MISCONDUCT IN PUBLIC OFFICE: IN THE SPOTLIGHT

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WHY IS THIS OFFENCE BACK IN THE SPOTLIGHT?

The recent police investigations into high-profile individuals, including Peter Mandelson and Andrew Mountbatten-Windsor, have centred around the offence of misconduct in public office. In this article we discuss the offence, its interplay with other offences and disciplinary processes, as well as the UK government's determination to broaden measures for accountability for those that hold positions in public office.

UNDERSTANDING THE OFFENCE: WHAT HAPPENS?

There are numerous ingredients that must be demonstrated to prove that an offence of misconduct in a public office has been committed.

Misconduct in public office is a common law offence in England and Wales, developed through caselaw. The elements of the offence, as set out in *Attorney General's Reference (No 3 of 2003) [2004] EWCA Crim 868*, are as follows:

1. The individual is a public officer acting as such.
2. The individual wilfully neglects to perform his or her duty and/or wilfully misconducts himself or herself.
3. The conduct is to such a degree that it amounts to an abuse of the public's trust in the office holder.
4. The conduct is without reasonable excuse or justification.

Except for in exceptional circumstances, the seriousness of the offence and strong public interest in deterrence mean that convictions for misconduct in public office typically result in an immediate custodial sentence. The maximum sentence is life imprisonment, though sentences imposed to date have generally been lower.

Acting as a Public Officer

The offence can be committed by a “public officer” who is “acting” in the course of his or her public duties. Whether someone is a public officer will be assessed on a case-by-case basis, considering his or her position, the nature of his or her duties, and whether the fulfilment of those duties represents the fulfilment of one of the responsibilities of government such that the public has significant interest in the discharge of the duty.[1] Previously, public officers have included elected officials, civil servants, police constables and prison staff.

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The “acting as” is an important element of this offence. There must be a close connection between the public officer's duties and the alleged misconduct—it is not sufficient to simply be acting whilst a public official.[2]

Wilful Neglect to Perform His or Her Duty or Wilful Misconduct

The offence requires “wilful” conduct. It must involve a positive act or an omission by the duty holder, and this must be done deliberately knowing it to be wrong or with reckless indifference as to whether it was wrong or not. For example, a prison officer passing information to journalists for payment[3] or a police officer taking no action to intervene during a disturbance in which an individual was fatally injured.[4]

Abuse of the Public's Trust

The evidential threshold for abuse of public trust is high: the conduct must represent a serious departure from proper standards and an affront to the standing of the office, warranting criminal punishment rather than disciplinary action. It is a matter for a jury to determine whether the threshold has been met.

Each case will be determined on its facts, but by way of illustration, previous cases have considered the following:

- How egregious was the abuse of power? Did the wilful misconduct or breach of a duty have the effect of benefitting the wider public interest rather than being damaging to it?[5]
- Did the conduct harm the public interest or undermine public trust? For example, if the suspects objectivity was compromised or they were exposed to a conflict of interest.[6]

This element of the offence can cause difficulties during any prosecution, which, as discussed further below, may lead to alternative routes to accountability.

Without Reasonable Excuse or Justification

The defendant may seek to argue that there was a reasonable excuse or justification for the misconduct; however, it is not necessary for the prosecution to prove the absence of a reasonable excuse or justification.

ROUTES TO ACCOUNTABILITY: CRIMINAL OR DISCIPLINARY?

Historically, disciplinary measures—such as pursuing breaches of the Ministerial Code—have proved more effective than criminal prosecution for suspected misconduct by government ministers given the high evidential burden required for misconduct in public office. The Ministerial Code applies to all government ministers and broadly sets out how each government should function, including propriety, ethics and the separation between public and private interests. It is at the prime minister's discretion to determine how alleged breaches should be investigated, often leading to investigation by the Independent Adviser on Ministerial Interests (the Individual Adviser) or the cabinet secretary. As of November 2024, the Independent Adviser has power to initiate his or her own investigations into potential breaches.

Breaches of the Ministerial Code can lead to dismissal or resignation for more serious breaches or a public apology, remedial action or removal of salary. In October 2022, Suella Braverman resigned from the UK government following a breach of the Ministerial Code after sending a draft written ministerial statement from a personal email to a colleague outside government in contravention of the rules.

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WHAT IS CHANGING: THE UK GOVERNMENT'S STEPS FOR ACCOUNTABILITY

On 9 February 2026, Chief Secretary to the Prime Minister Darren Jones MP highlighted immediate steps that the UK government will take in the wake of information released by the US Department of Justice about Peter Mandelson's relationship with Jeffrey Epstein. One of these steps includes the passage of the Public Office (Accountability) Bill (the Bill) through Parliament, which was introduced following calls for greater accountability following high-profile scandals, such as the Hillsborough disaster. The Bill will abolish the common law offence of misconduct in public office and replace it with two statutory offences. The first is “seriously improper” acts by a person who holds public office to obtain a benefit or to cause another person to suffer a detriment, knowing his or her behaviour is seriously improper. The second offence is a breach of duty to prevent death or serious injury by a person in public office.

Whilst the Bill will not impact misconduct in a public office investigation into historic actions involving public individuals associated with Jeffrey Epstein, it remains to be seen what future action will be taken to maintain public trust in those holding public office.

The firm is well positioned to advise on both criminal investigations and wider disciplinary action against those in public office, with an established White Collar Defence and Investigation practice group and an established Public Policy and Law practice group. The authors listed above lead these efforts from the London office.

FOOTNOTES

[1] Mitchell [2014] EWCA Crim 318.

[2] R (on the application of Johnson) v Westminster Magistrates Court [2019] EWHC 1709 (Admin).

[3] Norman [2016] EWCA Crim 1564.

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

[5] Chapman [2015] EWCA Crim 539.

[6] Cosford [2013] EWCA Crim 466.

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