Law Commission
Reforming the law

Misconduct in public office

HC 1027

Law Com No 397

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LC 397

Misconduct in public office

Presented to Parliament pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by the House of Commons to be printed on 3 December 2020

HC 1027

This publication is available at www.gov.uk/government/publications.

Any enquiries regarding this publication should be sent to us at criminal@lawcommission.gov.uk

ISBN 978-1-5286-2279-0

CCS1120583574 12/20

Printed on paper containing 75% recycled fibre content minimum

Printed in the UK by the Williams Lea Group on behalf of the Controller of Her Majesty's Stationery Office

The Law Commission

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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The terms of this Report were agreed on 6 November 2020.

The text of this Report is available on the Law Commission's website at http://www.lawcom.gov.uk.

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Misconduct in public office

To the Right Honourable Robert Buckland QC MP, Lord Chancellor and Secretary of State for Justice

Chapter 1: Introduction

BACKGROUND TO THE PROJECT

1.1 The criminal offence of misconduct in public office may be committed by a public office holder, who, while acting in the role of the public office, wilfully neglects to perform his or her duty or wilfully misconducts him or herself, to such a degree as to amount to an abuse of the public's trust in that office.[1] It is a common law offence, dating back hundreds of years, and therefore its terms have been established through case law, rather than in legislation.

1.2 Misconduct in public office is one of the most notoriously difficult offences to define in England and Wales. While this has always been an issue, the increased usage of the offence by police and prosecutors in recent decades has exacerbated the problem. In the past two decades, a substantial body of case law has refined, and in some cases shifted, the terms of the offence. The offence has also begun to be used in relatively novel contexts, such as the prosecution – as secondary parties – of journalists who have encouraged public office holders to leak confidential information. This has generated significant controversy.

1.3 In recent years there have also been high profile inquiries into alleged misconduct by public office holders – such as the various inquiries into the Hillsborough disaster, and the current Undercover Policing Inquiry.[2] In this context, questions have been raised as to how well-equipped the common law offence is to deal with modern forms of misconduct.

1.4 In 2010, a report by the House of Commons Committee on the Issue of Privilege stated:

> In our view, the current law on misconduct in public office remains unsatisfactory, not least because it is punishable with up to a life sentence. We recommend that the

1 *AG's Reference (No 3 of 2003)* [2004] EWCA Crim 868; [2005] QB 73.

2 See Undercover Policing Inquiry, "About the Inquiry" (17 July 2019), available at https://www.ucpi.org.uk/about-the-inquiry/.

Law Commission re-visit its 1997 recommendation that misconduct in public office be made a statutory offence, in the light of developments of the past dozen years.[3]

1.5 In the 2011 case of *DL*, Lord Justice Leveson stated that "consideration of the offence by the Law Commission would be of value".[4]

1.6 These views, together with consultation responses to our Eleventh Program, led us to include a review of the common law offence of misconduct in public office in our Eleventh Programme of Law Reform.[5]

1.7 We did not expect this to be a simple task, and it has not proved to be so. As we note below, there have been several previous considerations of reform of the offence, none of which have ultimately led to any substantive change.

1.8 In this report we do recommend substantive reform of the offence, through the repeal of the common law, and replacement with two more precise and targeted statutory offences. This follows an extensive process of consultation, and a thorough consideration of the complex legal and policy issues the offence entails.

1.9 This report describes the process of our review and details our reform recommendations.

1.10 We consider that our recommendations represent an improvement on the current common law offence, and if implemented, they should result in a clearer articulation of the scope and application of the offence. As with many law reform projects, it has proved impossible to reach universal consensus on the exact form of the office, and differences of view exist over the extent to which certain forms of misconduct should be a matter for the criminal law.

1.11 We have subjected the recommendations we make in this report to careful scrutiny by expert consultees and interested bodies including the Crown Prosecution Service, the Director of Public Prosecutions, the judges at the Central Criminal Court and Sir Brian Leveson (when President of the Queen's Bench Division of the High Court).

1.12 Our recommendations seek to strike a balance between punishing and deterring the most serious forms of misconduct by public office holders, while leaving space for civil and disciplinary penalties, and other, less serious offences, in cases that do not warrant such serious criminal sanction.

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3 Police Searches on the Parliamentary Estate, First Report of the Committee on Issue of Privilege (2009-10) HC 62 at [57].

4 [2011] EWCA Crim 1259; [2011] 2 Cr App R 14 at [21].

5 Eleventh Programme of Law Reform (2011) Law Com No 330 at paras 2.57 to 2.60. The Law Commission is required to receive and consider proposals for law reform and to prepare and submit to the Lord Chancellor, from time to time, programmes for the examination of different branches of the law with a view to reform. The terms of the Eleventh Programme of Law Reform were agreed on 27 May 2011.

History of the offence and calls for reform

1.13 The common law offence of misconduct in public office has existed for hundreds of years.[6] The most well-known historical statement of the offence was made in 1783, by Chief Justice Mansfield in the case of *Bembridge.*[7] In describing the offence in his judgment, 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 indictable. That such should be the rule is essential to the existence of the country.

1.14 The offence fell largely into disuse between the late 18th century and the beginning of the 21st century, and there were only occasional reported cases. These included *Borron*[8] in the 19th century and *Llewellyn-Jones*,[9] *Dytham*,[10] and *Bowden*[11] in the 20th century. We consider these cases, and the historical development of the offence more generally in Chapter 2.

1.15 In parallel with the criminal offence, there exists a tort of misfeasance in public office, early manifestations of which date back to the 18th century.[12] While not directly the subject of this review, we also briefly outline the history of the tort in Chapter 2.

1.16 Despite the relatively infrequent use of the criminal offence in the 20th century, there were a number of proposals to reform the offence during this time. We have previously outlined these in greater detail in Annex E to our 2016 Issues Paper,[13] but in brief, these were:

(1) The **"Salmon Commission"**, which had the complete title of the "Royal Commission into Standards of Conduct in Public Life" and was chaired by the Rt Hon Lord Salmon. This followed allegations of corruption within local government. As part of its work, the Salmon Commission highlighted the challenges of attempting to put the common law offence of misconduct in public

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

7 *R v Bembridge* (1783) 3 Doug KB 327; 99 ER 679.

8 *R v Borron* (1820) 3 B & Ald 432.

9 *R v Llewellyn-Jones* [1968] 1 QB 429.

10 *R v Dytham* [1979] QB 722.

11 *R v Bowden* [1996] 1 WLR 98; [1995] 4 All ER 505.

12 *Ashby v White* (1703) 2 Ld Raym 938; 1 Smith LC (13th ed) 253.

13 All Law Commission publications related to our Misconduct in Public Office project are available at: https://www.lawcom.gov.uk/project/misconduct-in-public-office/.

office on a statutory footing, and recommended not doing so.[14] More generally, the Salmon Commission recommended that for the purpose of corruption offences, public bodies should be defined as broadly as is compatible with certainty.[15] It was noted that "the boundaries of the public sector will, in the last resort, be arbitrary and there are bound to be some perplexing cases at the fringes".[16]

(2) The **Committee on Standards in Public Life (CSPL)**, which published a consultation paper entitled "Misuse of Public Office"[17] together with the publication of its Third Report. The Committee recommended that the offences be put on a statutory basis, and that consent of the Director of Public Prosecutions should be required to prosecute the offence. The Committee again noted the challenges in defining the boundaries of public office, and sought stakeholder views.

(3) The **Joint Committee on Parliamentary Privilege**, which considered the work of the CSPL, and noted the high level of support for the proposals to put the offence on a statutory basis.

(4) The **Law Commission's** work in the late 1990s in relation to corruption more generally.[18] These recommendations were largely but not wholly adopted in the Home Office's 2003 draft Corruption Bill (which was never enacted).[19]

(5) The **Report of the Joint Committee on the Draft Corruption Bill**, which considered the previous work of the CSPL, but concluded that "the draft Bill does not seem to us the appropriate vehicle for giving a statutory definition of misconduct in public office".[20]

(6) **Other relevant Law Commission reports** relating to corruption more generally:

(a) the report on fraud in 2002,[21] which recommended the creation of an offence of fraud by abuse of position that was implemented by sections 1 and 4 of the Fraud Act 2006; and

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14 Report of the Royal Commission on Standards of Conduct in Public Life (1976) Cmnd 6524 ("The Salmon Commission"), Chapter 10.

15 The Salmon Commission at [88(iii)].

16 The Salmon Commission at [50].

17 Pamphlet "Misuse of public office: a consultation paper" accompanying the Committee on Standards in Public Life, Third Report – Standards of Conduct in Local Government – Volume 1 (July 1997) Cm 3702-I, [18] and [22].

18 Legislating the Criminal Code: Corruption (1997) Law Commission Consultation Paper No 145; Legislating the Criminal Code: Corruption (1998) Law Com No 248.

19 Draft Corruption Bill (March 2003) Cm 5777.

20 Joint Committee on the Draft Corruption Bill Report (31 July 2003) HL Paper 157 HC 705 at [80].

21 Fraud (2002) Law Com No 276.

(b) the report on bribery in 2008,[22] which was implemented in the Bribery Act 2010.

1.17 There has been a revival in the prosecution of the offence, with annual prosecution numbers rising from single figures in the early 2000s, to averaging more than 80 per year since 2006.[23]

1.18 In 2003 the terms of the offence were defined in more detail by the Court of Appeal (Criminal Division) in the case of *Attorney General's Reference (No 3 of 2003)* ("*AG's Reference*")[24] as follows:

(1) a public officer acting as such;

(2) wilfully neglecting to perform his or her duty and/or wilfully misconducting him or herself;

(3) to such a degree as to amount to an abuse of the public's trust in the office holder; and

(4) without reasonable excuse or justification.[25]

1.19 This case remains the definitive statement of the law on misconduct in public office, though subsequent cases such as *Cosford*,[26] *Mitchell*[27] and *Chapman*[28] have further refined the elements of the offence, as established in *AG's Reference*.

1.20 Although *AG's Reference* provided significantly more clarity around the terms of the offence, concerns have remained that the offence is still not sufficiently clear or certain, and has operated unfairly at times.

1.21 The ongoing challenges in the application of the offence have been noted in several Court of Appeal judgments, including the 2011 case of *DL*, where Lord Justice Leveson stated:

> It is no part of the purpose of this judgment to seek to revisit the formulation of the offence as enunciated in [*AG's Reference*] although that might, in the future, become necessary.[29]

1.22 Difficulties arising from its use in more novel contexts, such as the prosecution of journalists for aiding and abetting the offence, have also been noted by the senior

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22 Reforming Bribery (2008) Law Com No 313.

23 See tables at paragraphs 2.20 and 2.21.

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

25 *Attorney General's Reference (No 3 of 2003)* [2004] EWCA Crim 868; [2005] QB 73 at [61].

26 *R v Cosford* [2013] EWCA Crim 466; [2014] QB 81.

27 *R v Mitchell* [2014] EWCA Crim 318; [2014] 2 Cr App R 2.

28 *R v Chapman* [2015] EWCA Crim 539; [2015] 2 Cr App R 10.

29 *R v DL* [2011] EWCA Crim 1259; [2011] 2 Cr App R 14 at [21].

judiciary, with the Lord Thomas CJ making the following observation in the 2015 case of *Chapman*:

> 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.[30]

1.23 These prosecutions – part of the wider "Operation Elveden" investigation into allegations of inappropriate payments to police officers and other public officials – have attracted criticism from other quarters, notably journalists.[31] We consider Operation Elveden, and the cases it generated, in further detail in Chapter 2.

1.24 During this period, in 2015, following the findings of the Stephen Lawrence Independent Review conducted by Mark Ellison QC, a new offence of "corrupt or other improper exercise of police powers and privileges" was introduced.[32] We discuss the broad scope of this provision in Chapter 5, and the extent of its overlap with misconduct in public office.

1.25 Academics have criticised various aspects of the current law of misconduct in public office.[33] Of particular note, a comprehensive analysis was undertaken by Professor Jeremy Horder in 2018.[34] We consider Horder's work in more detail in Chapter 3.

1.26 Concerns about the state of the current law have similarly been confirmed in the consultations we have conducted throughout the course of this review. We have consulted with government departments and agencies, prosecutors, academics, barristers with expertise in defending and prosecuting the offence, unions and representative bodes, independent advocacy bodies and representatives of the press. A full list of individuals and organisations who responded to our consultation paper appears at Appendix 1 to this report.

The Law Commission's review

1.27 The Law Commission first began work on its review of misconduct in public office in 2012, as part of its Eleventh Programme of Law Reform.

1.28 Our terms of reference for this project are:

(1) to decide whether the existing offence of misconduct in public office should be abolished, retained, restated or amended; and

(2) to pursue whatever scheme of reform is decided upon.

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30 *R v Chapman* [2015] EWCA Crim 539; [2015] 2 Cr App R 10 at [29], per Lord Thomas CJ.

31 BBC, *Operation Elveden corruption probe ends* (26 February 2016), available at https://www.bbc.co.uk/news/uk-35666520.

32 Criminal Justice and Courts Act 2015, s 26.

33 See, eg S Parsons, "Misconduct in a public office: should it still be prosecuted?" (2012) 76(2) *Journal of Criminal Law* 179; C Sjolin and H Edwards, "When misconduct in public office is really a sexual offence" (2017) 81(4) *Journal of Criminal Law* 292.

34 Professor Horder was the Criminal Law Commissioner at the Law Commission from 2005 to 2010. See J Horder, *Criminal Misconduct in Office* (2018).

1.29 To date, our most significant pieces of work have comprised an issues paper, published in January 2016, and a consultation paper in September 2016. Both of these publications were followed by extensive stakeholder consultation.

Issues paper

1.30 Our issues paper set out the current law and identified a number of problems with it. It asked consultees to respond to twelve questions relating to the many areas of uncertainty surrounding the offence. The majority of the 36 consultees who responded to the issues paper agreed that there was a need to reform the offence.

1.31 The issues paper also outlined the then recently introduced statutory offence of "corrupt or other improper exercise of police powers and privileges" under section 26 of the Criminal Justice and Courts Act 2015. This offence covers similar ground to the common law offence (though its application is limited to police) and has influenced the development of our proposals for the corruption offence that we outline in Chapter 5 of this report.

1.32 The launch of our first consultation period coincided with a symposium held at the Dickson Poon School of Law, King's College London. The event was attended by approximately 100 delegates from a variety of backgrounds and further informed the development of our consultation paper.

Consultation paper and options for reform

1.33 Our consultation paper drew upon the significant contribution by consultees following the publication of the issues paper. It outlined a number of provisional views we had reached and contained three broad proposals for reform.

1.34 Given the weight of responses to the issues paper that were against keeping the offence in its current form, we ruled out this option. The views consultees expressed for reform were consistent with our own analysis, which had identified too much uncertainty in the scope and operation of the current offence, and a particular concern that it potentially infringed article 7 of the European Convention on Human Rights, which prohibits "punishment without law".[35]

1.35 The consultation paper therefore focused on options for reform based on the starting point that we would be recommending abolition of the current offence. In developing these options, we broke down the types of behaviour that the offence of misconduct in public office was seeking to target, and identified the intrinsic wrongs and harms. We also examined the circumstances in which no other offence would be available to address such wrongs and harms if the offence was abolished entirely.

1.36 We developed three broad options, and a series of provisional proposals and consultation questions to guide further policy development. The three options we presented were to:

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[35] Misconduct in Public Office: The Current Law (2016), Law Commission Issues Paper 1 ("Issues Paper 1 (2016)"), Annex C.

(1) introduce an offence of breach of duty by a public office holder leading to a risk of serious harm;

(2) introduce an offence of corruption by a public office holder, involving the abuse of his or her position or power; or

(3) abolish the common law offence without replacement.

1.37 We proposed that Options 1 and 2 could be introduced either in combination, or individually.

1.38 Option 3 meant no offence would be substituted in replacement, but we did indicate that should this option be pursued, consideration might be given to treating abuse of "public office" as an aggravating factor for the purposes of sentencing other offences.

Consultation and subsequent policy development

1.39 We received a total of 46 responses to the consultation paper. We are grateful for the thought, time and effort that was involved in the preparation of these submissions. The following government departments and agencies, independent bodies, non-governmental organisations, legal academics, legal practitioners and members of the judiciary, independent professionals and members of the public responded.

(1) Departments: Counsel General, Welsh Government; the Crown Prosecution Service; the National Offender Management Service ("NOMS") (now Her Majesty's Prison and Probation Service ("HMPPS") from 1 April 2017); North Yorkshire County Council; the Under Secretary of State for Policing and the Fire Service, Home Office; and the Under Secretary of State for Prison and Probation, Ministry of Justice.

(2) Independent bodies: Church of England Archbishop's Council; College of Policing; Compassion in Care; CSPL; High Court Enforcement Officers Association; Independent Police Complaints Commission ("IPCC", now Independent Office for Police Conduct ("IOPC")); "PHSO the Facts"; and Public Concern at Work.

(3) Legal academics: Professor Liz Campbell, Monash University; Professor Alisdair Gillespie, Lancaster University; Robert Heaton, Canterbury University; Professor Jeremy Horder, London School of Economics; Simon Parsons, Solent University (retired); and Catarina Sjolin Knight and Helen Edwards, Nottingham Trent University.

(4) Legal practitioners and members of the judiciary: The Bar Council and Criminal Bar Association; The Council of Her Majesty's Circuit Judges ("COCJ"); the Ecclesiastical Law Society; Law Society; London Criminal Courts Solicitors' Association ("LCCSA"); Keir Monteith QC and Lucie Wibberley, Garden Court Chambers; Malcolm Morse, St Phillip's Chambers; Police Action Lawyers' Group and Pete Weatherby QC.

(5) Independent professionals: DS Jackie Alexander; Adrian Britliff (social worker); and DC Scott Pavitt.

(6) Members of the public: Dr Minh Alexander; Ann Bonne; Juliet Crowson; John von Garner; Ian Hall; Barbara Harris; James Kennedy; Jan Kumar; Margaret Lynch; Lesley McDade; Mike Paley; Teresa Steele; Michael Stone; William-Glyn Thomas; Nicholas Wheatley; and two members of the public who wished to remain anonymous.

1.40 We also took the opportunity to arrange subsequent meetings with significant public sector employer representative bodies, to ensure that the concerns of these groups were adequately understood.

1.41 Policy development has been underway since the end of the consultation period. Regrettably, this project has taken longer than intended to reach the final report. There are a variety of reasons for this, including the complexity of the issues and our ability continuously to resource a project which has been funded from our reduced core budget.

1.42 Despite the relatively contained nature of the review, misconduct in public office has also proved to be one of the most challenging policy areas the Law Commission has undertaken in recent years. Indeed, our former Chairman Sir David Bean has noted that it was probably the most difficult project he was involved in during his tenure.[36]

1.43 One of the main reasons for this is that there is a wide range of views on the utility of the offence of misconduct in public office, all of which are legitimately and sincerely held. At one extreme, there is the view that it is not right that a person should be held at risk of a criminal prosecution, when others are not, merely because their role involves a "public office". At the other end, there is a view that public officials should be held to significantly higher standards in their duties than other employed persons, due to the gravity and responsibility involved in undertaking public office, and that this should include criminalising their misconduct in circumstances where no equivalent criminal offence would apply in other contexts.

1.44 Almost every individual and organisation we have consulted with has been in favour of some version of a misconduct in public office offence. We have heard from a range of perspectives, variously accepting that there are circumstances where public officials should be held criminally liable, but also agreeing that there should be clear limits and a high threshold for the imposition of such criminal responsibility.

1.45 This is also the position that the Law Commission has arrived at following extensive research and consultation. We consider that the current offence is too ill-defined and uncertain to be maintained in the criminal law. However, we conclude that the common law offence of misconduct in public office should not be abolished without replacement. In Chapter 3, we discuss the implications that total abolition would have for the government's response to public sector corruption, and the gaps that would appear in the criminal law if this was to occur. Replacement offences should be clearer and more precise than the current offence, and focus on serious wrongdoing, rather than more trivial, disciplinary issues.

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36 Courts and Tribunals Judiciary, *Speech by Rt Hon Lord Justice Bean: Misconduct in Public Office* (7 November 2018), available at https://www.judiciary.uk/announcements/speech-by-rt-hon-lord-justice-bean-misconduct-in-public-office/.

Our recommendations

1.46 Our core recommendation is that the common law offence of misconduct in public office should be abolished and replaced with statutory offences based on those recommended below. These would be:

(1) an offence of **corruption in public office**, where the public office holder, in using the position or power of the role, has knowingly engaged in "seriously improper" conduct with the purpose of achieving a benefit or detriment, and cannot prove that their conduct was, in all the circumstances, in the public interest; and

(2) an offence of **breach of duty in public office**, where the public office holder has a specific duty to prevent death or serious injury, is aware of that fact, and breaches the duty, causing or risking death or serious injury, while being at least reckless as to whether that would result.

1.47 To help define the boundaries of the offence, we are recommending that both statutory offences should be underpinned by a broad list of positions capable of being considered as "public office". Functional tests within each offence will then further define the parameters of whether the individual can be considered to be acting in "public office" for the purposes of the offence. As a result of this functional test, we acknowledge that there will still be some cases of ambiguity as to whether a defendant was relevantly in public office, but by combining a list of positions and this test we seek to reduce the current uncertainty in the common law offence.

1.48 Finally, to provide greater consistency, we are recommending that the consent of the Director of Public Prosecutions should be required before either offence is prosecuted.

1.49 We detail the rationale for each of these recommendations throughout the report.

THE STRUCTURE OF THIS REPORT

1.50 The structure of this report is as follows:

- Chapter 2 outlines the current law, including the history of the offence, its main features, and recent developments.

- Chapter 3 outlines the case for reform of the offence, including the reasons why we consider that the offence should not be retained in its current form. It also outlines why we consider that there remains an ongoing need for specific offences targeted at misconduct in public office.

- Chapter 4 considers the challenge in defining the boundary between "public office" and other roles and outlines our proposal for a clearer definition of the limits of the "public office" for the purposes of the two replacement offences we recommend in Chapters 5 and 6.

- Chapter 5 outlines our recommendation for a replacement offence of corruption in public office, and the rationale for this recommendation. It also considers the future of the offence of "corrupt or other improper exercise of police powers and privileges" under section 26 of the Criminal Justice and Courts Act 2015.

- Chapter 6 outlines our recommendation for a replacement offence of breach of duty in public office, and the rationale for this recommendation.

- Chapter 7 considers a number of important issues that need to be considered in the implementation of the new offences, including the mode of trial, scope of liability, jurisdictional and devolution issues, and appropriate maximum penalties.

- Chapter 8 describes further safeguards that we consider should apply to the prosecution of both offences, including the continued publication of detailed prosecution guidance, and a requirement of the consent of the Director of Public Prosecutions to initiate prosecution.

- Chapter 9 considers the wider concerns around abuses of position and power in sexual contexts that have arisen in the course of this review, and our suggestion that government consider further work in this area.

1.51 A complete list of our recommendations can be found at the end of the report.

ACKNOWLEDGMENTS

1.52 Commissioners are grateful to members of staff at the Law Commission who have contributed to the project during its lifetime: Justine Davidge (team lawyer on the development of the issues paper and consultation paper), Martin Wimpole (team lawyer on the final report). Katie Jones, Rebecca Martin, Rebecca Cohen and Ruby Ward (research assistants) provided support to the final report, while David Connolly and Jessica Uguccioni were the relevant team managers. We are also particularly grateful for the considerable assistance provided by Parliamentary Counsel, in particular Jessica de Mounteney and Polly Walton.

Chapter 2: History and current law

INTRODUCTION

2.1 In our 2016 issues paper we outlined the history of the offence of misconduct in public office[1] and the current status of the law[2] in significant detail.

2.2 Misconduct in public office is a common law offence, with a maximum penalty of life imprisonment.

2.3 In this chapter we summarise the history and the key aspects of the offence, and also more recent developments. This background will provide the basis for the policy proposals and analysis that follows in this report.

HISTORY OF THE OFFENCE OF MISCONDUCT IN PUBLIC OFFICE

2.4 The 1783 case of *Bembridge*[3] is usually cited as the first clear articulation of the modern offence of misconduct in public office. Prior to this case, there is evidence of the prosecution of behaviour akin to misconduct in public office dating back to the 12th century. However, it was not until the 18th century that the concept of a standalone offence began to form.

2.5 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 his duty" in an "office of trust".[4] On appeal against conviction he argued that the offence charged was not known to the criminal law, being purely a civil matter.

2.6 In describing the offence in his judgment, 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 indictable. That such should be the rule is essential to the existence of the country.[5]

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1 Issues Paper 1 (2016), Annex A.

2 Issues Paper 1 (2016), Chapter 2.

3 *R v Bembridge* (1783) 3 Doug 327; 99 ER 679.

4 *R v Bembridge* (1783) 3 Doug 327; 99 ER 679, 331.

5 *R v Bembridge* (1783) 3 Doug 327; 99 ER 679, 332.

2.7 Following *Bembridge*, *Borron*[6] – which concerned the conduct of a magistrate – is the most commonly cited 19th century case. In this judgment, Lord Chief Justice Abbott elaborated on the fault element of the offence, clearly distinguishing errors and poor judgment from "corrupt motive":

> 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 and favour may generally be included, or from mistake or error. In the former case, alone, they have become the objects of punishment.[7]

Development of the law in the 20th century

2.8 The offence continued to develop in the 20th century, but there were relatively few reported cases, and until the 21st century, prosecution numbers for the offence were very low.[8] In 1983, Glanville Williams observed that "this offence is practically never charged".[9]

2.9 Three of the most important 20th century cases were *Llewellyn-Jones*[10] in 1967, *Dytham*[11] in 1979, and *Bowden*[12] in 1995.

2.10 *Llewellyn-Jones* concerned a registrar of a county court who was convicted on six counts of an indictment charging him with misbehaviour in a public office. The counts described conduct involving the improper making of orders for the release of money which had been paid into court in respect of damages to injured persons. However, they did not specifically allege fraud or dishonesty on the part of the defendant. On appeal, the defendant argued that fraud or dishonesty were essential elements of the offence. This was rejected, with the Court finding the behaviour amounted to misconduct.

2.11 *Dytham* stands as probably the clearest articulation that the offence can include a positive duty to act. In this case, the defendant was a police officer who failed to intervene during a disturbance in which a man was kicked to death. He was found guilty of misconduct in public office. On appeal, he argued that a mere failure to act was not sufficient to amount to the offence. In rejecting this, Lord Widgery CJ found that non-feasance could amount to the offence where the relevant conduct was "… of

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6 *R v Borron* (1820) 3 B & Ald 432.

7 *R v Borron* (1820) 3 B & Ald 432, 434.

8 See, eg D Lusty, "Revival of the common law offence of public office" (2014) 38 *Criminal Law Journal* 337, 341. David Lusty has observed that throughout the 20th century, the offence of misconduct in public office was rarely utilised and that the only reported case in England and Wales between 1900 and 1975 was *R v Llewellyn-Jones* [1968] 1 QB 429. See also: C Nicholls and others, *Corruption and Misuse of Public Office* (3rd ed, 2017), p 146.

9 G Williams, *Textbook of Criminal Law* (2nd ed, 1983), p 151, quoted in D Lusty, "Revival of the common law offence of public office" (2014) 38 *Criminal Law Journal* 337, 341.

10 *R v Llewellyn-Jones* [1968] 1 QB 429.

11 *R v Dytham* [1979] QB 722.

12 *R v Bowden* [1996] 1 WLR 98; [1995] 4 All ER 505.

such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment".[13]

2.12 *Bowden* concerned the limits of what could make holders of positions liable to the offence. The defendant was a maintenance manager of a local authority works department. He had improperly caused work to be carried out for his girlfriend in the course of his employment for Stoke-on-Trent City Council. On appeal, he argued he was not holding "public office" for the purposes of the offence. In rejecting this argument, the Court drew upon the statement in *Bembridge* that "a man accepting an office of trust concerning the public … is answerable criminally to the King for misbehaviour in his office", and most significantly that "this is true, by whomever and in whatever way the officer is appointed".[14]

Revival of the offence in the 21st century

2.13 The offence has experienced something of a revival in the 21st century,[15] with a more significant body of case law emerging, and an increase in prosecutions. Nicholls and others[16] have identified several reasons for its popularity, including:

(1) a single charge may be used to reflect an entire course of conduct;

(2) it may be used to reflect serious misconduct which is truly "criminal", but which cannot be satisfactorily reflected by any other offence;

(3) with the increasing value of confidential information to criminal and commercial interests, it may reflect more effectively the severity of the unlawful passing of that information than other data protection and official secrets offences; and

(4) the maximum sentence is life imprisonment.

Attorney General's Reference (No 3 of 2003)

2.14 The most authoritative contemporary statement of the offence is the case of *Attorney General's Reference (No 3 of 2003)* ("*AG's Reference*").[17]

2.15 The facts of the case that led to the reference involved the death of a 37-year-old man in police custody. He had suffered a blow to the head in an assault, and then behaved in an abusive and aggressive manner towards staff treating him at a hospital and was apprehended by police. The police officers were advised that the man was fit to be detained and took him to a police station in a police van. He was unconscious on arrival and was taken to the custody suite where he was placed in a semi-prone position on the floor. His breathing was audibly obstructed and ten minutes later he

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13 *R v Dytham* [1979] QB 722, 727 to 728.

14 *R v Bembridge* (1783) 3 Doug 327; 99 ER 679, 332, per Lord Mansfield CJ cited in *R v Bowden* [1996] 1 WLR 98, 103.

15 See generally, D Lusty, "Revival of the common law offence of misconduct in public office" (2014) 38 *Criminal Law Journal* 337.

16 C Nicholls and others, *Corruption and Misuse of Public Office* (3rd ed, 2011), p 147.

17 [2004] EWCA Crim 868; [2005] QB 73.

stopped breathing. Attempts at resuscitation failed and he was pronounced dead some three hours later.

2.16 Five police officers were charged with manslaughter by gross negligence and misconduct in a public office. The trial judge ruled that there was no case to answer on the manslaughter charge. It was further held that there was no evidence, which could safely found a conviction, for the offence of misconduct in a public office on the basis of recklessness as to the risk to the victim's welfare.

2.17 The Attorney General then referred to the Court of Appeal,[18] querying the ingredients of the common law offence of misconduct in a public office, and whether it was necessary to prove "bad faith".

2.18 The judgment of Lord Justice Pill, which remains the authoritative statement of law, found that the elements of the offence of misconduct in public office are:

(1) a public officer acting as such;

(2) wilfully neglecting to perform his or her duty and/or wilfully misconducting him or herself;

(3) to such a degree as to amount to an abuse of the public's trust in the office holder; and

(4) without reasonable excuse or justification.[19]

2.19 We explore each of these four elements in further detail in the "current law" section below.

Developments since *AG's Reference*

2.20 The *AG's Reference* decision in 2004 coincided with a rise in the number of annual prosecutions of the offence. This is evident from the table below:

Table one: Crown Prosecution Service ("CPS") data for annual number of prosecutions commenced in the magistrates' courts of England and Wales, relating to the common law offence of misconduct in public office[20]

2005-2006	2006-2007	2007-2008	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018
24	29	72	55	93	148	93	94	95	137	93	81	83

[18] Pursuant to section 36 of the Criminal Justice Act 1972.

[19] *Attorney General's Reference (No 3 of 2003)* [2004] EWCA Crim 868; [2005] QB 73 at [61].

[20] This information was provided by the Crown Prosecution Service. Please note that the offence data is limited to volume counts – the statistics do not disaggregate to show the number of defendants prosecuted or the eventual outcome of a prosecution. No assumptions should be made about the number of cases of defendants prosecuted from these data – defendants may be charged with more than one offence and a case may comprise one or more defendants.

2.21 Ministry of Justice data (covering the calendar year, not the financial year like the CPS data) shows the number of prosecutions and convictions has broadly levelled out in recent years.

Table two: Ministry of Justice data on prosecutions proceeded against and convictions entered

Year	2013	2014	2015	2016	2017	2018
Prosecutions	55	93	148	93	94	95
Convictions	40	42	50	38	34	25

2.22 In the years since *AG's Reference*, a number of subsequent cases have refined its parameters, including *W*[21] in 2010, *Belton*[22] in 2011, *Cosford*[23] in 2013, *Mitchell*[24] in 2014 and *Chapman*[25] in 2015.

2.23 *W* involved a serving police officer who was charged with misconduct in public office connected to the improper use of his work credit card for personal expenses in excess of £12,500. He was convicted at trial but appealed his conviction successfully. The Court of Appeal found that the trial judge had failed to direct the jury properly as to the subjective nature of the fault element, specifically the significance of the police officer's evidence that he was not aware that what he was doing was wrong and intended to repay the money. The Court of Appeal further held that:

> In our judgment it is clearly established that when the crime of misconduct in a public office is committed in circumstances which involve the acquisition of property by theft or fraud, and in particular when the holder of a public office is alleged to have made improper claims for public funds in circumstances which are said to be criminal, an essential ingredient of the offence is proof that the defendant was dishonest.[26]

2.24 *Belton* involved a volunteer with the Independent Monitoring Board who was charged with misconduct in public office connected with inappropriate relationships she developed with prisoners. The volunteer argued on appeal that the offence was confined to those holders of public offices who were remunerated. The Court of Appeal rejected this argument.

2.25 *Cosford* is the most important authority on the question of when a person may be considered to be in "public office" for the purposes of the offence. The case concerned convictions against prison nurses relating to an inappropriate relationship one of them had with a prisoner. On appeal they argued that their role as nurses did not constitute

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21 *R v W* [2010] EWCA Crim 372; [2010] QB 787.

22 *R v Belton* [2011] QB 934; [2010] EWCA Crim 2857.

23 *R v Cosford* [2013] EWCA Crim 466; [2014] QB 81.

24 *R v Mitchell* [2014] EWCA Crim 318; [2014] 2 Cr App R 2.

25 *R v Chapman* [2015] EWCA Crim 539; [2015] 2 Cr App R 10.

26 *R v W* [2010] EWCA Crim 372; [2010] QB 787 at [14].

being in a "public office". Lord Justice Leveson, outlined the following test for determining whether the offence could apply:

(1) What was the position held?

(2) What was the nature of the duties undertaken by the employee or officer in that position?

(3) Did the fulfilment of those duties represent the fulfilment of one of the responsibilities of government such that the public had a significant interest in the discharge of that duty extending beyond an interest in anyone who might be directly affected by a serious failure in the performance of the duty?[27]

2.26 Applying this test, Lord Justice Leveson concluded that through working in a prison environment, the nurses had undertaken a responsibility to the public over and above that which they held to the patient they were treating. The nurses' appeals were dismissed: they were in public office.

2.27 Following *Cosford*, the boundaries of "public office" were further tested in *Mitchell*. This case involved inappropriate sexual conduct by a paramedic worker towards a patient in an ambulance. He had been charged with misconduct in public office, with the prosecution providing the court with "cogent reasons for the CPS decision that it would not have been appropriate to prosecute Mr Mitchell for a sexual offence".[28] The defendant had been convicted of misconduct in public office at trial, but on appeal he successfully argued that his role as a paramedic fell outside the ambit of the offence. In applying the test he had set out in *Cosford*, Lord Justice Leveson found that the paramedic had no "public" duty over and above that which he had to the patient:

> In a general sense, of course, the public would be concerned by any example of a breach of the individual duty (such as occurred in this case) but that is not to say that there is a duty to the public which is different from, or additional to, the general duty owed to the individual. There is not.[29]

Operation Elveden

2.28 Around this time, there were also a number of prosecutions of misconduct in public office as part of the Metropolitan Police investigation "Operation Elveden". These concerned payments allegedly made by journalists to a variety of public officials for information to be used in news stories. A large number of investigations and prosecutions were pursued as part of the operation, which cost almost £15m, and resulted in the conviction of 34 individuals.[30]

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27 *R v Cosford* [2013] EWCA Crim 466; [2014] QB 81 at [34].

28 *R v Mitchell* [2014] EWCA Crim 318; [2014] 2 Cr App R 2 at [7].

29 *R v Mitchell* [2014] EWCA Crim 318; [2014] 2 Cr App R 2 at [19].

30 See, eg BBC, *Operation Elveden corruption probe ends* (26 February 2016), available at https://www.bbc.co.uk/news/uk-35666520.

2.29 Some of the convictions were for misconduct in public office, and in 2015 and 2016, appeals were considered by the Court of Appeal (Criminal Division) in the cases of *Chapman*, *Norman*,[31] and *France*.[32]

2.30 The first appeal in *Chapman* concerned a prison officer selling stories to a journalist relating to a high-profile prisoner. The officer and his ex-partner were found guilty of misconduct in public office for their role, while the journalist was found guilty of conspiracy to commit misconduct in public office. On appeal they successfully argued that the trial judge had not properly directed the jury as to the seriousness threshold for the offence. Specifically, the judge had not directed them, in making this assessment, to consider the degree of harm to the public caused by the conduct.[33]

2.31 The case resulted in a Crown Prosecution Service ("CPS") review of Operation Elveden cases and the subsequent discontinuance of various prosecutions.[34]

2.32 By contrast, an appeal against conviction was unsuccessful in *Norman*, which involved a similar factual scenario to *Chapman*. Norman was a prison officer who was paid more than £10,000 by a journalist over a period of five years in return for information. On appeal he argued that his prosecution was an abuse of process, because improper pressure had been placed on the newspaper to reveal him as a source. Norman also argued that he had no case to answer because the prosecution infringed his right to freedom of expression under article 10 of the European Convention on Human Rights, and his conduct was not serious enough to warrant criminal sanction.

2.33 In rejecting the abuse of process argument, the Court of Appeal found that while the newspaper could not be compelled to reveal Norman as a source, it had chosen to do so voluntarily, and therefore the conduct of the investigation did not amount to an abuse of process.[35] The Court also rejected the argument that Norman had "no case to answer",[36] finding that the conduct was sufficiently serious to amount to the offence, and that "the defendant's conduct, amounting to the serious offence of misconduct in public office, is not protected by article 10".[37]

2.34 Decided soon after *Norman*, the case of *France* involved an appeal by a journalist who had been convicted of aiding and abetting the commission of misconduct in public office by making payments to a serving police officer for confidential information. In successfully appealing against the conviction, the appellant argued that

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31 *R v Norman* [2016] EWCA Crim 1564; [2017] 4 WLR 16.

32 *R v France* [2016] EWCA Crim 1588; [2016] 4 WLR 175.

33 *R v Chapman* [2015] EWCA Crim 539 at [36] to [40].

34 See, eg BBC, *Operation Elveden: Nine journalists have cases dropped* (17 April 2015), available at https://www.bbc.co.uk/news/uk-32355478.

35 *R v Norman* [2016] EWCA Crim 1564; [2017] 4 WLR 16 at [28].

36 This refers to an application by a defendant to seek acquittal from a judge at the end of the prosecution evidence without having to present a defence. The judge needs to be persuaded that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it. See further *R v Galbraith* [1981] 1 WLR 1039.

37 *R v Norman* [2016] EWCA Crim 1564; [2017] 4 WLR 16 at [50].

following *Chapman*, the judge had failed to direct the jury adequately with regard to the seriousness threshold of the offence. The Court of Appeal (Criminal Division) held that notwithstanding the great care the trial judge had taken in preparing directions for the jury, he had not given the jury sufficient guidance on how to assess seriousness and harm, and therefore the conviction was unsafe.[38]

Undercover policing investigation

2.35 The use of undercover police to infiltrate various political movements in recent decades is currently the subject of an independent inquiry.[39] There have been calls for some of the police involved to be charged with misconduct in public office, among other offences, relating to their conduct while undercover.

2.36 In the 2018 case of *R (on the application of Monica) v DPP*,[40] the High Court considered an application for judicial review. The application related to a decision by the Director of Public Prosecutions not to prosecute a former detective constable for the offences of rape, indecent assault, procurement of sexual intercourse by false pretences and misconduct in public office, relating to his time working undercover.

2.37 The claimant was an environmental activist. In 1997 she entered into a sexual relationship with the detective constable while he was acting undercover. The detective constable had infiltrated the "Reclaim the Streets" movement in which she was involved. The claimant was unaware of the detective constable's real identity throughout the relationship, which lasted six months. She discovered his true identity many years later in 2011 following media reports.

2.38 The application for judicial review of the CPS's decision not to prosecute any of the proposed charges was rejected by the High Court. In relation to misconduct in public office, the Court found that while "it by no means follows that the threshold of seriousness is incapable of being surmounted" in circumstances such as this case, the CPS had not acted irrationally in making its decision not to prosecute.[41] The court found that in reaching its decision, the CPS had placed particular weight on the terms of the Special Demonstration Squad Tradecraft Manual, which did not expressly prohibit undercover officers from forming sexual relationships, and it was within the CPS's discretion to determine that this lack of specific prohibition significantly reduced the prospects of a likely conviction.[42]

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38 *R v France* [2016] EWCA Crim 1588; [2016] 4 WLR 175 at [21] to [31].

39 See Undercover Policing Inquiry (10 October 2018), available at https://www.ucpi.org.uk/.

40 [2018] EWHC 3508 (Admin); [2019] 2 WLR 722.

41 *R (on the application of Monica) v DPP* [2018] EWHC 3508 (Admin); [2019] 2 WLR 722 at [94].

42 *R (on the application of Monica) v DPP* [2018] EWHC 3508 (Admin); [2019] 2 WLR 722 at [94] to [96].

The Hillsborough disaster

2.39 The offence of misconduct in public office has also gained public attention in relation to charges against police officers connected to the Hillsborough Stadium disaster in 1989, which led to the death of 96 people. There have been a number of previous inquests and public inquiries that have considered the causes of this disaster and the conduct of those involved.[43]

2.40 While charges of misconduct in public office have been withdrawn, other charges are still being pursued at the time of publication of this report.[44]

CURRENT LAW

2.41 As outlined above, the leading modern case on misconduct in public office is *AG's Reference*.

2.42 Below we consider each of the four main elements of the offence as outlined in Lord Justice Pill's judgment.

First element: a public officer acting as such

2.43 There are two distinct components of this element: the fact of holding "public office" and "acting as such" at the time of the offending conduct.

Public office

2.44 The exact parameters of "public office" are notoriously difficult to define. There are many categories in which the classification of public office is clear, such as for police officers and civil servants. However, others, such as publicly employed medical professionals, have proven more challenging, as observed in the *Cosford* and *Mitchell* cases referred to above. The classification of Bishops of the Church of England is another that has proved challenging, with the 2015 case of Bishop Peter Ball clarifying that Bishops of the Church of England are public office holders,[45] while senior figures in other religions are not.[46]

2.45 In our consultation paper we outlined various different approaches to defining public office, notably:

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43 The first coronial inquest opened in November 1990; a jury returned a majority verdict of accidental death in March 1991. In 2012, after the Hillsborough Independent Panel reviewed 450,000 documents and published its report, then Home Secretary Theresa May accepted the report and ordered a new criminal inquiry into the disaster, Operation Resolve. In March 2014, new inquests began. In April 2016, the inquest jury concluded that the 96 people who died in the Hillsborough disaster were unlawfully killed, overturning the verdict of accidental death at the 1991 inquest. See D Conn, *The long road to justice: Hillsborough disaster timeline* (2 June 2017), available at https://www.theguardian.com/football/2017/jun/28/long-road-justice-hillsborough-inquest-timeline.

44 See, eg L Dearden, *Hillsborough disaster: CPS will not charge five police officers over deaths of 96 Liverpool fans* (14 March 2018), available at https://www.independent.co.uk/news/uk/crime/hillsborough-disaster-cps-liverpool-police-officers-fan-deaths-prosecutions-david-duckenfield-a8255081.html.

45 *R v Ball* (8 September 2015) Central Criminal Court (unreported).

46 See further F Cranmer and A Pocklington, "Peter Ball and Misconduct in a public office" (2016) 18 *Ecclesiastical Law Journal* 188.

(1) status or in institutional terms;

(2) identification of a determinative duty;[47]

(3) performance or exercise of a public function; or

(4) performing a public function whilst under a duty to act in a certain way.[48]

2.46 In Chapter 4, we expand on the way in which these four approaches to defining public office encompass either institutional or functional considerations.

2.47 This difficulty in defining the boundaries of the "public" and non-public spheres has been observed in other legal contexts, most notably in the definition of "public authority" for the purposes of section 6(3)(b) of the Human Rights Act 1998.[49] It has also arisen in the judicial consideration of when organisations might be considered to be exercising public authority such that they may be subject to judicial review.[50]

2.48 In another criminal context, the meaning of the phrase a "public official or person acting in an official capacity" for the purposes of the offence of torture contrary to section 134 of the Criminal Justice Act 1988 has recently been interpreted by the Supreme Court as follows:

> 'A person acting in an official capacity' in section 134(1) of the Criminal Justice Act 1988 includes a person who acts or purports to act, otherwise than in a private and individual capacity, for or on behalf of an organisation or body which exercises, in the territory controlled by that organisation or body and in which the relevant conduct occurs, functions normally exercised by governments over their civilian populations. Furthermore, it covers any such person whether acting in peace time or in a situation of armed conflict.[51]

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47 This refers to a classification whereby it is because of the duty which the defendant is alleged to have breached that they can be classified as being in public office. This is similar to the current approach whereby the focus is on whether the individual has a duty associated with the state function or governmental responsibility and the public has an interest in the individual's performance of that duty.

48 Reforming Misconduct in Public Office (2016) Law Commission Consultation Paper No 229 ("Consultation Paper (2016)"), para 4.23.

49 See *YL v Birmingham City Council* [2007] UKHL 27; [2008] 1 AC 95.

50 The leading case on this issue is *R v Panel on Takeovers and Mergers Ex p. Datafin Plc* [1987] QB 815 (*Datafin*).

51 *R v Reeves-Taylor (Agnes)* [2019] UKSC 51; [2019] 3 WLR 1073 at [76], per Lord Lloyd-Jones.

2.49 In the context of misconduct in public office, the Court of Appeal in *Cosford* set out a useful test for determining whether an individual is in public office for the purpose of the misconduct in public office offence. It essentially requires asking whether the public had an interest in the misconduct over and above those directly affected. However, the answer to this question will not necessarily be clear cut in every case. For example, in *Mitchell*, where the court applied the *Cosford* test, it was not entirely obvious prior to the decision that a paramedic did not owe a broader duty beyond that owed to the specific patient. While this particular circumstance has now been clarified, there are likely to be other such ambiguous situations that emerge in the future.

2.50 Since the case of *Belton*, it is at least clear that remuneration is not a decisive determining factor.

Acting as such

2.51 A public officer must be "acting as such" when he or she performs the misconduct. The case law is less expansive about the precise practical implications of this aspect of the offence, but it is clearly designed to distinguish between circumstances where the public office holder is misconducting themselves while performing their function or role, and where they are misconducting themselves in non-public contexts. This includes, but is not necessarily limited to, conduct in their personal life. For example, should a judge engage in tax fraud in their personal financial affairs, this may be a basis to seek their removal from office, but would not amount to the offence of misconduct in public office.

2.52 This was considered in the recent, successful appeal against the issuing of the summons in the private prosecution of Boris Johnson MP, before he became Prime Minister. The High Court stated that the words "plainly mean acting in the discharge of the duties of the office". In the particular circumstances of the case, which concerned statements made in the context of the 2016 EU referendum:

> It was not sufficient to say that he made the statements when in office as a MP and/or Mayor of London, and that "*the public offices held by Mr Johnson provide status but with that status comes influence and authority*" (see para 12 above). That does no more than conclude that he occupied an office which carried influence. This ingredient requires a finding that as he discharged the duties of the office he made the claims impugned. If, as here, he simply held the office and whilst holding it expressed a view contentious and widely challenged, the ingredient of "acting as such" is not made out.[52]

2.53 However, the boundaries are not always readily clear in practice. For example, in the case of *W*, which involved the misuse of a police credit card, the Court of Appeal noted that:

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[52] *Johnson v Westminster Magistrates' Court* [2019] EWHC 1709 (Admin) (03 July 2019), [2019] 1 WLR 6238 at [29].

> Save to the extent that it arose from his employment as a police officer the misconduct did not take the form of a breach of or failure to perform his duties as a police officer.[53]

2.54 Though the appeal was ultimately successful on a different basis, there was also arguably a strong case that the police officer was not "acting as" a police officer in respect of the impugned conduct.[54]

Second element: wilfully neglecting to perform his or her duty and/or wilfully misconducting him or herself

2.55 Although *AG's Reference* does not draw a clear boundary, there are in practice two distinct forms of conduct that are caught by this element of the offence:

(1) wilfully neglecting to perform a duty; and

(2) wilful misconduct.

Wilfully neglecting to perform a duty

2.56 The classic example of this is the case of *Dytham*, where a police officer failed to intervene to prevent a fatal assault. The *AG's Reference* case itself also arose from a neglect of duty factual scenario; in this case, the alleged failure of police to prevent the death of an injured man who was in their custody.

2.57 There is some overlap here with other offences involving neglect of duty, such as manslaughter by gross negligence,[55] and endangerment offences.[56]

Wilful misconduct

2.58 Wilful misconduct refers more generally to deliberate or reckless conduct that goes beyond neglect of duty in public office. In our previous issues and consultation papers we have broadly grouped this kind of behaviour under the term "corruption".[57] Our review of cases prosecuted in recent years suggests that these cases are significantly more common than "neglect of duty" prosecutions.[58]

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53 *R v W* [2010] EWCA Crim 372; [2010] QB 787 at [2].

54 Parsons uses the case to illustrate the wider uncertainty with the current state of the law, stating that: "this was not a case of misconduct in a public office as W's misconduct did not take the form of a breach of, or failure to perform, his duties as a police officer. W should have been charged with theft or, if there had been a false representation, fraud". See S Parsons, "Misconduct in a public office - should it still be prosecuted?" (2012) 76(2) *Journal of Criminal Law* 179, 184.

55 See *R v Adomako* [1995] 1 AC 171.

56 For example, Offences Against the Person Act 1861, ss 27, 34.

57 We recognise that "corruption" is a broad label. In our issues paper, we observed that the label of corruption has often been used – particularly by the media in regard to "corruption" within police – "without reference to any specific definition, but to encapsulate various types of wrongdoing including: bribery, fraud, abuse of authority, perverting the course of justice, neglect of duty and the exploitation of vulnerable people": Issues Paper 1 (2016), para 3.1.

58 Issues Paper 1 (2016), Annex D.

2.59 "Wilful misconduct" can potentially encompass a very broad array of behaviour, but some typical examples in practice include:

(1) Misuse of the public office to obtain improper financial gain – for example, the 2013 case of a local authority registrar who was found guilty of misconduct in public office after issuing five false birth certificates which were then used for benefits fraud.[59]

(2) A misuse of position for some other non-financial reason – for example, an immigration official falsifying information in order to allow immigrants to stay in the country in order to "give them a chance".[60]

(3) Improperly using the public office to access personal information about another – for example, an HMRC official improperly accessing and misusing personal information about an ex-partner.[61]

(4) A public office holder engaging in a sexual relationship in circumstances where the nature of the public office renders this to be serious misconduct – for example, it involves a serious abuse of power, or disrupts a highly sensitive public environment. The various cases which have been pursued in recent years where a prison officer has engaged in a sexual relationship with an inmate are an example of the latter.

2.60 In some of these cases, there may be other offences that could also be pursued; for example, offences contrary to the Fraud Act 2006 may apply, or the defendant may have committed data protection offences contrary to the Data Protection Act 2018.

2.61 The starting point for prosecutors in these circumstances is that the statutory offence should ordinarily be pursued,[62] and this is reflected in CPS prosecution guidance.[63] However, there may be circumstances where a misconduct in public office charge is considered more appropriate, in particular where the statutory offence fails to capture adequately the abuse of public trust involved in the offending conduct, or the maximum penalty available is inadequate given the seriousness of the conduct.

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59 See Newham Recorder, "Former Newham registrar jailed for helping gang illegally claim £4m in benefits" (1 February 2013), available at: https://www.newhamrecorder.co.uk/news/crime-court/former-newham-registrar-jailed-for-helping-gang-illegally-claim-4m-in-benefits-1-1856467.

60 This example is based on the case of Aliya Ali, who in 2009 pleaded guilty to 12 charges of misconduct in public office and was sentenced to 5 years' imprisonment. See, "Home Office worker let in illegal immigrants 'to give them a chance'", *The Telegraph* (26 September 2009) available at: https://www.telegraph.co.uk/news/uknews/crime/6232642/Home-Office-worker-let-in-illegal-immigrants-to-give-them-a-chance.html.

61 See *R v Kadiri* [2017] EWCA Crim 2667; [2019] 1 Cr App R (S) 25.

62 *R v Rimmington* [2005] UKHL 64; [2006] 1 AC 459 at [30].

63 See Crown Prosecution Service, Misconduct in Public Office Legal Guidance (16 July 2018), available at https://www.cps.gov.uk/legal-guidance/misconduct-public-office.

The fault element – "wilfulness"

2.62 In both "neglect of duty" and "misconduct" cases, the underlying fault standard is "wilfulness".

2.63 Wilfulness is now understood to equate to the more widely used criminal standard of "recklessness" – that requires proof of an awareness of a risk of the harm and an unjustified taking of that risk. This is the minimum criminal standard for this offence and is most relevant to cases involving "neglect of duty". In practice, much of the conduct that amounts to "wilful misconduct" is also likely to meet the higher criminal threshold of intention.

2.64 This issue was considered in some detail in *AG's Reference*, where the court affirmed that the approach to recklessness set out in *R v G*[64] should be applied. That is, that:

> There must be an awareness of the duty to act or a subjective recklessness as to the existence of the duty. The recklessness test will apply to the question whether in particular circumstances a duty arises at all as well as to the conduct of the defendant if it does. The subjective test applies both to reckless indifference to the legality of the act or omission and in relation to the consequences of the act or omission.[65]

2.65 In cases involving wilful misconduct of a dishonest nature, following *W* there is arguably also an additional requirement that the prosecution prove that the defendant has behaved in a dishonest manner.

2.66 This decision in *W* has been strongly criticised. For example, Cronin states that the approach of the court "effectively bypassed the statement of law in *Attorney-General's Reference (No. 3 of 2003)* in favour of a selective reading of the older cases".[66]

Third element: to such a degree as to amount to an abuse of the public's trust in the office holder

2.67 This element of the offence essentially defines the seriousness threshold for the imposition of criminal liability, over and above any civil or disciplinary consequences that might flow from the public office holder's conduct.

2.68 The 19th century case of *Borron* emphasised that the conduct must be more than an error of judgment, as "to condemn anyone who had fallen into error or made a mistake, belonged only to the law of a despotic state".[67]

2.69 In practice, the question of whether the threshold for criminal liability has been met is one for the jury, but the Court of Appeal emphasised in *Chapman* that the jury should

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64 [2003] UKHL 50; [2004] 1 AC 1034.

65 *Attorney General's Reference (No 3 of 2003)* [2004] EWCA Crim 868; [2005] QB 73 at [30].

66 A Cronin, "Misconduct in public office: dishonesty is an element if misconduct amounts to theft or fraud" (2010) 74(4) *Journal of Criminal Law* 290, 292.

67 *R v Borron* [1820] 3 B & Ald 432; 106 ER 721.

be directed that the conduct must involve harm to the public interest in order to meet the requisite standard.[68]

2.70 In *Chapman*, Lord Thomas CJ stated that the public office holder must know of the facts and circumstances that would lead "the right-thinking member of the public to conclude that the misconduct was such as is required". However, it need not be proved that the public office holder had reached that same conclusion:

> It was sufficient to prove that he had the means of knowledge available to him to make the necessary assessment of the seriousness of his misconduct; the assessment was for the jury.[69]

2.71 There are a number of factors that a jury might weigh up in considering whether the seriousness of the misconduct met the criminal threshold, including:

(1) The severity of the actual or likely consequences of the behaviour; for example, was there a risk of death or serious injury? Were large sums of money involved? How egregious was the misuse of power?

(2) The motives of the defendant; for example, was there dishonesty or malice involved? Was the conduct a simple mistake, or the result of a more reckless disregard for their public duty?

(3) Other circumstantial factors; for example, how senior was the public official? Did they appreciate the consequences of their actions? Were they appropriately supported in their role?

2.72 It is a difficult threshold for a jury to apply, and there have been successful appeals on the basis that the trial judge has failed to guide the jury properly in this challenging task.[70]

Fourth element: without reasonable excuse or justification

2.73 As we have previously noted,[71] it is unclear whether the final element – "without reasonable excuse or justification" – is really a standalone element of the offence, or an aspect of the broader consideration of whether the conduct is serious enough to warrant criminal sanction.

2.74 The question of "reasonable excuse or justification" can arise in public "whistleblowing" cases. A whistleblower is generally understood to refer to an employee or organisation member who discloses illegal, immoral or illegitimate practices under the control of their employers to persons or organisations who can effect action.[72]

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68 *R v W* [2015] EWCA Crim 539; [2015] 2 Cr App R 10 at [36].

69 [2015] EWCA Crim 539; [2015] 2 Cr App R 10 at [48].

70 See *R v France* [2016] EWCA Crim 1588; [2016] 4 WLR 175.

71 Issues Paper 1 (2016), para 2.208.

72 See J Near and M Miceli, "Organisational dissidence: the case of whistleblowing" (1985) 4 *Journal of Business Ethics* 1, 4.

2.75 Several of the recent prosecutions for misconduct in public office have concerned public office holders who leaked information from police computer systems.[73] The reported cases were mostly sentencing appeals, in which the question of justification did not arise. In some cases, the defendants have claimed that they were acting as whistleblowers where, for the purposes of a misconduct charge, the damage to the public through the unauthorised (and potentially illegal) release of certain information by a public official may need to be weighed against any potential public benefit that arises from having that information in the public domain.

2.76 In *Chapman*,[74] the Court of Appeal dealt with the issue of the public interest within the context of the assessment of whether the breach of duty alleged was serious enough to constitute misconduct. If "seriousness" is defined by reference to that which may harm the public interest, then conduct which benefits the public interest cannot logically amount to misconduct. However, the case did not address the question of "reasonable excuse or justification" in any more detail.

2.77 In *DL*,[75] another case which concerned unauthorised release of information, the Court of Appeal similarly found that in the circumstances of the case:

> the phrase "without justification or reasonable excuse" meant no more than acting culpably or in a blameworthy fashion. Bearing in mind that if the jury were to conclude (as they did) that the standard of the appellant's behaviour fell so far below that which was to be expected as to amount to an abuse of the public trust in him, it is impossible to see how the jury would equally not have concluded that the conduct was culpable.[76]

2.78 We consider this element in more detail in Chapter 5.

OTHER RELEVANT LAWS

2.79 As we have noted above, given the breadth of the conduct encompassed by the common law offence of misconduct in public office, a variety of other offences may also apply depending on the circumstances. These can include gross negligence

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73 *R v Keyte* [1998] 2 Cr App R (S) 165; *R v Kassim* [2005] EWCA Crim 1020; [2006] 1 Cr App R (S) 4*; Attorney General's Reference (No 1 of 2007)* [2007] EWCA Crim 760; [2007] 2 Cr App R (S) 86; *R v Gallagher and others* [2010] EWCA Crim 3201; *R v Stubbs* [2011] EWCA Crim 926; [2011] 2 Cr App R (S) 113; *R v Mungur* [2018] EWCA Crim 1062, [2018] 2 Cr App R (S) 33.

74 *R v Chapman* [2015] EWCA Crim 539; [2015] QB 883.

75 [2011] EWCA Crim 1259; [2011] 2 Cr App R 14.

76 *R v DL* [2011] EWCA Crim 1259; [2011] 2 Cr App R 14 at [21].

manslaughter,[77] endangerment offences,[78] fraud,[79] bribery,[80] data protection offences,[81] and sexual offences,[82] amongst others.

2.80 There are also other laws that target very similar grounds to misconduct in public office, notably:

- the offence of improper exercise of police powers and privileges contrary to section 26 of the Criminal Justice and Courts Act 2015; and
- the tort of misfeasance in public office.

2.81 We outline the key elements of each below.

Corrupt or other improper exercise of police powers and privileges

2.82 In 2015, a new offence of "corrupt or other improper exercise of police powers and privileges" was introduced.[83]

2.83 This followed the findings of the Stephen Lawrence Independent Review, conducted by Mark Ellison QC.[84]

2.84 The offence criminalises police constables who:

(a) exercise the powers and privileges of a constable improperly, and

(b) know or ought to know that the exercise is improper.[85]

2.85 "Improper" exercise of powers and privileges is defined further as follows:

> A police constable exercises the powers and privileges of a constable improperly if—
>
> (a) he or she exercises a power or privilege of a constable for the purpose of achieving—

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77 See *R v Adomako* [1995] 1 AC 171, and further discussion in Chapter 6.

78 eg Doing or omitting anything to endanger passengers by railway contrary to section 34 of the Offences Against the Person Act 1861.

79 Contrary to the Fraud Act 2006.

80 Contrary to the Bribery Act 2010.

81 For example, offences under section 170 of the Data Protection Act 2018 or contrary to the Official Secrets Act 1989. There are a huge number of statutory offences that can apply in these circumstances. For further details see: Protection of Official Data (2017) Law Commission Consultation Paper No 230.

82 Contrary to the Sexual Offences Act 2003.

83 Criminal Justice and Courts Act 2015, s 26.

84 See M Ellison QC, The Stephen Lawrence Independent Review: Possible Corruption and the Role of Undercover Policing in the Stephen Lawrence Case (6 March 2014) HC 1038, available at https://www.gov.uk/government/publications/stephen-lawrence-independent-review.

85 Criminal Justice and Courts Act 2015, s 26(1).

(i) a benefit for himself or herself, or

(ii) a benefit or a detriment for another person, and

(b) a reasonable person would not expect the power or privilege to be exercised for the purpose of achieving that benefit or detriment.[86]

2.86 The maximum penalty for the offence is 14 years' imprisonment.[87]

2.87 The criminalisation of "improper exercise of powers and privileges" covers similar conduct to the "wilful misconduct" criminalised by the offence of misconduct in public office. However, it arguably operates at an even lower fault threshold because there is no further qualifier on the threshold of "improper". There have been no reported judgments involving this offence, and only six convictions have been secured since its implementation.[88]

Tort of misfeasance in public office

2.88 The tort of misfeasance is a civil remedy which operates in parallel with the criminal offence of misconduct in public office. We published a detailed explanation of the tort (authored by Mark Aronson) as Appendix B to our issues paper.[89] Below we outline its key elements.

2.89 While early manifestations of the tort date back to the 18th century,[90] it was not formally recognised until the 20th century,[91] receiving clear judicial acknowledgment in the English Courts from the 1980s.[92]

2.90 The core elements of the tort are:

(1) an abuse of public power or authority;

(2) by a public officer;

(3) who either:

(a) knew that he or she was abusing their public power or authority, or

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86 Criminal Justice and Courts Act 2015, s 26(4).

87 Criminal Justice and Courts Act 2015, s 26(2).

88 As at December 2019. See Ministry of Justice, *Criminal Justice System Statistics publication: Proceedings and Outcomes by Home Office Code 2013 to 2019: Pivot Table Analytical Tool for England and Wales Time Period: 12 months ending December 2013 to 12 months ending December 2019* (May 2020), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888344/HO-code-tool-principal-offence-2019.xlsx.

89 M Aronson, Misfeasance in Public Office, in Issues Paper 1 (2016), Appendix B.

90 *Ashby v White* (1703) 2 Ld Raym 938; 1 Smith LC (13th ed) 253.

91 M Aronson, Misfeasance in Public Office, in Issues Paper 1 (2016), Appendix B, p 4.

92 *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] 1 QB 716.

(b) was recklessly indifferent as to the limits to or restraints upon their public power or authority;

(4) and who acted or omitted to act:

(a) with either the intention of harming the claimant, or

(b) with the knowledge of the probability of harming the claimant, or

(c) with a conscious and reckless indifference to the probability of harming the claimant.[93]

2.91 One key difference between the tort and the criminal offence is the tort's lack of a broader requirement for harm to be caused to the "public" through the actions of the defendant. However, the tort is also narrower than the criminal offence in that it entails an underlying requirement of bad faith on the part of the defendant, which is not always necessarily a component of the criminal offence.

2.92 The House of Lords decision in *Three Rivers District Council v Bank of England (No 3)*[94] is the leading English case on the tort of misfeasance in public office. This case was brought by depositors in a failed bank. The depositors claimed that the regulator, the Bank of England, should never have allowed the failed bank to be licensed, and sought compensation. The claim failed as the depositors failed to demonstrate the requisite bad faith on the part of the defendant.

2.93 Misfeasance in public office has limited application given its restriction solely to public office holders, and high threshold requirement of bad faith. As such, the number of successful claims is low, and the exact boundaries of the tort are not fully developed in case law.[95]

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93 M Aronson, Misfeasance in Public Office, in Issues Paper 1 (2016), Appendix B, p 1.

94 [2001] UKHL 16; [2003] 2 AC 1.

95 M Aronson, Misfeasance in Public Office, in Issues Paper 1 (2016), Appendix B, p 19.

Chapter 3: The case for reform

INTRODUCTION

3.1 As prosecution rates for misconduct in public office have risen in recent years, so have calls for its reform.[1]

3.2 The most commonly expressed concern is that the offence in its current form is not sufficiently clear or precise, and this imprecision creates the potential for misuse and injustice. This is further amplified by the fact that the offence, as a common law offence, carries a maximum penalty of life imprisonment.

3.3 In this chapter we outline the criticisms that have been raised about the offence, and the views on these that have been expressed during our consultation process. We conclude that in light of the seriousness of these concerns, the offence should not be retained in its current form.

3.4 We then consider whether some kind of replacement offence or offences are needed, or whether other existing offences adequately deal with the relevant offending conduct. We find that there is an ongoing need for offences specifically targeted at the misconduct of public office holders, so as to capture certain harms and wrongs that would otherwise be inadequately dealt with by the criminal law.

3.5 Finally, we outline in broad terms our proposals for reform, which we explain in more detail in subsequent chapters.

KEY PROBLEMS WITH THE CURRENT OFFENCE

3.6 In Chapter 2 we considered each of the elements of the common law offence. There are a number of problems with how these elements operate in practice. The most significant of these are:

(1) a lack of clarity in the terms and extent of the current offence;

(2) the risk of overuse and misuse of the offence, leading to injustice;

(3) its use as a "catch all" offence, in place of more targeted statutory offences; and

(4) a concern that it tends to be used primarily against relatively junior officials, rather than more senior decision-makers that members of the public might more readily expect to be held criminally accountable.

3.7 We consider each of these issues in turn.

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[1] eg Judicial calls for a review of the offence have been made in the cases of *R v DL* [2011] EWCA Crim 1259; [2011] 2 Cr App R 14 at [21] and *R v Cosford* [2013] EWCA Crim 466; [2014] QB 81 at [39].

Lack of clarity

3.8 In our consultation paper we identified a number of key concerns with the clarity and workability of the current offence.

3.9 In particular, we noted that:

(1) exactly what is meant by "public office" and "acting as such" is not sufficiently clearly defined;

(2) the fault element that must be proved is unclear and may depend on the circumstances of the case;

(3) the seriousness requirement – that the offence amounts to an "abuse of the public's trust" – is highly subjective and difficult to apply; and

(4) it is not clear whether the fourth element – "without reasonable excuse or justification" – should be treated as a separate element of the offence.

The definition of "public office" and "acting as such"

3.10 The application of the offence of misconduct in public office necessarily hinges on the definition of what amounts to "public office".

3.11 In practice, drawing clear boundaries between the "public" and "private" spheres is not always easy. This is compounded by the fact that many traditionally public functions, such as the operation of prisons, and the provision of social services, are now regularly outsourced in whole or in part to private organisations.

3.12 As we outlined in Chapter 2, a number of cases in recent years, notably *Belton*,[2] *Cosford*[3] and *Mitchell*,[4] have considered the question of what amounts to "public office" for the purposes of the offence. While a helpful test was outlined in *Cosford*,[5] this has not completely resolved the ambiguity.

3.13 Misconduct in public office is not the only context in which this difficulty arises. There has been similar uncertainty about what amounts to a "public authority" for the purposes of section 6(3)(b) of the Human Rights Act 1998,[6] and also when organisations might be considered to be exercising "public authority" such that they may be subject to judicial review.[7] However, in the criminal law context the concern is particularly acute, as certainty and consistency are of such fundamental importance to

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2 *R v Belton* [2011] QB 934; [2010] EWCA Crim 2857.

3 *R v Cosford* [2013] EWCA Crim 466; [2014] QB 81.

4 *R v Mitchell* [2014] EWCA Crim 318; [2014] 2 Cr App R 2.

5 See further paragraph 2.25 of this report.

6 See *YL v Birmingham City Council* [2007] UKHL 27; [2008] 1 AC 95.

7 The leading case on this issue is *R v Panel on Takeovers and Mergers Ex p. Datafin Plc* [1987] QB 815 (*Datafin*).

criminal justice.[8] Further, as we noted in Annex C to our issues paper, this lack of certainty may be incompatible with article 7 of the European Convention on Human Rights ("no punishment without law").[9]

3.14 The case law has – until recently – also been somewhat unclear about the meaning and effect of the phrase "acting as such". However, the recent case of *Johnson v Westminster Magistrates Court* has provided some further definition, with the High Court stating that the words "plainly mean acting in the discharge of the duties of the office".[10] For example, if a local authority worker were to use a private social media account to engage in abusive internet trolling during their work hours, that was unconnected to their job, it would be difficult to argue that they were "acting as" a public office holder for the purposes of the misconduct offence.

The fault element

3.15 The fault element of the offence – "wilfulness" – covers two distinct concepts: "neglecting to perform his or her duty" and/or "misconducting him or herself". In *Attorney General's Reference (No 3 of 2003)* ("*AG's Reference*"),[11] the Court of Appeal clarified that "wilfulness" has the same meaning as "subjective recklessness"[12] as defined in *R v G*.[13] However, the subsequent case of *W*, which involved allegations of misuse of a credit card by a police officer, introduced an additional requirement that in cases of dishonesty offences, such as theft or fraud, both "wilfulness" and "dishonesty" must be proved as separate elements.

3.16 This context-dependant approach to fault – which requires an element of dishonesty in some circumstances and not others – creates the potential for further confusion and complexity in applying the offence in practice. Later in this report we make recommendations to replace the common law offence with two distinct offences: breach of duty and corruption, and to define more clearly the fault elements within each. Through this we seek to make the offence more workable for law enforcement bodies, and to target more precisely the wrongdoing involved.

The seriousness threshold

3.17 The offence contains a threshold of seriousness, which establishes the degree of wrongdoing necessary for a conviction. This is that the public office holder neglected their duty, or misconducted themselves, "to such a degree as to amount to an abuse of the public's trust in the office holder".[14]

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8 *Kokkinakis v Greece* (1994) 17 EHRR 397 at [52]. See also K Stevenson and C Harris, "Breaking the thrall of ambiguity: simplification (of the criminal law) as an emerging human rights imperative" (2010) 74(6) *Journal of Criminal Law* 516.

9 Issues Paper 1 (2016), Annex C [C.35].

10 *Johnson v Westminster Magistrates' Court* [2019] EWHC 1709 (Admin) (03 July 2019); [2019] 1 WLR 6238 at [29].

11 [2004] EWCA Crim 868; [2005] QB 73.

12 *Attorney General's Reference (No 3 of 2003)* [2004] EWCA Crim 868; [2005] QB 73 at [26] to [30].

13 [2004] UKHL 50; [2004] 1 AC 1034.

14 *Attorney General's Reference (No 3 of 2003)* [2004] EWCA Crim 868; [2005] QB 73 at [61].

3.18 The Court of Appeal in *Chapman* clarified that a jury considering this question should be directed to consider two issues:

(1) Was the misconduct serious enough to warrant criminal punishment?

(2) Did the conduct harm the public interest?[15]

3.19 There is a degree of circularity involved in the first part of this assessment; is the offence criminal because it is serious, or serious because it is criminal? This is of limited assistance as a means of discerning a criminal standard, although the Court of Appeal in *Misra* has ruled that tests of this type do not offend basic criminal justice principles.[16]

3.20 More fundamentally, the question the jury is being asked in this context is highly subjective: when is misconduct serious enough that it becomes a criminal, not a civil or disciplinary issue? Views may diverge widely on this question in any given factual scenario. For example, while a number of misconduct convictions have been made in relation to consensual sexual relationships between prison staff and inmates, the view that this should amount to a criminal (rather than disciplinary) issue was not universally shared in our consultation discussions.

"Without reasonable excuse or justification"

3.21 As we noted in Chapter 2 and our previous papers, it is not clear whether the fourth element of the offence – "without reasonable excuse or justification" – constitutes a distinct defence to the offence, or is simply an aspect of the consideration of whether the offence has been committed at all. Essentially, if a "reasonable excuse or justification" for the conduct exists, there is an argument that it should not be considered misconduct in the first place.

3.22 This issue was considered by the Court of Appeal in *DL*.[17] On the facts of this case (which involved a civilian police employee passing on confidential information to a member of the criminal fraternity who he argued was an informant), the phrase "without justification or reasonable excuse" was found to mean no more than acting culpably or in a blameworthy fashion.[18]

3.23 Our analysis of the case law suggests that in practice, this element is rarely treated separately.

3.24 However, one context where it may have particular application, although this is yet to be properly tested, is in the context of "whistleblowing" cases. In these cases, a public officer may seek to argue that any "misconduct" they have committed through revealing confidential information, and thereby damaging public confidence in that

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15 *R v Chapman* [2015] EWCA Crim 539; [2015] QB 883 at [36] to [40].

16 See *R v Misra* [2004] EWCA Crim 2375; [2005] 1 Cr App R 21 at [59], where the Court of Appeal considered a similar test in the context of the offence of gross negligence manslaughter, and its compatibility with article 7 of the European Convention on Human Rights.

17 [2011] EWCA Crim 1259; [2011] 2 Cr App R 14.

18 *R v DL* [2011] EWCA Crim 1259; [2011] 2 Cr App R 14 at [21].

institution, is justified by the "greater public interest" in what they have revealed. We consider this particular context in further detail in Chapter 5.

Overreach and overuse

3.25 Another significant strand of concern expressed about the current offence is that, at least in recent years, cases have been pursued in circumstances that are considered to be inappropriate. The main concerns are around the breadth or extent of the types of conduct covered, and the pursuit of cases where the conduct is not considered sufficiently wrongful so as to warrant criminal sanction.

3.26 In other words – the criticism can be divided into two categories. The first category is cases that we describe below as potential "overreach" of the offence: whereby its ambiguous terms encourage law enforcement agencies to pursue it in new contexts which many consider unjust. The second we categorise as "overuse", where the conduct is a more recognised category, but the criticism relates to the pursuit of the offence in circumstances that are not grave enough to amount to a "breach of the public's trust", and the pursuit of less serious offences, or non-criminal disciplinary sanction would be more appropriate.

Overreach

3.27 Probably the most high-profile example of perceived "overreach" relates to the charges pursued against journalists and purported whistleblowers as part of Operation Elveden.[19] The relevant cases involved payments made by journalists to public officials to reveal confidential information. The public officials were charged with misconduct in public office, while the journalists were charged as accessories to the commission of misconduct in public office.

3.28 It has been suggested that the prosecution of journalists for encouraging misconduct in public office in such contexts has a potentially chilling effect on free speech and freedom of the press. For example, when commenting on the acquittal of four journalists from The Sun who were prosecuted for misconduct in connection with payments to military sources, Geoffrey Cox QC MP (former Attorney General) stated (in his then capacity as a barrister):

> The jailing of journalists and editors for newsgathering, provided it was information not of a restricted or classified kind, does raise questions as to proportionality.
>
> And if you have a vague law which applies to the newsgathering and editorial decisions, you have the risk that people will not report things that are in the public interest for fear of transgressing a vague law.[20]

3.29 The case of *W* (see para 3.15) has also attracted criticism as an example of overreach of the offence, and the Crown Prosecution Service ("CPS") have since acknowledged that misconduct was not the appropriate charge in this case, stating in their submission that:

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19 See paragraphs 2.28 to 2.34 of this report.

20 BBC, *Sun journalist's lawyer queries use of 'vague' law* (21 March 2015), available at https://www.bbc.co.uk/news/uk-31998319.

> The case has rightly been subject to criticism and in our view, was not a case about the abuse of public trust. There was no breach or failure to perform the duties of a public officer. It was a simple case of dishonesty and ought to have been charged as such.[21]

Overuse

3.30 Additionally, public sector unions and professional representative bodies that we met expressed considerable concern that police investigations were being conducted against public office holders for matters that – while potentially requiring disciplinary action – they did not believe should be considered criminal in nature. They stated that many of these investigations did not actually result in prosecution, but caused significant stress and hardship to individuals who had the prospect of prosecution hanging over their heads for months or even years.

3.31 To the extent that the offence is sometimes used inappropriately, at least one possible cause is likely to be the imprecision in its terms that we outlined at paragraphs 3.8 to 3.24 above. Later in this chapter we outline our proposals to refine these terms.

3.32 To assist with prosecution decisions regarding the offence, the CPS has published detailed charging guidance for a number of years. However, these concerns about charging persist. An additional option to strengthen charging rigour, that we consider further in Chapter 8, is therefore to introduce a requirement of the consent of the Director of Public Prosecutions to launch prosecutions.

An imprecise "catch all" offence

3.33 Related to the concern of overuse of the offence in some contexts is the criticism that its broad ambit means that it is being used as a "catch all" offence that is charged in addition to or instead of more appropriate statutory offences. We have also heard criticism that it is at times pursued as an alternative to more appropriate non-criminal disciplinary and civil remedies.

3.34 One context where this concern has arisen is in cases where death has occurred through alleged negligence of a public office holder. There have been some cases – including *AG's Reference* – where a misconduct in public office charge has been added as an alternative to charges of gross negligence manslaughter, in circumstances where the causation element of that offence is difficult to prove.[22] The Court of Appeal discouraged this approach in *AG's Reference*, although did not entirely rule it out, stating:

> we do not consider that, in future … a charge of misconduct in public office should routinely be added, as an alternative, to a charge of manslaughter by gross negligence on the basis that it may be difficult to establish causation.[23]

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21 CPS response to the consultation paper, p 5.

22 See, eg *R v Travers* (26 January 2018) Central Criminal Court (unreported). The gross negligence manslaughter charge also requires proof of a serious and obvious risk of death which is not a requirement in misconduct.

23 *Attorney General's Reference (No 3 of 2003)* [2004] EWCA Crim 868; [2005] QB 73 at [64].

3.35 This is not to say that it is never appropriate to charge misconduct in public office where other more targeted offences might be available. As the CPS charging guidance notes, a statutory offence alone may not sufficiently acknowledge the serious breach of public trust involved in the conduct. For example, if an official were to access confidential tax records to discredit another in an inter-familial feud, a data protection offence alone may not be sufficiently descriptive of the wrongdoing involved. Similarly, the maximum punishment for data protection offences (often capped at a fine) may be considered insufficient.

3.36 It is also noteworthy that the offence of "corrupt or other improper exercise of police powers and privileges",[24] which overlaps significantly with misconduct in public office, has only resulted in six convictions since its enactment in 2015.[25] This suggests a reluctance to move towards a more specific statutory offence, notwithstanding that it is arguably easier to prove.[26] However, the number of prosecutions did increase slightly in 2019, as the following table demonstrates:

Table three: Prosecutions and convictions for the offence of "corrupt or other improper exercise of police powers and privileges" contrary to section 26 of the Criminal Justice and Courts Act 2015

	2015	2016	2017	2018	2019
Prosecutions	0	3	1	2	5
Convictions	0	2	0	1	3

Targeting the wrong offenders?

3.37 Another significant concern expressed by unions and representative bodies is that the offence disproportionately targets "frontline", and generally more junior, staff such as police and prison officers, rather than senior managers and politicians. It was argued that this was unfair, because often, the difficulty the public office holder found themselves in could at least partly be explained by a lack of training, support and resources, or indeed the nature of the role itself, which exposed the office holder to various challenging and competing risks. They also noted that this was at odds with what might be the general public's expectation, that an offence of this seriousness should be used to prosecute senior officials, whose misconduct amounted to the most egregious abuse of public trust.

3.38 Further, and more fundamentally, they argued that in cases of alleged neglect of duty leading to harm – such as deaths in prisons and police custody suites – blame, and in some cases criminal responsibility, was being directed disproportionately towards the often relatively low-paid, junior officers working at the frontline. This was occurring instead of considering the impact of staffing and resourcing decisions further up the

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24 Criminal Justice and Courts Act 2015, s 26.

25 As at December 2019. See Ministry of Justice, *Criminal Justice System Statistics publication: Proceedings and Outcomes by Home Office Code 2013 to 2019: Pivot Table Analytical Tool for England and Wales Time Period: 12 months ending December 2013 to 12 months ending December 2019* (May 2020), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888344/HO-code-tool-principal-offence-2019.xlsx.

26 See paragraphs 2.82 to 2.87 of this report.

management chain. In essence, they suggested that it was often those with very limited power to influence a situation who were held most responsible.

3.39 The Commission has not been in a position to conduct a robust empirical analysis of the relative seniority of individuals charged with misconduct in public office. However, a review of the cases outlined as Appendix D to our issues paper suggests that the vast majority of prosecutions are not directed at senior managers or public figures, but rather low to mid ranking level officials.

Conclusions on the future of the common law offence

3.40 Our analysis of the offence, and the consultation responses we have received, has led us to the view that it is important that an offence or offences targeted at serious misconduct by public officials be retained in some form. However, we consider that there are enough genuine concerns with the terms and the practical effects of the current offence that we cannot recommend that it be retained in its current form. In summary, we consider the following to be the main concerns:

(1) It is not clear in all cases whether a person might be subject to the offence, as the category of "public office" is not defined with sufficient precision. This creates problems in practice, including erroneous charging decisions and successful appeals, and may offend article 7 of the European Convention on Human Rights.

(2) The fault element that must be proved appears to vary depending on the circumstances of the case, creating additional complexity, and leading to costly appeals.

(3) The seriousness threshold – that the offence amounts to an "abuse of the public's trust" – is highly subjective and difficult to apply. This has led to concern that the offence is being pursued in some circumstances that are not sufficiently blameworthy so as to justify criminal consequences.

(4) There is a general lack of definition in the scope and subject matter of the offence, which has led to its application in contentious contexts.

3.41 The unifying concern is that the offence fails to provide the certainty and clarity that the criminal law demands, and is therefore prone to error, misuse and abuse by law enforcement agencies.

3.42 This view is further supported by those expressed in our consultation process, where there was almost unanimous agreement that the offence should not be retained in its current form. The Law Society, for example, stated in response to our issues paper that:

> We agree that the existing complexity inherent in this common law offence is such that the need for reform is indeed pressing.[27]

[27] The Law Society – Response to Issues Paper 1 (2016), p 2.

3.43 We had already reached this provisional view in our consultation paper, where we stated:

> Given the extent and fundamental nature of the problems with the current offence our provisional view is that we should not propose, as reform options, either its retention or codification.[28]

3.44 Nothing in our subsequent consultations has changed our view in this regard.

Recommendation 1.

3.45 The common law offence of misconduct in public office should not be retained in its current form.

ABOLITION WITHOUT REPLACEMENT?

3.46 Having identified some serious concerns with the current law, it is necessary to consider whether there is an ongoing need for a similar offence, or if the criminal law would function adequately without it. This is essentially a consideration of the merits of what we proposed as "Option 3" in our consultation paper: abolition of the offence without replacement.[29]

3.47 Below we outline some of the forms of conduct that are criminalised by the offence that might not be captured by other laws, as well as our analysis of the harms and wrongs that might justify having such an offence.

3.48 We then consider the views expressed in consultation, and also look to relevant international jurisdictions by way of comparison.

Conduct that is uniquely criminalised by misconduct in public office

3.49 As we have noted, the fact that no particular form of conduct is specified in the offence of misconduct in public office, means that potentially, a very wide array of behaviour could fall within the offence. While other offences may also apply in some cases, in our issues paper[30] we considered a compilation of unreported prosecutions for misconduct in public office since 2005.[31] We identified the following five circumstances where no other offence may be available, or would be considered adequate to address the wrongdoing:

(1) the use of a position as a public office holder to facilitate a sexual relationship – for example, a prison officer with an inmate;

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28 Consultation Paper (2016), para 2.149.

29 Consultation Paper (2016), Ch 7.

30 Issues Paper 1 (2016), Ch 6.

31 For further details, see Issues Paper 1 (2016), Annex D.

(2) engaging in a relationship (not necessarily sexual) that could give rise to a conflict of interest – for example, a police officer developing an intimate personal relationship with a suspect of a crime;

(3) acting under the influence of a conflict of interest or of a bias or prejudice – for example, a homophobic immigration official systematically denying refugee status to LGBT+ applicants;

(4) neglect of duty giving rise to serious harm, to individuals or to the public interest – for example, a child safety officer failing to perform basic checks leading to damaging neglect of a child; and

(5) misuse of information – for example, the use of a confidential database to find out personal details about an ex-partner's new partner for the purposes of damaging the ex-partner's relationship with their children.

3.50 These are circumstances where it is likely that without the offence of misconduct in public office, no prosecution could occur, or any criminal penalty that was available would not wholly encapsulate the extent of the wrongdoing involved.[32]

3.51 The recent case of *Harris*,[33] which involved a police Sexual Offences Liaison Officer who accessed a rape victim's email and Facebook account and downloaded childhood images of her, is a good example of the latter category. In this case, simply pursuing the other charges – possession of indecent photographs of a child, and making indecent photographs of a child – or indeed any other available data breach or computer misuse offence, would not adequately or most accurately describe the serious breach of public trust that occurred.

3.52 Whilst there may be debate as to whether some of the above scenarios might better be dealt with through disciplinary action, many would consider criminal prosecution an appropriate course in the more extreme cases of each, such as in *Harris*.

3.53 By contrast, we noted the following as cases where there is a stronger argument that other offences do adequately address the conduct, including:[34]

(1) public office holders who exploit their positions to facilitate financial gain;[35]

(2) payments accepted by an individual in advance of becoming a public office holder, where the payment would cause a conflict with their future functions as a public office holder;[36]

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32 eg If a police officer were to misuse a confidential database to obtain the contact details of a victim, and seek to pursue a relationship with them, a prosecution merely on the basis of database misuse would not fully describe or condemn the breach of public trust involved with the subsequent misuse of that information.

33 *R v Harris* [2018] EWCA Crim 2002; [2019] 1 Cr App R (S) 18.

34 See Consultation Paper (2016), para 3.3.05 and Issues Paper 1 (2016), Annex D.

35 Fraud Act 2006, s 4.

36 Bribery Act 2010, s 2.

(3) interference with evidence by public office holders;[37] and

(4) conveyance of non-prohibited, but potentially harmful or disruptive, articles into prison by public office holders.[38]

3.54 In most of the first three circumstances, adequate offences exist under the Bribery Act 2010, Fraud Act 2006, Theft Act 1968, Perjury Act 1911, Forgery and Counterfeiting Act 1981 and Sale of Offices Act 1809 amongst others, while in the fourth category there are offences under the Prison Act 1952 which may apply. However, there may remain an argument for pursuing misconduct in public office in such cases to reflect the fact of the abuse of position as a public office holder, and thereby reflect the full wrongfulness and gravity of the conduct in question.

Harms and wrongs in the current offence

3.55 In our issues paper we outlined a theoretical approach to analysing the moral content of criminal offences. We adopted the approach of Professor Stuart Green who divides the moral content into three basic elements: culpability, harmfulness and moral wrongfulness.[39] In summary:

(1) Culpability reflects the mental element with which the offence is committed.

(2) Harmfulness reflects the degree to which a criminal act causes, or at least risks causing, harm to others or to one's self.

(3) Wrongfulness reflects the way in which the criminal act involves the violation of a specific moral norm or set of norms.

3.56 Legal theorists differ widely in their views about the relative importance of these requirements, about their exact meaning and about the use to be made of these concepts in defining an offence. However, broadly, under this theoretical approach, an activity should not be made criminal unless:

(1) it does some harm (or at least, harm would result from failure to criminalise that activity); and

(2) according to generally accepted moral standards, it is wrong.

3.57 In our consultation paper we considered the harms and wrongs in the existing offence of misconduct in public office in some detail, as we sought to unpack the theoretical justification for an offence of misconduct in public office.[40]

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37 Most notably, the common law offence of perverting the course of justice. See *R v Vreones* [1891] 1 QB 360.

38 Prison Act 1952, s 40C.

39 Stuart P Green, "Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offences" (1997) 46 *Emory Law Journal* 1533. Professor Green was an academic on our advisory panel for this project.

40 Consultation Paper (2016), Ch 3.

3.58 In other words, we sought to identify the "harms" the offence is designed to protect the public from, and the moral "wrongs" that would justify the imposition of criminal liability.

Harm to the public interest

3.59 With regard to harms, we identified "harm to the public interest" as the primary form of harm underlying the offence. By this we referred particularly to damage to public confidence in the institutions of government caused by the misconduct of public office holders. There is often a particular harm suffered by an individual in misconduct cases – such as the death of the victim of the assault in *Dytham*,[41] or an invasion of privacy in data breach cases such as *Kadiri.*[42] However, the unifying feature of misconduct cases is the broader harm to public confidence – the breach of trust – the conduct creates.

Wrongs

3.60 We then considered the key wrongs underpinning the offence, identifying:

(1) abuse of position for a personal advantage;

(2) misgovernment or abuse of power, position or authority; in particular the use of governmental powers or positions for improper motives or in an oppressive or extortionate way; and

(3) breach of the public's trust.

3.61 We divided breach of trust into two further categories:

(1) Breach of trust in the "weak sense": referring to the public's general expectation of trust in the competence of public officials. This generally applies to cases involving "neglect of duty".

(2) Breach of trust in the "strong sense": which involves a breach of a particular duty of loyalty owed by the office holder to others arising from their role. This might be equated to the civil law concept of a "fiduciary duty" – whereby the fiduciary has entered into a relationship of special trust and confidence towards one or more others. This is more relevant to cases involving "wilful misconduct".

3.62 Of the three wrongs we identified, we considered breach of the public's trust to be the most complete underlying rationale for the offence, accounting for almost all circumstances where the offence is pursued.

3.63 While "abuse of position" is often a component of misconduct cases, our analysis revealed that it could not alone be considered a justification for the offence. This was because it was too broad a concept (not, for example, confined to public office) and it

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41 *R v Dytham* [1979] QB 722.

42 *R v Kadiri* [2017] EWCA Crim 2667, [2019] 1 Cr App R (S) 25. In this case, an HMRC employee pleaded guilty to misconduct in public office (and wrongful disclosure of Revenue and Customs information), after accessing databases for reasons other than work that were motivated by her husband's relationship with a new partner, rather than financial reasons.

also did not easily encapsulate cases such as *Dytham*, which involve conduct more naturally understood as a breach of a duty, rather than an abuse of a position.

3.64 "Misgovernment" is the wrong most uniquely tailored to the "public office" context of the offence. However, as with "abuse of position" (with which there is significant overlap), it does not account for all cases. A focus on the oppressive or extortionate use of state power does not easily describe failure to act scenarios such as *Dytham*, and cases which involve very poor judgment – such as some instances of inappropriate, consensual relations between prison officers and prisoners – rather than conscious misuse of power.

Comparing the offence and the underlying harms and wrongs

3.65 In comparing the conduct captured by the current offence, and the underlying harms and wrongs, we concluded that there was no single unifying justification for the offence. Different rationales apply more strongly in different contexts. Considering the five categories of conduct outlined at paragraph 3.49, we highlighted the following wrongs in each:

(1) **The use of a position as a public office holder to facilitate a sexual relationship**: this conduct may be described as misgovernment and may be characterised as an "abuse of position" or "breach of public trust".

(2) **Relationships that could give rise to a conflict of interest**, which could again be characterised by either an "abuse of position" or "breach of public trust".

(3) **Decisions taken for a corrupt purpose**, which go beyond merely unpopular decisions, or genuine mistakes. We identified breach of trust in the "stronger sense" – that is the breach of a duty not to allow the decision-making process to be influenced, or appear to be influenced, by bias, prejudice or conflicts of interest – as a unifying underlying wrong in these cases. Depending on the circumstances, "abuse of position" and "misgovernment" may also be relevant.

(4) **Neglect of duty giving rise to serious harm**, which we categorised as a "negative form of misgovernment", or breach of trust in the "weaker sense".

(5) **Misuse of information**, which correlates most closely with "abuse of position" but also may involve a "breach of public trust".

3.66 We found that the strongest rationale for offences lay in cases involving corruption and neglect of duty by public officials. This would also entail the broadest application of the offence to the various forms of wrongdoing that might be involved in misconduct in public office. This has therefore been the main focus of our proposals for reform, which focus on:

(1) corruption by a public office holder, which we describe in detail in Chapter 5; and

(2) breach of duty by a public office holder, which we describe in detail in Chapter 6.

A different theoretical approach: Horder and the use of the "role" theory of criminalisation

3.67 Throughout this review we have analysed the current offence within a traditional criminal theory framework of harms and wrongs, which we outlined at paragraphs 3.55 to 3.58. The proposals we developed in our consultation paper, and the recommendations we make in this report have been underpinned by this approach.

3.68 However, it is important that we acknowledge that since the publication of our consultation paper, a different approach to theorising the offence has been proposed by Professor Jeremy Horder, who has published a book entitled "Criminal Misconduct in Office".[43]

3.69 In this book, Horder emphasises the need for the law to "clearly and unequivocally" condemn "all abuses of public position, power, or duty".[44] He prefers a formulation of the offence which – in contrast to the offences we outline in Chapter 5 and 6 – does not require "serious" impropriety or "serious" harm, viewing this additional, qualifying standard as unnecessary. He argues that the misconduct offence cannot be very securely captured by a straightforward application of the harm principle.[45]

3.70 Horder contends that instead, the emphasis should be upon whether there has been a wilful "abuse" of power or duty, as opposed to mere error of judgment or shortcomings.[46] However, he acknowledges that the issue of seriousness or wrongdoing may naturally contribute to a judgment that there was an abuse of position, power, or duty.[47]

3.71 Horder argues that the "role" theory of criminalisation better justifies the misconduct offence, and that part of being a public servant "is to uphold and promote one or more 'public goods' in one's work".[48] Expanding on the role theory, Horder observes that "the range of someone's responsibilities in criminal law can depend on the nature of the role they occupy".[49] He adds that "the role theory is, in part … aimed at underpinning the commitment of public officials to the promotion of key public goods".[50] Using the example of the police officer, Horder argues that for such public officials,

> it is part of the role … – a matter of high obligation – to behave in a restrained and civilised manner. Further, it is a stain on the police service if there are some officers

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43 J Horder, *Criminal Misconduct in Office* (2018).

44 J Horder, *Criminal Misconduct in Office* (2018), p 19.

45 J Horder, *Criminal Misconduct in Office* (2018), p 38.

46 J Horder, *Criminal Misconduct in Office* (2018), pp 19, 32.

47 J Horder, *Criminal Misconduct in Office* (2018), p 19.

48 J Horder, *Criminal Misconduct in Office* (2018), p 35.

49 J Horder, *Criminal Misconduct in Office* (2018), p 37; see AP Simester and A Hirsch, *Crime, Harms and Wrongs: On the Principles of Criminalisation* (2011), p 64.

50 J Horder, *Criminal Misconduct in Office* (2018), p 38.

– even a tiny number – who lack the qualities of self-restraint and civility in dealing with members of the public.[51]

3.72 Horder considers that "the role theory may justify criminalisation in circumstances where the possibility of more or less remote harm is not, as such, the primary concern".[52] Specifically, he focuses on cases where someone has "voluntarily taken on a role the value of which comes from the part the holder of the role will play in honouring and sustaining important public goods, such as honesty, integrity, openness, accountability, self-restraint, and the maintenance of discretion in relation to confidential information".[53]

3.73 In such cases, Horder contends that the role theory can justify the criminalisation of conduct dishonouring those goods, irrespective of whether the conduct is of a type that risks remote harm.

3.74 He also emphasises the need to consider the "organisation dimension" to liability for misconduct, arguing that the complicity or toleration of misconduct by more senior members of an organisation should also amount to an offence.[54]

3.75 He advocates two replacement offences for common law misconduct in public office:

(1) Wilful neglect or misconduct (whether through act or omission), amounting to an abuse of a public position, power, or duty. In appropriate cases, Horder suggests this might be dealt with through the imposition of an administrative penalty.

(2) Misconduct (whether through act or omission), amounting to an abuse of a public position, power, or duty, caused by gross negligence on the part of a public organisation, in which negligence on the part of senior managers played a substantial role.

3.76 We consider the first of these proposals in more detail, as it more directly relates to the proposals for reform we are considering in this review.

Our assessment of Horder's arguments

3.77 We have considered Horder's arguments and his carefully developed proposals closely.

3.78 The standard of public conduct he outlines in the offence of "wilful neglect or misconduct" is a laudable one, and there is a high degree of moral consistency in his framework.

3.79 However, there are two main reasons we have not adopted this approach:

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51 J Horder, *Criminal Misconduct in Office* (2018), p 36.

52 J Horder, *Criminal Misconduct in Office* (2018), p 37.

53 J Horder, *Criminal Misconduct in Office* (2018), pp 37 to 38.

54 J Horder, *Criminal Misconduct in Office* (2018), pp 28 to 29.

(1) it retains the lack of definition, and very broad scope for interpretation, that has led to criticism of the current offence; and

(2) it lowers the threshold for the imposition of criminal liability to a level that we consider risks over-criminalisation of the conduct of public office holders.

3.80 In directly considering the Law Commission's consultation paper proposals, Horder acknowledges that we have sought to provide greater definitional certainty to the common law offence. His concern is that this has come at the expense of encapsulating all the conduct that should fall within the terms of the offence.[55] However, as we explore further in Chapter 5, we consider the scope of our proposed corruption offence to be sufficiently broad.

3.81 While we understand the reason why Horder considers an additional fault qualifier such as "seriously" improper to be redundant, we believe that in practice, there is a certain gravity or potential harm of offending that should be satisfied before the criminal law intervenes. To emphasise, we do not consider that "lesser" impropriety should be free of consequence; merely that these consequences should not necessarily involve the heavy burden of criminal responsibility. Criminal liability should be reserved for the most serious cases.

3.82 We consider this to be particularly so given the scale and reach of the offence, which covers millions of public office holders in England and Wales. Further, the public sector is already held to a higher standard in non-criminal contexts, for example through Codes of Conduct.

Example One:

A junior Police Constable, Jack, uses his contacts to find out what a particular Assessment Centre will be asking in interviews to recruit new police officers. Jack knows that his friend Sarah, from school, really wants to be a police officer. He tells Sarah the questions that will be asked at interview, and gives her unauthorised access to the content of the written exercises, verbal ability tests and interactive exercises. Sarah attends the Assessment Centre but is very nervous and gives poor responses.

3.83 The above example details a circumstance involving very poor conduct that undoubtedly should give rise to disciplinary sanction. However, it is not clear that this is of sufficient severity to merit the imposition of a criminal penalty. We do note that Horder considers administrative penalties may be applicable, however this would create a fundamentally different regime of sanctions that we do not consider is warranted.

3.84 Ultimately, we consider our approach to be a practical yet principled one, which seeks to set out appropriate boundaries for the criminal law, with the aim of ensuring it

[55] J Horder, *Criminal Misconduct in Office* (2018), p 19. eg Horder queries whether the use of highly abusive language by a police officer towards demonstrators would fall within the terms of our proposed corruption offence.

operates in a consistent and proportionate way. Horder's model is a more purist theoretical one, which we are concerned would not address the fundamental concerns with the current offence, notably clarity and certainty, which we identified earlier in this chapter.

Approaches taken in other relevant jurisdictions and international law

3.85 In considering the merits of retaining an offence of misconduct in public office, some guidance may be drawn from the approach of comparable jurisdictions.

3.86 As we noted in Annex F to our issues paper, almost all comparable common law jurisdictions[56] have an offence of misconduct in public office of one form or another. Such offences are common in most developed legal systems.[57]

3.87 This is suggestive of a broad, global, acknowledgement that public officials may legitimately be held to a higher standard by the criminal law than other members of the community. Such a view is also reflected in the UN Convention Against Corruption (entered into force on 14 December 2005, ratified by the UK on 9 February 2006), which positively encourages signatories to enact criminal offences targeted at abuse of functions or position by public officials:

> Article 19 – Abuse of functions
>
> Each State Party shall consider adopting such legislative and other measures that may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.

3.88 Neither the example of other jurisdictions, nor advisory text in the UN Convention should necessarily be seen as determinative of the approach to misconduct in public office as an offence in England and Wales. However, they do lend weight to the view that an offence targeted at misconduct by public officials can, and should, form part of a criminal justice system, and as part of a broader range of measures designed to prevent and punish corruption.

The risks of decriminalisation

3.89 As we have noted at paragraph 3.49, there are a number of contexts in which the offence either criminalises conduct which would otherwise not amount to a criminal offence, or provides the option for a more serious criminal offence to exist where an

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56 We considered in particular equivalent offences in Australia, Canada, Hong Kong, Scotland and Caribbean states.

57 eg Finland (Ch 4, s 9 of Finnish Penal Code): "a public official, when acting in his or her office, intentionally… violates his or her official duty based on the provisions or regulation to be followed in official functions; Norway (s 171 of Norwegian Penal Code): "the violation of an official duty in the exercise of a public office is a criminal offence when it is of gross nature"; France: Penal Code Article 432-1 to 432-17 which outlines a range of "offences against the government committed by civil servants".

See generally Frank Zimmerman (ed), *Criminal Liability of Political Decision-Makers: A Comparative Perspective* (2017).

alternative equivalent might be seen as inadequate (for example, because it failed to encapsulate the breach of public trust that is at the heart of the misconduct offence).

3.90 One possible option to remedy this would be to enact a range of more specific offences to deal with each of the particular forms of conduct that would be decriminalised if the common law offence were to be abolished. For example, specific offences could be created for prison officers and other officials with coercive powers, who engage in sexual relationships with those in their care, control or supervision. Police officers have also been prosecuted for the offence of corrupt or other improper exercise of police powers and privileges in the context of sexual misconduct.[58] However, it would be very difficult to conceive of all the different ways in which a public office holder might engage in misconduct that damages public trust, and some circumstances are likely to be arbitrarily excluded. Indeed, the Salmon Commission identified this as a major impediment to the repeal and replacement of the common law offence in its 1976 report.[59]

3.91 There is a further concern about the message that would be sent if the offence of misconduct in public office were to be abolished without replacement. This approach risks not holding public officers properly to account for conduct that is damaging to the public, and potentially encouraging or facilitating corruption and dereliction of public duty. This in turn has the potential to undermine confidence in government and public services. There are many other ways to hold public officers accountable – through disciplinary proceedings, or other offences such as fraud and gross negligence manslaughter. However, the lack of a specific offence of public sector corruption in England and Wales, particularly set against comparable jurisdictions, might be perceived as weakening the government's response to public sector corruption. This would run counter to the government's 2017-2022 anti-corruption strategy, which identified public sector integrity as one of its key priorities, and the availability of "sound laws that can be used to punish and deter" as an important component of this goal.[60]

Consultation responses

3.92 Only one of the 35 responses to our consultation paper that considered the option of abolition without replacement was in favour of this approach. Many of the others expressed their opposition to abolition in strong terms. The Independent Police Complaints Commission (now the Independent Office for Police Conduct) for example stated:

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58 Criminal Justice and Courts Act 2015, s 26. See eg, Alisha Buaya, "Police officer, 38, 'had sexual relationship with vulnerable domestic abuse victim he was tasked with helping after meeting her on duty'", *Mail Online* (15 August 2019), available at https://www.dailymail.co.uk/news/article-7360859/Hednesford-police-officer-38-sexual-relationship-vulnerable-domestic-abuse-victim.html, and Jordan Coussins, "Mugshot released of disgraced Sandwell police officer who had sexual activity with victims", *Birmingham Mail* (10 July 2019), available at https://www.birminghammail.co.uk/black-country/mugshot-released-disgraced-sandwell-police-16563054.

59 Report of the Royal Commission on Standards of Conduct in Public Life (1976) Cmnd 6524 ("The Salmon Commission"), Chapter 10.

60 HM Government, *United Kingdom Anti-Corruption Strategy 2017-2022* (2017), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/667221/6_3323_Anti-Corruption_Strategy_WEB.pdf.

> The IPCC considers that abolition without replacement would create unacceptable gaps in the criminal law. Disciplinary sanctions for the kinds of conduct discussed in this response would not adequately reflect the seriousness of such conduct. Moreover, in the case of retired officers, staff and contractors, option 3 could result in such failings going completely unpunished.

3.93 The only voice in favour of abolition of an offence of general application without replacement were barristers Lucy Wibberley and Keir Monteith QC, who emphasised that a minimal criminalisation approach should be taken, and stated that the offence:

> should be abolished and if necessary specific reforms of certain statutes can take place to criminalise serious offending by public officials.

3.94 Union representatives that the Law Commission subsequently met also expressed serious reservations about the offence. They recognised the need to target serious institutional corruption, but as noted earlier in this chapter, their observation was that the offence disproportionately targeted frontline operators, rather than management.

3.95 We should acknowledge also that the former Chairman of the Law Commission has expressed the view that abolition without replacement is a "realistic option" on the basis that:

> the nation managed perfectly well for most of the 20th century when there were only a handful of MIPO prosecutions per year and perhaps it could manage without MIPO at all.[61]

3.96 On balance, however, the overwhelming view expressed was that some form of the offence should be retained.

Conclusion

3.97 Having carefully considered the option of outright abolition, we have concluded that this would not be a desirable course. It would decriminalise conduct where there are important harms and wrongs that justify the imposition of criminal sanction. It would also be a somewhat anomalous course among comparable jurisdictions and run counter to international and domestic priorities in tackling public sector corruption. Finally, it was strongly rejected by the majority of responses we received.

Recommendation 2.

3.98 The offence of misconduct in public office should not be abolished without a suitable replacement statutory offence or offences.

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61 Courts and Tribunals Judiciary, *Speech by Rt Hon Lord Justice Bean: Misconduct in Public Office* (7 November 2018), p 19, available at https://www.judiciary.uk/announcements/speech-by-rt-hon-lord-justice-bean-misconduct-in-public-office/. In addition, the Rt Hon Lord Justice Bean considered that there were two other realistic options: replacing the common law offence "by a carefully drafted corruption offence consisting of abuse of the defendant's position, as a holder of public office, in order to achieve a financial benefit for himself or for someone else"; or to "leave things as they are" (at p 19).

OUR PROPOSED MODEL OF REFORM

3.99 Having ruled out the option of retaining the current offence, or abolishing it without replacement, it is necessary to consider how the offence may be reformed.

3.100 Below we list the key objectives we are seeking through reform. We also outline, in broad terms, our recommendations for reform of the offence to meet these objectives. In Chapters 4, 5 and 6 we consider these recommendations in more detail.

Key reform objectives

3.101 The key concerns we have identified with the common law offence are a lack of clarity and certainty, and the potential for misuse. Our focus is on providing greater clarity and consistency in the operation of the offence and ensuring that it is targeting serious wrongdoing and damage to the public interest.

3.102 More specifically, through reform of the offence we seek to:

(1) provide clearer guidance on the circumstances that render a person a "public office holder" for the purposes of the offence;

(2) distinguish between the different forms of wrongdoing currently encapsulated in the single offence; namely, neglect of duty and misconduct;

(3) ensure that the fault and seriousness threshold for imposition of criminal liability is set at an appropriate standard;

(4) provide sufficient guidance for juries who are asked to consider whether the fault and seriousness standards have been met; and

(5) promote fairness and consistency in charging and prosecution practice.

3.103 These objectives have informed our model for reform.

3.104 While a degree of decriminalisation in certain contexts will result from some of our proposals, this is not the primary focus of our recommendations, and we do not anticipate a radical reduction in misconduct prosecutions compared with the current law. Rather, by defining the boundaries of the offence, we hope to improve the clarity and certainty of its operation and effects.

Our recommendations for two statutory offences

3.105 As we outlined in our consultation paper, the conduct currently criminalised by the common law offence can be broadly split into two categories:

(1) corruption in public office; and

(2) breach of a duty in public office.

3.106 As the wrongdoing involved for each is not the same, it is problematic that they currently share the same fault element, and this has led to some ambiguity.[62] We are

[62] See paragraphs 3.15 to 3.16

recommending the separation of these two strands into separate offences. This will ensure that the circumstance and fault elements of each are more precisely tailored to the underlying wrongs.

3.107 We also consider that reform is necessary to clarify when a person is considered to be in "public office". We are therefore recommending that a broad list of positions capable of constituting "public office" should be set out in the offences, to provide greater clarity and certainty.

Recommendation 3.

3.108 Two statutory offences should replace the common law offence of misconduct in public office:

(1) an offence of corruption in public office; and

(2) an offence of breach of duty in public office.

3.109 Both of these offences should be underpinned by a clear articulation of when a person can be considered "in public office".

3.110 In Chapter 4 we explain our recommendations for an underpinning definition of public office, in Chapter 5 we outline the model offence of corruption in public office and in Chapter 6 we outline the offence of breach of duty in public office.

3.111 In Chapter 7 we then consider some of the further practical implications that need to be considered in the implementation of new statutory offences, including mode of trial, the application of criminal liability principles, jurisdiction and devolution issues, and sentencing.

Chapter 4: A definition of public office holder

INTRODUCTION

4.1 In this chapter we outline recommendations to address one of the core concerns with the current offence of misconduct in public office: how should the law decide when a person is to be treated as "in public office" for the purposes of the offence. This is fundamental to any replacement offences. Without a workable definition there would be an unacceptable degree of uncertainty as to whether a person could be liable to prosecution.

4.2 In many cases, the question of whether a person is the holder of a public office will be clear. For example, police, prison officers and civil servants are currently understood as falling clearly within the terms of misconduct in public office.

4.3 There are, however, circumstances which are less obvious, in particular as the activities of the modern state have become extremely varied and complex, and the line between the public and private sectors has blurred. For example, it is less easy to assert whether or not private contractors working in prison environments are public office holders for the purposes of the offence.

4.4 In this chapter we review the current law, and the options for reform we presented in our consultation paper. We note that no real consensus was apparent in consultees' responses to the options we presented.

4.5 After giving very serious consideration to the various views consultees expressed, and approaches adopted in comparable jurisdictions, we have decided to recommend an approach that we believe strikes the right balance between workability, clarity and theoretical justification. This is to recommend that a broad list of positions capable of forming public office should underpin the two offences that we recommend should replace the common law.

4.6 This approach would define an outer boundary of a category of positions that are capable of being considered public office for the purposes of our proposed offences of breach of duty and corruption in public office. Further functional tests would then apply within each of the two offences, to determine whether the defendant was acting in public office at the relevant time. We outline these functional tests at the end of this chapter and discuss them in further detail in the following two chapters.

CURRENT LAW

The test of "public office" outlined in *Cosford*

4.7 The Court of Appeal in *Cosford*[1] outlined a three-stage test for assessment of whether a person was acting in public office for the purpose of the offence of misconduct in public office:

(1) What was the position held?

(2) What was the nature of the duties undertaken by the employee or officer in that position?

(3) Did the fulfilment of those duties represent the fulfilment of one of the responsibilities of government such that the public had a significant interest in the discharge of that duty which was additional to or beyond an interest in anyone who might be directly affected by a serious failure in the performance of that duty?

4.8 As we outlined in Chapter 2, this case concerned convictions against prison nurses relating to an inappropriate relationship one of them had with a prisoner.

4.9 Applying the test to the facts of the case, Lord Justice Leveson found that prison service nurses – unlike nurses in other care contexts – were to be considered public office holders for the purposes of this offence. This was because:

> the responsibilities of a nurse (whether trained as a prison officer or not) in a prison setting are not only for the welfare of the prisoners (their patients); they are also responsible to the public for, so far as it is within their power to do so, the proper, safe and secure running of the prison in which they work.[2]

4.10 However, in concluding his judgment in *Cosford*, Lord Justice Leveson also remarked that:

> it is unsatisfactory that each of the recent decisions in this area has required the court to trawl through the authorities to try to discern a thread which accurately represents the true position and can be translated into modern employment conditions. In this regard, it is entirely laudable that the Law Commission intends to revisit the ambit of the offence of misconduct in public office. [3]

4.11 This judgment indicates a degree of frustration concerning the workability of the common law offence as it stands.

4.12 In Appendix C to our issues paper we discussed this concern about the lack of clarity in the definition of "public office". We concluded that it may make the offence incompatible with article 7 of the European Convention on Human Rights ("ECHR"),

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1 *R v Cosford* [2013] EWCA Crim 466; [2014] QB 81. We discuss the facts of this case further in Chapter 2.

2 *R v Cosford* [2013] EWCA Crim 466; [2014] QB 81 at [36].

3 *R v Cosford* [2013] EWCA Crim 466; [2014] QB 81 at [39].

which prohibits retrospective punishment.[4] This prohibition has been held to include a prohibition against laws which are so ambiguous that they cannot be predictably interpreted.[5] We expressed concern that the definition of public office was so vague that it could be difficult for an individual to ascertain their potential liability to the offence, and regulate their conduct accordingly.

4.13 An argument along these lines was in fact raised by the defence in the 2014 case of *Mitchell*[6] (which followed and applied *Cosford*). However, in that case, as the defendant paramedic was held to not have been acting as a public officer, the article 7 issue was ultimately not dealt with.

Assessing the *Cosford* test

4.14 Probably the strongest advantage of the test outlined in *Cosford* is that it neatly encapsulates the essence of why the criminal law might apply to the conduct of a public official acting in that capacity, when there is no criminal offence applicable to the same conduct undertaken by someone employed in the private sector or otherwise acting in a personal capacity. That is, the interest the public has in good governance and trust in public services. Indeed, as we noted in Chapter 3, "breach of trust" and "misgovernment" are two of the key wrongs that justify the existence of the offence.

4.15 However, it is not a test that someone at the margins of what might commonly be understood to be a public office could readily understand and apply to their own circumstances. Its effect may also be unclear to law enforcement agencies and prosecutors in more ambiguous contexts, and lead to investigation and charging in cases which have no prospects of success.

4.16 The difficulty in applying the test in practice, together with the concerns we outlined above in relation to article 7 of the ECHR, lead us to the view that we cannot simply retain the current common law test.

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4 Issues Paper 1 (2016), Appendix C, para C.35.

5 See further *Sunday Times v UK* (No 1) (1979-80) 2 EHRR 245 at [49], in which the European Court of Human Rights considered the qualities necessary for something to be considered "prescribed by law" for the purposes of the Convention. In the case of *Kokkinakis v Greece* (1994) 17 EHRR 397 the Court held that "an offence must be clearly defined in law… [so] the individual can know from the wording of the relevant provision, and if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable" – at [52]. However, see also *SW v UK* App No 20166/92 (Chamber decision), in which the applicant, who had been found guilty of raping his wife on 18 September 1990, submitted that the retrospective application of the common law after *R v R* [1991] UKHL 14; [1992] 1 AC 599 (which had held that a man could be found guilty of raping his wife) was incompatible with Article 7 of the ECHR. In dismissing the application, it was held that: "Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen" – at [36].

6 *R v Mitchell* [2014] EWCA Crim 318; [2014] 2 Cr App R 2.

WHY WE NEED A CLEAR DEFINITION OF PUBLIC OFFICE

4.17 The arguments in Chapter 3 of the consultation paper lead us to the conclusion that a definition of "public office" will need to underpin, at least at a basic level, any new offence we propose. There are three reasons for this:

(1) Although all of the harms we identified do not arise only as a result of conduct that is performed by public office holders, the wrong of misgovernment is limited to individuals who perform state functions.

(2) The fact of a person holding public office is a good indicator both that the defendant is in a position of public trust and that a risk of public harm is likely to arise if they engage in wrongdoing. In addition, the fact that someone is a public office holder may serve to aggravate the harms and wrongs identified as arising from breaches of public trust.

(3) It is necessary to define a category of potential offenders with precision. An offence, however defined, that can be committed by any person "in a position of public trust" would be too wide and uncertain, and raises article 7 concerns.

4.18 The overwhelming majority of consultees agreed with us that officials exercising public functions should be treated as being in a special position compared with individuals exercising only private ones. They also agreed that a rigorous definition would promote legal certainty and allow for the identification of these individuals.

COMPARATIVE APPROACHES IN OTHER JURISDICTIONS

4.19 While most common law jurisdictions have an offence comparable to the common law offence of misconduct in public office, many of these are now codified in statute. Across these jurisdictions, a variety of different approaches to defining public office are taken. We have considered the potential applicability of these approaches in England and Wales, and outline some of the key models below.

Canada

4.20 In Canada, "official" is defined as either a holder of an office or a person appointed or elected to discharge a public duty. A further non-exhaustive definition provides that "office" includes:

(1) an office or appointment under the government;

(2) a civil or military commission; and

(3) a position or an employment in a public department.[7]

[7] Canadian Criminal Code, s 118.

Australia

4.21 In Australia, the relevant offence varies between the states and territories, with Victoria and New South Wales retaining the common law offence,[8] while statutory offences exist in the other six jurisdictions.[9] In five of these jurisdictions, a list of positions amounting to "public office" is included to aid with interpretation, with varying degrees of detail, length, and room for interpretation. The exception is Tasmania, which adopts a functional definition not dissimilar from the *Cosford* test.[10]

4.22 Queensland, for example, adopts a hybrid approach, combining a statutory test of public office, and an illustrative list of positions, defining "public officer" as:

> a person other than a judicial officer, whether or not the person is remunerated:
>
> (1) discharging a duty imposed under an Act or of a public nature; or
>
> (2) holding office under or employed by the Crown;
>
> and includes, whether or not the person is remunerated:
>
> (3) a person employed to execute any process of a court; and
>
> (4) a public service employee; and
>
> (5) a person appointed or employed under any of the following Acts:
>
> (a) the Police Service Administration Act 1990;
>
> (b) the Transport Infrastructure Act 1994;
>
> (c) the State Buildings Protective Security Act 1983; and
>
> (6) a member, officer, or employee of an authority, board, corporation, commission, local government, council, committee or other similar body established for a public purpose under an Act.

4.23 In Western Australia, public officer is defined primarily by way of a fixed list as follows:[11]

> (1) a police officer;

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8 The leading case in Victoria being *R v Quach* [2010] VCSA 106; [2010] 201 A Crim R 522 (Supreme Court of Victoria), with *Blackstock v R* [2013] NSWCCA 172 (New South Wales Court of Criminal Appeal) setting out the offence in New South Wales.

9 See Criminal Code Act 1995 (Cth), s 142; Criminal Law Consolidation Act 1935 (SA), s 251; Criminal Code Act 1924 (Tas), s 83; Criminal Code Act Compilation Act 1913 (WA), s 83; Criminal Code Act 1899 (Qld), ss 92 and 92A; Criminal Code Act (NT), ss 76 to 81; Criminal Code 2002 (ACT), s 359.

10 Section 1 of the Criminal Code Act 1924 (Tas) defines "public officer" as "a person holding any public office, or who discharges any duty in which the public are interested, whether such person receives payment for his services or not".

11 Criminal Code Act Compilation Act 1913 (WA), s 1.

(2) a Minister of the Crown;

(3) a Parliamentary Secretary appointed under section 44A of the Constitution Acts Amendment Act 1899;

(4) a member of either House of Parliament;

(5) a person exercising authority under a written law;

(6) a person authorised under a written law to execute or serve any process of a court or tribunal;

(7) a public service officer or employee within the meaning of the Public Sector Management Act 1994;

(8) a person who holds a permit to do high-level security work as defined in the Court Security and Custodial Services Act 1999;

(9) a person who holds a permit to do high-level security work as defined in the Prisons Act 1981;

(10) a member, officer or employee of any authority, board, corporation, commission, local government, council of a local government, council or committee or similar body established under a written law; and

(11) any other person holding office under, or employed by, the State of Western Australia, whether for remuneration or not.

4.24 However, the final category is so broad as to leave scope for a significant degree of interpretation in practice.

4.25 In South Australia, public officer for the purpose of the relevant offence is defined by reference to a relatively detailed schedule to a separate Act, the Independent Commissioner Against Corruption Act 2012.[12] Like that in Western Australia, this list contains some categories which are extremely broad and open to interpretation.[13]

4.26 In the Northern Territory, a number of specific offences target corrupt conduct by public officers, who are defined as:[14]

(1) a minister;

(2) a Member of the Legislative Assembly;

(3) a judicial officer;

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12 Criminal Law Consolidation Act 1935 (SA), s 237; Independent Commissioner Against Corruption Act 2012, Sch 1.

13 eg "Any other public sector employee", "a person performing contract work for a public authority or the Crown" and "a member of a local government body".

14 By virtue of section 75A of the Criminal Code Act (NT), which draws on the definition of public officer found in sections 4 and 16(2) of the Independent Commissioner Against Corruption Act 2017 (NT).

(4) the holder of an office established under an Act who is appointed by the Administrator or a minister;

(5) a member, officer or employee of a public body; and

(6) any other person engaged, whether under the Contracts Act or otherwise, by or on behalf of a person mentioned in paragraphs [1 to 5] in relation to the performance of official functions.

4.27 Finally, in the Australian Capital Territory, public officer[15] is defined as:

a person having public official functions, or acting in a public official capacity, and includes the following:

(1) a territory public official;

(2) a member of the legislature of the Commonwealth, a State or another Territory;

(3) a member of the executive of the Commonwealth, a State or another Territory;

(4) a member of the judiciary, the magistracy or a tribunal of the Commonwealth, a State or another Territory;

(5) a registrar or other officer of a court or tribunal of the Commonwealth, a State or another Territory;

(6) an individual who occupies an office under a law of the Commonwealth, a State, another Territory or a local government;

(7) an officer or employee of the Commonwealth, a State, another Territory or a local government;

(8) an officer or employee of an authority or instrumentality of the Commonwealth, a State, another Territory or a local government;

(9) an individual who is otherwise in the service of the Commonwealth, a State, another Territory or a local government (including service as a member of a military or police force or service); and

(10) a contractor who exercises a function or performs work for the Commonwealth, a State, another Territory or a local government.

New Zealand

4.28 In New Zealand, separate but comparable offences apply to corruption and bribery of judicial officers,[16] Ministers of the Crown or members of the Executive Council,[17]

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15 Criminal Code 2002 (ACT), s 300.

16 Crimes Act 1961 (NZ), s 100.

17 Crimes Act 1961 (NZ), s 102(1).

members of Parliament,[18] law enforcement officers[19] and officials.[20] "Official" is further defined as:

> any person in the service of the Sovereign in right of New Zealand (whether that service is honorary or not, and whether it is within or outside New Zealand), or any member or employee of any local authority or public body, or any person employed in the education service within the meaning of the State Sector Act 1988.[21]

Republic of Ireland

4.29 In the Republic of Ireland, the offence of corruption in office,[22] can be committed by a public official, which is defined as:[23]

(1) an office holder or director (within the meaning, in each case, of the Public Bodies Corrupt Practices Act, 1889, as amended) of, and a person occupying a position of employment in, a public body (within the meaning aforesaid) and a special adviser (within the meaning aforesaid);

(2) a member of Dáil Éireann or Seanad Éireann;

(3) a person who is a member of the European Parliament by virtue of the European Parliament Elections Act 1997;

(4) an Attorney General (who is not a member of Dáil Éireann or Seanad Éireann);

(5) the Comptroller and Auditor General;

(6) the Director of Public Prosecutions;

(7) a judge of a court in the State; and

(8) any other person employed by or acting on behalf of the public administration of the State.

Scotland

4.30 By contrast, "public official" is not specifically defined in the equivalent common law offence in Scotland. This lack of definition has prompted one commentator to suggest that "perhaps it would be helpful if Parliament or the High Court was now to intervene to tell us what, if any, limits apply to the offence".[24]

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18 Crimes Act 1961 (NZ), s 103(1).

19 Crimes Act 1961 (NZ), s 104(1).

20 Crimes Act 1961 (NZ), s 105(1).

21 Crimes Act 1961 (NZ), s 99.

22 Prevention of Corruption (Amendment) Act, 2001 (Ireland), s 8.

23 Prevention of Corruption (Amendment) Act, 2001 (Ireland), ss 8(2) and 5(b)(ii).

24 A Brown, "Wilful Neglect of Duty by Public Officials" (1996) 64 *Scottish Law Gazette* 130, 132.

Hong Kong

4.31 In Hong Kong, which retains a common law offence, the Court of Appeal has rejected an approach which would make anyone employed by the government or a public body liable to the offence.[25] Instead, the Court should:

> Examine what, if any, powers, discretions or duties have been entrusted to the defendant in his official position for the public benefit, asking how, if at all, the misconduct alleged involves an abuse of those powers.[26]

4.32 In practice, a wider range of officials have been caught by the offence in Hong Kong than in England and Wales; most notably, doctors employed by public health bodies.[27]

POLICY OBJECTIVES FOR A NEW DEFINITION

4.33 In considering how public office should be defined for the purposes of any offence or offences replacing misconduct in public office, we believe it should satisfy a number of key policy objectives. The most important of these are:

(1) Achieving legal certainty: The criminal law requires maximum certainty. To achieve legal certainty, a definition of public office should be sufficiently clear to produce predictable and consistent decisions.

(2) Reflecting the wrong of misgovernment: The wrong of misgovernment is the only wrong we identified underlying the current offence of misconduct in public office which applies only to public office holders. It is concerned with the abuse of state powers and positions, and this justifies the criminalisation in relation to public office holders. Equivalent conduct and harms carried out and caused by those not in public office do not involve that distinctive wrong.

(3) According with modern understandings of public office: A definition of public office should accord with modern ordinary and legal understandings of public office.

4.34 These objectives have guided our discussion of public office and informed the resulting recommendations.

OUR PROVISIONAL PROPOSALS AND CONSULTEES' RESPONSES

How "public office" could be defined

4.35 In our consultation paper, we discussed four possible ways of defining public office for the purposes of reform offences. We suggested it could be defined by way of any one of the following:

(1) Status or in institutional terms – does the position held by the person have an employment or institutional link to one or more of the arms of state?

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25 *HKSAR v Wong Lin Kay* [2012] HKCFA 33; [2012] 2 HKLRD 898.

26 *HKSAR v Wong Lin Kay* [2012] HKCFA 33; [2012] 2 HKLRD 898 at [22], per Ribeirio PJ.

27 *Chan Tak Ming v HKSAR* [2010] HKCFA 74; [2011] 1 HKLRD 766.

(2) Identification of what we called a "determinative duty" – where it is because of the duty which the defendant is alleged to have breached that they can be classified as being in public office. This is similar to the current approach whereby the focus is on whether the individual has a duty associated with the state function or governmental responsibility and the public has an interest in the individual's performance of that duty.

(3) Performance or exercise of a "public function" – a concept that is used in other contexts such as judicial review proceedings.

(4) Exercising a public function whilst under a duty to act in a certain way – drawing on the example of the Bribery Act 2010, which adopts a two-stage test to determine who could be convicted of accepting or agreeing to receive a bribe.

4.36 We concluded our discussion by proposing that neither of the first two definitions should be adopted. We argued that the first option had the strong virtues of finality and certainty, but was too rigid and inflexible to reflect the complicated nature of modern public office, and would be likely to prove both over and under inclusive in several respects. With regard to the second option – determinative duties – our concern was that it was insufficiently precise for the purposes of the criminal law, leading to unpredictable outcomes, and potentially violating the prohibition on retroactive laws contained within article 7 of the ECHR.

4.37 We considered the latter two options to represent a more promising balance between the nuance and certainty required of a workable definition. We formulated options for each as follows:

(1) "a position involving a public function performed pursuant to a state or public power"; and

(2) "a position involving a public function which the office holder is obliged to exercise in good faith, impartially or as a public trust".

4.38 We then asked consultees which model they preferred. The responses revealed a fairly even split. Nine consultees favoured definition (1), based on the identification of a public function performed pursuant to a state or public power. Eleven favoured definition (2), based on the identification of a public function, which it is expected will be exercised in good faith, impartially or as a public trust.

4.39 There was therefore no clear consensus evident as to a preferred definition. Consultees' responses also highlighted a number of concerns as to whether or not a functional test for public office could provide a sufficiently certain definition leading to predictable results.

How the definition of public office could be set out in statute

4.40 Following our discussion of how public office should be defined, we then considered how an agreed approach could be given practical effect in statute.

4.41 We also asked for consultees to indicate a preference for one of the following forms of statutory definition that we proposed:

(1) a general definition of public office;

(2) a definition of public office as any position involving one or more of the functions contained in a list;

(3) a list of positions constituting a public office; or

(4) a general definition, supplemented by a non-exhaustive list of functions or positions given by way of example.

4.42 We received 16 responses that directly addressed the question of which option was preferable. There was again no clear consensus evident in responses, but options three and four – both involving a list of positions – were more strongly favoured than options one and two, which did not.

4.43 The Council of Her Majesty's Circuit Judges and the Church of England/Ecclesiastical Law Society were the supporters of a closed list of positions – option (3). The Church of England Archbishop's Council said,

> On balance we favour option (3), in the interests of certainty: predicting which individuals would be caught by the offence on the basis of the other options seems unlikely to be straightforward, and we consider it important that it should be absolutely clear to public office holders whether in some circumstances they would be at risk of committing a criminal offence as opposed to simply being susceptible to disciplinary proceedings.

4.44 Other responses favoured an approach that struck a balance between flexibility and certainty. The Law Society, for example, supported

> a [function based] definition of 'public office' that cross-refers to a schedule of positions constituting public office. This would have the advantage of certainty … provided that there is capacity for periodic review of the list.

OUR CONCLUSIONS AND RECOMMENDATIONS

4.45 The lack of a clear agreement in the consultation responses reflects the broader difficulty in attempting to prescribe a definition of the public/private divide. It is also symptomatic of the tension between seeking a definition that perfectly encapsulates the moral basis for the imposition of criminal liability, and one which is clear and certain, and therefore readily understandable and applicable in practice. To put this another way, we consider it essentially impossible to achieve a perfect, all-encompassing definition, that also proves to be clear and predictable in every conceivable circumstance. As we noted in Chapter 1, similar conclusions were reached by the Salmon Commission[28] and the Committee on Standards in Public

[28] Who concluded that "the boundaries of the public sector will, in the last resort, be arbitrary and there are bound to be some perplexing cases at the fringes." See Report of the Royal Commission on Standards of Conduct in Public Life (1976) Cmnd 6524 ("The Salmon Commission"), Chapter 10.

Life[29] in previous considerations of the offence. Our recommendations therefore inevitably reflect a compromise that we consider strikes the best balance for the future operation of our replacement offences.

4.46 Having considered the responses to our consultation, and noting the approaches adopted in other comparable common law countries, we consider that reliance solely on a statutory test would provide insufficient certainty and clarity. Our primary concern is that it would not allow, in every case, for an employee of an organisation that performed a quasi-public role, to determine whether they could potentially be liable to the offence. While ignorance of the law is not generally a defence to a criminal offence,[30] if the law itself is not sufficiently clear as to its potential application this creates real problems with regard to the human rights protections afforded by article 7 of the ECHR, which prohibits punishment without law. On a more practical level, it also creates uncertainty for police, prosecutors and courts in determining whether a person may be prosecuted, causing potential expense to the criminal justice system, and unnecessary distress to anyone who is erroneously pursued.

4.47 Instead, we have concluded that a two-stage process should be applied to decide whether a person is in public office for the purposes of the statutory offences we recommend:

(1) A list of categories of position would provide the "outer limit" to the pool of people who could be treated as being in public office. This list would be exhaustive, but could be added to by way of the affirmative resolution procedure, and therefore define with certainty who could and could not be a public office holder.

(2) Within each of the two offences proposed to replace misconduct in public office there would be an additional functional test to define the contexts in which the office holder would fall within the scope of that offence. Each would further convey a functional understanding of public office within the clear limits set by the overarching list.

4.48 We have received advice on the practicability of this approach, in relation to legislative drafting, from the Office of the Parliamentary Counsel. Their advice was that our proposed approach could be put into legislative form, as has occurred in the various Australian jurisdictions referred to earlier in this chapter. Indeed, comparable examples do exist in other domestic contexts such as:

(1) Schedule 19 of the Equality Act 2010, which sets out the bodies that are subject to the public sector equality duty; and

(2) Schedule 1 of the Freedom of Information Act 2000, which defines "public authorities" for the purposes of this Act.

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29 Pamphlet "Misuse of public office: a consultation paper" accompanying the Committee on Standards in Public Life, *Third Report – Standards of Conduct in Local Government – Volume 1* (July 1997) Cm 3702-I, [18] and [22].

30 Though this position has been powerfully critiqued by Professor Andrew Ashworth. See A Ashworth, "Ignorance of the Criminal Law, and Duties to Avoid it" (2011) 74(1) *Modern Law Review* 1.

4.49 By recommending that the definition of "public office" be underpinned by a fixed list of positions, we are prioritising legal certainty as the single most important consideration for the definition. However, we consider that this list should not be a detailed elaboration of every possible form of public office (which could run onto many pages) but a short, simple list, produced at a relatively high level of generality. This approach would be similar to the lists adopted for the relevant statutory offence in various Australian jurisdictions and in Ireland that we referred to above.

4.50 The key advantage that we have identified with relying on a list to form the outer boundaries of the offence is that it makes clearer the limits of the law's application, reducing the likelihood of misdirected investigations and prosecutions. By not attempting to be over-prescriptive in its contents, our intention is that the list would remain sufficiently flexible over time.

4.51 The generality of the list may mean that there are still some circumstances of ambiguity. However, the risk of uncertainty would be reduced compared with the current law and as a result, we would anticipate fewer appeals with regard to this aspect of the offence.

4.52 There is also a possibility that the list will prove under-inclusive to some degree. There are conceivably some roles that some people might consider should fall within the offence that are not specifically listed. This is something we may have to accept as a necessary imperfection with our model in the broader interests of achieving clarity and certainty. To the extent that this risk materialises, we consider under-inclusion to be preferable to a position of over-inclusion, or ongoing ambiguity as to which roles are included altogether. Erring on the side of under-inclusion is consistent with the principle of minimal criminalisation.[31] An important mitigation against this concern is our further recommendation that the list should be able to be amended through secondary legislation – we discuss this further at 4.64 to 4.68. It is also important to recall that as the offence covers such a broad array of conduct, it overlaps significantly with other statutory and non-statutory offences, and these could be available as an alternative for prosecutors.

[31] By this we mean seeking to avoid criminalising conduct more than is necessary in contemporary society. See: D Husak, *Overcriminalization: The Limits of the Criminal Law* (2008). The theory of "minimal criminalisation" is not unanimously accepted by commentators. See J Horder, "Bribery as a form of criminal wrongdoing" (2011) 127 *Law Quarterly Review* 37.

Recommendation 4.

4.53 The determination of whether a person is in "public office" for the purposes of both the recommended replacement offences should be determined by a two-stage process:

(1) By reference, for each offence, to a fixed list of positions capable of amounting to "public office"; and

(2) By applying a functional test in each of the offences to determine whether the public office holder was acting "in public office" at the relevant time.

Stage 1: a list of positions that can amount to public office

4.54 Below we recommend a draft list of positions that can amount to public office for the purposes of "stage 1" of the test. However, we are conscious that we did not ask stakeholders to consider in any detailed way which positions should and should not constitute public office. As we noted in our consultation paper, "the ultimate decision as to who should be included on any list would be for Parliament to make", but we could "propose a draft list, as a guide for decision makers".[32]

4.55 We therefore suggest that government conduct its own further consultation before finalising the list for implementation in legislation.

4.56 With this caveat in mind, and following discussion with the Office of the Parliamentary Counsel, we have devised the following provisional list. We have based this on contemporary understandings of public office, and where relevant have drawn on existing statutes, such as the definition of "Crown servant" and "government contractor" in the Official Secrets Act 1989:

(1) **Crown servants;** Crown servants hold their position at the pleasure of the Crown, and most Crown servants exercise at least one or more public functions. Based on the definition of Crown servants in section 12(1) of the Official Secrets Act 1989, Crown servants for the purpose of the present list could include:

(a) Ministers of the Crown;

(b) any person employed in the civil service of the Crown;

(c) any constable and any other person employed or appointed in or for the purposes of any police force;

(d) any member or employee of the naval, military or air forces of the Crown; and

(e) members of the Welsh, Scottish and Northern Irish executives.

[32] Consultation Paper (2016), para 4.78.

(2) **Crown and executive appointees, including judges and magistrates;** A number of positions held by individuals as a result of a Crown or executive appointment, do not qualify the person as a Crown servant. Judges are one example. Judges exercise functions for the purpose of the administration of justice. There have been very few judges prosecuted for misconduct in public office, with the last prosecution dating from 1967. Commissioners of the Law Commission are another example.

(3) **Parliament: Members of Parliament, Peers, Assembly Members and employees of Parliament and employees and Members of the Senedd Cymru (Welsh Parliament);** This category would include Members of Parliament, Peers, and Senedd Cymru Members (SMs), and individuals employed by these bodies, as well as by bodies which report directly to them (for instance, the National Audit Office, the Parliamentary Ombudsman and the Electoral Commission).

(4) **Elected officials and their employees;** This would include all individuals elected by the public for the purposes of governance, and those they employ to staff their offices. For instance, Police and Crime Commissioners and Local Councillors.

(5) **Employees of non-departmental public bodies;** Individuals employed by or who are members of non-departmental public bodies (such as advisory committees, Independent Prison Monitoring Boards, specialised legal tribunals, and regulators) which exercise one or more public functions. These individuals are generally not civil servants and are therefore listed separately.

(6) **Employees of public corporations;** These corporations include, for example, the Pension Protection Fund, the Office for Nuclear Regulations, and the London and Continental Railways Ltd. Again, at least some individuals employed by these corporations perform public functions.

(7) **Employees of local authorities;** Individuals employed in local authorities who perform functions of governance. There have been several prosecutions of employees of local authorities for misconduct in public office.

(8) **Employees of state funded schools;** It is not our intention that teachers or other employees at schools will fall within the scope of the new offence when they are simply performing their teaching functions. However, there will be employees of state-funded schools who exercise functions of governance (such as the administration of public funds) and we consider that they should be caught. Although many of these will be within category (7) above (employees of local authorities), teachers at academies and free schools will not, which is why we propose to include employees at state-funded schools as a separate category. Including such school staff within the offence would be consistent with the fact that they are subject to the public sector equality duty under the Equality Act 2010.

(9) **Employees of the National Health Service ("NHS");** As we note below, it is not our intention that the replacement offences capture the provision of frontline health care. These functions are not inherently public, and there are already

adequate regulatory frameworks and specific criminal offences in place to deal with misconduct in these contexts. However, there is also a significant level of public administration that is undertaken by the NHS, and we consider that non-frontline functions such as these should remain within the scope of replacement offences.

(10) **Contractors who exercise functions or perform work for the government;** Section 12(2)(a) of the Official Secrets Act 1989 defines a government contractor as anyone who is not a Crown servant but provides, or is employed in the provision of, goods or services for the purpose of government Ministers (which in practice, includes goods or services provided to government departments). In recent times, as a number of public services have been privatised, government contractors perform an increasing amount of public functions, particularly in relation to prisons and social care.

4.57 This list largely reflects the present state of the law, and seeks to reflect, as far as possible, modern understandings of government in England and Wales.

4.58 In the interests of creating consistency of treatment with other religious leaders, we would propose that Bishops of the Church of England, who are Crown appointees, should be specifically excluded from the list. However, where they are acting in another relevant capacity, such as those who are appointed as one of the 26 "Lords Spiritual" members of the House of Lords, they would potentially be subject to the offence by virtue of their being in that office. We recognise that members of the clergy, along with other religious leaders, do perform an important public function in respect of the solemnization and registration of marriages in England and Wales. However, in this context we consider that there are adequate criminal offences under the Marriage Act 1949,[33] and the general criminal law,[34] to deal with any serious misconduct, and that this context does not justify the inclusion of religious leaders in our proposed fixed list of public officials.

4.59 There are a number of other discrete Crown appointees who we consider should also be excluded on the basis they do not entail any relevant public function. Examples of these are:

- Masters of Trinity College and Churchill College, Cambridge;
- the Provost of Eton;
- the Poet Laureate;

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33 See sections 75, 76 and 77 of the Marriage Act 1948. In our recent consultation paper in relation to weddings law we provisionally proposed the removal of some of these offences. However, we provisionally proposed that it should be an offence where an officiant deliberately or recklessly misleads either of the couple about the effect of the ceremony. See Getting Married: A Consultation Paper on Weddings Law (2020) Consultation Paper 247, pp 297 to 302. Should this provisional proposal be adopted, we consider that the criminal law would remain capable of dealing with serious misuse or abuse of the role of wedding officiant.

34 For example, offences of fraud under the Fraud Act 2006. There are also specific provisions that criminalise forced marriage under sections 120 and 121 of the Anti-social Behaviour, Crime and Policing Act 2014.

- the Astronomer Royal.

4.60 By not detailing every possible position, we recognise that there will remain a degree of ambiguity in the law. The position of government contractors, in particular, may require further judicial consideration in some specific factual scenarios. For example, the context of privately run care homes, which look after state-funded patients, has been found not to fulfil a "public function" for the purposes of section 6(3)(b) of the Human Rights Act 1998.[35] Similar ambiguity – and possibly a degree of arbitrariness – may exist in the context of staff in these homes for the purposes of our replacement offences.

4.61 We consider this broad list to be a preferable approach rather than seeking to specify every possible position in an extensive schedule to any legislation. Attempting this could actually make the offence less readily comprehensible, and the schedule would be likely to require regular review and updating as roles and functions of public office shift and change.

Recommendation 5.

4.62 In devising the list of "public office holders", government should consider inclusion of the following categories:

(1) Crown servants, including Ministers of the Crown; any person employed in the civil service of the Crown; any constable and any other person employed or appointed in or for the purposes of any police force; any member or employee of the naval, military or air forces of the Crown; and Members of the Welsh, Scottish and Northern Irish executives;

(2) Crown and executive appointees, including judges and magistrates;

(3) Parliament; MPs, Peers, SMs (Members of the Senedd Cymru) and employees of Parliament and the Senedd Cymru;

(4) elected officials and their employees;

(5) employees of non-departmental public bodies;

(6) employees of public corporations;

(7) employees of local authorities;

(8) employees of state funded schools;

(9) employees of the National Health Service;

(10) contractors who exercise functions or perform work for the government.

[35] *R (on the application of Heather and others) v Leonard Cheshire Foundation* [2002] 2 All ER 936; [2002] EWCA Civ 366; *YL v Birmingham City Council* [2007] UKHL 27; [2008] 1 AC 95.

Recommendation 6.

4.63 The following Crown appointments should be specifically excluded from the list of "public office holders":

- Bishops of the Church of England
- Masters of Trinity College and Churchill College, Cambridge;
- the Provost of Eton;
- the Poet Laureate;
- the Astronomer Royal.

Additionally, the government should consider whether there are any other discrete Crown appointments that should be excluded on the basis that they have little or no relevant connection to public office.

Amendment of the list

4.64 We recognise that one of the key disadvantages of a fixed list of positions is that it is relatively inflexible and does not readily allow for shifts in understandings of the public and private spheres.

4.65 While this is an unavoidable disadvantage of our recommendation, there are two aspects of our proposals that are designed to mitigate it.

4.66 The first is, as noted above, to make the categories of position relatively broad. The category of "Crown and executive appointees", for example, is much less likely to shift fundamentally over time than more specific roles or positions.

4.67 The second is to give a power to the Secretary of State for Justice to amend the list, by way of an affirmative statutory instrument (a process of change that would require active approval by both Houses of Parliament), should it become clear that there is a category of position that should or should not fall within the terms of the offence. This would not be able to fix particular issues that arose "after the event" but would be a swifter process for making prospective changes than attempting to do so through primary legislation. While this process of secondary legislation would involve less parliamentary oversight than primary legislation, and this is not generally considered the optimum approach for amendments to the criminal law, we consider it to be a proportionate approach in this context given the ever-increasing complexity of the public/private divide.

Recommendation 7.

4.68 The Secretary of State should be given a power to amend the list of positions in the definition of "public office" by way of an affirmative statutory instrument.

Stage 2: Functional tests within each offence

4.69 In addition to an overarching list, for each offence, a functional test would then define the specific circumstances in which the offence applies. These tests would apply only where the defendant holds one of the positions specified in the overarching list. The functional tests for each offence are briefly summarised below and expanded upon in Chapters 5 and 6.

Corruption model

4.70 In Chapter 5 we set out the proposed corruption offence, which is targeted at situations where public officials misuse their position to achieve a benefit to themselves or a benefit or detriment to someone else in circumstances that are seriously improper.

4.71 The test that we propose for this offence is that the public office holder "uses or fails to use their public power or position" to achieve this aim, and that this is "seriously improper". This is intended to remove from the scope of the offence conduct which is unrelated to the "public" nature of their role. For example, a police officer who committed insurance fraud in relation to a burglary at their private residence would be liable for a fraud offence but not for the new statutory misconduct in public office offence merely because he or she also happened to hold public office.

Breach of duty model

4.72 In Chapter 6 we set out the proposed breach of duty offence, which concerns neglect of public duty causing serious injury or death.

4.73 The functional test that we propose for this offence is that it applies where a public office holder is subject to a duty "that arises only by virtue of the functions of the public office". Similar terminology is adopted for the offence of ill treatment or neglect by a care worker in section 20 of the Criminal Justice and Courts Act 2015, where liability arises "by virtue of being a care worker" for an individual.

4.74 This is designed to ensure that the offence is specifically criminalising a breach of a "public" duty, rather than a duty that merely has a connection with public office, but could equally exist in the private sector.

4.75 For example, a police officer driving normally to a destination while on duty would not be subject to the breach of duty offence, as their duty of care in this context would be the same as any other road user.[36] However, if they were to engage in a high-speed pursuit with sirens on,[37] then a particularly "public" duty of care arises for the purposes

[36] *R v Bannister* [2009] EWCA Crim 1571; [2010] 1 WLR 870.

[37] The relevant guidance for police is in such a circumstance is set out in the College of Policing Authorised Professional Practice guidance on police pursuits. See: https://www.app.college.police.uk/app-content/road-policing-2/police-pursuits/. It is highly likely that a court would consider the extent to which the conduct of a police officer conformed to this guidance in assessing whether they had committed a misconduct offence.

of this offence, as the context is inherently "public", and the police officer is subject to distinct duties to which the public are not. [38]

4.76 Another example that illustrates this difference is the distinction between (a) the duty of care of a fire safety officer for a local authority who has power to issue a licence to a club that the fire exits are safe as part of licence for use, and (b) an employee of a private fire alarm company whose role is to check and install alarms, needing to do so with care, but not being subject to a "public" duty in the same way.

Exclusion of the provision of health care and education from both offences

4.77 In devising this draft list, we have given particular consideration to whether the provision of health care and education should fall within the terms of the offence. These are two of the most significant services that are delivered at least in part through public funding and public bodies. However, they are not services which are, of themselves, inherently public. There are numerous examples of private education providers, and the provision of private health care is commonplace. Moreover, health care and education services involve large workforces which are subject to their own extensive rules and regulations.[39]

4.78 We consider that the terms of the two replacement offences we propose in Chapters 5 and 6 should not capture the frontline delivery of health care and education. This is because, with the exception of certain forms of involuntary treatment under the Mental Health Act 1983, these roles do not involve:

- the use of a public position or power; or
- a duty that arises only by virtue of the public office.

4.79 In the case of health care, there is now an offence of "ill treatment and neglect" under the Criminal Justice and Courts Act 2015, which is specifically designed to deal with misconduct by providers of these services. This offence, which carries a five-year maximum sentence, criminalises health or social care workers who "ill-treat or wilfully neglect" a patient. "Health care" for the purposes of this offence is defined to include:

(1) all forms of health care provided for individuals, including health care relating to physical health or mental health and health care provided for or in connection with the protection or improvement of public health, and

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38 For guidance surrounding police driving generally, see: https://www.app.college.police.uk/app-content/road-policing-2/police-driving/. This guidance provides that "…police officers are regularly expected to attend immediate response calls to help the public or deal with ongoing road related incidents. To do so in line with duty, officers are required to extend their driving skills beyond that of a careful and competent driver … Where there is a departure from the legal standard, then in line with the DPP's guidance to CPS for emergency service driving personnel, officers or those involved in the delivery of higher level driver training, must be able to show justification, proportionality and necessity for their actions and decision making based on the circumstances of the incident or nature of the role they are performing".

39 eg The Teacher Regulation Agency is an executive agency sponsored by the Department for Education. It has responsibility for the regulation of the teaching profession, including misconduct hearings and the maintenance of the database of qualified teachers: See: *Teacher Regulation Agency*, https://www.gov.uk/government/organisations/teaching-regulation-agency.

(2) procedures that are similar to forms of medical or surgical care but are not provided in connection with a medical condition.[40]

4.80 It is a conduct crime, not one requiring proof of a result, meaning that no adverse consequences need to be experienced by the patient for the practitioner to be found guilty.

4.81 However, to the extent that the state has assumed responsibility for health and education through the NHS, local government and state-funded schools, there are governance and administrative roles relating to these services that might be considered as examples of "public office". We therefore consider that there is need for the law to distinguish between the direct provision of health care and education – which should not fall within the terms of replacement offences – and the administration and planning of the public resources associated with these functions, and other ancillary conduct, which should.

4.82 Examples of the kind of public functions we consider should fall within the scope of the offence in these contexts would include:

(1) the expenditure of public health or education funds in corrupt or improper ways: for example, an NHS Trust manager authorising excessive payments of public funds to a private medical practitioner who is experiencing personal financial difficulty;

(2) misuse of confidential information held by public health or education institutions: for example, a Local Education Authority employee selling the contact details of the parents of students to a private tutorial company;

4.83 These tasks might be undertaken by someone who also, as part of their role, provides frontline health care or education. For example, a senior doctor with responsibility for managing finances at a hospital, in addition to providing direct medical care.

4.84 For the avoidance of doubt, we also consider that the circumstances of the case of *Cosford* should fall within the terms of our definition. In *Cosford*, the offending conduct was not the defendant's provision of health care as a nurse. Rather, it was the formation of an inappropriate relationship within a prison environment. Therefore, it was not the nurse's health care function, but her wider public responsibility as an employee in a prison context, that engaged the offence, and would continue to do so under our reform recommendations. However, we consider that in future, the exclusion should apply such that if the relevant conduct relates solely to the function of providing health care (for example by a doctor or nurse) in a prison environment, this particular context should fall outside the terms of the offence.

4.85 To achieve maximum clarity, an option could be to exclude specifically from the terms of the offence conduct that amounts to:

(1) the provision of "primary education", "secondary education" and "further education" within the meaning of Education Act 1996; and

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[40] Criminal Justice and Courts Act 2015, s 20(5).

(2) the provision of “health care” for the purposes of the offences of ill-treatment or wilful neglect within the meaning of the Criminal Justice and Courts Act 2015.

4.86 Both our recommended offences could include a clause to the effect that the provision of health care and education should not be considered relevant functions for the purposes of the offences.

Recommendation 8.

4.87 The following functions should be excluded from the scope of both replacement offences:

(1) the provision of “primary education”, “secondary education” and “further education” within the meaning of section 2 of the Education Act 1996; and

(2) the provision of “health care” within the meaning of section 20(5) of the Criminal Justice and Courts Act 2015.

4.88 This should be achieved by direct exclusion of these functions in implementing legislation.

Chapter 5: Corruption in public office

INTRODUCTION

5.1 In this chapter we detail our recommendation for a new offence of corruption that would constitute one of the two offences introduced to replace the common law offence of misconduct in public office. This recommendation is based on the proposals we outlined in Chapter 6 of our consultation paper, and that we presented as "Option 2".[1] The second of our recommended offences is "breach of duty in public office". We outline this recommendation in the following chapter, Chapter 6 of this report.

5.2 The replacement statutory offence of corruption in public office would criminalise a public office holder who, knowing that they are in a particular role (that is, the circumstances which put them in public office), uses or fails to use their public office intending to benefit themselves or to cause a benefit or detriment to someone else, where that behaviour was seriously improper.

5.3 Having reflected on the consultation responses, we are now recommending a formulation of the offence which we have illustrated in draft form below:

A draft, illustrative clause – offence of corruption in public office

(1) It is an offence for a public office holder to use, or fail to use, a power or position of his or her public office for the purpose of achieving a benefit for himself or herself, or a benefit or detriment for another person, if:

(a) a reasonable person would consider the use or failure seriously improper, and

(b) the public office holder knew that a reasonable person would consider the use or failure seriously improper.

(2) It is a defence if the public office holder can prove that the conduct was, in all the circumstances, in the public interest.

5.4 Below we outline our rationale for recommending this model for a replacement offence.

CURRENT LAW AND PRACTICE

5.5 Our proposal for a corruption offence corresponds most closely with the "wilful misconduct" limb of the common law offence of misconduct in public office. That is, it primarily relates to positive acts of misconduct, rather than derelictions of duty.

[1] Consultation Paper (2016), Ch 6.

5.6 Our review of publicly reported cases in recent years that we attached as Annex D to our issues paper indicates that cases of this nature are the most prevalent form of the current offence, with common categories of offending being:

(1) inappropriate sexual relationships between prison officers and prisoners, and between police and complainants or members of the public potentially subject to charges;

(2) misuse of confidential databases in various contexts;

(3) misuse of public funds for personal gain;

(4) bribery and misuse of decision-making powers; and

(5) facilitating smuggling of drugs and other contraband into prisons.

5.7 By contrast, the other limb of the common law offence: the office holder "wilfully neglecting to perform his or her duty" corresponds more closely with our proposals for an offence of breach of duty in public office, which we outline further in Chapter 6. However, the two different limbs in the current offence do not correspond exactly with the two replacement offences we are recommending. Specifically, in relation to our proposed corruption offence, there is some conduct involving the failure to use a power or position that might be characterised as both "wilful misconduct" and "wilful neglect". For example, the recent conviction of two former police officers who deliberately failed properly to investigate reports of child abuse, and according to prosecutors were motivated by laziness, self-preservation and disdain for the complainants.[2] In addition to neglecting their duty, the deliberate covering up of evidence for these selfish purposes could be characterised as a form of wilful misconduct or corruption, as it involved "a mixture of dishonesty and laziness".[3] We discuss how serious derelictions of duty may continue to be prosecuted under our replacement offence at 5.67.

5.8 As we noted in Chapter 3, since the case of *W*,[4] the fault element of the common law offence has become somewhat complicated. Following *W*, proof of "dishonesty" has become a necessary component of the fault element of the offence of misconduct in public office in cases where, but for the decision to charge misconduct in public office, another dishonesty offence such as theft or fraud would be pursued. However, such a requirement is not part of the offence in other contexts.

5.9 There has also been difficulty in applying the seriousness threshold of the offence: "to such a degree as to amount to an abuse of the public's trust in the office holder".[5] In

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2 See Crown Prosecution Service, *Police officers who failed to investigate child abuse cases facing prison* (14 March 2019), available at https://www.cps.gov.uk/cps/news/police-officers-who-failed-investigate-child-abuse-cases-facing-prison. The two officers were sentenced to two years' imprisonment and 18 months' imprisonment following their convictions for misconduct in public office They unsuccessfully appealed against the severity of the sentences in *R v Pollard* [2019] EWCA Crim 1638; [2020] 1 Cr. App. R. (S.) 24.

3 Crown Prosecution Service, *Police officers who failed to investigate child abuse cases facing prison* (14 March 2019).

4 *R v W* [2010] EWCA Crim 372; [2010] QB 787.

5 *Attorney General's Reference (No 3 of 2003)* [2004] EWCA Crim 868; [2005] QB 73 at [61].

the relatively recent cases of *Chapman*[6] and *France*,[7] successful appeals resulted from the failure of the trial judge to direct the jury adequately on the intricacies of this requirement.

CONSULTATION PAPER PROPOSALS AND RESPONSES

5.10 In our consultation paper, we outlined a proposal for an offence of corruption that would encompass the following wrongs:

(1) Those involving undue gains, deliberate infliction of detriment, conflict of interest and similar behaviour which may be regarded as reflecting a wrong of either abuse of position (breach of public trust in the strong sense) or positive misgovernment.[8]

5.11 The form of the offence we provisionally proposed was as follows:

(1) D commits the offence if he or she abuses his or her position, power or authority.

(2) That is to say, if:

(a) he or she exercises that position, power or authority for the purpose of achieving:

(i) a benefit for himself or herself; or

(ii) a benefit or a detriment for another person; and

(b) the exercise of that power, position or authority for that purpose was seriously improper.[9]

5.12 The proposed offence developed some concepts contained within – and addressed the majority of conduct already caught by – section 26 of the Criminal Justice and Courts Act 2015 ("CJCA 2015"), which criminalises the "corrupt or other improper exercise of police powers and privileges". The only conduct this proposed offence would not address, within the scope of section 26, was conduct that we did not think should be subject to criminal sanction. We suggested that a possible consequence of introducing our proposed offence might be that section 26, with its potential for overly wide application, might be made redundant and subject to repeal.[10]

5.13 The offence we outlined in our consultation paper is similar to that which we are now recommending, save for three important details:

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6 *R v Chapman* [2015] EWCA Crim 539; [2015] 2 Cr App R 10.

7 *R v France* [2016] EWCA Crim 1588; [2017] 1 Cr App R 19.

8 Consultation Paper (2016), Ch 6.

9 Consultation Paper (2016), para 6.91.

10 Consultation Paper (2016), para 6.11.

(1) our revised version of the offence clarifies that failure to use the position or power can amount to corruption;

(2) our revised version of the offence includes a test of serious impropriety that incorporates subjective and objective elements; and

(3) we consider that there is an ongoing need for there to be a defence where the defendant's conduct is, in all circumstances, in the broader public interest. However, we consider that this defence will be rarely relied upon, as there are only a limited range of circumstances in which a public office holder's conduct could be said to be seriously improper and yet in the public interest at the same time.

5.14 We discuss the rationale for these amendments in more detail later in this chapter.

Consultation responses to the provisional proposed model for a corruption offence

5.15 The majority of responses we received in relation to the provisional proposal for a new corruption offence were in favour, with only two disagreeing.

5.16 Of the 14 consultees who agreed, nine did so categorically. The Crown Prosecution Service ("CPS") thought that it was "vital" that an offence such as this should be created, though they had specific comments on the exact form it should take.

5.17 The only response that was wholly opposed to this proposal came from barristers Keir Monteith QC and Lucy Wibberley, who felt the offence was too wide. Professor Liz Campbell expressed more detailed concerns about how the test of "seriously improper" would be defined, and also queried why merely "improper" conduct would not be covered.

5.18 We did not ask many specific questions about the exact formulation of the offence. However, consultees raised a number of concerns. The main issues raised were:

(1) whether benefit and detriment should be further defined and, if so how;

(2) whether it was necessary to include the qualifier "seriously" in the test of impropriety;

(3) whether the application of the test of "seriously improper" would be sufficiently workable for a jury in practice; and

(4) the relevance of the defendant's subjective mental awareness of the wrongdoing.

5.19 We address these concerns below.

Should benefit and detriment be further defined and, if so how?

5.20 In highlighting the reliance of our proposed offence on the concept of "benefit" and "detriment", Professor Alisdair Gillespie asked:

> Will it include intangible benefits (goodwill, promotion prospects etc) or only those that can be quantified in a proprietary way? If the definitions are drawn too broadly,

there is a danger that anyone could show some form of benefit or detriment and the courts will become confused over the nature and purpose of the offence.

5.21 Most consultees were anxious to ensure that the definition of these concepts was wide enough to encompass the types of corrupt advantage that the current offence is often used to address. Gillespie went on to acknowledge that:

> … if they are defined too narrowly (eg by being tied to financial benefits or detriment) then some types of corrupt behaviour would not be captured (eg where a person acts in return for sexual favours) …

5.22 The Police Action Lawyers Group queried whether the definition was broad enough to encompass circumstances where the benefit or detriment is "not immediately obvious", for example "the avoidance of potential negative consequences".

5.23 The CPS's view was that:

> The definition (of benefit/detriment) needs to be wide enough to cover the many ways the office can be abused, including causing embarrassment or inconvenience to another or improving one's standing or opinion amongst others.

5.24 Pete Weatherby QC[11] specifically queried whether our proposed corruption model offence would be narrowly targeted at personal gains to individual public office holders or whether institutional advantages would suffice. His specific concern was whether conduct performed with the purpose of covering up misconduct within an organisation, like the police, could trigger criminal liability.

The threshold of "seriously improper"

5.25 There was some disagreement about whether the qualifier "seriously" was a necessary part of the test of impropriety.

5.26 Professor Jeremy Horder and Professor Liz Campbell both argued that there should be no seriousness threshold, with Horder stating:

> The inclusion of this extra restraining element is inappropriate and anomalous. If a public official abuses his or her position with a view to benefitting themselves or causing detriment to another, that is already a serious wrong in as much as it is a betrayal of their position. Either that is sufficient to justify criminalisation in itself, or it is not. It should not need to be dragged over the criminalisation line by reference to a 'seriously improper' criterion.

5.27 However, the majority of consultees strongly supported the seriousness requirement.

5.28 The CPS, the College of Policing and the IPCC all said that a "serious" requirement would represent an improvement on the police-specific offence of "corrupt or other

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[11] Pete Weatherby QC responded in his capacity as one of the drafters of the Public Authorities Accountability Bill, being proposed by a group of lawyers who previously represented the families of those who died in the Hillsborough disaster.

improper exercise of police powers and privileges",[12] which does not contain this additional threshold.

Would the requirement of "serious impropriety" be too uncertain and difficult to apply?

5.29 Some consultees (including those who supported a seriousness requirement and those opposed) also highlighted that a "seriously improper" test could prove difficult to apply in practice. The Police Action Lawyers Group stated:

> We would argue that "seriously improper" is no clearer a threshold than the "abuse of public trust" threshold contained in the current offence. While we recognise the problem identified by the Commission that the current seriousness threshold is potentially uncertain and circular, we consider this to be a problem with seriousness thresholds in general. To substitute one subjective threshold with another would do little more than indicate a departure from the current threshold and the case law that underlies it, which is bound to create more uncertainty rather than less.
>
> We are further concerned that the phrase "seriously improper" imports a consideration of what the "proper" exercise of power would have been, which in turn may result in reliance on expert opinion at trial when we consider this issue should more properly be left to the jury to decide.

5.30 Some consultees suggested different formulations of the seriously improper test. These included:

(1) The CPS, who suggested that it could be defined as behaviour "falling far below the standards expected".

(2) The Police Action Lawyers Group suggested that "clarity could be provided by a further provision, listing the factors that a jury would have to consider when assessing if conduct is seriously improper". Their response provided a suggested list of relevant factors, including: any relevant professional standards, the extent/value/scale of benefit/detriment sought, the defendant's culpability, whether *both* benefit and detriment were foreseeable as a result of the defendant's act and whether the defendant's intended purpose involved the exploitation of a vulnerable person.

5.31 We have taken particular account of this final suggestion – a list of factors to help juries interpret the test – which we elaborate on further below.

The relevance of the defendant's subjective mental awareness of the wrongdoing

5.32 In consultation meetings with public sector representative groups, participants emphasised the importance of taking account of the subjective mental state of public office holders who are accused of misconduct. They also expressed the view that too many cases were being pursued against very junior and inexperienced officials, who had limited awareness that their conduct was improper.

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[12] Criminal Justice and Courts Act 2015, s 26.

5.33 This raises the broader issue of whether the standard by which the office holder should be judged should be wholly objective, or whether some account should be taken of their subjective mental state.

5.34 This has informed the refinements we have made to the fault element of the offence, compared with what we proposed in our consultation paper.

REFLECTIONS ON CONCERNS RAISED IN CONSULTATIONS REGARDING SERIOUS IMPROPRIETY

5.35 While support was not universal, the weight of views in consultation responses was strongly in favour of our proposal for an offence of corruption. We have therefore decided to proceed with this broad approach, subject to further refinement.

5.36 We have considered some of the concerns raised in respect of the "seriously improper" threshold, and some of the alternatives proffered.

5.37 We accept that there is legitimate concern as to whether "seriously improper" is a test that would prove to be clear and certain for law enforcement agencies, prosecutors and jurors to implement. We do, however, consider it to be an improvement on the circularity of the current common law, in which the test of "abuse of the public's trust in the office holder" defines both the nature of the conduct and the seriousness threshold for the offence.

5.38 In considering this threshold, we looked by way of comparison to the standard of "gross negligence" in the offence of gross negligence manslaughter. Defining the precise degree of negligence required for this offence has also been problematic, and is ultimately a question for the jury.[13] In the leading case of *Adomako*,[14] the House of Lords asserted that if there had been a breach of duty of care towards a victim who had died, and the breach of duty caused the death of the victim, the jury must go on to consider whether the breach of duty should be characterised as gross negligence which "will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred…".[15] The court held that the seriousness of the breach of duty is whether "having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgment to a criminal act or omission".[16] In *Misra*,[17] it was held that the offence of gross negligence manslaughter was sufficiently certain for the purposes of article 7 of the ECHR - "… the law is clear. The ingredients have been clearly defined … They involve no uncertainty".[18] However, the difficulty that this test can cause for judges directing juries in practice was evident in

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13 *Blackstone's Criminal Practice* (2019), para B1.63.

14 *R v Adomako* [1995] 1 AC 171.

15 *R v Adomako* [1995] 1 AC 171, 187.

16 *R v Adomako* [1995] 1 AC 171, 187.

17 *R v Misra* [2004] EWCA Crim 2375; [2005] 1 Cr App R 21 (328).

18 *R v Misra* [2004] EWCA Crim 2375; [2005] 1 Cr App R 21 (328) at [64], per Judge LJ.

Sellu,[19] where in the context of a gross negligence manslaughter trial, the jury had not been:

> assisted sufficiently to understand how to approach their task of identifying the line that separates even serious or very serious mistakes or lapses, from conduct which, to use the phrase from the above direction, was "truly exceptionally bad and was such a departure from that standard [of a reasonably competent doctor] that it consequently amounted to being criminal".[20]

5.39 Notwithstanding the endorsement of "gross" negligence as a standard, we view the test of "seriously improper" as a more certain threshold. It adopts language which is more likely to be readily understood by a jury.

5.40 We also consider it to be a significant improvement on the wording of the statutory offence in section 26 of the CJCA 2015, which is: "a reasonable person would not expect the power or privilege to be exercised for the purpose of achieving that benefit or detriment". This offence has been rightly criticised on the basis that it contains no threshold of "seriousness", and therefore any exercise of a police power that is carried out with the purpose of achieving a benefit or detriment, however minor, and for any person (natural or legal) is potentially open to prosecution.

5.41 We are also not convinced that the other proposals that have been made are likely to prove easier for a jury to apply in practice. This is not an easy area of law on which to set entirely certain thresholds for liability. The range of conduct that might be caught is very wide. Inevitably, there is a degree of jury discretion which is required in applying an appropriate threshold for criminal liability. Recognising this, we recommend that the statute provide a list of further factors to assist the jury in this assessment. This approach would be similar to that adopted in section 8 of the Corporate Manslaughter and Corporate Homicide Act 2007, which provides a number of factors for the jury to consider in deciding whether there was a "gross breach" of duty. Under this section, factors that a jury *must* consider are: how serious that failure was, and how much of a risk of death it posed. No restriction is placed on what matters the jury *may* consider, but suggestions include that they may have regard to any health and safety guidance that relates to the alleged breach.

5.42 With regard to the additional qualifier of "seriously", we remain of the view that this is a necessary component of the test. While there is force in Horder's argument that any improper behaviour by a public office holder (in the sense of acting to achieve a benefit or a detriment) is "already a serious wrong in as much as it is a betrayal of their position",[21] in our view there must be a further degree of gravity in the wrongdoing that justifies the imposition of criminal responsibility. Neither the current offence, nor our recommended corruption model offence is designed to criminalise every instance of a public office holder achieving an improper benefit or detriment;

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19 [2016] EWCA Crim 1716; [2017] 1 Cr App R 24.

20 *R v Sellu* [2016] EWCA Crim 1716; [2017] 1 Cr App R 24 at [152].

21 If the conduct is always serious as Professor Horder suggests, there is no problem in spelling that out for the jury as they will always find it to be serious.

particularly having regard to the principle of minimal criminalisation[22] and the need to avoid overreach or misapplication of the offence.[23] Views may legitimately differ on this point, but the weight of consultation responses favoured this approach.

5.43 This approach is also consistent with approaches in comparable jurisdictions such as Hong Kong[24] and Canada.[25] These jurisdictions distinguish between the most serious conduct – warranting criminalisation – and less serious conduct, where it is not appropriate to apply criminal sanction and a disciplinary or other civil penalty may be appropriate. For example, in the Canadian case of *Boulanger*, where an official used his influence to obtain a more detailed – but not inaccurate police report in respect of his daughter's car accident (saving him $250 in insurance costs), the Court found the conduct was not sufficiently serious to warrant the imposition of a criminal penalty.[26]

5.44 One issue that we do consider is in need of further refinement is the extent to which the defendant's subjective understanding of whether their conduct was "seriously improper" should be assessed as a separate fault element of the offence. We discuss this further as we outline the elements of the revised offence that we are recommending.

PROPOSAL FOR A NEW OFFENCE OF "CORRUPTION IN PUBLIC OFFICE"

5.45 The statutory offence that we are now recommending would have six elements:

(1) that the defendant is a public office holder and is aware of the facts that put them in this role;

(2) the defendant uses or fails to use his or her public position or power;

(3) The conduct in (2) is for the purpose of achieving a benefit or detriment;

(4) a reasonable person would consider their conduct seriously improper;

(5) the defendant realised that a reasonable person would regard it as such; and

(6) the defendant is not able to prove that their conduct was, in all the circumstances, in the public interest.

5.46 We consider each of these elements in more detail in the following section.

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22 By this we mean seeking to avoid criminalising conduct more than is necessary in contemporary society. See: D Husak, *Overcriminalization: The Limits of the Criminal Law* (2008). The theory of "minimal criminalisation" is not unanimously accepted by commentators. See J Horder, "Bribery as a form of criminal wrongdoing" (2011) 127 *Law Quarterly Review* 37.

23 See our discussion of these concerns in Chapter 3.

24 See *HKSAR v Ho Hung Kwan Michael* [2013] HKCFA 83, (2013) 16 HKCFAR 525.

25 See *Boulanger* [2006] 2 SCR 49; [2006] SCC 32.

26 *Boulanger* [2006] 2 SCR 49; [2006] SCC 32 at [49], per McLachlin CJ.

First element: "Public office holder"

5.47 In Chapter 4 we recommended that a definition of public office should underpin any new offences to be introduced.

5.48 This would be achieved through an overarching list of positions that would set the outer boundary of the type and category of positions to which the two offences may apply. We argued that this would assist public officials, and those working in quasi-public roles, to understand whether they may potentially be subject to the offence. Similarly, it would assist police and prosecutors in making charging decisions by defining an outer limit for the availability of the offence.

5.49 As a threshold for the application of the offence, therefore, the defendant would need to be the holder of a public office as defined in the statutory list of positions.

5.50 It would also be necessary to show that the defendant had knowledge of the circumstances that meant that they were in a public office. In other words, they should have knowledge of the fact they were in a relevant role. For example, a junior prison officer may not be aware that their role could amount to public office for the purposes of the offence, but they are clearly aware of the general nature of their employment.

5.51 We are not proposing that they should know, as a matter of law, that the position would be classified as "public office" for the purposes of the offence. We specifically asked consultees whether such an awareness should be necessary to commit the offence, and a clear majority were against this proposal.

Second element: the use, or failure to use, a "public position or power"

5.52 This element narrows the scope of the offence by introducing a functional test – "uses, or fails to use, a public position or power". It replaces the current common law test of "acting as such".

5.53 This is designed to ensure the criminality is targeted at corruption *in* public office, rather than any kind of misconduct by someone who happens to be a public office holder.

5.54 For example, if a Border Agency staff member were to deny a visa to a person on the basis that he did not like black people, this would potentially amount to the corruption offence, as it involves the misuse of a public power. If the same person were to make a fraudulent workplace injury claim, this would fall outside the scope of the proposed offence, as the conduct does not involve a use of the position or power of the role as a Border Force agent.

5.55 Similarly, as we noted in our consultation paper, conduct of the type pursued in *W* (involving misuse of a police credit card) would not be criminalised, as it does not involve an abuse of the position or power held by the defendant by virtue of being a public office holder.[27] It is merely an incidental aspect of their employment contract.

5.56 Inevitably there will be some harder cases where it will not be immediately clear whether the conduct in question involved the use of, or failure to use, a public position

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27 Consultation Paper (2016), para 6.24.

or power. This could result in a need for further judicial consideration of the question in more challenging cases.[28]

Use of a "position or power"

5.57 As we explained in our consultation paper, we consider that the scope of the offence must go beyond mere exercise of a public power, and encompass the use of the "position" or "authority" of the role. A focus solely on "power" would fail to encompass many circumstances currently caught within the offence, such as misuse of confidential information, and inappropriate sexual conduct. For example, in the case of Sandy Ezekiel – a Kent councillor who used confidential insider information to purchase two properties – the misconduct conviction was on the basis of the misuse of his position, rather than on the specific exercise of a public power.[29] We consider that conduct such as this should fall within the scope of the replacement offence, as it would currently.

5.58 While we referred to the "exercise" of a position, power or authority in our consultation paper, we now consider the term "use" to be more appropriate, as the verb "to exercise" does not really fit well with the term "position".

5.59 Following further advice from Parliamentary Counsel, we also now consider it unnecessary to refer separately to the "authority" of the role, as this is adequately encompassed within the terms "position" and "power".

5.60 In developing this recommendation, we also looked at approaches in comparable common law jurisdictions, which adopt various different phrases to encompass conduct committed in the course of one's public office. We summarise the terminology adopted in each of these below:

(1) **Hong Kong** (common law offence): "powers, discretions or duties";[30]

(2) **Canada** (statute): "Acting in connection with the duties of his or her office";[31]

(3) **Australia**: Mixture of common law and statute-based offences:

- Common law:
    - New South Wales and Victoria: "In the course of or connected to his or her public office"[32]

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28 As we note at paragraph 2.52, a recent example of this in respect of the current "acting as such test" was the case of *Johnson v Westminster Magistrates' Court* [2019] EWHC 1709 (Admin) (03 July 2019); [2019] 1 WLR 6238. However, in this case, the court firmly dismissed the argument that defendant was "acting as such".

29 BBC, "Sandy Ezekiel guilty of four charges of misconduct" (1 March 2013), available at: https://www.bbc.co.uk/news/uk-england-kent-21632631.

30 *HKSAR v Wong Lin Kay* [2012] HKCFA 33; [2012] 2 HKLRD 898 at [22], per Ribeirio PJ.

31 Canadian Criminal Code, s 122.

32 *R v Quach* [2010] VSCA 106.

- Statute:

    - Commonwealth: “in the course of or connected to his or her public office”[33] (applies to Commonwealth public officials only).

    - South Australia: “exercises power or influence that the public officer has by virtue of his or her public office” or “fails to discharge or perform an official duty or function”.[34]

    - Tasmania: “anything done or omitted, or to be done or omitted, by him in or about the discharge of the duties of his office”.[35]

    - Western Australia: “in the performance or discharge of the functions of his office or employment”.[36]

    - Queensland:

        - Offence of abuse of office: “does or directs to be done, in abuse of the authority of the person’s office, any arbitrary act prejudicial to the rights of another”;[37]

        - Offence of misconduct in public office: “deals with information gained because of office; or performs or fails to perform a function of office; or does an act or makes an omission in abuse of the authority of office”.[38]

(4) **Ireland** (statute): “a public official who does any act in relation to his or her office or position for the purpose of corruptly obtaining a gift, consideration or advantage for himself, herself or any other person”;[39] and

(5) **New Zealand** (statute): “in his or her official capacity”.[40]

5.61 All of these jurisdictions adopt tests that encompass misconduct that goes beyond the mere exercise of a public power. That seems sensible given that the office holder may, by abuse of something other than a power in the formal legal sense, act with criminal purpose in a seriously improper way. For example, a police officer who engages in an inappropriate relationship with a victim of crime may not use any of the powers that inhere in their role in doing so, but rather misuse their position, and thereby exploit the vulnerability of the victim.

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33 Criminal Code Act 1995 (Cth), s 142(2).

34 Criminal Law Consolidation Act 1935 (SA), s 251(1).

35 Criminal Code Act 1924 (Tas), s 83.

36 Criminal Code Act Compilation Act 1913 (WA), s 83.

37 Criminal Code Act 1899 (Qld), s 92.

38 Criminal Code Act 1899 (Qld), s 92A.

39 Prevention of Corruption (Amendment) Act 2001 (Ireland), s 8(1).

40 Crimes Act 1961 (NZ) ss 105(1), 105A(1).

5.62 An approach which extends beyond mere "public power" is also adopted in article 19 of the United Nations Convention Against Corruption[41] which states:

> Each State Party shall consider adopting such legislative and other measures that may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.

5.63 Our consultation paper proposal to use the terminology "power, position, or authority" was strongly supported by consultees. The CPS suggested that we might go further by including reference to "influence" to capture the abuse of "soft power" that comes with public office. However, we consider that the concept of "influence" is too vague to be incorporated into this criminal offence, and would potentially expand its scope considerably.

Failure to use a "public position or power"

5.64 Our recommendation is that, as with the current offence, it should be possible to commit the offence through both positive acts, and by omission.

5.65 The CPS in particular argued that "failing to act or permitting others to act" should be explicitly included within the scope of conduct captured:

> In our view this would be necessary to capture instances where a public officer permitted his/her staff to carry out acts conceived by them but which would benefit the public officer or cause a detriment to an opponent of the public officer. Whilst a conspiracy charge could be preferred it might be more appropriate, depending on the facts, to charge the public officer alone.

5.66 These circumstances are made explicit in the police-specific offence under section 26 of the CJCA 2015, which states that the failure to exercise a power or privilege of a constable, or the threat of failing to do so, falls within its scope.[42]

5.67 This would, for example, encompass conduct such as the failure of a senior civil servant to pass on crucial national security information to a Minister because the information would paint them in a bad light and could result in them losing their job.

5.68 It would also more clearly encompass conduct such as the recent case referred to at paragraph 5.7 which involved the conviction of two former police officers who deliberately failed properly to investigate reports of child abuse.[43] While the circumstances of this case also involved active abuse of powers, such as the forgery

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41 The United Nations Convention Against Corruption entered into force on 14 December 2005, and was ratified by the UK on 9 February 2006.

42 Criminal Justice and Courts Act 2015, subs 26(6) to (7).

43 See CPS, *Police officers who failed to investigate child abuse cases facing prison* (14 March 2019), available at https://www.cps.gov.uk/cps/news/police-officers-who-failed-investigate-child-abuse-cases-facing-prison.

of documents and lying to senior officers, a complete failure to act should also be capable of being prosecuted.

5.69 Circumstances of failure to act to prevent serious injury or death potentially overlap with the breach of duty offence we outline in Chapter 6. The key distinction is that the breach of duty offence will be available on proof of a different fault element, that of recklessness, compared with the corruption offence, which requires intent on the part of the defendant – namely, the behaviour must be undertaken for the purpose of achieving a benefit for the official, or a benefit or detriment for another person.

Third element: for the purpose of achieving a benefit or detriment

5.70 This is an ulterior or additional intent element of the offence – that is, the component of the mental element of an offence that goes beyond the simple intention to commit the relevant acts. It is focused on the fault of the defendant and not on any consequences of the defendant's conduct. This element is directed at undue advantage, infliction of detriment and conflict of interest. This reflects the underlying wrongs associated with these – namely abuse of a position of power or trust and misgovernment.

5.71 The fault element here – "purpose" – is a narrower construction than "intention". In contrast to intent, "purpose" excludes situations of "oblique intent" – where a person does not act in order to bring about a particular consequence, but merely foresees that another consequence is a virtually certain result of his or her actions.[44] We are recommending that oblique intent will not suffice for the offence; the defendant must have the creation of a benefit or causing of a detriment as his or her purpose in engaging in the conduct. A focus on purpose would mean that the offence is not committed where the benefit or detriment was a by-product of the public official's actions, rather than the reason they acted in the way they did.

5.72 The defendant must have as his or her purpose to achieve a benefit or detriment as the effect of the failure or improper use of position or power. There is no need to prove that a benefit or detriment arose in fact.

5.73 Consultees commented on several aspects of this proposal.

5.74 The CPS argued that the definition of detriment needs to be wide enough to cover the many ways the office can be abused, including causing embarrassment or inconvenience to another or improving one's standing or opinion amongst others.

5.75 As we noted above, some consultees questioned whether the concepts of benefit and detriment could be defined with sufficient certainty for the purposes of the criminal law.

5.76 Most consultees were anxious to ensure that the definition of these concepts was wide enough to encompass the types of corrupt advantage that the current offence is often used to address.

5.77 The breadth of the possible advantages and disadvantages that can be achieved through "corrupt" behaviour is already recognised in the statutory criminal offences of

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44 *R v Woollin* [1999] 1 AC 82; [1998] 4 All ER 103.

bribery (sections 1 to 4 of the Bribery Act 2010) and the improper exercise of police powers and privileges (section 26 of the CJCA 2015). The Bribery Act refers to a bribe as a "financial or other advantage". Section 26(9) of the CJCA 2015 states:

> "benefit" and "detriment" mean any benefit or detriment, whether or not in money or other property and whether temporary or permanent …

5.78 For the purposes of drafting our recommended offence, we consider that the wide definition adopted above would be the preferable approach. However, for the avoidance of doubt, explanatory notes for the offence should make it clear that this definition includes:

- financial gain and loss (for example, money / gifts "in kind" / promotion or demotion), drawing on the definition used in section 34 of the Theft Act 1968;
- physical benefits and harm (for example, misuse of the organ donor register);
- reputational benefits and harm (for example, improper awarding of official titles or covering up errors to avoid embarrassment);
- relationship benefits and harm (for example, misusing power to ingratiate oneself to another / causing damage to a relationship between others)
- political benefits (for example, misusing power improperly to achieve a political outcome, such as deliberately forging official statistics to encourage racial division in accordance with the perpetrator's racist beliefs); and
- sexual benefits (misusing position or power for the purpose of engaging in a sexual relationship). This could be in exchange for a particular benefit to the other individual, or as "benefit/detriment" to both – (for example, a police officer offering protection to a vulnerable victim in exchange for sexual favours).

5.79 This would help to ensure that any future court interpreting the offence would give the definition the wide interpretation that is intended.

Fourth element: a reasonable person would consider the behaviour was seriously improper

5.80 In this element, the word "improper" describes the nature of the behaviour, and "seriously" defines the degree of the impropriety that warrants criminalisation. It is an objective test: was the use, or failure to use the position or power such that an ordinary reasonable person would consider it to be seriously improper?

5.81 As we noted above at paragraphs 5.25 to 5.44, this element was probably the aspect of our proposals on which consultees commented the most. Despite the reservations of some consultees, we consider this test to be the best option available to encapsulate the nature and gravity of corruption warranting criminal sanction.

5.82 We do recognise the concern that in practice juries may be assisted by further guidance as to what is meant by the term "seriously improper". We recommend that this should be provided in a manner similar to the legislative approach adopted in

section 8 of the Corporate Manslaughter and Corporate Homicide Act 2007, referred to at paragraph 5.41.

5.83 Drawing on the various factors that have informed the consideration of the current offence, we propose the following additional guidance on the gravity of conduct sufficient to warrant criminal sanction:

> In deciding whether the behaviour was seriously improper, factors that the jury should be directed to consider should include (where relevant):
>
> (a) the extent to which the behaviour involved dishonesty or a conflict of interest;
>
> (b) the extent to which the behaviour involved a breach of trust – particularly in relation to vulnerable individuals;
>
> (c) the degree of any undue benefit that was conferred on the defendant or another person;
>
> (d) the extent to which harm was caused to one or more affected individuals; and
>
> (e) the extent to which the conduct undermined public confidence in the institution to which the public office relates, or public institutions more generally.

Fifth element: the defendant realised that an ordinary decent person would regard the behaviour as seriously improper

5.84 We have given consideration as to whether the assessment of impropriety should be purely objective (as proposed by the CPS), or whether a hybrid two stage[45] formulation (pairing subjective and objective elements) would be preferable.

5.85 The two-stage test would be as follows:

(1) was the use, or failure to use the position or power such that an ordinary reasonable person would consider it to be seriously improper? (the objective test)

If yes:

(2) must the defendant have realised that their conduct was, by those standards, seriously improper? (the subjective test).

5.86 A test involving a subjective as well as an objective standard would be particularly favourable to very inexperienced public office holders, as in some cases, the prosecution might not be able to show the defendant appreciated the conduct was wrong, and thereby they will avoid criminal liability. This would go some way to addressing the concerns expressed to us by representatives from Unison and the Prison Officers Association, who argued that under the common law offence, in too

[45] Based in one sense on *R v Ghosh* [1982] EWCA Crim 2; [1982] QB 1053.

many cases charges were brought against junior officials who had little or no appreciation that their conduct was wrong.[46]

5.87 On the other hand, it should be noted that the Supreme Court has recently rejected a test of this dual nature for "dishonesty" in *Ivey v Genting Casinos*,[47] an approach which was subsequently followed by the Court of Appeal (Criminal Division) in *R v Barton and Booth*.[48] In particular, in *Ivey* the Supreme Court expressed the concern that the second limb of such a test meant that the more "warped" a defendant's standards were, the more likely they were to be acquitted.[49]

5.88 However, we consider that this approach to determining fault still has a useful role to play in the context of an offence of corruption in public office. The test does not rely on a purely subjective assessment of what the defendant considers to be "seriously improper", but rather what they realise a reasonable person will think is seriously improper.

5.89 For example, while an immigration official who makes racially biased determinations for visa applications may themselves consider this to be reasonable due to their own racist beliefs and assumptions, it would be difficult for them to argue successfully that they genuinely believed that a reasonable person would not consider this seriously improper. The official in these circumstances is not able to escape liability on the basis of their own warped moral standards.

5.90 On the other hand, if another official were to grant an application for asylum to a claimant who they knew did not meet the legal criteria, but who they knew would face severe hardship and possibly murder if deported, they may have a stronger argument that they believed that a reasonable person would not consider their behaviour seriously improper. However, given the fundamental importance attached to adherence to the law in the exercise of immigration rules, this argument may also ultimately fail. In this circumstance, the official may also seek to rely on the "public interest defence" that we outline further from paragraph 5.99.

5.91 A hybrid test for serious impropriety is also undeniably more difficult to apply for a jury, who are asked to engage in a two-stage process of mental reasoning that combines sophisticated legal notions of objective and subjective fault.

5.92 By contrast, the approach used in the statutory offence of "corrupt or other improper exercise of police powers and privileges" is largely objective,[50] and is therefore simpler to apply.

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46 An example of concern they cited under the current law was charges being brought against external training staff in prison, who had been given no formal training in appropriate boundaries, and had engaged in sexual conduct with prisoners.

47 [2017] UKSC 67; [2018] AC 391.

48 [2020] EWCA Crim 575; [2020] 2 Cr App R 7.

49 [2017] UKSC 67; [2018] AC 391 at [57]. For arguments to the contrary see D Ormerod and K Laird "Much ado about nothing?" in D Cleary, (ed) *The Supreme Court Yearbook* (2019).

50 Criminal Justice and Courts Act 2015, s 26(1)(a).

5.93 While we recognise the limitations and recent Supreme Court criticism of the two-stage assessment of dishonesty, we believe that a similar hybrid approach to assessing impropriety is the right approach in this context. As the corruption offence will criminalise behaviour that would not be criminal in other contexts, it is particularly important to ensure that the official was aware that what they were doing would be recognised by a reasonable person to be wrong (although not necessarily criminal) before criminal liability is imposed. For these purposes we do not consider that the test will serve to protect those with warped moral standards, but rather help safeguard against over-criminalisation of mistakes made by less experienced officials.

5.94 Where officials genuinely do not appreciate that others will see their conduct as seriously improper, there is significantly less value in criminalising it. This is because the extent of their moral wrongdoing is lesser, and the value of denunciation is limited.

Recommendation 9.

5.95 An offence of corruption in public office should be introduced with the following elements:

(1) that the defendant is, and knows he or she is, a public office holder;

(2) the defendant uses or fails to use his or her public position or power;

(3) for the purpose of achieving a benefit or detriment;

(4) a reasonable person would consider the use or failure seriously improper;

(5) the defendant realised that a reasonable person would regard it as such; and

(6) the defendant is not able to prove that their conduct was, in all the circumstances, in the public interest.

Recommendation 10.

5.96 The definition of benefit and detriment for the purposes of the offence should be that which is currently adopted in section 26(9) of the Criminal Justice and Courts Act 2015, as follows:

> "benefit" and "detriment" mean any benefit or detriment, whether or not in money or other property and whether temporary or permanent.

5.97 The explanatory notes to the offence should make it clear that the kinds of benefits and detriments that would meet the definition include:

- financial gain and loss;
- physical benefits and harm;
- reputational benefits and harm;
- relationship benefits and harm;
- political benefits and detriments; and
- sexual activity.

Recommendation 11.

5.98 The legislation implementing the offence should stipulate that, in deciding whether the conduct of the defendant was "seriously improper", factors that the jury should be directed to consider should include (where relevant):

(1) the extent to which the behaviour involved dishonesty or a conflict of interest;

(2) the extent to which the behaviour involved a breach of trust – particularly in relation to vulnerable individuals;

(3) the degree of any undue benefit that was conferred on the defendant or another person;

(4) the extent to which harm was caused to one or more affected individuals; and

(5) the extent to which the conduct undermined public confidence in the institution to which the public office relates, or public institutions more generally.

A PUBLIC INTEREST DEFENCE

5.99 The current offence of misconduct in public office includes, as a final element, a requirement that the defendant's actions be "without reasonable excuse or

justification".[51] As we noted in Chapter 3, our analysis of the case law suggests that in practice, this element has rarely been treated separately, though a public interest component to the offence was explicitly recognised in the 2015 case of *Chapman*.[52] In most cases, the fact that the public office holder has "wilfully misconducted him or herself to such a degree as to amount to an abuse of the public's trust in the office holder" would strongly suggest that there was no reasonable excuse or justification for the conduct. However, the specific context of "whistleblowing" by a public official could potentially create such a scenario. For example, if a government lawyer were to leak confidential advice suggesting the government was acting illegally in some serious way, this might be seen to both "amount to an abuse of the public's trust in the office holder" in their obligation to maintain confidentiality, while at the same time having the "reasonable excuse or justification" of exposing illegal conduct. Though he was prosecuted under section 2 of the Official Secrets Act 1911, rather than for misconduct in public office, a famous example of such a scenario might be the Clive Ponting case – which involved the leak by a senior Defence official of documents relating to the sinking of the Argentine Belgrano warship in the Falklands conflict.

5.100 Some civil protections for whistleblowers already exist by virtue of the Public Interest Disclosure Act 1998, which provides protection to workers making disclosures in the public interest, and allows such individuals to claim compensation for victimisation following such disclosures. However, this does not directly affect the availability of any criminal offences arising from the disclosure.

5.101 In the 2015 case of *Chapman*,[53] which concerned a prison officer selling stories to a journalist relating to a high-profile prisoner, the Court of Appeal stated that in these circumstances, an assessment of the "public interest" was critical to the determination of whether the offence of misconduct in public office had been committed. More specifically, the Court of Appeal held that an assessment of the "public interest" was determinative of whether the seriousness threshold – "to such a degree as to amount to an abuse of the public's trust in the office holder" – had been satisfied in the context of an unauthorised release of information to the press. Lord Thomas CJ outlined the reasoning of the Court as follows:

> We therefore turn to examine the second way in which the standard of seriousness can be judged — by reference to the harm to the public interest. In our view, in the context of provision of information to the media and thus the public, that is the way in which the jury should judge the seriousness of the misconduct in determining whether it amounts to an abuse of the public's trust in the office holder. The jury must, in our view, judge the misconduct by considering objectively whether the provision of the information by the office holder in deliberate breach of his duty had the effect of harming the public interest. If it did not, then although there may have been a breach or indeed an abuse of trust by the office holder vis a vis his employers or commanding officer, there was no abuse of the public's trust in the office holder as the misconduct had not had the effect of harming the public interest.

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51 See *Attorney General's Reference (No 3 of 2003)* [2004] EWCA Crim 868; [2005] QB 73 at [61].

52 *R v Chapman* [2015] EWCA Crim 539; [2015] QB 883 at [36] to [40].

53 *R v Chapman* [2015] EWCA Crim 539; [2015] 2 Cr App R 10. This case was one of the appeals in relation to the Operation Elveden prosecutions that were conducted several years ago. We discuss these in more detail in Chapter 2.

> No criminal offence would have been committed. In the context of a case involving the media and the ability to report information provided in breach of duty and in breach of trust by a public officer, the harm to the public interest is in our view the major determinant in establishing whether the conduct can amount to an abuse of the public's trust and thus a criminal offence. For example, the public interest can be sufficiently harmed if either the information disclosed itself damages the public interest (as may be the case in a leak of budget information) or the manner in which the information is provided or obtained damages the public interest (as may be the case if the public office holder is paid to provide the information in breach of duty).[54]

5.102 We agree with the Court of Appeal that assessment of the "public interest" is of importance in certain circumstances that are captured within the current offence, and would remain so in our recommended corruption offence; most notably the unauthorised use or disclosure of information by a public office holder. We confine the scope of our recommendation for an explicit public interest defence to our proposed corruption offence.

5.103 We provisionally expressed the view in our consultation paper that, beyond the common law defences such as duress and necessity, no additional defences should apply to our replacement corruption offence. A majority of responses agreed with this proposal, however none did so emphatically. The Bar Council and Criminal Bar Association, for example, were undecided in whether to support this proposal or not, with some of their members agreeing and some disagreeing. Public Concern at Work argued strongly that a public interest defence should be introduced:

> We believe a codified law on misconduct in public office should explicitly include a public interest defence which can be used by whistleblowers accused of the offence, so as to make it consistent with the freedom of expression protected by common law and Article 10 of the ECHR.

5.104 Having given further detailed consideration to this question, we now consider it necessary to ensure that the defences recognised at common law, particularly that in *Chapman*, are reflected in the replacement corruption offence. We consider that this is best achieved as a separate defence – a statutory "public interest" defence – that would be available in certain, limited circumstances – most likely in the context of unauthorised use or disclosure of official information (see further paragraphs 5.123 to 5.131). This approach would therefore reformulate and recast two existing aspects of the current offence: the *Chapman* public interest test and the defence of "without reasonable excuse or justification" as outlined in *AG's Reference*.[55]

A true public interest defence

5.105 A public interest defence is a *justification* of criminal conduct. It allows a defendant to plead that his or her conduct, though otherwise criminally culpable, should not be criminalised in this instance because circumstances exist that mean the conduct had a net benefit to the public.

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54 *R v Chapman* [2015] EWCA Crim 539; [2015] 2 Cr App R 10 at [36].

55 *Attorney General's Reference (No 3 of 2003)* [2004] EWCA Crim 868; [2005] QB 73 at [61].

5.106 Defences that rely upon concepts such as public good and public interest are unusual in the criminal law of England and Wales. Ordinarily, criminal defences do not require the jury to make a value judgement about the wider benefits of the defendant's conduct. In the context of a public interest defence, the jury are being asked to balance competing interests which are likely to be far outside their realm of experience.

5.107 There are, however, defences in the criminal law of England and Wales that are similar to public interest defences. The common law defence of necessity is one.[56] Another is the defence of "acting reasonably" in section 50 of the Serious Crime Act 2007, which provides a general defence to offences of encouraging or assisting crime under that Act. Moreover, the "public good" defences found in obscenity law allow certain justifications for the publication of obscene material. Section 4(1) of the Obscene Publications Act 1959, for example, states that a person who publishes an obscene article contrary to section 2 of that Act shall not be convicted if publication of the article is "justified as being for the public good on the grounds that it is in the interests of science, literature, art or learning, or of other objects of general concern". Both of these statutory defences carry reverse legal burdens (see further paragraph 5.111 and following). The prosecution and the defence are entitled to call expert witnesses to establish whether the publication may be justified as being for the public good. A "public good" defence in obscenity law does not amount to a denial of harm. The article remains obscene, but its obscenity is justified on the grounds that its publication is in the "public good".

5.108 While there are few examples of true public interest defences in the criminal law of England and Wales, very narrow public interest defences are set out in section 20 of the Commissioners for Revenue and Customs Act 2005 and section 3 of the Agricultural Statistics Act 1979. Furthermore, legislative reforms in recent years have also resulted in additional defences, in the context of unauthorised disclosure. For example, section 41 of the Digital Economy Act 2017, provides that the offence of disclosing relevant confidential personal information is not made out if the disclosure is made for the purposes of: preventing serious physical harm to a person; preventing loss of human life; safeguarding vulnerable adults and children; responding to an emergency; or protecting national security.[57] Section 170(3) of the Data Protection Act 2018[58] provides that it is a defence to the offence of knowingly or recklessly obtaining or procuring personal data without consent,[59] if the person acted "in the reasonable belief that in the particular circumstances the obtaining, disclosing, procuring or retaining was justified as being in the public interest".[60]

An objective test

5.109 The assessment of whether the "seriously improper" conduct is nevertheless in the "public interest" should be determined objectively. It would be insufficient if the office

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56 eg, see *Re A (Children)* [2000] 4 All ER 961; [2001] Crim LR 400.

57 Digital Economy Act 2017, s 41(2)(k).

58 This provision replaced s 55 of the Data Protection Act 1998.

59 Data Protection Act 2018, s 1.

60 Data Protection Act 2018, s 3(c)(iii).

holder merely believes his or her conduct to be in the public interest; it should be manifestly so.

5.110 For example, if an official were to publish the personal details of unemployment benefit recipients in his local area, out of a genuine belief that there was a "public interest" in "people knowing where their taxes are going", this would almost certainly not be "in the public interest", even if the official genuinely believed this to be the case.

5.111 By contrast, should a police officer publicly expose serious mishandling of an ongoing case by his or her force, in violation of professional obligations of confidentiality, it may at least be possible to mount an argument that the conduct was in the broader public interest. As we note further at paragraphs 5.126 and 5.127, whether or not the police officer had other, legitimate ways to raise these concerns will also be relevant to assessing whether the conduct was in the public interest.

Burden of proof

5.112 There are at least two forms that the public interest defence could take:

(1) the defendant must raise an issue of public interest sufficient to require the prosecution to disprove it as part of the burden of proof resting on the prosecution (an "evidential burden"); or

(2) the defendant must show, on the balance of probabilities, that the disclosure was in the public interest (a "legal burden" or "persuasive burden").

5.113 In the first model, the burden of proof remains with the prosecution, and they must prove beyond reasonable doubt that the disclosure was not in the public interest. The second model requires that the defendant prove that the disclosure was, more likely than not, in the public interest.

5.114 It is our view that the second formulation, the legal burden on the defence, is the preferable option. We consider that placing the burden of proof on the prosecution might place impossible evidential demands on the prosecution. Importantly, while the defendant bears the legal burden under our preferred model, they will not have to prove beyond reasonable doubt that the disclosure was in the public interest: they need only prove that it was more likely than not that the conduct was in the public interest. Such a determination would obviously be intensely fact-dependent, but it is important to note that such a defence would not necessarily require the defendant to prove the existence of certain facts (whereas the alternative formulation of the defence would require the prosecution to prove facts or the lack thereof).

Compliance of a reverse burden with Article 6(2)

5.115 In recommending a reverse burden of proof, regard must be had to the presumption of innocence under Article 6(2) of the European Convention on Human Rights. On the face of it, a reverse burden of proof would appear to conflict with a presumption of innocence: the facts (as least as they relate to the public interest) are presumed against the defendant unless they can prove otherwise. However, the European Court of Human Rights recognises certain departures where it is necessary. The

interference must be no more than is "reasonably proportionate to the legitimate aim sought to be achieved."[61]

5.116 Reverse legal burdens are certainly not unusual in domestic law, albeit they are perhaps not commonplace. Examples include:

(1) section 40 of the Health and Safety at Work Act 1974, which states "it shall be for the accused to prove... that it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement...";

(2) section 101 of the Magistrates' Courts Act 1980, which states "Where the defendant to an information or complaint relies for his defence on any exception, exemption, proviso, excuse or qualification... the burden of proving the exception, exemption, proviso, excuse or qualification shall be on him...";

(3) section 139(4) of the Criminal Justice Act 1988, which provides that "It shall be a defence for a person charged with [having a bladed or pointed article in a public place] to prove that he had good reason or lawful authority for having the article with him in a public place"; and

(4) section 4 of the Homicide Act 1957, which provides that it will be manslaughter and not murder if, under subsection (2), the defence "prove that the person charged was acting in pursuance of a suicide pact between him and the other."

5.117 On numerous occasions the appellate courts have found reverse legal burdens to meet the requirements of Article 6(2).[62]

5.118 The House of Lords considered the matter directly in *R v Johnstone*.[63] In this case Lord Nicholls explained that the proportionality test was essentially whether:

> the public interest will be prejudiced to an extent which justifies placing a persuasive [legal] burden on the accused. The more serious the punishment which may flow from conviction, the more compelling must be the reasons.[64]

5.119 This was a non-binding opinion by Lord Nicholls, but it was cited with approval in *Sheldrake v DPP* by Lord Bingham of Cornhill.[65] The Court of Appeal in *R v Webster* also considered that a reverse legal burden of proof would be justified where it was clear that the prosecution would otherwise face insuperable evidential obstacles in many cases.[66]

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61 *Janosevic v Sweden (34619/97)* (2004) 38 EHRR 473 at [101].

62 See, for example, the House of Lords' opinions in *Lambert* [2001] UKHL 37; [2002] 2 AC 545; *Johnstone* [2003] UKHL 28; [2003] 1 WLR 1736; and *Sheldrake and Others* [2004] UKHL 43; [2004] 3 WLR 976.

63 *R v Johnstone* [2003] UKHL 28; [2003] 1 WLR 1736; [2003] All ER 884.

64 *R v Johnstone* [2003] UKHL 28; [2003] 1 WLR 1736; [2003] All ER 884 at [50].

65 *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43; [2004] 3 WLR 976 at [33].

66 *R v Webster* [2010] EWCA Crim 2819; [2011] 1 Cr App Rep 16 at [22], per Pitchford LJ.

5.120 We consider that, whilst the reverse burden of proof in the public interest defence would constitute an interference in Article 6(2), the interference is nonetheless proportionate to the legitimate aim pursued.

5.121 First, to the extent that the defence is likely to be engaged in cases of unauthorised disclosure of information by the public office holder, the prosecution is likely to face significant evidential difficulties. These evidential difficulties will include difficulties born of having to prove the non-existence of certain events and those borne of the need to disclose further confidential information.

5.122 Secondly, the prosecution will have already been required to prove all of the other elements of the offence beyond reasonable doubt. Courts have long held that, where an interference relates to an exception rather than to the essential elements of the offence, that interference is less likely to be unacceptable.[67]

Practical application of the defence

5.123 Arguably, the overarching test of serious impropriety is wide enough to encompass almost all such circumstances in which a public interest defence might be raised. In practice, therefore we consider it would rarely be necessary to rely on the public interest defence alone as a denial of liability. It will be a rare case that a jury will be persuaded that:

(1) the defendant knew that a reasonable person would consider their conduct to be seriously improper; and yet

(2) the conduct was nonetheless justified in the public interest.

5.124 In most cases where the defendant denies that his or her conduct lacked the culpability to warrant criminal conviction he or she would rely on the argument about serious impropriety. Even if that argument failed, this would not preclude reliance also on the public interest defence.

5.125 In some cases, particularly involving the misuse of information, it might be clear, and perhaps even admitted, that the office holder's unauthorised use of the information was seriously improper in the sense that it was a serious breach of his or her duties and known by the defendant to be such. However, given the gravity of the state illegality or impropriety exposed, that impropriety might be seen by the jury as in the public interest.

5.126 A public interest defence in such circumstances would not focus solely on the public interest of the content of the information that was disclosed – it would still be relevant to consider the broader public interest that the community has in officials not routinely using or disclosing official data in an unauthorised manner. But the inclusion of the defence recognises that there may be a very limited set of circumstances where this could be justifiable. Of relevance to such a consideration (and also the prior consideration of serious impropriety) will be whether the official had any other legitimate avenues they could have pursued as an alternative. For example, in

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67 *Attorney-General of Hong Kong v Lee Kwong-Kut* [1993] AC 951, p 969.

Chapter 10 of our recent report in relation to Protection of Official Data, we recommended that:

> An independent, statutory commissioner should be established with the purpose of receiving and investigating allegations of wrongdoing or criminality where otherwise the disclosure of those concerns would constitute an offence under the Official Secrets Act 1989.[68]

5.127 If an official had such an avenue to pursue, and chose not to do so, this may tend towards a finding that their conduct was not, in all the circumstances, in the public interest.

5.128 To ensure adequate protection in the rare cases where it might legitimately be said that the wider public interest justifies the means, we recommend the introduction of a specific public interest defence. This approach would also be consistent with the approach we outline in Chapter 11 of our Protection of Official Data report, where we recommended that:

> A person should not be guilty of an offence under the Official Secrets Act 1989 if that person proves, on the balance of probabilities, that: (a) it was in the public interest for the information disclosed to be known by the recipient; and (b) the manner of the disclosure was in the public interest. We make no further recommendation beyond this in respect of the form of the defence[69]

5.129 We consider it desirable that in implementing these recommendations, government ensure that there is consistency across the defence in these two contexts, so as not to create a perverse incentive for prosecutors to pursue one charge in favour of the other on the basis that the public interest defence is more stringent (and therefore harder for the defendant to use successfully).

Recommendation 12.

5.130 It should be a defence to the commission of the offence of corruption in public office if the public office holder can prove that their conduct was, in all the circumstances, in the public interest.

5.131 The burden of proof should rest with the defendant to prove the defence on the balance of probabilities.

SEXUAL MISCONDUCT AND THE CORRUPTION OFFENCE

5.132 In our consultation paper, we highlighted that exploitation of an opportunity, gained by virtue of a particular position of public office, to facilitate a sexual relationship would no longer be criminal under the proposed offences unless it amounted:

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68 Protection of Official Data (2020) Law Com No 395, p 244, Recommendation 32.

69 Protection of Official Data (2020) Law Com No 395, p 261, Recommendation 33.

(1) Under the corruption model: to either a sexual offence or abuse of a position, power or authority where D's *purpose* was to gain an advantage or to cause detriment to another.

(2) Under the breach of duty model: to either a sexual offence or a breach of a particular duty concerned with the prevention of harm that caused a risk of serious injury to the victim.

5.133 At paragraph 5.78 above we outlined that our recommended offence of corruption in public office should continue to include sexual conduct within the definition of detriment and benefit. This is to ensure that contexts that are currently criminalised through the common law offence may remain criminal, should they meet the fault threshold of "seriously improper".

Sexual conduct and the current law

5.134 Sexual misconduct is one of the most common categories of prosecution under the common law offence of misconduct in public office. These prosecutions usually fall within one of the following categories:

(1) A public officer has requested or demanded sexual acts in exchange for using their position or power to benefit (or avoid detriment) to another person. For example, an immigration official requesting sexual favours from an asylum seeker in exchange for granting them refugee status.

(2) A public officer has engaged in sexual activity with someone they have met or gained access to in the course of their work and, while "consensual", the sexual conduct is considered to amount to a breach of public trust by the office holder due to the misuse of the position and the particular vulnerability of that person. For example, a police officer pursuing a relationship with a victim of crime.[70]

(3) A public officer has engaged in sexual activity with a person they have met or gained access to in the course of their work and, while "consensual", the sexual conduct renders the office holder vulnerable to misjudgement, conflicts of interest and exploitation. For example, a prison officer entering into a sexual relationship with a prisoner, which has wider implications for discipline and safety within the prison.

(4) A public officer has had consensual sex whilst on duty. While there is nothing about the relationship that would suggest improper pressure, vulnerability or corruption is present; the concern is the dereliction of duty/unprofessionalism that attends the conduct, and that it could be seen to undermine public trust in the office holder. For example, a government security officer engaging in sexual

[70] See for example the case of *R v Leyzell* [2019] EWCA Crim 385, where a police officer pleaded guilty to misconduct in public office in relation to his conduct in contacting a woman on social media after responding to a crime report and then entering into a sexual relationship with her.

conduct while they are meant to be providing security to a secure government building.[71]

5.135 Categories two and three above might also be grouped together under a single category of "sexual conduct in circumstances that are inherently corrupt". However, we outline them separately as there are subtle distinctions in the form of corruption between each.

5.136 There are also forms of misconduct involving the abuse of personal information for sexual purposes, for example:

(1) the use of confidential information obtained in the course of public office to harass someone sexually or try to pursue a relationship with them; and

(2) the abuse of the position to obtain some other personal material in relation to another for the purpose of sexual gratification – for example, private photographs.[72]

5.137 If sexual behaviour were removed from the scope of any potential corruption offence, our analysis of the cases charged since 2005 suggests that the largest cohort of offending behaviour that would be removed from the scope of the offence would relate to sexual activity between prison staff and prisoners. Sexual activity between police and witnesses and suspects is another significant group of cases that would be decriminalised if sexual behaviour was removed from the scope of the offence. However, as we noted at paragraph 3.90, in the latter group of cases the sexual conduct would fall within the definition of benefit or detriment under section 26(9) of the CJCA 2015, which states that "'benefit' and detriment' mean any benefit or detriment, whether or not in money or other property and whether temporary or permanent".[73]

Consultation responses

5.138 A number of responses considered the appropriateness of the ongoing criminalisation of sexual conduct within the specific context of public office. Many responses also addressed the separate question of whether the prosecution of sexual misconduct should not be confined to the context of public office. We deal with this question in more detail in Chapter 9.

5.139 Unions and representative bodies we spoke to expressed serious reservations about some of the cases that are currently pursued – particularly those where the free consent of the other person did not appear to be an issue. The Police Federation, for example, told us that while they understood the reason why serious abuses of police power in sexual contexts were prosecuted, they could see less justification for

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71 There is overlap between these categories, and Sjolin and Edwards divide them slightly differently: C Sjolin and H Edwards, "When misconduct in public office is really a sexual offence" (2017) 81(4) *Journal of Criminal Law* 292.

72 For example, the case of *R v Harris* [2018] EWCA Crim 2002, which involved a police Sexual Offences Liaison Officer who accessed a rape victim's email and Facebook account and downloaded images of her.

73 Note that we also recommend the repeal of this offence if our primary recommendations are adopted – see para 5.158 below.

criminalising sexual conduct merely because it had some connection to public office. For example, they argued that a police officer pursuing a relationship with a witness to a burglary (who is not directly affected by the crime) might be inappropriate, but does not involve an abuse of position or power to a degree worthy of criminal sanction.

5.140 Other bodies – notably the IPCC (now the Independent Office for Police Conduct), NOMS (now Her Majesty's Prison and Probation Service) and the CPS, sought to emphasise the importance of retaining sexual misconduct within the terms of any reformed offence.

5.141 The CPS expressed significant concern about the prospect of decriminalisation of sexual misconduct by public office holders:

> We do not agree that office holders who breach their duty by allowing themselves to be manipulated into engaging in an improper personal relationship should not be subject to the criminal law. Whilst not every case warrants such sanction, we are of the view that the breach of duty is capable of being so serious and so improper as to amount to an abuse of the public office.
>
> We do not agree that improper personal relationships are merely the precursor to an offence (such as perverting the course of justice or bringing listed substances into prison). In the closed world of a prison, a sexual relationship between a guard and an inmate seriously undermines the ability of the authorities to maintain good order and discipline. It is the favouring of one inmate over the others; it is to award power to that inmate, and probably his gang, over the others. The corollary is that other inmates will not trust or respect other guards or indeed each other, breeding chaos. It also, as in Cosford, draws other guards into the deceit and further breaches of duty. The same is true, though less common, of police officers who allow themselves to become personally involved with gang members - it is of itself corrupt.

5.142 NOMS expressed similarly strong views in response to indications that we may remove inappropriate relationships from the ambit of the offence:

> All prisoners are considered to be in NOMS' care and therefore there is a duty of care towards them, no matter what age/circumstances. Any kind of inappropriate relationship would be immoral, compromising the level of trust and professionalism expected of NOMS staff. Would this not fall under MIPO?
>
> It is vital that such relationships are captured and consistent outcomes are received on each occasion. However, we feel that the consequences of an inappropriate relation are being missed in the review. The fact that inappropriate relationships of any kind, can threaten the safety and security of the prison and puts – staff, visitors and prisoners at risk would still not be covered by this offence. It is not the mere fact that the relationship may have been (just) sexual, for example, it is the fact that the member of staff has taken advantage (abuse) of their position, may have conditioned and manipulated the prisoner (a person in NOMS' care) and furthermore, that the member of staff may have released information to the prisoner(s). Information is very easily passed between prisoners (and then to people on the outside) and this could quite easily destabilise a prison establishment placing the whole establishment at risk and leading to the exploitation of individual vulnerabilities – inside and outside of the prison. This threatens the security and

> order that is vital to run such an organisation. This would be an abuse rather than a misuse of a staff member's position …

5.143 The IPCC echoed both these views, stating:

> … we consider that, "benefit" (referred to in the proposal as 'advantage') ought to be defined sufficiently broadly to include covering up past failings and initiating inappropriate sexual relationships …

Our conclusions

5.144 While not every case of inappropriate sexual activity in public office will warrant criminal sanction, there remain some cases where this is the appropriate course. Most notable amongst these are some of the contexts that are currently pursued, such as:

(1) police abuses of position or power to gain a sexual advantage; and

(2) misuse of position or power by prison staff in the formation of a relationship with inmates.

5.145 Under our recommendations, the test will be whether the conduct was "seriously improper", and the defendant knew that a reasonable person would consider it to be so.

5.146 There may be some scope to consider other ways of targeting this conduct – for example through the creation of specific sexual offences (an issue we consider in further detail in Chapter 9). Notwithstanding, the weight of views and the evidence we have received throughout this review are such that we consider that certain forms of sexual misconduct by a public office holder must remain within the scope of any reformed misconduct in public office offence.

LABELLING THE REPLACEMENT OFFENCE

5.147 In our consultation paper and in this report, we have referred to our proposed replacement offence as an offence of "corruption". We have done so partly to distinguish this offence from the common law "misconduct" offence, and also because – from a technical point of view – we consider the term to be an accurate overarching description of the conduct it encapsulates.

5.148 The relevant definition of corruption in the Oxford English Dictionary is:

> Perversion or destruction of integrity in the discharge of public duties by bribery or favour; the use or existence of corrupt practices, *esp.* in a state, public corporation, etc.

5.149 This is a broad definition, although it does particularly emphasise "bribery" and "favour" within its scope.

5.150 We did not specifically ask consultees for views on their preferred term for this replacement offence, but, since consultation closed, a number of individuals have suggested that common understandings of the term are indeed largely concerned with bribery and favour. While this describes a significant portion of the conduct the offence

is intended to capture, it may not be as well suited to certain forms of behaviour, such as sexual misconduct, and misuse of confidential information, that fall within the offence. The current term – "misconduct" – is arguably a better fit in these contexts.

5.151 Instead of the label "corruption in public office" therefore, government may wish to consider another label for the offence, including retention of the label "misconduct in public office".

REPEAL OF SECTION 26 OF THE CRIMINAL JUSTICE AND COURTS ACT 2015

5.152 As indicated earlier in this chapter, and foreshadowed in our consultation paper, the proposed new offence would have substantial overlap with the existing offence of "corrupt or other improper exercise of police powers and privileges", under section 26 of the CJCA 2015.

5.153 Section 26 of the CJCA 2015 was introduced in 2015, following the findings of the Stephen Lawrence Independent Review, conducted by Mark Ellison QC. Prior to its introduction, the then Home Secretary (Theresa May MP) stated:

> The current law on police corruption relies on the outdated common-law offence of misconduct in public office. It is untenable that we should be relying on such a legal basis to deal with serious issues of corruption in modern policing, so I shall table amendments to the Criminal Justice and Courts Bill to introduce a new offence of police corruption, supplementing the existing offence of misconduct in public office and focusing clearly on those who hold police powers.[74]

5.154 Should our recommended offence of corruption in public office be enacted, it would also provide a statutory – rather than common law – basis for prosecuting police misconduct. As such, this rationale for the introduction of section 26 of the CJCA 2015 would be no longer applicable.

5.155 Moreover, we view the offence in section 26 of the CJCA 2015 as broader in scope than our recommended corruption in public office offence, and believe it has the potential to criminalise relatively trivial conduct that the officer may not have appreciated was improper. Specifically, the section 26 offence differs from our proposed offence in two important ways:

(1) it does not contain a seriousness threshold; and

(2) the test of impropriety is purely objective: the police officer "knows or ought to know that the exercise is improper" and "a reasonable person would not expect a constable to fail to exercise the power or privilege for the purpose of achieving that benefit or detriment".

5.156 In contrast, our formulation of the corruption in public office offence criminalises only *serious* impropriety, and only in circumstances where the office holder appreciates that a reasonable person would consider their conduct seriously improper. This approach is more consistent with minimal criminalisation and the theoretical underpinnings of criminal responsibility. We do not see any principled justification for

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74 Hansard, 6 March 2014, Col 1065.

holding police officers to a different standard than other public office holders, particularly those with coercive powers such as prison staff and immigration officials.

5.157 In our consultation paper, we observed that section 26 of the CJCA 2015 was designed to fill gaps that may have existed between statutory offences.[75] However, we expressed a view that a number of elements in this new offence were just as ambiguous as the elements of the common law misconduct in public office offence, and suggested that prosecutions under section 26 were likely to experience similar difficulties in practice. Moreover, our issues paper referred to the Home Office's publication of an impact assessment on 13 June 2014, outlining the policy objectives of section 26 of the CJCA 2015.[76] The impact assessment forecast that neither the number of investigations nor prosecutions involving police officers would change significantly.[77] Four years after its introduction, Home Office statistics show that the section 26 offence has been prosecuted against eleven individuals, with six convictions secured.[78] This can also possibly be attributed to the fact that the general misconduct in public office offence is more familiar to police and prosecutors.

5.158 We consider that should our recommended offence of corruption in public office be enacted – in the interests of appropriately targeting serious wrongdoing, fostering consistency and simplifying the law – section 26 of the CJCA 2015 should be repealed, together with the abolition of the common law offence.

Recommendation 13.

5.159 If the offence of corruption in public office is introduced, the offence in section 26 of the Criminal Justice and Courts Act 2015, "corrupt or other improper exercise of police powers and privileges", should be repealed.

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75 Consultation Paper (2016), para 2.51.

76 Issues Paper 1 (2016), para 3.13.

77 Issues Paper 1 (2016), para 3.16.

78 As at December 2019. See Ministry of Justice, *Criminal Justice System Statistics publication: Proceedings and Outcomes by Home Office Code 2013 to 2019: Pivot Table Analytical Tool for England and Wales Time Period: 12 months ending December 2013 to 12 months ending December 2019* (May 2020), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888344/HO-code-tool-principal-offence-2019.xlsx.

Chapter 6: Breach of duty in public office

INTRODUCTION

6.1 In this chapter we outline our recommendation for a new offence of "breach of duty" which would form part of the replacement offences for misconduct in public office. This recommendation draws on, and significantly amends, the proposals we made in Chapter 5 of our consultation paper, and that we presented as "Option 1".

6.2 Having reflected on this option, and taken into account the various consultation responses we received, we are now proposing a formulation of the offence, which we illustrate in draft form below:

A draft, illustrative clause – breach of duty in public office

(1) This section applies where—

(a) a public office holder is subject to a duty to prevent death or serious injury,

(b) the duty is of a type that arises only by virtue of the functions of the public office, and

(c) the public office holder is aware that he or she is subject to the duty.

(2) The public office holder is guilty of an offence if he or she—

(a) breaches the duty, causing or risking death or serious injury, and

(b) in breaching the duty was reckless as to the risk of death or serious injury.

6.3 We outline the rationale for the terms of this offence below.

CURRENT LAW AND PRACTICE

6.4 As we noted in Chapter 5 of this report, our proposed offence of "breach of duty in public office" corresponds most closely with the form of the current offence where a public officer "wilfully neglects to perform his duty … to such a degree as to amount to an abuse of the public's trust in the office holder". That is, it is primarily concerned with a failure to take appropriate action to prevent harm.

6.5 However, as with our proposed corruption offence, the concept of "breach of duty" can encompass positive acts (for example, an order from a manager not to intervene if certain circumstances are present) as well as omissions, so the concept of "neglect" does not correspond exactly with our proposed offence.

6.6 Under the current law, there is no requirement that a "neglect of duty" causes or risks any particular type of specified harm, provided that the conduct of the public officer is sufficiently serious so as to amount to an abuse of the public's trust. However, in practice, successful convictions have tended to involve neglects of duty that result in serious physical harm or death.

6.7 Cases that could be characterised as involving a "neglect of duty" are less commonly pursued than those characterised by "wilful misconduct" (which in Chapter 5, we broadly compare to our "corruption" offence). Nevertheless, when these cases do arise, they can be some of the most serious – for example, deaths in custody,[79] or a failure to intervene to prevent a violent act by another.[80]

CONSULTATION PAPER PROPOSALS AND RESPONSES

6.8 In our consultation paper, we analysed the types of cases prosecuted involving a breach of a duty, and discerned two distinct wrongs:

(1) an intentional, or wilful, failure by the defendant to fulfil the duties of a position he or she has voluntarily accepted and where the public has a legitimate expectation that such duties will be properly performed; and

(2) a neglect of duty by the defendant in circumstances where the defendant is aware that there is a risk of serious consequence arising from that neglect.[81]

6.9 We noted that this conduct amounted to a negative form of the wrong of "misgovernment"; a failure to use governmental powers and positions when required. We concluded that:

> a distinct mischief arises when, by virtue of D's position of public office, D is under a particular duty to act, which if not fulfilled could give rise to a risk of serious consequences occurring and D is aware of this duty but nevertheless fails to fulfil that duty. [82]

6.10 On this basis we proposed that an offence of breach of duty should form part of the replacement of the common law offence. As with the current law, the main distinguishing feature of our proposed offence would be the requirement of proof that a risk of serious consequence arose from the public office holder's breach of duty. This, we argued, would provide more definition and precision to the offence.

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

80 *R v Dytham* [1979] QB 722; see also the conviction of Sgt Andrew Kennedy, who was convicted of misconduct in public office after failing to intervene to prevent the violence inflicted by his colleague PC Jason Harvey upon a suspect: BBC, *Skull threat Greater Manchester PC faces hearing* (12 March 2010), available at http://news.bbc.co.uk/1/hi/england/manchester/8564131.stm.

81 Consultation Paper (2016), para 3.281.

82 Consultation Paper (2016), para 5.4.

6.11 More specifically, the proposal we made in relation to the breach of duty offence was:[83]

(1) There should be an offence of breach of duty by a public office holder with a particular duty concerned with the prevention of harm.

(2) Those public officers should be defined as including:

(a) those occupying positions carrying powers of physical coercion; and

(b) those occupying positions including a duty of protection.

(3) Collectively we referred to these as office holders with a particular duty concerned with the prevention of harm.

(4) The definition could take the form either of a general test or of a list of particular powers, functions and positions.

(5) The offence should be restricted to breach of the office holder's particular duty concerned with the prevention of harm, and therefore only cover cases where such harm occurs or is risked.

(6) The type of harm, both for the purpose of identifying the relevant public office holders and for the purpose of defining the breach of duty, should be restricted to:

(a) death;

(b) serious physical or psychiatric injury;

(c) false imprisonment;

(d) serious harm to public order and safety; and/or

(e) serious harm to the administration of justice.

(7) The fault element of the new offence should be one of:

(a) knowledge or awareness of:

(i) the circumstances that would mean that D held a public office; and

(ii) the circumstances relevant to the content of any particular duties of that office concerned with the prevention of harm;

(b) subjective recklessness as to the risk that D's conduct might cause one of the types of harm listed above.

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[83] Consultation Paper (2016), paras 5.214 to 5.219.

Consultation responses to our questions and proposals

6.12 We asked consultees whether an offence of the form outlined above should be introduced. Of those who responded, 14 agreed and five disagreed.

6.13 Of those who disagreed, only two wholly opposed the proposal. Barristers Keir Monteith QC and Lucy Wibberly argued that prosecution on the basis of risk of harm was too wide. On the other hand, pressure group "PHSOtheFACTS" expressed concern that both the pool of people and the type of wrongdoing that the offence would apply to would be too narrow.

6.14 Below we consider some of the more specific issues that were raised in respect of our proposals, highlighting in particular those that have influenced our final proposals.

Defining the scope of the duty

6.15 The majority of consultees recognised the difficulty in trying to identify and list every type of duty and supported a broad definition of duty. The Law Society said:

> We agree that attempting a precise definition of every type of duty that might be the subject matter of an offence replacing misconduct in public office is likely to be unnecessary and unwise …

6.16 Simon Parsons also saw no difficulty in adopting a broad definition of duty and leaving the courts to decide "on a case by case basis" the types of duty that should fall within the offence. Professor Jeremy Horder held a similar view:

> I would allow the courts to develop the scope of duty, as they have done for centuries in manslaughter cases. If need be, a list of the kinds of duties likely to attract a finding by the courts of a legal duty could be provided by statute.

6.17 The Bar Council and Criminal Bar Association considered that, as the offence was already restricted considerably by its focus on the need for harm or a risk of harm to be caused, then the types of duty covered could be defined as "every legally enforceable duty" without concern that the offence would grow to be too broad and uncertain. Police Action Lawyers Group agreed:

> Legally enforceable duties exist and are imposed by the law precisely because they reflect the public importance of the duties they impose. Breach of such duties is a matter of significant public importance. Given the existing limitations to the proposed offences, there should be no further limitation under the duty limb. This approach is consistent with ensuring public confidence in legal duties being performed …

6.18 Police Action Lawyers Group pointed out that there was a further evidential difficulty, regarding who could be said to be subject to particular duties at any given time:

> Further, questions concerning the nature of a duty cause problems where there are several participants involved in cases, and it is ambiguous who owes what duty and to what extent. While the scope of duty (that is the breadth) is not complex, the extent (that is the measure) is less than straightforward … However, this is not obviously an issue that can be remedied through drafting of a misconduct offence in

our view. It is better left to the jury to identify the nature of the duty involved and therefore it seems appropriate to include every legally enforceable duty.

6.19 Three consultees (the College of Policing, the Church of England Archbishop's Council and the Ecclesiastical Law Society) considered that the duty should be linked to the function that would qualify the person as a public office holder.

6.20 As noted above, Keir Monteith QC and Lucie Wibberley supported "a narrow approach", to any such duty, while The Council of Her Majesty's Circuit Judges also thought that the definition should be narrower to decrease the possibility of uncertainty.

Should public office holders with powers of physical coercion be included within the offence?

6.21 Fifteen people responded to this proposal, with a unanimous yes, although most questioned how "coercive powers" would be defined. Two consultees: NOMS (now HM Prison and Probation Service) and the IPCC (now the Independent Office for Police Conduct) emphasised that the offence should not be limited to public offices with these powers. The IPCC also said:

> We are concerned that, if the definition makes explicit reference to such powers, there is a risk of unintentionally limiting the scope of the offence to circumstances in which coercive powers have been utilised…
>
> In our view, the definition of those holding coercive powers is less important than ensuring the definition of public office holder incorporates any individual who performs policing functions or performs functions that are ancillary to the performance of policing functions. We are concerned that any definition that emphasises coercive powers risks taking individuals who are rightly considered public office holders under the current law outside that definition and producing the kinds of anomalous outcomes discussed above.

6.22 The Crown Prosecution Service ("CPS") also raised a similar point:

> Powers of physical coercion is an obvious category and, whilst there would be no harm done by specifically identifying it, it is not necessary to do so.
>
> We are unclear as to whether limiting public office to those who exercise lawful powers of physical coercion means limiting the breach to occasions when that particular power is or is not exercised. For example, a police officer would qualify under the physical coercion category but if the breach was in relation to a duty unrelated to his powers of arrest, we are not clear whether he/she would have to further qualify under the vulnerable individuals' category.

6.23 A few consultees expressed concern to make sure that powers of coercion could be properly defined (Compassion in Care were unclear whether it covers judges, for example), but others, such as Professor Alisdair Gillespie, considered it self-explanatory in the current law.

Should both actual and potential consequences be included within the scope of the offence?

6.24 A majority of consultees agreed with the proposal that potential consequences should be included, although four disagreed. The Law Society, the London Criminal Courts Solicitors' Association, Keir Monteith QC and Lucie Wibberley, and one member of the public all argued that only actual consequences should be included. Keir Monteith QC and Lucie Wibberley stated:

> Historically we cannot think of a situation where a risk of harm was previously prosecuted. One would have to think long and hard before criminalising a breach that might lead to serious harm where there was no other offence available. Without evidence of a need for such a new offence it seems to us that disciplinary action would be more appropriate and effective.

6.25 The Law Society's view was that:

> Criminal liability should be linked to actual consequences. Potential consequences are difficult to foresee with precision and could involve officials, prosecutors at the charge decision-making stage, and at the trial stage, jurors, in speculation. Potential consequences are more open to interpretation than actual consequences.

6.26 The academic Robert Heaton suggested that there may be evidential difficulties in relation to proving foresight of potential harm, particularly when it arises from an omission to act rather than a positive act.

6.27 Some consultees objected to any inclusion of an element requiring proof of harm or risk of harm within the offence. They thought that a harm requirement would limit the application of the offence unduly. The CPS, Gillespie and Police Action Lawyers Group expressed concern that the offence would, under a breach of duty model, move from being a conduct-based crime to a result-based one. Gillespie suggested that:

> Perhaps the solution is not to list harms but rather require the breach to be serious. Whilst it is conceded that this could be considered to introduce a degree of uncertainty into the offence, it is a measured risk. The courts are already left to decide whether offences are serious, and in the context of manslaughter by gross negligence, are already asked whether a breach is sufficiently serious to warrant criminalisation. It is not immediately clear why a court could not be left with the same test for this offence?

6.28 The Police Action Lawyers Group's view was that it is:

> crucial that the offence includes potential consequences. A public officer's breach of duty may not result in tangible harm, but that does not reduce the wrong, or the need for punishment. The lack of tangible harm is likely due to luck or coincidence, and should not mean that the public officer evades punishment…

REFLECTIONS FOLLOWING CONSULTATION RESPONSES

6.29 The weight of responses to our consultation paper were in favour – albeit sometimes qualified – of a replacement offence of breach of duty in public office.

6.30 We are therefore recommending the adoption of such an offence, together with the corruption offence, to replace the common law offence.

6.31 However, we have reflected on the form of the offence, and we are now recommending the following modifications to the proposals we made in the consultation paper:

(1) The specified harms should be limited to the risk of death or serious injury.

(2) The offence will not make specific reference to the presence of coercive powers or duty to protect vulnerable persons, but rather incorporate a wider duty to prevent death or serious injury.

(3) The scope of the duty should be limited to ensure that it extends only to duties of care to prevent death or serious injury that are unique to public office holders.

6.32 We explain our reasoning for each of these conclusions below where we outline the elements of the recommended offence.

RECOMMENDED BREACH OF DUTY OFFENCE

6.33 The breach of duty offence we are now proposing has six elements:

(1) a public office holder;

(2) subject to a duty to prevent death or serious injury that arises only by virtue of the functions of the public office;

(3) being aware of the duty;

(4) breaches the duty;

(5) the breach causes or risks death or serious injury; and

(6) the public office holder was reckless as to the risk of death or serious injury.

6.34 This represents a narrowing of the common law and is also narrower in scope than the offence we proposed in our consultation paper.

First element: "Public office holder"

6.35 In Chapter 4 we proposed that a definition of public office should underpin both the breach of duty and corruption offences.

6.36 This would be achieved through a list of positions amounting to "public office" that would set the outer boundary of positions to which the two offences may apply. We argued that this would assist those who are potentially within the pool of public officials to understand whether they could potentially be subject to the offence. Similarly, it would assist police and prosecutors in making charging decisions by defining a clear limit for the availability of the offence.

6.37 Whether or not the defendant falls within one of the above categories would be a threshold test as to the availability of the offence.

Second element: subject to a duty to prevent death or serious injury that arises only by virtue of the functions of the public office

6.38 This element of the offence represents a significant narrowing of the current common law, and has three main components:

(1) a duty to prevent;

(2) death or serious injury; and

(3) the duty arises only by virtue of the functions of the public office.

A duty to prevent

6.39 In our consultation paper we proposed limiting the scope of the duty to those with a particular duty concerned with the prevention of harm, and more specifically:

(1) those occupying positions carrying powers of physical coercion; and

(2) those occupying positions including a duty of protection.

6.40 In respect of "positions carrying powers of physical coercion", the CPS and IPCC agreed that positions encompassing these powers should fall within the offence, but felt there would be little practical benefit (and potentially some confusion) caused by singling these powers out. We accept this argument, and now consider that specific reference to these powers is not necessary.

6.41 Responses to the second proposed category – "positions including a duty of protection" were again, almost universally in favour in principle, but there were concerns about how it could be drafted. We had proposed, for example, drawing on the definition of vulnerable individuals found in the Safeguarding Vulnerable Groups Act 2006.[84] Gillespie was one of the consultees who expressed reservations about this. He stated:

> defining vulnerability is extremely difficult, with most definitions receiving some criticism. The Law Commission believe that statutory tests bring greater certainty, but one cannot help wonder whether this is an issue best left to the courts. The statute could say the offence applies to a public officer who has a duty to protect the vulnerable, but leave the courts to decide who is vulnerable. This does arguably introduce a degree of uncertainty but it would be modest as most vulnerable relationships are obvious. Creating a definitive test for these purposes would be difficult and arguably would go no further than if it were left to the courts.

6.42 On reflection, we agree that there is limited value (and potentially some risk) in seeking to define the nature of the duty beyond a "duty to prevent" specified harms.

6.43 Below we explain why we believe those harms should be limited to death or serious injury.

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[84] Consultation Paper (2016), para 5.70.

Death or serious injury

6.44 In our consultation paper we proposed that the serious consequences sufficient to trigger the offence should be individually specified and should include:

(1) death and serious injury (both physical and psychiatric);[85] and

(2) false imprisonment.[86]

6.45 We also asked consultees whether the following types of harm should also be covered by the offence:

(1) serious harm to public order and safety;

(2) serious harm to the administration of justice;

(3) serious damage to property; and

(4) serious economic loss.

6.46 Given the consensus amongst consultees that death and serious injury should be included in the breach of duty model offence, we have concluded that this is an essential component of the offence. While this creates some overlap with the common law offence of gross negligence manslaughter, it goes further in two key ways:

(1) it includes the risk of serious injury, as well as death, and therefore will not be limited to cases where there is a "serious and obvious risk of death";[87] and

(2) it will apply in cases where death is risked, without it having to be caused by the defendant's conduct.

6.47 The inclusion of death and serious injury will ensure that some of the most serious cases of neglect caught by the current offence remain criminalised under our breach of duty offence.

6.48 We have reconsidered, however, the proposal that false imprisonment should be included as a specified harm. In reaching this conclusion, we have placed particular weight on Horder's argument that the inclusion of false imprisonment would extend the scope of the offence too widely. Not all cases of actual or risked false imprisonment will be serious enough to warrant criminalisation. For example, where an individual is unlawfully detained for a few minutes as a result of a police officer not following the correct procedure in a high-pressure situation. Moreover, as Gillespie

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85 In our Consultation Paper (2016) (p 157), we explained that we defined serious injury in the same way that we defined it in our report on Reform of Offences against the Person: as really serious injury. We include injuries of both the physical and mental kind, noting that the criminal law recognises psychiatric injury as a form of bodily harm, but distinguishes this from psychological harm and "mere emotions" such as fear, distress or panic: see Reform of Offences against the Person (2015) Law Com 361 at para 4.124.

86 Consultation Paper (2016), para 5.151.

87 See *R v Rudling* [2016] EWCA 741; *R v Honey Rose* [2017] EWCA Crim 1168; [2018] QB 328.

highlighted, the inclusion of all levels of false imprisonment within the offence, whilst only "serious" physical harm is included, may also appear anomalous.

6.49 We do not consider this amendment would create an unacceptable gap in the law, as cases where false imprisonment is in fact caused could still be prosecuted using the common law offence of false imprisonment.[88]

6.50 Similarly, we have ruled out inclusion of the other harms we considered: serious harm to public order and safety; serious harm to the administration of justice; serious damage to property; and serious economic loss. This goes against the weight of consultation responses, which were generally in favour of the inclusion of each of these specified harms.

6.51 In reaching this view we took particular account of the existing offences that are available to deal with much of this conduct, and the desirability of not criminalising conduct of public office holders more than is absolutely necessary. We also consider that where it is purposeful, and seriously improper, it will be adequately dealt with by the offence of corruption in public office we recommended in Chapter 5.

6.52 In respect of "serious harm to the administration of justice", we were persuaded by the view that there are already adequate offences available to deal with this context; notably the common law offence of perverting the course of justice[89] and our recommended offence of corruption. For example, in cases such as the misconduct in public office charges pursued recently against police staff who falsified evidence and failed adequately to pursue criminal complaints,[90] our proposed offence of corruption would be likely to be available.

6.53 We have excluded "serious harm to public order and safety" on the basis that it has the potential to extend the scope of the proposed offence significantly. As Horder noted in his response, it might have particular implications for the police, where the majority of actions undertaken by senior officers in situations involving crowd control will carry some inherent risk of harm to public order and safety. We also consider that the most serious of such cases would fall within the scope of a risk of "death or serious injury".

6.54 Finally, we have ruled out "serious damage to property" and "serious economic loss", again out of concern that the scope of the offence should not be wider than absolutely necessary. In some cases involving these outcomes, the conduct may fall within our proposed corruption offence. The offence of criminal damage under section 1 of the Criminal Damage Act 1971 is also very wide and may have application in relevant cases. The terms of this offence are:

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88 In the case of *R v Rahman* (1985) 81 Cr App R 349 (at p 353) false imprisonment was defined as "the unlawful and intentional or reckless restraint of a victim's freedom of movement from a particular place".

89 *R v Vreones* [1891] 1 QB 360.

90 See M Evans, *Police officers sabotaged child abuse investigations through 'laziness', court hears* (17 January 2019), available at https://www.telegraph.co.uk/news/2019/01/17/police-officers-sabotaged-child-abuse-investigations-laziness/.

A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.

6.55 Criminal damage applies to both positive acts causing damage and omissions to prevent damage, including where the defendant's own acts or omissions have given rise to a risk that damage will occur (subject to the question of whether a causative link can be proved).[91]

6.56 The adoption of "economic loss" as a specified harm is particularly wide, and in the absence of fraud, or deliberate corruption of the kind covered by our proposed corruption offence, could extend the criminal law into the realm of unsuccessful policy and operational decisions. In our view, this would represent an undesirable overreach of the criminal law into the political sphere.

That arises only by virtue of the functions of the public office

6.57 We now also consider that there is a need for the offence to target more precisely and explicitly the "public" nature of the duty of care involved; confining its scope to duties of care that arise uniquely by virtue of the functions of the public office, and not duties of care that arise in wider contexts.

6.58 For example, it is recognised that a teacher has a duty of care to a school student in their care. However, in the education system in England and Wales, which is a hybrid system of public and privately-run schools, it could not be said that the role of teacher, and therefore its duty of care, is uniquely "public". Similarly, while the public sector in England and Wales employs millions of people, the established duty of care that exists between employers and employees is also not uniquely "public", as there are millions of employees in the private sector who are also protected by such a duty.

6.59 When we reflected on the proposals in our consultation paper, and amendments to these we have already outlined, it was not clear that the offence we had formulated had sufficiently isolated "public" duties from others with wider application. We have therefore added this component to ensure the scope of the offence is confined in this way.

6.60 For the avoidance of doubt, examples of contexts that we consider should fall within the scope of this duty would include:

(1) police, to members of the public;

(2) prison staff, to prisoners;

(3) public safety inspectors, to members of the public; and

(4) local authority social workers in their responsibilities to those in public care.

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91 *R v Miller* [1983] 2 AC 161.

6.61 These are roles which involve inherently "public" assumptions of responsibility for those protected.

6.62 Examples of contexts that we propose would fall outside the scope of the duty of care for the purposes of this offence would include:

(1) managerial responsibilities to staff in public service roles;

(2) teachers in state-run schools to their students; and

(3) NHS employed doctors and nurses providing medical care to voluntary patients.

6.63 All of these categories represent duties that are equally replicable in a private sector context. While the manager, teacher or doctor/nurse in question may be a public office holder, the duty of care is not uniquely "public" in nature. Breach of this duty therefore does not have the unique quality of damaging public trust that justifies the imposition of an additional criminal sanction for the purposes of this offence (though other offences such as gross negligence manslaughter may still apply).

6.64 In some ways this represents the inverse of the position in the Corporate Manslaughter and Corporate Homicide Act 2007, where a number of public contexts are specifically excluded from the definition of a "relevant duty" for that offence, namely:

- Public policy decisions, exclusively public functions and statutory inspections;[92]
- Military activities;[93]
- Policing and law enforcement;[94]
- Emergency situations;[95]
- Child Protection and probations functions.[96]

Who should determine the existence of the duty?

6.65 We recognise that the determination of the existence of a duty for the purpose of this offence could, in some cases, require a fairly detailed knowledge of the law and the public sector.

6.66 For this reason, we consider that the existence or otherwise of a "relevant duty" should be a question of law for the judge to decide, and not the jury. This would adopt the approach found in section 2(5) of the Corporate Manslaughter and Corporate

92 Corporate Manslaughter and Corporate Homicide Act 2007, s 3.

93 Corporate Manslaughter and Corporate Homicide Act 2007, s 4.

94 Corporate Manslaughter and Corporate Homicide Act 2007, s 5.

95 Corporate Manslaughter and Corporate Homicide Act 2007, s 6.

96 Corporate Manslaughter and Corporate Homicide Act 2007, s 7.

Homicide Act 2007, which states that "whether a particular organisation owes a duty of care to a particular individual is a question of law".

Third element: the public office holder's awareness of the duty

6.67 A requirement that the defendant "is aware that he or she is subject to the duty" reflects the policy that it is only appropriate to apply the criminal law to a public office holder (where he or she would not be liable as a private citizen) where he or she is aware of the specific obligations imposed on him or her. The fact that a defendant would have knowledge of the duty means that they are better placed to foresee the consequences if that duty is not fulfilled and therefore it is legitimate to hold the defendant criminally responsible for the consequences of their actions.

6.68 This test will not require the defendant to be aware of the legal duty imposed by the offence of breach of duty in public office – this would almost never be the case and would run counter to the usual criminal law rule that ignorance of the law is no defence. Rather, it will require a knowledge of the circumstances of employment that give rise to the duty to prevent death or serious injury.

6.69 In practice, this is unlikely to be a difficult threshold to meet. However, there may be some examples of very junior public officials where an argument may be made that they were unaware of the existence of the duty. For example, a very inexperienced police call handler might be able to argue they were unaware of the full extent of their duty of care owed to vulnerable members of the public. Unison – a union who represent non-sworn police staff and other people working in public services, cited this as a specific example of concern to them in a consultation meeting.

6.70 There are both positive and negative aspects to this. On the one hand it targets more experienced officials, who understand the implications of their role more fully. On the other hand, it might be criticised for providing a means by which some officials can escape responsibility for serious breaches of their duty of care by claiming ignorance of it.

6.71 On balance, however, we consider awareness of the duty to be an appropriate threshold requirement for the imposition of a criminal penalty.

Fourth element: breach of the duty

6.72 A link between the duty – the second element – and the breach of that duty is required to limit the scope of the offence. By linking the breach to the specified harms, the offence is targeted at preventing those specified harms, not merely the breach of any duty which happens to cause or risk a specified harm. This proposal follows the approach we outlined in our consultation paper.[97] It also reflects the view of consultees who responded to our issues paper, who considered the absence of a connection between the relevant duty and the breach that amounts to the misconduct to be problematic.[98]

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97 Consultation Paper (2016), p 134.

98 Consultation Paper (2016), para 5.23.

6.73 Consideration was given to whether the breach should be subject to a qualifying threshold, such as a "gross" breach of the duty. This could serve to limit the scope of the offence by raising the threshold of offences that would be caught within the breach of duty offence. It would achieve this by distinguishing between minor breaches and more significant breaches; thus requiring an assessment as to the degree to which the action or omission fell below the standard that was required of the defendant. For example, it could exclude from its scope negligent, but not grossly negligent breaches.

6.74 However, we have rejected the imposition of an additional standard for the breach for two main reasons:

(1) we are proposing a high threshold for the outcome of the offence: death and serious injury, or the risk thereof; and

(2) we are proposing a fault element of recklessness – a standard which is more stringent than "gross negligence".

6.75 Only two consultees proposed the use of "gross" breach. Horder in his consultation response argued that "it is time for the Law Commission to accept that (gross) negligence can be a perfectly justifiable fault element, in certain contexts, and this is one such context". Gillespie proposed that a qualifier should be applied to the breach rather than the harms because it reduces the uncertainty of a risk analysis and the courts are experienced in giving directions about breach qualifiers in relation to other offences such as gross negligence manslaughter.

6.76 Taking proper account of these perspectives, we nonetheless maintain that the scope of the offence is appropriately contained by the result (death or serious injury, or a risk thereof) and the fault element (recklessness) specified in the offence, and an alternative qualifier such as "gross negligence" is not desirable.

Fifth element: the breach causes or risks death or serious injury

6.77 In developing this element of the offence, we considered very carefully the question of whether the offence should apply only in cases where death or serious injury actually result from the breach of duty, or if the creation of the risk of such an outcome would be sufficient to warrant criminalisation.

6.78 Under the present law on misconduct in public office, there is no requirement to prove that death or serious injury occurred in fact. To impose that limitation in the new offence would be to decriminalise some categories of conduct. For example, in the case of Bijan Ebrahimi, a police officer was convicted of misconduct in public office following the failure to respond to the calls of Mr Ebrahimi, who was subsequently killed.[99] The neglect of duty by the police officer would have been decriminalised by an actual harm requirement, if, through sheer fortune, no harm had occurred to Mr Ebrahimi. We consider that this would be an undesirable outcome, and consultees also did not favour requiring proof of death or serious injury in fact.

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99 See *The Independent*, "Bijan Ebrahimi murder: Two police officers convicted of misconduct in a public office in connection with disabled man's killing" (21 December 2015), available at: https://www.independent.co.uk/news/uk/crime/bijan-ebrahimi-murder-two-police-officers-convicted-misconduct-public-office-pc-kevin-duffy-pcso-a6781856.html.

6.79 Consultees made two arguments against requiring the inclusion of a specified harm requirement: first, that specifying harms would limit the scope of the offence; secondly, that misconduct in public office is currently an endangerment offence.[100] Underlying this is the view that the offence exists to ensure that public officials undertake their duties to a minimum standard – and that damage to the "public" is done if they are not held to this standard, even where serious consequences have not in fact eventuated as a result of "moral luck".[101]

6.80 An analogy might be made here with offences in a medical context. Medical care is one of the most clearly established categories of duty of care, but ordinary medical care usually falls outside the scope of misconduct in public office (except, arguably, where it is provided in prisons).[102] In Chapter 4 we explain why the provision of health care should continue to fall outside the scope of our replacement offences. For cases of serious negligence leading to death, medical practitioners may be liable to prosecution for gross negligence manslaughter. Aside from circumstances leading to death, there were until recently limited criminal consequences where practitioners failed to meet the appropriate standard of care.[103] However, since 2015, doctors may be liable for the offence of ill-treatment or wilful neglect contrary to section 20 of the Criminal Justice and Courts Act 2015. This offence, which carries a five-year maximum sentence, criminalises health or social care workers who "ill-treat or wilfully neglect" a patient. It is a conduct crime, not one requiring proof of a result, meaning that no adverse consequences need to be experienced by the patient for the practitioner to be found guilty. Prior to the introduction of this more general offence, a more limited offence had been enacted under section 44 of the Mental Capacity Act 2005,[104] which applies only to ill-treatment of persons who lack capacity. Case law in relation to the Mental Capacity Act 2005 offence suggests that "wilful neglect" includes deliberately refraining from acting or refraining from acting because of not caring whether action was required or not,[105] and wilful neglect may be established even if

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100 More specifically, it is an endangerment offence which is predominantly conduct focused but includes consequence elements.

101 By this we mean circumstances whereby a moral agent is assigned moral blame or praise for an action or its consequences even if it is clear that said agent did not have full control over either the action or its consequences.

102 See *R v Cosford* [2013] EWCA Crim 466; [2013] 2 Cr App R 8. However, in this case the misconduct did not relate to the provision of medical care.

103 Offences only existed in respect of the ill-treatment and wilful neglect of patients receiving treatment for mental disorder (Mental Health Act 1983, s 127) and of those who lack capacity under the Mental Capacity Act 2005 (Mental Capacity Act 2005, s 44). There is also an offence of wilfully ill-treating or neglecting children in certain circumstances (Children and Young Persons Act 1933, s 1).

104 In the recent case of *R v Kurtz* [2018] EWCA Crim 2743 at [27], the Court of Appeal held that pursuant to section 44(1)(b) of the Mental Capacity Act 2005 – where D is guilty of an offence if he is the donee of a lasting or power of attorney created by P and ill-treats or wilfully neglects P – it is insufficient for the Crown to prove that D was the donee of a power of attorney and ill-treated or wilfully neglected P. The Crown must also prove that P lacked capacity, which is an element of the offence. The judgment also contemplated the original rationale for this pre-existing conduct crime, which pertained to "criminalising the neglect and ill-treatment of those suffering from mental disorder..." at [42].

105 *R v Turbill and Broadway* [2013] EWCA Crim 1422; [2014] 1 Cr App R 7.

administering the appropriate treatment would have made no difference to the well-being of the patient.[106]

6.81 A distinct advantage of a requirement to prove a resulting death or serious injury is that it would make the offence more definitive and certain. When we considered all the implications of such a course, however, we formed the view that it would decriminalise conduct that is presently caught by the offence of misconduct in public office to an unacceptable extent. For example, it would remove from the scope of the offence a situation where a local authority fire officer with duties specific to licensing and fire safety neglects his or her duty but by good fortune that neglect does not lead to deaths or serious injury. To take a more graphic example, it would also decriminalise the case of a police custody officer who fails to assist a suicidal detainee who attempts suicide by hanging, but through pure luck suffers no serious injury because the implement of clothing the detainee uses as a noose is too weak and breaks during the attempt.

6.82 The endangerment model we are recommending focuses on the officer's failure to perform the duty rather than its outcome. As the offence would still be linked to risk of "death or serious injury", it would be narrower in scope than the current law, and other purely conduct-based offences such as the offence of ill-treatment or wilful neglect by a care worker.[107]

6.83 The specified harms also make the breach of duty offence more targeted than some other "endangerment" offences such as that of "exposing children whereby life is endangered" contrary to section 27 of the Offences Against the Person Act 1861, which requires no particular outcome.

6.84 There are numerous other examples in the criminal law where endangerment offences exist and are supplemented by additional offences where the actual harm eventuates. For example:

(1) Different offences exist for dangerous driving causing death (14 year maximum), dangerous driving causing serious injury (five year maximum) and dangerous driving (two year maximum).[108]

(2) Some cases of medical malpractice that cause death might be charged as gross negligence manslaughter (maximum penalty of life imprisonment); whereas equally serious examples of negligent treatment not resulting in death would be charged as ill treatment or wilful neglect (five year maximum).[109]

6.85 We are not proposing to create such a two-tier model where the actual harm leads to a greater maximum penalty, even where the degree of culpability might be the same. We consider this would further complicate the offence. However, the degree of any

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106 *R v Patel* [2013] EWCA Crim 965; [2013] Med L R 507.

107 Criminal Justice and Courts Act 2015, s 20.

108 Road Traffic Act 1988, ss 1, 1A, 2.

109 Criminal Justice and Courts Act 2015, s 20.

actual harm caused will be relevant to a sentencing judge in assessing harm in accordance with section 63 of the Sentencing Code, which states:

> Where a court is considering the seriousness of any offence it must consider –
>
> (a) the offender's culpability in committing the offence, and
>
> (b) any harm which the offence –
>
> (i) caused,
>
> (ii) was intended to cause, or
>
> (iii) might foreseeably have caused

6.86 Where actual harm occurs, this may also provide good evidence of the risk caused by the neglect. Finally, the occurrence of actual harm is likely to weigh in favour of a prosecutor exercising discretion to prosecute the offence. We discuss prosecutorial discretion in more detail in Chapter 8.

6.87 A significant practical difference between the result and risk models is that the risk model would remove the challenging requirement of proving the breach actually caused the death or serious injury. For example, in the case of a negligent failure to prevent a devastating fire, it might be difficult to show that a negligent fire safety certification actually caused death, but much easier to argue that it at least risked death.

Defining "serious injury"

6.88 As we outlined in the consultation paper,[110] we consider the appropriate standard for "serious injury" to be the definition of "grievous bodily harm" for the purposes of sections 18 and 20 of the Offences Against the Person Act 1861.[111] Therefore, it would include serious physical and psychiatric injury, but not psychological injury. In *R v Ireland*, it was held that "the correct approach is simply to consider whether the words of [the Offences Against the Person Act 1861] considered in the light of contemporary knowledge cover a recognisable injury".[112] It was held that "'bodily harm … must be interpreted so as to include recognisable psychiatric illness".[113] The offence would therefore encompass the failure to protect against serious sexual abuse, as this is a circumstance that would risk causing psychiatric injury to the victim of the abuse. For example, if a prison manager were recklessly to breach their duty to prevent the sexual assault of an inmate, they would be liable to the offence.

6.89 We consider this approach is desirable as it would set a seriousness threshold that is consistent with other areas of the criminal law, and therefore more readily applicable in practice.

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110 Consultation Paper (2016), para 5.147.

111 See *R v Ireland* [1998] AC 147 and *R v Dhaliwal* [1998] AC 147.

112 *R v Ireland* [1998] AC 147, 158, per Lord Steyn.

113 *R v Ireland* [1998] AC 147, 159, per Lord Steyn.

Sixth element: the public officer was reckless as to the risk of death or serious injury

6.90 A fault element of subjective recklessness as to the specified harms is consistent with the approach of the current common law,[114] and that proposed in our consultation paper.[115]

6.91 We maintain the view that other possible standards such as objective recklessness, negligence or strict liability would not be appropriate on the grounds that the fault element of the new offence should not be set lower than either the current common law offence of misconduct in public office, or the tort.[116] Negligence would establish liability even if the defendant was not aware of circumstances that made their act or omission sufficient to establish a breach of duty offence.[117] A strict liability requirement as to causing or risking serious injury would allow for a defendant to be convicted without proof of intention, knowledge, recklessness or negligence.[118] The majority of consultees vehemently disagreed with the use of negligence as the fault element, and argued its use should remain firmly within civil law. We can infer, given the consultees' views on negligence, that strict liability would not be considered an acceptable fault element.

6.92 We are also maintaining the approach of the consultation paper in rejecting intention/knowledge as the fault element. Intention would significantly narrow the scope of the offence. The desire to limit the scope of the offence was the primary rationale behind the consultation response of Keir Monteith QC and Lucie Wibberley. Nevertheless, we reject intention as a fault element because intention would fail to appreciate all the harms that the breach of duty model seeks to remedy; specifically reckless (wilful) neglect of a duty to prevent harm, not just breaches of duty intended to cause a specified harm.

6.93 Another criminal standard that we have considered is "gross negligence". This standard is most commonly associated with gross negligence manslaughter,[119] which imposes criminal liability where it is reasonably foreseeable that the breach of the duty of care would give rise to a serious and obvious risk of death.

6.94 However, gross negligence is a controversial standard. In *Honey Rose*,[120] a case involving the death of a patient following the failure of the optometrist to identify an eye condition, the Court of Appeal found that the question of the knowledge and risk available to the defendant should always be judged based on the information that was available at the moment of the breach. Knowledge should not be judged on what could have or should have been known but for the breach of the duty of care – in this case that breach was a failure to perform a statutory duty to carry out examinations which should have identified a significant symptom and resulted in an urgent hospital

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114 *AG's Reference (No 3 of 2003)* [2004] EWCA Crim 868; [2005] QB 73 at [26] to [30].

115 Consultation Paper (2016), para 5.219.

116 Consultation Paper (2016), para 5.109.

117 Consultation Paper (2016), para 5.108.

118 Jeremy Horder, *Ashworth's Principles of Criminal Law* (8th ed, 2016) at para 180.

119 *R v Adomako* [1995] 1 AC 171.

120 *R v Honey Rose* [2017] EWCA Crim 1168; [2018] QB 328.

referral. The effect of this decision is that a defendant may be able to escape criminal liability by relying on a breach of duty which meant they were unaware of the potentially serious consequences for those within their care.[121] This decision was subsequently considered further in the case of *Kuddus*,[122] which involved the death of a teenage girl following an allergic reaction to take-away food. In *Kuddus* the court drew a distinction between a duty to have appropriate safety systems in place, and the particular foreseeability requirements of gross negligence manslaughter:

> foreseeable risk for the purposes of gross negligence manslaughter is that, armed with notice that a particular customer or patient falls into the category which the system (or statute) was designed to deal with, a reasonable person in the position of the restaurateur or optometrist would, at the time of breach of duty, have foreseen an obvious and serious risk of death. It is in those circumstances that the jury would have to go on to consider whether the negligent breach of duty was 'gross' within the meaning of that term defined by the authorities.[123]

6.95 For the purposes of the replacement offence, we prefer to maintain the current law approach of subjective recklessness, as set out in the leading case of *R v G*,[124] as it is a more consistent, certain and rigorous standard. Under this standard, a public office holder would only be liable for a breach of a duty to prevent death or serious injury where they are:

(1) aware of a risk that death or serious injury will occur; and

(2) it is, in the circumstances known to him or her, unreasonable to take the risk.

6.96 Importantly, the subjective requirement of this standard (a requirement of awareness of the risk, and an assessment of the unreasonableness of taking that risk by reference to the circumstances actually known to the public office holder) provides protection for public office holders who genuinely do not know or appreciate the degree of risk that may be caused by their action or inaction.

6.97 The Police Federation representatives raised a number of important concerns in our discussions with them in this context. Accepting that the most egregious cases of neglect of duty would merit criminal sanction, the Federation noted the particular challenges of policing, which they described as essentially a role requiring the management of many different kinds of risky situations, and weighing up and managing competing risks that arise within each. The Federation stated that “risk” is an inherent and inevitable component of policing, and even relatively minor lapses can have very serious consequences. This exposes police officers to the offence of misconduct in public office (and by extension, our replacement offence of breach of

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121 Further, it has been argued that the decision creates “a perverse incentive for those who owe a duty of care to another to do as little as possible to discharge it and in so doing avoid potential criminal liability”. See Karl Laird, “The evolution of gross negligence manslaughter” [2018] 1 *Archbold Law Review* 6, 8.

122 *Kuddus v R* [2019] EWCA Crim 837.

123 *Kuddus v R* [2019] EWCA Crim 837, at [80].

124 [2003] UKHL 50; [2004] 1 AC 1034.

duty) to a much greater degree than most other public office holders, and the public more widely.

6.98 The Federation were particularly concerned to ensure that police should not be prosecuted due to errors arising merely from a lack of competence or inadequate training. They argued that it was important that there be genuine wrongdoing of a sufficient seriousness to warrant the imposition of a criminal penalty.

6.99 Our assessment is that the standard of "subjective recklessness" achieves the appropriate balance. It entails sufficient allowance for the subjective position of police, and other office holders who occupy inherently "risky" roles, such that criminal liability will be appropriately confined to the most serious cases.

Recommendation 14.

6.100 An offence of "breach of duty in public office" should be introduced with the following six elements:

(1) a public office holder;

(2) subject to a duty to prevent death or serious injury that arises only by virtue of the functions of the public office;

(3) being aware of the duty;

(4) breaches the duty;

(5) thereby causing or risking death or serious injury;

(6) the public office holder was reckless as to the risk of death or serious injury.

Recommendation 15.

6.101 Whether there is "a duty to prevent death or serious injury that arises only by virtue of the functions of the public office" should be a question of law for the trial judge in the case.

Recommendation 16.

6.102 "Serious injury" should be given the same meaning as that of Grievous Bodily Harm in the Offences Against the Person Act 1861.

Chapter 7: Procedure, scope and sentencing of corruption and breach of duty offences

INTRODUCTION

7.1 In Chapters 4, 5 and 6 we described the core elements of our recommendations for replacement offences for misconduct in public office. In this chapter we consider further important aspects of these two replacement offences that would need to be considered in their implementation. These are:

(1) mode of trial;

(2) accessorial liability;

(3) inchoate liability;

(4) intoxication;

(5) corporate liability;

(6) jurisdictional considerations;

(7) Welsh devolution implications; and

(8) maximum penalties.

7.2 We consider the application of each of these issues to our replacement offences and make specific recommendations in relation to the mode of trial, jurisdiction, and maximum penalties.

MODE OF TRIAL

7.3 As a common law offence, the current offence of misconduct in public office is triable only on indictment.

7.4 Our replacement corruption and breach of duty offences would be statutory, and therefore it would be possible to designate each offence as an "either-way" offence.

7.5 However, after considering this option, we are recommending that both our replacement offences continue to be "indictable only" offences. We outline our reasoning for this below.

Classification of offences

7.6 Criminal offences in England and Wales are classified as:

(1) "summary only" – which means they are triable only in a magistrates' court;

(2) "indictable only" – which means they can only be dealt with by a Crown Court before both a judge and jury; and

(3) "either-way" – which means they may be tried in either forum, with the decision as to which depending on the circumstances of the case.

7.7 The appropriate venue for either-way offences[1] is decided in accordance with the procedure set out in the Crime and Disorder Act 1998. For cases involving serious or complex fraud, [2] or child witnesses,[3] the prosecutor can provide a notice that the matter be dealt with in the Crown Court. Otherwise a plea before venue process[4] is undertaken, where the accused is asked to indicate whether (if the offence were to proceed to trial) he or she would plead guilty or not guilty. If the accused indicates a not guilty plea (or gives no indication) then the court is required to conduct the allocation procedure to determine whether summary or jury trial is appropriate.[5] The court must first make its own determination of this question. If the court determines summary trial to be more appropriate, the accused is then given the option to elect trial on indictment.

7.8 The current approach to classifying offences in England and Wales dates back to recommendations first made in 1975 by the Inter-Departmental Committee on the Distribution of Criminal Business between the Crown Court and magistrates' courts (the *James Committee Report*). The classification framework is now contained within the Magistrates' Court Act 1980, while a list of either-way offences is contained within Schedule 1 of the Magistrates' Court Act 1980.

7.9 Common either-way offences include: theft,[6] handling stolen goods,[7] ABH (assault occasioning Actual Bodily Harm),[8] possession/possession with intent to supply/supplying drugs (of Class A, B or C)[9] and fraud.[10]

7.10 Examples of indictable only offences include:

- Murder
- Manslaughter

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1 Defined as "an offence triable either way" in section 51E(b) of the Crime and Disorder Act 1998.

2 Crime and Disorder Act 1998, s 51B.

3 Crime and Disorder Act 1998, s 51C.

4 Crime and Disorder Act 1998, s 17A.

5 Crime and Disorder Act 1998, ss 18 to 26.

6 Theft Act 1968, s 1.

7 Theft Act 1968, s 22.

8 Offences Against the Person Act 1861, s 47.

9 Misuse of Drugs Act 1971, ss 4 and 5.

10 Fraud Act 2006, s 1.

- Causing death by dangerous driving[11] and causing death by careless driving while under the influence of drink or drugs[12]
- Misconduct in public office
- Rape[13]
- Aggravated Burglary[14]
- Robbery[15]
- Arson with intent to endanger life or destroy or damage property[16]
- Blackmail[17]
- Kidnapping[18]
- Riot[19]
- Possession of firearms with intent to endanger life or cause fear of violence[20]
- Carrying a firearm with criminal intent[21]

7.11 Committal proceedings are no longer held for indictable only offences, and they must proceed immediately to the Crown Court for trial of the offence.[22]

7.12 We have given consideration as to which designation – "indictable only" or "either-way" – is appropriate for each of our recommended offences.

Breach of duty in public office

7.13 In the case of the offence of breach of duty in public office, we consider there to be a compelling basis for making this an indictable only offence. As the conduct of the defendant must have caused or risked serious injury, the offence is, by its nature, a serious one. The complexity of determining the existence of a relevant duty is something that we consider to be most appropriately dealt with by a Crown Court

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11 Road Traffic Act 1988, s 1.

12 Road Traffic Act 1988, s 3A.

13 Sexual Offences Act 2003, s 1.

14 Theft Act 1968, s 10.

15 Theft Act 1968, s 8.

16 Criminal Damage Act 1971, s 1(2).

17 Theft Act 1968, s 21.

18 *R v D* [1984] AC 778.

19 Public Order Act 1986, s 1.

20 Firearms Act 1968, ss 16, 16A.

21 Firearms Act 1968, s 18.

22 Crime and Disorder Act 1998, s 51(1).

Judge. Further, the factual considerations relevant to determining whether a duty was breached, and whether the breach caused or risked serious injury, merit consideration by a jury.

7.14 Making the offence indictable only would be consistent with the approach of the comparable offences of gross negligence manslaughter, and the offence of criminal damage endangering life under section 1(2) of the Criminal Damage Act 1971, both of which are triable only on indictment.

Corruption in public office

7.15 There is a stronger case for making the offence of corruption in public office an either-way offence. At least some of the conduct potentially captured by this offence is likely to be of a less serious kind – for example data breach and computer misuse offending – that in other contexts might be dealt with summarily. Also, somewhat comparable offences under the Fraud Act 2006 and Bribery Act 2010 are either-way offences. This reflects the range of seriousness that may be captured within the relatively broad ambit of each offence type.

7.16 One of the potential benefits of making the offence "either-way", and allowing for summary trial in the magistrates' court in appropriate cases is cost-related; it is a significantly less expensive forum than a jury trial in the Crown Court.[23]

7.17 If the corruption offence is to be charged with other summary (for example, data breach offences) or either-way (for example, fraud or theft) offences, the flexibility of making the offence an either-way offence could allow proceedings to be heard together summarily, rather than bringing all the more minor offences to the Crown Court.

7.18 However, the creation of an either-way offence of corruption could also increase the number of low-level prosecutions compared with the current common law offence, and this could in turn actually increase the overall cost to the criminal justice system.

7.19 If making the offence either-way led to an increase in prosecutions of low-level offending, this would also go against one of the core concerns that we identified with the current offence in Chapter 3 – that of its use in circumstances where non-criminal remedies are more appropriate.

7.20 Further, we consider that the seriousness threshold in our corruption offence – "seriously improper" – coupled with the fault requirement that the defendant knows that the reasonable person would consider the conduct to be "seriously improper", creates an offence of sufficient severity that it should always be tried on indictment.

7.21 In this regard we also look by way of comparison to the 2015 offence of "corrupt or other improper exercise of police powers and privileges" contrary to section 26 of the Criminal Justice and Courts Act 2015, which is an indictable only statutory offence. While in Chapter 5 we recommended the abolition of this offence, the fact of its

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[23] The average daily cost to the court service of a sitting day in the Magistrates' Court is £2,217 compared with £2,719 in the Crown Court. For the CPS, the cost difference is even greater. For example, where a late guilty plea is entered for a relatively straightforward case in the Magistrates' Court the average cost is £271.52, compared with £647.91 in the Crown Court.

relatively recent introduction as an indictable only offence is suggestive of government and parliament's view as to the appropriate forum for dealing with corruption offences involving public office holders.

Recommendation 17.

7.22 Both the offence of breach of duty in public office and the offence of corruption in public office should be indictable only offences.

ACCESSORIAL LIABILITY

7.23 Accessorial liability refers to criminal liability for the act of another. It is to be distinguished from inchoate liability (see para 7.34), which refers to situations where a defendant is held responsible for conspiring or attempting to commit, or encouraging the commission of, a substantive offence.

7.24 In our issues paper,[24] we observed that individuals (including those who are not themselves public officers) may be charged as secondary parties to the offence. This could be where they either aid, abet, counsel or procure the commission of misconduct by a public office holder.[25]

7.25 The conduct involved in each of aiding, abetting, counselling or procuring can be summarised as follows:

(1) "Aiding" can be satisfied by any act of assistance before or at the time of the offence. For example, if a criminal figure were to provide detailed information to a prison officer on how they can smuggle drugs into a prison.

(2) "Abetting" and "counselling" have a very similar meaning, and refer to the encouragement of the commission of an offence. They do not require a causal link between the encouragement and the actual commission of the offence. For example, if the wife of an immigration official were repeatedly to encourage her husband to misuse his powers improperly to grant a visa to a family member, she may have "abetted" or "counselled" the commission of the offence, even if this was not a decisive factor in his decision to do so.

(3) "Procuring" requires a causal link between the conduct and the commission of an offence. As we discuss below, this form of liability has been pursued in the context of journalists making payments to public officials to improperly release confidential information.[26]

7.26 Examples of people actually prosecuted as accessories to misconduct in public office have included:

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24 Issues Paper 1 (2016), para 2.221.

25 See Accessories and Abettors Act 1861, s 8.

26 See generally *R v Jogee* [2016] UKSC 8; [2017] AC 387. See also D Ormerod and K Laird, *Smith, Hogan and Ormerod's Criminal Law* (15th ed, 2018), pp 186 to 191.

(1) spouses and partners; for example, the wife of a public office holder who allows her bank account to be used for money laundering purposes;[27] and

(2) private contractors; for example, a local builder who gives a local councillor payments and gifts with the view to influencing decisions about the allocation of local authority building contracts.[28]

7.27 In recent years, as a result of the large number of journalists prosecuted as part of Operation Elveden, there has been criticism of the prosecution of secondary parties in connection with misconduct in public office.[29] The Court of Appeal in *Chapman* considered two appeals by journalists against convictions for both conspiracy to commit, and aiding and abetting, misconduct in public office.

7.28 In *Chapman*, the court considered submissions that the judge in each trial had wrongly directed the jury in respect of the fault required to be proved for secondary parties to misconduct in public office. The Court concluded that both juries had been correctly directed and that the established law as to the fault of secondary parties was applicable to misconduct in public office in the same way it was to other offences.[30] In particular, the Court held:

> We conclude that, just as the principal does not need to know or intend that the consequence of all of the facts of which he is aware will be so serious as to amount to the [wilful misconduct] element of the offence of misconduct in public office, the aider and abettor does not have to have such knowledge or intent.[31]

7.29 In February 2016, nearly a year after *Chapman*, and approximately one month after the release of our issues paper, the Supreme Court delivered the seminal decision of *Jogee*.[32] *Jogee* reasserted that all secondary participation requires proof that the necessary fault element of the secondary party is one of intention – either that the crime is committed or that the principal will have the fault element for the offence.[33]

7.30 Nothing less than intention will do. The decision in *Chapman* needs to be read in light of this subsequent decision.

7.31 In the context of the recommended offence of corruption in public office, the *Jogee* decision provides that the accessory must be aware of the existing facts necessary for their conduct to be criminal. In this context, the accessory will be liable if they intend to encourage or assist the public office holder to commit misconduct in public office,

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27 *R v Chapman* [2015] EWCA Crim 539; [2015] 2 Cr App R 10.

28 See BBC News, "Builder Kevin Wingrave admits bribing council boss" (10 November 2014), available at http://www.bbc.co.uk/news/uk-england-devon-29992509.

29 See, eg BBC, "Operation Elveden: Nine journalist have cases dropped" (17 April 2015), available at https://www.bbc.co.uk/news/uk-32355478; and R Greenslade, "Operation Elveden: a sad and sorry tale…" (26 February 2016), available at https://www.theguardian.com/media/greenslade/2016/feb/26/operation-elveden-a-sad-and-sorry-tale.

30 *R v Chapman* [2015] EWCA Crim 539; [2015] 2 Cr App R 10 at [41] to [69].

31 *R v Chapman* [2015] EWCA Crim 539; [2015] 2 Cr App R 10 at [55].

32 *R v Jogee* [2016] UKSC 8; [2017] AC 387.

33 *R v Jogee* [2016] UKSC 8; [2017] AC 387, at [90] to [91].

knowing that a reasonable person would consider the public office holder's behaviour to be seriously improper. In other words, in the case of the corruption offence, the accessory will be liable if they intend that the offence occurs or that the principal will intend it to occur.

7.32 In the case of the breach of duty offence, the accessory will be liable where he or she intends that the principal will be reckless as to causing or risking death or serious injury. The accessory will also be liable if they intend that death or serious injury will be risked or caused.

7.33 Having considered the application of accessorial liability in respect of our proposed replacement offences, we consider that ordinary criminal principles should apply, without need for further adaptation.

INCHOATE LIABILITY: ENCOURAGING OR ASSISTING, CONSPIRACY AND ATTEMPT

7.34 "Inchoate" means just begun, incipient; in an initial or early stage.[34]

7.35 The basis of liability in inchoate offences centres on the defendant's blameworthy state of mind, although in every case some physical conduct by the defendant is also required before criminal liability can be imposed.[35] "Inchoate" criminal liability may exist notwithstanding that no tangible harm has occurred even where the full offence may require proof of that harm.

7.36 There are three main types of inchoate offences:

(1) conspiracies; where two or more people agree to pursue a course of criminal conduct;

(2) attempts; where a person does an act which is more than merely preparatory to the commission of the offence with the intent to commit the offence; and

(3) encouraging or assisting the commission of a criminal offence.

7.37 Inchoate liability depends on the existence of a substantive offence.[36] The defendant becomes criminally liable for conspiring or attempting to commit, or encouraging the commission of, a substantive offence. A person cannot be criminally liable for attempting to commit an act that is not of itself criminal. However, the substantive offence does not need to actually be committed for inchoate liability to arise.

7.38 The current offence, and the recommended offence of corruption, could both be pursued as inchoate offences in certain circumstances. It is much less likely that the breach of duty offence could be pursued as an "attempt" or "encouraging or assisting", but certain factual scenarios could amount to "conspiracy".

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34 See D Ormerod and K Laird, *Smith, Hogan and Ormerod's Criminal Law* (15th ed, 2018), p 410.

35 D Ormerod and K Laird, *Smith, Hogan and Ormerod's Criminal Law* (15th ed, 2018), p 410.

36 There are also a number of "substantive inchoate offences", such as encouraging or assisting suicide contrary to section 2 of the Suicide Act 1961.

7.39 We consider that ordinary principles of inchoate liability could apply to each of the two offences we are recommending without need for further adaption. We outline how this might operate by way of example below.

Encouraging or assisting

7.40 The common law offence of inciting the commission of another offence was abolished by section 59 of the Serious Crime Act 2007 ("SCA 2007"). In its place, three offences were created under sections 44 to 46 of the Serious Crime Act 2007:

- intentionally encouraging or assisting an offence;[37]
- encouraging or assisting an offence believing it will be committed;[38] and
- encouraging or assisting offences believing one or more will be committed.[39]

7.41 These offences are very broad and overlap with other forms of inchoate liability.[40]

7.42 It is a defence to liability under sections 44 to 46 if the defendant can establish that they knew or reasonably believed "certain circumstances" (which are not further defined) to exist, and it was reasonable for the defendant to act as they did in those circumstances.[41]

Example One:

A person, whether or not they are a public officer, could conceivably encourage the commission of the corruption offence by offering payment to an immigration official to encourage them improperly to make an adverse determination against another (or alternatively, improperly make a positive determination).

7.43 Under our recommended corruption offence, liability under section 44 of the SCA 2007 may arise in the above scenario, even if the immigration official does not actually proceed with making the adverse determination. Importantly, to prove that an offence under section 44 has been committed, section 47 of the SCA 2007 would require that:

(1) the defendant did acts capable of assisting or encouraging the official to make the adverse determination;[42] and that either:

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37 Serious Crime Act 2007, s 44.

38 Serious Crime Act 2007, s 45.

39 Serious Crime Act 2007, s 46.

40 D Ormerod and R Fortson, "Serious Crime Act 2007: The Pt 2 Offences" [2009] 6 *Criminal Law Review* 389, 390.

41 Serious Crime Act 2007, s 50.

42 Serious Crime Act 2007, s 47(2).

(a) the defendant believed that, were the determination to be made, it would be seriously improper, and the immigration official would know that the reasonable person would consider that to be so;

(b) the defendant was reckless as to whether or not the determination would be seriously improper, and the immigration official would know that the reasonable person would consider that to be so; or

(c) the defendant's state of mind was such that, were he to make the determination himself, it would be seriously improper, and he knew that the reasonable person would consider that to be so.[43]

7.44 The conduct of the defendant in this scenario could also be pursued as an offence under the Bribery Act 2010, which in practice is the more likely charge.

Conspiracy

7.45 A criminal conspiracy involves an agreement between two or more persons to commit a crime.[44]

7.46 There are six elements to the offence of statutory conspiracy under section 1 of the Criminal Law Act 1977:[45]

(1) an agreement;

(2) that a course of conduct will be pursued;

(3) the course of conduct will necessarily amount to the commission of an offence if carried out in accordance with the defendants' intentions;

(4) the defendants had an intention to agree;

(5) the defendants had an intention that the agreement will be carried out; and

(6) the defendants had an intention or knowledge as to any circumstances forming part of the substantive offence.[46]

7.47 In the case of conspiracy, it is the agreement itself, rather than what in fact occurred, which is most important.

7.48 Whilst the agreement must be complete such that a decision has been reached between the parties,[47] the courts have failed to define with precision what conduct

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43 Serious Crime Act 2007, s 47(5)(a).

44 Criminal Law Act 1977, s 1.

45 See D Ormerod and K Laird, *Smith, Hogan and Ormerod's Criminal Law* (15th ed, 2018), p 437.

46 Criminal Law Act 1977, s 1(2). See *R v Saik* [2006] UKHL 18; [2007] 1 AC 18.

47 *R v Walker* [1962] *Criminal Law Review* 458. See also G Williams, *Criminal Law: the General Part* (1953), p 212.

suffices to constitute the completed agreement.[48] The offence lies in agreeing with another that a crime will be committed:

> What has to be ascertained is always the same matter: is it true to say ... that the acts of the accused were done in pursuance of a criminal purpose held in common between them?[49]

7.49 A person can be convicted of conspiracy even though he or she will not be involved in the commission of the substantive crime.[50]

7.50 Section 1(1)(b) of the Criminal Law Act 1977 also provides that, in a case of statutory conspiracy, the fact that the course of conduct relied on rendered the substantive offence impossible does not prevent a conviction for conspiracy.

Example Two:

Two prison officers agree that they will not respond to the next alarm from a suicidal prisoner, as they consider these to be usually false alarms, and a waste of time.

7.51 The above example potentially amounts to conspiracy to commit the breach of duty offence. What must be proven under section 1 of the Criminal Law Act 1977 is that:

(1) the prison officers had an agreement;

(2) that the prison officers would not respond to an alarm;

(3) that in doing so the prison officers would be committing the offence of breach of duty in public office, as they would be reckless as to the risk of death or serious injury;

(4) the prison officers had an intention to agree;

(5) the prison officers intended that the agreement would be carried out; and

(6) the prison officers knew that as prison officers they had a duty to prevent death or serious injury to inmates.

Conspiracy to defraud

7.52 There is also a common law offence of "conspiracy to defraud". This remains in force[51] despite the fact that the offences in the Fraud Act 2006, together with the statutory conspiracy provisions in section 1(1) of the Criminal Law Act 1977, now

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48 See D Ormerod and K Laird, *Smith, Hogan and Ormerod's Criminal Law* (15th ed, 2018), p 438.

49 *R v Meyrick* (1929) 21 Cr App R 94, 102.

50 *R v Anderson* [1986] AC 27.

51 See Criminal Justice Act 1987, s 12.

provide a statutory basis for charging almost all of the conduct that falls with the common law offence.

7.53 The Attorney General's Office has issued guidance in relation to the circumstances where it remains appropriate to pursue the common law offence.[52] Importantly, this guidance requires prosecutors first to consider:

(1) whether the behaviour could be prosecuted under statute - whether under the Fraud Act 2006 or another Act or as a statutory conspiracy; and

(2) whether the available statutory charges adequately reflect the gravity of the offence.[53]

7.54 The form of the offence that is most relevant in this context is the specific situation of deceiving another into acting contrary to his or her public duty.[54] In the case of *Welham v DPP*,[55] Lord Radcliffe held:

> In my opinion it is clear that in connection with this offence the intent to defraud existed when the false document was brought into existence for no other purpose than that of deceiving a person responsible for a public duty into doing something that he would not have done but for the deceit, or not doing something that but for it he would have done. Correspondingly, to put such a document forward with knowledge of its falsity and with a similar intent was to commit the crime of uttering it.[56]

7.55 This may continue to have some application in parallel with the statutory conspiracy to commit the offence of corruption.

Attempt

7.56 Section 1(1) of the Criminal Attempts Act 1981 ("CAA 1981")[57] provides that a person may be guilty of attempting to commit an offence if:

> with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence …

7.57 Liability therefore turns on the defendant doing one or more acts which are more than merely preparatory to the full offence with intent to commit a substantive offence.[58]

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52 Attorney General's Office, "Use of the common law offence of conspiracy to defraud" (29 November 2012) https://www.gov.uk/guidance/use-of-the-common-law-offence-of-conspiracy-to-defraud--6.

53 Attorney General's Office, "Use of the common law offence of conspiracy to defraud" (29 November 2012) https://www.gov.uk/guidance/use-of-the-common-law-offence-of-conspiracy-to-defraud--6, at [6].

54 *Welham v DPP* [1961] AC 103; *DPP v Withers* [1975] AC 842; [1975] Crim LR 95.

55 [1961] AC 103.

56 *Welham v DPP* [1961] AC 103, p 125.

57 Criminal Attempts Act 1981, s 6.

58 See Conspiracy and Attempts (2008) Law Commission Consultation Paper No 183.

7.58 As the substantive breach of duty offence does not require "intention" (the relevant fault element being recklessness) an issue which arises is whether "intention" would be required for the attempt form of the offence. There are conflicting Court of Appeal authorities on this issue: the decision in *Pace and Rogers*[59] took a strict approach to requiring intention, whereas the prior authority in *Khan*[60] held that recklessness could apply if that were the relevant mens rea for the full offence.

7.59 Only offences tried on indictment may be pursued as an attempt, and the offence of conspiracy, aiding and abetting, and assisting an offender or concealing an offence are further excluded.[61]

Example Three:

An official in the Department for Work and Pensions seeks to deny benefits to a person solely on the basis they do not like them, taking active steps to deny the claim. The offence may be committed even though the attempt was in fact impossible – for example, the person was not entitled to benefits for some other, unrelated reason.

INTOXICATION

7.60 It is generally accepted that a defendant is entitled to an acquittal where their voluntary intoxication is such that they did not form the mental element for an offence of specific (as opposed to basic) intent.[62] However, the distinction between offences of specific or basic intent, for the purposes of establishing the impact of any voluntary intoxication upon a defendant's liability for an offence, is invariably fraught.[63] A number of methods have been used to distinguish crimes connoting specific intent, including:

(1) a focus upon "ulterior intent" (specific) where there is an element of the mental element going beyond the immediate physical element (basic);[64]

(2) assessing whether the mental element of the crime requires a direct or "purposive intention" (specific) or some other form of mental element or strict liability (basic);[65]

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59 [2014] EWCA Crim 186; [2014] 1 WLR 2867.

60 (1990) 91 Cr App R 29; [1990] Crim LR 519, CA.

61 Criminal Attempts Act 1981, s 4.

62 This principle is subject to the caveat that a drunken intent is still an intent: *R v Sheehan and Moore* (1975) 60 Cr App R 308.

63 D Ormerod and K Laird, *Smith, Hogan and Ormerod's Criminal Law* (15th ed, 2018) p 318.

64 *DPP v Majewski* [1976] UKHL 2; [1976] AC 443, p 478, per Lord Simon.

65 *DPP v Majewski* [1976] UKHL 2; [1976] AC 443, p 478, per Lord Simon.

(3) establishing whether the crime is one for which the predominant mental element is intention, knowledge or dishonesty (specific) or some lesser mental element of recklessness, negligence or strict liability (basic);[66]

7.61 Various court decisions have identified that a number of crimes require specific intent, including: murder,[67] wounding or causing grievous bodily harm with intent,[68] theft,[69] robbery, burglary with intent to steal,[70] and handling stolen goods. In contrast, crimes which have been held not to require specific intent include manslaughter,[71] rape[72] and inflicting grievous bodily harm.[73]

7.62 With this somewhat fraught dichotomy in mind, it is likely that the proposed replacement offence of corruption in public office would require specific intent given the comparatively complex nature of the mental element of the offence. It is thus conceivable that a public office holder would be acquitted if they were extremely intoxicated, such that they did not form the mental element of intending to use, or failing to use, a position or power of public office for the purpose of achieving a benefit or detriment for another person. They may also not be capable of knowing that a reasonable person would consider the use or failure seriously improper.

7.63 Alternatively, and particularly in the context of the breach of duty offence – the very fact of the public office holder becoming voluntarily intoxicated in the course of their duties might weigh strongly in favour of an argument that they have satisfied the fault element of the offence. Specifically, that they were reckless as to the potential consequences that might flow from their intoxication while they were in a role that entailed a duty to prevent death or serious injury.

7.64 We conclude that ordinary principles concerned with "intoxication" should have application in relation to our replacement offences, without the need for further modification.

CORPORATE LIABILITY

7.65 At its heart, misconduct in public office is a crime focused on the duties of an individual in relation to the public. However, in our issues paper, we noted that a breach of a duty could equally be committed by a number of individuals who are jointly subject to that duty:

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66 See discussion of knowledge in *DPP v Majewski* [1976] UKHL 2; [1976] AC 443, 498, per Lord Russell.

67 *A-G for Northern Ireland v Gallagher* [1963] AC 349.

68 *Bratty v A-G for Northern Ireland* [1963] AC 386; *R v Pordage* [1975] Crim LR 575.

69 *Ruse v Read* [1949] 1 KB 377.

70 *Durante* [1972] 3 All ER 962.

71 *R v Lipman* [1970] 1 QB 152.

72 *R v Grewal* [2010] EWCA Crim 2448.

73 *Bratty v A-G for Northern Ireland* [1963] AC 386, 533.

> Where a duty is thrown on a body consisting of several persons, each is individually liable for a breach of duty, as well as for acts of commission as for omission.[74]

7.66 As observed in our issues paper, we have found no authority to suggest that the ordinary rules of corporate criminal liability do not apply to misconduct in public office, assuming that a corporation is held to be in public office.[75] However, the question of whether a corporation can hold public office for the purposes of the current common law offence has not been tested, so the position is currently unclear. The analysis below proceeds on the basis that it could be, but there is no definitive authority to confirm this. If adopted, our replacement offences would more clearly encompass corporations, as the statutory definition of "person" would include "a body of persons corporate or unincorporated".[76]

7.67 A company with a distinct legal personality is capable of committing crimes, subject to the restriction of the rules of attribution where the crimes require proof of a mental element, as with misconduct in public office.[77] It is conceivable that a corporate policy may be "seriously improper". While a corporation lacks a "body and mind", for the purposes of the criminal law, the "identification doctrine" overcomes this on the basis that the "controlling officers of the corporation performed the proscribed conduct with the relevant fault element".[78]

7.68 For example, if a private company contracted by Her Majesty's Prison and Probation Service to run a prison in England and Wales were to have a policy of treating LGBT+ prisoners in a demeaning way, there could be an argument that the corporate entity had:

(1) caused detriment to those prisoners;

(2) that the manner in which it had acted was seriously improper; and

(3) the company knew that the reasonable person would consider the conduct seriously improper.

7.69 The relevant controlling officers of the corporation – for example, the directors, a chief executive, or senior managers – may be held criminally liable. As the corruption offence is not one of strict liability, the attribution of criminal liability in this way requires that the controlling officer themselves had the relevant fault element.[79]

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74 *Russell on Crime* (1964); *Hollond* (1794) 5 TR 607; 101 ER 340; Issues Paper 1 (2016), para 2.226.

75 In the same way the usual rules of legal liability would apply in respect of unincorporated associations; Issues Paper 1 (2016), para 2.227; see D Ormerod and K Laird, *Smith, Hogan and Ormerod's Criminal Law* (15th ed, 2018), Chapter 8.

76 Interpretation Act 1978, Sch 1.

77 See D Ormerod and K Laird, *Smith, Hogan and Ormerod's Criminal Law* (15th ed, 2018) Ch 8 and Criminal Liability in Regulatory Contexts (2010) Law Com No 185, paras 1.60 to 1.88. On 3 November 2020 the Law Commission announced that the Government has asked the Law Commission to investigate the laws around corporate criminal liability and provide options to reform them. Further details in relation to this project are available at the project webpage: https://www.lawcom.gov.uk/project/corporate-criminal-liability/.

78 D Ormerod and K Laird, *Smith, Hogan and Ormerod's Criminal Law* (15th ed, 2018), p 249.

79 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153.

Therefore it is necessary to show that the senior manager individually knew that the reasonable person would consider the conduct of the company to be seriously improper.

7.70 The situation is somewhat different for an unincorporated association, such as a partnership, which is not considered a legal person at common law.[80] Therefore, an unincorporated association, as an entity, cannot currently be criminally liable for the common law offence of misconduct in public office (though individual members could be). However, as our replacement offences would have a statutory basis, this would bring them into the definition of a "person" for the purposes of the Interpretation Act 1978, and therefore they could be so liable.

7.71 In the implementation of our replacement offences, government may also wish to consider a consent or connivance provision, similar to section 18 of the Theft Act 1968. For example, section 18(1) provides that:

> Where an offence committed by a body corporate under … this Act is proved to have been committed with the consent or connivance of any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence, and shall be liable to be proceeded against and punished accordingly.

7.72 Of note, under Schedule 17 of the Crime and Courts Act 2013, a deferred prosecution agreement ("DPA") may take place between a prosecutor and a body corporate, partnership or an unincorporated association. The agreement may – amongst other outcomes – impose on the party to pay the prosecutor a financial penalty, compensate victims of the alleged offence, or implement a compliance program. Failure to comply with the DPA may result in its termination. However, if the DPA remains in force until its expiry date, and proceedings are discontinued by the prosecutor, fresh criminal proceedings may not be instituted against that party by the prosecutor.

7.73 Part 2 of Schedule 17 of the Crime and Courts Act 2013 lists the offences in relation to which a DPA may be entered into. Offences include the common law offences of conspiracy to defraud and cheating the public revenue, and statutory offences including forgery[81] and theft.[82] In recognising corporate liability, it may be appropriate for government to consider including the replacement offences of misconduct in public office within this list.

JURISDICTIONAL ISSUES

7.74 In our issues paper,[83] we observed that as a general rule, the common law does not extend to acts done outside England and Wales. An offence can be prosecuted within England and Wales if either the prohibited conduct or its consequences take place

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80 D Ormerod and K Laird, *Smith, Hogan and Ormerod's Criminal Law* (15th ed, 2018), p 259.

81 Forgery and Counterfeiting Act 1981, s 1.

82 Theft Act 1968, s 1.

83 Issues Paper 1 (2016), paras 2.210 to 2.220.

there, or there are substantial activities constituting the crime taking place in this country.[84]

7.75 As misconduct in public office is a "conduct crime", the offence will be committed upon the carrying out of the misconduct in question. A holder of public office will, therefore, be subject to the offence if his or her acts or omissions, or substantial activities constituting such, occur within England and Wales.[85]

7.76 However, there are a number of bases under which a state might seek to exercise criminal jurisdiction beyond its borders.[86] Of these, the right of a state to apply its criminal laws to the acts or omissions of its own subjects abroad is amongst the most widely accepted under international law.[87]

7.77 In our issues paper, we identified that some statutory provisions have extended the ambit of the criminal law of England and Wales to apply to specified classes of persons outside the jurisdiction.[88] In particular, two of these classes – Crown servants and service personnel of the Armed Forces – have also been held by the courts to be public office holders.

7.78 Section 31(1) of the Criminal Justice Act 1948 applies to Crown servants as follows:

> Any British subject employed under His Majesty's Government in the United Kingdom in the service of the Crown who commits, in a foreign country, when acting or purporting to act in the course of his employment, any offence which, if committed in England, would be punishable on indictment, shall be guilty of an offence [...] and subject to the same punishment, as if the offence had been committed in England.

7.79 The effect of this provision is that a Crown servant who commits an offence in a foreign country, which would also be an indictable offence in England and Wales, can be prosecuted in England and Wales. For example, if a Wales-based police officer who is seconded to Australia undertakes conduct which amounts to the offence of misconduct in public office under both the relevant domestic Australian law, and the common law of misconduct in public office in England and Wales, they can be held criminally liable in England and Wales.

7.80 As Hirst notes, a key rationale for this policy is that:

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84 *R v Smith (Wallace Duncan) No 4* [2004] EWCA Crim 631; [2004] QB 1418; Issues Paper 1 (2016), para 2.210.

85 *R v Smith (Wallace Duncan) No 4* [2004] EWCA Crim 631; [2004] QB 1418; Issues Paper 1 (2016), para 2.211.

86 These include "the protective principle", where acts done wholly abroad may be criminalised if they involve attacks on or threats against a state's security of vital national interests, claims of jurisdiction based on the offender's nationality, and more controversially, the "passive personality" principle, where a state asserts jurisdiction on basis of the nationality of the victims of criminal offences. See M Hirst, *Jurisdiction and the Ambit of the Criminal Law* (Oxford University Press, 2003), pp 48 to 51.

87 M Hirst, *Jurisdiction and the Ambit of the Criminal Law* (Oxford University Press, 2003), p 49.

88 These provisions are almost always restricted in application to British nationals or those domiciled in Britain; Issues Paper 1 (2016), para 2.212.

> serious misconduct abroad by any servant or officer of the British Crown carries great potential for scandal and national embarrassment, but any such scandal, etc., may be reduced if the United Kingdom is seen to deal firmly with the misconduct following that person's expulsion or recall.[89]

7.81 Section 42(1) of the Armed Forces Act 2006 is even broader, and provides that a British service personnel subject to service law, or a civilian subject to service discipline, commits an offence if he or she does any act that:

> (a) is punishable by the law of England and Wales; or
>
> (b) if done in England or Wales, would be so punishable.

7.82 The effect of section 42 is that any serviceman –

> Who is guilty of an act or omission that would be punishable by the law of England if committed in England is guilty of any offence […] wherever he commits it, whether in some other part of the UK or elsewhere in the world. Although, as the offence is a "service" offence, it can only be dealt with by way of court martial.[90]

7.83 Unlike section 31(1) of the Criminal Justice Act 1948, there is no requirement that the conduct also amount to an offence in the foreign jurisdiction.

7.84 Traditionally, misconduct in public office has, therefore, been an offence where the jurisdiction of the courts will depend on the status of a particular public office. Consequently, there is a lack of consistency between different types of defendant, as to how and when they can be prosecuted for acts occurring outside of England and Wales.[91]

7.85 Moreover, because of the current restriction of the common law offence to England and Wales, there are inconsistencies that may arise in respect of how a public office holder's misconduct is treated in different parts of the UK. For example, there is an offence in Scotland of "wilful neglect of duty by a public official". This offence is similar to the offence in England and Wales in some, but not all respects:

> It is a crime at common law for a public official, a person entrusted with an official situation of trust, wilfully to neglect his duty, even where no question of danger to the public or to any person is involved.[92]

7.86 In our issues paper, we considered the example of a customs officer for HM Revenue and Customs, who has powers across the UK, who commits misconduct one day in England and in the same way the next day in Scotland. This may result in the officer

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89 M Hirst, *Jurisdiction and the Ambit of the Criminal Law* (Oxford University Press, 2003), p 209.

90 Per Lord Roger of Earlsferry in *R v Spear* [2002] 3 All ER 1074; [2003] 1 AC 734, 1088, referring to the effect of section 70 of the Army Act 1955, which had essentially the same effect.

91 Issues Paper 1 (2016), para 2.216.

92 Gordon, The Criminal Law of Scotland (3rd ed 2001) vol ii at [44-01].

being prosecuted for two different offences for the two acts, or even being prosecuted in one jurisdiction but not the other.[93]

7.87 In contrast, a number of statutory offences, which may be considered to encompass conduct akin to misconduct in public office, have an extra-territorial ambit specified by the offence-creating statute. The justification for the wider territorial reach is usually that the nature of the offence is both serious and that the criminality is likely to cross geographical borders. Section 12 of the Bribery Act 2010 – which has application across jurisdictions of the United Kingdom – provides that acts and omissions forming part of an offence under sections 1, 2 or 6 of the Act, done or made outside the United Kingdom, can be the subject of proceedings within the United Kingdom if the person who commits those acts or omissions has a "close connection" with the United Kingdom.[94]

7.88 We have not consulted on the issue of extra-territorial jurisdiction for our replacement offences. Government may wish to make its own enquiries in this regard, particularly as to its potential impact on overseas postings of British officials. However, we see no principled reason why, in the context of our replacement offences, the extent of extra-territorial jurisdiction should be limited to Crown servants[95] and service personnel.[96] The terms of both the recommended replacement offences are sufficiently constrained, both in terms of who may be considered a "public office" holder, and the contexts in which they may be pursued.

7.89 The right of a state to apply its criminal laws to the acts or omissions of its own subjects abroad is universally recognised under international law.[97] In the United Kingdom, there is ordinarily a strong presumption against holding foreign nationals criminally liable under United Kingdom laws while overseas.[98] However, in the specific context of a foreign national who holds a public office under the law of England and Wales, and breaches their duty or acts corruptly within the context of that office, we consider that there is a case for the imposition of such liability, irrespective of where they are situated. In particular, we note the risk for scandal and national embarrassment, that may be occasioned, if the United Kingdom is not able to take appropriate steps to prosecute serious misconduct by its officials committed while abroad. This may be the case even where there is not any applicable offence in the domestic law of the relevant jurisdiction.

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93 Issues Paper 1 (2016), para 2.218.

94 However, the breadth of this provision is not without criticism. See, eg, J Lordi, "The UK Bribery Act: Endless Jurisdictional Liability on Corporate Violators" (2011) 44(3) *Case Western Reserve Journal of International Law*, 44(3), 955.

95 By virtue of section 31(1) of the Criminal Justice Act 1948.

96 By virtue of section 42(1) of the Armed Forces Act 2006.

97 M Hirst, *Jurisdiction and the Ambit of the Criminal Law* (Oxford University Press, 2003), p 49.

98 *R v Jameson* [1896] 2 QB 425; *Air India v Wiggins* [1980] 2 All ER 593.

Recommendation 18.

7.90 The government should consider extending the jurisdiction of the corruption and breach of duty offences to the conduct of public office holders in a foreign country, if the conduct of the public office holder would amount to one of these offences if committed in England and Wales.

WELSH DEVOLUTION IMPLICATIONS

7.91 Our recommendations for repeal and replacement of the common law offence of misconduct in public office are made on the basis that they apply to England and Wales, and we anticipate that government would seek to implement them as such. In responding to our consultation paper, the Counsel General of the Welsh Government helpfully highlighted the devolution implications of England and Wales-wide reform in this area.

7.92 Following the passage of the Wales Act 2017, it appears that at least some aspects of reform of this offence fall within the legislative competence of the Senedd Cymru, as it is not one of the areas specifically reserved by Parliament in Schedule 7A of the Government of Wales Act 2006. Assuming this to be the UK Government's view also, the Counsel General outlined the necessary process as follows:

> Once the proposal is finalised, then it will be for Welsh Government to consider the implications for devolved areas and then for the Assembly [now the Senedd Cymru / Welsh Parliament] to decide whether or not to give consent to those aspects of the proposal which are within its legislative competence.

7.93 This is not a matter on which we wish to make further comment, save to highlight this as an area for government to consider should it choose to implement our recommendations.

MAXIMUM PENALTIES

7.94 As a common law offence, the maximum penalty for the current offence of misconduct in public office is life imprisonment. Our review of cases between 2005 and 2016 demonstrates that in practice, sentences for misconduct in public office very rarely exceed 10 years' imprisonment.

7.95 As statutory offences, our replacement offences would need to specify a maximum penalty. We did not directly consult with stakeholders on this issue, and we consider the determination of a maximum penalty for each offence to be most appropriately a matter for parliament. Below we make a number of observations that may be of assistance with this process.

Corruption in public office

7.96 Looking to other offences by way of comparison, we consider the offences of fraud and bribery to be useful comparators for the offence of corruption in public office.

7.97 The offences of fraud under sections 2, 3 or 4 of the Fraud Act 2006 carry a maximum penalty of ten years' imprisonment or a fine, or both on indictment.[99]

7.98 The offences of bribery of another person[100] and being bribed[101] also carry a maximum penalty on indictment of ten years' imprisonment and / or a fine.

7.99 In relation to sexual misconduct, a somewhat analogous comparison may be drawn with the offences of abuse of position of trust under section 16 of the Sexual Offences Act 2003. These offences occur where sexual activity is undertaken with a person who is 16 or 17 years old, and the perpetrator is in a position of trust in relation to them. The maximum penalty is five years' imprisonment.

7.100 Finally, we note that the offence of "corrupt or other improper exercise of police powers and privileges" contrary to section 26 of the Criminal Justice and Courts Act 2015 carries a maximum penalty of 14 years' imprisonment.

7.101 Considering all these available comparator offences, we consider a maximum penalty of between 10 to 14 years' imprisonment to be an appropriate range for parliament to consider for the corruption offence.

Recommendation 19.

7.102 A maximum penalty of between 10 to 14 years' imprisonment is an appropriate range for parliament to consider for the offence of corruption in public office.

Breach of duty in public office

7.103 In relation to breach of duty in public office, which may result in death of another in the most serious cases, we consider the common law offence of gross negligence manslaughter to provide a useful guide to the appropriate maximum penalty.

7.104 As a common law offence, gross negligence manslaughter carries a maximum penalty of life imprisonment. Sentences for gross negligence manslaughter vary widely, reflecting the wide variety of situations in which the offence can be committed. A Sentencing Council definitive guideline, *Manslaughter*, has recently been introduced for the first time, effective from 1 November 2018. It details four different categories of offending: very high culpability; high culpability; medium culpability and lower culpability. For each category, the harm is considered to be of the utmost seriousness. The definitive guideline indicates appropriate sentences may range from one year's imprisonment (the lowest end of category range for an offence with lower culpability) to 18 years' custody (the highest end of the category range for very high culpability).

7.105 Another useful comparator is the offence of destroying or damaging property under section 1(2) of the Criminal Damage Act 1971, which is as follows:

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99 Fraud Act 2006, s 1(3).

100 Bribery Act 2010, s 1.

101 Bribery Act 2010, s 2.

A person who without lawful excuse destroys or damages any property, whether belonging to himself or another—

(a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and

(b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered;

shall be guilty of an offence.

7.106 As with the breach of duty offence, this offence deals with the "reckless" endangerment of life. It carries a maximum penalty of life imprisonment.[102]

7.107 The Sentencing Council last year published draft guidelines for this offence, recommending that in cases of reckless (as opposed to intentional) endangerment of life, offending causing the worst harm should attract a sentence in the range of four to 10 years' imprisonment.[103] The associated statistical bulletin indicated that the average (mean) sentence length for criminal damage endangering life in 2015 was two years seven months (as was the median).[104]

7.108 Weighing up the approach in these comparable offences, and noting in particular the usual approach to statutory maximum penalties (which rarely exceed 14 years), we consider that an appropriate maximum for the most serious breach of duty cases to be in the range of 10 to 14 years' imprisonment.

Recommendation 20.

7.109 A maximum penalty of between 10 to 14 years' imprisonment is an appropriate range for parliament to consider for the offence of breach of duty in public office.

[102] Criminal Damage Act 1971, s 4(1).

[103] Sentencing Council, *Arson and Criminal Damage Offences Guidelines Consultation* (March 2018), available at https://www.sentencingcouncil.org.uk/wp-content/uploads/Arson-and-Criminal-Damage_WEB.pdf.

[104] Sentencing Council, *Criminal Damage Statistical Bulletin* (March 2018), available at https://www.sentencingcouncil.org.uk/wp-content/uploads/Arson-and-criminal-damage-statistical-bulletin-1.pdf.

Chapter 8: Prosecutorial guidance and consent to prosecute

INTRODUCTION

8.1 A consistent theme throughout this review has been the particular challenge caused by the breadth and scope of the offence of misconduct in public office.

8.2 Through the recommendations for replacement offences that we outlined in Chapters 4, 5 and 6, we have sought to refine and clarify the way the criminal law deals with the conduct that is currently criminalised through this common law offence. However, we recognise that even if these proposals are adopted, the application of these offences in practice will not always be straightforward.

8.3 The Crown Prosecution Service ("CPS") have acknowledged the particular challenges posed by the current offence and have published detailed guidance for the prosecution of misconduct in public office.[1]

8.4 In this chapter we outline the current CPS guidance for misconduct in public office and recommend that similarly tailored guidance should inform the prosecution of the replacement offences we are proposing.

8.5 We then consider an additional safeguard to ensure consistency in future prosecutions – namely introducing a requirement of consent to prosecute the offences. We outline the various options available for this, including Attorney General ("AG") consent, personal consent of the Director of Public Prosecutions ("DPP"), and general DPP consent, which in practice can be delegated to Crown Prosecutors.[2] We conclude that the first two of these options would be disproportionate, but a requirement of general DPP consent would provide a valuable additional safeguard.

PROSECUTORIAL DISCRETION AND GUIDANCE

8.6 In deciding whether to prosecute an offence, the CPS exercises what is known as "prosecutorial discretion". This refers to the ability of prosecutors to decide – within defined criteria – whether or not to pursue a prosecution on the basis of the evidence and circumstances of the case.

Background to the CPS function

8.7 For most of the twentieth century, it was the police who controlled prosecutions for almost all serious and most non-serious offences.[3] However, the publication of a

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1 Crown Prosecution Service, *Misconduct in Public Office – Legal Guidance* (16 July 2018), available at https://www.cps.gov.uk/legal-guidance/misconduct-public-office.

2 See, generally: Crown Prosecution Service, *Consents to Prosecute* (11 December 2018), available at https://www.cps.gov.uk/legal-guidance/consents-prosecute.

3 See, generally: A Ashworth, "Developments in the Public Prosecutor's Office in England and Wales" (2000) 8(3) *European Journal of Crime, Criminal Law and Criminal Justice* 257, 258 to 259.

report by the British section of the International Commission of Jurists in 1970,[4] was a harbinger of change. The report argued that it was wrong in principle for the police to make prosecutorial decisions (which require impartiality and independence). It also found police – whose expertise lay in investigation – were not ideally equipped to undertake prosecutorial duties. In the subsequent years, critiques of the prosecutorial system continued, culminating in the Royal Commission on Criminal Procedure, which reported in 1981. The Royal Commission was in favour of establishing an independent public prosecutorial system and the CPS was created by the Prosecution of Offences Act 1985. The process is described by Professor Andrew Ashworth as follows:

> The essence of the system is that the police retain the initial decision whether or not to prosecute. If they decide not to bring a prosecution, then the CPS have no function. Only if the police decide to bring a prosecution must they pass the file to the CPS. … However, the principal role of the CPS is that of legal review of the file. Once the file is passed to the CPS, the 1985 Act gives them the power to discontinue the prosecution or to alter the charges. The CPS should decide whether the case file has all that is required in order to indicate a 'realistic prospect of conviction' for the offence charged …[5]

8.8 The position of the DPP actually predates the creation of the CPS, first appearing in 1879, and developing into a separate office following the Prosecution of Offences Act 1908.

The Code for Crown Prosecutors

8.9 The exercise of prosecutorial discretion is governed by the Code for Crown Prosecutors ("the Code")[6] which is issued by the DPP under section 10 of the Prosecution of Offences Act 1985.

8.10 The guidance requires that prosecutors only start or continue a prosecution when the case has passed both stages of the "Full Code Test". The two stages of the Full Code Test are:

(1) The evidential stage: is there sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge?

(2) The public interest stage: is a prosecution required in the public interest?

The evidential stage

8.11 The evidential stage – "a realistic prospect of conviction" – is an objective test. It requires prosecutors to consider whether an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in

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4 JUSTICE, "The Prosecution Process in England and Wales", *Criminal Law Review* (1970), pp 668 to 683.

5 A Ashworth, "Developments in the Public Prosecutor's Office in England and Wales" (2000) 8(3) *European Journal of Crime, Criminal Law and Criminal Justice* 257, 259; see also L Campbell, A Ashworth and M Redmayne, *The Criminal Process* (5th ed., 2019).

6 See: The Code for Crown Prosecutors (8th ed., 26 October 2018), available at https://www.cps.gov.uk/publication/code-crown-prosecutors.

accordance with the law, is more likely than not to convict the defendant of the charge alleged.[7] Important considerations in this regard are:

(1) the admissibility of the relevant evidence in court;

(2) the credibility of the evidence; and

(3) whether there is any other material that might affect the sufficiency of evidence.

The public interest stage

8.12 If the evidential test is met, the prosecutor is then required to consider whether the pursuit of prosecution in the circumstances of the case is in the public interest. They must balance factors for and against prosecution carefully and fairly. A prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour.

8.13 The seven key questions prosecutors are specifically directed to consider in weighing the public interest under the Code are:

(1) How serious is the offence committed?

(2) What is the level of culpability of the suspect?

(3) What are the circumstances of and the harm caused to the victim?

(4) What was the suspect's age and maturity at the time of the offence?

(5) What is the impact on the community?

(6) Is prosecution a proportionate response?

(7) Do sources of information require protecting?

8.14 If both the evidential test and the public interest test are met, a prosecution should be initiated.

Criticism of the structure of prosecutorial discretion

8.15 While now well established, there has been some academic criticism of the current approach to prosecutorial discretion. In 2006, Jonathan Rogers argued that the two-stage structure of the "evidential" and "public interest" tests had been relatively unquestioned.[8] Sir Keir Starmer (former Director of Public Prosecutions and current

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7 The Code for Crown Prosecutors (8th ed., 26 October 2018), [4.7].

8 J Rogers, "Restructuring the Exercise of Prosecutorial Discretion" (2006) 26(4) *Oxford Journal of Legal Studies* 775, 775. However, more broadly, a prosecutor's failure to exercise the discretion to prosecute a serious assault was successfully appealed in the case of *R (on the application of B) v DPP*. In this case, the prosecution was terminated on the eve of the trial, on the basis that the complainant was suffering from a mental disorder which would undermine his reliability as a witness – therefore affecting the evidential stage of the Full Code Test. The High Court held that the failure to prosecute this case on this basis amounted to a violation of the complainant's rights under article 3 of the European Convention on Human rights: *R (on the application of B) v DPP* [2009] EWHC 106 (Admin); [2009] 1 WLR 2072 at [70]; K Starmer, "Human rights, victims and the prosecution of crime in the 21st century" [2014] 11 *Criminal Law Review* 777.

Leader of the Opposition) has since referred to the case of *R (on the application of B) v DPP*,[9] in which the High Court held that in determining whether there was a realistic prospect of conviction, at the evidential stage, a "merits based" rather than a "purely predictive approach" was appropriate.[10]

8.16 Rogers suggests that the "public interest" test is flawed because it does not expressly encompass the prosecutor's aim in seeking punishment nor an assessment of the harms of prosecution.[11] He notes the "ambiguous constitutional position of the prosecutor" and describes the function of prosecutorial discretion as having so many characteristics it is both "quasi-judicial *and* partly executive".[12]

Challenging the exercise of discretion

8.17 The exercise of prosecutorial discretion can be challenged through judicial review proceedings. For example, the decision of the CPS not to prosecute a charge of misconduct in public office (among other offences) in the context of the conduct of an undercover policeman was unsuccessfully challenged in the 2018 case of *R (on the application of Monica) v Director of Public Prosecutions*.[13] An example of a successful challenge was *R (on the application of Purvis) v DPP*,[14] which challenged the decision of a CPS reviewing lawyer not to pursue charges against a police officer for perjury and misconduct in public office on public interest grounds. The Court found that the CPS lawyer had not addressed the seriousness of the offences or the need to maintain public confidence in the impartiality of decisions to prosecute police officers.

8.18 Following the 2011 case of *R v Killick*,[15] a scheme known as the "Victim's Right to Review Scheme" ("VRR") has also now been established, to provide a more accessible avenue for review. This scheme forms part of the government's Code of Practice for Victims of Crime.[16] The CPS VRR allows victims[17] of crime to challenge a

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9 [2009] EWHC 106 (Admin); [2009] 1 WLR 2072.

10 [2009] EWHC 106 (Admin); [2009] 1 WLR 2072 at [50]; K Starmer, "Human rights, victims and the prosecution of crime in the 21st century" [2014] 11 *Criminal Law Review* 777, 782 to 783. A "merits based" approach focuses upon the quality of the evidence itself, rather than trying to predict the likely outcome of the case.

11 J Rogers, "Restructuring the Exercise of Prosecutorial Discretion" (2006) 26(4) *Oxford Journal of Legal Studies* 775, 793.

12 J Rogers, "Restructuring the Exercise of Prosecutorial Discretion" (2006) 26(4) *Oxford Journal of Legal Studies* 775, 798 to 799.

13 [2018] EWHC 3508 (Admin); [2019] 2 WLR 722.

14 [2018] EWHC 1844 (Admin); [2018] 4 WLR 118

15 *R v Christopher Killick* [2011] EWCA Crim 1608; [2012] 1 Cr App R 10. In *Killick* (at [48]), it was held that "… as a decision not to prosecute is in reality a final decision for a victim, there must be a right to seek a review". See also K Starmer, "Human rights, victims and the prosecution of crime in the 21st century" [2014] 11 *Criminal Law Review* 777, 783 to 784.

16 Ministry of Justice, *Code of Practice for Victims* (last updated October 2015), para 2.2. At the time of writing, the Victims' Code is the subject of a further government consultation. See Ministry of Justice, *Government Response to the Consultation: Proposals for Revising the Code of Practice for Victims of Crime* (March 2020), available at https://consult.justice.gov.uk/victim-policy/consultation-on-improving-the-victims-code/supporting_documents/improvingthevictimscode.pdf.

17 Defined as a "person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by criminal conduct".

CPS decision not to charge, discontinue or otherwise terminate all proceedings, without the victim having to institute judicial review proceedings. It applies to cases where a decision was made after 5 June 2013, and involves a different CPS lawyer reviewing the decision that was originally made. A high-profile example of the VRR in practice, was when the decision not to prosecute Lord Janner,[18] in relation to allegations of sexual offences against seven complainants, was overturned by the CPS in June 2015.[19] In that case, David Perry QC – rather than a CPS lawyer – conducted the review and recommended the decision be overturned. Criticism of the VRR in this context included the suggestion that the associated guidance "should have made clear that, in those cases where the DPP is unpersuaded by the advice of an independent reviewer, the original decision should stand and victims should be left to bring a private prosecution or seek judicial review of the DPP's decision through the courts".[20] Parallel VRRs also operate in respect of decisions made by the various police forces in England and Wales.[21]

Prosecution guidance and misconduct in public office

8.19 In addition to the Code for Crown Prosecutors, the CPS also publishes "prosecution guidance" in respect of many different offences. This provides additional legal and practical support in the prosecution of these offences, and more tailored advice on how the Full Code Test should be applied in the context of the specific offence.

8.20 The CPS has published guidance in relation to misconduct in public office for more than ten years, and most recently updated this guidance in July 2018.[22] There are a number of key principles in charging practice outlined in this guidance, including:

(1) Where there is clear evidence of one or more statutory offences, they should usually form the basis of the case, provided the offences give the court adequate sentencing powers.[23] The "public office" element can be put forward as an aggravating factor for sentencing purposes.

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18 CPS, *The decision not to prosecute Lord Janner – statement from DPP* (16 April 2015), available at https://web.archive.org/web/20150416145609/http://blog.cps.gov.uk/2015/04/the-decision-not-to-prosecute-lord-janner-statement-from-the-dpp.html.

19 On 7 December 2015, it was ruled that Lord Janner was unfit to stand trial. Lord Janner died on 19 December 2015 and had always protested his innocence. See: R Parsons, *Seven Yorkshire sex crime victims have 'no-charge' decisions reversed* (2015), available at https://www.yorkshirepost.co.uk/news/seven-yorkshire-sex-crime-victims-have-no-charge-decisions-reversed-1-7334585; R Syal, *Lord Janner found unfit to stand trial for alleged sex offences* (7 December 2015), available at https://www.theguardian.com/uk-news/2015/dec/07/lord-janner-found-unfit-stand-trial-alleged-sex-offences.

20 J Rozenberg, *The Lord Janner U-turn is the CPS's own fault* (29 June 2015), available at https://www.theguardian.com/commentisfree/2015/jun/29/lord-janner-cps-child-sex-offences.

21 See: Association of Chief Police Officers, *National Policing Guidelines on Police Victim Right to Review* (2015), available at http://operationresolve.co.uk/media/1370/np_guidance_on_police_victim_right_to_review_feb_2.pdf .

22 *Misconduct in Public Office – Legal Guidance* (16 July 2018), available at https://www.cps.gov.uk/legal-guidance/misconduct-public-office.

23 In our report, Simplification of Criminal Law: Public Nuisance and Outraging Public Decency (2015) Law Com No 358, we referred in detail to the key case of *R v Rimmington* [2005] UKHL 63; [2006] 1 AC 459. In his seminal judgment, Lord Bingham outlined the framework of the common law offence of public nuisance.

(2) Misconduct in public office should be considered only where:

(a) there is no suitable statutory offence for serious misconduct (such as a serious breach of or neglect of a public duty that is not in itself a criminal offence);

(b) there was serious misconduct or a deliberate failure to perform a duty owed to the public, with serious potential or actual consequences for the public;

(c) the facts are so serious that the court's sentencing powers would otherwise be inadequate.

(3) Misconduct in public office should be used for serious examples of misconduct that amount to an abuse of public trust. The fact that a public officer has acted in a way that is in breach of his or her duties, or which might expose him/her to disciplinary proceedings, is not in itself enough to constitute the offence.

(4) Although the offence is not a "result crime", the likely consequences of any wilful neglect or misconduct are relevant when deciding whether the conduct falls below the standard expected.

8.21 The guidance also provides further detail for the specific contexts of "breaches of duty", "dishonesty offences" and "deaths in police custody".

Breaches of duty

8.22 In respect of cases involving breach of duty by public office holders (an issue we discuss further in Chapter 6), the guidance states that prosecutors should ask themselves:

(1) Was the breach more than merely negligent or attributable to incompetence or a mistake (even a serious one)?

(2) Did the defendant have a subjective awareness of a duty to act or subjective recklessness as to the existence of a duty?

(3) Did the defendant have a subjective awareness that the action or omission might be unlawful?

(4) Did the defendant have a subjective awareness of the likely consequences of the action or omission?

(5) Did the defendant realise (subjective test) that there was a risk not only that his or her conduct was unlawful but also a risk that the consequences of that behaviour would occur?

In particular, Lord Bingham identified that "where Parliament has defined the ingredients of an offence, perhaps stipulating what shall and shall not be a defence, and has prescribed a mode of trial and a maximum penalty, it must ordinarily be proper that conduct falling within that definition should be prosecuted for the statutory offence and not for a common law offence which may or may not provide the same defences and for which the potential penalty is unlimited" [at para 30].

(6) Were those consequences "likely" as viewed subjectively by the defendant?

(7) Did the defendant realise that those consequences were "likely" and yet went on to take the risk?

Dishonesty or corruption

8.23 The guidance states that when the allegation involves the acquisition of property by theft or fraud, any misconduct should normally be prosecuted using appropriate statutory offences. If a misconduct charge is appropriate, following the case of *W*[24] (which we discuss further in Chapter 2) it will be necessary to prove that the theft or fraud – in relation to improper claims for public funds by the defendant – was dishonest, which is not otherwise an element of the offence.

Cases involving a death in police custody

8.24 Where a prosecution is being considered as a result of a death in police custody, the guidance is clear that misconduct should not be pursued as an alternative charge to manslaughter by gross negligence solely to mitigate against the risk that a jury might conclude it cannot be sure that the breach of duty caused the death. The relative merits of a misconduct charge should be considered separately.[25] This reflects the statement to this effect in the leading case of *Attorney General's Reference No 3 of 2003*.[26]

The value of prosecution guidance

8.25 While almost any offence could be assisted by the availability of prosecution guidance, we consider this to be particularly so in relation to offences like misconduct in public office, which involve a high degree of subjectivity and discretion.

8.26 The current CPS guidance on prosecution of the common law offence is undoubtedly an important aid to prosecutors and helps to ensure more consistent and certain decisions are made.

8.27 While one of the core aims of our reform proposals is to provide more clarity and precision to the prosecution of corruption and breaches of public duty, we recognise that they will not completely resolve the potential for ambiguity and subjectivity. Indeed, we consider that this would be nearly impossible to achieve.

8.28 We therefore consider that, should our recommendations be adopted by government, there is a strong case for the CPS to continue to issue detailed prosecution guidance in respect of these offences (though we do not consider it necessary for this to be mandated by statute).

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24 *R v W* [2010] EWCA Crim 372; [2010] QB 787. See further discussion in Chapter 2.

25 However, misconduct in public office offence may be an appropriate charge when it is not clear if gross negligence manslaughter will be available, in the absence of an obvious and serious risk of death. For further information on manslaughter by gross negligence, see *Blackstone's Criminal Practice* (2019), paras B1.63 to B1.68.

26 [2004] EWCA Crim 868; [2005] QB 73.

8.29 The content of any such guidance would of course be a matter for the DPP.

Recommendation 21.

8.30 The Crown Prosecution Service should continue to publish detailed (non-statutory) prosecution guidance in relation to the replacement offences of corruption in public office and breach of duty in public office.

CONSENT TO PROSECUTE

8.31 Another safeguard that is sometimes used to ensure consistency and fairness in prosecution is a requirement of the consent of a senior decision maker to initiate the prosecution. Such consent is not currently a requirement to prosecute misconduct in public office.

Background to consent to prosecute

8.32 It has been suggested that the first example of a consent provision was contained in the Roman Catholic Relief Act 1829.[27] Throughout the nineteenth century, a number of statutes were subsequently enacted which restricted the right of private prosecution by way of a consent provision.[28] However, it was the advent of the Second World War and the following wave of social welfare legislation, which truly marked the widespread use of consent provisions – in particular to act as a counterbalance to broadly drafted legislation.[29]

Types of consent

8.33 There are three main forms that consent to prosecute takes in the criminal law of England and Wales:

(1) consent of the AG;

(2) personal consent of the DPP; and

(3) consent of the DPP that can be delegated.

8.34 The consent of the AG (which can also be provided by the Solicitor General (SG) by virtue of section 1 of the Law Officers Act 1997) is required for certain serious offences, including some offences relating to national interests and security.[30] While lawyers at the relevant prosecuting agency (often, but not always the CPS) and the

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27 See J Edwards, *The Attorney-General, Politics and the Public Interest* (1984), p 17.

28 B M Dickens, "The Attorney-General's consent to prosecutions" (1972) 35 *Modern Law Review* 347, 354, lists the following examples: the Sunday Observation Prosecutions Act 1871, s 1; the Metalliferous Mines Regulation Act 1872, s 35; the Public Health Act 1875, s 253; the Territorial Waters Jurisdiction Act 1878, s 3; and the Explosive Substances Act 1883, s 7(1).

29 B M Dickens, "The Attorney-General's consent to prosecutions" (1972) 35 *Modern Law Review* 347; Consents to Prosecution (1998) Law Com No 255, p 23.

30 A Ashworth, "Developments in the Public Prosecutor's Office in England and Wales" (2000) 8(3) *European Journal of Crime, Criminal Law and Criminal Justice* 257, 262 to 263.

Attorney General's Office routinely provide advice to the AG or SG (collectively known as the "Law Officers") on these decisions, the decision-making authority cannot be delegated, and must be made personally by one of them.

8.35 The personal consent of the DPP is required to prosecute offences under the Bribery Act 2010,[31] applications for the retrial of serious offences,[32] and the exercise of certain prosecutorial powers.[33] As with the consent of the Law Officers, this function cannot be delegated, and while it provides a high degree of oversight for the prosecutions, it also adds significantly to the personal workload of the DPP.

8.36 Most other offences that require the "consent of the DPP" allow for this consent to be delegated to a Chief Crown Prosecutor by virtue of section 1(7) of the Prosecution of Offences Act 1985.

Our previous review of "Consents to Prosecution"

8.37 In 1998, we published our "Consents to Prosecution" report, which focused on offences which require the consent of a Law Officer or the DPP.[34] One of the reasons for this review was the prior observation by the 1981 Royal Commission on Criminal Procedure that, regarding the wide-ranging list of offences which require the consent of a Law Officer or the DPP, "some of the restrictions have been arbitrarily imposed".[35] Indeed, Ashworth has since observed that, in particular, the list of offences which stipulate that prosecution may only be commenced with the consent of the DPP is "diverse and incoherent".[36]

8.38 With the aim of fostering coherence and rationalising this area of law, in 1998 we recommended specific categories of offence which should have a consent provision:

(1) where it is very likely that a reasonable defendant would contend that a prosecution for the particular offence would violate his or her Convention rights;

(2) offences involving national security or with some international element; and

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31 Bribery Act 2010, ss 10(1) and (4). The Director of the Serious Fraud Office can also provide personal consent where it is the relevant prosecuting agency.

32 Criminal Justice Act 2003, s 76(3).

33 Including various functions under the Serious Organised Crime and Police Act 2005 such as investigatory powers (ss 61 to 69), witness immunity notices (s 71), restricted use undertakings (s 72), sentence discount agreements (ss 73 and 74); applications for Serious Crime Prevention Orders under section 8 (a)(i) of the Serious Crime Act 2007, instigating civil proceedings and the making of certain orders under the Proceeds of Crime Act 2002; and the issue of arrest warrants in private prosecutions: Police Reform and Social Responsibility Act 2011, s 153.

34 Consents to Prosecution (1998) Law Com No 255, p iii.

35 Royal Commission on Criminal Procedure (Philips Report) 1981, para 7.56; Consents to Prosecution (1998) Law Com No 255, p 1.

36 A Ashworth, "Developments in the Public Prosecutor's Office in England and Wales" (2000) 8(3) *European Journal of Crime, Criminal Law and Criminal Justice* 257, 262.

(3) offences which create a high risk that the right of private prosecution will be abused and the institution of proceedings will cause the defendant irreparable harm.

8.39 We recommended that requirements of consent that could not be justified under one of these three categories should be abolished.

8.40 In respect of the third category – "high risk of abuse of private prosecution" – we cited the offence of misconduct in public office as an example of "a good case where a consent should be required".[37] We stated that:

> It is easy to envisage a case in which, say, a leader of a council has a private prosecution brought against him or her shortly before an election; the complaint receives much publicity and the defendant suffers in the election even though eventually the criminal prosecution is dismissed or taken over by the CPS who discontinue. In that event, the defendant will have suffered substantial loss and damage and he or she cannot be compensated.[38]

8.41 However, we specifically rejected the idea that consent requirements could be properly used to prevent prosecutions that were considered to be inappropriate in respect of imprecise offences.[39] This position was founded on the view "that we did not want the availability of consent provisions to be treated as an alternative to the precise formulation of offences".[40]

Consent and misconduct in public office

8.42 We agree with the conclusion of our 1998 report that misconduct in public office should require consent to prosecute. Similar views were also expressed by the Committee on Standards in Public Life in its 1997 consultation paper on a statutory offence of misconduct in public office, which stated:

> We have considered whether consent should be required before prosecution can be commenced. We do not believe that the public interest demands the ability to prosecute privately and there could be a significant problem with vexatious prosecutions or prosecutions stimulated by political motives. Our preliminary conclusion is that consent should be required and that authority to give it should be vested in the Director of Public Prosecutions.[41]

8.43 While this has not historically proved to be a cause of major concern with respect to the offence, the recent private prosecution of Boris Johnson MP (prior to his current

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37 Consents to Prosecution (1998) Law Com No 255, p 62.

38 Consents to Prosecution (1998) Law Com No 255, p 62.

39 Consents to Prosecution (1998) Law Com No 255, pp iv to v.

40 Consents to Prosecution (1998) Law Com No 255, p 51.

41 Pamphlet "Misuse of public office: a consultation paper" accompanying the Committee on Standards in Public Life, *Third Report – Standards of Conduct in Local Government – Volume 1* (July 1997) Cm 3702-I, [20].

role as Prime Minister) demonstrates the potential for private prosecutions to be at least open to the criticism of being vexatious and politically motivated.[42]

8.44 Additionally, we consider the high degree of discretion and subjectivity involved in the offence to be another reason why consent should be required. As we noted in Chapter 3, this discretion and subjectivity carries with it the risk of misuse, and indeed there have been a number of prosecutions that have attracted this criticism.

8.45 Although we rejected imprecision as a basis for consent in our 1998 report, in the particular context of misconduct in public office, we do not think the risk of misuse can be entirely eliminated through careful drafting. The nature of these offences is such that they retain a degree of subjectivity, and the potential for misapplication and abuse.

8.46 In this context, we consider that a requirement of consent to prosecute our replacement offences is desirable to ensure the necessary oversight, accountability, skill and experience is present in the exercise of prosecutorial discretion for these sensitive offences.

8.47 We consider that this would help ensure that rights of public office holders are protected, and they are not subject to prosecution in circumstances which are politically motivated or vexatious, and cases are only pursued where the appropriate thresholds – in particular that of "seriously improper" conduct in the case of the corruption offence – are met.

The type of consent

8.48 We have considered the options of a requirement of AG consent or the personal consent of the DPP for our replacement offences, but we have concluded that neither option would be proportionate.

8.49 There are currently approximately 80 to 100 prosecutions of the current offence each year (see Chapter 2, paragraphs 2.20 to 2.21), and if similar trends were to continue with our replacement offences, this could add significantly to the already demanding roles of the Law Officers or the DPP.

8.50 While there are certainly some very serious or complex instances of misconduct in public office that might benefit from this level of oversight (for example, controversial contexts such as Operation Elveden and Undercover Policing that we outlined in Chapter 2), in most cases a requirement of such senior involvement would be disproportionate.

8.51 A requirement of Law Officer consent could also prove counterproductive in prosecutions involving elected officials, as it could create perceived conflicts of interest given the political dimension to the Law Officers' role. For example, in the *Johnson* case referred to above, had the Law Officers been asked to provide consent, and rejected it on cogent legal grounds, they would likely still have been exposed to

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[42] While not determinative of the outcome, which was decided on the basis that Johnson was not "acting as such" for the purposes of the offence, the High Court also found that the basis on which the District Judge had found that the prosecution was not vexatious was "flawed", see *Johnson v Westminster Magistrates' Court* [2019] EWHC 1709 (Admin) (03 July 2019), at [46].

criticism that their own decision was politically motivated (as members of the same government and the same political party).

8.52 A requirement of DPP consent that is capable of delegation to Crown Prosecutors is a more desirable course. Spread across the 14 CPS regions in England and Wales, the number of misconduct prosecutions would not add disproportionately to the workload of Chief Crown Prosecutors. Personal consent of the DPP could still be pursued for the most complex and controversial cases.

Recommendation 22.

8.53 Consent of the Director of Public Prosecutions (but not personal consent) should be required for the prosecution of the proposed replacement offences of breach of duty in public office and corruption in public office.

Chapter 9: Sexual misconduct and sexual offences

INTRODUCTION

9.1 One of the most common uses of the current offence of misconduct in public office is in the prosecution of sexual misconduct.

9.2 In Chapter 5 we recommended that the prosecution of such conduct should continue to be available under our proposed replacement offence of corruption.

9.3 In this chapter we discuss a further, related, issue that we raised in Chapter 8 of our consultation paper. Namely, we consider whether there are forms of sexual conduct that currently constitute misconduct in public office (and may remain criminal under our replacement offences) that should also be criminal if perpetrated by those not in public office. In this context, we also address the suggestion that some consultees made that specific sexual offences relating to public office holders should be created.

9.4 Consideration of sexual misconduct that does not relate to public office is outside the terms of reference for this review. However, in the light of the concerns raised by some respondents to our consultation, we feel that it is appropriate to make a number of observations.

FORMS OF SEXUAL MISCONDUCT PROSECUTED UNDER THE CURRENT OFFENCE

9.5 As we outlined in Chapter 5, the main categories of sexual misconduct prosecuted under the common law offence of misconduct in public office are where:

(1) A public officer has requested or demanded sexual acts in exchange for using their position or power to benefit (or avoid detriment) to another person. For example, an immigration official requesting sexual favours from an asylum seeker in exchange for granting them refugee status.

(2) A public officer has engaged in sexual activity with someone they have met or gained access to in the course of their work and, while "consensual", the sexual conduct is considered to amount to a breach of public trust in the office holder due to the misuse of the position and the particular vulnerability of that person. For example, a police officer pursuing a relationship with a victim of crime.[1]

(3) A public officer has engaged in sexual activity with a person they have met or gained access to in the course of their work and, while "consensual", the sexual conduct renders the office holder vulnerable to misjudgement, conflicts of

[1] See for example the case of *R v Leyzell* [2019] EWCA Crim 385, where a police officer pleaded guilty to misconduct in public office in relation to his conduct in contacting a woman on social media after responding to a crime report and then entering into a sexual relationship with her. Another recent example was that of a West Midlands care worker who pleaded guilty (on 10 January 2020) to misconduct in public office after having had a sexual relationship with a vulnerable young adult in her care. See Crown Prosecution Service, *Care worker sentenced for misconduct in public office* (12 March 2020), available at https://www.cps.gov.uk/west-midlands/news/care-worker-sentenced-misconduct-public-office.

interest and exploitation. For example, a prison officer entering into a sexual relationship with a prisoner, which has wider implications for discipline and safety within the prison.[2]

(4) A public officer has had consensual sex whilst on duty. While there is nothing about the relationship that would suggest improper pressure, vulnerability or corruption is present; the concern is the dereliction of duty/unprofessionalism that attends the conduct, and that it could be seen to undermine public trust in the office holder. For example, a government security officer engaging in sexual conduct while they are meant to be providing security to a secure government building.[3]

Overlap with sexual offences

9.6 In some of these circumstances, the conduct of the public officer may also amount to an offence under the Sexual Offences Act 2003. A variety of offences – including rape and sexual assault – may apply if the circumstances are such that the other party has not consented to the act within the meaning of the definition outlined in section 74, which provides:

> a person consents if he agrees by choice, and has the freedom and capacity to make that choice.

9.7 As Rook and Ward note:

> Since consent involves free agreement by choice, simply to comply or to submit is not necessarily to consent. Consent must be freely given. The definition therefore serves to emphasise the focus upon the complainant's autonomy.[4]

9.8 Ultimately, this will be a question for the jury, as Rook and Ward go on to outline:

> However, the concept of "free agreement" remains capable of a wide interpretation and ultimately it will be for juries to decide its boundaries.
>
> …
>
> What degree of coercion and/or abuse of position, power or authority has to be exercised upon a person's mind before he or she is not agreeing by choice with the freedom to make that choice? This is a matter of fact for the jury to resolve. Is a penniless employee, who is threatened with the sack by her employer unless she

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2 See for example the 2019 case of a prison catering instructor employed by Her Majesty's Prison and Probation Service who began a sexual relationship with a prisoner (Moretto), became pregnant by him, and used the prison systems to obtain highly confidential information about another prisoner with whom Moretto was in conflict and passed that information on to Moretto. She was sentenced to eight months' imprisonment for the offence of misconduct in a public office. See Crown Prosecution Service, *Prison catering instructor pregnant by inmate jailed* (12 September 2019), available at https://www.cps.gov.uk/west-midlands/news/prison-catering-instructor-pregnant-inmate-jailed.

3 There is overlap between these categories, and Sjolin and Edwards divide them slightly differently: C Sjolin and H Edwards, "When misconduct in public office is really a sexual offence" (2017) 81(4) *Journal of Criminal Law* 292.

4 P Rook and R Ward, *Rook and Ward on Sexual Offences* (5th ed., 2016), para 1.187.

grants him sexual favours, giving her free agreement if she grants those favours? The availability to a complainant of alternative courses of action may be highly relevant. In situations where the complainant complies out of fear of the consequences of refusal, with no alternative course available, there is likely to be no free agreement. In contrast, an employee who fears discrimination if she does not comply with her employer's wishes has alternative courses of action available.

9.9 While it is not possible to define every single context, the CPS publishes a document entitled "What is consent", which breaks down some of the key issues for police and prosecutors to consider in interpreting the law, and challenges some common myths and stereotypes.[5] Among the factors highlighted in relation to "freedom to consent" are:

> Where the suspect was in a position of power where they could abuse their trust, especially because of their position or status – e.g. a family member, teacher, religious leader, employer, gang member, carer, doctor;

9.10 There are certainly examples of abuse of public power amounting to both rape and misconduct in public office: for example, the case of *Lomax*, where a police officer was convicted of charges of both rape and misconduct in public office.[6]

9.11 In some other cases, only a charge of misconduct in public office has been pursued. For example, in 2016 police Sergeant David Gibson was convicted of misconduct in public office after demanding a sex act from a vulnerable sex worker in exchange for not arresting her.[7]

9.12 Where a public office holder is convicted of a sexual offence (and not misconduct in public office), the fact of the perpetrator holding a public office will be relevant to sentencing where it entails either an abuse of trust or exploitation of the vulnerability of the victim. This forms part of the wider assessment of harm and culpability a judge is required to consider under section 143(1) of the Criminal Justice Act 2003 (soon to be transposed to section 63 of the Sentencing Code once it is commenced). For example, for the offence of rape, the Sentencing Council guideline is clear that "abuse of trust" places the offending in the highest category of culpability for the offence.

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5 Crown Prosecution Service, "What is consent?", available at https://www.cps.gov.uk/sites/default/files/documents/publications/what_is_consent_v2.pdf.

6 See *R v Lomax* [2019] EWCA Crim 254. The facts of the case were that on 20 October 1978, a then police officer attended the house of the victim, who had been fined by a court and was in arrears in her payment of that fine. The police officer indicated he would arrest the complainant and she would go to prison, unless she let him have sex with her and she felt she had no choice but to comply. A contemporaneous investigation did not result in any charges being laid, but a cold case review in 2016 matched DNA evidence from a semen sample on a towel taken from the scene with the former police officer. After maintaining his innocence and being found guilty at trial, the former police officer was sentenced to a total of four years and nine months' imprisonment, comprising concurrent terms of four years and nine months for rape and two years for misconduct. Following a reference by the Attorney General, the Court of Appeal quashed this sentence on the basis that it was too lenient, and substituted them for a total term of eight years' imprisonment, with sentences of eight years' imprisonment for the offence of rape and four years' imprisonment for the offence of misconduct in public office, to run concurrently.

7 N Docking, "On duty cop David Gibson who forced prostitute to perform sex act or be arrested is jailed" (5 February 2016), available at https://www.liverpoolecho.co.uk/news/liverpool-news/duty-cop-david-gibson-who-10848742.

Where the victim is "particularly vulnerable due to personal circumstances" this is also considered to increase the severity of the harm caused.[8]

9.13 However, it is also important to note that there are also many cases of sexual misconduct by public office holders which will not amount to a sexual offence. This is because misconduct in public office may be committed even where the other party has provided consent within the meaning of section 74 of the Sexual Offences Act 2003. An example of such sexual misconduct would be an entirely consensual sexual relationship between a prison officer and a prisoner.

WHAT WE SAID IN OUR CONSULTATION PAPER

9.14 In Chapter 8 of our consultation paper, we considered whether "a complementary legal reform" that could be considered in the context of this review was reform of the sexual offences regime.

9.15 We considered the particular context of a public office holder who exploits their position to facilitate a sexual relationship. We concluded that the harms and wrongs involved in such conduct are impairment of sexual autonomy and breach of the victim's trust.[9] We further noted that these harms and wrongs are independent of whether the defendant holds a public office, and could in themselves be sufficient to justify an offence.

9.16 We suggested that there could be a review of sexual misconduct offences which could consider all cases involving those harms and wrongs, whether or not performed by public office holders, and asked for stakeholder views on whether such a review should be pursued.

Impairment of sexual autonomy

9.17 Impairment of sexual autonomy is a wrong primarily addressed by sexual offences such as rape and sexual assault. These offences depend on the fact that the victim did not consent to the sexual activity in question. If the victim did "freely consent", there is no reason in principle to criminalise the activity. However, the notion of "free consent" is itself a highly contested concept.[10]

9.18 We noted in our consultation paper that there is arguably an intermediate class of case, in which a victim's consent should be regarded as flawed rather than non-existent: for example, if it was obtained by deception or improper pressure. In the Sexual Offences Act 1956, there were offences of obtaining sex by threats and by false pretences.[11] These offences were repealed by the Sexual Offences Act 2003.

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8 Sentencing Council, *Rape: Sexual Offences Act 2003, s* 1 (1 April 2014), available at https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/.

9 Consultation Paper (2016), para 8.5.

10 See A. Ashworth and J. Temkin, "The Sexual Offences Act 2003: (1) Rape, sexual assaults and the problems of consent" [2004] Crim. L.R. 328; K Laird, "Rapist or rogue? Deception, consent and the Sexual Offences Act 2003" [2014] 7 *Criminal Law Review* 2014, 492.

11 Sexual Offences Act 1956, ss 2 and 3.

This Act introduced other specific offences to address certain circumstances of abuse of power and trust.[12]

Sexual exploitation

9.19 The other possible wrong which arises may be expressed as the breach of trust or the sexual exploitation of a vulnerable person. In particular, this involves cases where the defendant has a duty of caring for that vulnerable person. At present, the Sexual Offences Act 2003 limits criminalisation of such conduct to two specific contexts:

(1) sexual conduct involving 16 and 17-year-olds which would otherwise be legal if the defendant were not in a position of trust with respect to the victim;[13] and

(2) sexual offences relating to adult persons with a mental disorder impeding choice.[14]

9.20 A reform option that could be considered in this regard would be to create similar offences covering abuse of other "vulnerable" people, such as those seeking medical or psychological treatment and adults in custody.

Possible new offences

9.21 We concluded that assessing the merits of introducing such sexual offences, unrelated to a position of public office, falls outside the scope of this project. However, given this issue emerged as an important consideration in the course of this review, we asked consultees whether reform of the sexual offences regime should be considered separately, in respect of:

(1) an offence of obtaining sexual activity by improper pressure (the types of pressure would need to be further defined) analogous to the now repealed offences of obtaining sex by threats or deception; and/or

(2) an offence of sexual exploitation of a vulnerable adult for whom the defendant has responsibility (analogous to sections 16 to 19 of the Sexual Offences Act 2003 which created an offence of "abuse of trust" applying to 16 and 17-year-olds).

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12 Sexual Offences Act 2003, Sch 7, para 1; The offences in the Sexual Offences Act 1956 were entitled "procurement of woman by threats" (section 2) and "procurement of woman by false pretences" (section 3). The Home Office report – "Setting the Boundaries: Reforming the law on sex offences – Volume 1" (July 2000), observed that sections 2 and 3 of the Sexual Offences Act 1956 were "very rarely used, possibly because the penalty is only 2 years". It was added that "these offences can be used to deal with the supply end of the trafficking trade where threats or deception are involved" and there was a particular concern "to ensure that the law provided a remedy for … people with learning disabilities, where low levels of threat or deception can be used to induce sex". An editorial prior to the introduction of the Sexual Offences Act 2003, observed that a key theme of the new legislation was the "elimination as far as possible of discriminatory gender-specific offences, and greater protection for the sexual autonomy of victims". It appears that the Sexual Offences Act 2003, with specific trafficking provisions (sections 57 to 60C) and offences relating to people with a mental disorder – especially section 34, "inducement, threat or deception to procure sexual activity with a person with a mental disorder" – was drafted to address these situations.

13 Sexual Offences Act 2003, ss 16 to 19.

14 Sexual Offences Act 2003, ss 30 to 41.

CONSULTATION RESPONSES

9.22 Twenty-two consultees responded to our question of whether there should be a review of the sexual offences regime in respect of obtaining sex by improper pressure, and/or sexual exploitation of a vulnerable person.

9.23 Fifteen supported a review of the sexual offences regime in respect of both types of conduct, and one supported a review in respect of improper pressure but not the second type of conduct. Some consultees supported a wider review of the sexual offences regime, but also suggested that a review should consider other types of conduct.

9.24 Six consultees did not support a review of the sexual offences regime. Four consultees submitted that the offences already proposed in the consultation paper applied or ought to apply to obtaining sex by improper pressure and sexual exploitation of a vulnerable person.

9.25 Two consultees writing a joint response did not support a further review, but instead proposed the creation of a different sexual offence within the present project. This was by far the most comprehensive response to this question and we consider it in some detail further below.

Responses in favour of a review

9.26 Consultees who supported a review of the sexual offences regime in respect of one or both of the types of conduct/wrongs advanced two main reasons for doing so:

(1) obtaining sex by improper pressure or sexually exploiting a vulnerable person ought to be criminalised, at least in serious cases; and

(2) reviewing the sexual offences regime in respect of obtaining sex by improper pressure or sexually exploiting a vulnerable person is outside the scope of this project because:

(a) this wrongful conduct is not limited to public office; and

(b) a review with a more dedicated focus on sexual offences is required.

9.27 The Independent Police Complaints Commission ("IPCC" – now known as the Independent Office for Police Conduct) and the Law Society thought that a review of the sexual offences regime would adequately address the problem of persons "in a position of trust" obtaining sex by improper pressure and sexually exploiting vulnerable persons. The IPCC added that "inappropriate relationships with vulnerable persons" was "one of the most common scenarios investigated by the IPCC and subsequently prosecuted as misconduct in public office".

9.28 Professor Alisdair Gillespie agreed with us that the wrong of sexual exploitation was not restricted to public office and should be criminalised "irrespective of the status of the exploiter". A review of the sexual offences regime was therefore "appropriate." Professor Jeremy Horder suggested that the complexity of criminalising sexual conduct called for "specialist further consideration".

9.29 Three consultees specifically raised the Undercover Policing Inquiry[15] as a reason for supporting a review of the sexual offences regime. Consultees thought that this type of conduct ought to be criminalised and one of them suggested that it did not fall within the proposed corruption offence. The Police Action Lawyers Group ("PALG") also referred to the inquiry, but remarked that:

> An offence of obtaining sex by improper pressure did not describe the wrong of an undercover police officer engaging in sexual (and intimate) relationships with activists.
>
> An offence of sexually exploiting a vulnerable person would more adequately describe that wrong, provided that the definition of vulnerability includes vulnerability arising from both the victim's conditions and circumstances (for instance, deceit).

Responses not supporting a wider review of the sexual offences regime

9.30 The Council of Her Majesty's Circuit Judges ("COCJ") argued that the sexual offences regime was based on a lack of consent and that the law on consent worked satisfactorily. Introducing new offences of obtaining sex by improper pressure and sexual exploitation of a vulnerable person carried a risk of "blurring the clear distinction between consensual and non-consensual activity".

9.31 COCJ nonetheless recognised that it ought to be criminal for a police officer to engage in a sexual relationship with the victim of a crime that he or she was investigating. The suggestion appears to be that conduct of this type would be better addressed through reformed offences of misconduct in public office than through a review of the sexual offences regime.

9.32 The National Offender Management Service ("NOMS", now known as Her Majesty's Prison and Probation Service) considered that the law on consent was "adequate". NOMS noted that "improper pressure may considerably confuse the issue of consent" and that defining vulnerability and sexual exploitation would "further complicate matters". However, NOMS were also strongly of the view that inappropriate relationships between prison staff and prisoners should remain within the ambit of the reformed offence:

> All prisoners are considered to be in NOMS' care and therefore there is a duty of care towards them, no matter what age/circumstances. Any kind of inappropriate relationship would be immoral, compromising the level of trust and professionalism expected of NOMS staff.

9.33 Detective Superintendent Jackie Alexander thought that neither our proposed (now recommended) offences, nor complementary sexual offences would address the

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[15] The Undercover Policing Inquiry was announced by the then Home Secretary, Theresa May MP on 12 March 2015, and its terms of reference were published on 16 July 2015. The Inquiry is focusing on undercover policing operations conducted by English and Welsh police forces since 1968, particularly relating to the role it has played in prevention and detection of crime, the effect upon individuals and the public – including potential miscarriages of justice, and the adequacy of training, regulation and oversight of undercover police officers. See: Undercover Policing Inquiry (12 March 2019), available at https://www.ucpi.org.uk/about-the-inquiry/.

problem of police officers sexually exploiting people with whom they came into contact.

9.34 Former Professional Standards Manager at the College of Policing Ray Marley stated that "misuse of a public office position for sexual purposes is a serious matter" and ought to be criminalised. He added, however, that there was "insufficient evidence to suggest reform of the sexual offences regime is required to capture abuse by non-public officers".

Responses supporting the creation of another complementary sexual offence within this project

9.35 Four consultees supported the creation of an offence of sexual misconduct, applicable to public office holders, within the present project. Dr Minh Alexander supported not only a review of the sexual offences regime in respect of improper pressure and sexual exploitation, but also the creation of an offence of:

> Improper relationships by a public official who misrepresents themselves in the course of official duties – to cover the abuses by undercover policemen against activists, that have been exposed.

9.36 Detective Constable Scott Pavitt reported that the CPS appeared to be increasingly reluctant to prosecute corrupt relationships between prison officers following the successful appeal in the case of *Chapman*,[16] and therefore suggested the creation of "a statutory offence of engaging in an intimate relationship with a prisoner". This offence would include but not be limited to relationships with a sexual element.

9.37 Academics Catarina Sjolin and Helen Edwards provided an extensive response on this issue which was subsequently followed by an article on the same subject.[17] Through their own research, they identified three types of conduct with a sexual element that are currently charged as misconduct in public office:

(1) exploiting a public office for sexual gain;

(2) engaging in an inherently corrupt relationship; and

(3) having sex whilst on public duty.

9.38 In relation to the first type of conduct, they noted that misconduct in public office is often charged as a lesser offence to a statutory non-consensual sexual offence or pleaded to by a defendant who was initially charged with a statutory non-consensual offence. They see a number of problems with this use of misconduct in public office:

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[16] *R v Chapman* [2015] EWCA Crim 539; [2015] 2 Cr App R 10. The facts of this case did not involve sexual misconduct, but rather a prison officer selling stories to a journalist relating to a high-profile prisoner. The case is important because it relates to the manner in which the trial judge must direct the jury as to the seriousness threshold for the offence. Specifically, the Court found that judge had erroneously not directed the jury, in making this assessment, to consider the degree of harm to the public caused by the conduct.

[17] C Sjolin and H Edwards, "When misconduct in public office is really a sexual offence", 81(4) *Journal of Criminal Law* 292.

(1) It places public office holders charged with a statutory sexual offence in a better position than non-public office holders charged with the same [sexual] offence [who will have no option of pleading guilty to a "lesser" charge]. However, the fact that a defendant is in public office should actually be seen as an aggravating factor.

(2) Public office holders convicted of misconduct in public office for exploiting their office for sexual gain escape the consequences of the Sexual Offences Act 2003 regime.

(3) A conviction for misconduct in public office fails to adequately label the sexual wrong of the conduct.

9.39 These problems were noted not to apply to the second and third types of conduct because these types of wrongs are not sexual in nature: a corrupt relationship does not necessarily involve sexual conduct and having sex whilst on public duty is wrongful because of the dereliction of duty involved.

9.40 While there is force in the second and third of the concerns raised, we do not consider the first of these arguments particularly compelling. This is because it could equally be argued that if a jury finds that the victim consented, but the behaviour nonetheless amounted to a breach of public trust, the public office holder will be punished in circumstances where other individuals would escape liability.

9.41 In light of their analysis and research, Sjolin and Edwards proposed the creation of an offence focusing "on the defendant's position and abuse thereof for sexual gain rather than the victim's vulnerability" as part of our misconduct in public office project. They suggest what the essential elements of such an offence should be:

(1) the defendant holds a position of power over or in relation to the victim;

(2) the defendant knows or could reasonably be expected to know of that position of power;

(3) the defendant abuses that power and is aware that his/her conduct would be seen by reasonable people as an abuse of that power;

(4) in order to gain a sexual advantage, namely:

(a) sexual contact with the victim; or

(b) making non-physical contact with the victim for the defendant's sexual gratification; or

(c) sexual behaviour by the victim, whether alone or with another, for the defendant's sexual gratification.

9.42 They also disagreed with us that the creation of such an offence is outside the scope of this project, stating:

> The Commission has suggested that a new sexual offence is outside its remit but we respectfully disagree as to suggest reform of MiPO [misconduct in public office]

without providing a workable sexual offence to cover the sexual offending which is so often the basis of the MiPO offence would be to leave the Commission's work half done. There is no need for wholesale review of sexual offences to suggest a new sexual offence to replace this aspect of MiPO as it would be a variant of MiPO based on SOA 2003 foundations.

CONCLUSIONS FOLLOWING CONSULTATION RESPONSES

9.43 We are grateful for the considered and thoughtful responses we received on this subject, and in particular the extensive response of Sjolin and Edwards.

Prosecution of misconduct in public office rather than sexual offences

9.44 We do not have detailed empirical evidence of the extent to which misconduct charges are currently pursued when a sexual offence might also have been available, but Sjolin and Edwards' work suggests it has occurred in at least some cases.[18]

9.45 We agree with Sjolin and Edwards' contention that it should ordinarily be the case that where the evidential and public interest tests for the prosecution of an offence under the Sexual Offences Act 2003 have been met, such a charge should be pursued in addition to or instead of the common law offence of misconduct in public office. This is consistent with the general approach to the prioritisation of statutory offences as set out by the House of Lords in *Rimmington*,[19] and the CPS's own guidance which states that:

> Misconduct in public office should be considered only where:
>
> - there is no suitable statutory offence for serious misconduct (such as a serious breach of or neglect of a public duty that is not in itself a criminal offence);
> - there was serious misconduct or a deliberate failure to perform a duty owed to the public, with serious potential or actual consequences for the public;
> - the facts are so serious that the court's sentencing powers would otherwise be inadequate.[20]

9.46 As the CPS guidance indicates, it may be that in some cases a misconduct charge is an appropriate additional charge to a sexual offence, as this may ensure that the totality of the wrongdoing involved – in particular, the breach of public trust – is adequately labelled and punished. This was the approach the CPS took in pursuing the case of *Lomax*, referred to at paragraph 9.10 above.

9.47 If our replacement offence of corruption in public office were to be introduced, it would itself be statutory. The *Rimmington* principle of prioritising statutory offences would

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18 See C Sjolin and H Edwards, "When misconduct in public office is really a sexual offence", 81(4) *Journal of Criminal Law* 292.

19 *R v Rimmington* [2005] UKHL 64; [2006] 1 AC 459 at [30].

20 *Misconduct in Public Office – Legal Guidance* (16 July 2018), available at https://www.cps.gov.uk/legal-guidance/misconduct-public-office.

therefore be less directly relevant. However, as Sjolin and Edwards point out,[21] there are other strong reasons for pursuing sexual offences where possible including:

(1) proper labelling of the sexual wrong of the conduct;

(2) the protection of witness anonymity afforded by the Sexual Offences (Amendment) Act 1992

(3) the consequences for the defendant of conviction for a sexual offence – including a Sexual Harm Prevention Order,[22] and being subject to notification requirements;[23] and

(4) the availability of special measures for victims as "intimidated witnesses" under the Youth Justice and Criminal Evidence Act 1999.[24]

9.48 As we noted in Chapter 8, the exercise of prosecutorial discretion sits with the CPS, as does the preparation of appropriate prosecution guidance. There may be legitimate reasons why the CPS would choose to pursue common law misconduct (or our replacement offences) in favour of a sexual offence; for example, they may consider the evidential test has not been satisfied in respect of the sexual offence, and there is no realistic prospect of conviction.

9.49 In Chapter 8 of this report, we reinforced the value of prosecution guidance for the current offence and recommended that similar guidance should be prepared for our proposed replacement offences. Although this is clearly a matter for the DPP, one of the issues such guidance might wish to elaborate on further is prosecution of the offences in contexts where a sexual offence is also potentially available.

9.50 In Chapter 8, we also recommended a further safeguard that is particularly relevant in this context: a requirement of the DPP's consent to prosecute. This would act as a further check to ensure that other available offences are not being discounted for the wrong reasons.

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21 And these concerns were recently echoed in a report by the International Bar Association entitled "Sextortion: A crime of corruption and sexual exploitation" (2019), p 30, available at www.ibanet.org/Document/Default.aspx?DocumentUid=E5E451C2-A883-4518-B0ED-5AAAEBCDD5AA.

22 Sections 103A to 103K of the Sexual Offences Act 2003 provide for Sexual Harm Prevention Orders ("SHPO"), which can be imposed on anyone convicted of a sexual offence listed in Schedule 3 or Schedule 5 of the Sexual Offences Act 2003. The court must be satisfied that the offender presents a risk of sexual harm to the public and that an order is necessary to protect against this risk. A SHPO can place restrictions on an individual, including from travelling abroad. It applies for a minimum five-year period, but can also be set indefinitely. Failure to comply with a SHPO may risk a term of imprisonment. See: Sentencing Council, "22. Sexual harm prevention order" (2019), available at https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/ancillary-orders/22-sexual-harm-prevention-orders/#.

23 Pursuant to section 80 of the Sexual Offences Act 2003, a person is subject to notification requirements if convicted or cautioned in respect of an offence listed in Schedule 3 of that Act. Sections 80 to 103 of the Sexual Offences Act 2003 create the framework for notification requirements.

24 Youth Justice and Criminal Evidence Act 1999, s 17(4).

Should further sexual offences be introduced?

9.51 As we outlined in Chapter 5, we are recommending that sexual misconduct should continue to fall within the scope of our replacement corruption offence.

9.52 While we recognise the arguments that have been made for a specific sexual offence applicable solely to public office holders, we have not recommended this approach for two main reasons.

(1) First, as the conduct may continue to be prosecuted under our replacement corruption offence, the implementation of our proposals will not create a gap compared with the current law.

(2) Secondly, as noted earlier in this chapter, we consider the issues of improper pressure or exploitation in sexual contexts, and the impairment of sexual autonomy they entail, to be wider concerns than those concerned solely with public office (though these are undoubtedly some of the most important contexts that arise).

9.53 On the broader question of whether there is a need for further offences to be introduced in relation to abuses of power that are not necessarily linked to public office, we reiterate the view that we do not believe it is appropriate to make any final recommendations in the context of this review. Sexual offences are a highly specialised and contentious area of the criminal law, and any significant changes merit their own dedicated review. While we have received some important responses on this issue, we have not engaged in the detailed analysis and consultation that would be necessary for us to make any formal recommendations.

9.54 We do, however, think that there is enough concern with abuses of power, exploitation, and “flawed consent” in sexual contexts that a further review of this area is warranted.

Chapter 10: Recommendations

Recommendation 1.

10.1 The common law offence of misconduct in public office should not be retained in its current form.

Paragraph 3.45

Recommendation 2.

10.2 The offence of misconduct in public office should not be abolished without a suitable replacement statutory offence or offences.

Paragraph 3.98

Recommendation 3.

10.3 Two statutory offences should replace the common law offence of misconduct in public office:

(1) an offence of corruption in public office; and

(2) an offence of breach of duty in public office.

10.4 Both of these offences should be underpinned by a clear articulation of when a person can be considered "in public office".

Paragraph 3.108

Recommendation 4.

10.5 The determination of whether a person is in "public office" for the purposes of both the recommended replacement offences should be determined by a two-stage process:

(1) By reference, for each offence, to a fixed list of positions capable of amounting to "public office"; and

(2) By applying a functional test in each of the offences to determine whether the public office holder was acting "in public office" at the relevant time.

Paragraph 4.53

Recommendation 5.

10.6 In devising the list of "public office holders", government should consider inclusion of the following categories:

(1) Crown servants, including Ministers of the Crown; any person employed in the civil service of the Crown; any constable and any other person employed or appointed in or for the purposes of any police force; any member or employee of the naval, military or air forces of the Crown; and Members of the Welsh, Scottish and Northern Irish executives;

(2) Crown and executive appointees, including judges and magistrates;

(3) Parliament; MPs, Peers, SMs and employees of Parliament and the Senedd Cymru;

(4) elected officials and their employees;

(5) employees of non-departmental public bodies;

(6) employees of public corporations;

(7) employees of local authorities;

(8) employees of state funded schools;

(9) employees of the National Health Service;

(10) contractors who exercise functions or perform work for the government.

Paragraph 4.62

Recommendation 6.

10.7 The following Crown appointments should be specifically excluded from the list of "public office holders":

- Bishops of the Church of England
- Masters of Trinity College and Churchill College, Cambridge;
- the Provost of Eton;
- the Poet Laureate;
- the Astronomer Royal.

Additionally, the government should consider whether there are any other discrete Crown appointments that should be excluded on the basis that they have little or no relevant connection to public office.

Paragraph 4.63

Recommendation 7.

10.8 The Secretary of State should be given a power to amend the list of positions in the definition of "public office" by way of an affirmative statutory instrument.

Paragraph 4.68

Recommendation 8.

10.9 The following functions should be excluded from the scope of both replacement offences:

(1) the provision of "primary education", "secondary education" and "further education" within the meaning of section 2 of the Education Act 1996; and

(2) the provision of "health care" within the meaning of section 20(5) of the Criminal Justice and Courts Act 2015.

10.10 This should be achieved by direct exclusion of these functions in implementing legislation.

Paragraph 4.87

Recommendation 9.

10.11 An offence of corruption in public office should be introduced with the following elements:

(1) that the defendant is, and knows he or she is, a public office holder;

(2) the defendant uses or fails to use his or her public position or power;

(3) for the purpose of achieving a benefit or detriment;

(4) a reasonable person would consider the use or failure seriously improper;

(5) the defendant realised that a reasonable person would regard it as such; and

(6) the defendant is not able to prove that their conduct was, in all the circumstances, in the public interest.

Paragraph 5.95

Recommendation 10.

10.12 The definition of benefit and detriment for the purposes of the offence should be that which is currently adopted in section 26(9) of the Criminal Justice and Courts Act 2015, as follows:

> "benefit" and "detriment" mean any benefit or detriment, whether or not in money or other property and whether temporary or permanent.

10.13 The explanatory notes to the offence should make it clear that the kinds of benefits and detriments that would meet the definition include:

- financial gain and loss;
- physical benefits and harm;
- reputational benefits and harm;
- relationship benefits and harm;
- political benefits and detriments; and
- sexual activity.

Paragraph 5.96

Recommendation 11.

10.14 The legislation implementing the offence should stipulate that, in deciding whether the conduct of the defendant was "seriously improper", factors that the jury should be directed to consider should include (where relevant):

(1) the extent to which the behaviour involved dishonesty or a conflict of interest;

(2) the extent to which the behaviour involved a breach of trust – particularly in relation to vulnerable individuals;

(3) the degree of any undue benefit that was conferred on the defendant or another person;

(4) the extent to which harm was caused to one or more affected individuals; and

(5) the extent to which the conduct undermined public confidence in the institution to which the public office relates, or public institutions more generally.

Paragraph 5.98

Recommendation 12.

10.15 It should be a defence to the commission of the offence of corruption in public office if the public office holder can prove that their conduct was, in all the circumstances, in the public interest.

10.16 The burden of proof should rest with the defendant to prove the defence on the balance of probabilities.

Paragraph 5.130

Recommendation 13.

10.17 If the offence of corruption in public office is introduced, the offence in section 26 of the Criminal Justice and Courts Act 2015, "corrupt or other improper exercise of police powers and privileges", should be repealed.

Paragraph 5.159

Recommendation 14.

10.18 An offence of "breach of duty in public office" should be introduced with the following six elements:

(1) a public office holder;

(2) subject to a duty to prevent death or serious injury that arises only by virtue of the functions of the public office;

(3) being aware of the duty;

(4) breaches the duty;

(5) thereby causing or risking death or serious injury;

(6) the public office holder was reckless as to the risk of death or serious injury.

Paragraph 6.100

Recommendation 15.

10.19 Whether there is "a duty to prevent death or serious injury that arises only by virtue of the functions of the public office" should be a question of law for the trial judge in the case.

Paragraph 6.101

Recommendation 16.

10.20 "Serious injury" should be given the same meaning as that of Grievous Bodily Harm in the Offences Against the Person Act 1861.

Paragraph 6.102

Recommendation 17.

10.21 Both the offence of breach of duty in public office and the offence of corruption in public office should be indictable only offences.

Paragraph 7.22

Recommendation 18.

10.22 The government should consider extending the jurisdiction of the corruption and breach of duty offences to the conduct of public office holders in a foreign country, if the conduct of the public office holder would amount to one of these offences if committed in England and Wales.

Paragraph 7.90

Recommendation 19.

10.23 A maximum penalty of between 10 to 14 years' imprisonment is an appropriate range for parliament to consider for the offence of corruption in public office.

Paragraph 7.102

Recommendation 20.

10.24 A maximum penalty of between 10 to 14 years' imprisonment is an appropriate range for parliament to consider for the offence of breach of duty in public office.

Paragraph 7.109

Recommendation 21.

10.25 The Crown Prosecution Service should continue to publish detailed (non-statutory) prosecution guidance in relation to the replacement offences of corruption in public office and breach of duty in public office.

Paragraph 8.30

Recommendation 22.

10.26 Consent of the Director of Public Prosecutions (but not personal consent) should be required for the prosecution of the proposed replacement offences of breach of duty in public office and corruption in public office.

Paragraph 8.53

Appendix 1: List of responses to consultation paper

ACADEMICS

Professor Liz Campbell, Monash University

Robert Heaton, Canterbury University

Professor Jeremy Horder, London School of Economics

Catarina Sjolin Knight and Helen Edwards, Nottingham Trent University

Simon Parsons, Solent University (retired)

LEGAL PRACTITIONERS

Bar Council and Criminal Bar Association

Ecclesiastical Law Society

Law Society of England and Wales

London Criminal Courts Solicitors' Association

Malcolm Morse, St Phillip's Chambers

Police Action Lawyers' Group

Pete Weatherby QC and Mike Mansfield QC

Lucy Wibberley and Keir Monteith QC

OFFICIAL ORGANISATIONS

Association of High Court Enforcement Officers

Church of England Archbishop's Council

College of Policing

Committee on Standards in Public Life

Crown Prosecution Service

Independent Police Complaints Commission

National Offender Management Service

North Yorkshire County Council

Welsh Government (Counsel General)

NON-GOVERNMENT ORGANISATIONS

Compassion in care

PHSO The Facts

Public Concern at Work

INDIVIDUAL PROFESSIONALS

Jackie Alexander (Detective Superintendent)

Adrian Britliff (social worker)

Rt Hon Brandon Lewis MP, Minister of State for Policing and Fire Services

Scott Pavitt (Detective Constable)

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978-1-5286-2279-0