Law Commission
Reforming the law

MISCONDUCT IN PUBLIC OFFICE

Summary

INTRODUCTION

The criminal offence of misconduct in public office may be committed by a public office holder who, while acting as a public office holder, 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.

It is a common law offence which has existed for hundreds of years. Despite falling largely into disuse in the 20th century, there has been a revival in the prosecution of the offence in recent decades, with annual prosecution numbers rising from single figures in the early 2000s, to averaging more than 80 per year since 2006.

As prosecution rates for the offence have risen, so have calls for its reform. 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 novel contexts, such as the prosecution of journalists – as secondary parties – who have encouraged public office holders to leak confidential information. This increased usage has exacerbated concerns about the lack of clarity in the terms and extent of the offence.[1]

"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."[2]
Lord Thomas CJ

In 2003, the terms of the offence were defined by the Court of Appeal in the case of *Attorney General's Reference (No 3 of 2003)* ("*AG's Reference*").[3] This remains the authoritative statement of law. Although *AG's Reference* provided some clarification, the most commonly expressed concern has remained that the offence lacks clarity and precision. This imprecision creates the potential for misuse and injustice, and risks it being used as a "catch all" offence, in place of more targeted statutory offences. There is also concern that the offence is commonly used to target relatively junior officials, rather than senior decision-makers who members of the public might more readily expect to be held criminally accountable.

Prosecutions and convictions for the offence of misconduct in public office

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

1 We outline in detail the criticisms that have been raised about the offence and the case for reform in Chapter 3 of the report.
2 *R v Chapman* [2015] EWCA Crim 539; [2015] 2 Cr App R 10 at [29], per Lord Thomas CJ.
3 *Attorney General's Reference* (*No 3 of 2003*) [2004] EWCA Crim 868; [2005] QB 73.

THE REPORT

This summary explains our recommendations and the background of the project. The full report can be viewed **here**. 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.

The Law Commission undertook this project in 2012, as part of our Eleventh Programme of Law Reform. We published our issues paper in January 2016, which set out the current law and identified areas of uncertainty surrounding the offence. We also asked consultees twelve questions relating to problems with the current law. The majority of the 36 consultees who responded to the paper agreed that there was a need for reform.

Our consultation paper, published in September 2016, drew upon the significant contributions by consultees in response to the issues paper. It outlined three broad options for reform. In line with the views of consultees against keeping the offence in its current form, the options were based on the starting point that we would recommend abolition of the current offence. The three options were to:

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

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

Option 3: abolish the common law offence without replacement.

This report has benefitted from the 46 consultation responses we received during the public consultation period. We received submissions and evidence from 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. A full list of individuals and organisations who responded to our consultation paper appears at Appendix 1 to the report.

Objectives

The purpose of this report is to provide greater clarity and consistency in the operation of the offence of misconduct in public office and to ensure that it targets serious wrongdoing and damage to the public interest. 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 offence: neglect of duty and misconduct;
3. ensure that the fault and seriousness threshold for imposition of criminal liability is set at an appropriate level;
4. provide sufficient guidance for juries who are asked to consider whether the fault and seriousness thresholds have been met; and
5. promote fairness and consistency in charging and prosecution practice.

OUR RECOMMENDATIONS

In Chapter 3 we conclude from our analysis of the offence, and the consultation responses we received, that there is a need for an offence or offences targeted at serious misconduct by public officials. However, due to the concerns with the terms and practical effects of the common law offence of misconduct in public office, we recommend that the offence should not be retained in its current form and should instead be replaced with two new statutory offences.

Two statutory offences

In Chapter 3 we recommend that two statutory offences should replace the common law offence of misconduct in public office. The current offence criminalises conduct which can be broadly split into two categories: (1) corruption in public office; and (2) breach of a duty in public office. The two strands of conduct therefore share the same fault element, despite involving different forms of wrongdoing. We recommend the separation of these two strands into separate offences.

We also recommend that a list of positions capable of constituting "public office" should be set out in the offences. This will provide greater clarity and certainty as to the circumstances that render a person to be in "public office".

Recommendation 3

We recommend that 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.

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

Definition of public office

In Chapter 4 we recommend reform to the common law test for when a person is in "public office" for the purposes of the offence. In Appendix C to our issues paper we concluded that the lack of clarity in the definition of "public office" may be incompatible with article 7 of the European Convention on Human Rights ("ECHR"). Article 7 of the ECHR prohibits retrospective punishment, which has been held to include a prohibition against laws which are so ambiguous that they cannot be predictably interpreted. In our report we conclude that the current common law test lacks the certainty and clarity to be predictably interpreted. An individual on the margins of what might commonly be understood to be a "public office" may struggle to understand and apply the test to his or her own circumstances and thereby be unclear as to whether he or she could be liable to prosecution.

We conclude that the lack of clarity also raises concerns regarding the workability of the definition in practice. The continued expansion of the modern state has resulted in the line between public and private sectors becoming increasingly blurred. As a consequence, law enforcement agencies and prosecutors may investigate and charge the offence in more ambiguous contexts, which may prove to be a waste of public resources.

Recommendation 4

We recommend that a two-stage process should be applied to determine whether a person is in "public office" for the purposes of our proposed statutory replacement offences of breach of duty and corruption in public office.

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

Stage 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

In Chapter 4 we recommend a draft list of positions that can amount to public office for the purposes of stage 1 of the test. This would provide an outer boundary to the pool of people who could be treated as being in "public office" and would assist public officials, and those working in quasi-public roles, to understand whether they may be subject to the offence. It would also assist police and prosecutors when making charging decisions. We suggest that government conduct its own further consultation before finalising the list for implementation in legislation.

Recommendation 5

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. Members of Parliament, Peers, Assembly Members and employees of Parliament and employees and Members of the Senedd Cymru (Welsh Parliament);
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 and;
10. contractors who exercise functions or perform work for the government.

In order to maintain consistent treatment with other religious leaders, we recommend that Bishops of the Church of England, who are Crown appointees, should be specifically excluded from the list. We also recommend that certain other discrete Crown appointments should be excluded on the basis that they do not entail any relevant public function.

We recommend that the two replacement offences should not capture the frontline delivery of health care and education. This is because these roles do not involve: (1) the use of a public position or power; or (2) a duty that arises only by virtue of the public office. However, there are governance and administrative roles relating to these services that might be considered as examples of "public office". We conclude that the administration and planning of public resources associated with these services should fall within the terms of the replacement offences.

Recommendation 8

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.

This should be achieved by direct exclusion of these functions in implementing legislation.

To avoid the inflexibility of a fixed list of positions, which will fail to account for shifts in understandings of the public and private sectors, we recommend that the Secretary of State for Justice should be given a power to amend the list of positions in the definition of "public office" by way of an affirmative statutory instrument (a process of change that would require active approval by both Houses of Parliament).

Stage 2

For stage 2 of the test, a further functional test would apply within each of the replacement offences, defining 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. We outline these functional tests for each proposed offence in Chapters 5 and 6.

The offence of corruption in public offence

In Chapter 5 we recommend a new statutory offence of corruption in public office. This would be one of the two proposed offences to replace the offence of misconduct in public office. The proposed offence would criminalise a public office holder who, knowing that they are in public office, uses or fails to use their public office for the purpose of benefitting themselves or causing a benefit or detriment to someone else, where that behaviour was seriously improper.

We recommend 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.

Recommendation 9

The offence of corruption in public office should have 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 his or her conduct was, in all the circumstances, in the public interest.

Element one

As outlined above, we recommend that a two-stage process should be applied to determine whether a person is in "public office" for the purposes of the replacement offences. For this offence to apply, the defendant would therefore need to be the holder of a public office as defined in the overarching list of positions. It would also be necessary to show that the defendant had knowledge of the circumstances that meant that he or she was in public office. We do not, however, recommend that the defendant should know, as a matter of law, that the position would be classified as "public office" for the purposes of the offence.

Element two

The second element narrows the scope of the offence by introducing a functional test – "uses, or fails to use, a public position or power". This is designed to ensure the offence is targeted at corruption in public office, rather than any kind of misconduct by someone who happens to be a public office holder.

We recommend that it should be possible to commit the offence through both positive acts, and by omission. A failure to act to prevent serious injury or death may overlap with the breach of duty offence we outline below. However, as we discuss below, the breach of duty offence will be available on proof of a different fault element – recklessness – whilst the corruption offence requires intent on the part of the defendant.

Element three

The third element requires that the defendant intended, as a result of their failure to use or improper use of their public position or power, to achieve a benefit or detriment. It is an additional intent element and is intended to reflect the underlying wrongs associated with the abuse of a position of power or trust and misgovernment. However, it does not require proof that a benefit or detriment actually arose.

Recommendation 11

We recommend that the government adopt the definition of benefit and detriment which is currently used in section 26(9) of the Criminal Justice and Courts Act 2015 ("CJCA 2015"), as follows: "benefit" and "detriment" mean any benefit or detriment, whether or not in money or other property and whether temporary or permanent.

We also recommend that 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.

This would help to ensure that any future court interpreting the offence would give the definition the wide interpretation that is intended.

Sexual misconduct

Sexual misconduct is one of the most common categories of prosecution under the offence of misconduct in public office. The weight of views and 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. We recommend that the proposed offence of corruption in public office should continue to include sexual conduct within the definition of detriment or benefit. This will ensure that contexts that are currently criminalised through the common law offence may remain criminal, should they meet the fault threshold of "seriously improper".

Element four

The fourth and fifth elements introduce a hybrid two-stage assessment of impropriety. The fourth element forms the objective element: the use, or failure to use, the position or power was such that a reasonable person would consider it to be seriously improper. In this element, the word "improper" describes the nature of the behaviour, and "seriously" defines the degree of the impropriety that warrants criminalisation. We recommend that the legislation implementing the replacement 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.

Element five

The fifth element forms the subjective element of the two-stage assessment. It does not rely on a purely subjective assessment of what the defendant considers to be "seriously improper", but rather what he or she realises a reasonable person will think is "seriously improper". As the corruption offence is intended to criminalise behaviour that would not be criminal in other contexts, we believe that it is particularly important that the official was aware that his or her conduct will be recognised by a reasonable person to be wrong before criminal liability is imposed. Where the official genuinely did not appreciate that others will see their conduct as seriously improper, there is less value in criminalising it because the extent of their moral wrongdoing is lesser.

Element six: public interest defence

The sixth element recommends the introduction of a public interest defence to our proposed corruption offence. We intend for this defence to cater for the specific context of "whistleblowing" by a public official. In *R v Chapman*,[4] the Court of Appeal held 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. We consider it necessary to reflect the defences already recognised at common law in the replacement corruption offence, and therefore recommend a statutory "public interest" defence that would be available in certain, limited circumstances.

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

We recommend that the burden should rest with the defendant to prove the defence on the balance of probabilities; he or she need only prove that it was more likely than not that the conduct was in the public interest. To require the prosecution to prove beyond reasonable doubt that the conduct was not in the public interest might place impossible evidential demands on them.

Repeal of section 26 of the Criminal Justice and Courts Act 2015 ("CJCA 2015")

The proposed offence of corruption in public office would have significant overlap with the existing offence of "corrupt or other improper exercise of police powers and privileges" under section 26 of the CJCA 2015, as both provide a statutory basis for prosecuting police misconduct. We conclude in Chapter 5 that the offence in section 26 is broader than our proposed offence and has the potential to criminalise relatively trivial conduct that the officer may not have appreciated was improper. We recommend that, should our proposed offence of corruption in public office be enacted, section 26 of the CJCA 2015 should be repealed.

The offence of breach of duty in public office

In Chapter 6 we recommend a new statutory offence of breach of duty, which would be one of the two replacement offences for the offence of misconduct in public office. This recommendation draws on, and significantly amends, the "Option 1" proposal we made in our consultation paper.[5] Our recommended offence represents a narrowing of the common law and is also narrower in scope than our "Option 1" proposal. The offence would apply where a public office holder is subject to and aware of a duty to prevent death or serious injury that arises only by virtue of the functions of the public office, the public officer breaches that duty, and in doing so is reckless as to the risk of death or serious injury.

We recommend a formulation of the offence which we have illustrated 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.

5 Chapter 5 of the Consultation Paper.

Recommendation 15

We recommend that the 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.

The two-stage test for when a person is in "public office", for the purposes of element one, is explained in Chapter 4 and outlined above. The third element requires the defendant to have knowledge of the circumstances of employment that give rise to the duty to prevent death or serious injury. It does not require knowledge of the legal duty imposed by the offence of breach of duty in public office. The fourth element limits the scope of the offence by requiring a link between the duty – the second element – and the breach of that duty. Elements two, five and six will be considered in further detail below.

Element two

We recommend that the consequences sufficient to trigger the offence should be limited to the risk of death or serious injury. This will ensure that the most serious cases of neglect caught by the current offence remain criminalised under our proposed breach of duty offence. In our consultation paper we proposed that the specified harms should also include false imprisonment. However, we have reconsidered this proposal because not all cases of actual or risked false imprisonment will be serious enough to warrant criminalisation. Further, cases where false imprisonment is caused could still be prosecuted using the common law offence of false imprisonment.

We also recommend that the determination of the existence of a "duty to prevent" should be a question of law for the trial judge, not the jury. This is because in some cases this determination will require a knowledge of the law and the public sector.

Element five

We recommend that "serious injury" should be given the same meaning as that of "grievous bodily harm" in sections 18 and 20 of the Offences Against the Person Act 1861. Bodily harm has been interpreted to include serious physical and psychiatric injury, but not psychological injury. The offence will therefore encompass the failure to protect against serious sexual abuse, as this is a circumstance that would at least risk causing psychiatric injury to the victim.

Element six

We recommend that the fault element of the replacement offence should be subjective recklessness as to the specified harms. To require intention or knowledge would significantly narrow the scope of the offence and fail to appreciate all the harms that the replacement offence seeks to remedy – namely, reckless (wilful) neglect of a duty to prevent harm, not only breaches of duty intended to cause a specified harm.

We recommend maintaining the current law approach of subjective recklessness, as set out in *R v G*.[6] Under this standard, a public office holder would only be liable for a breach of duty to prevent death or serious injury where he or she is:

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.

The first element of this standard provides protection for a public office holder who genuinely does not know or appreciate the degree of risk that may be caused by his or her action or inaction. We therefore believe that the standard of "subjective recklessness" achieves the appropriate balance.

Procedure, scope and sentencing of corruption and breach of duty offences

In Chapter 7 we consider some of the practical implications that arise in the implementation of the proposed statutory offences, including mode of trial, the application of criminal liability principles, jurisdiction and devolution issues, and sentencing.

Mode of trial

The offence of misconduct in public office, being a common law offence, is an "indictable only" offence; it can only be dealt with by a Crown Court before both a judge and jury. Our replacement offences would be statutory, and therefore could be designated as "either-way" offences; they could be tried in a magistrates' court or by a Crown Court. However, we recommend that both replacement offences continue to be "indictable only" offences.

Accessorial liability

Accessorial liability refers to criminal liability for the act of another. Individuals may be charged as secondary parties to the offence of misconduct in public office, where they aid, abet, counsel or procure the commission of misconduct by a public office holder. In Chapter 7 we consider the application of accessorial liability in respect of our proposed replacement offences and recommend that ordinary criminal law principles should apply.

6 *R v G* [2003] UKHL 50; [2004] 1 AC 1034.

Inchoate liability

A defendant becomes criminally liable for conspiring or attempting to commit, or encouraging the commission of, a substantive offence. The basis of liability in inchoate offences centres on the defendant's blameworthy state of mind and may therefore exist even if the substantive offence has not been committed. We recommend that ordinary principles of inchoate liability apply to our proposed replacement offences.

Jurisdictional issues

Generally, the common law does not extend to acts done outside England and Wales. However, an offence can be prosecuted within England and Wales if either the prohibited conduct or its consequences take place there, or there are substantial activities constituting the crime taking place in England and Wales.

Some statutory provisions have also extended the ambit of the criminal law of England and Wales to apply to specified classes of persons outside the jurisdiction. Two of these classes, Crown servants and service personnel of the Armed Forces, have been held by the courts to be public office holders. The jurisdiction of the courts for the offence of misconduct in public office therefore depends on the status of the public office. This creates inconsistency between different types of public office holder, as to when they can be prosecuted for acts occurring outside of England and Wales. 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 and service personnel. We recommend that the government should consider extending the jurisdiction of the replacement 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

Following the passage of the Wales Act 2017, at least some aspects of our proposed reforms fall within the legislative competence of the Senedd Cymru. It will therefore be for the Welsh Government to consider the implications of our recommendations for devolved areas and for the Senedd Cymru to decide whether to give consent to those proposals which fall within its legislative competence.

Maximum penalties

The offence of misconduct in public office, being a common law offence, carries a maximum penalty of life imprisonment. We consider the determination of a maximum penalty for each of our recommended offences to be appropriately a matter for Parliament. In Chapter 7 we consider the maximum penalties that comparable offences carry and conclude that a maximum penalty of between 10 to 14 years' imprisonment is an appropriate range for Parliament to consider for both replacement offences.

Prosecutorial guidance and consent to prosecute

In Chapter 8 we outline the current Crown Prosecution Service ("CPS") prosecution guidance for misconduct in public office. This guidance is an important aid to prosecutors and helps to ensure consistent and certain decisions are made. We recommend that the CPS continue to publish similarly tailored prosecution guidance in relation to our proposed replacement offences.

We also recommend that a requirement of the general consent of the Director of Public Prosecutions ("DPP") to prosecute those proposed offences would provide a valuable additional safeguard and help to ensure consistency and fairness in future prosecutions. We consider that this requirement would help ensure that public office holders are not subject to prosecution in circumstances which are politically motivated or vexatious, and that cases are only pursued where the appropriate thresholds are met. The requirement of DPP consent should be capable of delegation to Crown Prosecutors, in order to spread the workload across the 14 CPS regions in England and Wales and avoid disproportionately adding to the workload of Chief Crown Prosecutors.

Recommendation 23

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.

Sexual misconduct and sexual offences

In Chapter 9 we consider whether there are forms of sexual conduct that constitute misconduct in public office that should also be criminal if perpetrated by those not in public office.

We also consider the circumstance where the conduct of a public office holder may be prosecutable as sexual misconduct under the offence of misconduct in public office and 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 other party has not consented to the act within the meaning of the definition outlined in section 74 of the Sexual Offences Act 2003. However, there are 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.

We consider 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 offence of misconduct in public office. CPS guidance indicates that pursuing both charges may be appropriate in order to adequately label and punish the totality of the wrongdoing involved. It is for the CPS, with whom the exercise of prosecutorial discretion lies, to decide the appropriate charges.

In our consultation paper we considered whether an offence of sexual misconduct, applicable to public office holders, should be created. Taking into account the consultation responses we received on this matter, we have not recommended this approach. Instead, the sexual misconduct may continue to be prosecuted under our replacement corruption offence.