leverick, “Fair Labelling in Criminal Law” (2008) 71(2) Modern Law Review 217, 222.
caring for a patient could not be found guilty of misconduct in public office in circumstances in which police officers may be.”

7.32 As we stated in the background paper, it is generally accepted that one important consideration of the principle of fair labelling is the merit of particularity versus breadth. Chalmers and Leverick¹² 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 that defining offences too narrowly is equally problematic, because it overcomplicates the law.

7.33 On one view fair labelling may require the creation of more than one offence for the same conduct. The question of labelling was a primary reason why, in our consultation paper on the reform of bribery, we suggested that the fact that a proposed new offence of bribery would overlap to a significant degree with fraud did not undermine our proposals:

We see nothing wrong with, and indeed there may be some virtue in, such overlapping of offences.¹³

On another view, as we stated in Chapter 6, there is also a need to guard against creating a proliferation of criminal offences particularly where they are overlapping.¹⁴

**Practical reasons**

7.34 A number of consultation responses made reference to the overlap between the current misconduct offence and other offences and possible practical reasons for retaining it.

7.35 Some considered that the broad nature of misconduct in public office makes it extremely useful as an available alternative to narrow or more specialised offences. NOMS said, "when there are several statutory offences identified it may be easier to prove one offence of MiPO." The Council of HM Circuit Judges stated:

We do not agree with outright abolition of the offence and simply leaving the misconduct to be dealt with by charging other offences. There are some cases where a sentence greater than the ordinary maximum for the offence is justified by the serious abuse of the office held.

7.36 Others were strongly of the opinion that where an alternative statutory offence existed then that should be charged. Alec Samuels, a barrister and legal commentator, submitted that:

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Using MIPO because an existing statute in the judgment of CPS does not go far enough is unacceptable. Parliament prescribed the limits. … Parliament has set the maximum sentence for the substantive [statutory] offence. Using MIPO as a way of exceeding the maximum is improper.

This argument only applies when the statutory offence captures the full mischief of the conduct that occurred. Where the statutory offence is clearly inadequate in labelling terms, it is legitimate to charge a common law offence that expresses the full mischief, even though this may result in a higher sentence.\(^{15}\)

7.37 For as long as misconduct in public office remains a common law offence, it is generally preferable to use statutory offences covering the same behaviour unless there is good reason not to do so. In theory statutory offences should be by their nature better defined and provide a clearer basis for predicting criminal liability. Of course, if we were to replace the common law offence of misconduct in public office with a statutory offence or offences then the presumption of preferring a statutory offence over a common law one would no longer apply. It would simply be a choice between two statutory offences.

7.38 Where the choice is between two statutory offences the choice of preferring one over the other is less controversial than the choice to be made between a common law and a statutory offence. The same potentially “good” reasons referred to above may also be relied upon to assist in making the decision as to whether a broader statutory offence should be considered for charge in preference to a narrower one.

7.39 In Chapter 5 of the background paper we identified three types of “good reasons”, commonly identified as justifications that allow investigators and prosecutors to use a broader offence in place of a narrower one:

1. in some instances a broader offence 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. 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 (life imprisonment) is necessary to reflect D’s culpability for the conduct; and/or

3. a single charge of a broader offence 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.

7.40 We considered this issue in a different context in our report on public nuisance. We concluded that, even if the common law was to be placed on a statutory footing, there should still be a preference for charging a narrower offence over the broader, nuisance offence.\(^{16}\) This was provided that the narrower offence fully reflected the gravity and nature of the defendant’s wrongdoing.

\(^{15}\) See Dosanjih [2013] EWCA Crim 2366, [2014] 1 WLR 1780.

7.41 Consequently, although it is permissible to prefer prosecution of a broad common law or statutory offence over a narrower one, the requirements of legal certainty suggest that such prosecutions should be kept to a minimum. The use of such offences on grounds of principle, related to harms and wrongs and labelling considerations, is much easier to justify than the prosecution of such offences on practical grounds such as those set out above.

7.42 On the above argument, there is a role for an offence of official misconduct even in relation to conduct that is covered by other offences, so that the conduct is labelled in a way that fully reflects its wrongfulness and gravity. In this context, such an offence is desirable rather than necessary: even if other offences are used, the defendant’s abuse of his or her position is a factor that can be reflected in sentencing (see Chapter 8 for further discussion). As indicated in the early part of this chapter, the main need for the offence is in relation to conduct in Categories 3 and 4, as in the absence of such an offence this conduct could not be prosecuted at all.

CONCLUSION

7.43 The Royal Commission on Standards of Conduct in Public Life stated in 1976: “the common law offence has a useful, though small, part to play in the battery of criminal sanctions against malpractice in public life, and that it should be retained”.17

7.44 The main argument for creating or retaining an offence covering some or all of the same conduct as the existing offence of misconduct in public office is that there are some forms of conduct which merit prosecution and could not be prosecuted in the absence of such an offence. The main examples are those forms of conduct which fall within Categories 3 (acting under a conflict of interest) and 4 (wilful neglect of duty leading to or risking serious consequences). This argument is set out in detail in Chapter 3.

7.45 A second argument, though less compelling than the main argument, is that, even for conduct that is covered by other offences, it is desirable to have an offence specifically targeting official misconduct, so as to capture and correctly label the full wrongfulness of that conduct. This argument is set out above.

7.46 Consultees will be in favour of Option 3, namely abolishing misconduct in public office without replacement, if and only if they are not convinced by either of these two arguments. Option 3 may be implemented either with or without any of the complementary legal reforms we discuss in the next chapter.

7.47 Whilst we propose below that the current offence should not be abolished without the introduction of another offence to replace it, we would welcome consultees’ views on whether or not they agree.

**Provisional proposal 35**

7.48 The offence of misconduct in public office should not be abolished without any new offence being introduced to replace it.

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CHAPTER 8
COMPLEMENTARY LEGAL REFORMS

INTRODUCTION

8.1 In this chapter we discuss two additional legal reforms, which we consider could complement any one or more of the three law reform options outlined in Chapters 5 to 7:

(1) Reforming the sexual offences regime to address the issue of exploitation of a position to facilitate a sexual relationship.

(2) Making additional provision, in any offence, for the fact that the offender is a public office holder to be taken into account as an aggravating factor in determining the sentence to be passed.

8.2 In Chapters 3 to 6 we highlighted two issues that might arise if the offence were repealed and replaced by one or more of the options we propose:

(1) Depending on the options implemented, the exploitation of an opportunity, gained by virtue of a particular position, to facilitate a sexual relationship (Category 1 behaviour) would no longer be criminal unless it amounted to:

(a) Under Option 1: either a sexual offence or a breach of a particular duty concerned with the prevention of harm that caused a risk of serious injury.

(b) Under Option 2: either a sexual offence or abuse of a position where D’s purpose was to gain a personal advantage or to cause detriment to V.

(c) Under Options 1 and 2 combined: either a sexual offence, a breach of a particular duty concerned with the prevention of harm that caused a risk of serious injury (Option 1) or abuse of a position where D’s purpose was to gain a personal advantage or to cause detriment to V (Option 2).

This may necessitate a review of the sexual offences regime to assess whether additional sexual offences should be created to address such conduct. The need for such a review would be most apparent if we were to propose outright abolition of current law without replacement (Option 3). It would be least apparent if we were to propose that the current law should be replaced by a combination of Options 1 and 2.

(2) An offence labelled “misconduct in public office” might be valued because it serves an important communicative function. With any of the reform options we propose, the value of labelling may, depending on the label given to any statutory offence in Option 1 or 2, be diminished or lost. One way that the criminal law can continue to signal the distinct wrongfulness of improper behaviour by public officials is by the courts
publicly acknowledging that the sentence for any offence committed by a public office holder should be increased to reflect that aggravating factor.

REFORMING THE SEXUAL OFFENCES REGIME

8.3 In Chapter 3 we discussed scenarios within our Category 1 (exploitation of a position to facilitate a sexual relationship) which involved harms and wrongs that could justify reform of the current sexual offences regime to include additional offences.

8.4 These scenarios all involved a vulnerable adult, V, who entered into or remained in a relationship with an individual, D, as a result of perceived pressure associated with D’s position of authority and/or V’s vulnerability, though that pressure was not sufficient to vitiate V’s consent so as to render D liable for a sexual offence.

8.5 We came to the conclusion that the primary harms and wrongs involved in these scenarios are impairment of sexual autonomy and breach of V’s trust. These harms and wrong are independent of whether D holds a public office. If they are in themselves sufficient to justify an offence, this offence should cover all cases involving those wrongs, whether or not performed by public office holders.

8.6 Impairment of sexual autonomy is primarily addressed by sexual offences such as rape and sexual assault. These depend on the fact that V did not consent to the sexual activity in question. If V did freely consent, there is no reason in principle to criminalise the activity.

8.7 However, it could be argued that there is an intermediate class of case, in which V’s consent should be regarded as flawed rather than non-existent: for example, if it was obtained by deception or improper pressure. Such cases, on this argument, do not deserve to be stigmatised in the same way as a non-consensual sexual offence but should not escape liability altogether. In the Sexual Offences Act 1956,¹ for example, there were offences of obtaining sex by threats and by false pretences.

8.8 If the present sexual offences regime is regarded as unsatisfactory because it fails to criminalise infringements of sexual autonomy falling short of a non-consensual offence, arguably the solution is not to have a specialised offence concerned with public office (or D’s position in general). Rather, the solution is to revise the approach to consent in sexual offences.

8.9 The other possible wrong in Category 1 cases may be expressed as breach of trust or the sexual exploitation of a vulnerable person; in particular, in cases where D has a duty of caring for that vulnerable person. Again there are already offences of this kind, addressing the cases where V is a person with a mental disorder² or a young person.³ One solution might be to create similar offences covering the abuse of other vulnerable people, such as people seeking medical or psychological treatment and adults in custody. This solution was supported by

¹ Sexual Offences Act 1956, ss 2 and 3.
² Sexual Offences Act 2003, ss 38 to 44.
³ Sexual Offences Act 2003, ss 16 to 21.
two academics from Nottingham Trent University who responded to the background paper.4

8.10 In short, possible solutions to this problem include creating:

(1) an offence of obtaining sexual activity by improper pressure (the types of pressure would need to be further defined) analogous to the now repealed offences of obtaining sex by threats or deception; and/or

(2) an offence of sexual exploitation of a vulnerable adult person for whom D has responsibility (analogous to sections 16 to 19 of the Sexual Offences Act 2003 which created an offence of “abuse of trust” applying to 16 and 17 year olds).

8.11 Assessing the merits of such sexual offences, unrelated to the fact of public office, falls outside the scope of this project. The current use of misconduct in public office to prosecute such cases is fundamentally a stop-gap caused by an arguable lack of a suitable sexual offence. It is a stop-gap that means, however, that the criminal law only provides protection against such exploitation in respect of public office holders (and in fact prosecutions are often only brought against certain types of individuals, for example, police, prison and probation officers).

8.12 This type of conduct would not normally fall within the scope of the Option 2 offence and would only fall within Option 1 if V suffered injury. Consultees may, therefore, consider that a review of the sexual offences regime should be carried out. That review may or may not result in one or both of the sorts of additional sexual offences mentioned above being created.

8.13 Any such review will need to consider the evidence gathered, and the findings made by, of ongoing public inquiries such as that currently being undertaken by Lord Justice Pitchford into undercover policing.5 Sir Christopher’s review includes consideration of the fact that, for a period spanning a number of years, a number of undercover police officers assigned to infiltrate environmental and social justice groups engaged in personal and sexual relationships with members of those groups without disclosing to them that they were in fact police officers.6 This conduct would not, under the Sexual Offences Act 2003, amount to a sexual offence. Criticism has been made7 of the Act’s limited definition of the types of deception that can lead to a conclusive presumption being drawn to the effect that the complainant did not consent to sex in the circumstances.8

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4 Helen Edwards and Catarina Knight suggested the creation of a new offence(s) based on Sexual Offences Act 2003, ss 16 to 19.
5 See www.ucpi.org.uk (last visited 21 July 2016).
6 Civil actions brought against the Metropolitan police under the Human Rights Act 1998, as well as for the torts of misfeasance in public office, assault, negligence and deceit, by eight claimants resulted in seven out of court settlements in November 2015 (accompanied by an apology from the police) and one judgement in favour of the remaining claimant in January 2016. See www.policespiesoutoflives.org.uk (last visited 21 July 2016).
8 Sexual Offences Act 2003, s 76.
Consultation question 36

8.14 Should reform of the sexual offences regime be considered, in respect of:

(1) obtaining sex by improper pressure; and/or

(2) sexual exploitation of a vulnerable person?

TREATING PUBLIC OFFICE AS AN AGGRAVATING FACTOR FOR THE PURPOSES OF SENTENCING

8.15 In Chapter 3 we explained that the harms and wrongs underlying the types of conduct that presently can be prosecuted using misconduct in public office are not dependent on the fact of public office. However, the fact that a public office holder is the person performing that conduct may aggravate the harms and wrongs that arise from it. In that way conduct performed by public office holders may, in particular circumstances, justify criminalisation although the same conduct would not justify criminal sanction when performed by another person.

8.16 In Chapters 3 to 6 we also considered the question of whether the offence of misconduct in public office performs an important communicative function, in terms of providing an appropriate label for official misconduct. We concluded that this may be one of the functions of the current offence.

8.17 Some have suggested that any gap left by the abolition of misconduct in public office could be filled without the creation of a replacement offence (or set of offences). The suggestion is that any crime committed by a public office holder acting as such should be prosecuted under the relevant offence, but that the sentence should be increased to reflect the additional wrong involved.

8.18 This proposal was mooted at our symposium by a barrister, Jamas Hodivala. It was suggested that the need to mark the serious nature of breaches of trust by public office holders could be met exclusively and adequately during the sentencing process. If a public office holder was guilty of, say, an offence under the Immigration Act 1971, then that individual should be charged with the relevant offence under the Act and the fact of their public office should be treated as an aggravating factor that justified the imposition of a higher sentence upon the defendant (up to the maximum available for the offence charged).

8.19 This suggestion might seem attractive given our discussions in Chapter 3 of how the fact that someone is a public office holder may aggravate the harms and wrongs associated with particular types of conduct that can only be prosecuted as misconduct in public office. Additionally, for conduct where misconduct in public office is not the only offence that can be prosecuted, treating public office as an aggravating feature for the purposes of sentencing could satisfy the need to communicate the aggravating effect that “public office” has on an offender’s criminality.

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9 Law Commission Symposium on Misconduct in Public Office, 20 January 2016, at Dickson Poon School of Law, King’s College London.

10 For example, assisting unlawful immigration under s 25.
8.20 However, we consider that treating public office as an aggravating factor for the purposes of sentencing could not provide a complete and effective replacement for the crime of misconduct in public office were that crime to be abolished. In relation to conduct that can currently only be prosecuted as misconduct in public office, abolition of that offence would mean that such conduct could not be prosecuted at all. There would be no conviction for any offence and hence no sentence to increase.

8.21 We are also aware of the possibility that, even if the current law is replaced by one or both of our proposed offences in Options 1 and 2, the value of the current label may, depending on the label given to any statutory offence in Option 1 or 2, be diminished or lost.

8.22 Whichever of our law reform options is adopted, or if Options 1 and 2 are combined, there is value in the courts being able to treat the fact that the defendant committed a relevant crime whilst performing (or failing or purporting to perform) the duties or functions of a public office as an aggravating factor for the purposes of sentencing, in some cases.

8.23 A sentencing regime that takes account of public office as an aggravating factor could in our opinion, represent a reform option either in combination with a statutory offence(s) to replace misconduct in public office or if the offence were abolished without replacement.

8.24 Sentencing judges already have a discretion to take into account the fact that a defendant is a public office holder, without any need for a statutory power or a dedicated sentencing guideline. An important part of the sentencing process involves judges exercising their judicial discretion as to what factors in a particular case either aggravate or mitigate the defendants criminality, and thereby his or her eventual sentence.

**Sentencing guidelines**

8.25 The factors that a sentencing judge may take account of include, but are not limited to, those specified by the Sentencing Council in relevant sentencing guidelines.

8.26 The Sentencing Council is an independent body established to produce guidelines on sentencing for the judiciary and criminal justice professionals. The guidelines produced may be offence specific, or more general in nature (for example, guidelines for sentencing in the magistrates’ court or for the sentencing of youths).

8.27 There are no such guidelines for the offence of misconduct in public office. Additionally, at present “breach of trust” is commonly referred to as an aggravating factor within various sentencing guidelines whilst public office is not. That is not to say that the fact that a defendant has committed a crime in the course of carrying out the functions of a public office is not taken into account as an aggravating factor. A number of members of the judiciary indicated in consultation meetings that individual judges do, in appropriate cases, treat public

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11 Coroners and Justice Act 2009, s 18.
office as a factor liable to increase a defendant’s sentence. Our own research
into recent prosecutions, contained in Appendix D to the background paper,
supports this suggestion.\textsuperscript{12}

8.28 However, given our earlier discussions in respect of the importance of fair
labelling, some may think that it may be preferable to specify public office as an
aggravating factor in published guidelines rather than to leave it to be
encompassed within the much wider concept of breach of trust. This could be
achieved by way of inclusion of public office as a specific aggravating factor in
the sentencing guidelines issued by the Sentencing Council, albeit that it would
require revision of a number of current guidelines.

Statutory provision
8.29 An alternative way of reflecting public office as an aggravating factor in the
sentencing process would be through the creation of a statutory provision
requiring the courts to either: (1) consider whether to treat public office as an
aggravating factor or (2) to in fact treat public office as such a factor. This
possibility was suggested to us in a consultation meeting by David Perry QC.
Both methods could either grant the courts a discretionary power to aggravate a
sentence, or could impose a mandatory duty upon them to do so.

Conclusion
8.30 Our considered view, at this stage, is that there is no compelling case for
including the factor of public office in either formal sentencing guidelines or a
statutory provision specifying that it either can or must be treated as an
aggravating feature. We are not aware of any complaints made as to the way the
judicial process currently takes account of public office in the context of
sentencing criminal offences.

8.31 If we consider in due course that Option 3 (outright abolition of the current law
without replacement) would be the preferred way to reform misconduct in public
office, some consideration would need to be given, at that point, as to how the
law could ensure that “public office” as a concept did not disappear from the
criminal law altogether, specifically as a potential aggravating feature within the
sentencing process.

Consultation question 37
8.32 Do consultees agree that the fact that a defendant is in public office should
continue to be treated, as a matter of judicial discretion, as an aggravating
factor for the purposes of sentencing any criminal offence?

\textsuperscript{12} Appendix D to the background paper available at http://www.lawcom.gov.uk/wp-
content/uploads/2016/01/apd_spreadsheets.pdf.
CHAPTER 9
PROVISIONAL PROPOSALS AND CONSULTATION QUESTIONS

CHAPTER 4: LAW REFORM OPTIONS: PUBLIC OFFICE

Consultation question 1
9.1 For the purposes of a reformed offence or offences to replace misconduct in public office, should “public office” be defined in terms of:

(1) a position involving a public function exercised pursuant to a state or public power; or

(2) a position involving a public function which the office holder is obliged to exercise in good faith, impartially or as a public trust?

[paragraph 4.74]

Provisional proposal 2
9.2 For the purposes of a reformed offence or offences to replace misconduct in public office, “public office” should not be defined in terms of:

(1) a position with an institutional or employment link to one of the arms of the state; or

(2) a position where the person occupying it has a duty associated with a state function, which the public has a significant interest in seeing performed.

[paragraph 4.75]

Consultation question 3
9.3 For the purposes of a reformed offence or offences to replace misconduct in public office, should the statutory definition of public office take the form of:

(1) a general definition;

(2) a definition of public office as any position involving one or more of the functions contained in a list;

(3) a list of positions constituting a public office; or

(4) a general definition, supplemented by a non-exhaustive list of functions or positions given by way of example?

[paragraph 4.101]
Consultation question 4
9.4 If the definition of public office includes a list of functions or positions, should there be power to add to the list by order subject to the affirmative resolution procedure?

[paragraph 4.102]

CHAPTER 5: LAW REFORM OPTIONS – OPTION 1: THE BREACH OF DUTY MODEL
9.2 All provisional proposals and consultation questions in this section refer to the new proposed offence in respect of breaches of duty, causing or risking serious consequences, by public office holders with particular duties concerned with the prevention of harm.

Provisional proposal 5
9.3 The offence should encompass both positive acts and omissions and the conduct element should refer to a “breach of duty” to reflect this.

[paragraph 5.20]

Provisional proposal 6
9.4 The offence should be limited to breaches of particular duties concerned with the prevention of harm.

[paragraph 5.30]

Provisional proposal 7
9.5 The category of public office holders under a particular duty concerned with the prevention of harm should be defined to include public office holders with powers of physical coercion (whether or not it also includes any other public office holders).

[paragraph 5.58]

Consultation question 8
9.6 Should the category of public office holders under a particular duty concerned with the prevention of harm be defined to include those public office holders with a duty of protection in respect of vulnerable individuals (whether or not it also includes any other public office holders)?

[paragraph 5.65]
Consultation question 9
9.7 Should the category of vulnerable individuals be defined:

(1) in the same way as in the Safeguarding Vulnerable Groups Act 2006; or
(2) in some other, and if so, what way?  

[paragraph 5.71]

Consultation question 10
9.8 Should the offence be defined to include the breach of every legally enforceable duty to prevent (or not to cause) relevant types of harm, or should there be a more restricted definition of the nature of the duty involved?

[paragraph 5.83]

Provisional proposal 11
9.9 The offence should be defined as consisting of breach of a particular duty concerned with the prevention of specified harms.

[paragraph 5.92]

Consultation question 12
9.10 Should the definition of the category of public office holders with powers of physical coercion take the form of:

(1) a general definition;
(2) a definition of that type of public office as any position involving one or more of the functions contained in a list;
(3) a list of positions constituting that type of public office; or
(4) a general definition, supplemented by a non-exhaustive list of functions or positions given by way of example?  

[paragraph 5.98]

Consultation question 13
9.11 If the definition of that category (public office holders with powers of physical coercion) includes a list of functions or positions, should there be power to add to the list by order?  

[paragraph 5.99]

Consultation question 14
9.12 Should the definition of the category of public office holders with a duty of protection take the form of:

(1) a general definition;
(2) a definition of that type of public office as any position involving one or more of the functions contained in a list;

(3) a list of positions constituting that type of public office; or

(4) a general definition, supplemented by a non-exhaustive list of functions or positions given by way of example?

[paragraph 5.100]

Consultation question 15

9.13 If the definition of that category (of public office holders with a duty of protection) includes a list of functions or positions, should there be power to add to the list by order?

[paragraph 5.101]

Provisional proposal 16

9.14 There should be no requirement on the prosecution to prove that D knew that his or her position was, in law, a public office involving the exercise of powers of physical coercion or a duty of protection. It is sufficient for the prosecution to establish that D was aware of the factual circumstances that made it one.

[paragraph 5.119]

Provisional proposal 17

9.15 There should be a requirement that D is aware of any circumstances relevant to the content of any particular duties of his or her office concerned with the prevention of harm. For example, what types of harm the duties require D to prevent and in what circumstances.

[paragraph 5.120]

Provisional proposal 18

9.16 The offence, should include both actual and potential consequences.

[paragraph 5.136]

Provisional proposal 19

9.17 The risk of the following two types of consequence:

(1) death and serious injury (including both physical and psychiatric harm); and

(2) false imprisonment;

should be regarded as public harm for the purposes of the offence.

[paragraph 5.151]
Consultation question 20
9.18 Should the risk of serious harm to public order and safety be regarded as public harm for the purposes of the offence?

[paragraph 5.157]

Consultation question 21
9.19 Should the risk of serious harm to the administration of justice should be regarded as a consequence that would be likely to cause a risk of public harm occurring for the purposes of the offence?

[paragraph 5.165]

Consultation question 22
9.20 Should the risk of serious harm to property should be regarded as a consequence that would be likely to cause a risk of public harm occurring for the purposes of the offence?

[paragraph 5.169]

Consultation question 23
9.21 Should the risk of serious economic loss be regarded as a consequence that would be likely to cause a risk of public harm occurring for the purposes of the offence?

[paragraph 5.174]

Provisional proposal 24
9.22 Liability should only be imposed where a risk of serious consequences arises.

[paragraph 5.182]

Provisional proposal 25
9.23 The fault element of the offence should include recklessness as to the risk of specified consequence as defined above. The offence should not contain an ulterior intent element.

[paragraph 5.204]

Provisional proposal 26
9.24 The offence should exclude the element of “without reasonable excuse or justification” but retain the availability of relevant common law defences where it is prosecuted.

[paragraph 5.213]
Consultation question 27
9.25 Should an offence of breach of duty by a public office holder (subject to a particular duty concerned with the prevention of harm, as described in the foregoing provisional proposals) be introduced?

[paragraph 5.220]

CHAPTER 6: LAW REFORM OPTIONS – OPTION 2: THE CORRUPTION BASED MODEL
9.26 All provisional proposals and consultation questions in this section refer to the new proposed offence in respect of abuse of position by a public office holder, for the purpose of either obtaining a personal advantage or causing detriment to another.

Provisional proposal 28
9.27 The offence should address the following conduct:

(1) D commits the offence if he or she abuses his or her position, power or authority.

(2) That is to say, if:

(a) he or she exercises that position, power or authority for the purpose of achieving:

(i) a benefit for himself or herself; or

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

(b) the exercise of that power, position or authority for that purpose was seriously improper.

[paragraph 6.50]

Provisional proposal 29
9.28 The offence should apply to all public office holders, without further restriction.

[paragraph 6.59]

Provisional proposal 30
9.29 The offence should not include a requirement that the public office holder, as well as being aware of the circumstances which determine that the position in question is a public office, was also aware that his or her position was, in law, considered to be a public office.

[paragraph 6.63]

Provisional proposal 31
9.30 The fault element of the offence should include the purpose of achieving an advantage for the office holder or another or a detriment to another. There should
be no additional requirement of awareness that acting with that purpose was seriously improper.

[paragraph 6.82]

Provisional proposal 32

9.31 Common law defences should apply. There should not be further defences.

[paragraph 6.89]

Consultation question 33

9.32 Should a corruption based model of offence, applying to public officials, as described in the foregoing provisional proposals, be introduced?

[paragraph 6.96]

Consultation question 34

9.33 If such an offence is introduced should it be introduced on its own or in conjunction with the proposed offence described in Option 1?

[paragraph 6.97]

CHAPTER 7: LAW REFORM OPTIONS – OPTION 3: ABOLITION WITHOUT REPLACEMENT

Provisional proposal 35

9.34 The offence of misconduct in public office should not be abolished without any new offence being introduced to replace it.

[paragraph 7.48]

CHAPTER 8: COMPLEMENTARY LEGAL REFORMS

Consultation question 36

9.35 Should reform of the sexual offences regime be considered, in respect of:

(1) obtaining sex by improper pressure; and/or

(2) sexual exploitation of a vulnerable person.

[paragraph 8.14]

Consultation question 37

9.36 Do consultees agree that whether the fact that a defendant is in public office should be treated as an aggravating factor for the purposes of sentencing any criminal offence should remain a matter of judicial discretion in each case (rather than being set out in sentencing guidelines or in statute)?

[paragraph 8.32]