

APPENDIX A

THE HISTORY OF THE OFFENCE OF MISCONDUCT IN PUBLIC OFFICE

INTRODUCTION

- A.1 As explained in Chapter 2, misconduct in public office necessarily involves a breach of some duty, through either positive or negative acts. It has also been argued that “wilful neglect” and “wilful misconduct”, as described in *AG’s Reference*,¹ are separate offences.
- A.2 Although in Chapter 2 we chose to follow the approach of *AG’s Reference* in treating misconduct in public office as a single offence with two aspects, the argument that these aspects are in fact separate offences has some force when looking at the older cases. Indeed, looking at the history of the offence and the different types of conduct it is used to prosecute, it is arguable that misconduct in public office is an overarching description for a number of separate crimes.
- A.3 Tracing the history of a particular offence, or group of offences, is often considered to be a purely academic exercise with limited relevance to the current law. However there are some instances where an understanding of the origins of the offence and the context of its development can greatly assist with an understanding of what the current law does, and is intended to, encompass. A historical perspective can help when making an assessment of whether the law is fit for purpose in its current form and how, if at all, it could be improved.
- A.4 We are of the view that misconduct in public office, which is variably described as an “ancient misdemeanour” which has nonetheless “stood the test of time”,² and as “outdated”³ and “not always well suited to dealing with or deterring the pattern of corruption in today’s information age”,⁴ is one such offence. On one hand its longevity has been praised as a virtue, demonstrating a flexibility to adapt to social and political changes whilst upholding key constitutional principles of accountability.⁵ On the other hand, the offence has been roundly criticised as being vague and ill-defined, with no place in either the 21st century or “the criminal justice system of a civilised country”.⁶
- A.5 We hope that a clearer understanding and evaluation of these opposing perceptions may be forthcoming from an examination of the history of the offence, as far as that can be achieved within the limits of historical legal records

¹ *Attorney General’s Reference (No.3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73.

² D Lusty, “Revival of the Common Law Offence of Misconduct in Public Office” (2014) 38 *Criminal Law Journal* 337 (Australia).

³ *Hansard* (HC), 6 March 2014, vol 576, col 1065 per the Home Secretary Teresa May.

⁴ *Hansard* (HL), 30 June 2014, vol 754, col 1539; *Hansard* (HL), 14 July 2014, vol 755, col 493 as per Lord Faulks.

⁵ D Lusty, “Revival of the Common Law Offence of Misconduct in Public Office” (2014) 38 *Criminal Law Journal* 337 (Australia).

⁶ J Spencer, “Police behaving badly – the abuse of misconduct in office” [2010] *Cambridge Law Journal* 423.

and commentaries. Consideration of the history of the tort of misfeasance in public office can be found in Appendix B.

A.6 We will analyse the history of misconduct in public office using the following approach:

- (1) Establishing the usual historical starting point for analysis of the offence and examining the understanding and application of the law at that point and subsequently.
- (2) Examining legislation, case law and commentary and historical context before that point for evidence that the offence was in fact applied and/or developed earlier.
- (3) Evaluating what assistance the historical analysis provides.

BEMBRIDGE: THE POPULAR STARTING POINT

A.7 As with all historical analysis, the examination of misconduct in public office requires a starting point. That starting point is usually taken as the first statement of the offence in its current form, which allows for an examination of the understanding and application of the law at that point and up to the present day.

A.8 The case of *Bembridge*, decided in 1783, is usually cited as the first clear articulation of the offence as we now recognise it.⁷ Lord Mansfield, then Chief Justice, emphasised the need to clarify the law in this area.

Though the principles on which this prosecution is founded may be old, the specific application of them is new and it is therefore important to the defendant, and the public, that the evidence and the law should be accurately understood [...]

A.9 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". On appeal against conviction he argued that the offence charged was not known to the criminal law, being purely a civil matter.

A.10 Chief Justice Mansfield stated:

Here there are two principles applicable: first that 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: this is true, by whomever and whatever way the officer is appointed [...]

Secondly, where there is a breach of trust, fraud or imposition, in a matter concerning the public, though as between individuals it would only be actionable, yet as between the king and the subject it is

⁷ (1783) 3 Doug 327, 99 ER 679. See C Nicholls and others, *Corruption and Misuse of Public Office* (2nd ed 2011).

indictable. That such should be the rule is essential to the existence of the country.⁸

- A.11 Paul Finn describes *Bembridge* as containing the “seminal” formulation of the offence.⁹ One that he opines has been “as influential as it has been misunderstood”. David Lusty equally acknowledges Lord Mansfield’s articulation of the offence as the “authoritative statement in this field”.¹⁰
- A.12 Meanwhile Geoffrey Robertson QC argues that *Bembridge* is the starting point for the future development of a new offence not previously known to law.¹¹ The case therefore might seem to provide an obvious starting point for a historical analysis of misconduct in public office.
- A.13 To make this argument however ignores the important research undertaken by academics, such as Finn, in this area, which brought to light earlier pronouncements of the principle that “any public officer is indictable for misbehaviour in his office”.¹² It is also to ignore Mansfield’ CJ’s own reference to previous precedents for the prosecution of public officers at common law for misconduct,¹³ and his reference to the rule being “well laid down by Mr Serj. Hawkins”.¹⁴ Whilst it has been noted that “modern cases are not inclined to look beyond *Bembridge*”,¹⁵ in our view this is short-sighted.

Understanding and application of *Bembridge*

- A.14 It is important to understand *Bembridge* fully before we consider the years preceding it. The case has, over the years, sparked a great deal of debate. Of particular interest are two questions raised by a number of academics:
- (1) In stating two separate principles is Lord Mansfield referring to one or two separate offences relating to misconduct by public officers?
 - (2) Was *Bembridge* a clear pronouncement of a specific principle that misconduct in public office as a standalone offence could be prosecuted under the common law at all? Alternatively, was the judgment just a clarification of a general principle that persons in public office should be

⁸ *Bembridge* (1783) 3 Doug 327, 99 ER 679.

⁹ P Finn, “Official Misconduct” (1978) 2 *Criminal Law Journal* 307 (Australia).

¹⁰ D Lusty, “Revival of the Common Law Offence of Misconduct in Public Office” (2014) 38 *Criminal Law Journal* 337 (Australia).

¹¹ See Geoffrey Robertson QC’s commentary on the arrest of Christopher Galley and Damian Green MP, *The Times* 5 December 2008.

¹² *Case 136 Anon* (1704) 6 Mod 96, 87 ER 853.

¹³ “In Vidian there is a precedent against the custos brevium for losing a record”, *Bembridge* p 332. The reference is to A Vidian, *The exact pleader: a book of entries of choice, select and special pleadings in the court of Kings-Bench in the reign of his present Majesty King Charles II* (1684).

¹⁴ The reference is to W Hawkins, *A Treatise of the Pleas of the Crown* (1721) (“Hawkins”). This work will be discussed further below.

¹⁵ S Parsons, “Misconduct in a Public Office – Should it still be prosecuted?” (2012) 76(2) *Journal of Criminal Law* 179.

held to account, which in the future could be effected through the prosecution of a variety of existing offences?

- A.15 We will try to answer these questions through an examination of the legal commentary written and case law decided post-*Bembridge*.

(a) Legal commentary

- A.16 The two questions above have been the subject of discussion in recent years by two academics: Terrence Williams and Paul Finn. This commentary provides interesting insight in respect of how the questions should be answered.

(1) ONE OR TWO OFFENCES?

- A.17 Terrence Williams argues that Lord Mansfield was in fact distinguishing between two separate offences.¹⁶ The first principle describing “neglect of duty” and the second principle “breach of public trust”. The former being concerned solely with negative acts and the latter positive acts. Williams argues that these two separate offences were mistakenly conflated in the 20th century, following a failure to distinguish between them in the case of *Dytham* and culminating in the 2003 Court of Appeal judgment in *AG’s Reference*.¹⁷
- A.18 Williams’ argument rests on his identification of a number of different legal commentators who, between *Bembridge* and *Dytham*, describe “abuse of trust” and “neglect of duty” separately. The most notable of these is James Fitzjames Stephen, whose *Digest of the Criminal Law* presents “frauds and breaches of trust by officers” and “neglect of official duty” as two separate matters.¹⁸ Stephen’s work formed the basis of late 19th century criminal law codification exercises throughout the British Commonwealth and many of these jurisdictions still maintain the distinction between “breach of trust” and “neglect of duty”.¹⁹
- A.19 The main issue identified by Williams arising from this lack of distinction in English law is that of mens rea. Specifically that, as discussed in Chapter 2, there appeared to be a clear distinction, before *Dytham*, between positive acts that required proof of some “improper motive” (in addition to “wilfulness”) and negative acts where any wilful breach of trust would suffice.²⁰
- A.20 Indeed, Alison Cronin agrees that, prior to the two primary cases of the mid 20th century, *Llewellyn-Jones*²¹ and *Dytham*,²² there was a distinction in the way in which the mens rea element was applied to positive and negative misconduct,

¹⁶ T Williams, “Neglect of duty and breach of trust: ancient offences in the modern battle against impunity in the public service” (2010) *Journal of Money Laundering Control* 335.

¹⁷ *Dytham* [1979] QB 722; *Attorney General’s Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73.

¹⁸ *A Digest of the Criminal Law (Crimes and Punishments)* (1877) (“Stephen’s *Digest*”), Part III, pages 73 to 75, Articles 121 and 122.

¹⁹ See Bohlander and Birkett, *The Codification of the Criminal Law* (2014); D Brown, *The Genesis of the Canadian Criminal Code of 1892* (1989). See Appendix F for further discussion of the law in other countries.

²⁰ Chapter 2.

²¹ [1968] 1 QB 429.

and argues that the combination of neglect and misconduct under the single mens rea requirement of “subjective wilfulness” in *AG’s Reference* was to be welcomed.²³

A.21 However, as mentioned in Chapter 2, the distinction between those cases requiring an improper motive cannot, in our view, be wholly attributed to the difference between “breach of trust” and “neglect of duty”.²⁴

A.22 In fact the requirement of improper motive appears to have arisen out of a concern that those public officers exercising a discretion were not to be prosecuted simply for an unpopular or erroneous decision. Further, this manifested itself primarily in cases involving magistrates, whose role it was to grant or refuse liquor licences.²⁵

A.23 As stated in the 1843 edition of *Russell on Crime*:

Whenever justices have been challenged, either by way of indictment, or application for a criminal information, the question has always been, not whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive or corrupt motive, under which description fear or favour may generally be included, or from mistake or error.²⁶

A.24 Stephen’s *Digest* meanwhile should not be seen as a legal text on the criminal law as it stood in 1877. It was instead a compendium of laws, arranged by the author in such a way as to inform contemporary lawyers and politicians as to how the criminal law could and should be codified.²⁷ The *Digest* therefore is not a view of the criminal law as it was actually structured, but a view of how Stephen felt it could and should be structured in the future.²⁸

A.25 It is in fact clear that Stephen gave little consideration as to the definition of the offences collected under his heading “Abuses and obstructions of public authority”, including “breach of trust” and “neglect of duty”. Indeed, he stated “of

²² [1979] QB 722.

²³ A Cronin, case comment on *W* [2010] EWCA Crim 372, (2011) 74 *Journal of Criminal Law* 290; *Llewellyn-Jones* [1968] 1 QB 429; *Dytham* [1979] QB 722; *AG’s Reference* [2004] EWCA Crim 868, [2005] QB 73.

²⁴ Chapter 2 para 2.X.

²⁵ *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 Dougl 588, 99 ER 371; *Borron* (1820) 3 B & Ald 432, 106 ER 721. See also *ex parte Fentiman* (1834) 3 A & E 127, 111 ER 49 regarding the grant of a bind over.

²⁶ *Russell on Crime* (3rd ed 1843) (“Russell”) Vol II, Chapter XIV page 136.

²⁷ Which “might serve as a first step towards a code”, Stephen’s *Digest*, Vol II, Introduction.

²⁸ The work was influenced heavily by the Penal Code of India, to which Stephen was a major contributor. This Code was drafted circa 1860 and published in 1862: Stephen’s *History*, vol 3, chapter XXXIII, page 296 and following.

the offences defined in Part III I have little to say. Most of them are common law offences of rare occurrence.”²⁹

- A.26 Part III also includes, as separate articles, a number of other different types of misconduct by public officers. For example: article 119, extortion and oppression by public officers; article 123, refusal to serve an office; article 126 judicial corruption; article 127, corruption of other public officers; article 130, undue influence; article 133, selling offices; and article 134, making interest for offices for reward.
- A.27 Therefore, it should not be assumed that the *Digest*'s consideration of offences related to public office was based on any profound consideration of the principles expounded in *Bembridge*. Rather it may have been a convenient classification of types of conduct for the aim of codification.
- A.28 Six years later Stephen published his other great work, *The History of the Criminal Law*³⁰ (“Stephen’s *History*”). This makes no reference to specific offences of “breach of trust” or “neglect of duty” in public office. It refers to public officers only when describing briefly the history of bribery and corruption offences and makes no reference to *Bembridge*. In contrast the work highlights the fact that in the Indian penal code “offences relating to public servants naturally form a very important part”.³¹
- A.29 Stephen does however refer specifically to the phrase “breach of trust” in relation to dishonesty offences.

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, a 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 person.³²

- A.30 Stephen goes on to state:

Criminal breach of trust, using the expression in the first of the two senses above, was for many centuries only a civil injury [...] Many other forms of the offence have at different times and especially in our own days, been made punishable by statute; but the law upon the subject is still incomplete [...] Criminal breach of trust, in the second of the two senses above mentioned [...] was first made criminal in the year 1857.³³

²⁹ Stephen’s *Digest*, Vol I, Introduction.

³⁰ (1883).

³¹ Stephen’s *History*, Vol II, chapter XXXI, p 250 to 255 and ch XXXIII p 309 to 310.

³² Stephen’s *History*, Vol II, Chapter XXVIII, p 128.

³³ Stephen’s *History*, Vol II, Chapter XXVIII, p 128 and 129.

- A.31 The offences of breach of trust that Stephen states were created by statute, as exceptions to the general common law rule that such a breach is not a crime, are listed in his chapter on larceny and other dishonesty offences.³⁴ They are: servants embezzling their masters' property; brokers, merchants, bankers, attorneys and other agents misappropriating property entrusted to them; factors fraudulently pledging goods entrusted to them for sale; trustees under express trusts fraudulently disposing of trust funds; and bailees stealing the goods bailed to them. All of these can be seen to be specific instances of fraud by persons in positions of trust, but none are public officers as defined by Stephen in his *Digest*.³⁵
- A.32 Again, in contrast, Stephen recounts that the Indian Penal Code specifically criminalises "breaches of trust". Within the Code it is an offence of general application, not one that only applies to public officers.³⁶
- A.33 This therefore begs the question of whether Lord Mansfield in *Bembridge* intended, as Williams contends, for his "second principle" to refer to positive acts of misconduct by public officers, or whether he was instead espousing a principle that fraudulent breach of trust "in matters concerning the public" was generally contrary to the law, notwithstanding the general common law rule that "breaches of trust" were not criminal offences.
- A.34 Indeed Williams recognises that not all 19th century legal commentators were agreed that the positive and negative aspects of misconduct were clearly definable:
- The earlier editions of the Archbold suggest that a detailed particularisation of the conduct complained of was more important than any specific "label" for an offence.³⁷
- A.35 A perusal of the 1822 edition of *Archbold* confirms this, listing as it does in Chapter II, "Offences against public justice", separate example indictments for: neglect by a constable leading to a prisoner's escape; voluntary action by a constable allowing an escape; bribery of a public officer; extortion by a constable; failure by a constable to convey an offender to prison; committal of a suspect by a magistrate acting outside his jurisdiction; and failure by a constable to obey a court order. Failure to execute a public office meanwhile is contained in Chapter V "Offences against public, police and economy".³⁸

³⁴ Stephen's *History*, Vol II, Chapter XXVIII, p 151 to 159.

³⁵ Not quoted here as, again, the *Digest* contains Stephen's expectations of what the law should be, not necessarily what it was. As G Zelic states in his article *Bribery of Members of Parliament*: "the statement by Stephen, in the absence of both supporting authority and reasoning, can command little respect": (1979) *Public Law* 31.

³⁶ Stephen's *History*, Vol III, p 317; s.405 of the Indian Penal Code.

³⁷ T Williams, "Neglect of duty and breach of trust: ancient offences in the modern battle against impunity in the public service" (2010) *Journal of Money Laundering Control* 335.

³⁸ Archbold, *A Summary of the Law Relating to Pleading and Evidence in Criminal Cases*, (1822) ch II pages 303 to 328 and ch III p 383 to 387. For treatment of the offence by other 19th century writers see G McBain, "Modernising the Common Law Offence of Misconduct in a Public or Judicial Office" [2014] *Journal of Politics and Law* 7(4) 46 (Canada).

A.36 Another commentator who attempted to dissect the offence was Paul Finn.³⁹ He distinguishes between Lord Mansfield's first and second principles in *Bembridge*, arguing that the first only applies to "public officers" while the second "incorporates the narrow common law offence of cheating – one which can be committed by either an official or a member of the public". The second principle therefore includes instances of misconduct in public office where the cheat is committed by a public officer, but is not defined by them.

A.37 This would accord with what has been said above about Stephen's definition of criminal "breach of trust" as a narrow form of dishonesty offence.

A.38 Additionally, *Russell on Crime* states:

Of cheats, frauds, false tokens and false pretences.

Where the possession of goods is obtained, in the first instance, without fraud upon a contract or trust, a subsequent dishonest conversion of them [...] will in general only be a breach of trust or civil injury, and not the subject of a criminal prosecution.

However, *Russell* goes on to state:

In some cases the rendering of false accounts and other frauds practised by persons in official situations, have been deemed offences so affecting the public as to be indictable.⁴⁰

A.39 The case of *Bembridge* is quoted as authority for this principle on the basis that the breach of trust therein was "related to the public revenue". Indicating that it could be regarded as the subspecies of "common law cheat" described above: one which is committed against the public purse but, again, not necessarily committed by a public officer.⁴¹

A.40 Likewise Kenny's *Outlines of the Criminal Law*, under "Cheats punishable at common law" restates the common law rule that breach of trust is not a crime and comments that:

Where however the dishonest activity was of a sort which aimed at defrauding such members of the public as a whole who might come within its reach, then because of its general injurious character it was treated by the common law as a crime.⁴²

Kenny cites the case of *Hudson*⁴³ as authority for this, which refers specifically to *Bembridge*.

³⁹ P Finn, "Official Misconduct" (1978) 2 *Criminal Law Journal* 308 (Australia).

⁴⁰ *Russell*, Chapter XXXI pages 274 to 276.

⁴¹ This outline was repeated in *Russell* until 1964. Cheats against the public revenue were retained by the Theft Act 1968. Other forms of common law cheat were abolished.

⁴² Kenny's *Outlines of the Criminal Law* (1966) Chapter XVI pages 351 to 352.

⁴³ *Hudson* [1956] 2 QB 252.

A.41 Finn argues that treating breach of trust as a separate type of misconduct in the codification process was a mistake, and resulted in ‘breach of trust’ being used in many Commonwealth countries to describe the principle of misconduct in fact set out in Lord Mansfield’s first principle.⁴⁴

A.42 Following Finn’s analysis, as supported by contemporary commentary, Lord Mansfield’s “principles” can be said to embody:

- (1) a general rule that a person in an office of trust concerning the public is criminally liable for misconduct in his office; and
- (2) a rule that fraudulent breach of trust in matters concerning the public (or “common law cheat” where it relates to public funds) is a criminal offence in itself, and when committed by a public officer amounts to one type of misconduct in office.

(2) SPECIFIC OR GENERAL PRINCIPLE?

A.43 In relation to the first *Bembridge* principle, Finn goes on to identify at least five different types of misconduct encompassed therein:

- (1) fraud in office;
- (2) nonfeasance;
- (3) misfeasance: malicious exercise of power, divided into decisions for improper reasons and personal misbehaviour by officials;
- (4) malfeasance: wilful excess of authority, divided into acts that are never justified and acts where the justification is absent in the particular case; and
- (5) oppression: intentional infliction of harm under colour of office.⁴⁵

A.44 In the more recent case of *W*⁴⁶ the same five types of conduct were referred to as the “principal types” of misconduct in public office by Lord Judge, then Chief Justice.

A.45 Finn’s analysis is generally viewed as a helpful breakdown of the main types of conduct that are encompassed by the offence.⁴⁷ Yet it should be recognised that he is not describing a compendium of separate offences prosecuted using the overarching description of misconduct in public office. Nor is he describing an exhaustive list of conduct caught by the offence. His description is of three different definitions of misconduct (nonfeasance, misfeasance and malfeasance) and two other examples of types of conduct.

⁴⁴ Canadian criminal code, s 122.

⁴⁵ *Bembridge* (1783) 3 Doug KB 32, 99 ER 679.

⁴⁶ [2010] EWCA Crim 372.

⁴⁷ T Williams, “Neglect of duty and breach of trust: ancient offences in the modern battle against impunity in the public service” (2010) *Journal of Money Laundering Control* 335. D Lusty, “Revival of the Common Law Offence of Misconduct in Public Office” (2014) 38 *Criminal Law Journal* 337 (Australia).

- A.46 As Finn recognises, the first of his categories encompasses numerous different forms of fraud or dishonesty and many of these would also be caught by other specific statutory or common law dishonesty offences, including “cheat”. Therefore, there would seem to be little point in treating “fraud in office” as anything more than a specific type of misfeasance or malfeasance as defined in categories (3) and (4).
- A.47 Categories (2), (3) and (4) can all be seen as definitions of the types of negative and positive misconduct discussed in Chapter 2, and are terms historically used in misconduct cases and in other legal discourse.⁴⁸ Simply put, failure to perform the thing one is employed to do is nonfeasance. Performing it badly or for improper motives is misfeasance. Active misconduct outside the scope of duty is malfeasance.
- A.48 Oppression under colour of office meanwhile is another ancient common law offence.⁴⁹ We have found no instance of its use in modern times; Finn deals with it very briefly, and suggests that it does not catch any conduct not already falling within the other forms of misconduct.⁵⁰
- A.49 In substance, Finn’s five categories may be reduced to three and all amount to misconduct in public office, as in the first *Bembridge* principle, whether or not they also technically amount to other offences.⁵¹
- A.50 Therefore, two things support the argument that Lord Mansfield’s first principle in *Bembridge* was a pronouncement of a specific principle of misconduct in public office amounting to a common law offence. First, the decline in use of the offences of common law cheat and oppression under colour of office since the 18th century. Second, the treatment of (2), (3) and (4) as different types of misconduct rather than separate offences. It was not just a recitation of a wider principle that public officers be held accountable for their misconduct through various different offences, albeit that the misconduct offence continued to overlap to a significant degree with other crimes. As stated by Lord Mansfield, “the law does not consist of particular cases but of general principles, which are explained and illustrated by those cases.”⁵²
- A.51 An analysis of the legal commentary on the effect of *Bembridge* leads us to conclude that:
- (1) Lord Mansfield’s judgment concerned a single offence of misconduct in public office, not separate offences of positive and negative misconduct (the first *Bembridge* principle);
 - (2) The first *Bembridge* principle was a pronouncement of a specific principle of misconduct in public office amounting to a common law offence.

⁴⁸ We will discuss below the significance to this review of the different terms used.

⁴⁹ Its companion offence, extortion by colour of office, was abolished by the Theft Act 1968, s 32(1)(a).

⁵⁰ P Finn, “Official Misconduct” (1978) 2 *Criminal Law Journal* 308 (Australia), 325.

⁵¹ As we have seen in Chapter 5, the modern day potential for misconduct in public office to overlap with other offences is substantial.

⁵² *Bembridge* (1783) 3 Doug KB 32, 99 ER 679.

(b) Case law

- A.52 Unfortunately the case law decided in the 180 years following *Bembridge* does not appear to provide any clear answers to the two questions posed above.⁵³ The low number of prosecutions for misconduct in public office meant that legal definitions could not be refined and tested under the common law. This, no doubt, contributed to any confusion that may have existed as to the definition of misconduct in public office in the period.
- A.53 Our research indicates that in England and Wales there were somewhere in the region of 72 reported cases of such offences between 1783 and 2003. Only approximately 17 of those cases were heard after the publication of Stephen's *Digest* in 1877.⁵⁴ Although, there were also a large number of prosecutions in other common law jurisdictions in the 20th century, particularly in North America.⁵⁵
- A.54 Additionally, there were only three impeachments of senior public officials in Parliament after *Bembridge*. The practice ended in 1806 with the impeachment of Lord Melville, Treasurer of the Admiralty, for embezzlement.⁵⁶ Impeachment will be discussed further below.⁵⁷
- A.55 Such cases as do exist rarely assist with "putting flesh on the bones" of Lord Mansfield's pronouncements. These cases primarily provide examples of the types of public officer that may be caught by the offence, including an executive or ministerial officer,⁵⁸ a clergyman,⁵⁹ county court judges,⁶⁰ magistrates and a British consul.⁶¹
- A.56 A number of cases often cited in relation to misconduct in public office in fact relate to other offences such as common law bribery⁶² (relevant in respect of the

⁵³ Para A.14 above.

⁵⁴ On average this is one case every 16 months until 1877 and less than one every 7 years thereafter.

⁵⁵ For example: *Boston* [1923] 33 Commonwealth Law Reports 386, an Australian case where MPs were held to hold public office; *Sacks* [1943] SALR 413, South Africa; *Stewart* (1960) 2 WIR 450, Jamaica; *Leblanc* [1982] 1 SCR 344, Canada; *Rao v State of India* [1993] 3 LRC 297; *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381, Hong Kong.

⁵⁶ The two other impeachments were of Warren Hastings, Governor-General of India, and Elijah Impey, Chief Justice of Calcutta, in 1787, for corruption in relation to the East India Company (on which see para A.169 below).

⁵⁷ Para A.68.

⁵⁸ *Friar* (1819) 1 Chit Rep (KB) 702.

⁵⁹ *James* (1850) 2 Den 1, 169 ER 393.

⁶⁰ *Marshall* (1855) 4 El & BI 475, 119 ER 174.

⁶¹ *Borron* (1820) 2 B & Ald 432, 106 ER 721; *Hodgkinson* (26 June 1900); T R Fitzwalter Butler and M Garsia, *Archbold: Pleading, evidence and practice in criminal cases* (35th ed 1962) p 136.

⁶² Now abolished and replaced by statutory offences under the Bribery Act 2010.

definition of a public officer) and contempt of statute, a now redundant common law offence (relevant as to the jurisdiction of the courts under the common law).⁶³

A.57 Alternatively where cases do concern misconduct in public office and involve a discussion of principles, they confine themselves specifically with the question of what must be proved in relation to justices of the peace accused of misconducting themselves. Specifically, that they must be shown as acting from “improper motives” when exercising a discretion, as discussed above,⁶⁴ but not so when the power to be exercised involves no discretion, specifically in putting down a riot.⁶⁵

A.58 The one exception to this appears to be the case of *Hollond* in 1794,⁶⁶ which concerned an East India officer performing military duties. The case is often cited as an authority clarifying five important points arising from the *Bembridge* formulation of the offence:

- (1) That the terms of an officer’s appointment do not need to be proven for the indictment to succeed, “exercise of their offices is, as against them, proof that they are bound to discharge their respective functions”.
- (2) That a breach of duty can include both acts of commission and omissions.
- (3) That it is sufficient to charge a person with “wilful breach of duty” without adding that it must be corrupt.
- (4) Where a duty is held by a body consisting of several persons each is individually liable for a breach of duty.
- (5) Where the breach of duty arises from certain acts within “the limits of his government” it is not necessary to allege that he had notice of those acts, as the officer is presumed from their position to be aware of them.

A.59 However, on close examination it appears that *Hollond* was not a case where prosecution arose from any common law offence. The counts charged derive from section 49 of the East India Act 1784, which made a misdemeanour any “wilful breach of the trust and duty of any office or employment under the United Company (the East India Company)”. However, Chief Justice Kenyon did refer, in relation to point (5) above, to cases of misconduct by public officers not derived from statute, indicating that assistance on the ambit of the statutory offence could be sought from the common law.⁶⁷

⁶³ *Whitaker* [1914] KB 1283 and *Lancaster & Worrall* (1890) 16 Cox 739, both bribery; *Hall* [1891] 1 QB 747, contempt of statute.

⁶⁴ For example: *Holland and Forster* (1787) 1 TR 692, 99 ER 1324; *Brooke* [1788] 2 TR 190, 100 ER 103; *Borron* (1820) 3 B & Ald 432, 106 ER 721; *Fentiman* (1834) 2 Ad & E 127, 111 ER 49; *Badger* (1843) 4 QB 468, 114 ER 175; *Higgins* (1849) 10 Jur 838.

⁶⁵ *Pinney* (1832) B & Ad 947, 110 ER 349 and *Neale* (1839) 9 Car & P 431, 173 ER 899.

⁶⁶ *Hollond* (1794) 5 TR 607, 101 ER 340.

⁶⁷ “In a criminal prosecution or action against a justice of the peace or against a clergyman for any offences by either of them committed in their respective situations”.

- A.60 Putting *Hollond* to one side, there would seem to be little detailed discussion on a specific common law offence of misconduct in public office in English law until 1968 and *Llewellyn-Jones*.⁶⁸ Key cases after that point include *Dytham*⁶⁹, *Bowden*⁷⁰ and *AG's Reference*,⁷¹ discussed in Chapter 2.⁷²
- A.61 As Stephen stated, such offences were “of rare occurrence”,⁷³ a view shared by Finn exactly one century later when he described the offence as “in danger of passing into oblivion”.⁷⁴

BEFORE BEMBRIDGE

- A.62 We will now look at evidence of the application and development of the offence before 1783 through an examination of both earlier case law and commentary.
- A.63 We noted above that Lord Mansfield cited a precedent for a prosecution of an official who had lost a document.⁷⁵ Further, Graham McBain has identified a number of examples of historic statutory and other common law offences, pre-dating the *Bembridge* formulation of misconduct in public office. These offences criminalised the types of conduct the misconduct in public office offence covers⁷⁶ and include:
- (1) bribery;
 - (2) sale of public offices;
 - (3) extortion;
 - (4) embezzlement; and
 - (5) fraud and theft.
- A.64 These five categories are all now covered by criminal offences under statute but overlap with misconduct in public office when they are committed by public officials.⁷⁷

⁶⁸ [1968] 1 QB 429.

⁶⁹ [1979] QB 722.

⁷⁰ [1996] 1 WLR 98.

⁷¹ *Attorney General's Reference (No.3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73.

⁷² Although there is certainly instructive discussion to be found in cases involving similar types of conduct such as bribery.

⁷³ *Stephen's Digest*.

⁷⁴ P Finn, “Public Officers: Some Personal Liabilities” [1977] 51 *Australian Law Journal* 313.

⁷⁵ Para A.13 above.

⁷⁶ G McBain, “Modernising the Common Law Offence of Misconduct in a Public or Judicial Office” [2014] *Journal of Politics and Law* 7(4) 46 (Canada).

⁷⁷ Bribery and the sale of public offices are dealt with under the Bribery Act 2010, the Sale of Public Offices Acts 1551 and 1809 having been repealed by the Statute Law (Repeals) Act 2013. Extortion and embezzlement are dealt with under the Theft Act 1968 and the Fraud Act 2006.

- A.65 Additionally, McBain identifies a potential separate common law offence of refusal to take up a public office. However, it is debatable whether this was ever an offence separate to that of misconduct in public office. If it was, it is now obsolete and we are not aware of any such prosecutions in modern times.⁷⁸
- A.66 McBain has also compiled a list of cases⁷⁹ demonstrating that prior to *Bembridge* persons described as public officers were prosecuted both for misconduct falling within one of the above categories of offences and for misconduct that did not. An example is a constable who failed to enforce a fine imposed by a justice of the peace.⁸⁰ This suggests that a breach of duty by public officers could and did amount to a “standalone” common law offence.
- A.67 McBain also notes that, prior to *Bembridge* and for a short while afterwards, there were two other concepts existing, treated separately by the courts, which overlapped very closely with the *Bembridge* principle of misconduct. These were the concepts of:
- (1) high crimes and misdemeanours; and
 - (2) “misprision” (sometimes spelt “misprison”).
- A.68 The first concept encompassed a number of separate crimes, including: treason,⁸¹ bribery,⁸² embezzlement⁸³ and misconduct in a public office.⁸⁴ The importance of the term was that it permitted prosecution by way of special procedure, not just by way of information or indictment in the ordinary courts; for example by way of statute (through the passing of “Acts of Attainder”) or impeachment.⁸⁵ It was therefore used by either the Crown or Parliament to prosecute cases themselves outside of the usual court process.
- A.69 This was usually because the persons alleged to have committed these crimes were high ranking public officials and there was a lack of confidence that the ordinary courts would be equipped to deal with the cases in a non-partisan

⁷⁸ See Law Commission, *Legislating the Criminal Code: Corruption*, Consultation Paper No 145. McBain cites the most recent of these cases as being *Jones* (1740) 2 Strange 1146, 93 ER 1091, Sess Cas 218, 93 ER 220.

⁷⁹ Likewise, we are grateful to David Lusty for his thorough research of the historic case law, D Lusty, “Revival of the Common Law Offence of Misconduct in Public Office” (2014) 38 *Criminal Law Journal* 337 (Australia).

⁸⁰ *Wyatt* (1703) 1 Salk 380, 11 Mod Rep 53.

⁸¹ See the impeachment of Lord Lovat (1746) 18 State Trials 529, for involvement in the Jacobite rebellion.

⁸² See the impeachment of Lord Chancellor Macclesfield for taking over £100,000 in bribes in (1725) 16 State Trials 767.

⁸³ See the impeachment of Lord Melville, (1806) 29 State Trials 549, para A.54 above.

⁸⁴ *Warren Hastings and Elijah Impey*, (1787) 14 State Trials 234.

⁸⁵ The statutory process used “Acts of Attainder” and fell into disuse at the end of the 17th century, with only one final Act being passed in 1798 in relation to Lord Edward Fitzgerald who led the Irish revolt of the same year and who was killed during his arrest.

manner. As this category of offence was almost always prosecuted by way of Parliamentary impeachment it has not been used since 1806.⁸⁶

A.70 Impeachment involved an accusation brought by the House of Commons against a particular individual, which would thereafter be tried by the House of Lords as a court of justice. It was used infrequently throughout the 14th century and then fell practically into disuse from 1400 before being resurrected with in 1621 and used prolifically until 1698.⁸⁷

A.71 It may then be, because impeachment was usually brought against royal officials and other state figureheads, that later commentators took the view:

It does embody the sound principle that ministers and officials should be made criminally liable for corruption, gross negligence, or other misfeasances in the conduct of the affairs of the nation.⁸⁸

A.72 Meanwhile Acts of Attainder were statutes passed by Parliament that allowed a person accused of high crimes and misdemeanours to be convicted and executed without a trial. These were used on a less frequent basis from the 14th to the 18th century and were usually used “to get rid of the ministers the King had ceased to trust, or of persons considered to be dangerous to the state”.⁸⁹ Such Acts were also then associated with the concept of misconduct by public officers.

A.73 The concept of “misprision” meanwhile had two meanings:

- (1) A specific common law offence of failing to act upon knowledge of either treason or a felony (known as “misprision of felony” or “misprision of treason”). This was prosecutable against any person, not just public officers. In early times, when crime detection was almost non-existent, the state imposed a duty on all citizens to report any knowledge of criminal activity to the authorities. Like the first six offences listed above, therefore, this offence would overlap with misconduct in public office where it was committed by public officials, for example, sheriffs and constables.⁹⁰
- (2) A concept used by numerous legal commentators in the centuries before *Bembridge* to describe a collection of offences, sometimes including types of misconduct by a public office. The term “misprisions” specifically related to crimes which either personally involved the Crown as a victim

⁸⁶ Indeed, all 8 cases of high crimes and misdemeanours brought in the 18th century were impeachments. See G McBain, *Abolishing, high crimes and misdemeanours and the criminal process of attainder*, [2011] 85 *Australian Law Journal* 810.

⁸⁷ Holdsworth dates the first impeachment from 1376: W S Holdsworth, *A History of English Law*, [3rd ed 1923] (“Holdsworth”), Vol I page 379, although arguably an earlier example of impeachment was in 1283. See Stephen’s *History*, Vol I, page 146 and following.

⁸⁸ Holdsworth, Vol I page 285.

⁸⁹ The preference of the Tudor monarchy for Acts of Attainder rather than impeachment is noted by Holdsworth, Vol I page 382.

⁹⁰ In the present day this offence has been replaced with comparable statutory offences. Misprision of felony and treason are in substance dealt with under Criminal Law Act 1967, s 4, although in fact misprision of treason still exists as an obsolete common law offence while CLA 1967, s 1 abolished misprision of felony.

or which could be described as a “contempt” against the King or Queen.⁹¹ This will be discussed further below.

A.74 In recent times the word “misprision” has become associated with concepts of criminal neglect and “maladministration of public office”.⁹²

A.75 We will now examine the centuries before *Bembridge*. This seeks to establish whether the principle of misconduct in public office as a common law offence really did exist before 1783. Alternatively, whether the offence derived from a number of diverse concepts and procedures for dealing with public officials, applied to a range of separate offences. Recent comments regarding the offence have included references to it being “dredged up from the Middle Ages”⁹³ and to it having 13th century origins.⁹⁴ Is there any evidence that it is an offence of that antiquity?

Earliest period for legal research

A.76 We will start our search for the historic origins of the principle of misconduct in the 11th century. Many legal historians choose the 11th century, and the Norman Conquest in particular, as the starting point for historical legal research.⁹⁵ Although there are earlier accounts and records of laws, and what could be termed “legal processes”,⁹⁶ those records inevitably grow scarcer at that stage and we therefore consider that this is an appropriate point to start from.

Medieval Laws

A.77 Recent references made to the 13th century origins of misconduct in public office generally stem from the Statute of Westminster 1275. This was an important piece of legislation passed under Edward I which effected wide reaching changes throughout the administration of justice in England. It has been seen as an attempt to codify the law at that time.⁹⁷

A.78 There are a number of relevant parts of the Statute for the purposes of the concept of misconduct in public office:

⁹¹ These offences, including contempts (of Parliament, of courts etc), are now all separate offences within the criminal law and the word “misprision” is no longer used.

⁹² Wordnik, “Misprision” (Wordnik) <https://www.wordnik.com/words/misprision> last visited 8 January 2016.

⁹³ Sir David Calvert-Smith, then Director of Public Prosecutions, in oral evidence to the Joint Committee on the Corruption Bill (14 May 2003), Q126.

⁹⁴ Dominic Ponsford, “Nick Clegg says Journalists tried for Paying Public Officials should have Clearer Public Interest Defence in Law” (Press Gazette 30 March 2015) <http://www.pressgazette.co.uk/nick-clegg-says-journalists-tried-paying-public-officials-should-have-clearer-public-interest> last visited 8 January 2016.

⁹⁵ 1066 is usually heralded as the starting point of the English Common Law. See Baker, *An Introduction to English Legal History*, 1990.

⁹⁶ However, see Holdsworth, Vol I and F Pollock and F W Maitland, *The History of English Law before the Time of Edward I* (2nd ed 1898) (“Pollock and Maitland”).

⁹⁷ Holdsworth Vol II p 291 onwards.

- (1) C.9 – an offence if a sheriff, coroner or bailiff, “for reward or prayer or for great fear, or for any manner of affinity” conceals felonies or fails to arrest felons, “or will not do their office for favour borne to such misdoers”.
- (2) C.24 – a remedy for anyone wrongly dispossessed of their land by an officer of the King.
- (3) C.25 – an offence of “champerty” (taking a share of the outcome of a lawsuit).
- (4) C.26 – an offence for any sheriff, nor other King’s officer, to take any reward to do their office.
- (5) C.27 – an offence for clerks of the King’s officers to take any reward to do their office.
- (6) C.30 - and offence for clerks of the King’s Justice’s officers to take any reward to do their office.
- (7) C.31 – an offence for market holders to levy an excessive toll.
- (8) C.35 – an offence for an official to arrest someone outside of their jurisdiction.

A.79 The Statute of Westminster was just one set of reforms, in particular Chapters 24-30, aimed at addressing a wide spread perception of corruption by public officers involved in the administration of the Kingdom at that time. Officials, including judges, were poorly paid and were often paid by the parties themselves, or from the fines or damages recovered. This made it difficult to draw a line between legitimate payment and corruption. As Holdsworth stated: in the thirteenth century it never seemed to have occurred to anyone to attempt to draw such a line.⁹⁸

A.80 In 1289 Edward I held a purge of both his ministers and the judiciary.⁹⁹ Investigations of all complaints against royal officials were heard at Westminster. Eight judges of the King’s courts were accused of corruption and six were found guilty of various crimes, along with various minor officials.¹⁰⁰

A.81 Edward I’s investigations were not without precedent. The establishment of travelling justices, who visited the counties of England to dispense justice and conduct inquiries into the efficiency of local officials, was achieved under Henry II with the Assize of Clarendon in 1166.¹⁰¹

The justices in eyre of the thirteenth century carry with them a list of interrogatories [...] which are to be addressed to the local juries [...] A

⁹⁸ Holdsworth Vol II p 294.

⁹⁹ The King and his Chancellor, Robert Burnell, spending much time on war campaigns in France. Holdsworth, vol II, p 298.

¹⁰⁰ Including Adam de Stratton (Chamberlain of the Exchequer), Henry de Bray (an Escheator), Robert de Lyttelbury (Master of the Rolls). Holdsworth, Vol II, p 298.

¹⁰¹ 1166 Assize of Clarendon, Holdsworth Vol II pp 109-10.

third and large group of articles relates to the misdoings of royal officers, sheriffs, coroners and bailiffs [...] A very large part of the justices work will indeed consist of putting in mercy men and communities guilty of a neglect of police duties. This, if we have regard to actual results, is the main business of the eyre.¹⁰²

A.82 The Articles of Eyre, in addition to seeking out neglect of duty, also made enquiries of local communities as to sheriffs, coroners and bailiffs who may have taken money or gifts where they should not.¹⁰³

A.83 These practices are recorded by legal writers of the 13th century. *Bracton*, whose collection of papers has been dated to about 1275,¹⁰⁴ produces a series of legal pronouncements. These are based on moral principle. They also provide a number of examples of writs (legal actions) previously brought against public officers based on earlier practice and precedent, for both neglect of duty and misbehaviour. Three examples will suffice here:

(1) “He who judges ought to be wise” – “and though one is fit to judge and be made a judge, let each one take care for himself lest, by judging perversely and against the laws, because of prayer or price, for the advantage of temporary or insignificant gain, he dare to bring upon himself sorrow and lamentation everlasting”.¹⁰⁵

(2) “If the sheriff has been negligent” – “because sometimes the sheriff is negligent in executing the orders of the lord king, and then unless he puts forward an excuse he will remain at the king’s mercy [...] Therefore the sheriff is ordered as at another time (to do as ordered) and let the sheriff be there to hear his judgment as to this [...] If on that day he has done nothing more than before, and has not excused himself, he will be amerced (fined) for contempt at the king’s will [...]”¹⁰⁶

(3) “Of the deceit of the sheriff” – “sometimes the sheriff sends the writ he has received (containing orders to be served on person B requiring them to appear before the justices on a certain day) and deceitfully writes back and send word that he received it so late that he could not execute the king’s order [...] And therefore, as before, let him be ordered to attach him to appear on such a day etc and let the sheriff be there to hear his judgment as to this, that he did not attach the same B as he was ordered”.¹⁰⁷

A.84 The work known as “*Britton*” meanwhile, written circa 1289, was an attempt to make a comprehensive record of the law of Edward I and noted similar practices

¹⁰² Pollock and Maitland, p 546.

¹⁰³ See G McBain, “Modernising the Common Law Offence of Misconduct in a Public or Judicial Office” [2014] *Journal of Politics and Law* 7(4) 46 (Canada), 51.

¹⁰⁴ *Bracton de Legibus* c. 1275. [ed Samuel E Thorne (1977)] (“*Bracton*”). Baker. *Sources of English legal history: private law to 1750* (2010) (2nd ed).

¹⁰⁵ Bracton, p 21.

¹⁰⁶ Bracton, p 369.

¹⁰⁷ Bracton, p 371.

and precedents in relation to offences committed by public officials.¹⁰⁸ *Britton* refers to many different laws condemning either neglect of duty or misconduct in office and allowing for enquiries to be made of officials accused of such.¹⁰⁹ For example:

We forbid every coroner, upon pain of imprisonment and heavy ransom, to make his inquests of felonies accidentally or other things belonging to his office, by procurement of friends, or to remove a jury on the challenge of any party or to take anything by himself or another, or suffer anything to be taken by his clerk or any person belonging to him, for the executing of his office; or to erase, or alter, or practise any kind of fraud in his rolls, or suffer it to be done.¹¹⁰

...

Let inquiry be made concerning the fees taken and frauds committed by coroners, their clerks, and officers, according to that which is contained in our Statute of Exeter. Also of sheriffs and other officers, who for ward or entreaty or out of friendship for any man have concealed felonies committed in their bailiwicks, or suffered prisoners to remain unapprehended, whether within franchise or without, or have let to mainprise (to free) prisoners who were notailable, and have detained others who wereailable.¹¹¹

- A.85 Later, in 1297, the final and authoritative version of Magna Carta was entered onto the statute books. The “Great Charter” of course being concerned primarily with oppressive practices of the Crown, as embodied at that time in King John I. Magna Carta is most significant for, firstly, being an early example of private citizens attempting to restrict perceived misgovernance by the state and, secondly, introducing the concept of due process:

XXIX. No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.

- A.86 Part of this, as can be seen in the last line of the clause, is a requirement that justice not be for sale. In other words that no one involved in the administration of justice should take bribes.
- A.87 Magna Carta was thereafter also relied upon as authority for the concept of the “rule of law”, that all men including the King be subject to the law of the land. However, the full extent of this concept was not appreciated until the 17th century, as will be discussed below.

¹⁰⁸ See Holdsworth vol II, part I ch 4.

¹⁰⁹ Written by an unknown, or number of unknown authors, c 1289. Simeon E Baldwin (ed), *Summa de Legibus Anglie que Vocatur Britton* (1901) (“Britton”).

¹¹⁰ Britton, p 15.

¹¹¹ Britton, p 87.

A.88 Interestingly, similar legal principles to those referred to in *Britton* are recorded in much earlier legal commentary, that of *Leges Henrici Primi* (the laws of Henry the first), written by an unknown author in approximately 1115.¹¹² This work sets out firstly the jurisdiction of the King's courts:

These are the jurisdictional rights which the king of England has in his land solely and over all men, reserved through a proper order of peace and security [...] breach of the king's peace [...] the plea of contempt in his writs or commands [...] fighting in the king's dwelling or household, breach of the peace in the king's troop [...] receiving and maintaining an excommunicated person or an outlaw [...] false judgment, failure of justice, violation of the king's law.¹¹³

A.89 It can be seen that some of the matters listed above can be seen as types of misconduct associated with public officers, in particular judicial officers. It is the king's right to deal with these matters says the author because "the king must act as kinsman and protector to all persons".

A.90 The author also deals with the concept of neglect of duty by public officials in various sections. For example:

If anyone has undertaken to deliver to a lord or to anyone at all a summons from the king or from the overlord of the summoner and the person summoned and has failed to do so either intentionally or through ignorance, he shall make amends in the terms of the judgment according as it shall turn out.¹¹⁴

A.91 In these very early years of the development of the administration of English justice, distinctions between "criminal" law and civil law, that is between public wrongs and private disputes, barely existed. However the concept of the pleas of the Crown, under the King's jurisdiction, were the initiation of a system of redress for public wrongs, and what we would now term the criminal law.¹¹⁵

A.92 What then can be seen from both the medieval legislation and commentary is an early concept that public officials, holding powers direct from the state (in early times the Crown), should be held accountable for wrongdoing and neglect. Before the sophisticated development of a justice system and independent courts the action to bring such persons to account was carried out in the name of the King as the public "protector".

The 14th, 15th and 16th Centuries

(a) Legislation

A.93 Numerous statutes were created between the 14th and 16th centuries dealing with specific acts of wrong doing by public officers. They included the following:

¹¹² *Leges Henrici Primi* c 1115. (ed L J Downer 1972) ("Leges").

¹¹³ *Leges* p 109.

¹¹⁴ *Leges* p 151.

¹¹⁵ See Holdsworth Vol I, II and III

- (1) Payments to judges, above and beyond their fee from the King, were specifically prohibited in 1346 and 1384. The first specifying that they should not “from henceforth, as long as they shall be in the office of justice, take fee nor robe of any man but of ourself”; and the second that they should not take any “robe, fee, pension nor reward of any but the King”.¹¹⁶
- (2) Another form of public officer referred to was a gaoler. An Act of Edward III in 1340 made it an offence if any gaoler, “by too great duress of imprisonment, makes any prisoner [...] become an approver or appellor against his will (to accuse and give evidence against someone else)”.¹¹⁷
- (3) Coroners, important public officials in early times responsible for investigating deaths and apprehending murderers, also had specific provisions governing their actions. An Act of 1437 stated that “if any coroner be remiss, and make not inquisition upon the view of the body dead, and certify not, as ordained by statute, he shall, for every default, forfeit to the King a hundred shillings”.¹¹⁸
- (4) The Sale of Offices Act 1551 prohibited the buying and selling of Crown Offices, defined as any office or “part or parcel of them” touching upon the:

Administration or execution of Justice; or the receipt, control or payment of any the Kings Highness Treasure Money Rent Revenue, acompte, alneage, auditorship or surveying of any the Kings Majesty’s honours, castles manors, lands, tenants, wood or hereditaments; or any the Kings Majesties Customs, or any other administration or necessary attendance to be had done or executed in any the Kings Majesty’s custom house or houses; or the keeping of any the Kings Majesty’s towns, castles or fortresses being used occupied or appointed for a place of strength and defence; or which shall concern or touch any clerkship to be occupied in any manner of Courte of Record wherein Justice is to be administered.¹¹⁹

¹¹⁶ Sir Edward Coke cites the case of Sir William Thorpe CJ (1350) as an example of a Judge being prosecuted for bribery and Stephen refers to the impeachment of Michael de la Pole (1684): Coke’s *Institutes of the Laws of England: First Part, or a commentary upon Littleton* (1628) (19th ed 1832).

¹¹⁷ Coke, *Institutes of the Laws of England Third Part. Concerning High Treason and other pleas of the Crown and criminal causes* (1644) (6th ed 1809) ch 29, (Coke, *Institutes: Third part*). Numerous other statutes were also passed relating to misbehaviour by gaolers between the 14th and 19th centuries.

¹¹⁸ 3 Hen 7 c 1. Coroners were subject to a large number of statutory duties over centuries, such as the Coroners Act 1751 and culminating in the Coroners Amendment Acts of 1887 and 1892. For an example of a prosecution under this legislation see *Lord Buckhurst’s case* (1663) 1 Keb 280, 83 ER 946.

¹¹⁹ This was replaced by the Sale of Offices Act 1809.

- (5) An earlier statute relating to sheriffs¹²⁰ from 1402 meanwhile had a similar aim of preventing the sale of privileges attached to that office, and the Corrupt Appointments to Offices Act 1388 sought to prevent officials bribing their way into office.¹²¹
- A.94 It is statutes such as these that informed the legal writer, Staundeforde in his *Les Plees del Corone* (The Pleas of the Crown), when he listed separately a number of instances where public officials could be held accountable for neglect of duty or misbehaviour such as bribery or extortion in their office. Coroners in particular merited a whole chapter in Staundeford's work, as did gaolers.¹²²

The 17th Century

(a) Case law

- A.95 The earliest cited judicial formulation of a principle of misconduct by a public officer is usually *Crouther's Case*, decided in 1599.¹²³

Crouther was a constable and as such under a duty to raise a "hue and cry" within the parish he served whenever he was informed of a felony occurring therein. "Hue and cry" was a form of community policing with very ancient roots and was often the only way a victim of crime could pursue an offender and bring them to justice. Rules surrounding the hue and cry procedure allowed law officers and the community to effect summary, and often fatal justice, on suspects found either in the vicinity of the crime, or later with evidence of the crime about their person.¹²⁴ Fundamentally there was an important public duty imposed upon those who were tasked with raising the hue and cry when the circumstances arose. In failing to do so, when informed of a burglary committed at night, Crouther thereby breached this duty and the court held that an indictment brought against him for such a breach of duty was good in law. Failure to raise a hue and cry therefore seems a good, early, example of omissions by officials being punished as misconduct because: it is the constable's duty upon notice given unto him to presently pursue.¹²⁵

¹²⁰ Sheriffs were local law and tax enforcement officers granted franchises by the Crown for particular jurisdictions, usually including a number of communities. The Sheriffs would be tasked with carrying out the orders of the King's Justices and organising local justice, as well as collecting dues for the Crown. They would instruct in turn under-sheriffs, bailiffs and constables to assist them in their duties. The office had become significantly less important by the late 17th century (the remaining enforcement functions of the position are now exercised by High Court Enforcement officers), see Maitland, *The constitutional history of England*, (1980) ("Maitland, *Constitutional history*"), and Holdsworth, vol I. An example of a case prosecuted under this legislation was *Godbolt's case* (1576) 4 Leonard 33, 74 ER 710.

¹²¹ The Simony Act 1588 related to the sale of ecclesiastical offices.

¹²² Staundeforde, *Les Plees del Corone* (1557) ch 36 and 51.

¹²³ *Crouther's Case* (1600) Cro Eliz 654, 78 ER 893.

¹²⁴ See Holdsworth, Vol III p 599 onwards.

¹²⁵ *Crouther's Case* (1600) Cro Eliz 654, 78 ER 893 p 655.

- A.96 It would also appear to relate to the narrow meaning of “misprision” of treason or felony,¹²⁶ whereby a sheriff or constable fails to act on knowledge of a crime being committed. This may then lead to a suggestion that law officers, as persons who usually carried a duty of acting on “intelligence” of criminal conduct, were in practice those subject to prosecution for the narrower form of “misprision” and that it was this association that led to Blackstone and others to later associate the wider concept of “misprision” with offences committed specifically by public officers.
- A.97 However, *Crouther’s Case*, on close inspection, does not seem to have been a case brought solely under the common law, but was more likely one brought under a statutory provision which specifically imposed a duty of hue and cry upon a constable. The abridgement of the case states:
- And, it was said, that in every case where a statute prohibits a thing, and doth not limit a penalty, the party offending therein may be indicted, as for contempt against the statute.¹²⁷
- A.98 The reference “contempt against the statute” is one that reappears in case law from the 17th to the 19th centuries, quite often in cases that are cited as authorities for the offence of misconduct in public office.¹²⁸ It was used to enable criminal proceedings to be brought where a person had either failed to carry out a duty imposed upon them by statute, or committed an act prohibited by statute (where that statute did not provide a penalty for doing so). This was generally because older statutes were not always clear or comprehensive.¹²⁹
- A.99 As a doctrine, “contempt of statute” has been held no longer to exist and only applies to ancient statutes. Modern statutes may only create offences by clear words.¹³⁰ However, in many cases it was used to enable a criminal prosecution to be brought against a public officer who had not done their statutory duty or acted contrary to it.¹³¹ However, like “misprision”, it was not restricted to public officers.¹³²
- A.100 Additionally, it should be noted that the duty of raising the hue and cry and arresting suspects was not in early times limited to constables, but also attached to whole communities. There are records of a duty upon all citizens to pursue

¹²⁶ Para A.73(1) above.

¹²⁷ *Crouther’s Case* (1600) Cro Eliz 654, 78 ER 893 p 654.

¹²⁸ Hawkins, ch 22 p 92. 5, “also every contempt of a statute is indictable, if no other punishment be limited”.

¹²⁹ Stephen’s *Digest* included an offence of “disobedience to a statute” under Chapter 22, p 76 Article 124.

¹³⁰ *R v Horseferry Road Magistrates ex parte Independent Broadcasting Authority* [1987] QB 54.

¹³¹ *Castle* (1622/23) Cro Jac 644, 79 ER 555: magistrate acting without being qualified; *Crossley and Robinson* (1839) 10 Ad & E 132, 113 ER 51: overseers not accounting to auditor of poor law union when requested; *Hall* [1891] 1 QB 747, overseer of poor refusing to register voter.

¹³² *Stephens v Watson* (1702) 1 Salk 45, 91 ER 44: “If a man keep an alehouse without licence he may be committed for three days by the Act, but he is not indictable, because the statute which makes it an offence, has made it punishable in another manner.”

felons dating as far back as 1275 and specific duties attaching to constables and sheriffs of towns and villages have been attributed to statutes from 1331 and 1462.¹³³

- A.101 It would seem from *Crouther's Case* that by 1599 the duties of a constable were considered more onerous than those of the community. The specific decision was that, while the community did not have a duty to raise the hue and cry at night, a constable did.
- A.102 In other cases in this era, any pronouncement of the principle that misconduct in public office is a common law offence is hard to find. The cases found are generally ambiguous as to whether they concern an offence of general misconduct or more specific offences of extortion, fraud or failing to comply with duties under statute. For example, the case of *Broughton* where Lady Broughton, a warden of a gaol was prosecuted for extorting money from prisoners and ill-treating them.¹³⁴ Or *Burdett*, involving a market holder extorting monies from stall holders.¹³⁵

(b) Legal commentary

- A.103 Sir Edward Coke's *Institutes* is the key legal commentary of the 17th century. It appears that Coke was aware of *Crouther's Case* as he stated: "and the duty of the constable is to raise the power of the towne, as well in the night as in the day, for the prosecution of the offender".¹³⁶ However, Coke does not make this statement in the context of describing any specific offence of "misconduct in public office". Rather, it is made within a chapter dealing solely with the process of hue and cry. Likewise, Coke deals with offences of bribery and extortion in separate chapters.
- A.104 Coke defines bribery as both "a great misprision" and as an offence "only committed by him that hath a judicial place"¹³⁷ (including ecclesiastical judges). This is interesting, as he states that extortion "may be committed both by him that hath a judicial place or by him that hath a ministerial office" (which includes ecclesiastical ministers and bishops, justices of the peace, court clerks, probate officials and others).¹³⁸

¹³³ Statute of Westminster 1275 c.9; 6 Edw 3; 2 Edw 4. See Holdsworth Vol III, p 599 and Coke, (1628) Ch 52, p 116.

¹³⁴ (1672) Raym Sir T 216, 83 ER 112, 2 Lev 71, 83 ER 455.

¹³⁵ (1697) 1 Ld Raym 148, 91 ER 996.

¹³⁶ Coke, *Institutes: Third Part* ch 52.

¹³⁷ Coke, *Institutes: Third Part* ch 68. But see the unprinted statute referred to by Coke, 11 Hen 4, which also refers to "chancellor, treasurer, keeper of the privy seal, King's counsellor, serjeant or any other officer, judge or minister of the King". As one commentator notes, there have been key debates on the shift from court-centred corruption in the 16th century to Parliament-centred corruption in the 18th century: D Whyte, *How corrupt is Britain?* (2015).

¹³⁸ Extortion was prohibited by a number of statutes, for example Statute of Westminster 1275 c 26, 6 Edw 1; 1 Edw 3; 8 Hen 4. Coke also cites *Beawfage's case* (1612) 10 Co Rep 99b, 77 ER 1076, another case often referred to in respect of misconduct in public office.

A.105 This narrow definition of bribery also accords with some later descriptions of the offence of bribery discussed below. However, not all later writers restrict common law bribery to judicial office holders.¹³⁹

A.106 In relation to misprisions Coke says:

Misprision is twofold: one is *crimen omissionis*, of omission, as in concealment or not discovery of treason or felony: another is *crimen commissionis*, of commission, as in committing some heinous offence under the degree of felony.¹⁴⁰

A.107 In respect of crimes of commission Coke lists many examples, including imagining against the King; speaking against the King or his justices' rulings; violence committed in the Kings presence (including the presence of his justices); revenge against administrators of justice and rescuing a prisoner. He also gives a number of examples of persons prosecuted for such acts which makes it clear that he did not consider the concept of misprision to be restricted to public officials.

Indeed, in Coke's consideration misprisions appear to encompass all serious crime, he being the source of later references to the principle that: every treason or felony doth include in it misprision of treason and felony.¹⁴¹

A.108 Meanwhile, Coke treated other offences, which could only be committed by public office holders, separately. These included bribery and extortion. Further, it was an offence for a gaoler to voluntarily allow a prisoner to escape. The exercise of duress by gaolers, specifically where the gaoler forces a prisoner to accuse another of a crime against his will, was also an offence.¹⁴²

A.109 Coke also describes the process of impeachment to be brought, as he describes it, against "Peers of the Realm" for any treason, felony or misprision.¹⁴³ Together with the concept of corruption by public officials, these were ones Coke was

¹³⁹ Hawkins (1721). Archbold (1st ed 1822) ch 2 p 322, applying bribery to a constable. *Stephen's Commentaries* Ch XXXI p 250 onwards makes clear that it was by the 19th century being applied to all types of public officers and statutes had been passed dealing with bribery of voters, followed by the Corrupt Practices Act 1854. Cases affirming that bribery was a common law offence applicable to all public officers include: *Lancaster and Worrall* (1890) 16 Cox 739 and *Whitaker* [1914] KB 1283. Also see the unreported case of *Greenway* [1992] CCC, where MPs were held to be public officers cited in C Nicholls and others, *Corruption and Misuse of Public Office* (2011, 2nd ed) at [6.26]. The text of Buckley J's decision as to whether a MP was a "public officer" can be found in A Bradley, "Parliamentary privilege and the common law of corruption" (1998) 24 *Commonwealth Law Bulletin* 1317.

¹⁴⁰ Coke, *Institutes: Third Part* ch 65.

¹⁴¹ Hawkins, ch 65, p 140.

¹⁴² Coke, *Institutes: Third Part* ch 18 and 29.

¹⁴³ Coke, *Institutes: Third Part* ch 2, p 30.

familiar with. Coke had been instructed in 1621 to prosecute in the impeachment of Sir Francis Bacon, then Lord Chancellor.¹⁴⁴

- A.110 It should also be noted that another well recognised legal commentator of the 17th century dealt with duties of public officers in a not dissimilar way. Sir Matthew Hale's *Historia Placitorum Coronae* (History of the Pleas of the Crown) was published 8 years after Coke's *Institutes*.¹⁴⁵
- A.111 Evidence is scant therefore as to whether the principle of misconduct in public office, as a criminal offence, had developed at all prior to 1704. The evidence we have indicates that statute, procedure and other common law offences were used to encompass the mischief which the offence of misconduct in public office seeks to address.
- A.112 Nevertheless, in the 17th century, we can be relatively assured that principles and processes to deal with misconduct by public officers had developed even if the concept itself had not yet developed into a standalone offence.

(c) Context

- A.113 One reason for the restricted development of any specific concept of misconduct in public office prior to the early 18th century may have been a lack of any cohesive concept of "public office". "Public office" as a concept in that period was much removed from what it is now, and indeed in the 18th and 19th centuries.
- A.114 Early public officials almost inevitably received their authority directly from the Crown. This could be by way of peerage or other grant of nobility and an associated office (members of Privy Council or the treasury); through royal charter (governors of Crown bodies and in the colonies); franchise (overseers and sheriffs); or appointment (military or judicial office). It could also have been through persons delegated by the Crown to make such appointments. An example of this was justices of the peace, who had the delegated power to swear in constables.
- A.115 In that sense there was little need to define a public office much beyond the ambit of "Crown servant". In relation to such persons a number of statutory provisions existed to prohibit corrupt and negligent practices.¹⁴⁶ These were based on specific principles that behaviour such as extortion, oppression, bribery or a failure to prevent crime and secure criminals was criminal in nature.
- A.116 Additionally, where no prohibition and punishment was provided for in a particular statute, but the statute conferred a duty on a public officer, the common law was developing a process of "contempt of statute" to punish those who did not comply with that duty.

¹⁴⁴ Coke had recently been replaced as Lord Chancellor by Bacon, Coke having been removed from that office for refusing to adjudicate cases in favour of the King where legal authority meant that the cases should be decided against him. Bacon admitted corruption and was fined and removed from office without a trial.

¹⁴⁵ M Hale, *Historia Placitorum Coronae* (1636) (ed F Giles 1736) ch 28 'Misprisions' and ch 51 and 52 regarding escapes.

¹⁴⁶ See Coke's *Institutes: Third Part* for example, including offences relating to gaolers, ch 2 p 30.

- A.117 Likewise, the concept of “misprision” allowed the monarch to punish:
- (1) failures by officials, and other people, to report crime; and
 - (2) any behaviour that may go against the monarch’s direct orders or the interests of the state, by deeming such behaviour “contempt”.
- A.118 Alternatively, Parliament had recourse to the process of impeachment and Acts of Attainder for high ranking officials. These focused on the concept of “high crimes and misdemeanours” to prosecute a range of separate offences. In this way the concept of “public interest” or “public duty” had not developed much beyond the concept of “Crown interest” or duty to the Crown.
- A.119 The Kings of England from 1066 to the 15th century swore in their coronation oaths to: rule the whole people subject to them with “righteousness and royal providence”; and “enact and hold fast right law, and utterly forbid rapine and unrighteous judgments”. Thereby the King was the protector of the people and responsibility for their interest lay naturally with him. The role of “Lord Protector” arose from the system of feudalism in England and the reciprocal relationship between a liege (Lord or Sovereign) and their subjects. As Sir Edward Coke stated in *Calvin’s Case*:
- Ligeance is the mutual bond between the King and his subjects: whereby subjects are bound to obey and serve him and he should maintain and defend them.¹⁴⁷
- A.120 The idea of the “state” was embodied in the Crown. The word “state” of course derives from “status”, that is, the status of monarch, and is also related to the idea of “stateliness”. It was also the ultimate right and duty of the King to maintain the state of the realm, in terms of peace and stability. The King was the ruler of the Kingdom.
- A.121 The modern concept of “the state” is quite different and is considered to refer to:
- (1) an abstract entity above and distinct from both government and the governed;¹⁴⁸ or
 - (2) the idea of a prevailing regime, but also to refer to the institutions of governments and means of coercive control that serve to organise and preserve order within political communities.¹⁴⁹

In England, this includes the three separate “arms” of the state: the executive (the government, of which the monarch is the head), the legislature (Parliament) and the judiciary.¹⁵⁰

¹⁴⁷ (1608) 7 Co Rep 1a, 77 ER 377. The case was concerned with the national status of Scottish citizens in England under the Scottish King James I.

¹⁴⁸ J H Shennan, *The Origins of the Modern European State 1450-1725*, (1974). However, the concepts are the subject of continued debate and disagreement. See M Loughlin, “The State, the Crown and the Law”, in Sunkin and Payne, *The nature of the Crown: a legal and political analysis* (1999).

¹⁴⁹ Q Skinner, “The State”, in Ball, Farr and Hanson, *Political Innovations and Conceptual Change* (1989).

- A.122 In the 15th and 16th centuries the administration of the realm still centred on the monarch. The monarch governed the people, and as such he or she (and the royal officials) constituted the executive. Early legislation was passed in the name of the monarch rather than Parliament. Accordingly, the monarch was also the legislature.¹⁵¹ Early Parliaments were occasions on which the monarch summoned the Lords of the realm and representatives of the commons to “counsel” him or her, rather than an institution.¹⁵²
- A.123 Additionally, all judges were appointed by the Crown to sit as the “King’s Justices” in order to dispense the “King’s justice”, thereby also constituting the monarch the head of the judiciary.¹⁵³
- A.124 It during was the 17th century that changing ideas of the “state” and the “public” in England began to reach fruition. Theories of “state power”, the separation of that power between different arms of the state, and the responsibilities that accompanied that power filtered through to the courts.¹⁵⁴ This was largely due to the political writings of Renaissance republicans who proposed a concept of “civil” authority.¹⁵⁵ The idea of a King or Queen as the holder of ultimate, divine, power was the subject of challenge following royal divinity being asserted in a more extreme form than ever before, in keeping with the latest Continental theories of royal absolutism.
- A.125 The ideas and tensions that arose between King Charles I and Parliament in the early years of the 17th century led Coke (then an MP) to produce, and Parliament to pass, the Petition of Right on 7 June 1628. This prohibited the then King from infringing certain liberties of the subject. Tensions between royalists and reformers then erupted again in 1640 and led to the civil war of 1642 and finally the execution of the King in 1649.¹⁵⁶

¹⁵⁰ Although England is commonly referred to as a “stateless society” without a written “constitution” and associated constitutional bodies: achieved primarily by the incremental way in which our state bodies have been developed from above, rather than below. See Maitland, *Constitutional history*, and see M Loughlin, “The State, the Crown and the Law”, in Sunstein and Payne, *The nature of the Crown: a legal and political analysis*, (1999).

¹⁵¹ The monarch still retains the power to summon and dismiss Parliament. Arguably there was in early times a fourth arm, that of the Church, although ecclesiastical officers would often hold positions in government, the legislature and the judiciary. The question of the separation of Church and State is of course a distinct one.

¹⁵² The first Parliament to be held where representatives of the boroughs and shires were in attendance, not just noblemen, was in 1265. Maitland, *Constitutional History*, p 69 onwards.

¹⁵³ The monarch was the embodiment of justice. See E H Kantorowicz, *The King’s Two Bodies*, (1957).

¹⁵⁴ For example, see T Hobbes, *Leviathan* (1651) and J Locke, *Two Treatises on Government* (1669).

¹⁵⁵ The Renaissance is a description of the period of the 14th to 17th centuries between the medieval and modern periods of history. See Q Skinner, *The foundations of modern political thought*, Vol 1 The Renaissance, (1978). “Civil authority” refers to the ideology that all state authority is derived from the people, whose interests are then represented by their rulers. See theorists such as J Locke, *Two Treatises on Government* (1669).

¹⁵⁶ Through the Short and Long Parliaments and thereafter the Rump and Barebones Parliaments. See E Wicks, *The evolution of a constitution* (2006).

A.126 England's brief status as a republic ended in 1660 with the restoration of the monarchy and the proclamation of Charles II as king. However, the period in between has been described as one where:

The transformation of a council (Parliament) into a genuine legislature was achieved by the 13 years of continuous sittings in the absence of any executive authority.¹⁵⁷

A.127 The effect of this period was felt 28 years later when concerns about royal absolutism led to a revolt by Parliament against James II. The 1688 Bill of Rights was passed, establishing a constitutional monarchy and awarding victory to Parliament in the struggle for power against the Crown and establishing it as a sovereign legislature.¹⁵⁸

A.128 Additionally, the 1688 Bill of Rights contained an emphasis on "civil rights" described as "the true, ancient, and indubitable rights and liberties of the people in his kingdom". These were rights that could be enforced against the state through the use of law. In such a way, therefore, the Crown and the remainder of the state, including Parliament, became subject to the law. Thus establishing the power to enforce the fundamental concept of the "rule of law". The law was:

The best of all securities for the liberties of the subject, against both the claims of the royal prerogative and the claims of Parliamentary privilege.¹⁵⁹

A.129 Coke, and others who helped frame both the Petition and Bill of Rights, drew on the authority of much earlier legislation to support their position, including Magna Carta.¹⁶⁰

A.130 Thereafter, the Act of Settlement 1701 was passed by Parliament. The Act provided that judges were to hold office for as long as they were of good conduct and not at royal pleasure. This provision both established judicial independence and strengthened the ability of the law and the courts to hold the state to account.¹⁶¹

¹⁵⁷ See Kishlansky, "The emergence of adversary politics in the long parliament" in Cust and Hughes, *The English civil war*, 1997. Also, E Wicks, *The evolution of a constitution* (2006). Alternatively it could be argued that Cromwell was at least as vigorous an "executive authority", and treated Parliament in just as high-handed a fashion, as the monarchy ever did and that therefore England remained a monarchy in which the Lord Protector assumed the powers of a monarch.

¹⁵⁸ See E Wicks, *The evolution of a constitution* (2006).

¹⁵⁹ Holdsworth Vol VI, p 192.

¹⁶⁰ Coke's *Institutes: Second Part: containing the exposition of many ancient and other statutes* (1647) (6th ed 1809) was a clause by clause analysis of Magna Carta and the delay in publication of this Part, from 1628 to 1647, was due to the King's dissatisfaction with his writings, which led to his order that Coke's papers all be confiscated after the publication of *Institutes: First Part*.

¹⁶¹ In 1783 Lord Mansfield, in the case of the *Dean of St Asaph* 3 Term Rep 428, 100 ER 657, commented "the Judges are totally independent of the minister that may happen to be, and of the King himself".

- A.131 Accordingly, the upheaval of the 17th century resulted in the establishment of two concepts fundamental to both English law and politics: the separation of executive, legislative and judicial powers and the rule of law.
- A.132 These concepts can also be seen to underpin the concept of holding public officers to account through the common law:
- (1) First, they permitted the separation and development of state bodies outside of the traditional forms of “Crown servants” and allowed for their expansion and “franchisement”. This may in turn have led to a need to capture within the law misbehaviour by those not already legislated for.¹⁶²
 - (2) Secondly, they established a fundamental principle that no one, of whatever status, should be above the law – everyone should be susceptible to public scrutiny through the courts.

The 18th century

(a) Case law

- A.133 An example of a case of misconduct not falling within one of the five types of offence identified by McBain (paragraph A.63)¹⁶³ is the 1704 case of *Wyatt*.¹⁶⁴ A constable, Mr Wyatt, had been ordered by a Justice of the Peace’s warrant to levy a fine against a person convicted of deer stealing. He failed to do this and was therefore fined himself. Mr Justice Powell stated that “this is an offence at common law, neglecting to execute the office of a constable, and an indictment lies at common law.”¹⁶⁵
- A.134 Yet by far the clearest exposition of the offence of misconduct in public office can be found in a case decided 79 years before *Bembridge* in which it was stated:
- If a man be made an officer by Act of Parliament, and misbehave himself in his office, he is indictable for it at common law, and any public officer is indictable for misdemeanour in his office.¹⁶⁶
- A.135 It is worthy of note that 1704 was also the year that *Ashby v White*¹⁶⁷ was decided, usually cited as the primary authority for the important common law principle, that “where there is wrong, there is a remedy”.¹⁶⁸ Ashby had been refused a vote in a Parliamentary election by the House of Commons, who

¹⁶² It could be seen that the common law of bribery operated in a similar way, moving from its restriction to judicial office holders in Coke’s time, to a wider range of public officials by the 19th century.

¹⁶³ G McBain, “Modernising the Common Law Offence of Misconduct in a Public or Judicial Office” [2014] *Journal of Politics and Law* 7(4) 46 (Canada).

¹⁶⁴ (1705) 11 Modern 53, 88 ER 880.

¹⁶⁵ Direct reference to this principle was made 276 years later in *Dytham*. 1704 was also the year in which the last “failure to take up a public office” case was found by McBain. G McBain, “Modernising the Common Law Offence of Misconduct in a Public or Judicial Office” [2014] *Journal of Politics and Law* 7(4) 46 (Canada), p 53.

¹⁶⁶ *Case 136 Anon* (1704) 6 Mod 96, 87 ER 853.

¹⁶⁷ (1704) 2 Ld Raym 938, 92 ER 126; appeal to House of Lords 1 Bro PC 62, 1 ER 417.

¹⁶⁸ 2 Ld Raym 938, 953; summarised Holt KB 524, 90 ER 1188.

asserted that they alone could determine whether the decision was correct, and the majority of the judges of the Court of King's Bench agreed that the House of Commons had the exclusive right to decide. However, Lord Holt, then Chief Justice, disagreed and stated:

This is a noble franchise and right, which entitles the subject to a share of government and legislature [...] It is a vain thing to imagine, there should be a right without a remedy.

The House of Lords, on appeal, reversed the judgment of the court and upheld the view of Lord Holt.

- A.136 Likewise, it might be seen as peculiar for an official to hold a duty, for which, if he should breach it, he could not then be held accountable for.
- A.137 Our research has found approximately 30 reported cases of public officers being prosecuted where no other offence would necessarily be available, between 1704 and 1782.¹⁶⁹ The vast majority of these were magistrates. Some were proved to have acted from a partisan and improper motive whilst others were not. It is of note that at least seven of the cases we have considered were decided by Lord Mansfield.

(b) Legal commentary

- A.138 The most well known legal commentator of the 18th century is of course Blackstone. Chapter 10 of volume 4 of his *Commentaries* relates to "offences against public justice", of which he lists 22.¹⁷⁰ Not all of these are restricted to public office holders. Indeed most apply equally to all subjects of the common law, for example perjury. Of those that specifically relate only to officials there are:

- (1) abuse of power by gaolers;
- (2) a gaoler voluntarily allowing a prisoner to escape or negligently permitting him to escape;
- (3) bribery, "when a judge or other person concerned in the administration of public justice, takes any undue reward to influence his behaviour in his office" (the restriction to the administration of justice will be discussed below);
- (4) the negligence of public officers, "entrusted with the administration of public justice, as sheriffs, coroners, constables, and the like";

¹⁶⁹ However, the same research suggests that the number could be much higher. A number of anonymous cases appear in the case records that have not been cited by legal commentators, albeit that they may be decided on the same day as other cited cases. For example, *Anon* (1731) 2 Barn KB 29, 94 ER 335, a case involving bailiffs, sits between two other anonymous cases involving a judge and a town clerk.

¹⁷⁰ Blackstone's, *Commentaries* (1769), vol 4 ch 10.

- (5) the oppression and tyrannical partiality of judges, justices, and other magistrates, “in the administration and under the colour of their office”; and
- (6) extortion, “an abuse of public justice, which consists in any officer’s unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due”.

A.139 The main point arising is that Blackstone’s *Commentaries* contains no defined principle of misconduct in public office as later used in *Bembridge*. Whilst Blackstone does acknowledge an offence of “neglect of duty” he specifically, as with bribery, restricts this to those involved in the “administration of justice” rather than those in an “office of trust concerning the public”. Additionally, he refers to no general concept of a positive act amounting to an offence of misconduct. Rather, he refers to specific examples of types of misconduct that may be proceeded against.

A.140 Interestingly, Blackstone refers to Sir William Hawkins’ first *Treatise on the Pleas of the Crown*, published in 1721.¹⁷¹ This is a reference also made by Lord Mansfield in *Bembridge*.¹⁷² However, the question of misconduct by public officers is treated quite differently by Hawkins.

A.141 Hawkins specifically refers to a primary offence of “neglect or breach of duty” under his heading “offences by public officers”. He states:

I take it to be agreed, that in the grant of every office whatsoever, there is this condition implied by common reason, that the grantee ought to execute it diligently and faithfully; for since every office is instituted, not for the sake of the officer, but for the good reason of some other, nothing can be more just, than that he, who either neglects or refuses to answer the end for which his office was ordained, should give way to others, who are both willing and able to take care of it.¹⁷³

A.142 Hawkins also assumes that the types of conduct caught by this offence are numerous, obvious and easily defined:

But it would be endless to enumerate all the particular instances wherein an officer may be discharged or fined; and it also seems needless to endeavour it, because they are generally so obvious to common sense as to need no explication [...] And therefore I shall leave the particular cases of this nature to every man’s own judgment, which, from consideration of the general rules above-mentioned, and the various circumstances of every case, will easily discern how far each offence of this kind deserves to be punished.

¹⁷¹ Hawkins (1721).

¹⁷² (1783) 3 Douglas 327, 332, 99 ER 679, 682.

¹⁷³ Hawkins Vol I ch 66.

- A.143 Hawkins addresses bribery and extortion in the same chapter. In his view, they apply to the exercise of power by “public officers”. The question therefore arises as to why, in 1769, Blackstone did not reproduce Hawkins’ clear exposition of an offence relating to misconduct by public officers.
- A.144 The answer is not reached by looking at the cases, which deal with misconduct by magistrates, overseers, town clerks and judges without any discussion of the law. These are limited to the question of corrupt motives where prosecutions lie against magistrates.¹⁷⁴ Blackstone cites no cases in his work, purporting to rely on Hawkins as his source for the relevant parts of his chapter.¹⁷⁵
- A.145 Similarities do exist, however, within Hawkins’ and Blackstone’s works regarding other concepts involving public officers. Both describe in some detail “misprisions” and “contempts”, referred to above.¹⁷⁶
- A.146 “Misprision” is a word derived from the Norman French word “mespris”, subject to different exact translations depending on whether the narrower or wider view is taken of the term.¹⁷⁷ In the narrower sense, of the specific offence of misprision of treason or felony, “mespris” has been explained as meaning “ill-apprehended or known”.¹⁷⁸ In the wider sense of misprisions or contempts against the King or Queen, “mespris” was usually explained as meaning contempt.¹⁷⁹ As noted above, however, the meaning of the word appears to have altered in later years, becoming closely associated with the concept of misconduct by public officers.
- A.147 In legal terms Blackstone describes “misprisions” as high criminal offences, but not capital ones.¹⁸⁰ He divides such offences into two types, as described above:
- (1) Negative offences: involving the knowledge of and failure to report a crime.
 - (2) Positive offences: also known as “contempts” against the King, that is acting contrary to the orders of the Crown.
 - (a) “The first and principal of these is the mal-administration of such high officers, as are in the public trust and employment [...] hitherto also may be referred the offence of embezzling the public money”;

¹⁷⁴ Para A.22 above.

¹⁷⁵ Interestingly, however, Blackstone sat as a member of the bench in at least 2 civil cases where the principle of indicting a public officer for his or her misconduct was acknowledged: *Bassett v Godschall* (1770) 3 Wils KB 121, 95 ER 967 and *Leader v Moxton* (1773) 3 Wils KB 461, 95 ER 1157.

¹⁷⁶ Para A.67(2) and following above.

¹⁷⁷ Para A.73 above

¹⁷⁸ Coke’s *Institutes*: Third Part, 1644, Ch 3. “Mes in composition in the French signifieth mal as mis doth in the English tongue: as mischance, for an ill chance, and so mesprise is. In legal understanding it signifieth, when one knoweth of any treason or felony, and concealeth, this is misprision”.

¹⁷⁹ *Commentaries*, vol 4 ch 9. In modern French “mépriser” means to despise, but the related verb “méprendre” means to mistake or misunderstand.

¹⁸⁰ *Commentaries*, vol 4 ch 9.

- (b) “Contempts against the King’s prerogative. As by refusing to assist him for the good of the public [...] Or by disobeying the King’s lawful commands [...]”
- (c) “Contempts and misprisions against the King’s person and government [...] doing anything that may tend to lessen him in the esteem of his subjects, may weaken his government, or, may, raise jealousies between him and his people”
- (d) “Contempts against the King’s title [...] the denial of his right to the Crown in common and unadvised discourse [...] A contempt may also arise from refusing or neglecting to take the oaths, appointed by statute for the better securing the government; and yet acting in a public office, place or trust, or other capacity, for which the said oaths are required to be taken”.
- (e) “Contempts against the King’s palaces and or courts of justice have always been looked upon as high misprisions”.

A.148 Not all of these offences need be committed by public officers but (a) and (c), and (d) in part, specifically relate to such positions.

A.149 The concept that a public officer is committing contempt against the monarch by committing maladministration appears to resonate with the later statement by Lord Mansfield that “a man accepting an office of trust concerning the public is answerable criminally to the king for misbehaviour in his office”.

A.150 It cannot be the case however that Blackstone meant that only those public officers who derive their authority directly from the monarch were liable to be prosecuted for misconduct in public office. While Blackstone implies that this is the case for “misprisions”, there are also a number of other categories of offending by public officers that are described in his chapter 10 (for example bribery and neglect of duty). Therefore, “misprison” or “contempt” by a public officer is just one form of misconduct, one perpetrated by those in government and holding power derived from the Crown.

A.151 Meanwhile, Hawkins deals with “misprisions” generally in the opening pages of his *Pleas of the Crown*:

Of offences more immediately against the King, not capital, there are two kinds: praemunire and misprison [...]

Misprisions more immediately against the king are either negative or positive. The negative is commonly called misprison of treason (c 20). Positive misprisions of this kind either amount to misprison of treason or they do not. Of such misprisions amounting to misprisions of treason there is only one species: forging foreign coin not current here. Of such misprisions not amounting to misprison of treason there are four kinds: contempts against the King’s palace or courts of justice (c 11); contempts against his prerogative (c 22); contempts against his person or government (c 23); contempts against his title (c 24).

A.152 It is notable that none of the misprisions listed by Hawkins relate exclusively to public officers and an examination of the relevant chapters confirms that this is the case. However, certain types of contempt might be more likely to be committed by such persons. For example, contempts against the monarch's prerogative include "refusal to assist him for the good of the public". Further, contempts against the monarch's government includes "refusal to take the oaths required by law for the support of his government". Hawkins goes on to explain his approach to misprisions further:

The word misprision has not any certain signification but is generally applied to all such high offences as are under the degree of capital and nearly bordering thereupon; and it is said that a misprision is contained in every treason or felony whatsoever, and that one who is guilty of felony or treason may be proceeded against for a misprision only if the king please.¹⁸¹

A.153 The concept that every criminal offence also amounts to a misprision refers to the principle that every treason and felony is a "plea of the Crown", an offence against the King's peace. Therefore, every crime can be prosecuted as a bare contempt of the King whether or not it is prosecuted as a specific offence. The reference to "high offences" may be analogous to the term "high crimes and misdemeanours", also associated with crimes by public officers.

A.154 Hawkins, therefore, while including misprisions in his work, differs markedly in his actual approach from the concept in Blackstone. To Hawkins the position is clear. The principle is that misconduct by a public officer, whether by act or omission, is an offence at common law, whether or not it is a misprision or any other type of offence.

A.155 The reason for the different approaches most likely lies in the different experiences of the law had by Hawkins and Blackstone. The former was a highly successful barrister from 1700 until the 1730s, working on a daily basis in court of King's Bench where criminal cases were dealt with. His practice included a number of cases involving corrupt public officials.¹⁸² Meanwhile, the latter became a renowned academic lawyer in 1753, following a short career at the Bar. Upon taking judicial office, Blackstone only sat in the court of Kings Bench for four months before transferring to the Court of Common Pleas, which dealt with civil cases.¹⁸³

A.156 Hawkins' appreciation of the development of the criminal law in practice was possibly deeper than Blackstone's. Further, Blackstone was more concerned to impose theoretical considerations and categorisation to concepts and principles

¹⁸¹ Hawkins Ch 20.

¹⁸² *Anon* (1731) 94 ER 335, a case of a Judge refusing to give judgment. He also represented Thomas Bambridge, a notorious warden at Fleet prison, who was convicted of extortion from prisoners in 1728 and in relation to whom an Act of Parliament was passed preventing him from working in the position. Baker and Milsom *Sources of English Legal History to 1750* (2010). H W Woolrych, *Eminent Serjeants-at-Law at the English Bar* (1869). [page references?]

¹⁸³ Although this included civil cases involving allegations of misfeasance in public office. J H Baker, *An Introduction to English Legal History* (2002). Baker and Milsom, *Sources of English Legal History to 1750* (2010). [page references?]

that had developed through the operation of the common law in a pragmatic fashion.¹⁸⁴ Certainly Hawkins' exposition of the law was referred to and relied upon by Blackstone and senior judges of the 18th century, such as Lord Mansfield, with great frequency. This suggests that his approach was probably the closest to the reality of the working criminal law.

- A.157 In other respects however the work of Blackstone provides a better treatment of the manner in which high ranking public officials could be brought to account. He refers to the process of impeachment both for misprisions committed by public officers and for the oppression and tyrannical partiality of judges.¹⁸⁵
- A.158 In fact, however, the period from 1700 to 1782 only saw six impeachments and, as noted above, the partiality of judges was commonly dealt with by way of criminal proceedings.¹⁸⁶

(c) Context

- A.159 When evaluating legal history it is helpful to consider, alongside specific legal developments, the political and social context of the time in which the developments occurred. Given the pivotal role of *Bembridge* in this account it would seem necessary to make some comments regarding events leading up to 1783.
- A.160 In general terms the late 18th century was a time of concern for those in positions of either high or middle ranking power. Concerns about the lawlessness of the "lower classes" were widespread.¹⁸⁷
- A.161 Criminologists have opined that in the late 18th century attempts by the establishment to "control the lower classes" moved away from the use of landownership to the use of legal processes.¹⁸⁸ Magistrates in particular were useful tools for such endeavours. They were both increased in number and given an enormous amount of discretion under both statute and the common law to deal with vagrants, those alleged to be disturbing the peace, the licensing of ale and gin houses and more generally the section of society referred to as "the poor".

¹⁸⁴ For an interesting discussion of how different legal commentators and practitioners use legal materials to interpret the law, and refer to principle, see A Halpin, *Definition in the Criminal Law* (2004).

¹⁸⁵ His reference to impeachment does not include the phrase "high crimes and misdemeanours", so we will look to earlier sources for associations between this and misconduct by public officers.

¹⁸⁶ Impeachments of Hans Bentinck, diplomat, (1701) 14 State Trials 234; Henry Sacheverell, for ecclesiastical offences, (1710) 15 State Trials 1, James Radcliffe and Robert Harley for treason, (1715) 15 State Trials 761 & 1046; Thomas Parker, Lord Chancellor, (1725) 16 State Trials 767; and Simon Fraser for treason (1746) 18 State Trials 530.

¹⁸⁷ These fears were likely underpinned by fear of social change, given the success of the political status quo since the coronation of George I in 1714. D L Keir, *The Constitutional History of Modern Britain since 1483* (1948).

¹⁸⁸ L Radzinowicz, *A History of English Criminal Law 1750-1833*, Vol II, *The Enforcement of the Law*, (1956) ("Radzinowicz"). P Rawlings, *Crime and Power: A History of Criminal Justice 1688-1998* (1999) ("Rawlings").

- A.162 A further class of public official also came to hold wide ranging powers and duties, the “overseer”, whose duty it was to “oversee” the poor in townships and counties around the country.¹⁸⁹
- A.163 It was then, and has since been, acknowledged that, due to the way in which magistrates and overseers were appointed, partisanship was rife.¹⁹⁰ There were at this time numerous prosecutions brought before the courts concerning magistrates and overseers alleged to have acted in a partisan manner. A number of these were heard by Lord Mansfield.¹⁹¹
- A.164 The increase of professional “thief-takers” in the late 1700s, the basis for the “police force” of England and Wales, arose in part from various crime “panics” and attempts to regulate the morality of the lower classes. The new constables were not always successful, however, in bringing offenders to justice and were often viewed as corrupt and/or neglectful. To encourage them in detecting and bringing criminals to justice, numerous “incentive schemes” were used by both the state and private individuals, involving monetary rewards.¹⁹²
- A.165 The inevitable result was the growth of potential for corruption. A number of high profile thief-takers were prosecuted in the 1750s for perjury, the result of conspiracies to procure rewards and incentives. Nevertheless, it continued to be accepted practice for police officers and other professional constables to receive rewards for their action, and in 1816 several officers were again convicted for conspiracy to commit perjury. On the other hand there were also many ways in which constables could profit from not reporting, or participating in crime. As stated by Radzinowicz, “the abuses committed by informers and thief takers were well known but no mechanism existed for exposing them”.¹⁹³
- A.166 In addition to this undercurrent of corruption in the criminal process, 1782 saw England lose the American war of independence. This meant the return of a large number of disaffected soldiers and sailors to England. The crime panic that ensued has been described as “more intense than any other” that century.¹⁹⁴ 1783 in particular saw high levels of rioting by sailors in London, protesting against non-payment of wages, refusals to grant discharges and otherwise mis-governance of the navy. It was reported at the time that the army could not be relied upon to police these riots as the soldiers often sided with the rioters.¹⁹⁵

¹⁸⁹ Overseers were granted “franchises” by the Crown over the areas where they held power. See Holdsworth Vol I.

¹⁹⁰ See Radzinowicz Vol II and P Rawlings, *Crime and Power: A History of Criminal Justice 1688-1998* (1999).

¹⁹¹ *Phelps* (1757) 2 Ld Kenyon 570, 96 ER 1282; *Williams and Davis* (1762) 3 Burr 1317, 97 ER 851; *Baylis* (1762) 3 Burr 1318, 97 ER 851; *Overseers of Bridgewater* (1774) 1 Cowp 139, 98 ER 1010; *Barrat* (1780) 2 Douglas 465, 99 ER 297; *Cozens* (1780) 2 Douglas 426, 99 ER 273; *Davie* (1781) 2 Douglas 588, 99 ER 371

¹⁹² See Rawlings. John and Henry Fielding in particular operated professional thief takers from Bow Street from 1748.

¹⁹³ Radzinowicz, Vol II p 235 onwards.

¹⁹⁴ Rawlings, p 36.

¹⁹⁵ Rawlings, p 36.

- A.167 It also led to questioning of the competence of the then aristocratic government, a movement for reform of corrupt domestic practices and allegations of corruption in the colonies. The 18th century had also seen the development of expanding governmental, Parliamentary and administrative bodies within the state performing the functions traditionally held close to the Crown, described as a “gradual extension of the franchise”.¹⁹⁶ Much debate was heard in Parliament between 1782 and 1784 on the subject of corrupt ministers, parliamentarians and other public officers.¹⁹⁷
- A.168 A number of bills were also proposed to deal with misbehaviour by public officers abroad. The expansion of state administration throughout England, Wales and Scotland,¹⁹⁸ and also to the colonies,¹⁹⁹ created risks of corruption and unaccountability. This was of great concern to Parliament.
- A.169 The most notable of these was the East India Bill of 1783, which was debated while Lord Mansfield was speaker of the House of Lords, 17 days after *Bembridge* was heard.²⁰⁰ The Bill, which was defeated, contained no specific offence of misconduct by officers of the East India Company. However, it did prevent the continuation in office or appointment of any officers convicted of “any corrupt practice, peculation (embezzlement) or oppression in India”.²⁰¹
- A.170 It is notable also that from 1782 it was decreed that pardons would be denied for numerous types of dishonesty offences and that instances of capital punishment rose by 60% between 1782 and 1783.²⁰²
- A.171 This was the climate in which Lord Mansfield may have felt compelled to iterate two clear legal principles in the context of a case of corruption in the paymaster general’s office.²⁰³ First, in relation to misbehaviour of public officers. Second, in

¹⁹⁶ M Loughlin, “The State, the Crown and the Law”, in Sunkin and Payne, *The nature of the Crown: a legal and political analysis* (1999).

¹⁹⁷ Hansard: *The Parliamentary History of England from the Earliest Period to the Year 1803*, Vol XXIV from 3 December 1783 to 1 February 1785.

¹⁹⁸ With the Act of Union 1707.

¹⁹⁹ The East India trade and British Empire in India were established from 1600 under a charter of Elizabeth I, the “first” British Empire in the Americas and Caribbean being established between 1603 and 1783. See also the Governors of Plantations Act 1698.

²⁰⁰ “Fox’s East India Bill”. Lord Mansfield took the unusual step on the day of the debate of stepping down from his position “on the woolsack” to enter the debate. Hansard: *The Parliamentary History of England from the Earliest Period to the Year 1803*, Vol XXIV from 3 December 1783 to 1 February 1785, p 150.

²⁰¹ Hansard: *The Parliamentary History of England from the Earliest Period to the Year 1803*, Vol XXIV from 3 December 1783 to 1 February 1785, p 66. A different version of the Bill was passed as an Act the following year which included at s 49 a specific offence of “wilful breach of the trust and duty of any office or employment under the United Company”, discussed further below. “Pitts’ East India Bill”, The East India Act 24 Geo. 3 c 25. Warren Hastings, then Governor-General of India, and Elijah Impey, Chief Justice of Bengal, were impeached by Parliament in 1787. The first was acquitted and the proceedings against the second were discontinued.

²⁰² Rawlings, p 38.

²⁰³ *Bembridge* (1783) 3 Doug 327, 99 ER 679.

relation to the misappropriation of public funds.²⁰⁴ This was also the context for individual prosecutions of public officers brought either side of *Bembridge* and brings us back to the point at which we started our analysis.²⁰⁵

EVALUATION OF THE HISTORICAL SCOPE OF THE OFFENCE

A.172 It has recently been said that the United Kingdom should not be “intimidated by its own history” in the context of law reform.²⁰⁶ We agree. We should neither allow such history to weigh too heavily on our shoulders nor be afraid to use it as the valuable educational tool it is.

What can be learned?

A.173 We consider this historical analysis to be a useful exercise in evaluating a number of matters, which will inform and shape our eventual proposals for law reform in this area:

- (1) Understanding the mischief that the offence was created to address.
- (2) Understanding the context of the offence’s evolution so that we can appreciate why it evolved as it did.
- (3) Understanding whether that mischief still exists and therefore whether the offence continues to serve a purpose.
- (4) Understanding whether the law, in the form it has evolved, is currently fit for purpose.

A.174 In relation to points (1) and (2) we are of the view that the analysis provides the following important conclusions:

- (1) The concept of a standalone common law offence of misconduct in public office offence was most likely not formulated until the beginning of the 18th century.
- (2) Once formulated, the concept gained ground, leading to the seminal case of *Bembridge*.
- (3) References in *Bembridge* to a principle of “being answerable criminally to the king for misbehaviour” almost certainly did not mean that the concept was limited to Crown servants or emanations of the Crown and the executive.
- (4) The earlier history clarifies that any association with the Crown, and the concept of public office, was a historic one. It was one which had waned by the 18th century, following the Bill of Rights, separation of powers and increased “franchisement” of the state.

²⁰⁴ Lord Mansfield’s London residence was also destroyed in the Gordon riots of 1780. Rawlings, p 35.

²⁰⁵ (1783) 3 Doug 327, 99 ER 679.

- (5) 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.
- (6) 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.
- (7) 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.
- (8) That principle is an ancient one that was guarded against as far back as the 12th century, and possibly earlier.
- (9) The offence proved particularly useful where there had been a neglect of duty or where there was otherwise no specific proscription of a breach of a particular officer's duty.
- (10) The offence most likely developed in reaction to crises in respect of maladministration by those in public office and to changes in the types of bodies comprising the state during the 18th and 19th centuries.
- (11) Both the concept and offence of misconduct in public office overlapped to a large degree with other statutory and common law offences.
- (12) Therefore, if such a danger has not now receded entirely then the offence may still have a purpose.
- (13) The offence, however, lacked development between 1783 and the mid-20th century due to the limited number of prosecutions brought under it.
- (14) This lack of development and a concurrent, extensive alteration of the nature of the state and the growth and divergence of state bodies since the 18th century may mean that it is no longer fit for purpose in its current formulation.

A.175 These conclusions inform our consideration, in Chapters 4 and 5, of points (3) and (4) regarding the modern problems with the offence.

Name of the offence

A.176 As a final note we record here that throughout the history of the common law offence of misconduct in public office the offence has been referred to by many different names: misconduct, misfeasance,²⁰⁷ misbehaviour, malfeasance and

²⁰⁶ Law Commission, Scarman Lecture March 2015 given by Sir Geoffrey Palmer PC QC, former President of the Law Commission of New Zealand, and Prime Minister of New Zealand.

²⁰⁷ The tort is also referred to as "misfeasance in public office", see Appendix B.

nonfeasance amongst others. Some of these phrases relate to the totality of the offence, other to particular forms of it.

- A.177 We also acknowledge that the offence is referred to as both misconduct in public office and also as misconduct in a public office. In our view, the use of these different phrases, given the piecemeal development of the offence over time, does not shed light on any issues of substance or assist with the question of reform. We do, however, recognise the confusion that is caused through the use of different terms for a single offence.