



Bar Council & Criminal Bar Association response to the Law Commission Consultation 'Reforming Misconduct in Public Office' consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) and the Criminal Bar Association ("CBA") to the Law Commission consultation paper entitled "Reforming Misconduct in Public Office".¹
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.
4. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.
5. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.
6. The CBA is the largest specialist Bar association, with over 4,000 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are

¹ Law Commission Consultation Paper 229 "Reforming Misconduct in Public Office A Consultation Paper" 5 September 2016

in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

Overview

7. The Law Commission's consultation paper is thoroughly researched and identifies pragmatic reforms, which would clarify the offence of misconduct in public office ("MIPO"). In general, we are in favour of the proposals and the benefits of codifying this area of law. Where we agree with the Law Commission's proposals we simply say so and do not amplify or rehearse the arguments in favour.

8. There is one area on which we were unable to reach agreement. Question 26 proposes that the new MIPO offence would exclude the requirement to consider whether a defendant acted "without reasonable excuse or justification". It was not possible to form a consensus within the Bar Council or CBA as to whether, in effect, "reasonable excuse or justification" should be available as a defence to any new offence. Both the Bar Council and the CBA endeavour to represent the views of their members, and in view of the conflicting approach within the committees we have set out the competing arguments and raised examples to illustrate how and why the retention of the defence may be thought necessary.

Chapter 4: Law Reform Options: Public Office

Consultation Question 1: For the purposes of a reformed offence or offences to replace misconduct in public office, should "public office" be defined in terms of:

(1) a position involving a public function exercised pursuant to a state or public power; or

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

9. We agree with provisional proposal 2 that "public office" should not be restricted to an institutional or employment link to the state or a state function. We agree that (1) or (2) are better options which focus upon public function.

10. Our preference is a definition of "public office" that is not limited to state or public power but is sufficiently broad to encompass a public function where there is a duty to act in the public's trust. Therefore (2) is preferred.

Consultation question 3: For the purpose of a reform offence or offences to replace misconduct in public office, should the statutory definition of public office take the form of:

(1) A general definition;

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

(3) A list of positions constitution a public office; or

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

11. For the reasons outlined in the consultation paper and primarily to achieve sufficient legal certainty and flexibility to encompass changing public functions we prefer (4). We consider that a non-exhaustive list of functions and positions could supplement the general definition.

Consultation question 4: If the definition of public office includes a list of functions or positions, should there be power to add to the list by order to subject to the affirmative resolution procedure?

12. Yes. We agree with provisional proposals 5-7.

Consultation question 8: Should the category of public office holders under a particular duty concerned with the prevention of harm be defined to include those public office holders with a duty of protection in respect of vulnerable individuals (whether or not it also includes any other public office holders)?

13. Yes.

Consultation question 9: Should the category of vulnerable individuals be defined:

In the same way as in the Safeguarding Vulnerable Groups Act 2006; or

In some other way, and if so, what way?

14. We agree that categorisation in accordance with the SVG Act 2006 is appropriate.

Consultation question 10: Should the offence be defined to include the breach of every legally enforceable duty to prevent (or not to cause) relevant types of harm, or should there be a more restricted definition of the nature of the duty involved?

15. In view of the suggestion that the offence be limited to types of harm we consider that all legally enforceable duties designed to prevent (or not to cause) those types of harm should be included.

16. We agree with proposal 11.

Consultation question 12: Should the definition of the category of public office holders with powers or physical coercion take the form of:

- (1) A general definition;
- (2) A definition of that type of public office as any position involving one or more of the functions contained in a list;
- (3) A list of positions constituting that type of public office; or
- (4) A general definition, supplemented by a non-exhaustive list of functions or positions given by way of example?

17. We prefer a general definition, supplemented by a non-exhaustive list of functions or positions to achieve sufficient level of certainty and flexibility.

Consultation question 13: If the definition of that category (public office holders with powers of physical coercion) includes a list of functions or positions, should there be power to add to the list by order?

18. Yes.

Consultation question 14: Should the definition of the category of public office holders with a duty of protection take the form of:

- (1) A general definition;
- (2) A definition of that type of public office as any position involving one or more of the functions contained in a list;
- (3) A list of positions constituting that type of public office; or
- (4) A general definition, supplemented by a non-exhaustive list of functions or positions given by way of example?

19. We prefer Option 4. This approach would bring clarity in relation to positions that would clearly fall within the definition – for example police officers, whose positions could be listed – while allowing for a degree of flexibility to cater for the possibility that important public offices have been missed. The burden would be on the prosecution to demonstrate in each case where a position was not listed that the position or the functions exercised did indeed give rise to a duty of protection.

Consultation question 15: If the definition of that category (of public office holders with a duty of protection) includes a list of functions or positions, should there be power to add to the list by order?

20. Yes.

Provisional proposal 16: There should be no requirement on the prosecution to prove that D knew that his or her position was, in law, a public office involving the exercise of powers of physical coercion or a duty of protection. It is sufficient for the prosecution to establish that D was aware of the factual circumstances that made it one.

21. We agree. It is unlikely that there would be many cases in which D would be aware of such factual circumstances and yet unaware that the position was a public office involving the exercise of such powers / giving rise to a duty of protection.

Provisional proposal 17: There should be a requirement that D is aware of any circumstances relevant to the content of any duties of his or her office concerned with the prevention of harm. For example, what types of harm the duties require D to prevent and in what circumstances?

22. We agree. The prosecution should be required to prove knowledge of the relevant facts (e.g. the scope of his duties), but not the law (as noted in connection with the previous proposal).

Provisional proposal 18: The offence should include both actual and potential consequences.

23. We agree.

Provisional proposal 19: The risk of the following two types of consequence:

**(1) death and serious injury (including both physical and psychiatric harm);
and
(2) false imprisonment;
should be regarded as public harm for the purposes of the offence.**

24. We agree.

Consultation question 20: Should the risk of serious harm to public order and safety be regarded as public harm for the purposes of the offence?

25. Yes. The scope of the proposed new offence might encompass, for example, the role of an official charged with managing stewarding and crowd control at an international football match at Wembley, where there was a risk to public safety from, say, clashing sets of fans or a terror attack.

Consultation question 21: Should the risk of serious harm to the administration of justice should be regarded as a consequence that would be likely to cause a risk of public harm occurring for the purposes of the offence?

26. Yes. The proper administration of justice is one of the most fundamental responsibilities of relevant public office-holders, and failing to prevent the risk of harm to this is generally (and rightly) viewed with seriousness by the public.

Consultation question 22: Should the risk of serious harm to property should be regarded as a consequence that would be likely to cause a risk of public harm occurring for the purposes of the offence?

27. Yes.

Consultation question 23: Should the risk of serious economic loss be regarded as a consequence that would be likely to cause a risk of public harm occurring for the purposes of the offence

28. Yes. While much of the misconduct that might be caught by the new offence could fall within the Fraud Act 2006 (specifically fraud by abuse of position) it would be worth retaining the wider offence of misconduct in public office to cater for situations in which the misconduct falls short of fraud.

Provisional proposal 24: Liability should only be imposed where a risk of serious consequences arises.

29. We agree.

Chapter 5: Law Reform Options – Option 1: The breach of duty model

Q25 (paras. 5.183-5.204) The fault element of the offence should include recklessness as to the risk of specified consequence as defined above [death and serious injury (including both physical and psychiatric harm) and false imprisonment]. The offence should not contain an ulterior intent element.

30. We agree.

Q26 (paras. 5.205-5.213) The offence should exclude the element of “without reasonable excuse or justification” but retain the availability of relevant common law defences where it is prosecuted.

31. It was not possible to reach agreement on this proposal. The breach of duty model seeks to criminalise conduct that a public office holder should not engage in and includes as a qualifying condition that when engaging in that behaviour they foresee a risk of serious harm. Serious harm is provisionally proposed to be restricted to death, serious physical or psychiatric injury, false imprisonment, serious harm to public order and safety or serious harm to the administration of justice. For public policy reasons, there is merit in removing any defence of “*reasonable excuse or justification*” from a public office holder who has breached their duty, leading to a risk of serious harm while being subjectively reckless as to that risk.

Arguably the law should not protect a public officer holder who foresaw a risk of serious harm but nonetheless went on to breach their public duty. Moreover, were the foreseeable risks of the breach of duty prosecuted as substantive offences the defence of “reasonable excuse” would not be available.² Therefore, the narrowing of the proposed offence of MIPO from its present scope would, in most cases, protect the public office holder and render a defence of “without reasonable excuse or justification” redundant.

32. However, in support of including such a defence we considered examples which could still be captured by the new proposed offence and would potentially merit the jury considering whether the defendant had a reasonable excuse.

33. We can envisage factual scenarios where the public would consider that the conduct was justified/excusable but that a properly directed jury could not find that a defence of self-defence / prevention of crime / duress etc. was open to the defendant. In those circumstances, we find that there may be merit in a reasonable excuse defence.

34. One example is the case of Betina Jordan-Barber. Ms Jordan-Barber was employed by the Ministry of Defence as a strategist, and leaked to Sun journalists the shortage of military equipment for UK troops deployed in Afghanistan, for which she was paid £100,000. Ms Jordan-Barber pleaded guilty to misconduct in public office and was sentenced to 12 months’ imprisonment. A public office holder who leaked information about military shortages could fall within the definition of MIPO proposed in this consultation: in disclosing the information there is a clear and foreseeable risk of serious harm (death / serious injury) befalling active soldiers. The motivation for the disclosure (i.e. that it was in the public interest and in a wider sense was intended to protect, rather than to harm, the troops) might be regarded by a jury as a “reasonable excuse or justification”, whereas under the current proposals it would not appear that any defence would be available.

35. It difficult for the legislature to predict all the behaviour which could be justified but still meet the criteria set out in the breach of duty model.

36. It is therefore the rare and unforeseen cases, which may justify the inclusion of the defence as a safety valve. The defence could be included to permit the jury to consider whether a defendant’s actions (which amounted to a breach of duty leading to a risk of serious harm) were still justified.

Q27 (paras. 5.214-5.220) Should an offence of breach of duty by a public office holder (subject to a particular duty concerned with the prevention of harm, as described in the foregoing provisional proposals) be introduced?

² E.g. Death & Serious Injury and False Imprisonment – Offences Against the Person Act 1861; Serious Harm to Public Order – Public Order Act 1986.

37. Yes.

Chapter 6: Law Reform Options – Option 2: The Corruption Based Model

Q28 (paras. 6.1-6.50) The offence should address the following conduct:

(1) D commits the offence if he or she abuses his or her position, power or authority.

(2) That is to say, if:

(a) he or she exercises that position, power or authority for the purpose of achieving:

(i) a benefit for himself or herself; or

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

(b) the exercise of that power, position or authority for that purpose was seriously improper.

38. We agree.

Q29 (paras. 6.51-6.59) The offence should apply to all public office holders, without further restriction.

39. We agree.

Q.30 (paras. 6.60-6.63) The offence should not include a requirement that the public office holder, as well as being aware of the circumstances which determine that the position in question is a public office, was also aware that his or her position was, in law, considered to be a public office.

40. We agree.

Q.31 (paras. 6.64-6.82) The fault element of the offence should include the purpose of achieving an advantage for the office holder or another or a detriment to another. There should be no additional requirement of awareness that acting with that purpose was seriously improper.

41. We agree.

Q.32 (paras. 6.83-6.89) Common law defences should apply. There should not be further defences.

42. We agree.

Q.33 (paras. 6.90-6.96) Should a corruption based model of offence, applying to public officials, as described in the foregoing provisional proposals, be introduced?

43. Yes.

Q.34 (paras. 6.90-6.97) If such an offence is introduced should it be introduced on its own or in conjunction with the proposed offence described in Option 1?

44. In conjunction – it addresses different conduct and such conduct should be criminal.

Chapter 7: Law Reform Options – Option 3: Abolition Without Replacement

Q35 (paras. 7.1-7.48) The offence of misconduct in public office should not be abolished without any new offence being introduced to replace it.

45. We agree.

Chapter 8: Complementary Legal Reforms

Q36 (paras. 8.1-8.14) Should reform of the sexual offences regime be considered, in respect of: (1) obtaining sex by improper pressure; and/or (2) sexual exploitation of a vulnerable person.

46. Yes. This issue has been brought into renewed focus in the Undercover Policing Inquiry.

Q37 (paras. 8.15-8.32) Do consultees agree that whether the fact that a defendant is in public office should be treated as an aggravating factor for the purposes of sentencing any criminal offence should remain a matter of judicial discretion in each case (rather than being set out in sentencing guidelines or in statute)?

47. Yes, considering the evidence in Appendix D.

Bar Council

Criminal Bar Association

7 December 2016

For further information please contact:

*Natalie Darby, Policy Analyst
The General Council of the Bar of England and Wales
289-293 High Holborn,
London WC1V 7HZ
Email: NDarby@BarCouncil.org.uk*