Law Commission
Reforming the law

# Misconduct in Public Office
# Summary of Issues Paper 1: The Current Law

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# LAW COMMISSION

# MISCONDUCT IN PUBLIC OFFICE: ISSUES PAPER 1 – THE CURRENT LAW

# SUMMARY

## INTRODUCTION

1.1 This is a summary of *Misconduct in Public Office: Issues Paper 1 – The current law* which is available on our website, together with accompanying appendices.[1] This background paper reviews the current law relating to the offence of misconduct in public office and sets out the associated problems which result. In spring 2016 we will publish our next paper which will outline potential options for reforming the law.

1.2 This summary is split into five sections:

(1) Background to the project.

(2) The current law.

(3) Problems identified with the current law.

(4) Overlaps with other methods of accountability.

(5) Conduct prosecuted as misconduct in public office.

### Background to the project

1.3 A review of the offence of misconduct in public office was included in our 11th programme of law reform.[2] Our reform objectives are to decide whether the existing offence of misconduct in public office should be abolished, retained, restated, or amended; and to pursue whatever scheme of reform is decided upon.

1.4 Since commencing work on the project we have identified a number of problems with the current law. There have been a number of recent high-profile allegations, investigations and prosecutions of the offence and appeals in relation to its interpretation. These have brought the problems with the offence into especially sharp focus.

1.5 One example is the series of prosecutions, between 2014 and 2015, of suspects arrested as part of the Metropolitan Police investigation, Operation Elveden. The investigation concerned payments allegedly made by journalists to public officials for information to be used in news stories. These prosecutions led to a number of

[1] http://www.lawcom.gov.uk/project/misconduct-in-public-office/.

[2] *Eleventh Programme* (2011) Law Com No 330.

high profile trials and the Court of Appeal judgment in *Chapman* in March 2015.[3] The decision in *Chapman* resulted in a Crown Prosecution Service ("CPS") review of those cases which led to a number of prosecutions against journalists being discontinued.[4] Around 30 officials have been convicted as a result of Operation Elveden.

1.6 Statistics show a substantial rise in the number of prosecutions for the offence in the last ten years, and that a significant proportion of resulting convictions lead to appeals.

1.7 The statistics also show a significant decrease in the proportion leading to convictions in recent years.[5] There may be many reasons why more people are being accused of misconduct in public office while fewer of those accusations lead to conviction. One possible reason is that the lack of clear definition of the offence renders it difficult to apply in practice.

**History of the offence and calls for reform**

1.8 The offence is of significant age.[6] The most well-known statement of the offence was made in 1783, by Chief Justice Mansfield in the case of *Bembridge.*[7] The offence fell largely into disuse between the late 18th century and the beginning of the 21st century, except for the occasional high profile case. It is probably unsurprising, therefore, that many people, including judges and lawyers, were unsure of the definition of the offence.

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

> This is without doubt a difficult area of the criminal law. An ancient common law offence is being used in circumstances where it has rarely before been applied.[8]

1.10 Attempts to reform the offence date back at least to the 1960s.[9] More recently the offence was considered by the Committee on Standards in Public Life ("CSPL"). In 1997 the CSPL published a consultation paper which recommended the creation of a statutory offence of misuse of public office.[10] The Joint Committee

[3] *Chapman* [2015] EWCA Crim 539, [2015] 2 Cr App R 10.

[4] http://www.cps.gov.uk/news/latest_news/crown_prosecution_service_re_review_of_operation_elveden/ (last visited 13 January 2016).

[5] Based on statistics obtained from the Crown Prosecution Service and the Ministry of Justice for the period 2005 to 2014.

[6] See Appendix A for further analysis of the historical development of the offence.

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

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

[9] See Appendix E for further analysis of previous attempts to reform the offence.

[10] CSPL, Report of the CSPL on Standards in Local Government in England, Scotland and Wales (1997) Cmnd 3702-1, with appended CSPL, *Misuse of public office: a consultation paper* (1997).

on Parliamentary Privilege supported this recommendation,[11] but no further steps were taken.[12]

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

## THE CURRENT LAW

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

1.13 The current law has been developed in a piecemeal fashion by the courts over many years. It is difficult to see with absolute certainty where the boundaries of the offence and each of its elements lie. The leading modern case is *Attorney General's Reference (No 3 of 2003)* ("*AG's Reference*"),[13] in which the Court of Appeal stated that the elements of the offence of misconduct in a public office are:

> (1) a public officer acting as such; (2) wilfully neglects to perform his duty and/or wilfully misconducts himself; (3) to such a degree as to amount to an abuse of the public's trust in the office holder; (4) without reasonable excuse or justification.[14]

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

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

1.15 Although *AG's Reference* does not separate the concepts of "public office" and "acting as such" we found it helpful to consider them separately.

#### *Public Office*

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

[11] Joint Committee on Parliamentary Privilege Report (1998-99) HC 214-I/HL43-I.

[12] The question of reforming the misconduct offence was absorbed into a wider government review of the law on corruption between 1998 and 2003.

[13] [2004] EWCA Crim 868, [2005] QB 73 at [61].

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

(1) to establish an "office" in any technical sense nor any kind of permanent position;

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

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

1.17 To qualify as a public office holder a person's position must involve the performance of a duty associated with a state function. The law is unclear as to what amounts to a state function. One relevant consideration for the court is whether the office holder exercises coercive powers (we interpret this as being a sufficient but not a necessary condition).[15]

1.18 There is a further important aspect of this element of the offence. The individual's duty associated with a state function must be one in which the public has a significant interest. This goes beyond an interest of those who might be directly affected by a serious failure in the performance of those functions.

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

### *Acting as such*

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

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

1.21 Again, although the *AG's Reference* does not separate the concepts of "wilfulness" and "neglect or misconduct" we examine them separately.

### *Breach of duty (neglect or misconduct)*

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

### *Wilfulness*

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

[15] An example of a coercive power is the police power of arrest under Police and Criminal Evidence Act 1984, s 28.

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

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

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

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

**(3) Abuse of the public's trust**

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

1.25 To be guilty of the offence it must also be proven that the public office holder was aware of the circumstances existing that made his or her breach of duty serious. It is not, though, a requirement that he or she had in fact concluded that it was serious.[16]

**(4) Without reasonable excuse or justification**

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

## PROBLEMS IDENTIFIED WITH THE CURRENT LAW

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

**Lack of clear definition of "public office" and "acting as such"**

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

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

(1) There are difficulties in both defining a public office by status, (to the extent that considerations of status remain relevant), and in defining a public office by function.

(2) There is no definition of what amounts to a governmental responsibility or state function (beyond an interest of those who might be directly affected by a serious failure in the performance of those duties).

[16] *Chapman* [2015] EWCA Crim 539, [2015] 2 Cr App R 10 at [48] and [49].

(3) There is no definition of the types of duties in which the public have a significant interest.

(4) It is debatable whether the requirement that a public officer be "acting as such" has any practical significance within the current offence of misconduct in public office, other than to exclude the cases where an officer is acting in a wholly private capacity.

1.30 We are aware that many prosecutions for misconduct in public office result in legal challenges at trial[17] and on appeal[18] as to whether the defendant is in public office. In at least one case it has been argued that the uncertainty renders the offence so vague as to infringe article 7 of the European Convention on Human Rights ("ECHR").[19]

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

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

**Lack of clarity as to the fault element required**

1.33 The "fault" element of misconduct in public office is "wilfulness". The term has the same meaning as subjective recklessness[20] as clarified in *AG's Reference*.[21]

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

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

[18] *Cosford* [2013] EWCA Crim 466, [2014] QB 81 (concerning nurses working with a prison); *Mitchell* [2014] EWCA Crim 318, [2014] 2 Cr App R 2 (concerning a paramedic).

[19] *Mitchell* [2014] EWCA Crim 318, [2014] 2 Cr App R 2 at [21], although the Court of Appeal did not consider this point in detail as the appellant succeeded on his first ground of appeal – that a paramedic was not a public officer. Article 7 prohibits the creation of retroactive law: see Appendix C for further discussion.

[20] As defined in *G* [2004] 1 AC 1034, [2003] UKHL 50.

[21] *AGs Reference (No 3 of 2003)* [2004] EWCA Crim 868 at [27] to [30].

cases hold that any breach of duty that is wilful and not merely inadvertent is sufficient;[22] others refer to a dishonest, oppressive, corrupt or partisan motive being required.[23]

1.35 If the court in *AG's Reference* did intend to apply a single fault requirement to all types of misconduct in public office, at least one later case did not follow that approach. The Court of Appeal in the case of *W* held that where the allegation of misconduct would also amount to a dishonesty based offence (such as theft or fraud) then both wilfulness and dishonesty must be proved as separate elements.[24] That decision has been roundly criticised.[25]

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

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

1.37 The offence of misconduct in public office is primarily concerned with a breach of duty whether by act or omission. The question that arises is whether the offence applies only in cases where the duty breached is a determinative duty; or whether a breach of *any* duty to which the office holder is subject may suffice.

1.38 Analysis of the case law suggests that a breach of a determinative duty is usually sufficient for this element.[26]

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

D's breach is of a duty that is determinative of D being a public office holder. In this situation D could, subject to the seriousness test and mental element, be prosecuted for misconduct in public office.[27]

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

[23] *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; *ex parte Fentiman* (1834) 3 A & E 127, 111 ER 49.

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

[25] J Spencer, "Police behaving badly, the abuse of misconduct office" (2010) 69(3) *Criminal Law Journal* 423.

[26] Including *Dytham* [1979] QB 722, [1979] 3 WLR 467; *Bowden* [1996] 1 WLR 98, [1995] 4 All ER 505; *Speechley* [2004] EWCA Crim 3067, [2005] 2 Cr App R (S) 15; *W* [2010] EWCA Crim 372, [2010] QB 787; *King* [2013] EWCA Crim 1599, [2014] 1 Cr App R (S) 73.

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

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

Here D has breached a duty owed to D's employee, but not a duty that is determinative of D being in public office. It is unclear whether this would be an offence of misconduct in public office.

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

**Lack of clarity as to what can constitute an "abuse of the public's trust"**

1.41 The "seriousness test" requires that the neglect or misconduct must be "of such a degree as to amount to an abuse of the public's trust in the office holder". In other words, the breach must be one which merits criminal prosecution, and not merely civil law or disciplinary proceedings.[28]

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

(1) The likely consequences of the breach of duty. The offence itself contains no requirement that the prosecution prove any particular consequence; the offence is concerned with *conduct*. However, the existence of a *risk of* adverse consequences is relevant to the determination of whether the breach of duty is a serious one.[29]

(2) The existence of improper motive (for example; bad faith, dishonesty, oppression or corruption) may also be relevant. Some early cases refer to a dishonest, oppressive, corrupt or partisan motive being required as a separate element of the offence,[30] but the later cases contain no such

[27] Although, there are specific offences relating to the failure to register a marriage under the Marriage Act 1949, ss 76(1) and (2).

[28] See *Chapman* [2015] EWCA Crim 539, [2015] 2 Cr App R 10 at [36].

[29] *AGs Reference (No 140 of 2004)* [2004] EWCA Crim 3525. *Chapman* at [36].

[30] See para 1.34 above.

requirement.[31] Motive may simply be one consideration to be taken into account when assessing "seriousness".[32]

(3) Other circumstances may also result in the breach being viewed as more serious, such as a breach of duty by a senior public official as opposed to the same breach by a lower level official.

1.43 The Lord Chief Justice reiterated recently, in the case of *Chapman,* that the legal position is that an "abuse of the public's trust" is one that has the effect of harming the public interest.[33] However, it remains unclear what role, if any, factors such as consequences and impropriety of motive will play in the assessment of "harm to the public interest". We consider that the difficulties currently experienced with the definition of "seriousness" in the offence are unlikely to be resolved by the courts without a more fundamental review of this element of the offence.

1.44 There are two problems with this element. Firstly, the jury is being asked to make a circular assessment of whether an individual's breach of duty is serious enough to be criminal (it is criminal because it is serious, it is serious because it is criminal). Secondly, this may be compounded by the fact the jury is being asked to do so without any clear indication of what *could* amount to serious, and therefore criminal, misconduct.[34]

1.45 The lack of comprehensive guidance as to what makes misconduct "serious" causes difficulties for investigators, prosecutors, judges and juries.[35] It is particularly difficult in terms of making decisions as to where the line should be drawn between disciplinary and criminal proceedings.

**Lack of clarity as to the operation of "reasonable excuse or justification"**

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

[31] *Dytham* [1979] QB 722, [1979] 3 WLR 467; *AG's Reference (No 140 of 2004)* [2004] EWCA Crim 3525 at [56]; *DL* [2011] EWCA Crim 1259, [2011] 2 Cr App R 14.

[32] As discussed above there still seems to be an exception, following the case of *W* [2010] EWCA Crim 372, [2010] QB 787, where the misconduct would potentially also amount to a dishonesty based crime such as theft or fraud. In these cases dishonesty is a requirement of the offence.

[33] *Chapman* at [18], referring to Sir Anthony Mason's judgment in to *Shum Kwok Sher* [2002] 5 HKFAR 381.

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

[35] This was clearly demonstrated by the appeal of *Chapman* and the subsequent CPS review of Operation Elveden prosecutions. The review resulted in the cases against nine defendants being discontinued.

1.47 Arguably, in the context of misconduct in public office, the existence of facts which would constitute such a defence would preclude proof of the elements of the offence, so no defence is necessary. In particular, where a defendant has a reasonable excuse or justification:

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

(2) the defendant may not have acted wilfully.

1.48 The case law shows that the "without reasonable excuse or justification" element of the offence is rarely distinguished from other elements of the offence in the way that it was separated by the court in *AG's Reference.*[36] However, it has been argued that the law on misconduct in public office should specify the defences to such a charge, in particular a defence of "acting in the public interest". The main supporters of this argument are the representatives of press.[37] The press consider that the recent criminal prosecution of journalists for assisting, or conspiring to commit, misconduct in public office to be an infringement of the freedom of the press and the right to freedom of expression under article 10 of the ECHR.[38]

1.49 The object of specifying the available defences to a charge of misconduct would be to enable the courts to consider more clearly factors weighing against conviction. These could include benefit to the public arising from the nature of the misconduct, the motives of the person disclosing it and the harm which it was likely to cause.

## OVERLAPS WITH OTHER FORMS OF ACCOUNTABILITY

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

(1) other criminal offences; and

(2) disciplinary procedures.[39]

### Other criminal offences

1.51 The conduct alleged in a prosecution for misconduct in public office will very often also constitute at least one other offence.[40] An example of this is a public office

[36] *DL* [2011] EWCA Crim 1259, [2011] 2 Cr App R 14 at [12].

[37] Evidence given by the Newspaper Society to the Joint Committee of the Draft Corruption Bill: *Report of the Committee on the Draft Corruption Bill* (2003) HL 157, HC 705 at ev 138. More recently see: http://www.theguardian.com/law/2015/apr/18/dont-prosecute-journalists-who-pay-for-public-interest-leaks-says-ex-dpp (last visited 14 December 2015); The Leveson Inquiry, *An Inquiry into the Culture, Practices and Ethics of the Press* (November 2012) part J at [6.2].

[38] See Appendix C for further discussion of implications under the ECHR.

[39] In addition there are clearly overlaps between criminal misconduct and the tort (civil action) of misfeasance in public office; see Appendix B.

[40] See Appendix D.

holder who accepts a payment to influence a decision he or she has to make, who may be guilty of both bribery and misconduct in public office.[41] The reason for choosing a charge of misconduct or an alternative or related offence may vary depending on a number of factors.

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

1.53 Criticism of broad common law offences is often based on the premise that such offences are inherently uncertain and lack clear boundaries when in fact the law should be "clear, precise, adequately defined and based on a discernible rational principle".[42]

1.54 However, there is no absolute rule that the use of a broad common law offence offends against legal certainty.[43] There must be good reason for using a broader common law offence rather than either a narrower common law one (for example, perverting the course of justice) or a statutory one[44] and the offence must be applied in a way that is not unexpected and therefore retroactive in effect.[45] This may occur where the alternatives are narrow and specialised offences that pose greater difficulties of proof, and/or where the seriousness of the wrongdoing merits a particular sentence that cannot be accommodated by the alternative offences, and/or a single charge of misconduct may more readily capture the nature or range of the conduct.

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

1.56 Some stakeholders have expressed the view that, as a matter of principle, a conviction for misconduct in public office describes a distinctive form of wrongdoing.

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

[41] For example, see *Patel* (October 2011) (unreported), which concerned a court clerk who accepted bribes from motorists due to be subject to points on their driving licences.

[42] *Rimmington* [2005] UKHL 63, [2006] 1 AC 459 at [36], Lord Bingham.

[43] *Rimmington* at [52].

[44] *Rimmington* at [30].

[45] *SW and CR v United Kingdom* (1995) 21 EHRR 363 (App Nos 20166/92 and 20190/92), at [34] and [36].

### *Section 26 of the Criminal Justice and Courts Act 2015*

1.58 Section 26 of the Criminal Justice and Courts Act 2015[46] provides a new offence which overlaps with misconduct in public office: corrupt or other improper exercise of police powers and privileges.

1.59 In recent years police corruption has been a matter of government and public concern. The section 26 offence is designed to fill gaps that may have existed between existing statutory offences. However, on analysis of the provision we consider that prosecutions under section 26 are likely to suffer from as many difficulties in practice as prosecutions for misconduct in public office. In our view, a number of the elements of this new offence are just as ambiguous as the elements of misconduct in public office.

### Disciplinary matters

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

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

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

## CONDUCT PROSECUTED AS MISCONDUCT IN PUBLIC OFFICE

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

1.64 Examining the cases that can only be prosecuted as misconduct, we consider that there is only a small number of such cases. These can be grouped together in five non-exhaustive categories:

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

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

[46] Section 26 came into force on 13 April 2015, SI 2015 No 778, sch 1.

(3) Public office holders who act in a prejudicial or biased manner or under a conflict of interest.

(4) Neglect of duty by public office holders which results in serious consequences, or a risk of serious consequences arising.

(5) Public office holders who fail properly to protect information that comes into their possession by virtue of their positions.

1.65 Some may argue that these instances of misconduct, which would not otherwise be caught by other offences, nonetheless deserve to be criminalised. This could be either as misconduct in public office or some specifically created offence. To clarify, we are not necessarily agreeing that this is conduct that ought to be criminalised. Our aim is to highlight that abolition of misconduct in public office, without replacement, would have the effect of decriminalising some conduct that can currently be the subject of prosecution.

1.66 We also consider the numerous types of conduct that are prosecuted as misconduct in public office but that could be prosecuted under an alternative offence. In such cases, the selection of the charge of misconduct in public office may be for a number of reasons of practical prosecutorial discretion. We give four examples:

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

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

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

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

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

**QUESTIONS FOR CONSULTEES**

**The current law**

**Question 1**

Can consultees provide any further examples of the problems of interpretation with the elements of the current offence of misconduct in public office?

## THE NEW OFFENCE OF CORRUPT OR OTHER IMPROPER EXERCISE OF POLICE POWERS OR PRIVILEGES

### Question 2

Can consultees provide further examples of the problems with the offence of "corrupt or other improper exercise of police powers and privileges" under section 26 of the Criminal Justice and Courts Act 2015?

## SUMMARY OF PROBLEMS WITH THE OFFENCE AND CONCLUSIONS

### Question 3

Can consultees provide further examples of the problems with the current definition of "public office"?

### Question 4

Do consultees have any views on whether the requirement that a public office holder is "acting as such" at the time of his or her misconduct has any practical significance within the current formulation of misconduct in public office?

### Question 5

Can consultees provide further examples of problems arising from a lack of clarity as to what types of breach of duty are sufficient to establish the offence of misconduct in public office?

### Question 6

Do consultees have any views on whether a lack of clarity regarding what can constitute an "abuse of the public's trust" generates problems in providing a workable "seriousness" threshold for the offence?

### Question 7

Can consultees provide further examples of problems arising from the existence of variable fault elements for different species of misconduct in public office?

### Question 8

Can consultees provide further examples of problems arising from a lack of clarity as to the operation of the "without reasonable excuse or justification" element of the offence?

## OVERLAPS WITH OTHER FORMS OF LEGAL ACCOUNTABILITY

### Question 9

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

(1) The alternatives are narrow and specialised ones or are offences that pose greater difficulties of proof.

(2) The other possible charges carry more limited sentence options.

(3) A single charge of misconduct may more readily capture the nature or range of the conduct.

Can consultees provide further examples of reasons that may exist for prosecuting misconduct in public office where there are alternative offences available?

**Question 10**

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

**Question 11**

Do consultees have any views on whether the offence of misconduct in public office fulfils an important role from the perspective of fair labelling?

## CONDUCT PROSECUTED AS MISCONDUCT IN PUBLIC OFFICE

**Question 12**

We have identified five types of conduct which can only be prosecuted as misconduct in public office under the current law. Namely:

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

(2) Public office holders who use their position to facilitate a personal relationship which may create a conflict of interest with the functions of their position.

(3) Public office holders who act in a prejudicial or biased manner, or under a conflict of interest.

(4) Neglect of duty by public office holders which results in serious consequences, or a risk of serious consequences arising.

(5) Public office holders who fail properly to protect information that comes into their possession by virtue of their positions.

Can consultees provide further examples of types of conduct, which presently can only be prosecuted as misconduct in public office, where there is no alternative offence available?

## CONCLUSION

This summary has highlighted the many areas of uncertainty surrounding the offence of misconduct in public office. It is not possible in a summary of this length to do justice to the many complexities of the law. Stakeholders are therefore encouraged to refer to the full Issues Paper available on our website. We welcome feedback on any further problems or potential gaps in the law we may not have covered, so we may take these into account in framing our provisional proposals for reform in our next paper. We seek responses to the questions set out in this paper by 20 March 2016.

## Comments may be sent:

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