Misconduct in Public Office

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Content

This guidance describes the legal elements of the offence of misconduct in public office and how to apply them. It provides charging advice indicating the factors to consider when deciding if it is appropriate to charge the offence.

Principle

Scope of the offence

Misconduct in public office is an offence at common law triable only on indictment. It carries a maximum sentence of life imprisonment. It is an offence confined to those who are public office holders and is committed when the office holder acts (or fails to act) in a way that constitutes a breach of the duties of that office.

The Court of Appeal has made it clear that the offence should be strictly confined. It can raise complex and sometimes sensitive issues. Area Prosecutors should therefore consider seeking the advice of the Director's Legal Advisor to resolve any uncertainty as to whether it would be appropriate to bring a prosecution for such an offence.

Policy

Where there is clear evidence of one or more statutory offences, they should usually form the basis of the case, with the 'public office' element being put forward as an aggravating factor for sentencing purposes.

The decision of the Court of Appeal in *Attorney General's Reference No 3 of 2003* [2004] EWCA Crim 868 does not go so far as to prohibit the use of misconduct in public office where there is a statutory offence available. There is, however, earlier authority for preferring the use of statutory offences over common law ones. In *R v Hall* (1891) 1 QB 747 the court held that where a statute creates (or recreates) a duty and prescribes a particular penalty for a wilful neglect of that duty 'the remedy by indictment is excluded'.

In *R v Rimmington, R v Goldstein* [2005] UKHL63 at paragraph 30 the House of Lords confirmed this approach, saying:

"…good practice and respect for the primacy of statute…require that conduct falling within the terms of a specific statutory provision should be prosecuted under that provision unless there is good reason for doing otherwise."

The use of the common law offence should therefore be limited to the following situations:

- Where there is no relevant statutory offence, but the behaviour or the circumstances are such that they should nevertheless be treated as criminal;
- Where there is a statutory offence, but it would be difficult or inappropriate to use it. This might arise because of evidential difficulties in proving the statutory offence in the particular circumstances; or because the maximum sentence for the statutory offence would be entirely insufficient for the seriousness of the misconduct.

Definition of the Offence

The elements of the offence are summarised in *Attorney General's Reference No 3 of 2003* [2004] EWCA Crim 868.

The offence is committed when:

- a public officer acting as such;
- wilfully neglects to perform his duty and/or wilfully misconducts himself;
- to such a degree as to amount to an abuse of the public's trust in the office holder;
- without reasonable excuse or justification.

A Public Officer

The prosecution must have evidence to show that the suspect is a 'public officer'. There is no simple definition and each case must be assessed individually, taking into account the nature of the role, the duties carried out and the level of public trust involved.

The courts have been reluctant to provide a detailed definition of a public officer. The case law contains an element of circularity, in that the cases tend to define a public officer as a person who carries out a public duty or has an office of trust. What may constitute a public duty or an office of trust must therefore be inferred from the facts of particular cases.

The judgment of Lord Mansfield in *R v Bembridge* (1783) 3 Doug KB 32 refers to a public officer having:

'… an office of trust concerning the public, especially if attended with profit ... by whomever and in whatever way the officer is appointed'.

It does not seem that the person concerned must be the holder of an 'office' in a narrow or technical sense. The authorities suggest that it is the nature of the duties and the level of public trust involved that are relevant, rather than the manner or nature of appointment.

In *R v Whitaker* (1914) KB 1283 the court said:

'A public office holder is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public.'

This approach was followed in a series of cases from other common law jurisdictions: *R v Williams* (1986) 39 WIR 129; *R v Sacks* [1943] SALR 413; *R v Boston* (1923) 33 CLR 386.

In *R v Dytham* (1979) 1 QB 723 Lord Widgery CJ talked of 'a public officer who has an obligation to perform a duty'.

Remuneration is a significant factor, but not an essential element. In *R v Belton* [2010] WLR (D) 283 the defendant was an unpaid voluntary member of the Independent Monitoring Board. The Court of Appeal held that remuneration was not an indispensable requirement for the holding of a public office, or for liability to prosecution for the offence of misconduct in a public office.

The fact that an individual was a volunteer might have a bearing on whether there had been wilful misconduct, but was only indicative, rather than determinative, of whether an individual held a public office.

The court in *Attorney General's Reference No 3 of 2003* [2004] EWCA Crim 868 referred to the unfairness that could arise where people who carry out similar duties may or may not be liable to prosecution depending on whether they can be defined as 'public officers'. What were once purely public functions are now frequently carried out by employees in private employment. An example is the role of the court security officer.

The court declined to define a public officer, however, but said:

'This potential unfairness adds weight, in our view, to the conclusion that the offence should be strictly confined but we do not propose to develop the point or to consider further the question of what, for present purposes, constitutes a public office.'

In *Cosford* [2013] EWCA Crim 466, [2014] QB 81, the court had to decide whether nurses working in a prison were public officers. Lord Justice Leveson concluded that they were public officers (whether directly employed by the prison service or by a private company contracting with the prison service). He held that the limit on the scope of who is a public officer should not be focused on the position held by the defendant, rather:

‘It should be addressed to the nature of the duty undertaken and, in particular, whether it is a public duty in the sense that it represents the fulfilment of one of the responsibilities of government such that the public have a significant interest in its

discharge extending beyond an interest in anyone who might be directly affected by a serious failure in the performance of the duty'.

In *Mitchell* [2014] EWCA Crim 318, [2014] 2 Cr App R 2 the Court of Appeal had to decide whether an ambulance paramedic was a public officer. Lord Justice Leveson stated the correct approach was to ask three questions:

'First, what was the position held? Second, what is the nature of the duties undertaken by the employee or officer in that position? Third, does the fulfilment of those duties represent the fulfilment of one of the responsibilities of government such that the public have a significant interest in the discharge of the duty which is additional to or beyond an interest in anyone who might be directly affected by a serious failure in the performance of that duty? If the answer to this last question is "yes", the relevant employee or officer is acting as a public officer; if "no", he or she is not acting as a public officer.'

The following have been accepted as holding a public office by the courts over several centuries:

- *Coroner* (1675) Parker 2 Lev 140
- *Constable* (1703) Wyatt 1 Salk 380
- *Accountant in the office of the Paymaster General* (1783) Bembridge 3 Doug
- K.B. 32
- *Justice of the Peace* (1791) Sainsbury 4 T.R 451
- *Executive or ministerial officer* (1819) R v Friar 1 Chit.Rep (KB) 702
- *Gaoler* (1827) Cope 6 A%E 226
- *Mayor or burgess* (1828) Henly v Mayor of Lyme 5 Bing 91
- *Magistrates Pinney* (1832) 110 ER 349
- *Overseer of the poor* (1891) Hall 1 QB 747
- *Army officer* (1914) Whitaker 10 Cr.App.R.245
- *County Court registrar (district judge)* (1968) Llewellyn-Jones 1 Q.B.429
- *Police officer* (1979) Dytham 69 Cr.App.R.387
- *Local authority employees* (1995) Bowden 4 All E.R 505
- *DVLA employees Att Gen's Ref (No 140 of 2004)* [2004] EWCA Crim 3525
- *Police Community Support Officer Amar Iqbal* [2008] EWCA Crim 2066
- Immigration officers *John-Ayo* [2009] 1 Cr App R (S) 71
- *Those in charge of police computer systems Gallagher* [2010] EWCA Crim 3201
- *Nurses working within a prison Cosford* [2014] QB 81

- *Church of England clergy James* (1850) 2 Den 1, 169 ER 393 though its authority was doubted in the unreported case of Ball (8 September 2015) in which Wilkie J ruled that a Church of England Bishop was a public office holder.
- *Local councillor* (2004) *R v Speechley* [2004] EWCA Crim 3067
- *Member of the Independent Monitoring Board for prisons* (2010) *R v Belton* [2010] EWCA Crim 2857

It is extremely difficult to extract from the cases any general identifying features of public officers in a contemporary context. A person may fall within the meaning of a 'public officer' where one or more of the following characteristics applies to a role or function that they exercise with respect to the public at large:

- Judicial or quasi-judicial
- Regulatory
- Punitive
- Coercive
- Investigative
- Representative (of the public at large)
- Responsibility for public funds

This list is not exhaustive and cannot be determinative of whether a person is properly described as a public officer, when acting in a particular capacity. The characteristics should be treated only as a guide and considered in the context of all the facts and circumstances of the particular case.

Wilful neglect or misconduct

Nature of the neglect or misconduct

The wilful neglect or misconduct can be the result of a positive act or a failure to act. In the case of ***R v Dytham*** [1979] QB 722, for example, a police officer was held to have been correctly convicted when he made no move to intervene during a disturbance in which a man was kicked to death.

There must also be an element of knowledge or at least recklessness about the way in which the duty is carried out or neglected. The test is a subjective one and the public officer must be aware that his/her behaviour is capable of being misconduct.

Meaning of 'wilful' (also see 'Breach of Duty')

In *Attorney General's Reference No 3 of 2003* the court approved the definition of 'wilful' as ‘deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not'.

In *R v G* [2003] UK HL 50 Lord Bingham said with respect to inadvertence:

“It is clearly blameworthy to take an obvious and significant risk of causing injury to another. But it is not clearly blameworthy to do something involving a risk of injury to another … if one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment.”

Lord Steyn added:

“… the stronger the objective indications of risk, the more difficult it will be for defendants to repel the conclusion that they must have known.” (*R v G* [2003] UK HL 50)

- ## Abuse of the public’s trust

Public officers carry out their duties for the benefit of the public as a whole. If they neglect or misconduct themselves in the course of those duties this may lead to a breach or abuse of the public's trust.

- ## Seriousness of the neglect or misconduct

The behaviour must be serious enough to amount to an abuse of the public's trust in the office holder. In *R v Dytham*, Lord Widgery said that 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.”

In *Attorney General's Reference No 3 of 2003* the court said that the misconduct must amount to:

“… an affront to the standing of the public office held. The threshold is a high one requiring conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder.”

In *Chapman* [2015] 2 Cr App R 10, the Lord Chief Justice stated that the judge in summing up had to make clear that the necessary conduct was not simply a breach of duty or a breach of trust:

“It is not in our view sufficient simply to tell the jury that the conduct must be so serious as to amount to an abuse of the public’s trust in the office holder, as such a direction gives them no assistance on how to determine that level of seriousness. There are, we consider, two ways that the jury might be assisted in determining whether the misconduct is so serious. The first is to refer the jury to the need for them to reach a judgment that the misconduct is worthy of condemnation and punishment. The second is to refer them to the requirement that the misconduct must be judged by them as having the effect of harming the public interest.”

- ## Consequences

Although the offence is not a ‘results crime’, the likely consequences of any wilful neglect or misconduct are relevant when deciding whether the conduct falls below the standard expected:

“It will normally be necessary to consider the likely consequences of the breach in deciding whether the conduct falls so far below the standard of conduct to be expected of the officer as to constitute the offence. The conduct cannot be considered in a vacuum: the consequences likely to follow from it, viewed subjectively … will often influence the decision as to whether the conduct amounted to an abuse of the public's trust in the officer. (Attorney General's Reference No 3 of 2003).”

Whilst there is no need to prove any particular consequences flowing from the misconduct, it must be proved that the defendant was reckless not just as to the legality of his behaviour, but also as to its likely consequences.

The consequences must be likely ones, as viewed subjectively by the defendant. Although the authorities do not say so, likely can probably be taken to mean at the very least 'reasonably foreseeable'; it is arguable that likely may mean 'probable' in this context.

- ## Motive

In order to establish whether the behaviour is sufficiently serious to amount to the offence, the officer's motive is also relevant:

“… the question has always been, not whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive, or corrupt motive, under which description, fear and favour may generally be included, or from mistake or error …

“To punish as a criminal any person who, in the gratuitous exercise of a public trust, may have fallen into error or mistake belongs only to the despotic ruler of an enslaved people, and is wholly abhorrent from the jurisprudence of this kingdom.”

(*R v Borron* [1820] 3 B&Ald 432: Abbott CJ, at page 434.)

At its highest the motive may be malice or bad faith but they are not prerequisites. Reckless indifference would be sufficient.

Without reasonable excuse or justification

It is not necessary for the prosecution to prove the absence of a reasonable excuse or justification, although the nature of the prosecution evidence should in practice negate any such element.;

The defendant may advance evidence of a reasonable excuse or justification. It is for the jury to determine whether the evidence reveals the necessary culpability.

Charging Practice

General principles

Where there is clear evidence of one or more statutory offences, they should usually form the basis of the case, provided the offences give the court adequate sentencing powers. The 'public office’ element can be put forward as an aggravating factor for sentencing purposes.

A comparison may be made with charges of perverting the course of justice. In *R v Sookoo* (2002) EWCA Crim 800 the Court of Appeal held that adding a charge of attempting to pervert the course of justice along with counts for the principal offence or offences was only appropriate where a case had serious aggravating features (such as wasted police time and resources or detention of members of the public following false implication of them in the offence by the accused).

Similar reasoning should apply to the charging of misconduct in public office. When charging such an offence the prosecutor should provide a detailed review note of the reasons for doing so in the particular case. The note should make reference to any relevant factors referred to in this guidance, particularly where a statutory offence covering the behaviour in question is either charged or could have been charged.

For example an assault by a police officer committed on duty should not automatically be considered as misconduct in public office. A charge of assault would normally provide the court with adequate sentencing powers and the ability to take into account the breach of trust by the officer as an aggravating factor. See *R v Dunn* (2003) 2 Cr.App.R.(S).

Similarly, prosecutions for unauthorised access to or use of computer or other data systems should normally be conducted using the specific offence provided in section 55 Data Protection Act 1998. Only where the circumstances are such that a fine would not be an appropriate or sufficient penalty should a prosecution for misconduct in public office be considered.

Misconduct in public office should be considered only where:

- there is no suitable statutory offence for serious misconduct (such as a serious breach of or neglect of a public duty that is not in itself a criminal offence);
- there was serious misconduct or a deliberate failure to perform a duty owed to the public, with serious potential or actual consequences for the public;
- the facts are so serious that the court's sentencing powers would otherwise be inadequate.

Level of misconduct required

The offence is, in essence, one of abuse of the power or responsibilities of the office held. Misconduct in public office should be used for serious examples of misconduct when there is no appropriate statutory offence that would adequately describe the nature of the misconduct or give the court adequate sentencing powers.

The third element of the definition of the offence provides an important test when deciding whether to proceed with an offence of misconduct in public office. Unless the misconduct in question amounts to such an abuse of trust, a prosecution for misconduct in public office should not be considered.

The 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' (*R v Dytham 1979* QB 722).

The fact that a public officer has acted in a way that is in breach of his or her duties, or which might expose him/her to disciplinary proceedings, is not in itself enough to constitute the offence.

Examples of behaviour that have in the past fallen within the offence include:

- wilful excesses of official authority;
- 'malicious' exercises of official authority;
- wilful neglect of a public duty;
- intentional infliction of bodily harm, imprisonment, or other injury upon a person;
- frauds and deceits.

Breaches of duty

Some of the most difficult cases involve breaches of public duty that do not involve dishonesty or corruption.

In all cases involving breach of duty, the following matters should be considered:

Was there a breach of a duty owed to the public (not merely an employment duty or a general duty of care)?

- Was the breach more than merely negligent or attributable to incompetence or a mistake (even a serious one)?
- Regard must be had to motive.

In considering whether the neglect or misconduct was wilful, the following issues should be addressed:

- Did the defendant have a subjective awareness of a duty to act or subjective recklessness as to the existence of a duty?
- Did the defendant have a subjective awareness that the action or omission might be unlawful?
- Did the defendant have a subjective awareness of the likely consequences of the action or omission?
- Did the officer realise (subjective test) that there was a risk not only that his or her conduct was unlawful but also a risk that the consequences of that behaviour would occur?
- Were those consequences ‘likely’ as viewed subjectively by the defendant?

- Did the officer realise that those consequences were ‘likely’ and yet went on to take the risk?

Dishonesty or corruption

Dishonesty or corrupt behaviour are not essential elements of the offence of misconduct in public office.

If, however, an allegation of misconduct in public office arises from circumstances involving the acquisition of property by theft or fraud, or where the holder of a public office is alleged to have made improper claims for public funds in circumstances said to be criminal, an essential ingredient of the offence is proof that the defendant was dishonest.

In *R v W* [2010] EWCA 372, a police officer used an official credit card for personal purchases. The Court of Appeal held that an essential ingredient of the offence of misconduct in public office in such circumstances was that the defendant was dishonest, and had not merely flagrantly broken the rules governing the use of the card.

When the allegation does involve the acquisition of property by theft or fraud, any misconduct should normally be prosecuted using appropriate statutory offences on the basis that an appropriate statutory offence should always be used where available in accordance with R v Rimmington, *R v Goldstein* [2005] UKHL63. (See Policy). The fact that the offence was committed in the course of a public office is an aggravating element.

Cases involving a death in police custody

A charge of Misconduct in Public Office should never be added routinely as a lesser alternative to a charge of manslaughter by gross negligence for the purpose of catering for the possibility that a jury might conclude it cannot be sure that the breach of duty [amounting to gross negligence] caused death. The legal elements of a misconduct charge must be carefully and separately considered. A gross breach of duty is not the same as the neglect/misconduct threshold required to prove a charge of misconduct.

AG Ref 1993 concerned an allegation that police officers failed to reposition a detainee in police detention, ensuring his airways were clear, and failed to summon

medical help. During the course of its judgement the Court of Appeal observed [at Para 64] that:

"*While this is not intended as a comment upon the present case, it will be clear from what we have said that we do not consider that, in future, in circumstances such as the present, a charge of misconduct in public office should* ***routinely be added****, as an alternative, to a charge of manslaughter by gross negligence on the basis that it may be difficult to establish causation. This offence is quite different from manslaughter and, as appears from the authorities, different considerations apply when considering whether to allege it".*

Please see the guidance on deaths in custody for further information.

Useful Links

Archbold 25-381

Attorney General's Reference No 3 of 2003 [2004] EWCA 868

R v Bembridge (1783) 3 Doug KB 32

R v Whitaker (1914) KB 1283

R v Williams (1986) 39 WIR 129

R v Sacks (1943) SALR 413;

R v Boston (1923) 33 CLR 386.

R v Dytham (1979) 1 QB 723

R v W (2010) EWCA 372

R v G (2003) UK HL 50

R v Borron (1820) 3 B&Ald 432

R v Dunn (2003) 2 Cr.App.R.(S)

R v Sookoo (2002) EWCA Crim 800