

THE LAW COMMISSION

REFORMING MISCONDUCT IN PUBLIC OFFICE: OVERVIEW

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

Misconduct in Public Office: Issues Paper 1 – the current law (“the background paper”) was the first document to be published as part of this project. That paper began the first phase of the consultation process.

The background paper set out the current law of misconduct in public office, highlighting problems that arise through areas of uncertainty, as well as gaps and overlaps with alternative offences. It asked consultees a number of questions, which were aimed at gathering further evidence as to existing problems and their extent. Public consultation on the background paper closed on 20 March 2016.

Our Consultation Paper, *Reforming Misconduct in Public Office*, begins our second phase of consultation and sets out options for what the law of misconduct in public office should be. The consultation is open for three months, closing on **28 November 2016**.

Both the Consultation Paper and the background paper, together with accompanying appendices and summaries (including Welsh language versions of the summaries and overviews) are available online at: <http://www.lawcom.gov.uk/project/misconduct-in-public-office/>. Our final report will be published in 2017.

The offence and its problems

Misconduct in public office is a common law offence: it is not defined in any statute. It carries a maximum sentence of life imprisonment. The offence requires that: a public officer acting as such; wilfully neglects to perform his or her duty and/or wilfully misconducts him or herself; to such a degree as to amount to an abuse of the public’s trust in the office holder; without reasonable excuse or justification.

The offence is widely considered to be ill-defined and has been subject to recent criticism by the Government, the Court of Appeal, the press and legal academics. Statistics suggest that more people are being accused of misconduct in public office while fewer of those accusations lead to convictions. One possible reason is that the lack of clear definition of the offence renders it difficult to apply. In the background paper we identified a number of specific problems with the offence.

In general terms, those consultees who responded to the background paper agreed with us that the law is in need of reform in order to ensure that public officials are appropriately held to account for misconduct committed in connection with their official duties. Consultees also indicated that our review of the law and its problems was comprehensive.

Law reform options

The problems identified in the existing law clearly show that it would be undesirable either to retain the existing offence or to attempt to codify it in statute. All the options in the Consultation Paper therefore assume that the common law offence of misconduct in public office is to be abolished.

The underlying issue tying together the problems with the current offence is that it is not clear what mischief the current offence targets and therefore what sort of offence it is meant to be. At first sight there are three possible explanations for the current offence: abuse of position for personal advantage, misgovernment and breach of the trust of the public. However, none of these explanations alone wholly accounts for the offence. Likewise, none of the rationales identified are clearly enough defined to be able to base the elements of a new offence upon them. The wrong that comes nearest to explaining the current offence is *breach of the trust of the public*.

In the Consultation Paper we test this conclusion by considering the five categories of conduct which, according to the background paper, are often prosecuted using this offence because there is no other offence that applies to them. We further conclude that there are two main types of wrong which deserve consideration for the purposes of a reformed offence or offences: breach of duty leading to a risk of serious harm and corrupt behaviour, including the abuse of a position for personal advantage or to cause harm to another.

For the purpose of devising any offence or offences to replace misconduct in public office, we need to devise a more rigorous definition of public office. The current, vague definition is a major problem with the current offence. We discuss in the Consultation Paper four possible methods of defining public office. Any new offence will need to be underpinned by the concept, however not every new offence needs to apply to all public office holders. It may be that certain types of new offence need only apply to a subset of public office holders.

We propose two possible new offences to replace the current offence of misconduct in public office. Option 1 involves a new offence addressing breaches of duty that risk causing serious harm, when committed by particular public office holders (those with duties concerned with the prevention of harm). Option 2 involves a new offence addressing corrupt behaviour on the part of all public office holders. Options 1 and 2 are separate but compatible. That is, it would be possible to implement Option 1 on its own, Option 2 on its own or both together.

Law reform Option 3 involves abolition of the current law without replacement. At this stage, it is our view that reform of this nature would be likely to leave unacceptable gaps in the law.

At the end of the Consultation Paper we discuss two other possible legal reforms, which could complement any of our Options 1, 2 or 3. Both possibilities were raised by consultees, during the first phase of consultation. The first involves reform of the sexual offences regime. The second involves treating the fact that a defendant is a public official as an aggravating factor for the purposes of sentencing his or her criminal conduct.