Misconduct in public office

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Author: Lucinda Maer
Section Parliament and Constitution Centre

This Note briefly sets out the history of the common law offence of 'misconduct in public office'. It looks at recent use of the offence in prosecutions and considers proposals to place the offence on a statutory footing.

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1 Misconduct in public office - historical background

Misconduct in public office is a common law offence. The offence is said to date back to the case of *R v Bembridge* in 1783. The defendant in this case was an accountant in the office of the Receiver and Paymaster General of the Forces. He was accused of corruptly concealing from his superior his knowledge that certain sums of money had been omitted in the final accounts. The judge in the case, Lord Mansfield QC, stated:

> The duty of the defendant is obvious; he was a trustee of the public and the Paymaster, for making every charge and every allowance he knew of… if the defendant knew of the omission… and if he concealed it, his motive must have been corrupt. That he did know was fully proved, and he was guilty, therefore, not of an omission or neglect, but of a gross deceit. The object could only have been to defraud the public of the whole, or part of the interest…a man accepting an office of trust, concerning the public, especially if attended which profit, is answerable criminally to the King for misbehaviour in his office; this is true by whomever and in whatever way the officer is appointed.

However, as pointed out in the book *Corruption and Misuse of Public Office*:

> …even before *Bembridge,* the common law sought to criminalize the public officer who had the benefit of the privileged position of occupying a public office, but who failed to discharge his duties truly competently and for the public good. Thus, a constable who failed to act in accordance with his duty as an officer of the Crown was criminally liable in *Makally's Case (1611)* whilst in *Crouther's Case (1600)* a constable was prosecuted having refused to make a 'hue and cry' after being informed of a burglary.[1]

2 The offence today

Details of the offence are set out in November 2007 guidance from the Crown Prosecution Service (CPS):

> **Principles**
>
> The elements of misconduct in public office are:
>
> a) A public officer acting as such.
>
> b) Wilfully neglects to perform his duty and/or wilfully misconducts himself.
>
> c) To such a degree as to amount to an abuse of the public's trust in the office holder.
>
> d) Without reasonable excuse or justification.
>
> **Who is a Public Officer?**
>
> In **Attorney General's Reference No. 3 of 2003 [2004] EWCA 868**, it was put to the Court of Appeal, but not argued as part of the substantive appeal, that public functions are now frequently carried out by employees in private employment, e.g. security at courts and transport of prisoners, and that it was unfair and illogical if those holding public office, such as police officers, were to be liable to conviction of an offence not applicable to private employees doing similar work.
>
> Having not heard argument on the point, this may present problems of definition", which they declined to elaborate upon.

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[1] Colin Nicholls QC et al, *Corruption and Misuse of Public Office,* 2006, p66

the Court stated as follows (Para 62):

"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."
So who holds a public office and as a result can be guilty of this offence? According to the Court of Appeal, which quoted from the earlier authorities, it requires that the defendant "must be a public officer acting as such .... There must be a breach of duty by the officer, [which is wilful and which is such that the conduct is] 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" (Para 56). And later, quoting from the case of **Bembridge [(1783) 3 Doug KB 32]**, "those who hold public office carry out their duties for the benefit of the public as a whole and, if they abuse their office, there is a breach of the public's trust" (Para 57).

Charging Practice

Like perverting the course of justice, misconduct in public office covers a wide range of conduct. It should always be remembered that it is a very serious, indictable only offence carrying a maximum sentence of life imprisonment. A charge of misconduct in public office should be reserved for cases of serious misconduct or deliberate failure to perform a duty which is likely to injure the public interest.

Before deciding to proceed with a charge of misconduct in public office you should consider whether the acts complained of can properly be dealt with by any available statutory offence. If the seriousness of the offence can properly be reflected in any other charge, which would provide the court with adequate sentencing powers, and permit a proper presentation of the case as a whole, that other charge should be used unless:

- the facts are so serious that the court's sentencing powers would be inadequate; or
- it would ensure the better presentation of the case as a whole; for example, a co-defendant has been charged with an indictable offence and the statutory offence is summary only.

In **R v Sookoo (2002) TLR 10/4/02** the Court cautioned against adding a count of perverting the course of justice when the conduct could properly be treated as an aggravating feature of a statutory offence. Similar reasoning should be applied to the charging of misconduct in public office. So for example, an assault by a police officer committed while on duty could also arguably be misconduct in public office, but the appropriate assault charge would 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)**].[2]

There is also a tort of misfeasance in public office, which is a civil wrong. This has been defined in the leading case of *Three Rivers D.C. v Bank of England (no 3).*[3] Lord Steyn explained that there were two different forms of the tort:

First there is the case of targeted malice by a public officer i.e. conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act

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2 http://www.cps.gov.uk/legal/l_to_o/misconduct_in_public_office/index.html
3 [2000] 2 W.L.R. 1220

> complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful.[4]

In such a civil case, a person injured by the action would need to begin proceedings. *Archbold 2008* notes the Attorney General case of 2004 where it was held that the tort is committed by a public officer acting as such who wilfully neglects to perform his duty or wilfully misconducts himself to such a degree as to amount to an abuse in the public's trust in the office holder. However, the court noted that the threshold was high.[5]

3 Proposals for a statutory offence

In 1997 the Committee on Standards in Public Life recommended a statutory offence be created, partially to replace the proposed abolition of surcharge in local government:

> 15. A common law offence of 'misconduct in a public office' exists at present, and prosecutions are still undertaken from time to time. We believe that the new statutory offence should be developed from the common law offence.
>
> 16. Discussing the common law offence in its consultation paper on corruption, the Law Commission described it as 'wide-ranging and ill-defined'. It appears to be treated as a general description of a series of reprehensible acts or omissions by those exercising authority. These acts may involve dishonesty, in which case prosecutions for theft or corruption might also occur, or they may not. Dishonesty is not an essential component of misconduct in a public office.
>
> 17. Misuse of public office can arise both as a result of actions taken and of failing to act. For example, in **R v Dytham** [1979] QB 722 a police officer was prosecuted for failing to intervene to quell a disturbance in which a man was beaten to death outside a night-club. The Lord Chief Justice, reviewing the common law offence, explained that the neglect of duty must be wilful and not merely inadvertent, and that it must be culpable in the sense that it was without reasonable excuse or justification. The Lord Chief Justice went on to explain that the element of culpability had to be 'of such degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment.' Whether such a situation was revealed was a matter for the jury, and the Lord Chief Justice considered that this burden was no heavier than that of considering whether driving is dangerous or a publication obscene.
>
> 18. The unifying factor of the common law cases appears to be the existence of some improper, dishonest or oppressive motive in the exercise or refusal to exercise some public function, rather than a mere abuse of power. There are few prosecutions, suggesting that action is taken only when misconduct is particularly gross. The advantage of creating a statutory offence of misuse of public office would be that some clearer indication could be given in the statute of the circumstances in which an offence might occur. The limits should not have to be drawn by the jury unguided.[6]

Responding to an enquiry from the chairman of the Joint Committee on Parliamentary Privilege about progress on this issue of misuse of public office on 18 November 1998 the then Home Secretary replied:

> This is proving particularly tricky and no decision has yet been taken on which categories of public servant might be included. It may, as you say, prove necessary to

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4 Ibid at 1229

5 *Archbold 2008* para 25-381 *Att Gen's Reference (no 3 of 2003)* [2004] 2 Cr App.R 23, CA

6 *CSPL Misuse of Public Office: A Consultation Paper* 1997 http://www.archive.official-documents.co.uk/document/parlment/nolan3/misuse-1.htm

> examine the statutory duties of Members and Ministers in this context. We are conscious that we need to avoid unnecessary overlaps between any new offence and existing offences, civil remedies and disciplinary codes. Clearly, we do not wish to capture conduct which can be best left to disciplinary procedures or other effective mechanisms. Equally, however, there would be presentational difficulty in excluding certain categories of public servant from the scope of any new offence.[7]

The book C*orruption and Misuse of Public Office* asks whether the law would be better reflected in statute?

> Away from the courts, and even more fundamentally, will misconduct in public office survive as a common law offence, or might it be better reflected in statute? Continuing as the former will ensure the availability of the offence of real breadth, whilst a change to the latter might achieve greater clarity than hitherto as to its elements…[8]

The Joint Committee on the Draft Corruption Bill 2002-03 considered the offence in their report. They found that:

> 44. The draft Bill does not contain a statutory offence of 'misuse of public office'. The Committee on Standards in Public Life (under Lord Nolan) published a consultation paper in July 1997 recommending a new statutory offence of 'misuse of public office' as a replacement for surcharges on councillors. This issue was not mentioned in the Law Commission report of 1998. Meanwhile the common law offence of 'misconduct in public office' has been revived in recent years as a means of prosecuting police officers in particular. There is also, in civil law, the tort of 'misfeasance in public office'. The Law Commission has recently proposed a statutory offence of misconduct in the context of new fraud legislation.
>
> 45. The Director of Public Prosecutions told us: "I can see great advantage for public servants in having a misconduct offence which was statutory rather than dredged up from the Middle Ages". Transparency International (UK) said: "A separate offence committed by a public official or servant could be a useful tool for upholding public integrity in cases where to mount a full corruption prosecution would present insuperable difficulties eg the corruptor is beyond the jurisdiction".[9]

However, they concluded:

> 80. **The draft Bill does not seem to us the appropriate vehicle for giving a statutory definition of misconduct in public office.**

At the request of the Government, the Law Commission published in a consultation paper Reforming Bribery in November 2007. This was a comprehensive review of the options for legislation. It proposed broadening the offence of bribery to avoid the need for an agent to betray a principal as in current legislation. The offence would be committed by someone who offers an advantage to another as a reward for breaching a trust, or breaching a duty to act impartially or in the best interests of another person. The person soliciting or taking the advantage would also be guilty and agreeing to use one's influence to persuade someone else to breach a duty would also be an offence of bribery. The Commission also proposed a new offence of bribing a foreign public official. Consultation closed in March 2008 and the Commission published a final report, with draft bill in November 2008.[10]

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7 Both letters are reproduced in Joint Committee on Parliamentary Privilege Report HC 214-III 1998-99

8 Colin Nicholls QC et al, *Corruption and Misuse of Public Office,* 2006, p93

9 Joint Committee on the Draft Corruption Bill, *Draft Corruption Bill,* HL Paper 157 HC 705 2002-03

10 http://www.lawcom.gov.uk/docs/lc313.pdf

The Government published its Draft Bribery Bill on 25 March 2009. It does not include proposals for a statutory offence of misconduct in public office.[11]

4 Recent use

4.1 Introduction

Whilst the offence was rarely used in the mid-twentieth century, it appears that prosecutions under it have become more common in recent years. The book *Corruption and Misuse of Public Office* states that:

> …in more recent times its value as an offence has been recognized in many of the jurisdictions with a common law tradition: it has become one of the offences of choice for, *inter alia,* prosecutors with conduct of police and public official corruption cases in England and Wales; the Hong Kong Independent Commission Against Corruption; and those tasked with pursuing serious criminality amongst public servants and law enforcement personnel in Australia and some of the Caribbean states.[12]

One recent case is that of *R v Kearney and Murrer 2008*. Sally Murrer was a local journalist for the *Milton Keynes Citizen* newspaper. She was charged by Thames Valley Police with "aiding and abetting misconduct in public life". She was accused of helping Mark Kearney, a former detective for Thames Valley Police, to leak police secrets over the period of November 2006 to April 2007.[13] On 25 November 2008 her trial collapsed because the judge held that the prosecution had breach the Article 10 of the *Human Rights Act 1998,* which relates to freedom of expression.

Another recent case was that of Thomas Lund-Lack, a civilian worker at Scotland Yard, who was jailed for eight months in 2007 for leaking information about a planned al-Qaeda attack on the West to a Sunday Times journalist. According to press reports he was charged with misconduct in public life, and with breaching the *Official Secrets Act 1989*.[14] He admitted the charge of misconduct. The press reported that the Official Secrets charge was "expected to lie on file".[15] Sentencing Mr Lund-Lack, the judge Mr Justice Gross was reported as saying, "Disclosure of this nature should and ought to attract immediate custody. I shall impose such a sentence in this case with no little sadness but equally no hesitation".[16]

Other recent cases reported in the press have tended to involve the conduct of police officers. For example, on 10 December the Press Association reported that:

> A policeman said to have tried to make more than £1 million by blackmailing sex offenders and criminals, wept today as he gave evidence at the Old Bailey.
>
> …
>
> Johal, of Ilford, east London, denies 12 counts of blackmail amounting to £419,000 and one count of misconduct in public office.[17]

On 6 December 2008 it was reported in *The Sentinel* that:

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11 For more information see the Library Standard Note SN/PC/5045, *The draft Bribery Bill*
12 Colin Nicholls QC et al, *Corruption and Misuse of Public Office,* 2006, p65
13 'Murrer pleads not guilty in police leak case', *The Guardian,* 10 March 2008
14 'Police worker in court over intelligence leak', *PA Business,* 17 May 2007
15 'Police worker admits leaking terror report', *PA Business,* 18 June 2007
16 As quoted in 'Former police officer jailed for secrets leak', *PA Business,* 27 July 2007
17 'Policeman accused of blackmail weeps in dock', *Press Association,* 10 December 2008

> Corrupt police officer Mark Morgan has been jailed for four years after arranging to receive a £100,000 bribe.
>
> …
>
> Morgan pleaded guilty to misconduct in public office and has resigned from Staffordshire Police.[18]

4.2 Statistics on use of the offence

A Parliamentary Question from 1 April 2008 asked:[19]

> **Mr. Hoban:** To ask the Secretary of State for Justice when the last conviction for misconduct in public office took place; and how many such convictions took place in each of the last 10 years. [196651]
>
> **Maria Eagle:** The available information held by my Department on defendants found guilty of misconduct in public office, from 1996 to 2006, is provided in the following table.

[18] 'Corrupt detective jailed', *The Sentinel,* 6 December 2008

[19] HC Deb 1 April 2008 c896W

Number of defendants found guilty of misconduct in public office, England and Wales 1996-2006[1,2]	
	Found guilty
1996	—
1997	—
1998	—
1999	2
2000	2
2001	1
2002	2
2003	3
2004	10
2005	3
2006	12

(1) These data are on the principal offence basis.
(2) Every effort is made to ensure that the figures presented are accurate and complete.
However, it is important to note that these data have been extracted from large administrative data systems generated by the courts and police forces. As a consequence, care should be taken to ensure data collection processes and their inevitable limitations are taken into account when those data are used.

However, on 15 December 2008 Jack Straw answered another question on the offence by saying that questions had arisen with the quality and validity of the data in the table above:

> **Mr. Grieve:** To ask the Secretary of State for Justice how many people were *(a)* prosecuted and *(b)* convicted for the offence of misconduct in public office in each of the last 10 years. [241615]
>
> **Mr. Straw:** The information requested is only contained on paper records. While analysing the information available to my Department, questions have arisen with regard to the quality and validity of the data, including that given in an answer to the hon. Member for Fareham (Mr. Hoban) on 21 April 2008, *Official Report,* column 896W. The Office for Criminal Justice Reform is investigating this information, where possible, with the individual courts. I will write and place a copy of the letter in the Libraries of the House once these investigations are complete. If appropriate I will issue a correction statement.[20]

In a letter sent to Dominic Grieve in July 2009, Jack Straw provided some additional information and different statistics on the use of the offence. He stated that:

Information from the Crown Prosecution Service (CPS) states that the elements of misconduct in a public office are:

a) A public officer acting as such.
b) Wilfully neglects to perform their duty or misconducts themselves.
c) To such a degree as to amount to an abuse of the public's trust in the officer holder.
d) Without reasonable excuse or justification

On receipt of this information, analysts in my department have reviewed the records from 1998 to 2007 and excluded cases where it was clearly identifiable that the defendant proceeded against or offender found guilty was for 'conspiracy, aiding or abetting' a public officer to commit Misconduct in a Public Office. As a result of this exercise the figures provided in this answer will differ to those provided in an answer to the Honourable Member for Fareham (Mark Hoban) on 1 April 2008 (Official Report, CoT 896W).

The table to be presented will exclude those defendants whom we can confirm were found guilty for conspiring, aiding and abetting "Misconduct in a Public Office'. Defendants whom we can confirm were found guilty of the substantive offence, and cases where the paper records do not confirm either outcome have been included in the table.[21]

The table provided was as follows:

[20] HC Deb 15 December 2008 c478W8
[21] Letter from Jack Straw to Dominic Grieve, 19 July 2009, DEP2009-2136

Number of defendants proceeded against at magistrate's courts and found guilty at all courts for 'Misconduct in a public office'.[1] [2]

England & Wales, 1998 to 2007[3] [4] [5]

Year	Proceeded against	Found guilty
1998	-	-
1999	1	1
2000	5	1
2001	3	1
2002	5	2
2003	-	3
2004	3	9
2005	10	4
2006[6]	8	18
2007	21	16

[1] Is an offence under Commons law

[2] Defendants proceeded against or found guilty of conspiring, aiding or abetting a public official to commit Misconduct in a Public Office are excluded from the data in this table.

[3] The statistics relate to persons for whom these offences were the principal offences for which they were dealt with. When a defendant has been found guilty of two or more offences the principal offence is the offence for which the heaviest penalty is imposed. Where the same disposal is imposed for two or more offences, the offence selected is the offence for which the statutory maximum penalty is the most severe.

[4] Every effort is made to ensure that the figures presented are accurate and complete. However, it is important to note that these data have been extracted from large administrative data systems generated by the courts and police forces. As a consequence, care should be taken to ensure data collection processes and their inevitable limitations are taken into account when those data are used.

[5] The number of defendants found guilty in a particular year may exceed those proceeded against, as it may be the case that the proceedings in the magistrates' court took place in the preceding year and they were found guilty at the Crown Court in the following year, or the defendants was found guilty for a different offence to the original offence proceeded against.

[6] Figures provided for 2006 are the result of a validation process between OCJR-Evidence and Analysis and the courts

Source: Evidence & Analysis Unit – Office for Criminal Justice Reform

The book *Corruption and Misuse of Public Office* asks why the use of the offence in prosecutions might have increased:

> Why the modern recourse to misconduct in public office? The answer is at least fivefold:
>
> (1) a single charge may be used to reflect an entire course of conduct;
>
> (2) it may be used to reflect serious misconduct which is truly 'criminal' but which cannot be satisfactorily reflected by any other offence;
>
> (3) it may be used to reflect behaviour which would amount to perverting the course of justice in circumstances where the 'course of justice' is fictitious (ie created by those carrying out an integrity test);
>
> (4) as confidential information becomes increasingly valuable to criminals or commercial interests, it may be used to reflect the unlawful passing of such information when other offences (for example under the Data Protection Act 1998) are limited or give the court only limited sentencing options;
>
> (5) the maximum sentence is life imprisonment (unlike the statutory corruption offences which carry a maximum of seven years' imprisonment.[22]

4.3 The arrests of Damian Green and Christopher Galley and the subsequent decision not to prosecute

Attention was focused on the offence when in November 2008 Christopher Galley, a Home Office civil servant in the office of the Home Secretary, was arrested on suspicion of misconduct in public office for allegedly passing confidential and restricted documents to Damian Green. Damian Green was also arrested on suspicion of conspiring to commit, and being an accessory to, the alleged offence by Christopher Galley.

On 16 April 2009 the Director of Public Prosecutions, Keir Starmer QC, announced that he had decided not to prosecute either Christopher Galley or Damian Green. He stated:

> "There is a high threshold before criminal proceedings can properly be brought for misconduct in public office. In considering whether the conduct of Mr Galley and Mr Green reached that threshold and in particular whether it represented such a serious departure from acceptable standards, and abuse of trust as to constitute a criminal offence, I have considered the extent to which there has been any actual damage arising, or the extent of any potential damage that could have arisen, as a result of their conduct.
>
> "I have also had regard to the freedom of the press to publish information and ideas on matters of public interest.
>
> "I have concluded that there is evidence upon which a jury might find that there was damage to the proper functioning of the Home Office. Such damage should not be underestimated. However, it has to be recognised that some damage to the proper functioning of public institutions is almost inevitable in every case where restricted and/or confidential information is leaked.
>
> "In this case, therefore, I have considered whether there is evidence of any additional damage caused by the leaks in question. I have concluded that the information leaked was not secret information or information affecting national security:

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[22] Colin Nicholls QC et al, *Corruption and Misuse of Public Office,* 2006, pp65-66

> "It did not relate to military, policing or intelligence matters. It did not expose anyone to a risk of injury or death. Nor, in many respects, was it highly confidential. Much of it was known to others outside the civil service, for example, in the security industry or the Labour Party or Parliament. Moreover, some of the information leaked undoubtedly touched on matters of legitimate public interest, which were reported in the press.
>
> "I have therefore decided there is insufficient evidence for a realistic prospect of conviction against Mr Galley or Mr Green.
>
> "This should not be taken to mean that in future cases, a prosecution on other facts would not be brought. My decision is made on the particular facts of this case and the unauthorised leaking of restricted and/or confidential information is not beyond the reach of the criminal law".[23]

In an article in *Criminal Law & Justice Weekly,* Australian lawyer, David Lusty wrote that he disagreed with the view given by the Director of Public Prosecutions:

> It is respectfully submitted that Mr Starmer, in concluding that there was no realistic prospect of convictions in the present case, misconstrued the principles referred to above and placed undue emphasis on the likely consequences of the misconduct. In effect, he treated one possible consequence (ie, damage) as an essential character of the offence, rather than merely one of the many factors that were relevant in assessing the third element. This error is starkly illustrated by the fact that Mr Starmer actually concluded that "Mr Galley seriously breached the trust placed in him by the public", thereby effectively concluding that the third element of the offence was satisfied and that his conduct was sufficiently serious to pass the threshold for a criminal conviction, yet he then proceeded on the footing that damage was the determinative issue in the case. In addition, he required a level of damage that was unduly high and arguably placed insufficient weight on other potentially culpable characteristics of the conduct in question (such as motive and the possible pursuit of private or political advantage).[24]

David Lusty also argued that the Director of Public Prosecutions had put undue reliance on decisions of the European Court of Human Rights, and given inadequate regard to relevant precedents.

Maurice Frankel, Director of the Campaign for Freedom of Information, wrote to *The Times* in December 2008 about the use of the offence in this case as follows:

> Sir, The Damian Green case and the unsuccessful prosecution of the journalist Sally Murrer raise the question of whether the offence of misconduct in public office is now being used as a way of recriminalising the leaking of official information.
>
> For many years any leak of official information on any subject – damaging or innocuous – was an offence under Section 2 of the 1911 Official Secrets Act. The 1989 Official Secrets Act changed this. It limited the offence to unauthorised and damaging disclosures relating to the work of the security and intelligence services, defence, international relations and law enforcement or to the obtaining of information under certain warrants, for example to intercept communications.
>
> The 1988 White Paper that announced the reform made clear that disclosures that were merely "undesirable, a betrayal of trust or an embarrassment to the Government" would not be punishable by the criminal law. Introducing the legislation Douglas Hurd,

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[23] Crown Prosecution Service Press Notice, *CPS advises Metropolitan Police no prosecution of Damian Green or Christopher Galley,* Press Notice, 16 April 2009

[24] David Lusty, "Misconduct in Public Office", *Criminal Law & Justice Weekly,* vol. 173, 11 July 20091

> the then Conservative Home Secretary, explained that it "will remove the protection of the criminal law from the great bulk of sensitive and important information – including policy documents, Cabinet discussions on education, on health and on social security, and economic information and budget preparations. None of them will any longer have the protection of the criminal law." Such disclosures might lead to disciplinary action – but not prosecution.
>
> The disclosures that the Home Office civil servant are alleged to have made not only fall within the broad class of information deliberately removed from these criminal sanctions but in some cases are likely to be disclosable under the Freedom of Information Act. How has the clock been turned back to make such disclosures the subject of police investigations, arrests and possible prosecutions?[25]

Geoffrey Robertson QC stated, also in a letter to *The Times*, that:

> …Were this charge (of conspiracy and aiding and abetting in relation to alleged misconduct in public office) to stick, it would mean that any "public watchdog" – editor, journalist or MP – who enthusiastically receives a leak from a civil servant would be liable (incredibly) to a maximum sentence of life imprisonment, without any public interest defence.[26]

For information about changes to official secrecy laws see the House of Commons Library Standard Note *Official Secrecy.*[27]

On 9 December 2008 the Secretary of State for Justice was asked:

> 10. **Mr. Peter Bone (Wellingborough) (Con):** If he will make an assessment of the effectiveness of the common law offence of misconduct in a public office. [240234]
>
> **The Secretary of State for Justice and Lord Chancellor (Mr. Jack Straw):** The higher courts have made it clear that the threshold for the common law offence of misconduct in public office is a high one. A unifying factor appears to be the existence of some improper, dishonest or oppressive motive in the exercise or refusal to exercise a public function rather than a mere abuse of power. The Committee on Standards in Public Life, in a consultation paper in 1997, recommended the partial replacement of this common law offence of misconduct in public office with a new statutory offence of misuse of public office. In 1998, as Home Secretary, I reported to a parliamentary Joint Committee on the difficulties of defining the proposed new offence. The Joint Committee on the Draft Corruption Bill concluded in 2003 that such a Bill was not the appropriate vehicle for giving a statutory definition of misconduct in public office. I am unaware of any representations made to me since on this matter.[28]

Later during Questions to the Secretary of State for Justice, the following exchanges took place:

> **David Howarth (Cambridge) (LD):** … The central point is this: what should be the relationship between misconduct, leaks in the civil service and national security? The one thing that we learned from the Government's account of the events leading up to the arrest of the hon. Member for Ashford (Damian Green) is that they think that there should be no police investigation unless there is some sort of potential threat to national security. Will the Secretary of State accept that there is a case for removing

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25 Letter to the Editor, *The Times,* 4 December 2008
26 Letter to the Editor, *The Times,* 8 December 2008
27 House of Commons Library, SN/PC/2023, *Official Secrecy*
28 HC Deb 9 Dec 2008 c390

the possibility of the use of that offence in the case of leaks by civil servants that do not involve national security?

Mr. Straw: The issue has not arisen, but when it has been more calmly looked at, the nature of the offence of misconduct in public office, albeit as a common law offence, which the higher courts have defined and refined in recent years, has met with general approbation. I know of no direct provenance for the hon. Gentleman's suggestion that, even if there is continued, wilful misconduct by an official in breach of their office, the criminal law should [not] apply. That would be a very odd circumstance. I do not wish to comment on current investigations, and I shall not.[29]

[29] HC Deb 9 December 2008 c392