APPENDIX A
ANALYSIS OF SYMPOSIUM ON MISCONDUCT IN PUBLIC OFFICE: THE CURRENT LAW

INTRODUCTION

A.1 On 20 January 2016 the Law Commission published its first paper in relation to the misconduct in public office project – *Issues Paper 1: The Current Law* ("the background paper").[1] We launched this background paper with a symposium of eminent speakers[2] and delegates at King's College London. The symposium was attended by over 90 people.

A.2 Delegates and speakers (collectively referred to as "participants" in this analysis) came from a variety of backgrounds and included: regulators, government officials, academics, legal practitioners, members of the judiciary, the press, whistleblowing campaigners, students and other members of the public, some of whom described themselves as having been involved in misconduct in public office prosecutions. In an informal poll, delegates were invited to indicate how they categorise themselves and the results were: journalists – 5, politicians – 1, civil servants – 16, lay people – 9, people who have been involved in a misconduct in public office prosecution – 8. This confirmed that discussion was from a broad range of perspectives. That discussion provided valuable insight into how the current law operates and how people believe it should be reformed.

OVERVIEW AND EMERGING THEMES

A.3 A vast number of contributions were made to the symposium, but it was possible to identify a number of overarching themes that arose.

A.4 There was general consensus that:

(1) The law requires reform.

(2) Lack of certainty is a major concern.

(3) There would be a gap left in the law should the offence be abolished without replacement.

(4) The offence serves a potentially important purpose.

[1] Misconduct in Public Office Issues Paper 1: The Current Law (January 2016), available at http://www.lawcom.gov.uk/wp-content/uploads/2016/01/misconduct_in_public_office_issues-1.pdf.

A.5 There was little consensus as to:

(1) The extent of law reform required.

(2) The form a reformed offence should take.

(3) Whether there are any other effective forms of accountability that address serious misconduct by public office holders.

The need for reform

A.6 Every participant agreed that the current law is problematic and requires reform. Many agreed with the view that the offence is outdated and that review is long overdue as "it doesn't fit the bill in modern times"[3] and "we are badly in need of clarity and review".[4] The Rt Hon Dominic Grieve QC MP, former Attorney General, stated that the current offence "is plainly flawed, it needs replacing."

A.7 Clare Montgomery QC was concerned that the breadth and uncertainty of this element had led to an unacceptable development of the offence which leaves individuals unclear as to what conduct the offence applies until a jury has returned a verdict:

> In a realm where standards have moved rapidly it is not predictable. For example, 25 years ago the position would have been different. Informants, now would be committing an offence. There are problems around whistleblowing and information sharing. Public officials are in an impossible position.

Legal certainty

A.8 A core issue for many participants was the lack of predictability and certainty in the current law. Most felt that this was a fundamental failing of the offence and goes so far as to potentially violate the legal certainty requirements of article 7.[5] The two key elements which concerned participants in this regard were the lack of clear definitions of "public office" and "public harm".

[2] Colin Nicholls QC, 3 Raymond Buildings; Detective Superintendent Ray Marley, Policing Standards Manager for the College of Policing; Rosemary Ainslie, Specialist Crown Prosecutor for the Crown Prosecution Service; Clare Montgomery QC, Matrix Chambers; Professor David Whyte Professor of Sociology, University of Liverpool; Eleanor Hoggart, Monitoring and Governance Officer at Lawyers in Local Government; Gerard Elias QC, Standards Commissioner, National Assembly for Wales; Sarah Green, Deputy Chair of the Independent Police Complaints Commission; Liz Hartley, Head of Editorial at Associated Newspaper; The Right Honourable Dominic Grieve QC MP, former Attorney General; Professor A T H Smith, Goodhart Visiting Professor 2015-16 University of Cambridge; Jamas Hodivala, 2 Bedford Row; Lord Bew, Chair of the Committee on Standards in Public Life.

[3] Detective Superintendent Ray Marley, Policing Standards Manager, College of Policing.

[4] Rosemary Ainslie, Senior Crown Prosecutor – CPS.

[5] Colin Nicholls QC, Clare Montgomery QC, Rosemary Ainslie.

A.9 A number of participants expressed a belief that this uncertainty amounts to retrospective application of the criminal law – individuals are unable to regulate their conduct as they do not know if the offence applies to them until a jury has reached a verdict. Clare Montgomery QC stated that "there is a real issue with legal certainty, it is used in a way to apply *ex post facto* judgement". Many other participants agreed.[6] Colin Nicholls QC was of the opinion that "it is true that the legal concepts involved in the offence are complex and not sufficiently accessible to lawyers, judges and importantly to the public at large."

A.10 However, some participants did not agree that it is objectionable that a number of elements cannot be predicted with certainty and instead require determination by a jury.[7] They believed that this is no different from many areas of the criminal law, for example gross negligence manslaughter. Gerard Elias QC, Standards Commissioner for the National Assembly for Wales, stated:

> Uncertainty is not irregular. Where no specific offence is available look at the individual's conduct and the integrity of the office. Common sense overcomes uncertainty.

The offence should not be abolished without replacement

A.11 All but one of the participants agreed that there is some gap in the law that would need to be filled should the offence be abolished outright. For example, Professor A T H Smith stated that "I don't think it can be abolished without replacement. There is undoubtedly a mischief here."

A.12 In contrast, Jamas Hodivala suggested that the most appropriate compromise to fill any such gaps left by abolition of the common law offence was not for it to be replaced by another statutory offences(s), but for "public trust" or "public office" to be taken into account as an aggravating factor at the point of sentencing for an alternative offence. Although this may remove certain conduct from the ambit of the law, Jamas suggested it is a better balance between certainty of the law and ensuring public officials are held to account. He considered that any gaps in the law are for Parliament to fill.

The criminal offence serves a potentially important purpose

A.13 A number of participants gave their opinion on what purpose the offence serves:

(1) Rosemary Ainslie, senior Crown Prosecutor: it is important because the offence covers serious corruption involving officers or high profile individuals. "Nothing else that fits the bill that captures the kind of gravity of misconduct."

(2) Professor David Whyte:[8] "Misconduct in public office is a distinct wrongdoing because it is a distinct abuse of public trust. This is the core".

[6] Eleanor Hoggart (Lawyers in Local Government), Professor A T H Smith (Goodhart Visiting Professor, University of Cambridge).

[7] Gerard Elias QC, Colin Nicholls QC.

~~University of Liverpool.~~

(3) Dominic Grieve QC MP: The offence is important because of "the nature of the state's power – coercive powers, taxes, powers of arrest and entry – is entirely different from anything else. They have special immunities and privileges." These are "of immense public importance [and] should be seen to be carried out to very high standards and if that standard is diverted from, by a wilful disregard of duties placed on individual, not only has impact on individuals effected but there is a wider effect on public confidence on the way the state functions. For those reasons an offence of misconduct in public office is needed."

A.14 Many participants felt that the offence is important as a means of holding people to account:

(1) Ray Marley: "it seems that the use of misconduct in public office or a criminal offence to use against public servants is about greater accountability".

(2) Eileen Chubb (Compassion in Care): "the prime aim should be to hold people to account. There is a real lack of accountability."

(3) Eleanor Hoggart: the offence "is about being seriously let down by public authorities".

(4) Gerard Elias QC: "we need the offence so that the public can have faith that those in office are accountable"

(5) Dominic Grieve QC MP: "if we want people to have confidence in governmental functions then holding those to account seems to me to be very much in the public interest."

A.15 However, not everyone agreed that the misconduct offence should be used to address this issue of accountability. Jamas Hodivala accepted that "there is an appetite that public officials be held to account" but considered that "there is a problem when that is not expressly stated in the law".

Extent of reform

A.16 Professor Ben Bowling[9] observed that "the real issue is what form that reform should take." Opinions as to the form and extent of any reform covered a broad spectrum. Only one participant suggested that the common law could continue, but that significant further clarity is required.[10] There were others who considered the current law so deficient that the common law offence must be abolished and replaced with radically different legislation.[11] Broadly, opinions fell into two main categories:

(1) Maintain the breadth of the current law but improve clarity.

(2) Radically amend the current offence by narrowing its scope.

[9] Vice Dean of the Dickson Poon School of Law, King's College London.

[10] Colin Nicholls QC.

[11] The key proponent of this was Clare Montgomery QC.

Improving clarity but retaining breadth

A.17 A number of participants felt that the offence is very useful and that a broad offence applying to "public office holders" should be retained. However, this group of participants agreed that the current offence lacks certainty and should be made clearer.

A.18 Dominic Grieve QC MP felt that:

> There is a need for an offence that covers misconduct in public office offence. That is irrespective of whether a person who conducts himself may also be committing other criminal offences.

A.19 Colin Nicholls QC strongly supported the continuing existence of a broad offence of this type:

> The prevalence and variety and forms of corruption particularly by those in public office is such that there is every reason why this offence should continue to be either in common law or on the statute book.

However, he stated that "each element is fundamental, each element lacks definition: they are out of control".

A.20 Gerard Elias QC agreed that "the case for the charge remains a strong one". He supported a very broad offence." However, as stated above, he did not share the concerns of many that the current uncertainties are significantly problematic.

A.21 Dr Alexander Williams[12] criticised the offence for giving juries the opportunity to make criminals of people they don't like. Gerard Elias disagreed:

> Yes, a jury may come to the conclusion because they don't like him - that is the fact of life. There is no certainty in criminal law. Juries take different views. This is not a reason not to prosecute. We must just put up with this if we are to have public office holders held accountable.

Radical reduction in criminalisation

A.22 Clare Montgomery QC was the key proponent of abolition of the current law because the offence "has simply expanded to fill areas where the criminal law has no business expanding without legislation". She suggested that the law should be reformed by creating specific, targeted offences to cover the types of conduct that really warranted criminal prosecution: "We need to decide what it is we want our public officials to stop doing and criminalise those. We can list breaches of duty we think deserve prison."

A.23 There was, however, some resistance to this approach. Professor Smith was concerned that in creating discrete offences "there are perils, especially with the complexity of some of the recent legislation – that gaps may be left in the law."

[12] Durham University.

The form a reformed offence should take

Who should be included in any new offence

A.24 All participants but one agreed that the "public office" element of the current law is fundamentally flawed.[13] This was the key element that concerned participants in relation to legal certainty requirements, outlined above.[14] However, no participants were able to offer an alternative definition of who a reformed offence should apply to.

A.25 Colin Nicholls QC suggested that public office should be defined according to functions and not just position.

A.26 Ray Marley made the valuable observation that the uncertainty may have resulted in misleading patterns in application of the law:

> One area in which it doesn't seem to be vague is in relation to police officers. Arguably, there have been a disproportionate amount of prosecutions of police officers because it is very clear that officers fall within the definition of the offence whereas not for other public officers.

THE RELEVANCE OF A "PUBLIC/PRIVATE DIVIDE"

A.27 The issue of a distinction between the public and private sectors was a key issue for discussion on our second panel, particularly in relation to the impact it may have on the definition of "public office". It was broadly concluded that any such distinction is becoming increasingly blurred and irrelevant.

A.28 Professor David Whyte stated that "you cannot avoid talking about private when discussing public sector. Private companies have encroached into public duties and functions" and that this is becoming progressively important as privatisation increases. Professor Whyte also suggested a number of factors that are relevant when considering the relevance of an organisation being "private" including whether it exercises monopoly powers, whether they receive substantial government funding and whether a breach of duty might be met by government funds. He suggested that the offence should apply to, for example, providers of utilities that used to be state owned.

A.29 David Prince added that surveys conducted by the Committee on Standards in Public Life support Professor Whyte's conclusions. Mr Prince stated that "with public services, public expectation is the same regardless of who is the delivering service. Trust and trustworthiness: effective communication as well as rigorous scrutiny is required".

A.30 Colin Nicholls QC and Dominic Grieve QC MP both agreed that the definition of public office should include private persons working in the public sector and vice versa.

A.31 Specific organisations or services that were suggested should be included regardless of whether they are run by a private company were:

[13] Gerard Elias QC did not, as explained above.

(1) Prisons (Dominic Grieve QC MP).

(2) Utility companies that were formerly state owned (Professor David Whyte).

(3) The health service, education and railways (Colin Nicholls QC).

What types of conduct should be included in any new offence

A.32 Two other issues that concerned participants were:

(1) How serious does a person's misconduct have to be to justify criminal sanction?

(2) Does a breach of any duty arising from a public office holder's position suffice or should criminal liability only apply to particular types of breach?

SERIOUSNESS

A.33 The current offence of misconduct in public office contains a threshold element. Conduct must be deemed serious enough to amount to an abuse of the public's trust in order for the offence to apply.

A.34 Ray Marley gave a specific example of the type of conduct that he felt it was important for the offence to cover:

> There is nothing more serious than a public officer who takes advantage of their position to have relationship with someone who is vulnerable. A lot of this hinges on how serious the offending is.

Mr Marley added that there is an "element of the public seeing justice done in those cases, in those circumstance, dismissal doesn't seem enough."

A.35 Rosemary Ainslie was particularly concerned about this element of the offence. She submitted that the most and least serious are clear cut but that the broad spectrum in between is where there is significant difficulty. Two examples:

(1) There is a death in a police cell where the prisoner is on observations and the custody officer watches videos but falsely records that observations were made when they were not and later the prisoner is found dead. This clearly warrants criminal prosecution.

(2) A detention officer who fills in a log for another detention officer. This is a breach of standards and code.

A.36 Sarah Green stated that "assessing standards against conduct is more of an art than a science. The top end is wilful or reckless serious abuse of power. At the opposite end of the spectrum are cases where an officer would need better training." Sarah went on to criticise the new police corruption offence under section 26 of the Criminal Justice and Courts Act 2015 for also failing to have an adequate seriousness threshold:

[14] See para A.8~~1.11~~ and following above.

> The new police corruption offence is anticipated to be as grey as misconduct in public office with respect to the relationship of criminal and disciplinary spheres. It could work to criminalise previously non-criminal conduct.

A.37 Lord Bew, Chair of the Committee on Standards in Public Life, indicated that it is difficult to draw a line between morality and breaking the law. Alice Irving[15] suggested it is important that the current law permits consequences to be taken into account here.

A.38 The issue of lack of legal certainty was also raised in relation to this element. A number of participants were particularly concerned about whether cases of disclosure of information that could be defined as "whistleblowing" should be deemed to meet this threshold. Colin Nicholls QC suggested that this is a very difficult question for a jury to answer but that it is within the decision making remit of the jury to decide that a disclosure did not cause public harm. There was disagreement as whether the following should be relevant when determining seriousness:

(1) "Diluting" or "putting a gloss" on official publications.[16]

(2) Whether the receipt of a payment for information is justified or could be relevant to the issue of harm to the public interest.[17]

A.39 It is particularly difficult to draw a line between conduct which should be dealt with as a disciplinary matter and that which truly warrants prosecution for a serious criminal offence. Sarah Green, Deputy Chair of the IPCC, provided insight into how these decisions are made by the IPCC.

> In a five year period from 1 April 2009, 19 cases of misconduct in public office were referred by the IPCC to the CPS. There were others referred and the CPS chose to charge misconduct in public instead of an alternative offence. From 12 charges of misconduct in public office, there were 11 convictions. 9 of which received custodial sentences ranging from 4 months' to 4 years' imprisonment. Others received suspended sentences, a fine or unpaid work. An example is an officer exploiting a female for personal gain. There was a case of a failure to respond to a cry for help where a disabled man was beaten to death after calling police. There are also cases of use of confidential information on the police system. Just over half of referrals were proceeded with by CPS. This is potentially due to the low threshold needed for referral relative to the CPS charging test. Further, there are new measures to stop an officer from retiring before a disciplinary hearing can take place. Misconduct has a corrosive effect on public confidence in the police.

[15] Lecturer at Lady Margaret Hall, University of Oxford.

[16] Liz Hartley did not think that this warranted application of the criminal law.

[17] Jamas Hodivala did not think that this should be determinative of the issue.

A.40 Colin Nicholls QC was of the view that the offence should be limited to breaches of a duty to perform a state function.

A.41 Gerard Elias QC supported a very broad offence: "I would criminalise wilful breach of duty/misconduct on part of office holder which a reasonable person thinks brings the office into disrepute." This would include conduct committed both within and outside of a public office holder's performance of such functions.

A.42 Jamas Hodivala referred to "acting as such" as a requirement that could potentially address this question.

A.43 Clare Montgomery QC was concerned that:

> Misconduct is worryingly wide, there is a lack of legal certainty. As long as you can say what happened looks like a breach of duty generally then it can be characterised as giving rise to breach of public duty.

The fault element

A.44 Those participants who specifically addressed the fault element agreed with our conclusion in the background paper that it is unprincipled for it to vary between wilfulness and dishonesty depending on the facts of a particular case.

A.45 However, there was little further consensus as to what the fault element should actually be in any new offence. Colin Nicholls QC, for example, felt that it should remain as "wilfulness" which is to be understood as deliberately or recklessly. However, Professor A T H Smith was of the view that "wilfulness has always been one of the most slippery of common law concepts".

Defences

A.46 The current law requires the offence to be committed without reasonable excuse or justification. Discussion relating to this aspect of the offence overlapped significantly with discussion of the seriousness threshold.

A.47 Liz Hartley, Head of Editorial Legal Services, Associated Newspapers Limited, argued for the importance of the freedom of the press and protection of journalistic sources in respect of allegations of misconduct by way of unauthorised disclosure of information. She proposed that: "If journalists will face prosecution, there must be a public interest defence. Journalists or people fulfilling conduct on behalf of the state should have this defence with the burden on the prosecution."

Other methods of ensuring accountability

A.48 Clare Montgomery also indicated that where this may create a perceived reduction in accountability, the corresponding civil tort of misfeasance in public office may be appropriate:

> It is much less objectionable to have a parallel broad civil remedy. You have to remember that broad criminal offences like this can capture too much, for example whistleblowers too could be captured. If it is capturing the good and the bad then the offence is too wide. It is down to the whim of the CPS to decide whether there is a reasonable excuse or justification. We need properly structured civil remedies.

A.49 In terms of alternative ways to address official misconduct, Lord Bew added that standards must be incorporated into organisations, and not just considered as an afterthought.

A.50 A number of other participants identified the issue of who should be held accountable where the root cause of a problem may be the wider culture of an organisation rather than the actions of a particular individual.

(1) David Prince, formerly of the Committee on Standards in Public Life: "The focus has moved from individual to the collective and the culture. There is more talk of systemic failures".

(2) Eleanor Hoggart, Lawyers in Local Government, felt that this was particularly important in relation to lack of legal certainty - "especially when the actual action might be by a junior person, but the culture of an organisation is the responsibility of seniors".

(3) Related to culture, Sarah Green, Deputy Chair of the IPCC, and Lord Bew both referenced the importance of good standards throughout an organisation to avoid misconduct occurring in the first place.

A.51 Eleanor Hoggatt indicated that she thought misconduct in public office had been of limited use in the arena of misconduct by members and employees of local authorities, but said that she would welcome a review of the codes of conduct applicable to the local authority sector in order to close potential loopholes.

A.52 However, a number of other delegates expressed concern that alternate modes of redress, for example, civil proceedings, internal disciplinary, regulatory or independent complaints procedures were insufficient to address serious allegations of misconduct. Barry Faith expressed the view that the expense of bringing civil proceedings is, by and large, prohibitive of individual victims of misconduct using that process. Daphne Havercroft highlighted that large numbers of complaints are brought every year against public bodies, which remain unresolved from the point of the view of the individual pursuing the issue.

A.53 Susan Gallagher, of Devonshires Solicitors, observed that having an independent complaints organisation, such as the IPCC, may be good practice to be applied across other sectors. Not everyone agreed on the efficacy of such organisations, as Della Reynolds, PHSO the facts pressure group, suggested this is only useful when independence is maintained between the independent body and the body itself.