



**Law
Commission**
Reforming the law

Reforming Misconduct in Public Office Summary

**Consultation Paper No 229 (Summary)
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LAW COMMISSION

REFORMING MISCONDUCT IN PUBLIC OFFICE: CONSULTATION PAPER

SUMMARY

INTRODUCTION

- 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 out our provisional proposals for the reform of misconduct of 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

The background paper and the first phase of consultation

- 1.4 On 20 January 2016 we published *Misconduct in public office: Issues paper 1 – The current law* (“the background paper”).⁵ This was a background paper to 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 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.

² See Appendix A to the background paper for further analysis of the historical development of the offence. Available at http://www.lawcom.gov.uk/wp-content/uploads/2016/01/apa_history.pdf.

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

⁴ Lord Thomas CJ in *Chapman* [2015] EWCA Crim 539, [2015] 2 Cr App R 10.

⁵ *Misconduct in Public Office Issues Paper 1: The Current Law* (January 2016), available at http://www.lawcom.gov.uk/wp-content/uploads/2016/01/misconduct_in_public_office_issues-1.pdf.

- 1.5 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. The responses confirmed for us particular concerns that had been raised in 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.
- 1.6 The consultation paper now published sets out our provisional law reform proposals.

The symposium and responses to the first paper

- 1.7 In addition to publishing the 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. An analysis of the contributions made at the symposium is contained in Appendix A to the Consultation Paper.⁶
- 1.8 The background paper received a total number of 36 consultation responses. We are extremely grateful to both those individuals and bodies who took the time to respond in writing. The relationship between the questions asked in the background paper and the responses received is explained, and the main themes arising from the responses are analysed, in Chapter 2 of the Consultation Paper.
- 1.9 As part of this initial phase of the consultation process we met with a number of organisations and individuals directly, in the following forums:
- (1) A representative stakeholder group:⁷
 - (2) An academic advisory group.⁸
 - (3) A judicial and practitioner advisory group.⁹

⁶ Available online at: <http://www.lawcom.gov.uk/project/misconduct-in-public-office/>.

⁷ Meeting took place on 23 February 2016. All meeting attendees are listed in ch 1 of the full consultation paper.

⁸ 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.

⁹ 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.

- (4) A government stakeholder group.¹⁰
 - (5) A wider government stakeholder group.¹¹
- 1.10 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.

THE CURRENT LAW AND ITS PROBLEMS

- 1.11 The leading modern case is *Attorney General's Reference (No 3 of 2003)* ("AG's Reference"),¹² 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.¹³

This implies that there is a single offence which can be committed in two ways, namely wilful neglect and wilful misconduct, though both may be present in the same case.

- 1.12 In the background paper we identified numerous problems with the current formulation of the common law offence that make it difficult to use. These are:
- (1) "Public office" lacks clear definition yet is a critical element of the offence. This ambiguity generates difficulties in interpreting and applying the offence.
 - (2) The types of duty that may qualify someone to be a public office holder are uncertain. Whether it is essential to prove a breach of those particular duties is also unclear from the case law.

¹⁰ 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.

¹¹ 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.

¹² [2004] EWCA Crim 868, [2005] QB 73 at [61].

¹³ This remains the clearest statement of the elements of the offence, although other more recent cases have refined aspects of it. In particular, see *W* [2010] EWCA Crim 372, [2010] QB 787; *Chapman* [2015] EWCA Crim 539, [2015] 2 Cr App R 10; *Cosford* [2013] EWCA Crim 466, [2014] QB 81; and *Mitchell* [2014] EWCA Crim 318, [2014] 2 Cr App R 2.

- (3) An “abuse of the public’s trust” is crucial in acting as a threshold element of the offence, but is so vague that it is difficult for investigators, prosecutors and juries to apply.
 - (4) The fault element that must be proved for the offence differs depending on the circumstances. That is an unusual and unprincipled position.
 - (5) Although “reasonable excuse or justification” appears as an element of the offence, it is unclear whether it operates as a free standing defence or as a definitional element of the offence.
- 1.13 The responses received to the background paper suggest that our analysis of the problems was both accurate and comprehensive. At the end of Chapter 2 of the Consultation Paper we conclude that, given the extent and fundamental nature of the problems with the current offence, we should not propose, as reform options, either its retention or codification into statute.
- 1.14 The remaining law reform options open to us are either the creation of one or more new offences to replace the current law or abolition of the current offence without replacement. We discuss these options in Chapters 3 to 8 of the Consultation Paper.

THE RATIONALE FOR THE OFFENCE

- 1.15 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. In Chapter 3 of the Consultation Paper we discuss possible rationales for the current offence and how these might underpin any new offence that could replace it.
- 1.16 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.
- 1.17 If the main wrong is the *abuse of position for personal advantage or to cause detriment to another*, it is not clear why this should be restricted to public officers. Private employees are equally under a duty not to abuse their position, and there would be a case for a comprehensive offence covering both public and private sectors, similar to bribery. Further, this mischief does not cover all instances of the offence, in particular those cases which fall within the “wilful neglect of duty” limb of the definition (“neglect cases”).
- 1.18 If the main mischief is *misgovernment* (meaning the oppressive or extortionate use of state power)¹⁴ this would suggest a much narrower offence covering oppressive use of official powers such as powers of arrest. However it is unclear whether misgovernment is a concept that describes a single type of wrong or a number of separate wrongs, such as oppression and extortion. Again the status

¹⁴ 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.

of the neglect cases would be uncertain under this rationale, though these could be regarded as a negative form of misgovernment, namely failure to use official powers when required.

- 1.19 The wrong that comes nearest to explaining the current offence is *breach of the trust of the public*. There is good legal authority supporting the view that public office holders are in a position of public trust, similar to a trust relationship in civil law, though we regard this as a helpful analogy rather than a precise statement of law. In particular, this concept of breach of trust (which we describe as the “stronger sense” of that phrase) would explain cases involving conflict of interest and abuse of position for private advantage and/or causing detriment, as these are established forms of breach of trust. Once more, however, this fails to explain the neglect cases, as these are only a breach of trust and confidence in a weaker sense, namely failure to perform a duty as expected.
- 1.20 We proceeded to test these conclusions by considering the five categories of conduct which, according to the background paper,¹⁵ are often prosecuted using this offence because there is no other offence that applies to them.
- 1.21 Category 1: exploiting a position of public office to facilitate a sexual relationship. Having considered the types of cases that could fall under this category, we conclude that there is no clear reason for this to be criminal unless there is an element of exploitation of a person in a vulnerable position. However, this kind of exploitation can occur in many contexts and is not tied to the fact of public office. Category 1, taken on its own, does not supply a sufficient argument for introducing an offence based on breach of public trust (stronger sense), as in most cases this wrong is secondary to the main wrong of exploiting a vulnerable person. The solution would appear to be a sexual offence, not restricted to public office holders, similar to the existing offences of exploiting children and people with mental disorders, and in Chapter 8 of the Consultation Paper we suggest considering this in a future review of sexual offences. However, if the introduction of an offence of breach of public trust can be justified on other grounds, it will sometimes be appropriate to charge such an offence in Category 1 cases.
- 1.22 Category 2: engaging in a relationship leading to conflict of interest. Again, having considered the types of cases that could fall under this category, we conclude that there is no clear reason for this to be criminal unless some further wrongdoing results from a particular conflict. Where such tangible wrongdoing occurs, there will generally be an existing offence that addresses it. The typical example is a member of prison staff forming a relationship with a prisoner and subsequently smuggling in prohibited items.¹⁶
- 1.23 Category 3: acting under the influence of conflict of interest, bias or prejudice. Here we distinguish between cases involving corrupt motives and those involving no more than biased attitudes. The corruption cases fall within the “breach of public trust” explanation (stronger sense) and could warrant an offence. The bias cases, in our view, can be dealt with without recourse to the criminal law.

¹⁵ See the background paper, ch 6 and Appendix D, both available online at <http://www.lawcom.gov.uk/project/misconduct-in-public-office/>.

¹⁶ The conveyance of prohibited articles into prison is an offence under the Prison Act 1952, s 40.

1.24 Category 4: neglect of duty leading to a risk of serious harm. This represents the “neglect” branch of the definition of the current offence, and many of the leading cases, including *AG’s Reference*,¹⁷ fall within this category. Out of all the categories, this is the clearest example of wrongful and harmful behaviour that, in the absence of the current offence, would escape criminal liability. Category 4 conduct may justify the creation of a new offence addressing breaches of duty, including both acts and omissions to act, where the breach causes at least a risk of serious consequences. On the face of it, a new offence of this type would appear very similar to the current offence of misconduct in public office. However, in order to avoid the creation of an offence that is far too wide to be certain, a new offence of this kind would need to define both:

- (1) who it applied to; and
- (2) the types of consequence it applied to, much more clearly than the current law.

1.25 Category 5: misuse of official information. We did not pursue the discussion of this category, as it almost always falls within another offence and is the subject of another current Law Commission project.¹⁸

1.26 In conclusion, there are two main types of wrong which deserve consideration for the purposes of a reformed offence or offences:

- (1) Breach of duty leading to a risk of serious harm. This covers Category 4 above, and could be regarded as a negative form of misgovernment or a breach of trust in the weaker sense (a failure to perform a duty as expected). An offence based on this wrong could be made more precise by:
 - (a) clarifying that it potentially applies to acts as well as omissions (which is why we now speak of “breach” rather than “neglect” of duty);
 - (b) specifying the types of harm involved; and
 - (c) narrowing the category of public officers who can commit the offence

An offence of this kind is discussed in detail in Chapter 5 of the Consultation Paper as law reform Option 1.

- (2) Corrupt behaviour, including the abuse of a position for personal advantage or to cause detriment to another. This covers Category 3 so far as it relates to corruption rather than bias, and potentially some cases within Category 1. The wrong could be described as either abuse of position or breach of the trust of the public (stronger sense); in cases

¹⁷ *AG’s Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73.

¹⁸ See Law Commission project page for Breaches of Protected Government Data, available online at <http://www.lawcom.gov.uk/project/breaches-of-protected-government-data/>.

where the purpose is to cause harm, it would also constitute misgovernment.

An offence of this kind is discussed in detail in Chapter 6 of the Consultation Paper as law reform Option 2.

LAW REFORM OPTIONS

- 1.27 As stated above, 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 without significant change to its definition. All the options in the Consultation Paper therefore presuppose that the common law offence of misconduct in public office is to be abolished.
- 1.28 Options 1 and 2 each involve the creation of a new offence to replace the current law. Option 3 involves the abolition of the current law without replacement (discussed in Chapter 7 of the Consultation Paper).
- 1.29 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.

Definition of public office

- 1.30 In Chapter 4 of the Consultation Paper we explain that, 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 broad concept which this definition should reflect could be explained in any of the following four ways,:
- (1) a position with an institutional or employment link to one of the arms of the state;
 - (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 believe this is the meaning of “public office” in current law);
 - (3) a position involving a public function associated with a state or public power; or
 - (4) a position involving a public function which the office holder is obliged to exercise in good faith, impartially or as a public trust.

We set out reasons why we would not propose using either approach (1) or (2) and we ask a consultation question about which of approaches (3) and (4) should be preferred.

- 1.31 A separate question is how, once one of these four approaches has been adopted, it should be reflected in a statutory definition. We therefore ask consultees: 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 which simply places the preferred approach on a statutory footing, leaving it to the courts to apply it in individual cases;

- (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?
- 1.32 A further supplementary question we ask is: if the definition of public office includes a list of functions or positions, should there be power to add to the list by order (the affirmative resolution procedure)?

Option 1: breach of duty model

- 1.33 To address the first of the main wrongs we identified in Chapter 3 as justifying criminalisation, namely breach of duty leading to a risk of serious harm, we propose the creation of a new offence of breach of duty by a public office holder with a particular duty concerned with the prevention of harm. We call this the “breach of duty model”.
- 1.34 Those public office holders subject to this offence should be defined as those with duties concerned with prevention of harm, which would include:
- (1) those occupying positions carrying powers of physical coercion, including arrest, detention and imprisonment (those with powers of physical coercion); and
 - (2) those occupying positions including functions for the purpose of protecting vulnerable individuals from harm (those with a protective duty).
- 1.35 The definition of the category of relevant public officers could take the form either of a general test, or of a list of particular powers, functions, duties and positions.
- 1.36 The offence should be restricted to breach of a particular duty of the office holder connected with the prevention of harm, and therefore only cover cases where such harm occurs or is risked.
- 1.37 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
 - (5) serious harm to the administration of justice.
- 1.38 The fault element of the new offence should be:
- (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; together with
- (2) subjective recklessness as to the risk that D's conduct might cause one of the types of harm listed above.
- 1.39 We ask consultees a series of questions to elicit views on the need for such an offence and its precise formulation.

Option 2: corruption based model

- 1.40 This option reflects the second main wrong identified in Chapter 3: the corruption type of wrong. We propose the creation of a new offence that borrows some elements from the existing offence of police corruption under section 26 of the Criminal Justice and Courts Act 2015,¹⁹ but applies to all public office holders and improves upon the section 26 offence in a number of ways. We call this the "corruption based model".
- 1.41 Under this option, there would be an corruption based model of offence applying to public office holders, defined as follows:
- (1) A public office holder 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 position, power or authority for that purpose was seriously improper.²⁰
- 1.42 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, the seniority of the defendant's position and the culpability of the defendant.
- 1.43 The fault element of the offence would be satisfied if:
- (1) the office holder was aware of the circumstances which determine that the position in question is a public office; and

¹⁹ This offence is discussed in detail in Chapter 3 of the background paper.

²⁰ 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.

- (2) the office holder held the purpose in question.
- 1.44 There should be no separate requirement of awareness that the office entailed a duty not to exercise the position, power or authority for that purpose or that doing so was seriously improper. The duty follows as a matter of law from the fact of being in public office, and the requirement of impropriety already takes account of culpability.
- 1.45 We again ask consultees a series of questions to elicit view on the need for such an offence and its precise formulation.

Option 3: abolition without replacement

- 1.46 In order to obtain a full range of responses we include the option of abolishing the existing offence without replacement although our provisional proposal is that the current offence should not be abolished without any new offence being introduced to replace it.
- 1.47 Doing this would leave a gap in the law if there were types of conduct falling within the existing offence which ought to be criminal, but which:
- (1) would not be covered by any other offence if the existing offence were abolished; or
 - (2) would be so covered, but that other offence would not do justice to the full wrongfulness of that conduct in terms of labelling or seriousness.
- 1.48 The argument in Chapter 3 (harms and wrongs) concludes that, at least in Category 4 (neglect of duty risking harm) and some cases within Category 3 (acting under a conflict of interest), there is conduct which ought to be criminal and is not covered by other offences. Consultees will favour Option 3 (abolition without replacement) if and only if they are not convinced by either this argument or the argument about labelling.

Complementary reforms

- 1.49 Whichever of the above options is chosen could be supplemented by either or both of two additional reforms. We discuss these in Chapter 8 of the Consultation Paper.

Reforming the sexual offences regime

- 1.50 In our discussion of Category 1, the use of a position of public office to facilitate a sexual relationship, we concluded that the only serious wrong was the exploitation of a person in a position of vulnerability, and that the same wrong could occur in contexts unconnected to public office.
- 1.51 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:
- (1) Under Option 1: either a sexual offence or a breach of a particular duty to prevent harm that caused a risk of serious injury.

- (2) 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.
 - (3) Under Options 1 and 2 combined: either a sexual offence, a breach of a particular duty to prevent 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).
- 1.52 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.
- 1.53 We suggest that a future reform of sexual offences could consider:
- (1) an offence of obtaining sexual activity by improper pressure; or
 - (2) an offence of obtaining sexual activity by exploitation of a person in a position of vulnerability.

We ask consultees whether reform of the sexual offences regime should be considered in this context.

Treating public office as an aggravating factor for the purposes of sentencing

- 1.54 The other additional reform would formally treat the fact that the defendant is in public office as an aggravating factor in sentencing for other offences. 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.
- 1.55 This could be combined with any of the three main options, though the need for it would be most obvious in the case of Option 3 (abolition without replacement).
- 1.56 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 defendant's criminality, and thereby his or her eventual sentence.
- 1.57 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. 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 consider whether, or in fact, to treat public office as an aggravating factor.

- 1.58 There are no sentencing guidelines for the offence 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. Likewise, there is no statutory provision relating to the treatment of public office as an aggravating feature of a particular case. That is not to say, however, 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.
- 1.59 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 ask consultees whether they agree with this statement.

SUMMARY OF CONSULTATION QUESTIONS AND PROVISIONAL PROPOSALS

Chapter 4: Law reform options: Public office

Consultation question 1

- 1.60 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?

Provisional proposal 2

- 1.61 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.

Consultation question 3

- 1.62 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?

Consultation question 4

- 1.63 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?

Chapter 5: Law reform options – Option 1: The breach of duty model

- 1.64 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

- 1.65 The offence should encompass both positive acts and omissions and the conduct element should refer to a “breach of duty” to reflect this.

Provisional proposal 6

- 1.66 The offence should be limited to breaches of particular duties concerned with the prevention of harm.

Provisional proposal 7

- 1.67 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).

Consultation question 8

- 1.68 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)?

Consultation question 9

- 1.69 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?

Consultation question 10

- 1.70 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?

Provisional proposal 11

- 1.71 The offence should be defined as consisting of breach of a particular duty concerned with the prevention of specified harms.

Consultation question 12

1.72 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?

Consultation question 13

1.73 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?

Consultation question 14

1.74 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?

Consultation question 15

1.75 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?

Provisional proposal 16

1.76 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.

Provisional proposal 17

1.77 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.

Provisional proposal 18

- 1.78 The offence, should include both actual and potential consequences.

Provisional proposal 19

- 1.79 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.

Consultation question 20

- 1.80 Should the risk of serious harm to public order and safety be regarded as public harm for the purposes of the offence?

Consultation question 21

- 1.81 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?

Consultation question 22

- 1.82 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?

Consultation question 23

- 1.83 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?

Provisional proposal 24

- 1.84 Liability should only be imposed where a risk of serious consequences arises.

Provisional proposal 25

- 1.85 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.

Provisional proposal 26

- 1.86 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.

Consultation question 27

- 1.87 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

- 1.88 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

- 1.89 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.

Provisional proposal 29

- 1.90 The offence should apply to all public office holders, without further restriction.

Provisional proposal 30

- 1.91 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.

Provisional proposal 31

- 1.92 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.

Provisional proposal 32

- 1.93 Common law defences should apply. There should not be further defences.

Consultation question 33

- 1.94 Should a corruption based model of offence, applying to public officials, as described in the foregoing provisional proposals, be introduced?

Consultation question 34

- 1.95 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

Provisional proposal 35

- 1.96 The offence of misconduct in public office should not be abolished without any new offence being introduced to replace it.

Chapter 8: Complementary legal reforms

Consultation question 36

- 1.97 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.

Consultation question 37

- 1.98 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)?

CONCLUSION

- 1.99 This summary sets out the arguments in favour of law reform and the law reform proposals put forward in our published Consultation Paper *Reforming Misconduct in Public Office*. The proposals, and in particular the theoretical discussion that underpins those proposals, cannot be done justice in a summary of this length. Consultees are therefore encouraged to refer to the full Consultation Paper available on our website.²¹ We welcome responses to the provisional proposals and consultation questions contained in that paper. These should be sent to us by 28 November 2016. We aim to publish a final report on this project in 2017.

²¹ Available at <http://www.lawcom.gov.uk/project/misconduct-in-public-office/>.

Comments may be sent:

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By telephone: 020 3334 3462

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