

**Room GC.05
1 Horse Guards Road
London
SW1A 2HQ**

Tel: 020 7271 2948

Email: public@public-standards.gov.uk

**Committee on
Standards in
Public Life**

March 2016

**CSPL RESPONSE TO THE LAW COMMISSION'S CONSULTATION ON THE REVIEW
OF THE OFFENCE OF MISCONDUCT IN PUBLIC OFFICE**

Introduction

1. The Law Commission has produced a full and impressive consultation paper on the review of the offence of misconduct in public office and the Committee is grateful for the opportunity to respond. Currently misconduct in public office is a common law offence and is not defined in any statute. The Commission's 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. As the Law Commission has pointed out in its consultation documents, this Committee has a history in this area but has not considered this issue in recent years.

2. As the Commission states, the legal concepts involved in the offence of misconduct in public office are highly technical and complex. This Committee exists to promote and provide guidance on ethical standards for providers of public services and faces the challenge of negotiating the grey space between the hard fact of those breaking the law and moral behaviours in general. Our response to the consultation paper has therefore focused on general principles and principles of standards which are our primary focus but we have two key points to make regarding: (a) the definition of public office holders; and (b) sanctions for any misconduct.

3. We have also attached for the Law Commission's consideration, a submission by Professor Mark Philp who is Chair of the Committee's Research Advisory Board.

Definition of terms

4. The Committee notes the difficulty in defining the term "public office" and "public office holders". There is an increasingly blurred distinction between public

Selflessness | Integrity | Objectivity | Accountability | Openness | Honesty | Leadership

and private and voluntary sectors. The Committee's own remit has been widened to make clear that the Seven Principles apply to any organisation delivering public services (see paragraph 16). The question of whether the offence of misconduct in public office should apply to, for example, higher education institutions or housing associations, sport, or even to fully privatised entities such as the utilities remains pertinent. What is clear to this Committee is that the public want all providers of public services to adhere to and operate by common ethical standards, regardless of whether they are in the private, public or voluntary sectors. For the public "how" things are done are as important as "what" is done. Some in the private sector delivering public services have responded well to the call for ethical behaviour as reported in our 2014 report *Ethical Standards for providers of public services*.¹

5. So whilst the Committee understands completely the difficulty in defining the terms "public office" and "public office-holder", we would welcome a broader definition to encompass all those whose role impacts on national, public life. This reflects the extension of our own remit so that the Seven Principles of Public Life apply to anyone who works as a public office-holder. This includes all those who are elected or appointed to public office, nationally and locally, and all people appointed to work in the civil service, local government, the police, courts and probation services, NDPBs, charities and in the health, education, financial, social and care services, whether in a remunerated or a voluntary capacity. All public office-holders are both servants of the public and stewards of public resources. The Principles also have application to all those in other sectors delivering public services.

Sanctions and Consequences of Breaches of Conduct in Public Office

6. Our 1997 paper *on Misconduct in Public Office* raised a number of concerns regarding the current common law offence and advised that consideration should be given to the introduction of a new statutory offence, partially to replace the proposed abolition of surcharge in local government. That paper argued then that the current common law offence lacked clarity and advised that consideration should be given to the introduction of a new statutory offence. Nearly 20 years have passed since the publication of that paper. Since then the Bribery Act 2010 and the Local Government Act 2000 have addressed many of the issues raised.

7. The current Committee is not wedded to any particular detail of the recommendations of the 1997 paper, but agrees that issues remain around the clarity of the current common law offence of misconduct of public office, in terms of the circumstances in which an offence might occur and, as noted above, around the definition of "public office". The introduction of a new statutory offence might go some way to addressing these concerns.

¹ <https://www.gov.uk/government/publications/ethical-standards-for-providers-of-public-services-reports>

8. As the Committee stated in 1997, by recommending a new statutory offence, the current Committee is not suggesting that this would necessarily lead to frequent prosecutions, or that misconduct in public office is something that occurs so regularly that urgent steps must be taken. On the contrary, we believe the actual standards of public officials to be generally high, notwithstanding public perceptions. It may however help achieve greater consistency across all public bodies, and to signal clearly the unique responsibilities of public offices.

9. What we would argue now is the need, and the increasing expectations of the public, to have sanctions in place if standards are not met. We believe that to define clear and principled consequences of any material failure to achieve ethical standards would support the re-building and sustaining of public trust in public office and therefore, if it is decided to proceed with a legal definition of “misconduct” we, the Committee, would strongly encourage the discussion of sanctions and consequences in the event of any transgression.

Principles and Culture

10. Finally we would reiterate the importance of principles and that the culture of an organisation is as essential as “hard” definitions in law. Misconduct by any individual in public office can have a significant impact on undermining the public’s trust and confidence in an organisation. Holders of public office need to have common standards and take responsibility for ethical behaviour within their organisations. Our aim is for ethical standards and behaviours to be embedded in organisations and not bolted on as afterthought; we look at how to sustain good behaviour and high standards in public office. Principles of independence, fairness and accountability can help guide officials in public office and help to assess and regulate their behaviour. A strong ethical culture may assist in assessing misconduct and how far an individual may have strayed.

11. As we state in our July 2014 report, *Ethics in Practice: promoting ethical standards in public life*,² Awareness and understanding of the Seven Principles of Public Life cannot be left to chance. We need to make sure all of those in public life, whether employed, appointed or elected, are aware of their ethical responsibilities and are prepared to act as ethical leaders. An important first step in building that culture of ethical awareness and understanding is induction. We strongly advocate that those in public life have a clear understanding of the ethical standards expected of them.

12. Citizens have a right to expect holders of public office who take decisions which affect their lives, to do so with impartiality, they should be truthful about what they are doing and should use public money wisely. Public office holders and

2

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/336976/2902536_CSPL_EthicsInPractice_acc.pdf

organisations should seek to improve their own trustworthiness by consistently and reliably exemplifying high standards of ethical behaviour, openness and accountability and establishing and promulgating robust mechanisms for detecting and dealing with wrongdoing³.

13. Understanding high standards as a matter of personal responsibility, especially by those in leadership positions, and embedding those standards in an organisation's culture, is fundamental to high ethical conduct.

Background to Committee

14. The Committee on Standards in Public Life is an advisory Non-Departmental Public Body (NDPB). The Committee was established in October 1994, by the then Prime Minister, with the following terms of reference:

“To examine current concerns about standards of conduct of all holders of public office, including arrangements relating to financial and commercial activities, and make recommendations as to any changes in present arrangements which might be required to ensure the highest standards of propriety in public life”.

15. The Committee on Standards in Public Life is defined by its Seven Principles of Standards in Public Life, which are Selflessness, Objectivity, Integrity, Accountability, Openness, Honesty and Leadership.

16. The Committee's terms of reference were updated in 2013: “...the Committee's remit to examine 'standards of conduct of all holders of public office' [encompasses] all those involved in the delivery of public services, not solely those appointed or elected to public office” (Hansard (HC) 5 February 2013, col. 7WS).

17. The Committee's terms of reference were further clarified in a House of Lords written Parliamentary Question on 28th February 2013 to explain that the Committee's remit means it “can examine issues relating to the ethical standards of the delivery of public services by private and voluntary sector organisations, paid for by public funds, even where those delivering the services have not been appointed or elected to public office” (Hansard Column WA347).

18. The Committee's work is supported by a Research Advisory Board, chaired by Professor Mark Philp, University of Warwick. A submission by Professor Philp is attached.

³ <https://www.gov.uk/government/publications/standards-matter-thirteenth-report-of-the-committee-on-standards-in-public-life>

Law Commission: Misconduct in Public Office

A note to the CSPL and Law Commission by Professor Mark Philip

1. There is one broad issue, and two narrower ones that relate to this question:
2. The broad issue is whether the Commission is trying to turn to statute in an area in which it is extremely difficult to predict and define the parameters of cases that could legitimately be regarded as misuses of public office. The Law Commission seems to want to standardize the offence and to take cases out of the remit of jury judgements about what's reasonable, but I wonder if that's the right way to go about something that is always going to involve a sizable judgment call. Indeed, if there's no sizable judgement call, because it is obviously bad, than I suspect such a case would fall under another, existing statute. The examples the Commission gives of cases that might slip under the net were not, I thought, either especially clear or convincing, and would need to be if this were to go further. As it is, the more general issue is that judgements of malfeasance in public office which are not covered by existing statute law are precisely that - matters of judgment!
3. The first sub-issue concerns political office and the ways in which political office and public office are related. Clearly, there are formal requirements for offices under the crown, but there are also political dimensions to many such offices, and the Law Commission needs to be clear about whether, and to what extent, it regards public office as covering public service and political office, or whether political activity is outside the remit of the offence. Even if the answer is straightforward, it is one that should be stated; and if the intent is to deal only with public office, the difficulties of separating matters of political judgment from judgment tied to the formal role requirements of office need to be recognised. My sense is that the origin of the offence relates to a period in which public office and political office were very imperfectly distinguished, and while that still might be true, it is so in different ways.
4. The second sub-issue concerns the existence of sanctions short of prosecution. There is a tendency for people to think that if you cannot be prosecuted for something then there's nothing wrong with it. But that's clearly wrong. There are things like 'bringing the office into disrepute', or failing to do the job properly (where one gets the sack (or is reprimanded) rather than being prosecuted); or acting in ways that is widely regarded as unacceptable and that forces resignation (without there being a formal legal offense). My sense is that these are important ways of dealing with unacceptable and untoward behaviour, and I'd want to press hard the question of whether we need something in addition to the range of offences people can commit, and these more informal non-judicial ways of dealing with things. Of course, in this more litigious age, people might regard these less formal sanctions as allowing claims of unfair dismissal - but the

political and employment world just has to be robust about this and to preserve the right to sanction for poor conduct.

Prof. Mark Philp
Chair, Research Advisory Board, CSPL
University of Warwick