APPENDIX F
INTERNATIONAL COMPARISONS

INTRODUCTION

F.1 This Appendix provides an overview of the law relating to misconduct in public office, or equivalent, in the following jurisdictions.[1]

(1) Hong Kong.[2]

(2) Canada.[3]

(3) The Caribbean states: Cayman Islands, Jamaica, Bahamas.[4]

(4) Australia.[5]

(5) Scotland.[6]

HONG KONG

F.2 We have chosen to look at the law in Hong Kong for two reasons:

(1) It has retained the common law offence of misconduct in public office, as originating from English law.

(2) There has been a significant increase in prosecutions for the offence in recent years.[7]

The current formulation of the offence

F.3 Although most criminal offences in Hong Kong are now statutory, misconduct in public office remains an offence at common law.[8] Unlike common law offences in

[1] We are grateful to Dr Alice Irving for conducting research into the law in Hong Kong, Canada and the Caribbean states on our behalf.

[2] From para F.2.

[3] From para F.32.

[4] From para F.63.

[5] From para F.101.

[6] From para F.152.

[7] In the early 1990s, Hong Kong's dedicated anti-corruption agency, the Independent Commission Against Corruption, started to detect cases where civil servants abused their position and powers, but which did not fall under the offences contained in the Prevention of Bribery Ordinance ch 201. Their attention turned to the common law, in the hope that the offence of misconduct in public office might capture this conduct. However, there was uncertainty as to the elements of the offence. The Court of Final Appeal in *Shum Kwok Sher v HKSAR* [2002] HKCFA 27, [2002] 2 HKLRD 793 confirmed that the offence continued to exist in Hong Kong and set out the elements of the offence. Since then, the offence has seen an increase in use, and is now a favoured charge of the Independent Commission Against Corruption.

England and Wales, the offence in Hong Kong has a maximum penalty of seven years' imprisonment set by statute.[9]

F.4 The offence is committed when:

(1) a public official;

(2) in the course of or in relation to his or her public office;

(3) wilfully misconducted him or herself, by act or omission;

(4) without reasonable excuse or justification; and

(5) such misconduct was serious, not trivial.[10]

F.5 Whether the offence should be retained in its common law form has been discussed by the Hong Kong courts. The Court of Final Appeal has held that the offence, thus formulated, is sufficiently precise to be constitutional.[11] However, the court also recognised that an alternative to a broadly formulated offence could be to enact a statute containing specific offences for particular categories of misconduct in public office. It concluded that this course of action was undesirable as it would result in a loss of flexibility and would run the risk that some forms of serious misconduct would not be captured. The broadly formulated offence was held to serve an important purpose in providing an effective criminal sanction against misconduct by public officers.[12]

(1) Public official

F.6 In *HKSAR v Wong Lin Kay*[13] the Court of Final Appeal rejected the argument that a public officer for the purposes of the offence of misconduct in public office was anyone who was employed by the government or a public body. The absurdity that might result from this approach was noted. For example, two men employed

[8] See *Chan Tak Ming v HKSAR* [2010] HKCFA 74, [2011] 1 HKLRD 766, *Sin Kam Wah v HKSAR* [2005] HKCFA 29, [2005] 2 HKLRD 375, *Shum Kwok Sher v HKSAR* [2002] HKCFA 27, [2002] 2 HKLRD 793. Hong Kong's criminal justice system is based on common law. In 1966, English common law offences were initially received into the law of Hong Kong by virtue of section 3 of the Application of English Law Ordinance (ch 88). When Hong Kong's sovereignty was transferred from the United Kingdom to the People's Republic of China on 1 July 1997, article 8 of the Basic Law stated that the law previously in force in Hong Kong was to be maintained. This meant that the common law in effect in colonial Hong Kong continued to apply. Despite the enactment of comprehensive bribery and corruption legislation, the common law offence of misconduct in public office has never been abolished.

[9] Criminal Procedure Ordinance, ch 221, s 101I. In *Secretary of Justice v Shum Kwok Sher* [2001] HKCA 540*,* [2001] 3 HKLRD 386 the Court of Appeal agreed that misconduct in public office was analogous to corruption. Accordingly, the sentencing principles applicable to the Prevention of Bribery Ordinance (ch 201) also apply to misconduct cases. See also *Ng Tat-shing v R* [1977-79] HKC 71*, HKSAR v Wong Yiu-kuen* [2001] 1 HKC 486.

[10] *Sin Kam Wah v HKSAR* [2005] HKCFA 29, [2005] 2 HKLRD 375.

[11] *Shum Kwok Sher v HKSAR [*2002] HKCFA 27, [2002] 2 HKLRD 793.

[12] *Shum Kwok Sher v HKSAR* [2002] HKCFA 27, [2002] 2 HKLRD 793 at [91] to [92], Sir Mason NPJ,

[13] [2012] HKCFA 33, [2012] 2 HKLRD 898.

as drivers who both breached their duties of loyalty as employees by driving whilst disqualified would receive completely different treatment merely because one was employed in the public, and the other in the private, sector.[14] Instead, the court held that the correct approach is:

> Not to attempt somehow to decide in the abstract or in isolation whether a person is or is not a "public officer". One must 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 in any of the ways identified in *Shum Kwok Sher v HKSAR*. If the defendant occupies a position which confers no such powers on him, he is not a candidate for prosecution for the offence, even if he is employed by a government department or by an analogous public body.[15]

F.7 In coming to this conclusion the court emphasised that the essence of the offence is the abuse of powers or duties entrusted for the public benefit, or abuse of an official position.[16]

F.8 Persons in a variety of positions have been prosecuted for this offence. In respect of some of these, the equivalent position would also be a public office under the law of England and Wales, for example police officers.[17] However, a number of individuals have also been successfully prosecuted in Hong Kong where it is not clear if the equivalent position would be considered a public office in England and Wales. The positions in question included: doctors;[18] a senior training officer in the Civil Service Training and Development Institute;[19] a commander of the fire services department;[20] the former head of surgery at the University of Hong Kong; and[21] a high-ranking landscape architect of the Housing Department.[22]

[14] *HKSAR v Wong Lin Kay* [2012] HKCFA 33, [2012] 2 HKLRD 898 at [35], Ribeiro PJ.

[15] *HKSAR v Wong Lin Kay* [2012] HKCFA 33, [2012] 2 HKLRD 898 at [22], Ribeirio PJ,

[16] See also *HKSAR v Wong Lin Kay [2012] HKCFA 33, [2012] 2 HKLRD 898* at [44] to [46], Lord Millett NPJ.

[17] *Sin Kam Wah v HKSAR* [2005] HKCFA 29, [2005] 2 HKLRD 375; *HKSAR v Chow Koon Shing* [2007] HKCFI 378, [2007] 3 HKLRD 10; *HKSAR v Fung Hin Wah Edward* [2011] HKCA 310, [2012] 1 HKLRD 374.

[18] *Chan Tak Ming v HKSAR* [2010] HKCFA 74; [2011] 1 HKLRD 766 – the defendant was a doctor in a public hospital. Prior to his resignation he obtained the names and addresses of patients from the public hospital database. Without the authorisation of the hospital authority, he used this information to mail letters to patients informing them of his shift into private practice. *HKSAR v Ho Hung Kwan Michael* [2013] HKCFA 83, (2013) 16 HKCFAR 525 – the defendant was a doctor employed by a hospital authority, but his conviction was quashed on the basis that the misconduct was not serious enough to call for criminal sanction, see paras F.20 and following below.

[19] *HKSAR v Chung Sim Ying Tracy* HCMA No 267 of 2001 (Court of First Instance).

[20] *HKSAR v Cheng Chun Wai* [2007] HKCFI 697, HCMA No 724 of 2006.

[21] *Secretary of Justice v Wong John* [2014] HKCA 97, [2014] 2 HKLRD 278. He used funds from the university bank account to pay his personal driver. He also failed to report that his personal assistant had stolen millions of dollars from the university, instead loaning her money so she could repay the university and conceal her theft.

[22] *HKSAR v Wong Kwong Shun Paul* [2009] HKCA 478, [2009] 4 HKLRD 832.

F.9 Therefore, the Hong Kong offence is likely to apply to a broader range of positions than the equivalent offence in England and Wales. This is interesting, as it has developed from the same starting point. The fact that the Hong Kong offence seems to apply to a wider range of positions may be due to the different relationships that the organisations containing those positions have with the state.

F.10 The academic commentator Jackson notes that Hong Kong is unique in how clearly the Court of Final Appeal has adopted what he calls a "functional test" of public office, as opposed to considerations of status. This is seen as a welcome development, which places a necessary constraint on the over-zealous use of the offence to pursue civil servants who are just employees. However, he notes that a potential implication of this approach is that the offence will apply to non-civil servants invested with powers, duties and responsibilities of a public nature. This may be particularly significant as independent statutory bodies and private contractors are now carrying out many public functions.

F.11 Jackson concludes that the application of a "functional test" in these cases may not lead to a clear determination of whether a non-civil servant discharging public duties is a public officer. Judicial development of the test will be necessary to determine the true scope of "public office" for the purposes of the offence.[23]

F.12 Further, as in England and Wales, persons who do not hold a public office may be convicted of conspiracy to commit misconduct in public office.[24]

(2) In the course of or in relation to his public office

F.13 The offence in Hong Kong captures not only conduct which is committed "in the course of" carrying out public office, but also that which brings that office into disrepute.[25]

F.14 In *Sin Kam-Wah*[26] the Court of Final Appeal held that wilful misconduct which has a relevant relationship with the defendant's office is enough to constitute the offence of misconduct in public office.

> Misconduct otherwise than in the performance of the defendant's public duties may nevertheless have such a relationship with his public office as to bring that office into disrepute.[27]

F.15 This case concerned a senior superintendent of police conducting routine checks on nightclubs. The officer accepted free meals from these clubs and free sexual services from club hostesses.

[23] M Jackson, "A Functional Approach to Misconduct in Public Office" [2012] *Journal of Commonwealth Criminal Law* 342.

[24] *HKSAR v Kwok Ping Kwong Thomas* [2015] HKCA 435, CACC No 444 of 2014. The defendant was found to have paid the Chief Secretary of the HKSAR $8.5 million as a "sweetener" so that he would look favourably upon the property developing company directed by the defendant.

[25] *Sin Kam Wah v HKSAR* [2005] HKCFA 29, [2005] 2 HKLRD 375.

[26] *Sin Kam Wah v HKSAR* [2005] HKCFA 29, [2005] 2 HKLRD 375.

[27] *Sin Kam Wah v HKSAR* [2005] HKCFA 29, [2005] 2 HKLRD 375 at [47], Sir Mason NPJ .

(3) Wilfully misconducted himself, by act or omission

F.16 In *Shum Kwok Sher*[28] the Court of Final Appeal held that for the misconduct to be culpable, the public official must have:

(1) wilfully and intentionally neglected or failed to perform a duty to which he was subject by virtue of his office or employment;[29] or

(2) with an improper motive, wilfully and intentionally exercised a power or discretion which he had by virtue of his office or employment.[30]

F.17 The court also held that wilfully "signifies knowledge or advertence to the consequences, as well as intent to do an act or refrain from doing an act."[31] For misconduct to be "wilful" it must be deliberate rather than accidental, or in other words, the official either knew that his or her conduct was unlawful or wilfully disregarded the risk that his or her conduct was unlawful.

F.18 Further, it is not necessary to allege or prove any specific act of favour on the part of a public officer toward a private individual to secure a conviction.[32] A public officer who, because has been paid a large sum of money, is generally favourably disposed towards private interests, commits a gross act of misconduct, even if no particular act of favouritism can be proven.

(4) Without reasonable excuse or justification

F.19 We have found no elaboration upon this element in the Hong Kong case law to date. McWalters notes a substantial overlap between the requirement that the defendant must have acted "without reasonable excuse or justification" and other elements of the offence.[33] The offence in England and Wales is subject to similar criticism.[34]

(5) Where such misconduct was serious, not trivial

F.20 There have been numerous decisions of the Court of Final Appeal in recent years which have focused on the question of "seriousness" in relation to the Hong Kong offence.

[28] *Shum Kwok Sher v HKSAR* [2002] HKCFA 27, [2002] 2 HKLRD 793.

[29] *Shum Kwok Sher v HKSAR* [2002] HKCFA 27, [2002] 2 HKLRD 793 at [82], Sir Mason NPJ. *R v Dytham* [1979] QB 722 (Court of Appeal) and *Question of Law Reserved (No 2 of 1996)* (1996) 67 SASR 63, [1996] SASC 5674 (Supreme Court of South Australia) were cited as authority for this conclusion.

[30] *Shum Kwok Sher v HKSAR* [2002] HKCFA 27, [2002] 2 HKLRD 793 at [84], Sir Mason NPJ.

[31] *Shum Kwok Sher v HKSAR* [2002] HKCFA 27, [2002] 2 HKLRD 793 at [85], Sir Mason NPJ.

[32] *HKSAR v Kwok Ping Kwong Thomas* [2015] HKCA 435, CACC No 444 of 2014.

[33] I McWalters, *Bribery and Corruption Law in Hong Kong* (2003).

[34] See Chapter 2 for full analysis of the current law.

F.21 It was established in *Shum Kwok Sher*[35] that, in determining whether or not misconduct was serious, regard must be had to the responsibilities of the office and the officeholder, the importance of the public objects which they served and the nature and extent of the departure from those responsibilities. However, Sir Anthony Mason emphasised that this qualification should not be taken as the dividing line between the offence of misconduct in public office and disciplinary offences, as:

> There is no doubt a borderland in which the common law offence and disciplinary offences overlap.[36]

F.22 The court has stated that in considering this important question of seriousness, one must not lose sight of the object of the offence: it is aimed at punishing an abuse by a public officer of the power and duty entrusted to him or her for the public benefit or of his or her official position.[37]

F.23 *HKSAR v Wong Kwong Shun*[38] the court held that misconduct is not restricted to a wilful violation of the rules by a public officer in the performance of his public duties, but includes any other misconduct committed in any matter relating to his public office. Nevertheless, it has been held that the requirement of serious misconduct meriting criminal sanction is a high threshold for the prosecution. What is required is conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder. A mistake, even a serious one, will not suffice.[39]

F.24 Examples of conduct found to be sufficiently serious include:

(1) Failure to disclose a conflict of interest contrary to Civil Service Rules and subsequently using position to give preferential treatment.[40]

(2) Helping contractors to cheat on an examination required in order to compete for contracts.[41]

(3) A senior police officer taking a photograph under a woman's skirt without her knowledge while she was in the process of reclaiming bail money.[42]

[35] *Shum Kwok Sher v HKSAR* [2002] HKCFA 27, [2002] 2 HKLRD 793. This approach was reaffirmed in *Chan Tak Ming v HKSAR* [2010] HKCFA 74, [2011] 1 HKLRD 766.

[36] *Shum Kwok Sher v HKSAR* [2002] HKCFA 27, [2002] 2 HKLRD 793 at [86] to [87], Sir Mason NPJ citing as authority *R v Dytham* [1979] QB 722 (Court of Appeal).

[37] *HKSAR v Ho Hung Kwan Michael* [2013] HKCFA 83, (2013) 16 HKCFAR 525.

[38] *HKSAR v Wong Kwong Shun Paul* [2009] HKCA 478, [2009] 4 HKLRD 832.

[39] *HKSAR v Ho Hung Kwan Michael* [2013] HKCFA 83, (2013) 16 HKCFAR 525.

[40] *Shum Kwok Sher v HKSAR* [2002] HKCFA 27, [2002] 2 HKLRD 793, *HKSAR v Chung Sim Ying Tracy* HCMA No 267 of 2001 (Court of First Instance) – sentenced to seven months' imprisonment, suspended; *HKSAR v Wong Kwong Shun Paul* [2009] HKCA 478, [2009] 4 HKLRD 832 – sentenced to 100 hours' community service.

[41] *HKSAR v Cheng Chun* Wai [2007] HKCFI 697, HCMA No 724 of 2006. Sentenced to seven months' imprisonment.

[42] *HKSAR v Chow Koon Shing* [2007] HKCFI 378, [2007] 3 HKLRD 10. Sentenced to six months' imprisonment.

(4) Failure to perform a duty of supervising individuals who were subject to supervision orders to monitor their drug use.[43]

(5) Advising would-be criminals as to how the police generally responded to certain unlawful activities, how they could evade or reduce the difficulties this might cause for their unlawful business, and how they might best hide their unlawful activities.[44]

F.25 McWalters notes that the qualification that misconduct must be serious for the offence to apply is an interesting addition to the offence.[45] Sir Anthony Mason himself recognised that this qualification is not present in earlier cases, but felt that it underlay some of Lord Chief Justice Widgery's comments in *Dytham.*[46] He also considered this qualification to be appropriate, given the creation of a wide range of disciplinary offences which could apply to less serious misconduct committed by public officers. The qualification makes it clear that acts of a public official will not fall under the offence of misconduct in public office if they are the result of inadvertence, or of an honest error or misjudgement on the part of the official, or there exists a reasonable excuse or justification for what was done or not done. It is apparent from this discussion of the qualification, however, that it overlaps to some extent with other elements of the offence.

THE RELEVANCE OF CONSEQUENCES

F.26 The Court of Final Appeal has held that the offence is focused on the public officer's conduct, not the consequences of it.[47]

F.27 Consequences are however relevant to the question of seriousness. In *Ho Hung Kwan*[48] the defendant was a doctor employed by the Hospital Authority. He booked appointments in the names of his parents and son for consultation at the clinic, prescribed medicine for his parents and son, and obtained this medicine. His parents and son never attended the clinic. The defendant claimed that he had diagnosed his parents over the phone, and his son at home, and he thought that he had to follow the clinic's consultation procedure in order to obtain medicine for family members. His conviction for misconduct in public office was quashed on the basis that the defendant's misconduct was not serious enough to call for criminal sanction. The court held that:

(1) Where corruption, dishonesty or other illegal practices are involved, it is not necessary to specifically consider the consequences of the

[43] *HKSAR v Tang Kwai Man and Another* [2013] HKEC 615. Sentenced to three months' imprisonment.

[44] *HKSAR v Fung Hin Wah Edward [2011] HKCA 310, [2012] 1 HKLRD 374*. Six months' imprisonment.

[45] I McWalters, *Bribery and Corruption Law in Hong Kong* (2003).

[46] *Dytham* [1979] QB 722 (Court of Appeal).

[47] *Secretary of Justice v Shum Kwok Sher* [2001] HKCA 540, [2001] 3 HKLRD 386. The Court held that as the offence was conduct based, consequences were not a relevant factor for the purposes of sentencing that no loss was suffered as a result of the misconduct. It was also irrelevant for sentencing purposes that the defendant did not benefit financially from the misconduct.

[48] *HKSAR v Ho Hung Kwan Michael* [2013] HKCFA 83, (2013) 16 HKCFAR 525.

misconduct in deciding whether it is serious enough to constitute the offence of misconduct in public office. The misconduct speaks for itself: the seriousness of the consequences of such corrupt, dishonest, or illegal practices will be obvious.

(2) Where corruption, dishonesty, or other illegal practices are not involved, the consequences of the misconduct will be a factor which is relevant when considering whether the misconduct is serious enough to merit criminal sanction.[49]

THE RELEVANCE OF MOTIVE

F.28 It has been held that personal benefit to the defendant is not an element of the offence.[50] Misconduct in public office can be committed for other motives, including, to benefit others or to harm others, or even for no discernible or provable motive. Significant personal benefit is not a necessary part of the element of seriousness either.

F.29 However, in *Shum Kwok Sher* it was held that for the misconduct to be culpable, the public official must have either:

(1) wilfully and intentionally neglected or failed to perform a duty to which he was subject by virtue of his office or employment without reasonable justification;[51] or

(2) with an improper motive, wilfully and intentionally exercised a power or discretion which he had by virtue of his office or employment without reasonable excuse or justification.[52]

F.30 The court also provided a more detailed expression of the mental states required, which bears reproducing in full:

> Outside the area of non-performance of a duty, an additional element is generally, if not always required, to establish misconduct which is culpable for the purposes of the offence. A dishonest or corrupt motive will be necessary as in situations where the officer is exercising a power or discretion with a view of conferring a benefit or advantage on himself, a relative or friend. A malicious motive will be necessary where the officer exercises a power or discretion with a view to harming another. And a corrupt, dishonest or malicious motive will be required where an officer acts in excess of power. The point about these cases is that, absent the relevant improper motive, be it

[49] Reference was made in *HKSAR v Wong Kwong Shun Paul* [2009] HKCA 478, [2009] 4 HKLRD 832 to the reasoning in *AG's Reference (No 3 of 2003*) [2004] EWCA Crim 868, [2005] QB 73 that consequences may be relevant to the question of seriousness.

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

[51] *Shum Kwok Sher v HKSAR* [2002] HKCFA 27, [2002] 2 HKLRD 793 at [82], Sir Mason NPJ citing as authority for this proposition: *Dytham* [1979] QB 722 (Court of Appeal) and *Question of Law Reserved (No 2 of 1996)* (1996) 67 SASR 63, [1996] SASC 5674 (Supreme Court of South Australia).

[52] *Shum Kwok Sher v HKSAR* [2002] HKCFA 27, [2002] 2 HKLRD 793 at [84], Sir Mason NPJ.

> dishonest, corrupt or malicious, the exercise of the power or discretion would not, or might not, amount to culpable misconduct.[53]

The territorial reach of the offence

F.31 Generally speaking, the Hong Kong courts have jurisdiction over offences committed within their territory, which includes the airspace and waters of Hong Kong. A person is criminally liable for an offence if they perform an act that satisfies all the essential elements of that offence in Hong Kong. When only some part of the criminal offence is performed in Hong Kong and the rest is performed abroad, Hong Kong follows the English approach.[54]

CANADA

F.32 Canada has a codified criminal law.[55] Therefore, the common law offence of misconduct in public office no longer exists in Canada. The fact that the Canadian Criminal Code contains a specific offence concerned with misconduct by public officers however means that it is of interest as a comparative jurisdiction.

The current formulation of the offence

F.33 Section 122 of the Canadian Criminal Code sets out the offence of breach of trust by a public officer, which deals, in part, with the same range of conduct previously dealt with by the common law offence of misconduct in public office. Section 122 states that:

> Every official who, in connection with the duties of his offence, commits fraud or a breach of trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person.[56]

[53] *Shum Kwok Sher v HKSAR* [2002] HKCFA 27, [2002] 2 HKLRD 793 at [83]. The meaning of "dishonesty" in this context is that set out in the English case of *R v Ghosh* [1982] QB 1053 (Court of Appeal), as affirmed by Lugar-Mawson J in *HKSAR v Chung Sim Ying Tracy* HCMA No 267 of 2001 (Court of First Instance).

[54] V H Wai Kin, *Criminal Law in Hong Kong* (2011). See Crimes Ordinance (ch 200), s 23. *Treacy v DPP* [1971] AC 537 (House of Lords) was approved in *Somchai Liangsiriprasert v Government of the USA* [1991] 1 AC 225, [1990] UKPC 31. See Chapter 2.

[55] Canadian Criminal Code RSC 1985, ch C-46, s 9 abolishes all common law offences, except contempt of court.

[56] As amended by an Act (SC 2007, Ch 13) in order to implement the United Nation's Convention against Corruption (resolution 58/4 of 31 October 2003). This provision mirrors almost exactly Article 121 in J F Stephen, *A Digest of the Criminal Law (Crimes and Punishments)* (1877) ("Stephen's *Digest*"), Part III, p 73-75. See also Appendix A. Stephen's *Digest* was the template used by many Commonwealth countries embarking on codification in the 19th century. When the Canadian Parliament enacted the first Canadian Criminal Code in 1892, they relied heavily upon Stephen's *Digest* and the original offence of breach of trust by a public officer was an exact mirror of Art 121 of the *Digest*. It was enacted as section 135 of the Code.

F.34 The leading case, of the Supreme Court of Canada, applicable to section 122 is *Boulanger*.[57] Chief Justice McLachlin delivered the unanimous judgment of the court. She stated that the purpose of the offence is to recognise that the public is entitled to expect public officials, entrusted with powers and duties, to exercise these powers and duties for the public benefit. Public officials are, therefore, made answerable to the public in a way that private actors may not be.[58]

F.35 Chief Justice McLachlin held the elements of the offence of breach of trust by a public officer to be:

(1) an official;

(2) acting in connection with the duties of his or her office;

(3) breached the standard of responsibility and conduct demanded of him or her by the nature of the office;

(4) the conduct represented a serious and marked departure from the standard expected of an individual in the accused's position of public trust; and

(5) the accused acted with the intention to use his or her public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt, or oppressive purpose.[59]

F.36 Importantly, the Canadian offence of breach of trust only applies to acts of commission carried out by officials. It does not apply to instances of neglect of duty or nonfeasance.[60] The offence was amended in 1954 and neglect of duty remained absent.[61] Despite this clear parliamentary choice, Chief Justice McLachlin stated in *Boulanger* that subsequent judicial consideration of the offence failed to recognise that the Criminal Code did not criminalise neglect of duty, and as a result a degree of confusion entered into Canadian jurisprudence. *Boulanger* itself sought to rectify this. Chief Justice McLachlin interpreted section 122 so as to bring the offence in line with its historical roots. She made it clear that the offence is limited the offence to cases of active breach of duty and excludes cases of neglect of duty from its scope.

F.37 Terrence Williams has described the Canadian jurisprudence as the clearest exposition of the offence of misfeasance in public office.[62] He recommends that

[57] *Boulanger* [2006] 2 SCR 49, [2006] SCC 32. Chief Justice McLachlin sets out the historical background to section 122 in this case which primarily focuses on the English common law offence, see Appendix A.

[58] *Boulanger* [2006] 2 SCR 49, [2006] SCC 32 at [52], McLachlin CJ.

[59] *Boulanger* [2006] 2 SCR 49, [2006] SCC 32 at [58] McLachlin CJ. Stephen's *Digest*, Part III, pp 73-75, included an offence of "neglect of duty" at Article 122, however this was not included in the Canadian Criminal Code RSC 1985, ch C-46.

[60] *Boulanger [2006] 2 SCR 49, [2006] SCC 32* [48], Mc Lachlin CJ. For a full discussion of the history of the Canadian offence see *Boulanger.*

[61] Vol II, 1st Session, 32nd Canadian Parliament, 19 January 1954.

[62] T Williams, "Neglect of Duty and Breach of Trust: Ancient Offences in the Modern Battle against Impunity in the Public Service" (2010) 13 *Journal of Money Laundering Control* 336.

the approach set out in *Boulanger*[63] be followed in other Commonwealth jurisdictions.

(1) An official

F.38 Section 118 of the Canadian Criminal Code defines "official" as a person who:

(1) holds an office; or

(2) is appointed or elected to discharge a public duty.[64]

F.39 Under section 118 "office" includes, but is not limited to:

(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.

F.40 This definition does not explicitly extend to include either a state-controlled or private company and its employees.[65] Nevertheless, it is arguable that an employee of a either a state-controlled or private company, in some circumstances, could be described as having been "appointed… to discharge a public duty", such that he or she may in fact be treated as an official, and subject to section 122 of the Criminal Code.

F.41 Examples of officials prosecuted under section 122 include:

(1) A public safety director of Varennes City.[66]

(2) A licensed provincial driver training instructor.[67]

(3) A petty officer.[68]

(4) The Mayor of Dawson.[69]

(5) A border guard.[70]

(6) A manager with Citizenship and Immigration Canada.[71]

[63] [2006] 2 SCR 49, [2006] SCC 32.

[64] As amended by an Act (SC 2007, Ch 13) in order to implement the United Nation's Convention against Corruption (resolution 58/4 of 31 October 2003). This added the word "elected" to s 118.

[65] M Barutciski, "Canada" in H Moyer (ed), *Anti Corruption Regulation in 43 Jurisdictions Worldwide* (2015).

[66] *Boulanger* [2006] 2 SCR 49, [2006] SCC 32. Conviction quashed on other grounds, see paras F.48 and F.54.

[67] *Singh* 2007 ABPC 119 (Alberta Provincial Court).

[68] *Bradt* [2010] CMAJ No 2 (Court Martial Appeal Court of Canada).

[69] *Everitt* [2010] YKTC 91 (Yukon Territorial Court).

[70] *Greenhalgh* [2012] BCCA 148 (British Colombia Court of Appeal).

(2) Acting in connection with the duties of his or her office

F.42 In *Buchan*[72] the defendant was acquitted on the basis that his actions were not in connection with the duties of his office. The defendant was the manager of the Red Bluff Indian Band.[73] A credit card had been issued in his name for use on behalf of the Red Bluff Indian Band in that role. He misused the credit card for personal expenses. The court concluded that in misusing the credit card the accused was not acting in connection with the duties of his office as manager as he was simply making personal use of the card. It cited pre-*Boulanger* case law in support of this conclusion.[74]

F.43 This decision arguably narrows the scope of the offence. The requirement as set out in *Boulanger* is that the accused committed the breach when acting in connection with the duties of his or her office. The requirement is not that the accused must have committed the breach in the course of carrying out the functions of his or her public office

F.44 In other jurisdictions, such as Hong Kong, it has been held that the offence captures conduct which is not committed in the course of carrying out public office, but which nevertheless brings that office into disrepute.[75] A similar interpretation has been made recently in relation to the offence in England and Wales.[76] This approach was supported by the Australian Court of Appeal in Victoria, which described the second element of the offence as being "in the course of or *connected* to his public office" (emphasis ours). The court also determined that there was no inconsistency between the approaches taken in England and Wales, Hong Kong or Australia in respect of this element of the offence.[77]

[71] *Serré* [2013] ONSC 1732, 105 WCB (2d) 769 (105 WCB (2d) 769) (Ontario Superior Court of Justice).

[72] [2014] BCSC 2591 (British Colombia Supreme Court).

[73] The Red Bluff Indian Band is a Dakelh First Nations government located in the northern Fraser Canyon region of the Canadian province of British Columbia. The Dakelh or Carrier are aboriginal people of a large portion of the Central Interior of British Columbia, Canada. The Department for Aboriginal Affairs and Northern Development Canada is the department of the Government of Canada with responsibility for policies relating to aboriginal peoples in Canada, that comprise the First Nations (Indians), Inuit and Metis. A band is the basic unit of First Nations government in Canada. https://www.aadnc-aandc.gc.ca/eng/1100100010023/1100100010027 (last visited 15 November 2015) .

[74] *Yellow Old Woman* [2003] ABCA 342, [2004] 10 WWR 276 (Alberta Court of Appeal); *the Queen v Sheets* [1971] SCR 614, 16 DLR (3d) 221.

[75] *Sin Kam Wah v HKSAR* [2005] HKCFA 29, [2005] 2 HKLRD 375. See para F.13 above.

[76] *W* [2010] EWCA Crim 372, [2010] QB 787. See Chapter 2.

[77] *Quach* [2010] VCSA 106, [2010] 201 A Crim R 522 [36] Redlich JA (Supreme Court of Victoria). See also C Davids and M McMahon, "Police Misconduct as a Breach of Public Trust: The Offence of Misconduct in Public Office" (2014) 19(1) *Deakin Law Review* 89.

F.45 It is certainly arguable that the *Boulanger* requirement of acting in connection with the duties of his or her office could bear this broader meaning. If this broader approach were taken, the actions of the defendant in *Buchan* might be captured by the offence of breach of trust. Nevertheless, this is not the current approach of the Canadian courts.

(3) Breached the standard of responsibility and conduct demanded of the accused by the nature of the office

F.46 In *Boulanger* it was held that section 122 could be engaged by any intentional act of commission contrary to a duty imposed by law or regulation, by the defendant's contract of employment or by a guideline connected with the defendant's duties.[78] For example:

(1) Where there is a code of practice in place in relation to the office held by a defendant, this may be referred to in order to determine whether the defendant breached the standard of responsibility and conduct demanded of him or her.[79]

(2) Similarly, evidence of internal policies and staff training and workshops can be referred to in order to establish that the defendant breached the standard of responsibility and conduct demanded of him or her.[80]

F.47 It is not sufficient for the prosecution to simply assert that the conduct in question breached a standard. There must be evidence of what the standard of conduct required was, from which a conclusion can be reached that the defendant acted improperly.[81]

(4) A serious and marked departure from the standard expected of an individual in the accused's position of public trust

F.48 The defendant in *Boulanger* had his conviction quashed in part on the grounds that his conduct did not satisfy this element of the offence.[82] He was a public safety director when his daughter was involved in a car accident. A police report was completed. Mr Boulanger however required the police to write a second, more detailed, report on the basis of which his daughter was found not liable for the accident by her insurance company, and Mr Boulanger did not have to pay $250. What is notable was that the second report was in no way false, but would not have been written but for Mr Boulanger using his influence to request it.

F.49 Chief Justice McLachlin stated that:

> It cannot be that *every* breach of the appropriate standard of conduct, no matter how minor, will engender a breach of the public's trust. Such a low threshold would denude the concept of breach of trust of

[78] *Boulanger* [2006] 2 SCR 49, [2006] SCC 32 [49], McLachlin CJ.

[79] For example, see *Mathur* [2007] CanLII 48460 (Ontario Superior Court of Justice) and *Ellis* [2010] ONSC 2390 (Ontario Superior Court of Justice).

[80] For example, see *Boudreau* [2012] CM 4007 (Court Martial).

[81] *Bell* [2007] ABPC 243 (Alberta Provincial Court).

[82] Also quashed on the grounds of element (5), see para F.54 below.

> its meaning. It would also overlook the range of regulations, guidelines and codes of ethics to which officials are subject, many of which provide for serious disciplinary sanctions…. The conduct at issue… must be sufficiently serious to move it from the realm of administrative fault to that of criminal behaviour.[83]

F.50 Borrowing from the jurisprudence of the Court of Final Appeal of Hong Kong in *Shum Kwok Sher v HKSAR*,[84] the court held that:

> Whether it is serious misconduct in this context is to be determined having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities.[85]

F.51 Chief Justice McLachlin also noted that the test of serious and marked departure, in this context, is similar to the test for criminal negligence, where it is necessary to distinguish conduct sufficient to attract criminal sanction from less serious forms of conduct meriting civil or administrative sanction.[86]

F.52 Stuart has expressed surprise at the Supreme Court of Canada's willingness in *Boulanger* to limit the offence of breach of trust to cases of serious wrongdoing only but welcomes the approach.[87] He interprets this as the court applying the doctrine of *de minimis non curat lex*: the law does not concern itself with trifles. Stuart notes that in previous cases the Supreme Court has not endorsed this doctrine.[88]

F.53 The following conduct has been successfully prosecuted under section 122:

(1) Improper assistance and provision of fraudulent documents in relation to driving examinations.[89]

(2) Using vehicles for personal use and for having firewood chopped by subordinates of the office holder at a residence during work hours.[90]

(3) Misappropriation of $38,300 over an eight year period by filing claims for expenses that had never occurred.[91]

[83] *Boulanger* [2006] 2 SCR 49, [2006] SCC 32 [50] and [52], McLachlin CJ (original emphasis).

[84] *Shum Kwok Sher v HKSAR* [2002] HKCFA 27, [2002] 2 HKLRD 793. See para F.21 above.

[85] *Boulanger* [2006] 2 SCR 49, [2006] SCC 32 [53], McLachlin CJ (original emphasis removed).

[86] *Boulanger* [2006] 2 SCR 49, [2006] SCC 32 [54], McLachlin CJ.

[87] D Stuart, "The Chart Is a Vital Living Tree and Not a Weed to be Stunted: Justice Moldaver Has Overstated" (2006) 21 *National Journal of Constitutional Law* 2006.

[88] The example offered is *Malmo-Levine* [2003] 3 SCR 571, 2003 SCC 74.

[89] *Singh* 2007 ABPC 119 (Alberta Provincial Court). Sentenced to 90 days' imprisonment.

[90] *Bradt v R* [2010] CMAJ No 2 (Court Martial Appeal Court of Canada). Severely reprimanded and fined $3,000.

(4) Unauthorised strip searches of four young women at the border, including three cases of touching in a sexual manner.[92]

(5) An enterprise to make money by taking payments from immigrants in return for providing special treatment.[93]

(5) The intention to use his or her public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt, or oppressive purpose

F.54 In *Boulanger* the defendant's conviction was also quashed partly on the basis that he had not acted with any intention to betray the public trust reposed in him.[94]

F.55 Consistent with fundamental criminal law principles, in Canada the mental state of a defendant has to be sufficiently blameworthy to warrant criminal attention. For misconduct in public office, "mere mistakes do not suffice, nor do errors of judgment".[95] Further, an attempt by a defendant to conceal his or her actions may provide evidence of an improper intent.[96] However the fault requirement in Canada is higher than that required in the law of other countries such as England and Wales[97].

F.56 In *Brown*[98] the defendant was the acting watch commander at a Royal Canadian Mounted Police detachment when two intoxicated females were brought in and placed in the "drunk-tank". The females engaged in consensual sexual conduct, and the defendant observed them on the monitor screen. The defendant was found guilty of one count of breach of public trust, contrary to section 122 of the Criminal Code. His conviction was quashed on appeal on the basis that the women knew they were being constantly monitored, that there was no evidence that the defendant was entertained by the viewing of the sexual acts, and that his decision to monitor the women was reasonable in the circumstances. Therefore, there was a reasonable doubt that the necessary *mens rea* for conviction was established, and the accused did not breach his standard of responsibility and conduct.

THE RELEVANCE OF PERSONAL BENEFIT OR MOTIVE

F.57 The fact that a public officer obtains a benefit as an effect of his or her action, and knows that he or she will receive this benefit, is not conclusive evidence of a

[91] *Everitt* [2010] YKTC 91 (Yukon Territorial Court). Sentenced to a restitution order, 12 months' imprisonment and 12 months' probation.

[92] *Greenhalgh* [2012] BCCA 148 (British Colombia Court of Appeal). Sentenced to two years' imprisonment and three years' probation.

[93] *Serré* [2013] ONSC 1732, 105 WCB (2d) 769 (105 WCB (2d) 769) (Ontario Superior Court of Justice).

[94] Also quashed on the grounds of element (4), see para F.48.

[95] *Boulanger* [2006] 2 SCR 49, [2006] SCC 32 [56], McLachlin CJ].

[96] *Boulanger* [2006] 2 SCR 49, [2006] SCC 32 [57], McLachlin CJ.

[97] See Chapter 2.

[98] [2014] BCJ No 2527.

sufficiently blameworthy mental state. The core question is not whether the official gained a benefit through his or her action, but whether the official acted with the intention to use the office for a purpose other than the public good. Accordingly, the offence may also be committed in circumstances where no benefit accrues to the defendant.[99]

The territorial reach of the offence

F.58 Section 6(2) of the Criminal Code states that, subject to legislative exceptions, no person shall be convicted of an offence committed outside Canada. No legislative exception applies to the offence of breach of trust by a public official, and therefore the principles of territorial jurisdiction apply. In practice, territorial jurisdiction has received wide interpretation.

F.59 The Supreme Court of Canada has held that the Canadian courts have jurisdiction in relation to a criminal offence if a significant portion of the activities constituting the offence took place in Canada. It is sufficient that there was a real and substantial link between the offence and Canada for Canadian courts to exercise jurisdiction.[100]

CARIBBEAN STATES, COMMONWEALTH REALMS AND BRITISH OVERSEAS TERRITORIES

F.60 The Caribbean Commonwealth realms and British overseas territories are of interest for two reasons:

(1) the English common law was transmitted to the colonies on settlement; and

(2) there have been recent high profile prosecutions involving the offence of misconduct in public office.

F.61 Under the rules governing the reception of law in any Commonwealth Caribbean territory, as set out in *Campbell v Hall*,[101] the English common law was transmitted to colonies on settlement. In all territories the reception of the law predates the rudimentary development in England of the common law rules of misconduct in public office, the earliest being 1599 in *Crouther's Case*.[102]

F.62 Contemporary anti-corruption regimes in the Commonwealth Caribbean are generally based on legislation. In some territories, such as the Belize and Bahamas, the criminal law has been codified, and the common law offence of misconduct in public office has effectively been reproduced in their codes. Nevertheless, in many the common law offence of misconduct in public office remains alongside anti-corruption legislation. These include the Cayman Islands

[99] *Boulanger* [2006] 2 SCR 49, [2006] SCC 32 [57] and [64], McLachlin CJ.

[100] *Libman v The Queen* [1985] 2 SCR 178.

[101] [1774] 98 ER 1045, (1774) 1 Cowper 204 (Court of King's Bench).

[102] (1599) Croke Elizabeth 654, 78 ER 893. For dates of reception of the English common law see KW Pacthett, "Reception of Law in the West Indies" (1972) *Jamaica Law Journal* 17. See Appendix A.

and Jamaica.[103] Even in the code states of the Caribbean, it remains unclear whether the code provisions have effectively abolished the common law on misconduct in public office.[104]

F.63 There have been very few Caribbean cases dealing with the common law offence of misconduct in public office. Prosecutions of public officials for corruption in the Commonwealth Caribbean are infrequent and rarely successful.[105] The cases discussed here provide some insight into the factual scenarios that might be captured by the offence.

F.64 Perhaps the most notable unsuccessful prosecution to date was that of the former Premier of the Cayman Islands, McKeeva Bush. He was acquitted by a jury on all counts brought against him: six counts of misconduct in public office contrary to common law and five counts of breach of the trust contrary to section 13 of the Anti-Corruption Law. The allegations related to use of his government-issued credit card.[106]

F.65 There is no fixed sentence for the offence of misconduct in public office.

The current formulation – the common law offence

F.66 The elements of the offence appear to be as they were set down in the 1986 case of *Williams*:

(1) that the defendant was a public officer;

(2) that as such he owed a duty;

(3) that there was a breach of that duty;

(4) that the conduct impugned was calculated to injure the public interest so as to call for condemnation and punishment; and

(5) that there was an oblique or fraudulent motive.[107]

(1) Public officer and (2) he owed a duty

F.67 The first two elements are so closely connected that they should be discussed together.

[103] The Cayman Islands are a British overseas territory and Jamaica and the Bahamas are British commonwealth realms.

[104] D McKoy, "Knowing the Corners: The Relevance of the Common Law to the Caribbean Anticorruption Project" (2009) 34 *West Indies Law Journal* 119. See Belize's Criminal Code, Revised Edition 2000 (ch 101) and The Bahama's Penal Code 1873 (ch 84). See para F.95 below.

[105] D McKory, "Known Knowns: Corruption in the Commonwealth Caribbean" (2012) 61 *Social and Economic Studies* 1.

[106] "McKeeva Bush not Guilty" 9 October 2014 *Cayman Compass*, http://www.compasscayman.com/caycompass/2014/10/09/McKeeva-Bush-not-guilty/ (last visited 30 June 2015).

[107] *Williams v R* (1986) 39 WIR 129 (Court of Appeal of the Eastern Caribbean States). The approach in England and Wales has also recently been relied upon in the Caribbean Court of Justice, *Marin and Another v A-G of Belize* [2011] CariCJ 9, (2011) 78 WIR 51.

F.68 It is clear, following the cases of *Walter*[108] and *Williams*,[109] that the correct approach to determining whether a person is a "public officer" is set out in *Whitaker*.[110] That is, a "public officer" is one who discharges any duty in which the public is interested, and more particularly if he receives payments from public money. This brings the Caribbean in line with other Commonwealth countries in focusing on the nature of the duties of a person, as opposed to status, in determining whether or not they are a public official.

F.69 In *Walter* the defendant was the former Premier of the State of Antigua. While he was Premier the defendant negotiated in his private capacity for the purchase and importation into the state of two buildings. He negotiated for one building to be sold to the government and then applied the other to his personal use. After the shipping documents arrived, the defendant arranged for both buildings to be cleared from customs and to enter the state free of duty. The officers responsible for the clearing of the goods acted in the belief that both buildings were imported solely for the Government's use. The defendant was convicted of misbehaviour in public office, and appealed on the basis that the Premier of the State was not a public office. This argument was rejected by the Court of Appeal of the West Indies Associated States Criminal Division, but his appeal was allowed on other grounds.

F.70 The defendant referred to section 115 of the Antigua Constitution Order 1967 in which both "public office" and "public service" are defined narrowly. However, the Court of Appeal found that the Constitution Order defined these terms for the purposes of the Constitution, rather than for the purposes of the common law offence of misbehaviour in public office and held that the meaning of "public officer" in common law was set out in *Whitaker*. Applying this definition the Court of Appeal held that the Premier of the State was a public officer for the purposes of misconduct in public office.

F.71 The defendant in *Williams* was, at the material time, Minister of Communications and Works in the Government of St Vincent and the Grenadines. He was also the owner of a boat named the *mv Richard*. He presented to the general manager of the St Vincent Government Funding Scheme a bill for the freight cost for a shipment of asphalt, which had already been paid for by another party. He received payment from the treasury of $40,000. He was convicted of misconduct in public office. He appealed his conviction on the basis that he was not a "public officer" for the purposes of the offence. The Court of Appeal of the West Indies Associated States Criminal Division rejected this argument and his conviction was upheld.

F.72 The defendant argued that the meaning of "public officer" should be taken from section 105(1) of the Constitution of St Vincent and the Grenadines, defining "an office in the public service". Section 105(2) of the Constitution expressly states that a Minister shall not be considered to hold such an office. The court rejected this argument, instead following *Walter* in applying the *Whitaker* definition of

[108] *Walter v R* (1980) 27 WIR 386 (the Court of Appeal of the West Indies Associated States Criminal Division).

[109] *Williams v R* (1986) 39 WIR 129 (Court of Appeal of the Eastern Caribbean States).

[110] *Whitaker* [1914] 3 KB 1283 (Court of Criminal Appeal). A case of bribery of a public official. See Chapter 2.

"public officer". On this basis, the defendant was held to be a public officer for the purposes of the common law offence.[111]

(3) Breach of that duty

F.73 This element would appear to encompass both positive acts and omissions.

(4) The conduct impugned was calculated to injure the public interest so as to call for condemnation and punishment

F.74 The fourth requirement appears to be a seriousness requirement and to have been lifted directly from the English case of *Dytham*,[112] which was decided seven years before the elements of the offence were set out in *Williams*.[113]

(5) There was an oblique or fraudulent motive

F.75 The status of the final requirement – that there be an oblique or fraudulent motive – is uncertain. In *Walter*[114] the court allowed the appeal on the basis that a fraudulent or oblique motive had not been proven. Having considered *Llewellyn-Jones*,[115] and *Dytham*,[116] as well as *Stephen's Digest of the Criminal Law*,[117] the court concluded:

> It would… appear from the sum total of the learning revealed in the reports of the recent cases of this nature that proof of some fraudulent or oblique motive is a necessary ingredient of the offence at law of misbehaviour in public office… Put another way, this court is not at all sure, on the learning available to it from recent cases of this nature, that such a fraudulent or oblique motive is not an important and necessary ingredient of this offence.[118]

F.76 However, it is important to note the qualification of this statement with the phrase "cases of this nature". It was clear from the totality of the court's judgment that it acknowledged that the offence of misconduct in public office could be committed in a variety of ways. Further, that there will be many situations where whether or not the defendant has acted in bad faith will be critical to his guilt. Nevertheless, this arguably leaves open the possibility of some cases where a fraudulent or oblique motive is not required. McKoy has suggested that, in the future, the Caribbean courts might follow the approach to this issue taken in Hong Kong,

[111] *Williams* (1986) 39 WIR 129,132 to 133 (Court of Appeal of the Eastern Caribbean States).

[112] *Dytham* [1979] QB 722 (Court of Appeal).

[113] *Williams* (1986) 39 WIR 129 (Court of Appeal of the Eastern Caribbean States). See Chapter 2.

[114] *Walter* (1980) 27 WIR 386 (the Court of Appeal of the West Indies Associated States Criminal Division).

[115] *Llewellyn-Jones* [1966] 1 QB 429 (Court of Appeal).

[116] *Dytham* [1979] QB 722 (Court of Appeal).

[117] J F Stephen, *A Digest of the Criminal Law (Crimes and Punishments)* (1877). See full historical analysis in Appendix A.

[118] *Walter* (1980) 27 WIR 386, 393 (the Court of Appeal of the West Indies Associated States Criminal Division).

which recognises the possibility of liability for misconduct in public office without an oblique or fraudulent motive in some cases.[119]

F.77 The court in *Walter* held that the prosecution had failed to prove that the defendant acted from any fraudulent or oblique motive, reprehensible though his conduct may have been. For this reason, his conviction for misbehaviour in public office was quashed. In reaching this conclusion, the court however observed that:

> While there must be many standards of conduct which may be said to be reprehensible, they do not all constitute criminal offences at common law.[120]

This would appear to indicate that the motive may in fact have been relevant to the question of seriouness – the fourth requirement of the offence – rather than a separate element.to be proved. If that is the case then the Caribbean offence would be much closer to the current law of England and Wales.[121]

The territorial reach of the offence

F.78 The principles of criminal jurisdiction in the Commonwealth Caribbean are based on English common law. These principles are applicable unless expressly overridden by statute law. Under the English approach, the foundation of criminal jurisdiction is territorial. Therefore, generally speaking, it is only conduct that occurs within a particular state that falls within the jurisdiction of that state. However, even when only some part of a criminal offence is performed in a Caribbean state and the rest is performed abroad, there is jurisdiction to try the crime if either the requisite conduct or the prescribed consequences occurred in that state.[122]

The current formulation – statutory offences

F.79 We cannot here set out all of the legislative regimes for every Caribbean territory relevant to a review of the common law offence of misconduct in public office. Therefore we will only detail the legislative regimes that sit alongside and/or overlap with this common law offence in three jurisdictions.

[119] D McKoy, "Knowing the Corners: The Relevance of the Common Law to the Caribbean Anticorruption Project" (2009) 34 *West Indies Law Journal* 119.

[120] *Walter v R* [1980] 27 WIR 386, 393 (the Court of Appeal of the West Indies Associated States Criminal Division).

[121] See Chapter 2.

[122] D Seetahal, *Commonwealth Caribbean Criminal Practice and Procedure* (4th ed 2014).

The Cayman Islands

F.80 The key anti-corruption offences in the Cayman Islands are set out in the Anti-Corruption Law 2008.[123] Part III of the Law creates a wide range of offences that occupy a space similar to the common law offence of misconduct in public office.

F.81 The three most similar to misconduct in public office are:

(1) Breach of trust by public officer or by a member of the Legislative Assembly.[124]

(2) Abuse of office by a public officer – acts prejudicial to rights of another.[125]

(3) Failure to disclose conflict of interest.[126]

F.82 There are many other offences that may overlap, including:

(1) Bribery of public officers and members of the Legislative Assembly.[127]

(2) Frauds on the Government.[128]

(3) Influencing or negotiating appointments or dealings in offices.[129]

(4) Offences of failing to fulfil reporting duties.[130]

F.83 Unlike many Caribbean state laws, the Cayman Islands Anti-Corruption Law does not include an offence of illicit enrichment. However, provision is made for suspicious standards of living and access to property to be taken into account as evidence of a corruption offence.[131]

F.84 Sentences available under the Anti-Corruption Law range from two years to fourteen years' imprisonment. Where a specific offence definition does not

[123] (Law 11 of 2008). This legislation was expressly passed to give effect to the Organisation of Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD 2011) and the United Nation's Convention against Corruption (resolution 58/4 of 31 October 2003). In preparing the Bill, a number of pieces of legislation were referred to from other jurisdictions - Consultation Draft Bill: The Anti-Corruption Bill 2007, http://www.legislativeassembly.ky/pls/portal/docs/PAGE/LGLHOME/BUSINESS/BUSINESS/REPORTS/REPORTS20072008/ANTICORRUPTIONDRAFTBILL07_0.PDF (last visited 30 June 2015).

[124] Anti-Corruption Law 2008, s 13. Maximum penalty of five years' imprisonment.

[125] Anti-Corruption Law 2008, s 17. Maximum penalty of two years' imprisonment.

[126] Anti-Corruption Law 2008, s 19. Maximum penalty of five years' imprisonment.

[127] Anti-Corruption Law 2008, s 10.

[128] Anti-Corruption Law 2008, s 11(a) and s 11(c).

[129] Anti-Corruption Law 2008, s 15.

[130] Anti-Corruption Law 2008, s 20(1), (2), (5) and (6).

[131] Anti-Corruption Law 2008, s 26.

specify a sentence, the general penalty of a fine of $5,000 or two years' imprisonment, or both, applies.[132]

F.85 Section 2 of the Anti-Corruption Law 2008 states that:

> (1) "public office" means, subject to the following definition, an office of emolument in public service.
>
> (2) "public officer" means –
>
> (a) a person holding public office whether temporarily or permanently by appointment, or by operation of any law;
>
> (b) a judge, magistrate, an arbitrator, an umpire, an assessor, a member of a jury or a referee in any proceeding or matter with the sanction of any court or in pursuance of any law;
>
> (c) a Justice of the Peace; and
>
> (d) a member of any statutory body, a tribunal or a commission of inquiry in pursuance of any law;
>
> but does not include a member of the Legislative Assembly.
>
> (3) "public service" means the service of the Crown in a civil capacity in respect of the government of the Islands.
>
> (4) "members of the Legislative Assembly" includes the elected and official members of the Cabinet.

F.86 There has been only one conviction under the Anti-Corruption Law that we can find. On 15 May 2014 Police Constable Elvis Ebanks was found guilty of two counts of soliciting a bribe and two counts of breach of trust, contrary to sections 10 and 13 of the Anti-Corruption Law.[133] He requested a bribe of in return for not pursuing a criminal case against a person who was suspected of stealing a phone. He was sentenced to three years' imprisonment. An appeal was lodged.[134]

Jamaica

F.87 The key anti-corruption offences in Jamaica are set out in the Corruption (Prevention) Act 2001. This Act was passed specifically to give effect to the provisions of the Inter-American Convention Against Corruption, which was signed by Jamaica in 1996 and ratified in 2001. In many respects the drafting of the Act follows the wording of the Inter-American Convention Against Corruption.

[132] Anti-Corruption Law 2008, s 44.

[133] Cayman Islands Anti-Corruption Commission, "Annual Report 1 July 2013 – 30 June 2014" http://www.anticorruptioncommission.ky/pls/portal/docs/PAGE/ACCHOME/PUBLICATIONS/REPORTS/ANNUAL-REPORTS/ACC%20ANNUAL%20REPORT%202013-2014.PDF (last visited 30 June 2015).

[134] Cayman News Service, "2014 in Review: Crime and Punishment" https://caymannewsservice.com/2015/01/2014-in-review-crime-and-punishment/ (last visited 30 June 2015).

F.88 Section 14 creates the following corruption offences which apply to public servants –

(1) Bribery and obtaining illicit benefits.

(2) Improper use of classified information or government property.

(3) Diversion of government property.

(4) Secret commissions.

(5) Illicit enrichment.

F.89 Section 2 states that:

(1) "public function" means any activity performed a single time or continually, whether or not payment is received therefor, which is carried out by –

(a) a person for, or on behalf of or under the direction of a Ministry, Department of Government, a statutory body or authority, a Parish Council, the Kingston and St Andrew Corporation or a government company;

(b) a body, whether public or private, providing public services (including provision of electricity, water, and communication);

(c) a Member of the House of Representatives or of the Senate in that capacity;

(2) "public servant" means any person –

(a) employed –

(i) in the public, municipal or parochial service of Jamaica;

(ii) in the service of a statutory body or authority or a government company;

(b) who is an official of the State or any of its agencies;

(c) appointed, elected, selected or otherwise engaged to perform a public function;

(3) "government company" means a company registered under the Companies Act being a company whose policy the Government or an agency of Government, whether by the holding of shares or by financial input, is in a position to influence.

F.90 McKoy has commented on the very wide scope of the definition of "public servant".[135] In particular, he notes that the class of persons characterised as public servants extends to include employees of government companies. This is significant, because the Jamaican government extensively delegates state functions to the private sector. Therefore, many employees of private companies may find themselves classified as public servants and subject to the provisions of the Corruption (Prevention) Act 2001.

F.91 The maximum penalty for offences of corruption[136] is a fine not exceeding ten million dollars of imprisonment for a term not exceeding ten years, or both.[137]

F.92 We have found three examples of convictions under the Corruption (Prevention) Act:

(1) In *Daley*[138] the defendant was a superintendent of the police who had accepted a sum of $15,000 from another person in return for offering protection to that person and his premises. He was sentenced to 18 months' imprisonment.

(2) In *Rose and Harvey*[139] the defendants were members of the Jamaica Constabulary Force who had corruptly accepted gifts of $30,000 and $80,000 in return for securing the release of a person from custody. They were both sentenced to 12 months' imprisonment at hard labour.

(3) In *Rowe*[140] the defendant was a constable in the Jamaican Constabulary Force who corruptly solicited money from a person in return for omitting to prosecute that person. He was sentenced to nine months' imprisonment at hard labour.

The Bahamas

F.93 The Bahamas is one of the Caribbean states that has a codified criminal law, as set out in the Penal Code (ch 84). Section 11 states that nothing in the code shall affect the liability of a person under the common law. However, if an act is punishable under the Penal Code, and is also punishable under the common law, that person cannot be punished both under the Code and the common law. It remains unclear whether the code provisions have effectively abolished the common law on misconduct in public office.[141]

[135] D McKoy, "The Emerging Regimes on Anticorruption and State Enterprise Governance in the Commonwealth Caribbean" (2009) Thesis submitted for the degree of Doctor of Philosophy at the University of Leicester.

[136] Other than for illicit enrichment which is limited to a fine not exceeding three million dollars, or imprisonment for a term not exceeding three years, or both.

[137] Corruption (Prevention) Act 2001, s 15(1).

[138] JM [2013] CA Crim 14 (The Jamaican Court of Appeal).. On appeal the conviction was quashed on the basis that the prosecution evidence was unreliable.

[139] [2011] JMCA Crim 4 (The Jamaican Court of Appeal).

[140] [2012] JMCA Crim 2 4 (The Jamaican Court of Appeal).

[141] D McKoy, "Knowing the Corners: The Relevance of the Common Law to the Caribbean Anticorruption Project" (2009) 34 *West Indies Law Journal* 119.

PENAL CODE OFFENCES

F.94 The Penal Code creates a large number of offences concerning various forms of misconduct in public office. The offence most akin to the common law offence of misconduct office is "corruption, etc., by public officer or juror" which provides:

(1) Every public officer… who is guilty of corruption, or of wilful oppression, or of extortion, in respect of the duties of his office, commits a misdemeanour and shall be liable to imprisonment for two years.

(2) A public officer… is guilty of wilful oppression in respect of the duties of his office if he wilfully commits any excess or abuse of his authority, to the injury of the public or of any person.

(3) A public officer is guilty of extortion who, under cover of his office, demands or obtains from any person, whether for public purposes or for himself or any other person, any money or valuable consideration which he knows that he is not lawfully authorised to demand or obtain, or at a time at which he knows that he is not lawfully authorised to demand the same.[142]

F.95 The meaning of corruption is also clarified:

(1) A public officer is guilty of corruption in respect of the duties of his office if he directly or indirectly agrees or offers to permit his conduct as such officer to be influenced by the gift, promise or prospect of any valuable consideration to be received by him, or by any other person, from any person whomsoever.[143]

(2) It is immaterial, for the purposes of the above definition of corruption, whether the act to be done by a person in consideration or in pursuance of any such gift, promise, prospect, agreement, or offer as therein mentioned be in any manner criminal or wrongful otherwise than by reason of the provisions dealing with corruption.[144]

(3) If, after a person has done any act as a public officer, he secretly accepts or agrees or offers secretly to accept for himself or for any other person, any valuable consideration on account of such act, he shall be presumed, until the contrary is shown, to have been guilty of corruption in respect of the act done.[145]

F.96 There are also the following offences:

(1) Giving of a false certificate by a public officer.[146]

(2) Destruction of a document by a public officer.[147]

[142] The Bahama's Penal Code 1873 (ch 84), s 453.

[143] The Bahama's Penal Code 1873 (ch 84), s 473.

[144] The Bahama's Penal Code 1873 (ch 84), s 475.

[145] The Bahama's Penal Code 1873 (ch 84), s 476.

[146] The Bahama's Penal Code 1873 (ch 84), s 454.

(3) A number of offences pertaining specifically to postal officers.[148]

(4) Oppression by an officer of a prison.[149]

(5) Unlawful sale or purchase of any public office.[150]

(6) Withholding of public money by a public officer.[151]

(7) Extortion.[152]

F.97 Section 6 of the Penal Code states that:

> In this Code "public officer" means any person holding any of the following offices, or performing the duties thereof, whether a deputy or otherwise, namely –
>
> > (1) any civil office, including the office of Governor-General, the power of appointing a person to which or of removing a person from which is vested in her Majesty, or in the Governor-General, or in any public commission or board or committee;
> >
> > (2) any office to which a person is nominated or appointed by statute or by public election;
> >
> > (3) any civil office, the power of appointing to which or of removing from which is vested in any person or persons holding public office of any kind included in either subsections (1) or (2) of this section;
> >
> > (4) any office of arbitrator or umpire in any proceeding or matter submitted to arbitration by order or with the sanction of any court;
> >
> > (5) any justice of the peace.
> >
> > A person acting as a minister of religion or ecclesiastical officer, of whatsoever denomination, is a public officer in so far as he performs functions in respect of the notification of intended marriage, or in respect of the solemnization of marriage, or in respect of the making or keeping of any register or certificate of marriage, birth, baptism, death or burial, but not in any other respect.

[147] The Bahama's Penal Code 1873 (ch 84), s 455.

[148] The Bahama's Penal Code 1873 (ch 84), destruction of postal packets s 456; opening or delaying of postal packets s 457; issuing any money order with fraudulent intent s 458.

[149] The Bahama's Penal Code 1873 (ch 84), s 461.

[150] The Bahama's Penal Code 1873 (ch 84), s 466.

[151] The Bahama's Penal Code 1873 (ch 84), s 235.

[152] The Bahama's Penal Code 1873 (ch 84), s 240.

> "civil office" means any public officer other than an office in the naval, military or air service of Her Majesty;
>
> "public office" means the office of any public officer;
>
> "judicial officer" means any person executing judicial functions as a public officer.
>
> It is immaterial for the purposes of these definitions whether a person is entitled or not to any salary or other remuneration in respect of the duties of his office.

F.98 It is particularly of interest that the position of religious ministers is set out so clearly. We are not aware of any other definition of public office that does this. It also accords with one view of the how the current law in England and Wales could be applied.[153]

F.99 An example of a conviction for the offence of extortion can be seen in *A-G v Bullard.*[154] The defendant was a police officer who sought $4000 from another person, in return for which he promised to have serious assault charges laid against that person dropped. The defendant pleaded guilty to the offence of extortion.

BRIBERY ACT OFFENCES

F.100 The Prevention of Bribery Act also creates a number of offences applicable to public officers. The maximum sentence for bribery offences is a fine not exceeding ten thousand dollars or imprisonment for a term not exceeding four years' imprisonment, or both.[155]

AUSTRALIA

F.101 The utility of Australian (and other Commonwealth) law in delineating misconduct in public office has been consistently noted throughout domestic commentary.[156]

F.102 In addition to law which applies nationally – Commonwealth law – Australia is also divided up into the eight main territories and states. Therefore, the relevant offence comparable to misconduct in public office varies as follows:

(1) Misconduct in public office exists as a common law offence in New South Wales and Victoria.

(2) Misconduct in public office exists as a statutory offence in Commonwealth law and in all other Australian state jurisdictions, namely: Australian Capital Territory, South Australia, Northern Territory, Queensland, Western Australia and Tasmania.

[153] See Chapter 2.

[154] [2004] BSCA 15 (Bahamas Court of Appeal).

[155] Prevention of Bribery Act 1973, s 10.

[156] See K Stanton, "Comparative Law in the House of Lords and Supreme Court" (2013) 42(3) *Common Law World Review* 269.

F.103 The statutory offences of misconduct in public office generally appear to be narrower, and are more determinate.

The current formulation – the common law

F.104 In New South Wales and Victoria misconduct in public office continues to be a common law offence.[157] The offence is variously described. Other labels include "abuse of public office", "misbehaviour in a public office" and "misfeasance in public office".[158]

F.105 The offence is committed where:

(1) a public official;

(2) in the course of or connected to his or her public office;

(3) wilfully misconducts him- or herself; by act or omission, for example, by wilfully neglecting or failing to perform his or her duty;

(4) without reasonable excuse or justification; and

(5) where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.[159]

F.106 In New South Wales, as in England and Wales, there is no prescribed maximum penalty for an offence of misconduct in public office. In Victoria, the offence has a statutory maximum sentence of 10 years' imprisonment.[160]

(1) Public official

F.107 The term "public officer" has been defined broadly. A public officer is any person who is appointed to discharge any duty in which the public are interested, especially where the person is paid in relation to the position by a fund provided by the public.[161] It includes people employed by local authorities. Although, these authorities originate from decisions made in England and Wales. [162]

[157] See *Halsbury's Law of Australia* (2011) [130-12340] (bribery), [130-12350] (conflict of interest), [130-12370] (failure to perform a public office), [130-12375] (sale of public office), [130-12380] (abuse of office).

[158] *Question of Law Reserved (No 2 of 1996)* (1996) 67 SASR 63, [1996] SASC 5674 (Supreme Court of South Australia).

[159] *Quach* [2010] VCSA 106, [2010] 201 A Crim R 522 (Supreme Court of Victoria).

[160] Crimes Act 1958, s 320.

[161] *McCann* [1997] QCA 238, (1997) 95 A Crim R 308 (Supreme Court of Queensland Court of Appeal).

[162] *Whitaker* [1914] 3 KB 1283 (Court of Criminal Appeal); *Bowden* [1996] 1 WLR 98, [1995] 4 All ER 505 (Court of Appeal).

F.108 The court in New South Wales has further stated that in all cases the person must discharge public duties, it is insufficient merely to be employed by, say, the government.[163]

F.109 The following have been successfully prosecuted:

(1) Police officer.[164]

(2) Prison officer.[165]

(3) Project manager at the Rail Infrastructure Corporation and RailCorp.[166]

(4) The Registry Services Manager of the Botany Motor Registry.[167]

(5) General manager of the Riverina County Council[168]

F.110 Members of Parliament have also been held to be in public office.[169]

F.111 Further, there are ongoing prosecutions, following recommendations by ICAC, in New South Wales in relation to:

(1) The Mayor of the City of Ryde in relation to disclosure of confidential information.[170]

(2) Members of Legislative Council: Eddie Obeid and Ian Macdonald – (Minister for Primary Industries and Minister for Mineral Resources), in relation to granting consent for a coal exploration licence.[171]

(2) In the course of or connected to his or her public office

F.112 This element was the subject of the decision in *Quach*,[172] in particular whether it is necessary to prove that the public officer was acting:

(1) "as such", or

[163] *Ex parte Kearney* (1917) 1 SR(NSW) 578 (Supreme Court of New South Wales).

[164] *Bunning* [2007] VSCA 205 (Supreme Court of Victoria - Court of Appeal).

[165] *Soylemez* [2014] VSCA 23 (Supreme Court of Victoria - Court of Appeal).

[166] *Blackstock* [2013] NSWCCA 172 (Supreme Court of New South Wales - Court of Criminal Appeal). Guilty plea.

[167] *Jaturawong* [2011] NSWCCA 168 (Supreme Court of New South Wales - Court of Criminal Appeal).

[168] *Pieper* [2014] NSWDC 242 (District Court of New South Wales).

[169] *Boston* [1923] HCA 59, (1923) 33 CLR 386.

[170] Independent Commission Against Corruption, "Ryde City Council – Allegations Concerning the City of Ryde Mayor, Councillor Ivan Petch (Operation Cavill)" http://www.icac.nsw.gov.au/investigations/current-investigations/investigationdetail/195 (last visited 16 October 2015).

[171] Australian Associated Press, "Former NSW Minister Ian Macdonald Prosecuted over Mining Licence" (*The Guardian*, 20 November 2014) http://www.theguardian.com/australia-news/2014/nov/20/former-nsw-minister-ian-macdonald-prosecuted-mining-licence (last visited 16 October 2015).

[172] *Quach* [2010] VCSA 106, [2010] 201 A Crim R 522 (Supreme Court of Victoria).

(2) "in the exercise of his duties", or

(3) "in the course of or in relation to his public office"; or

(4) in some other way, and if so what formulation should be used?

F.113 Mr Quach was a serving police officer. While on duty he and other police officers conducted a welfare check on a young woman ("P") who had recently attempted suicide. Later the same day, after he had finished his shift, and in plain clothes, Mr Quach returned to P's house with some groceries. Mr Quach drove her to his apartment in his car. The prosecution alleged that sexual activity took place at Mr Quach's apartment, which Quach denied. He accepted that the young woman had showered and changed her clothes at his apartment before walking on his back (to relieve some back pain) and that he kissed her later as she left his apartment.

F.114 After a review of relevant jurisprudence from a number of jurisdictions the court concluded that:

> The proper formulation of the offence requires the element to be expressed so that it encompasses the circumstance in which the offender's misconduct, though not occurring while the offender was discharging a function or duty, had a sufficient connection to their public office.[173]

(3) Wilfully misconducts him- or herself

F.115 The common law offence includes both nonfeasance and misfeasance. Lusty gives the following eight examples of how the offence can be committed:

(1) Wilful neglect of duty (nonfeasance).

(2) Misuse of official information.

(3) Misuse of public resources.

(4) Fraud and other dishonest conduct.

(5) Partiality and other abuses of official power or authority.

(6) Concealed conflicts of interest.

(7) Sexual misconduct.

(8) Misconduct by Members of Parliament (inclusing Ministers).[174]

F.116 The requirement that the misconduct be wilful mirrors the common law in England and Wales.[175]

[173] *Quach* [2010] VCSA 106, [2010] 201 A Crim R 522 [40] and [41], Redlich JA (Supreme Court of Victoria).

[174] D Lusty, "Revival of the Common Law Offence of Misconduct in Public Office" (2014) 38 *Criminal Law Journal* 337.

(4) Without reasonable excuse or justification

F.117 As in England and Wales, the ambit of this element has primarily arisen in discussions of other aspects of the offence.

F.118 The defendant in *Bunning*[176] made an application to appeal against conviction on the grounds that he erroneously pleaded guilty to the charges of misconduct in public office in the mistaken belief that motive was not a relevant element of the offence.[177] He submitted that the prosecution failed to establish that the "improper motive" element of the offence had been established beyond reasonable doubt. The court stated:

> What the applicant refers to as a requirement to prove "improper motive" may be seen as the requirement of the prosecution to prove that the particular act or acts were without reasonable excuse or justification.[178]

(5) Where such misconduct is serious and meriting criminal punishment

F.119 The element of culpability must be of such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment, and whether such a situation is revealed by the evidence is a matter for the jury to decide.[179]

F.120 In *Quach* the court stated that:

> It will generally be desirable that the trial judge emphasise the notion that the conduct must be so far below acceptable standards as to amount to an abuse of the public's trust in the office holder. As in the case of criminal negligence, and offences such as culpable driving and dangerous driving, it is recognised that it is necessary to distinguish the conduct sufficient to attract criminal sanction from less serious forms of conduct which may give rise to civil proceedings.[180]

F.121 In *Question of Law Reserved (No 2 of 1996)*, Olsson J also noted the broad nature of the offence.

> My researches suggest that the common law did not ever contemplate closed, specifically titled, categories of offences in relation to public officers... Quite apart from specific offences termed bribery, extortion, buying and selling public offices and the like, a

[175] See Chapter 2.

[176] *Bunning* [2007] VSCA 205 (Supreme Court of Victoria - Court of Appeal). The appeal concerned sentencing.

[177] *Bunning* [2011] HCASL 21 (High Court of Australia Special Leave Dispositions).

[178] *Bunning* [2011] HCASL 21 [3] Gummow AC and Kiefal AC (High Court of Australia Special Leave Dispositions).This application was rejected because it was out of time.

[179] *Dytham* [1979] QB 722, 727 to 728, Lord Widgery CJ (Court of Appeal); considered in *Quach* [2010] VCSA 106, [2010] 201 A Crim R 522 (Supreme Court of Victoria).

[180] *Quach* [2010] VCSA 106, [2010] 201 A Crim R 522 [47], Redlich JA (Supreme Court of Victoria).

> public officer could, it appears, have been indicted for ANY conduct which amounted to misconduct or misbehaviour and which could fairly be categorised as misfeasance, malfeasance or nonfeasance in office of a criminally culpable nature [...] The emphasis was not on any generic description, by way of nomenclature, but, rather, the inherent nature of the detailed conduct.[181]

F.122 This might suggest therefore that the scope of the offence is unclear, however the essence of the offence was captured by Doyle CJ, who stated:

> I consider, that the generic offence ... strikes at the public officer who deliberately acts contrary to the duties of the public office in a manner which is an abuse of the trust placed in the office holder and which, to put it differently, involves an element of corruption. It may be that the mere deliberate misuse of information is sufficient to give rise to an offence, but the further allegation of an intent to receive a benefit clearly, in my opinion, brings the matter within the ambit of the common law offence.[182]

F.123 In *Bunning*[183] the ten counts related to a corrupt relationship between a police officer and a registered informant. The conduct involved was:

(1) the supply of confidential information relating to police investigations and addresses of associates of the informant;

(2) use of confidential passwords belonging to other police members, obtained through installation of software to track keystrokes;

(3) failure to relay information relating to the informant's wherabouts and criminal activities to the investigation.

F.124 The court stated that the offences of misconduct in public office to which the appellant pleaded guilty were serious examples of such offences.

F.125 Other conduct successfully prosecuted includes:

(1) Improper access to police computer systems and failure to relay evidence to an investigation.[184]

(2) The entering of false intelligence reports in order to create appearance of legitimate access to police computer system.[185]

[181] *Question of Law Reserved (No 2 of 1996)* (1996) 67 SASR 63, [1996] SASC 5674 (Supreme Court of South Australia) at [96] to [97], Olsson J.

[182] *Question of Law Reserved (No 2 of 1996)* (1996) 67 SASR 63, [1996] SASC 5674 (Supreme Court of South Australia) at [13], Doyle CJ.

[183] *Bunning* [2007] VSCA 205 (Supreme Court of Victoria - Court of Appeal). The appeal concerned sentencing.

[184] *Hughes* [2014] NSWCCA 15 (New South Wales Court of Criminal Appeal).

[185] *Hughes* [2014] NSWCCA 15 (New South Wales Court of Criminal Appeal).

(3) Improper access to, printing and dissemination of information on police computer systems and repeatedly falsifying timesheets relating to unauthorised absences.[186]

(4) Failures to declare conflicts of interest in relation to contracts for welding services.[187]

(5) The manipulation of accounts and improper use of a credit card.[188]

THE RELEVANCE OF MOTIVE

F.126 In *Quach* it was clarified that whilst financial gain, dishonesty and corruption are often aspects of the offence, they do not constitute elements of it.[189] The offence proscribes public officials from acting (or omitting to act) contrary to the duties of their office in a manner which so injures the public interest that the punishment is warranted. Therefore the issue of an improper motive is to be considered within the seriousness element of the offence.

The current formulation – statutory offences

F.127 There are various statutory offences across Commonwealth law and the criminal codes of the remaining states, which appear to have superseded the common law offence of misconduct in public office.[190]

F.128 The relationship between statutory provisions and the common law offence was discussed in *Question of Law Reserved.*[191] In this case, the majority held that while, on its face, the relevant South Australian legislation abolished particular forms of the offence rather than the generic offence itself, it should be taken as having been intended to abolish the generic offence, particularly given the simultaneous enactment of a statutory code dealing with misconduct; the abolition was held to apply only in relation to acts committed after the date of the legislation.

Commonwealth law

F.129 Section 142(2) of the Criminal Code Act 1995 contains a statutory offence of abuse of public office:

> (1) A Commonwealth public official is guilty of an offence if:
>
> (a) the official:

[186] *Jansen* [2013] NSWCCA 301 (New South Wales Court of Criminal Appeal).

[187] *Blackstock* [2013] NSWCCA 172 (New South Wales Court of Criminal Appeal).

[188] *Pieper* [2014] NSWDC 242 (District Court of New South Wales).

[189] See further *Llewellyn-Jones* [1966] 1 QB 429, 436 Parker LCJ (Court of Appeal). Here, however, dishonesty was present. See also *Dytham* [1979] QB 722, 726 Lord Widgery CJ (Court of Appeal), considered in *Quach* [2010] VCSA 106, [2010] 201 A Crim R 522 (Supreme Court of Victoria).

[190] *Question of Law Reserved (No 2 of 1996)* (1996) 67 SASR 63, [1996] SASC 5674 (Supreme Court of South Australia).

(i) exercises any influence that the official has in the official's capacity as a Commonwealth public official; or

(ii) engages in any conduct in the exercise of the official's duties as a Commonwealth public official; or

(iii) uses any information that the official has obtained in the official's capacity as a Commonwealth public official; and

(b) the official does so with the intention of:

(i) dishonestly obtaining a benefit for himself or herself or for another person; or

(ii) dishonestly causing a detriment to another person.

F.130 There is a separate offence that applies to persons who have ceased to be a public official but uses information obtained during their tenure for a benefit or to cause a detriment. Both offences carry a penalty of five years' imprisonment.

F.131 "Commonwealth public official" is defined in the Criminal Code Dictionary.[192] This provides a broad list of specific positions, including a Member of either House of Parliament, statutory provisions including the Corporations Act 2001, and general provisions such as an individual who is a contracted service provider for a Commonwealth contract.[193]

Australian Capital Territory

F.132 The Australian Capital Territory has a statutory offence of abuse of public office in section 359 of the Criminal Code 2002. This provides:

(1) A public official commits an offence if—

(a) the official—

(i) exercises any function or influence that the official has as a public official; or

(ii) fails to exercise any function the official has as a public official; or

[191] *Question of Law Reserved (No 2 of 1996)* (1996) 67 SASR 63, [1996] SASC 5674 (Supreme Court of South Australia).This case was more recently considered in *Quach* [2010] VCSA 106, [2010] 201 A Crim R 522 (Supreme Court of Victoria).

[192] Criminal Code Act 1995, vol 2.

[193] These offences have "extended geographical jurisdiction" which means they apply whether or not the conduct constituting the alleged offence occurs in Australia; and whether or not a result of the conduct constituting the alleged offence occurs in Australia. Criminal Code Act 1995, s 15(4).

(iii) engages in any conduct in the exercise of the official's duties as a public official; or

(iv) uses any information that the official has gained as a public official; and

(b) the official does so with the intention of—

(i) dishonestly obtaining a benefit for the official or someone else; or

(ii) dishonestly causing a detriment to someone else.

F.133 As in the Commonwealth Code, there is an offence for the use of information after the position as a public officer has ceased. The maximum penalty for both offences is imprisonment for 5 years' imprisonment or a fine, or both.

F.134 Public duty is defined as "a duty of a public official". "Public official" is defined as a person having public official functions, or acting in a public official capacity.[194] A non-exhaustive list is then given, which includes: a member of the legislature, executive or judiciary of the Commonwealth, a State or another Territory; an officer or employee of the Commonwealth, a State, another Territory or a local government; and a contractor who exercises a function or performs work for the Commonwealth, a State, another Territory or a local government.

Northern Territory

F.135 The Criminal Code Act 1983 of the Northern Territory of Australia contains a number of relevant offences. Most relevant is section 82, abuse of office:

> (1) Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another is guilty of a crime and is liable to imprisonment for 2 years.

F.136 "Employed in the public service" includes being employed in an agency under the Public Sector Employment and Management Act as a police officer, or to execute any process of a court of justice. The offence has an increased maximum sentence if done for the purposes of gain.

F.137 Section 122 provides a specific offence of "refusal by public officer to perform duty":

> Any person who, being employed in the public service or as an officer of any court or tribunal, perversely and without reasonable excuse omits or refuses to do any act that it is his duty to do by virtue of his employment is guilty of a crime and is liable to imprisonment for 2 years.

[194] (Australian Capital Territory) Criminal Code Act 2002, s 300.

Queensland

F.138 The Queensland Criminal Code Act 1899 has two relevant offences: section 92 contains the offence of "abuse of office'" and section 92A contains the related offence of "misconduct in relation to public office".

F.139 The abuse of office offence prohibits any person employed in the public service from doing any act in abuse of the authority of his or her office any arbitrary act prejudicial to the rights of another. The offence has an increased maximum sentence if done for the purposes of gain.

F.140 The "misconduct in relation to public office" provision creates two offences:

> (1) A public officer who, with intent to dishonestly gain a benefit for the officer or another person or to dishonestly cause a detriment to another person—
>
> > (a) deals with information gained because of office; or
> >
> > (b) performs or fails to perform a function of office; or
> >
> > (c) without limiting paragraphs (a) and (b), does an act or makes an omission in abuse of the authority of office;
>
> is guilty of a crime.
>
> (2) A person who ceases to be a public officer in a particular capacity is guilty of a crime if, with intent to dishonestly gain a benefit for the person or another person or to dishonestly cause a detriment to another person, the person deals with information gained because of the capacity.

F.141 The basic maximum sentence is seven years' imprisonment. This is increased to 14 years if the offender was a participant in a criminal organisation.

F.142 The following definitions are provided:

(1) *authority*, of office, includes the trust imposed by office and the influence relating to office.

(2) *office*, in relation to a person who is a public officer, means the position, role or circumstance that makes the person a public officer.

(3) *Person employed in the public service* includes police officers, staff members under the Ministerial and Other Office Holder Staff Act 2010 and persons employed to execute any process of a court of justice, and also includes the chief executive officer of and persons employed by a rail GOC or a subsidiary of a rail GOC.

(4) *Public officer* means a person other than a judicial officer, whether or not the person is remunerated:

(a) discharging a duty imposed under an Act or of a public nature; or

(b) holding office under or employed by the Crown;

and includes, whether or not the person is remunerated

(c) a person employed to execute any process of a court; and

(d) a public service employee; and

(e) a person appointed or employed under any of the following Acts

(i) the Police Service Administration Act 1990;

(ii) the Transport Infrastructure Act 1994;

(iii) the State Buildings Protective Security Act 1983; and

(f) 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.

South Australia

F.143 Division 4 of the South Australian statute, Criminal Law Consolidation Act 1935, contains offences relating to public officers. Section 251 contains the offence of abuse of public office:

(1) A public officer who improperly—

(a) exercises power or influence that the public officer has by virtue of his or her public office; or

(b) refuses or fails to discharge or perform an official duty or function; or

(c) uses information that the public officer has gained by virtue of his or her public office,

with the intention of—

(d) securing a benefit for himself or herself or for another person; or

(e) causing injury or detriment to another person,

is guilty of an offence.

F.144 There is also an offence of a former public officer using information for benefit or detriment. The maximum penalty for a basic offence is imprisonment for 7 years and for an aggravated offence it is imprisonment for 10 years.

F.145 “Acting improperly” is defined in section 238 as:

(1) For the purposes of this Part, a public officer acts improperly, or a person acts improperly in relation to a public officer or public office, if the officer or person knowingly or recklessly acts contrary to the standards of propriety generally and reasonably expected by ordinary decent members of the community to be observed by public officers

of the relevant kind, or by others in relation to public officers or public offices of the relevant kind.

(2) A person will not be taken to have acted improperly for the purposes of this Part unless the person's act was such that in the circumstances of the case the imposition of a criminal sanction is warranted.

(3) Without limiting the effect of subsection (2), a person will not be taken to have acted improperly for the purposes of this Part if—

(a) the person acted in the honest and reasonable belief that he or she was lawfully entitled to act in the relevant manner; or

(b) there was lawful authority or a reasonable excuse for the act; or

(c) the act was of a trivial character and caused no significant detriment to the public interest.

(4) In this section—

act includes omission or refusal or failure to act;

public officer includes a former public officer.

F.146 Public officer is defined in section 237 as including:

(a) a person appointed to public office by the Governor; or

(b) a judicial officer; or

(c) a member of Parliament; or

(d) a person employed in the Public Service of the State; or

(e) a member of the police force; or

(f) any other officer or employee of the Crown; or

(g) a member of a State instrumentality or of the governing body of a State instrumentality or an officer or employee of a State instrumentality; or

(h) a member of a local government body or an officer or employee of a local government body; or

(i) a person who personally performs work for the Crown, a State instrumentality or a local government body as a contractor or as an employee of a contractor or otherwise directly or indirectly on behalf of a contractor,

and public office has a corresponding meaning.

Tasmania

F.147 In the Tasmania Criminal Code Act 1924, within a chapter of the Code which is titled Corruption and Abuse of Office, there is also an offence that deals with the corruption of public officers (section 83).

> Any person who –
>
> (a) being a public officer, corruptly solicits, receives, or obtains, or agrees to receive or obtain, any property or benefit of any kind for himself or any other person on account of anything done or omitted, or to be done or omitted, by him in or about the discharge of the duties of his office; or
>
> (b) corruptly gives, confers, or procures, or promises or offers to give, confer, or procure, or attempt to procure, to, upon, or for any public officer, or any other person, any property or benefit of any kind on account of anything done or omitted, or to be done or omitted, by such officer in or about the discharge of the duties of his office –
>
> is guilty of a crime.

F.148 Also under section 84 of the Tasmanian Criminal Code, it is an offence for public officers to use their office extort to inflict injury on another or for the purposes of oppression.[195]

> (1) Any public officer who, under colour of office and otherwise than in good faith, demands, takes, or accepts from any person for the performance of his duty as such officer, any reward beyond his proper pay and emoluments, is guilty of a crime.
>
> (2) Any public officer who, in the exercise or under colour of exercising his office, wilfully and unlawfully inflicts upon any person any bodily harm, imprisonment, or other injury is guilty of a crime.

F.149 Section 21 of the Criminal Code defines a 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.

Western Australia

F.150 Western Australia's Criminal Code Act Compilation Act 1913 contains an offence of corruption of a public officer at section 83.

> Any public officer who, without lawful authority or a reasonable excuse —
>
> (a) acts upon any knowledge or information obtained by reason of his office or employment; or

[195] (TAS) Criminal Code Act 1924, s 84(2).

(b) acts in any matter, in the performance or discharge of the functions of his office or employment, in relation to which he has, directly or indirectly, any pecuniary interest; or

(c) acts corruptly in the performance or discharge of the functions of his office or employment,

so as to gain a benefit, whether pecuniary or otherwise, for any person, or so as to cause a detriment, whether pecuniary or otherwise, to any person, is guilty of a crime and is liable to imprisonment for 7 years.

F.151 Section 1 of the Criminal Code contains a definition of public officer. It means any of the following:

(a) a police officer

(aa) a Minister of the Crown

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

(ac) a member of either House of Parliament

(ad) a person exercising authority under a written law

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

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

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

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

(d) 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

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

SCOTLAND

F.152 Scotland is a particularly interesting jurisdiction because the comparable offence there appears to focus on “wilful neglect” rather than misconduct by way of a positive act.

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. [196]

Wilful neglect of duty by a public official

F.153 Although an offence of misconduct in public office does not exist in Scots law, the common law offence of the wilful neglect of duty by a public official could be seen as its Scottish counterpart.

F.154 The offence is made up of the following elements:

(1) a public official;

(2) wilfully neglects his or her duty; and

(3) the neglect must be significant.

Public official

F.155 The case law does not define who, for the purposes of the offence, is a "public official". As documented by Brown and Ferguson, a wide range of "public officials" have been prosecuted in early case law.

F.156 In the most recent, and only case since the 19th century, it was held that a police constable was a public official.[197] In determining the applicability of "public official", Sheriff Cameron held that the terms of the employment are not relevant but, "what matters is the tenure of an official appointment of a public nature".[198]

F.157 Gordon defines a public official as "a person entrusted with an official situation of trust, wilfully to neglect his duty".[199] Further, Hume and MacDonald state that:

> [I]t is not to be understood, that it is with respect to Judges only, or in the exercise only of powers of a judicial nature, that this of neglect of duty is acknowledged as a point of dittay. If our statutes were even silent on the subject, the common law would reach his misdemeanour, who as a magistrate, or in any station of public trust, should be notoriously careless of the welfare of that which is committed to him.[200]

F.158 Persons in the following positions have been successfully prosecuted for this offence:

[196] G Gordon, *The Criminal Law of Scotland* (3rd ed 2001) vol ii [44-01].

[197] *Wilson v Smith* 1997 SLT (Sh Ct) 91 (Sherriff Court).

[198] *Wilson v Smith* 1997 SLT (Sh Ct) 91, 92G Sheriff Cameron (Sheriff Court).

[199] *G Gordon, The Criminal Law of Scotland (3rd ed 2001)* vol ii [44-01].

[200] *D Hume, Commentaries on the Law of Scotland Respecting Trial for Crimes* (1884) vol i, 411.

(1) Post office workers (or "letter-carriers").[201]

(2) A doctor who had been appointed a "vaccinator" under the Compulsory Vaccination Act.[202]

(3) Police sergeant.[203]

F.159 The case concerning the doctor is of particular interest when considering how the Scottish courts approach the question of who is in public office. *Webster* was charged with falsely granting certificates of vaccination for children he had not successfully vaccinated. Lord Neaves held that by virtue of the functions he performed as vaccinator under the Vaccination Act, not his status as a Doctor, *Webster* was "a public officer with a public duty to perform".

> The medical practitioner is, by that Act, erected into an officer who is to serve the public, and give a certificate of successful vaccination, and that certificate is a permanent document entered on a public register.[204]

F.160 The lack of clarity as to the scope of the term "public official" has led 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."[205]

Wilful neglect of duty

F.161 This can be traced back to *Archibald Stewart* where the Provost of Edinburgh was charged with the offence on the basis that he "wilfully neglected to pursue… such measures as were proper or necessary for the defence of the city against the rebels".[206] As stated by Ferguson, the crime must be deliberate "and not merely inadvertent".[207]

F.162 Hume and MacDonald state that:

> Any flagrant neglect of duty by judges and magistrates or other officials, or refusal to execute duty, or encouragement by magistrates of offences against the peace, or the like, are punishable at common

[201] *William Cunningham* (1820), as cited in I Alison, *Principles of the Law of Scotland* (1832) 635; *Donald Smith* (1827), as cited in D Syme*, Syme's Justiciary Reports* (Law Rep 340 Jus, 1826-29) 185; *John Graham* (1830), as cited in I Alison, *Principles of the Law of Scotland* (1832) 635.

[202] *Thomas Black Webster* (1872) 2 Couper 339 (High Court and Circuit Courts of Justiciary).

[203] *Wilson v Smith* 1997 SLT (Sh Ct) 91 Sheriff Cameron (Sherriff Court).

[204] *Thomas Black Webster* (1872) 2 Couper 339, 344, Lord Neaves (High Court and Circuit Courts of Justiciary).

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

[206] D Hume*, Commentaries on the Law of Scotland Respecting Trial for Crimes* (1884) vol i 411.

[207] PW Ferguson "Wilful Neglect of Duty" (1997) 42(2) *Journal of the Law Society of Scotland* 67, 67.

> law. For example, before the passing of the Post Office Statutes, "wilful neglect of duty and violation of the "trust and duty of his office, as a public officer in the course of "his employment as such," was held a relevant charge in the case of a letter-carrier accused of detaining letters… It is not necessary that any injury to the public service should result from the offence… The duty to exercise care for the safety of persons may be regarded as being owed towards the private individual, or as being a public duty owed towards the State. It is in its latter aspect that breach of the duty is punishable as a crime.[208]

F.163 Despite its title, in practice the offence is not restricted to omissions. As demonstrated by *Thomas Black Webster* (falsely granting a vaccination certificate) and *Donald Smith* (the opening of letters), positive acts are also included within the scope of the offence. A public officer can neglect a duty by committing an act that proves contrary to it.

The neglect must be significant.

F.164 The requirement that the neglect must be significant was established in *Wilson v Smith,*[209] in reliance on MacDonald's definition of the offence which included the phrase "flagrant neglect of duty".[210]

F.165 However Gordon states that conduct will be sufficient for this offence "even where no question of danger to the public or to any person is involved."[211] Actual harm resulting is not necessary.

F.166 Conduct deemed sufficiently significant includes:

(1) Detention, opening, secretion and failure to deliver letters.[212]

(2) Falsely granting certificates of vaccination for children he had not successfully vaccinated.[213]

(3) Failure to submit reports relating to alleged offenders to the procurator fiscal.[214]

[208] A MacDonald, *A Practical Treatise on the Criminal Law of Scotland* (5th ed 1948) 141 to 142.

[209] *Wilson v Smith* 1997 SLT (Sh Ct) 91 (Sherriff Court).

[210] A MacDonald, *A Practical Treatise on the Criminal Law of Scotland* (5th ed 1948) 141.

[211] G Gordon, *The Criminal Law of Scotland* (3rd ed 2001) vol ii [44-01].

[212] *William Cunningham* (1820), as cited in I Alison, *Principles of the Law of Scotland* (1832) 635; *Donald Smith* (1827), as cited in D Syme*, Syme's Justiciary Reports* (Law Rep 340 Jus, 1826-29) 185; *John Graham* (1830), as cited in I Alison, *Principles of the Law of Scotland* (1832) 635.

[213] *Thomas Black Webster* (1872) 2 Couper 339 (High Court and Circuit Courts of Justiciary).

[214] *Wilson v Smith* 1997 SLT (Sh Ct) 91 (Sherriff Court).

The territorial reach of the offence

F.167 The issue of the territorial scope of the offence has not been raised in the courts. As a general principle, Scottish court have jurisdiction over offences committed within Scotland. The offence of the wilful neglect of duty by a public official does not fall within any statutory exemption to this general principle.