
Revival of the common law offence of misconduct in public office

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The ancient common law offence of misconduct in public office has recently enjoyed a major resurgence in many jurisdictions, including New South Wales and Victoria, yet it has received relatively little attention from academics and commentators. This article presents a comprehensive analysis of the offence, drawing upon historical precedents and contemporary case law from around the world. It is submitted that this 800-year-old offence has stood the test of time and continues to provide a crucial mechanism for preserving the integrity and fidelity of public officials, including Members of Parliament and Ministers of the Crown.

INTRODUCTION

The functions of the executive system, in all its parts, ministerial and judicial, cannot possibly be exercised purely, and effectually, if the temptation to sacrifice duty to gain be not rigorously excluded by means of penal laws.¹

The common law offence of misconduct in public office can be traced back to the 13th century.² A few decades ago Professor Paul Finn remarked that this ancient misdemeanour, which he described as “obscure and often ill-defined”,³ had “withered” and was “in danger of passing into oblivion”.⁴ However, since that time it has been extensively utilised in North America and has experienced a major revival in the United Kingdom, Hong Kong and Australia. The offence now ranks as the charge of choice for anti-corruption investigators and prosecutors in a host of jurisdictions, yet it has been the subject of relatively little academic research or recent commentary.

This article examines the rationale, evolution, elements and examples of the offence of misconduct in public office, drawing upon historical precedents and modern case law from around the common law world. It is submitted that this 800-year-old offence has stood the test of time and continues to provide an essential mechanism for preserving the integrity and fidelity of public officials.

RATIONALE: THE PUBLIC TRUST PRINCIPLE

It is a living tenet of our society and not mere rhetoric that a public office is a public trust.⁵

The central thesis of the doctrine of representative government is that all powers of government are derived from, ultimately belong to, and may only be exercised for and on behalf of, the people.⁶ It

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¹ *Fifth Report of Her Majesty's Commissioners on Criminal Law* (22 April 1840) p 47.

² *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal* (1987) 7 NSWLR 503 at 524. Also see n 22.

³ Finn PD, “Official Misconduct” (1978) 2 Crim LJ 307 at 318.

⁴ Finn PD, “Public Officers: Some Personal Liabilities” (1977) 51 ALJ 313 at 313.

⁵ *Nuisse v Camp* 385 F 2d 694 (1967) at 706.

⁶ See, for example, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 70-72; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 137-138; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 180-183; *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at 468. Also see *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 191; *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at 190; *R v Shayler* [2003] 1 AC 247 at [21]; *Commissioner of Taxation v Day* (2008) 236 CLR 163 at [34].

follows that persons entrusted with such power owe a fiduciary “duty of loyalty” to the public.⁷ Indeed, it is widely accepted that public office is a “public trust”⁸ and public officials are “trustees”.⁹ This legal and political theory dates back to the writings of Aristotle, Plato and Cicero.¹⁰ It gained renewed currency in the 17th century through the works of John Locke, whose views have been summarised as follows:

[T]he power of both an executive and the legislature represents a fiduciary trust. The public delegates power to their representatives so that they may act for society’s benefit; neither the executive nor legislators can use that power arbitrarily or exceed the limits imposed by the fiduciary obligations of the public trust.¹¹

Professor Finn has described the public trust principle in the following terms:

Public officials occupy positions of public trust. Lawful remuneration and entitlements apart, they hold their positions and the authority these confer not for their own benefit but for the benefit of the public whom, ultimately, they serve.

Though their conduct in office can be regulated, variously, by employment obligation, constitutional/political convention, the standards set by professional bodies and by the general law, they are, as trustees (or fiduciaries), to be expected to serve the public honestly, impartially and disinterestedly. This is their fiduciary duty of loyalty.

As public office commonly provides (though in varying degree) the opportunity to use official power and position to serve interests other than the public’s interests – and particularly those of the official himself or herself – the object of the fiduciary duty imposed on officialdom is to foreclose the exploitation of that opportunity. The duty exacts loyalty in the public’s service by proscribing conduct either which is deemed to be disloyal or, in some instances, which can have the appearance of, or tendency to, disloyalty.¹²

More recently, a former Chief Justice of Australia has remarked that “the fiduciary nature of political office” is “a fundamental conception which underpins a free democracy”¹³ and the current Chief Justice of Australia has observed that:

The application of the concept of trusteeship to the exercise of public power is longstanding and persistent ... [T]he trusteeship analogy is consistent with a characterisation of public power as fiduciary in nature.¹⁴

The public trust principle embodies a trust “in the higher sense”,¹⁵ rather than one necessarily enforceable in equity, and encapsulates the common law’s insistence that public officials adhere to fiduciary standards of behaviour. The offence of misconduct in public office enforces these standards. The justification for the criminal law adopting such a role inhered in the nature of public office itself, namely “as public office was founded upon a public trust and involved the discharge of a public

⁷ Finn PD, *Abuse of Official Trust: Conflict of Interest and Related Matters*, Integrity in Government Project, 2nd Report (ANU, 1993) p 3. Also see *R v Boston* (1923) 33 CLR 386 at 400, 412; *Village of Wheeling v Stavros* 411 NE 2d 1067 (1980) at 1069; *Graf v Frame* 352 SE 2d 31 (1986) at 36-37.

⁸ See *R v White* (1875) 13 SCR (NSW) (L) 322 at 333-339; *R v Boston* (1923) 33 CLR 386 at 402-410; *People v Murray* 307 Ill 349 (1923) at 356; *Driscoll v Burlington-Bristol Bridge Co* 86 A 2d 201 (1952) at 221-222; *R v Herscu* (1991) 55 A Crim R 1 at 65; *Porter v Magill* [2002] 2 AC 357 at 463-464.

⁹ See *R v Bembridge* [1783] 93 ER 679 at 681; *R v Whitaker* [1914] KB 1283 at 1298.

¹⁰ See Natelson RG, “The Constitution and the Public Trust” (2004) 52 Buff L Rev 1077 at 1097-1101.

¹¹ Rogers EM and Young SB, “Public Office as a Public Trust” (1974) 63 Geo LJ 1025 at 1026.

¹² Finn, n 7, p 3.

¹³ The Hon Sir Gerard Brennan AC, *Presentation of Accountability Round Table Integrity Awards* (Canberra, 11 December 2013), www.accountabilityrt.org/integrity-awards.

¹⁴ Chief Justice Robert French AC, *The Interface Between Equitable Principles and Public Law*, Presented at the Society of Trust and Estate Practitioners (Sydney, 29 October 2010). Also see Chief Justice Robert French AC, *Public Office and Public Trust*, Presented as the 7th Annual St Thomas More Forum Lecture (Canberra, 22 June 2011).

¹⁵ *Kinloch v Secretary of State for India* (1882) 7 AC 619 at 625-626; *Tito v Waddell (No 2)* [1977] Ch 106 at 215-217.

function, abuse of office ... was such a matter of public concern as to be treated as a public wrong”,¹⁶ even though similar wrongdoing in the private sector might not attract criminal liability.¹⁷

The Supreme Court of Canada has explained the rationale for the offence, which is now codified and known as “breach of trust by a public officer” in that country, as follows:

The crime ... is both ancient and important. It gives concrete expression to the duty of holders of public office to use their offices for the public good. This duty lies at the heart of good governance. It is essential to retaining the confidence of the public in those who exercise state power ...

The purpose of the offence ... can be traced back to the early authorities that recognize that public officers are entrusted with powers and duties for the public benefit. The public is entitled to expect that public officials entrusted with these powers and responsibilities exercise them for the public benefit. Public officials are therefore made answerable to the public in a way that private actors may not be.¹⁸

Canadian courts have further recognised that the object of the offence is “to preserve the integrity of government and to prevent public officials from dividing their loyalties between their private interests and the interests of the public”.¹⁹ The Supreme Court of Canada has added: “Protecting the integrity of government is crucial to the proper functioning of a democratic system. Criminal law has a historic and well-established role in helping to preserve this integrity”.²⁰

Lord Millett NPJ, sitting on Hong Kong’s Court of Final Appeal, has recently described the general nature of the common law offence of misconduct in public office as follows:

The offence can be committed only by a public official. It cannot be committed by an ordinary member of the general public. But it does not discriminate against government employees. The reason it does not do so is that the core concept is abuse of official power. It can therefore be committed only by persons who are invested with powers, duties, responsibilities or discretions which they are obliged to exercise or discharge for the benefit of the general public. Such persons may or may not be employed by the government; they may or may not be paid. They may be high officers of state or lowly employees; the offence may be committed as well by a police or customs officer as by a government minister. The common element is that the accused must have abused some power, duty or responsibility entrusted to or invested in him or her and exercisable in the public interest.

Every such power, duty, discretion or responsibility is granted for the benefit of the public and for a public purpose. For the person having such a power, duty or responsibility to exercise it or refrain from exercising it for his or her own private purposes, whether out of malice, revenge, friendship or hostility, or for pecuniary advantage is an abuse of power and amounts to the offence of misconduct in public office.²¹

EVOLUTION OF THE OFFENCE

From the earliest days of the common law, sheriffs, bailiffs, justices, coroners, gaolers and other “King’s officers” were amenable to criminal prosecution for neglecting their duties or otherwise abusing their positions in a range of ways not limited to bribery or extortion.²²

Between the 14th and 18th centuries such misconduct was a well-recognised example of “high crimes and misdemeanours” alleged in impeachment proceedings (the process by which crimes are

¹⁶ Finn, n 7, Appendix II, p 5.

¹⁷ See *R v Llewellyn-Jones* (1966) 51 Cr App R 4 at 6; *R v Dytham* [1979] QB 722 at 726.

¹⁸ *R v Boulanger* [2006] 2 SCR 49 at [1], [52].

¹⁹ *R v Zalm* [1992] BCWLD 1746 at [12]; *R v Pilarinos* (2002) 168 CCC(3d) 548 at [40]-[46].

²⁰ *R v Hinchey* [1996] 3 SCR 1128 at [15]; *R v Pilarinos* (2002) 168 CCC(3d) 548 at [43].

²¹ *HKSAR v Wong Lin Kay* [2012] 2 HKLRD 898 at [44]-[45].

²² Pollock F and Maitland F, *The History of the English Law* (2nd ed, Cambridge, 1968) Vol II, pp 520-522; Holdsworth W, *A History of English Law: Vol II* (4th ed, London, 1936) p 49; Thorne SE, *Bracton on the Laws and Customs of England* (Cambridge, 1968) Vol 2, pp 330-332; Nichols FM (ed), *Britton* (Oxford, 1983) pp 86-94.

prosecuted before Parliament) brought against royal favourites, senior judges and powerful ministers who might otherwise avoid or suborn ordinary courts.²³

By the end of the 17th century these principles had evolved into a generic common law offence applicable to all “public officers” that was succinctly expressed in 1704 as follows: “[A]ny public officer is indictable for misbehaviour in his office.”²⁴ In 1705 one of the main species of this offence was stated in the following terms: “Where an officer neglects a duty incumbent on him, either by common law or statute, he is for his default indictable.”²⁵

Since its inception, the generic offence (which has been variously known by such names as *misbehaviour in office*, *official misconduct*, *breach of public trust* and *abuse of public office*, but is now most commonly called *misconduct in public office*) has never been confined to fixed specific categories of misbehaviour and there has been a strong disinclination to attempt to delineate its precise scope.²⁶ For example, in 1716, Hawkins remarked that:

it would be endless to enumerate all the particular instances, wherein an Officer may be [convicted and punished]; and it also seems needless to endeavour it, because they are generally so obvious to common sense, as to need no Explication.²⁷

In 1783 Lord Mansfield delivered the following authoritative statement of the law in this field in *R v Bembridge* (a case involving fraudulent behaviour by an accountant in the office of the paymaster-general of the forces):

Here there are two principles applicable: first, that a man accepting an office of trust concerning the public, especially if attended with 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 ... Secondly, where there is a breach of trust, fraud, or imposition, in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and the subject it is indictable. That such should be the rule is essential to the existence of the country.²⁸

During the 18th and 19th centuries there were frequent prosecutions for the common law offence of misconduct in public office (although seldom referred to by that precise name) in the United Kingdom²⁹ and the United States,³⁰ as well as occasional prosecutions in Australia³¹ and Canada,³² for a diverse range of misconduct by a variety of public officials.

²³ McBain G, “Abolishing ‘High Crimes and Misdemeanours’ and the Criminal Process of Impeachment and Attainer” (2011) 85 ALJ 810 at 814, 818-823, 826, 829-834, 866, 873-876.

²⁴ *Anon* [1704] 87 ER 853 at 853.

²⁵ *R v Wyat* [1705] 91 ER 331 at 332. Also see *Crouther’s Case* [1599] 78 ER 893.

²⁶ See *R v Llewellyn-Jones* (1966) 51 Cr App R 4 at 6; *Question of Law Reserved (No 2 of 1996)* (1996) 88 A Crim R 417 at 432; *HKSAR v Wong Lin Kay* [2012] 2 HKLRD 898 at [42].

²⁷ Hawkins W, *Pleas of the Crown* (London, 1716) Bk 1, Ch 66.

²⁸ *R v Bembridge* (1783) 93 ER 679 at 681 (also see 22 St Tr 1 at 155-156). Also see *Bassett v Godschall* [1770] 95 ER 967.

²⁹ There are countless reported cases, many of which are referred to in this article. Also see Hawkins, n 27; Blackstone W, *Commentaries on the Laws of England* (Oxford, 1769) Bk IV, pp 121-122, 130, 140-141; Greaves C, *A Treatise on Crimes and Misdemeanours by Sir WM Oldnall Russell* (4th ed, London, 1865) Vol I, pp 200-213; Stephen JF, *Digest of the Criminal Law* (London, 1877) pp 71-74 (arts 121-122).

³⁰ See *Jacobs v Commonwealth* 29 Va 709 (1830); *State v Berkshire* 2 Ind 207 (1850); *South v State of Maryland* 59 US 396 (1855) at 402-403; *Hiss v State* 24 Md 556 (1866); *State v Startup* 10 Vroom 324 (1877); *State v Hawkins* 77 NC 494 (1877); *State v Wedge* 24 Minn 150 (1877); *State v West* 82 Tenn 38 (1884).

³¹ See *R v Fitzgerald* [1829] NSWSupC 46; *In re Tyler* [1829] NSWSupC 25; *Ex parte Wilson* [1834] NSWSupC 15; *Anon* [1839] TASSupC 4.

³² See *Re Recorder of Division Court of Toronto* (1864) 23 UCQB 376; *R v Bennett* (1871) 21 UCCP 235; *R v Arnoldi* (1892) 23 OR 201. Also see *R v Currie* (1906) 11 CCC 343; *Re McMicken* (1912) 20 CCC 334.

Throughout the 20th century, prosecutions for misconduct in public office continued unabated in the United States³³ and a codified version of that offence (“breach of trust by a public officer”) was regularly prosecuted in Canada,³⁴ but for most of that period the common law offence was rarely utilised elsewhere.³⁵ This prompted Professor Glanville Williams to observe that “this offence is practically never charged”.³⁶ However, in 1976, a Royal Commission chaired by Lord Salmon drew attention to the continued existence of the common law offence and recommended that it “be retained in its present form”.³⁷ Since that time it has experienced a major revival in the United Kingdom,³⁸ Hong Kong,³⁹ Australia⁴⁰ and elsewhere.⁴¹

The renewed reliance on the common law offence appears to have been triggered by growing public concern about perceived declining standards of integrity among public officials, coupled with a realisation that more specific statutory offences are inadequate to capture the full range of ways in which public powers or positions may be culpably abused.⁴²

The continued importance of the common law offence of misconduct in public office has been emphasised in many contemporary cases.⁴³ For example, in a recent case involving the alleged corrupt sale of state land for less than its market value by two Ministers of the Belize government to a related company, the President of the Caribbean Court of Justice, after observing that the Ministers “occupied a fiduciary position” and that the alleged conduct constituted the common law offence identified by Lord Mansfield in *Bembridge*, declared:

Bembridge may have been decided in the Eighteenth Century but Lord Mansfield’s pronouncements have echoed down through the years and stood the test of time

As a matter of public policy, serious infractions by a public servant such as misbehaviour in office, neglect of duty and breach of trust are to be treated as crimes ...

Public wrongs should normally attract public sanctions. Corrupt acts ought to be dealt with by punishing the perpetrator. When allegations are made that a Minister has misbehaved in office and the misbehaviour occasions significant and foreseen economic loss to the State and corresponding personal gain to the Minister and/or his company, it is in the public interest that criminal proceedings be instituted. The failure to detect, investigate and punish corruption has a corrosive impact on democracy

³³ There are countless reported cases, many of which are referred to in this article. Also see Perkins RM and Boyce RN, *Criminal Law* (3rd ed, New York, 1982) pp 540-548; 67 *Corpus Juris Secundum*, Officers, § 446 (June 2014); 63C *American Jurisprudence* (2d), Public Officers and Employees, §§ 362-365 (August 2014).

³⁴ There are many reported cases, including *R v Campbell* (1967) 3 CCC 250; affirmed in (1967) 2 CRNS 403; *R v Sheets* [1971] SCR 614; *R v McKitka* (1982) 66 CCC (2d) 164; *R v Lippe* (1996) 111 CCC (3d) 187.

³⁵ The only reported cases in Australia and Britain between 1900 and 1975 are *Ex Parte Kearney* (1917) 17 SR (NSW) 578; *R v Jones* [1946] VLR 300; *R v Clarke* [1954] Arg LR 312; *R v Llewellyn-Jones* [1968] 1 QB 429.

³⁶ Williams G, *Textbook of Criminal Law* (2nd ed, Stevens & Sons, London, 1983) p 151.

³⁷ Royal Commission on Standards of Conduct in Public Life, Report, Cmnd 6524 (July 1976) pp 58-59, 102.

³⁸ There have been hundreds of prosecutions and scores of appeals, many of which are referred to in this article. Also see Lusty D, “Misconduct in Public Office” (2009) 173 CL&J 437; Nicholls C et al, *Corruption and Misuse of Public Office* (2nd ed, OUP, 2011) Ch 6.

³⁹ There have been scores of prosecutions and appellate decisions, the most significant of which are referred to in this article. Also see McWalters I, *Bribery and Corruption Law in Hong Kong* (2nd ed, 2010) Ch 14.

⁴⁰ See *Question of Law Reserved (No 2 of 1996)* (1996) 88 A Crim R 417; see also the references at nn 47-50.

⁴¹ Notable examples in the Caribbean include: *Walter v The Queen* (1980) 27 WIR 386; *Williams v The Queen* (1986) 39 WIR 129.

⁴² See *Royal Commission on Standards of Conduct in Public Life*, n 37, pp 5-12, 58-59; Nolan Committee, *Standards in Public Life*, First Report (May 1995), pp 1-21, 106-108; Mahoney D, “The Criminal Liability of Public Officers for the Exercise of Public Power” (1996) 3 TJR 17 at 20; Nolan Committee, *Third Report* (July 1997), p 56; Nolan Committee, *Misuse of Public Office: A New Offence?*, Consultation Paper (8 July 1997); *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 at [91].

⁴³ See *Commonwealth v Kirk* 14 A 2d 914 (1940) at 920; affirmed in 17 A 2d 195 (1941); *R v Clarke* [1954] Arg LR 312 at 313; *Question of Law Reserved (No 2 of 1996)* (1996) 88 A Crim R 417 at 419; *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 at [91]; *R v Boulanger* [2006] 2 SCR 49 at [1].

and the rule of law. We underestimate at our peril the degree to which such failure affords encouragement to the criminal element in society and contributes to burgeoning crime rates.⁴⁴

Modern decisions from around the common law world have not only confirmed the existence of a generic common law offence of misconduct in public office,⁴⁵ but also rejected arguments that the offence is vague, imprecise, uncertain, ill-defined, overly broad, arbitrary, obsolete or unfairly discriminatory against public officers.⁴⁶

In Australia the common law offence of misconduct in public office subsists and has enjoyed a major resurgence in the two most populous states, New South Wales (NSW)⁴⁷ and Victoria.⁴⁸ For example, the NSW Independent Commission Against Corruption (ICAC) has recently made corrupt conduct findings against three former Ministers based on the offence and is seeking advice with respect to the commencement of prosecutions.⁴⁹ In addition, the NSW Court of Criminal Appeal, in affirming a sentence of four years' imprisonment for a single count of misconduct in public office, recently remarked that future investigations by ICAC "may bring an increasing number of instances of this type of offending to light".⁵⁰

ELEMENTS OF THE OFFENCE

The specific elements of misconduct in public office have recently been elucidated in a series of decisions from appellate courts around the world.⁵¹ In this author's opinion, they are best identified in the following formulation stated by the Victorian Court of Appeal in *R v Quach*:

[T]he elements of the offence are:

- (1) a public official;
- (2) in the course of or connected to his public office;
- (3) wilfully misconduct himself; by act or omission, for example, by wilfully neglecting or failing to perform his duty;
- (4) without reasonable excuse or justification; and
- (5) where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.⁵²

Each element is examined in detail below.

⁴⁴ *Marin & Coye v Attorney General of Belize* [2011] CCI 9 (CJ) at [27], [31]-[33], [38], [44].

⁴⁵ See *R v Llewellyn-Jones* (1966) 51 Cr App R 4; *Question of Law Reserved (No 2 of 1996)* (1996) 88 A Crim R 417; *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793; *Attorney General v Bhojwani* [2010] JLR 24.

⁴⁶ See *Commonwealth v Steinberg* 362 A 2d 379 (1976); *Shum Kwok Sher v HKSAR* [2001] 3 HKLRD 399; *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793; *R v Tremblay* (1992) 13 CRR (2d) 160; *R v Lippe* (1996) 111 CCC (3d) 187; *R v Pilarinos* (2002) 168 CCC (3d) 548; *HKSAR v Wong Lin Kay* [2012] 2 HKLRD 898 at [35]-[36], [45]; *Leopold v State* 88 A 3d 860 (2014). Also see *State v Egan* 287 So 2d 1 (1973).

⁴⁷ See n 31; *In re Bardsley* [1828] NSWSupC 24; *In re Pashley* [1829] NSWSupC 8; *Donnison v Faunce* [1837] NSWSupC 72; *Ex parte Ingless* [1837] NSWSupC 77; *Ex Parte Kearney* (1917) 17 SR (NSW) 578; *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal* (1987) 7 NSWLR 503 at 524; *R v Dunn* [2000] NSWCCA 171 at [25], [35]; *R v Purcell* [2010] NSWDC 98; *Jaturawong v The Queen* [2011] NSWCCA 168; *R v MacLeod* [2013] NSWCCA 108 at [17]-[18]; *Blackstock v The Queen* [2013] NSWCCA 172; *Jansen v The Queen* [2013] NSWCCA 301; *Hughes v The Queen* [2014] NSWCCA 15; Hall P, *Investigating Corruption and Misconduct in Public Office* (2004) pp 18-25. In recent years, ICAC has also relied on misconduct in public office to make findings of corrupt conduct in dozens of public reports (all available at www.icac.nsw.gov.au/investigations/past-investigations).

⁴⁸ See *R v Jones* [1946] VLR 300; *R v Clarke* [1954] Arg LR 312; *DPP v Marks* [2005] VSCA 277; *DPP v Armstrong* [2007] VSCA 34; *R v Bunning* [2007] VSCA 205; *R v Quach* (2010) 201 A Crim R 522; *Quach v The Queen* (2011) 216 A Crim R 376 at [59]-[61], [123]-[129]; *Soylomez v The Queen* [2014] VSCA 23; Hall, n 47.

⁴⁹ See the references at nn 251-253.

⁵⁰ *Blackstock v The Queen* [2013] NSWCCA 172 at [12].

⁵¹ See *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 at [84]; *Attorney-General's Reference (No 3 of 2003)* [2005] 1 QB 73 at [61]; *Sin Kam Wah v HKSAR* [2005] 2 HKLRD 375 at [45]; *R v Boulanger* [2006] 2 SCR 49 at [58]; *R v Quach* (2010) 201 A Crim R 522.

⁵² *R v Quach* (2010) 201 A Crim R 522 at [46], building upon similar formulations adopted in the cases referred to at n 51.

(1) A public official (or public officer)

The traditional terminology in relation to this threshold element of the offence is “public officer” rather than “public official”, but the two terms are often used interchangeably and treated as synonymous. The meaning of “public officer” is largely dependent on the specific context in which it arises, but there are two leading definitions of more or less general application at common law that have been most frequently applied in the present context. The first is the following statement of Best LCJ almost two centuries ago in *Henly v The Mayor of Lyme*: “[E]very one who is appointed to discharge a public duty, and receives compensation in whatever shape, whether from the crown or otherwise, is constituted a public officer”.⁵³ That case involved the tort of misfeasance in public office, but the definition of public officer in the present context is at least as wide as, and probably wider than, that in respect of the tort.⁵⁴

The second definition, which was propounded in a case involving bribery but is regarded as the “accepted modern definition” in the present context,⁵⁵ is the following statement from the English Court of Criminal Appeal in *R v Whitaker*: “A public officer 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.”⁵⁶ The word “interested” is used “in the sense of legitimate concern rather than of the mere gratification of curiosity”.⁵⁷

The key issue in the present context is whether a person is a “public officer”, as opposed to “holder of a public office” in any kind of formal, technical or narrow sense.⁵⁸ It has been observed that the former term has a different and wider meaning than the latter.⁵⁹

The “duties” of an officer are not limited to those arising at common law or under statute or specified in written instruments or contracts.⁶⁰ Unwritten duties may arise from the inherent nature of the position itself.⁶¹ In addition, the word “duty” is not confined to specific acts a public official is legally obliged to perform, but extends to “the functions and proper actions which his employment authorises”.⁶²

As is evident from the *Whitaker* definition, and many other authorities,⁶³ remuneration from public funds is indicative of being a public officer, but is neither determinative nor essential; persons who discharge public duties are public officers even if they are unpaid.

⁵³ *Henly v The Mayor of Lyme* [1828] 130 ER 995 at 1001.

⁵⁴ See *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons* [1999] EWHC Tech 199 at [246]-[247]; Sadler RJ, “Liability for Misfeasance in a Public Office” (1992) 14 Syd LR 131 at 159. In relation to the tort, courts have occasionally adopted a narrow view of whether a person is a public officer due to policy considerations peculiar to the tort or confusion surrounding other perceived elements of the tort or questions of immunity: see *Tampion v Anderson (No 2)* [1973] VR 321 at 715; *Canon v Tahche* (2002) 5 VR 317.

⁵⁵ Hall, n 47, p 24. Also see Finn, n 4 at 314; *R v Cosford* [2014] QB 81 at [26]; *R v Belton* [2011] 1 Cr App R 20 at [22]; *HKSAR v Wong Lin Kay* [2012] 2 HKLRD 898 at [28].

⁵⁶ *R v Whitaker* [1914] 3 KB 1283 at 1296. Also see *R v Burnell* (1698) Carth 478 at 479 (see quote at n 65).

⁵⁷ *Graham v White (Inspector of Taxes)* [1972] 1 WLR 874 at 878.

⁵⁸ See *R v Boston* (1923) 33 CLR 386 at 402; *R v Greenway* (London Central Criminal Court, 25 June 1992, Buckley J), reported at [1998] PL 356; *R v Bowden* [1996] 1 Cr App R 104; *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at 191, 230; Nicholls et al, n 38 at [6.18]; McWalters, n 39, pp 684-691.

⁵⁹ *R v McCann* (1997) 95 A Crim R 308 at 315, 327.

⁶⁰ See *R v Bembridge* [1783] 93 ER 679 at 681; 22 St Tr 1 at 155; *Unites States v Birdsall* 233 US 223 (1914) at 230-231; *Public Service Association of South Australia Inc v South Australia* (1997) 68 SASR 461 at 481-482.

⁶¹ See *State v Weleck* 91 A 2d 751 (1952) at 756-757; *State v Winne* (1953) 96 A 2d 63; *Attorney-General of Ceylon v De Livera* [1963] AC 103.

⁶² *Canadian Pacific Tobacco Co Ltd v Stapleton* (1952) 86 CLR 1 at 6. Also see *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal* (1987) 7 NSWLR 503 at 524; *Herscu v The Queen* (1991) 173 CLR 276 at 281-287; 56 A Crim R 270.

⁶³ See *R v Bembridge* [1783] 93 ER 679 at 681; 22 St Tr 1 at 155; *State v Stanley* 8 Am Rep 488 (1872); *Childs v State* 113 P 546 (1911) at 548; *Abbott v McNutt* 22 P 2d 510 (1933); *Stewart v The Queen* (1960) 2 WIR 450; *R v Belton* [2011] 1 Cr App R 20 at [29]-[30]; *HKSAR v Wong Lin Kay* [2012] 2 HKLRD 898 at [44].

Other significant aspects of the definition of public officer are that: it is not dependent on the manner in which the officer was appointed; it extends to officers who hold only temporary appointments;⁶⁴ it is not confined to officers with high levels of authority or seniority;⁶⁵ it can include persons in private employment who perform public functions;⁶⁶ and the nature of the position held by the officer “is immaterial as long as it is for the public good”.⁶⁷ It is thus apparent that the term has a wide meaning, a point that has often been emphasised.⁶⁸

Despite some assertions to the contrary,⁶⁹ it is clear that the definition of public officer in the present context includes not only Ministers⁷⁰ but also ordinary Members of Parliament.⁷¹ As one English judge has remarked: “Few are in a higher position of trust or have a duty to discharge in which the public have a greater interest, than Members of Parliament”.⁷²

Other noteworthy examples of public officers include (but are by no means limited to):

- judges and all other judicial officers,⁷³ including coroners⁷⁴ and court officials;⁷⁵
- mayors,⁷⁶ councillors/aldermen,⁷⁷ and employees⁷⁸ of local government authorities;

⁶⁴ *R v Jones* [1946] VLR 300 at 302; *Re Newton* (1983) 1 SR (WA) 444 at 448; *R v Greenway* (London Central Criminal Court, 25 June 1992, Buckley J), reported at [1998] PL 356 at 358.

⁶⁵ See *R v Burnell* (1698) Carth 478 at 479: “[E]very man is a public officer who hath any duty concerning the public; and he is not the less a public officer where his authority is confined to narrow limits, because ’tis the duty of his office, and the nature of that duty, which makes him a public officer, and not the extent of his authority”, approved in *Inland Revenue Commissioners v Hambrook* [1956] 2 QB 641 at 652-653; *Graham v White (Inspector of Taxes)* [1972] 1 WLR 874 at 880: “I cannot see that it makes any difference that the [officer] was ... ‘in a subordinate position with limited duties’ ... I do not think that the duties of a civil servant suddenly become ‘of a public nature’ on promotion”; *R v Bowden* [1996] 1 Cr App R 104; *R v Belton* [2011] 1 Cr App R 20; *HKSAR v Wong Lin Kay* [2012] 2 HKLRD 898 at [44]; *R v Cosford* [2014] QB 81.

⁶⁶ *R v Cosford* [2014] QB 81 at [37]. Also see *Public Service Association of South Australia Inc v South Australia* (1997) 68 SASR 461 at 481-482; *YL v Birmingham City Council* [2008] 1 AC 95 at [62]-[63].

⁶⁷ *R v Lancaster* (1890) 16 Cox CC 737 at 739.

⁶⁸ See *R v Boston* (1923) 33 CLR 386 at 410-411; *R v McMorran* (1948) 91 CCC 19 at [5]; *State v Begyn* 167 A 2d 161 (1961) at 165; *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at 191, 230; *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 at [99]; *R v Cosford* [2014] QB 81 at [29]-[35].

⁶⁹ See Stephen, n 29, p 71 (art 118); *R v Bunting* (1885) 7 OR 524 at 568; *R v Boston* (1923) 33 CLR 386 at 413; *Royal Commission on Standards of Conduct in Public Life*, n 37, p 98.

⁷⁰ *R v Vaughan* (1769) 4 Burr 2494 at 2501; *Roncarelli v Duplessis* [1959] SCR 121; *R v Sommers* [1959] SCR 678; *Walter v The Queen* (1980) 27 WIR 386; *Williams v The Queen* (1986) 39 WIR 129; *Bourgoin SA v Ministry of Agriculture, Fisheries & Food* [1986] QB 716; *R v Jackson* (1988) 33 A Crim R 413; *Re Austin* (1991) 57 A Crim R 220 at 222; *Sanders v Snell* (1998) 196 CLR 329; *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 at 545; *R v Pilarinos* (2002) 168 CCC (3d) 548; *Marin & Coye v Attorney General of Belize* [2011] CJC 9 (CJ); *HKSAR v Wong Lin Kay* [2012] 2 HKLRD 898 at [44]. Also see Mahoney, n 42 at 24.

⁷¹ See *R v White* (1875) 13 SCR (NSW) (L) 322; *R v Bunting* (1885) 7 OR 524; *Kelly v Common Council* 77 NY 503 (1879); *Horne v Barber* (1920) 27 CLR 494; *R v Boston* (1923) 33 CLR 386; *Martineau v The Queen* [1966] SCR 103; *R v Greenway* (London Central Criminal Court, 25 June 1992, Buckley J), reported at [1998] PL 356; *Sneddon v NSW* [2012] NSWCA 351 at [215]-[225]; *D’Amore v ICAC* [2013] NSWCA 187; Zellick G, “Bribery of Members of Parliament and the Criminal Law” [1979] PL 31; *Rao v State* [1999] 3 LRC 297; ICAC, *Investigation into Conduct of the Hon Richard Face* (June 2004) pp 39-58.

⁷² *R v Greenway* (London Central Criminal Court, 25 June 1992, Buckley J), reported at [1998] PL 356 at 358.

⁷³ *Anon* [1731] 94 ER 335; *R v Bembridge* (1783) 22 St Tr 1 at 155-156; *R v Borron* [1820] 106 ER 721; *R v Marshall* [1855] 119 ER 174 at 175; *R v Whitaker* [1914] 3 KB 1283; *R v Llewellyn-Jones* [1968] 1 QB 429; *In Marriage of Sillars* (1985) 84 FLR 22 at 43; *Merckle v State* 512 So 2d 948 (1987); *Rawlinson v Rice* [1998] 1 NZLR 454. Also see *Sirroos v Moore* [1975] 1 QB 118 at 132.

⁷⁴ See *R v Whitcomb* [1823] 171 ER 1130; *Garnett v Ferrand* [1827] 108 ER 576 at 582.

⁷⁵ See *R v Burcombe* [2010] EWCA Crim 2818 at [9]; *R v Patel* [2013] 1 Cr App R (S) 48.

⁷⁶ See *R v Kennet* [1781] 47 ER 976; *Henly v The Mayor of Lyme* [1828] 130 ER 995 at 1001; *R v Pinney* [1832] 172 ER 962; *R v Gagne* (2000) 148 CCC (3d) 182.

⁷⁷ See *Booth v Arnold* [1895] 1 QB 571 at 579; *Wood v Little* (1921) 29 CLR 564; *R v Sheets* [1971] SCR 614; *Shalhoub v Buchanan* [2002] NSWSC 622 at [15]; *R v Speechley* [2005] 2 Cr App R (S) 15.

⁷⁸ See *R v Bowden* [1996] 1 Cr App R 104.

- police officers and civilian employees of police agencies;⁷⁹
- prison officers and administrative or medical staff employed by prisons;⁸⁰
- public prosecutors⁸¹ and administrative staff employed by prosecution agencies;⁸²
- any persons with official duties relating to public revenue or public funds;⁸³
- academic and non-academic staff of public education institutions;⁸⁴
- medical practitioners and other persons employed within a public health system;⁸⁵
- members and employees of the armed forces;⁸⁶ and
- a wide variety of other government employees and public servants.⁸⁷

A public officer is generally not entirely divested of official status, or relieved of all official obligations, when on leave, off duty or under suspension and can be liable for misconduct engaged in at such times that has a relevant relationship to his or her official position.⁸⁸ The offence also extends to persons who act or purport to act as public officers even if they have not been validly appointed and may be ineligible for appointment to such a position.⁸⁹

(2) In the course of or connected to his public office

To constitute the offence of misconduct in public office the misconduct must have a relevant connection to the public office. A leading statement on this element of the offence is the following passage from prominent American authors, Professors Perkins and Boyce:

The mere coincidence that a crime has been committed by one who happens to be a public officer is not sufficient to establish official misconduct. For this offense it is necessary not only that the offender be an officer, or one who presumes to act as an officer, but the misconduct, if not actually in the exercise of

⁷⁹ See references at nn 137-141, 147-157, 167, 226-229.

⁸⁰ See references at nn 142-143, 157, 189, 229-230; *Watkins v Home Office* [2006] 2 AC 395 at [26].

⁸¹ See *State v Wedge* 24 Minn 150 (1877); *State v Jefferson* 97 A 162 (1916); affirmed in 101 A 569 (1917); *State v Bolitho* 136 A 164 (1927); *State ex rel McKittrick v Wymore* 132 SW 2d 979 (1939); *State v Winne* (1953) 96 A 2d 63; *R v Bain* [1992] 1 SCR 91 at 116-123; *Elguzouli-Daf v Commissioner of Police* [1995] QB 335 at 337.

⁸² See *R v Land* [2006] EWCA Crim 2856.

⁸³ See *R v Bembridge* [1783] 93 ER 679 at 681-682; 22 St Tr 1 at 151-157; *R v Hackner* (1987) 4 WCB (2d) 73; *HKSAR v Chu King Kwok* [2010] HKCFI 343; *HKSAR v Mak Chai Kwong* [2013] HKDC 1214 at [182].

⁸⁴ *Gibson v Ross* [1840] 7 ER 1059 at 1064; *R v Darlington School Governors* [1844] 6 QB 682 at 715; *Bowers v Harding* [1891] 1 QB 560; *Commonwealth v Fahey* 40 A 2d 167 (1944); *HKSAR v Wong John* [2012] HKDC 254 at [175]-[192]; *Redmond v Worthington* 878 F Supp 2d 822 (2012); ICAC, *Report on Investigation into the University of Newcastle's Handling of Plagiarism Allegations* (June 2005) pp 62-67.

⁸⁵ *State v Begyn* 156 A 2d 15 (1959); affirmed in 167 A 2d 161 (1961); *Mitchell v Ross* [1960] 1 Ch 145 at 166, 169; affirmed in [1960] 1 Ch 498 and [1962] AC 814; *Ridder v Goodsoil Union Hospital Board* (1962) 40 WWR 283 at 285; *Chan Tak Ming v HKSAR* [2011] HKLRD 766 at [4], [25]; *HKSAR v Michael* [2013] HKCFA 83. Compare *R v Cosford* [2014] QB 81 at [36], but see Rogers J, "The Effect of 'Deception' in the Sexual Offences Act 2003" (2013) ArchRev 4; *R v Mitchell* [2014] EWCA Crim 318 (holding, wrongly, it is respectfully submitted, that an ambulance paramedic is not a public officer).

⁸⁶ *R v Bembridge* [1783] 93 ER 679 at 681-682; 22 St Tr 1 at 151-157; *R v Hedges* (1803) 28 St Tr 1315 at 1326, 1413; *R v Davidson* (1809) 31 St Tr 99 at 99, 103; *R v Jones* (1809) 31 St Tr 251 at 251-252, 322; *R v Whitaker* [1914] KB 1283; *Commonwealth v Holleran* (1944) 39 A 2d 612.

⁸⁷ See *R v Jones* [1946] VLR 300; *Hardess v Beaumont* [1953] VLR 315 at 319; *R v Clarke* [1954] Arg LR 312; *Re Newton* (1983) 1 SR (WA) 444 at 448; *Edwards v Olsen* [2003] SASC 238 at [644]-[645]; *R v John-Ayo* [2009] 1 Cr App R (S) 71; *HKSAR v Cho Wing Nin* [2012] HKDC 604 at [251]-[264]; *R v Clarke* [2013] 1 Cr App R (S) 93; *R v Cosford* [2014] QB 81 at [35]; *R v Akpom* [2013] EWCA Crim 2662; Mahoney, n 42 at 24.

⁸⁸ See *Ward v Keenan* 70 A 2d 77 (1949); *Sykes v Cleary* (1992) 176 CLR 77; *State v Bullock* 642 A 2d 397 (1994); *State v Hinds* 674 A 2d 161 (1996); *Question of Law Reserved (No 2 of 1996)* (1996) 88 A Crim R 417 at 431; *R v Quach* (2010) 201 A Crim R 522 at [38]-[41]; *R v Gallagher* [2010] EWCA Crim 3201 at [7]; *R v Knox* [2011] 2 Cr App R 21 at [38]-[45].

⁸⁹ *State v Goss* 69 Me 22 (1878); *Florez v State* 11 Tex App 102 (1881); *Ex parte Winters* 140 P 164 (1914); *Germany v State* 3 SW 2d 798 (1928); *People v Wortman* 165 NE 788 (1928); *Brandon v State* 173 So 251 (1936); *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal* (1987) 7 NSWLR 503 at 525-527; *Cassell v The Queen* (2001) 201 CLR 189 at [19]; 110 A Crim R 317.

the duties of his office, must be done under colour of his office. On the other hand the act of one who is an officer, which act is done because he is an officer or because of the opportunity afforded by that fact, is *under colour of his office*.⁹⁰

This statement of principle has been approved or applied by American courts on numerous occasions⁹¹ and accords with leading commentaries from Australia, Hong Kong and the United Kingdom recognising that the offence may be made out by misconduct in the course of (or as a result of) the exercise of official functions *or* conduct that involves an abuse or misuse of official title, rank, status, position or capacity.⁹²

A similar view was taken by Sir Anthony Mason NPJ, former Chief Justice of Australia, delivering principal judgments for Hong Kong's Court of Final Appeal in two leading cases on misconduct in public office. In *Shum Kwok Sher v HKSAR* he observed that the offence applied to misconduct occurring "in or in relation to, or under colour of exercising, the office" and could be constituted by an abuse of "official position" not necessarily involving an abuse of official powers or duties.⁹³ Three years later in *Sin Kam Wah v HKSAR* he elaborated on this element of the offence as follows:

To constitute the offence of misconduct in public office, wilful misconduct which has a relevant relationship with the defendant's public office is enough. Thus, misconduct otherwise than in the performance of the defendant's public duties may nevertheless have such a relationship with his public office as to bring that office into disrepute, in circumstances where the misconduct is both culpable and serious and not trivial.⁹⁴

This particular element of the offence has recently been most comprehensively considered in *R v Quach*, where Redlich JA on behalf of the Victorian Court of Appeal (after reviewing leading authorities from Australia, the United Kingdom, Hong Kong and Canada) stated:

In my opinion the relevant misconduct need not occur while the officer is in the course of performing a duty or function of the office. Certain responsibilities of the office will attach to the officer whether or not the officer is acting in the course of that office. Where the misconduct does not occur during the performance of a function or duty of the office, the offence may be made out where the misconduct is inconsistent with those responsibilities. It may be connected to a duty already performed or to one yet to be performed or it may relate to the responsibilities of the office in some other way. The misconduct must be incompatible with the proper discharge of the responsibilities of the office so as to amount to a breach of the confidence which the public has placed in the office, thus giving it its public and criminal character. Accordingly, use of knowledge or information acquired by the office holder in the course of his or her duties for a private or other impermissible purpose may be inconsistent with the responsibilities of the office and calculated to injure the public interest. If the misuse of the information is of a serious nature and is likely to be viewed as a breach of the trust reposed in the office so as to bring the office into disrepute, the conduct will fall within the ambit of the offence whether or not it occurs in the course of public office. It will in such circumstance have the necessary connection to that office.

I consider that the proper formulation of the offence requires the element to be expressed so that it encompasses the circumstance in which the offender's misconduct, though not occurring while the offender was discharging a function or duty, had a sufficient connection to their public office. Whether the misconduct was so connected will turn upon the facts of the case.⁹⁵

A potentially different approach was recently adopted by Hong Kong's Court of Final Appeal (absent Mason NPJ) in *HKSAR v Wong Lin Kay*, in which the court effectively combined the first three

⁹⁰ Perkins and Boyce, n 33, p 541 (original emphasis). Also see *Wallace v State* 211 A 2d 845 (1965) at 850-851.

⁹¹ See *Chester v Maryland* 363 A 2d 605 (1976) at 612-613; *State v Schultz* 367 A 2d 423 (1976) at 429-430; *Commonwealth v Bellis* 440 A 2d 1179 (1982) at 1182-1183; *State v Bullock* 642 A 2d 397 (1994) at 400-401; *People v Perkins* 662 NW 2d 727 (2003) at 732; *People v Hardrick* 671 NW 2d 548 (2003) at 551-552.

⁹² Finn, n 3 at 311-320; Finn, n 4 at 315-316; McWalters, n 39, pp 702-703; Nicholls et al, n 38 at [6.50].

⁹³ *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 at [69], [81], [84].

⁹⁴ *Sin Kam Wah v HKSAR* [2005] 2 HKLRD 375 at [47]. Also see *HKSAR v Paul* [2009] 4 HKLRD 840 at [39].

⁹⁵ *R v Quach* (2010) 201 A Crim R 522 at [40]-[41]. This approach accords with the authorities referred to at nn 90-94.

elements of the offence by stating: “There is in reality only one question: did the conduct with which the accused is charged consist of an abuse of a power, duty or responsibility entrusted to him or her and exercisable for the public good?”.⁹⁶ While there appears to be little (if any) substantive difference between this formulation and the previously identified principles and authorities (as long as “abuse”, “power”, “duty” and “responsibility” are construed sufficiently broadly),⁹⁷ it is submitted that the five-element formulation of the offence stated in *Quach* provides a better analytical framework for determining liability.

A particularly insidious form of misconduct in public office is the misuse of official *influence* to advance private interests. In *Herscu v The Queen*, the High Court of Australia confirmed that wielding influence could constitute a discharge of official duties, with Brennan J declaring:

When the office is such that the holder wields influence or is in a position to wield influence in matters of a particular kind, the wielding of influence in a matter of that kind is a discharge of the duties of the office. Such wielding of influence is something done in an official capacity.⁹⁸

(3) Wilful misconduct by act or omission

[Misconduct in public office] is not concerned primarily with the abuse of official position for pecuniary gain, with corruption in the popular sense. Its object is simply to ensure that an official does not, by any wilful act or omission, act contrary to the duties of his office, does not abuse intentionally the trust imposed in him.⁹⁹

The English Court of Appeal, following decisions of the House of Lords in an analogous context,¹⁰⁰ has defined “wilful misconduct” in the present context as “deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not”.¹⁰¹ The justification for punishing *reckless* wrongdoing by public officers is that reckless indifference is “inconsistent with an honest attempt to perform the functions of a public office” and, consequently, constitutes an “abuse of the office”.¹⁰²

The English Court of Appeal has observed that “[t]he circumstances in which the offence may be committed are broad and the conduct which may give rise to it is diverse”.¹⁰³ In *Shum Kwok Sher*, Mason NPJ similarly stated that the offence “is necessarily cast in general terms because it is designed to cover many forms of misconduct on the part of public officers”.¹⁰⁴ The NSW Court of Criminal

⁹⁶ *HKSAR v Wong Lin Kay* [2012] 2 HKLRD 898 at [46] (Lord Millett NPJ), reaching the same conclusion as that expressed by Ribeiro PJ at [22] (with whom the rest of the court agreed).

⁹⁷ It seems clear that the court in *HKSAR v Wong Lin Kay* did not intend to depart from the previous principles stated by Mason NPJ in *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 or *Sin Kam Wah v HKSAR* [2005] 2 HKLRD 375 because it expressly endorsed them: [2012] 2 HKLRD 898 at [18]-[25].

⁹⁸ *Herscu v The Queen* (1991) 173 CLR 276 at 287 (also see at 282-284). Also see *Greiner v ICAC* (1992) 28 NSWLR 125 at 131, 175; *Commonwealth v Kirk* 14 A 2d 914 (1940); affirmed in 17 A 2d 195 (1941); *R v Gagne* (2000) 148 CCC(3d) 182 at [28], [44]-[46]; *R v Speechley* [2005] 2 Cr App R (S) 15 at [39]-[40], [45]; the references at nn 241-242.

⁹⁹ Finn, n 3 at 308, approved in *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 at [80].

¹⁰⁰ *Lloyd v McMahon* [1987] AC 625 at 697, 702; *Porter v Magill* [2002] AC 357 at 464, 507.

¹⁰¹ *Attorney-General's Reference (No 3 of 2003)* [2005] 1 QB 73 at [28], referred to with apparent approval in *R v Boulanger* [2006] 2 SCR 49 at [27]. A similar formulation was adopted by Hong Kong's Court of Final Appeal in *Sin Kam Wah v HKSAR* [2005] 2 HKLRD 375 at [46]: “The misconduct must be deliberate rather than accidental in the sense that the official either knew that his conduct was unlawful or wilfully disregarded the risk that his conduct was unlawful”. This formulation is misleading insofar as it requires knowledge or recklessness that the conduct was “unlawful” as opposed to merely “wrong”. Knowing that conduct is wrong is not the same as knowing that it is against the law: *Stapleton v The Queen* (1952) 86 CLR 358.

¹⁰² *Northern Territory v Mengel* (1995) 185 CLR 307 at 357. It appears that the extension of the offence to recklessness is well accepted: *Sin Kam Wah v HKSAR* [2005] 2 HKLRD 375 at [46]; *Chan Tak Ming v HKSAR* [2011] HKLRD 766 at [28]-[29]. Also see *Pillai v Messiter [No 2]* (1989) 16 NSWLR 197 at 200-201.

¹⁰³ *Attorney-General's Reference (No 3 of 2003)* [2005] 1 QB 73 at [61].

¹⁰⁴ *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 at [92]. Also see *State v Begyn* 167 A 2d 161 (1961) at 168.

Appeal has very recently added: “The offence of misconduct in public office ... is by its nature protean, covering a very wide range of offending”.¹⁰⁵

It is well established that the offence encompasses, inter alia, frauds by public officers (*fraud in office*), wilful neglect of duty (*nonfeasance*), wilful excesses of official authority and other acts wrongful in themselves (*malfeasance*), and otherwise lawful acts performed in an improper manner or for an improper purpose (*misfeasance*).¹⁰⁶ A public officer who wilfully engages in any of these types of misconduct may properly be regarded as having acted “corruptly” in its broad and general sense.¹⁰⁷ Corruption, in the narrower sense of entailing abuse of a public position for personal gain, is sufficient but not necessary to constitute the offence.¹⁰⁸ The offence is not restricted to cases involving actual or intended financial gain (whether by the defendant or another) or loss (whether to the public or an individual).¹⁰⁹

Nevertheless, the offence is clearly not one of strict liability. It requires a guilty mind, the precise nature of which will vary according to the particular type of alleged misconduct. The Supreme Court of Canada has discussed the mental element of the offence (specifically excluding cases of wilful neglect of duty) in the following general and non-exhaustive terms:

In principle, the *mens rea* of the offence lies in the intention to use one’s public office for purposes other than the benefit of the public. In practice, this has been associated historically with using one’s public office for a dishonest, partial, corrupt or oppressive purpose, each of which embodies the non-public purpose with which the offence is concerned.

As with any offence, the *mens rea* is inferred from the circumstances. An attempt by the accused to conceal his or her actions may often provide evidence of improper intent. Similarly, the receipt of a significant personal benefit may provide evidence that the accused acted in his or her own interest rather than that of the public. However, the fact that a public officer obtains a benefit is not conclusive of a culpable *mens rea*. Many legitimate exercises of a public authority or power by a public servant confer incidental advantages on the actor.

Conversely, the offence may be made out where no personal benefit is involved.¹¹⁰

(4) Without reasonable excuse or justification

The “without reasonable excuse or justification” qualification has recently been identified as a general element of the offence,¹¹¹ although it was traditionally limited to alleged nonfeasance¹¹² and it still appears to have little practical application beyond such cases.¹¹³

¹⁰⁵ *Jansen v The Queen* [2013] NSWCCA 301 at [64]. Also see *Duncan v State* 377 A 2d 567 (1977) at 570.

¹⁰⁶ See Finn, n 3 at 310-325; Perkins and Boyce, n 33, pp 540-548; *Question of Law Reserved (No 2 of 1996)* (1996) 88 A Crim R 417 at 432; *People v Coutu* 599 NW 2d 556 (1999) at 561; *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 at [81]-[84]; *State v Hinds* 674 A 2d 161 (1996) at 163; *R v W* [2010] 1 Cr App R 28 at [8].

¹⁰⁷ See *State v Schultz* 367 A 2d 423 (1976) at 429; *HKSAR v Shum Kwok Sher* [2001] 3 HKLRD 399 at [97]; *Porter v Magill* [2002] 2 AC 357 at 478, 503; *R v Field* [2011] 1 NZLR 784 at [58].

¹⁰⁸ See *R v Arnoldi* (1892) 23 OR 201 at 211; *State ex rel Dinneen v Larson* 286 NW 41 (1939) at 42; *People v Hughey* 47 NE 2d 77 (1943) at 81; *R v Dytham* [1979] QB 722 at 727-728; *People v Coutu* 599 NW 2d 556 (1999) at 562. Also see *Attorney-General’s Reference (No 3 of 2003)* [2005] 1 QB 73 at [59].

¹⁰⁹ See n 108; *State v Boncelet* 258 A 2d 894 (1969) at 898; *Commonwealth v Steinberg* 362 A 2d 379 (1976) at 386-387; *State v Secula* 380 A 2d 713 (1977) at 715; *DPP v Marks* [2005] VSCA 277 at [35]; *R v Boulanger* [2006] 2 SCR 49 at [57]; *Chan Tak Ming v HKSAR* [2011] HKLRD 766 at [26]; *Jansen v The Queen* [2013] NSWCCA 301 at [11].

¹¹⁰ *R v Boulanger* [2006] 2 SCR 49 at [56]-[57] (citations and quotations omitted).

¹¹¹ *Attorney-General’s Reference (No 3 of 2003)* [2005] 1 QB 73 at [60]-[61]; *Sin Kam Wah v HKSAR* [2005] 2 HKLRD 375 at [45]; *R v Quach* (2010) 201 A Crim R 522 at [46].

¹¹² See *R v Kennett* [1781] 47 ER 976 at 984; *R v Pinney* [1832] 172 ER 962 at 971; Stephen, n 29, pp 71-75; *State v Wheatley* 63 A 2d 644 (1949) at 646; *R v Dytham* [1979] QB 722; *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 at [82].

¹¹³ In other cases the possible existence of a “reasonable excuse or justification” would ordinarily be addressed in assessing whether the third and fifth elements of the offence are satisfied, rather than considered a separate element: see *DL v The Queen* [2011] 2 Cr App R 14; Nicholls et al, n 38 at [6.53]; McWalters, n 39, pp 709-711.

(5) Seriousness

The requirement that the misconduct be serious was first explicitly identified as an element of the offence by Mason NPJ in *Shum Kwok Sher*.¹¹⁴ It is now firmly established, with the following formulation from *Quach* building upon leading authorities from around the world:

[The] misconduct [must be] serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.¹¹⁵

The English Court of Appeal has described this requirement as follows:

[T]here must be a serious departure from proper standards before the criminal offence is committed; and a departure not merely negligent but amounting 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.¹¹⁶

The Supreme Court of Canada has observed that the misconduct “must be sufficiently serious to move it from the realm of administrative fault to that of criminal behaviour”,¹¹⁷ although in *Shum Kwok Sher* Mason NPJ rightly remarked:

The qualification [that the misconduct be serious] is not to be taken as a dividing line between the offence of misconduct in public office and disciplinary offences. There is no doubt a borderland in which the common law offence and disciplinary offences overlap.¹¹⁸

A key factor in assessing the seriousness of any misconduct is the officer's motive in acting or failing to act.¹¹⁹ Another relevant factor is the likely consequences of the misconduct, although this is not decisive.¹²⁰ Hong Kong's Court of Final Appeal has recently remarked:

In cases where corruption, dishonesty or other illegal practices are involved, it is not necessary to specifically consider the consequences of the misconduct in deciding whether it is serious enough as to constitute the offence of misconduct in public office. The misconduct speaks for itself: the seriousness of the consequences of such corrupt, dishonest or illegal practices will be obvious.¹²¹

ACCESSORIAL AND CONSPIRATORIAL LIABILITY OF NON-PUBLIC OFFICIALS

In accordance with general principles of accessorial and conspiratorial liability,¹²² a person who is incapable of committing the offence of misconduct in public office as a principal because he or she is not a public officer (or is not acting as such) may nevertheless be convicted of conspiring to commit, or being an accessory (aiding, abetting, counselling or procuring) to the commission of, the offence by a person who is a public officer.¹²³

¹¹⁴ *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 at [86]-[87].

¹¹⁵ *R v Quach* (2010) 201 A Crim R 522 at [46] (also see at [42]-[45]).

¹¹⁶ *Attorney-General's Reference (No 3 of 2003)* [2005] 1 QB 73 at [56]. This description, while informative, is not “part of the definition of the offence”: *R v Quach* (2010) 201 A Crim R 522 at [44].

¹¹⁷ *R v Boulanger* [2006] 2 SCR 49 at [52]. Also see *R v Quach* (2010) 201 A Crim R 522 at [47].

¹¹⁸ *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 at [87].

¹¹⁹ See *R v Borron* [1820] 106 ER 721 at 721-722; *Attorney-General's Reference (No 3 of 2003)* [2005] 1 QB 73 at [36], [40], [56]; *R v Boulanger* [2006] 2 SCR 49 at [55]-[57].

¹²⁰ See *Attorney-General's Reference (No 3 of 2003)* [2005] 1 QB 73 at [46], [56]-[59]; *HKSAR v Paul* [2009] 4 HKLRD 840 at [47]-[49]; *HKSAR v Chu King Kwok* [2010] HKCFI 343; *HKSAR v Michael* [2013] HKCFA 83 at [28]-[30]; Lusty, n 38 at 439; Nicholls et al, n 38 at [6.42].

¹²¹ *HKSAR v Michael* [2013] HKCFA 83 at [29].

¹²² See *R v Whitchurch* (1890) 24 QBD 420; *R v Mackenzie* (1910) 6 Cr App R 64.

¹²³ See *R v Wright* [1964] SCR 192; *R v Llewellyn-Jones* (1967) 51 Cr App R 4; *Question of Law Reserved (No 2 of 1996)* (1996) 88 A Crim R 417 at 426, 436-437, 442; *R v Rees* [2000] EWCA Crim 55; *Attorney-General's Reference (No 5 of 2002)* [2005] 1 AC 167 at [3]; *R v Miles* [2006] EWCA Crim 2675; *R v Ahmed* [2008] EWCA Crim 1384; *Belfast Crown Court v Griffiths* [2009] NICC 23; *Richardson, Re Attorney-General's Reference (No 5 of 2009)* [2009] NICA 41; *R v Bohannan* [2011] 1 Cr App R (S) 106 at [7]; *R v Knox* [2011] 2 Cr App R 21 at [3], [39]; *Jaturawong v The Queen* [2011] NSWCCA 168.

Sentencing

As with all common law offences,¹²⁴ the penalty for misconduct in public office (length of imprisonment and amount of fine) is “at large and in the discretion of the court” but cannot be “excessive”.¹²⁵ In Victoria there is a statutory maximum of 10 years imprisonment.¹²⁶

Courts have often emphasised the inherent seriousness of the offence, which invariably involves a breach of public trust and undermines all-important confidence in the integrity of government, and identified the need to impose “deterrent” sentences (usually involving significant periods of full-time custody even in the face of substantial personal mitigation).¹²⁷

EXAMPLES OF MISCONDUCT IN PUBLIC OFFICE

The law has always set high standards for official conduct. The fact that departures from the standards may have been unhappily frequent, difficult to detect and more difficult to prove, has not meant that the standards are low, but they have been difficult to enforce.¹²⁸

Some recognised categories of conduct capable of constituting misconduct in public office are discussed below. They are neither exhaustive nor mutually exclusive. Many cases involve conduct, or a course of conduct, featuring more than one distinct type of wrongdoing.

Wilful neglect of duty (nonfeasance)

One of the oldest examples of misconduct in public office is wilful failure of a public officer to perform a mandatory public duty without reasonable excuse or justification.¹²⁹ This species of the offence has been recognised in Australia on many occasions.¹³⁰

The duty in question must be both *public* in nature, in the sense of being of legitimate concern to the public,¹³¹ and *mandatory*, in the sense of being one the officer is positively required to perform in the circumstances known by him or her, in which case the requisite mental element for the offence is simply *wilful* non-performance “without reasonable excuse or justification”.¹³² The latter qualification

¹²⁴ See generally *Verrier v DPP* [1967] 2 AC 195 at 219-220; *R v Morris* [1951] 1 KB 394 at 395-396; *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483 at 497; *Wood v Galea* (1995) 79 A Crim R 567 at 573.

¹²⁵ See *Blackstock v The Queen* [2013] NSWCCA 172 at [8]-[11]; *Jansen v The Queen* [2013] NSWCCA 301 at [48]-[52].

¹²⁶ *Crimes Act 1958* (Vic), s 320.

¹²⁷ See nn 149-151; *DPP v Armstrong* [2007] VSCA 34; *R v Bunning* [2007] VSCA 205 at [51]-[53]; *R v John-Ayo* [2009] 1 Cr App R (S) 71; *R v Clarke* [2012] 1 Cr App R (S) 93; *R v Akpom* [2013] EWCA Crim 2662; *R v Speechley* [2005] 2 Cr App R (S) 15 at [55]; *Secretary for Justice v Shum Kwok Sher* [2011] 3 HKLRD 386. Also see *HKSAR v Chow Koon Shing* [2007] 3 HKLRD 10; *R v Ratcliffe* [2010] 1 Cr App R (S) 51.

¹²⁸ *Greiner v ICAC* (1992) 28 NSWLR 125 at 180 (Priestly JA).

¹²⁹ In addition to the authorities referred to at nn 22, 25, 129-138, see *R v Wiat* [1796] 88 ER 880; *Miller v Knox* [1838] 132 ER 910 at 922, 932; *Hill v Chief Constable of West Yorkshire* [1989] AC 53 at 59; *Van Colle v Chief Constable of Hertfordshire Police* [2009] 1 AC 225 at [53], [120], [139]; Finn, n 3 at 315-318; Perkins and Boyce, n 33, pp 545-548.

¹³⁰ *Enever v The King* (1906) 3 CLR 969 at 991-994; *Ex Parte Kearney* (1917) 17 SR (NSW) 578; *Gray v Chilman (No 2)* [1935] SASR 359 at 363-364; *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal* (1987) 7 NSWLR 503 at 524; *Question of Law Reserved (No 2 of 1996)* (1996) 88 A Crim R 417 at 418, 431-432; *R v McCann* (1997) 95 A Crim R 308 at 319-320; *Kirkland-Veenstra v Stuart* [2008] 23 VR 36 at [33]; *R v Quach* (2010) 201 A Crim R 522 at [8]-[27], [46].

¹³¹ See *R v Llewellyn-Jones* (1966) 51 Cr App R 4 at 6. “Public duty” has a wide meaning: nn 53-69; *R v Withers* [1974] QB 414 at 420-421; *DPP v Withers* [1975] AC 842 at 860, 862, 873, 875; *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal* (1987) 7 NSWLR 503 at 524.

¹³² *R v Dytham* [1979] QB 722; *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 at [82]; *Sin Kam Wah v HKSAR* [2005] 2 HKLRD 375 at [45]; *R v Quach* (2010) 201 A Crim R 522 at [46]. Where a duty is merely discretionary wilful non-performance will not constitute an offence unless it stems from an improper motive, such as partiality: Perkins and Boyce, n 33, pp 545-548; Finn, n 3 at 315-317; Finn, n 4 at 315.

will excuse officers who have done all that could reasonably be expected of them in the circumstances or who refused to act in circumstances where a person of reasonable and ordinary firmness would similarly have refused to act.¹³³

It has occasionally been suggested or assumed that the offence is limited to neglect of public duties arising at common law or under statute,¹³⁴ but the true position is that it covers non-performance of public duties arising from any source.¹³⁵ This is illustrated by the decisions in *Henley*, in which the House of Lords held that failure to perform a public duty (“an obligation of ... general and public concern”) arising under letters patent was indictable,¹³⁶ and *Ward*, in which the English Court of Appeal found a police officer guilty of misconduct in public office for failing to administer an alcohol breath test even though the duty to do so did not arise under statute or at common law.¹³⁷

Some further examples of this species of the offence include the wilful failure of:

- police officers to act in relation to offences committed in their presence,¹³⁸ credible complaints of serious offences¹³⁹ or flagrant criminal activities;¹⁴⁰
- police officers to report, or take other required action in relation to, known or suspected offences by other officers or associates;¹⁴¹
- prison officers and employees to report the possession of contraband by prisoners or a sexual relationship between another officer and a prisoner;¹⁴²
- correctional officers to supervise prison inmates on work release;¹⁴³ and
- a senior officer at a public hospital to report a serious theft by an employee.¹⁴⁴

¹³³ *R v Nicholls* [1724] 88 ER 241; *R v Kennett* [1781] 47 ER 976 at 984; *R v Pinney* [1832] 172 ER 962 at 971; *State v Wheatley* 63 A 2d 644 (1949) at 646; *R v Dytham* [1979] QB 722 at 727; Finn, n 3 at 316-317; Perkins and Boyce, n 33, p 548; Stephen, n 29, p 74 (art 122).

¹³⁴ See *R v Wyatt* [1705] 91 ER 331 at 332; Stephen, n 29, p 74 (art 122); *Ex Parte Kearney* (1917) 17 SR (NSW) 578; *R v Dytham* [1979] QB 722.

¹³⁵ None of the leading modern definitions of the offence, all of which recognise wilful neglect of duty as an example, are restricted to the neglect of duties arising at common law or under statute: *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 at [81]-[85]; *Attorney-General's Reference (No 3 of 2003)* [2005] 1 QB 73 at [61]; *Sin Kam Wah v HKSAR* [2005] 2 HKLRD 375 at [45]; *R v Quach* (2010) 201 A Crim R 522 at [46]; Perkins and Boyce, n 33, pp 545-548; Finn, n 3 at 315-318; Finn, n 4 at 315; McWalters, n 39, pp 703-704.

¹³⁶ *Lyme Regis Corporation v Henley* [1834] 6 ER 1180 at 1186-1189.

¹³⁷ *R v Ward* (unreported, 25 February 1994): “We are not talking here about a statutory duty ... Nor, indeed, we would suggest, are we talking about the common law duty of a police officer fulfilling the ancient office of Constable. It is the duty which he has as an officer of justice by virtue of his rank and employment in the force in which he serves. The evidence must go to show what that duty is.” Also summarised at [1995] Crim LR 398.

¹³⁸ Stephen, n 29, pp 74-74 (art 122, illustration 5); *Shaw v Macon* (1857) 21 Ga 280; *R v Dytham* [1979] QB 722.

¹³⁹ *Creagh v Gamble* (1888) 24 LRI 458 at 472-473; *DPP v Bartley* [1997] IEHC 94 at [4]-[6]; convictions of Hannah Notley and Ryan Coleman-Farrow referred to at www.thelawpages.com.

¹⁴⁰ *Commonwealth v Hubbs* 8 A 2d 618 (1939); *State v Donovan* 40 A 2d 546 (1945); *State v McFeeley* 54 A 2d 797 (1947); *State v Winne* 96 A 2d 63 (1953); *Commonwealth v Dolny* 342 A 2d 399 (1975).

¹⁴¹ *Duncan v State* 377 A 2d 567 (1977) at 570-574; *Duncan v State* 384 A 2d 456 (1978) at 458-460; *R v Ward* (unreported, 25 February 1994); *R v Ranson* [2007] 2 Cr App R (S) 55 at [9]-[22]; *DPP v Armstrong* [2007] VSCA 34 at [11], [31]; *Hughes v The Queen* [2014] NSWCCA 15 at [13]-[14], [83]. Also see *Donnelly v United States* 276 US 505 (1928) at 516: “Neglect of official duty is a misdemeanor at common law ... Intentional failure of enforcement officers to report violations is doubly injurious to the public. It encourages offenders and disgraces the law.”

¹⁴² *R v Ratcliffe* [2010] 1 Cr App R (S) 51 at [5]-[13]; *R v Cosford* [2014] QB 81 at [5]. Also see *R v King* [2013] EWCA Crim 1599 at [5]-[12].

¹⁴³ *HKSAR v Tang Kwai Man* [2013] HKCFI 651. Also see *State v Lombardo* 87 A 2d 375 (1952).

¹⁴⁴ *HKSAR v Wong John* [2012] HKDC 254; *Secretary for Justice v Wong John* [2014] 2 HKLRD 278.

Misuse of official information

One of the most common modern examples of misconduct in public office, especially in England¹⁴⁵ and Australia,¹⁴⁶ is the wilful misuse of information obtained by public officers by virtue of their official positions. This type of offending is not limited to misconduct engaged in for reward (financial or otherwise), although such a factor would significantly increase the seriousness of the misconduct and constitute an aggravating circumstance on sentence.¹⁴⁷ Nor is it limited to the misuse of information that is secret, operationally sensitive or inherently confidential (as opposed to merely “held in confidence” or otherwise subject to restriction).¹⁴⁸

The English Court of Appeal has often emphasised the seriousness of this type of offending and the need to impose “deterrent” sentences.¹⁴⁹ For example, the court has remarked that “[t]he unauthorised disclosure of information held in any records kept and maintained only for public purposes should always be regarded as a serious offence”¹⁵⁰ and further stated:

It seems to us that, especially nowadays, preservation of the integrity of information regarding members of the public held on databases like those maintained by the police is of fundamental importance to the wellbeing of society. Any abuse of that integrity by officials, including the police, is a gross breach of trust which, unless the wrongdoing is really minimal, will necessarily be met by a severe punishment, even in the face of substantial mitigation.¹⁵¹

Some examples of this type of offending include:

- police officers disclosing confidential information to friends or associates,¹⁵² private investigators,¹⁵³ and suspected or known offenders;¹⁵⁴
- administrative employees of police and other public authorities accessing or disclosing confidential information for personal or other unauthorised purposes;¹⁵⁵

¹⁴⁵ See Lusty, n 38 at 440; nn 148-157. Scores of recent convictions are detailed at www.thelawpages.com.

¹⁴⁶ See *Question of Law Reserved (No 2 of 1996)* (1996) 88 A Crim R 417; *DPP v Marks* [2005] VSCA 277; *R v Bunning* [2007] VSCA 205; *R v Purcell* [2010] NSWDC 98; *Jansen v The Queen* [2013] NSWCCA 301; *Hughes v The Queen* [2014] NSWCCA 15. Also see *R v Quach* (2010) 201 A Crim R 522 at [40].

¹⁴⁷ See *Chan Tak Ming* [2011] 1 HKLRD 766 at [26]; *R v Bohannan* [2011] 1 Cr App R (S) 106 at [64]; *Jansen v The Queen* [2013] NSWCCA 301 at [11]; *R v Arthurs* [2013] EWCA Crim 2407 at [19].

¹⁴⁸ See *R v Rees* [2000] EWCA Crim 55; *Attorney-General's Reference (No 140 of 2004)* [2004] EWCA Crim 3525; *R v McQueen* [2006] EWCA Crim 1795; *R v Land* [2006] EWCA 2856; *Attorney-General's Reference No 1 of 2007* [2007] 2 Cr App R (S) 86 at [20]; *Belfast Crown Court v Griffiths* [2009] NICC 23; *R v Bunyan* [2013] EWCA Crim 1885 at [11], [16]; references at n 157.

¹⁴⁹ *R v Keyte* [1998] 2 Cr App R (S) 165; *R v Gellion* [2006] 2 Cr App R (S) 69 at [13]-[14]; *Attorney-General's Reference No 1 of 2007* [2007] 2 Cr App R (S) 86 at [26]; *R v Nyack* [2008] EWCA Crim 61 at [5], [10]; *R v Turner* [2010] 1 Cr App R (S) 108 at [29]-[35]; *R v Wilkie* [2012] 2 Cr App R (S) 68 at [11]; *R v Bohannan* [2011] 1 Cr App R (S) 106 at [48]-[64]; *R v Stubbs* [2011] 2 Cr App R (S) 113 at [15]; *R v Talbot* [2012] EWCA Crim 331 at [26]; *R v Arthurs* [2013] EWCA Crim 2407 at [14], [19].

¹⁵⁰ *Attorney-General's Reference (No 140 of 2004)* [2004] EWCA Crim 3525 at [9].

¹⁵¹ *R v Kassim* [2006] 1 Cr App R (S) 4 at [19]. Also see *R v Bohannan* [2011] 1 Cr App R (S) 106 at [48]-[64].

¹⁵² *R v McQueen* [2006] EWCA Crim 1795; *R v Razaq* [2011] EWCA Crim 1518 at [6]; *R v Arthurs* [2013] EWCA Crim 2407; *Jansen v The Queen* [2013] NSWCCA 301.

¹⁵³ *Question of Law Reserved (No 2 of 1996)* (1996) 88 A Crim R 417; *R v Keyte* [1998] 2 Cr App R (S) 165; *R v Rees* [2000] EWCA Crim 55; *DL v The Queen* [2011] 2 Cr App R 14.

¹⁵⁴ *R v Woodall* [2003] EWCA Crim 2345; *R v Marks* [2005] VSCA 277; *R v Gellion* [2006] 2 Cr App R (S) 69; *R v Miles* [2006] EWCA Crim 2675; *R v Bunning* [2007] VSCA 205; *R v Ranson* [2007] 2 Cr App R (S) 55; *Attorney-General's Reference No 1 of 2007* [2007] 2 Cr App R (S) 86; *R v Turner* [2010] 1 Cr App R (S) 108; *R v Bohannan* [2011] 1 Cr App R (S) 106; *Hughes v The Queen* [2014] NSWCCA 15.

¹⁵⁵ *R v Pike-Williams* [2004] EWCA Crim 2400; *R v Kirwan* [2004] EWCA Crim 3289; *Attorney-General's Reference (No 140 of 2004)* [2004] EWCA Crim 3525; *R v Land* [2006] EWCA 2856; *R v Gallagher* [2010] EWCA Crim 3201; *R v Stubbs* [2011] 2 Cr App R (S) 113; *R v Batmaz* [2014] EWCA Crim 253.

- police officers and support staff misusing official databases to obtain contact details of victims, witnesses or suspects for the purpose of pursuing sexual relationships;¹⁵⁶
- police officers, prison officers and public healthcare workers selling or otherwise providing confidential or private information to the media;¹⁵⁷
- a tax officer copying and taking home taxpayers' private data for personal purposes;¹⁵⁸
- a public officer providing confidential information to a tenderer for a public contract;¹⁵⁹
- a local council officer disclosing confidential information to a developer about proposed town planning changes that would affect land values;¹⁶⁰ and
- a doctor at a public hospital copying patients' personal particulars with the intention of using them to solicit business for his proposed new private medical practice.¹⁶¹

Misuse of public resources

A similar type of misconduct in public office is wilful misuse of public resources, including human resources, entrusted to public officers for public purposes. Examples include:

- public officers using public resources or expending public funds for unauthorised personal or otherwise improper purposes,¹⁶² including incurring personal expenditure on credit cards provided for the sole purpose of paying work-related costs;¹⁶³
- public officers directing subordinates to perform work and/or use public resources for the officers' personal purposes,¹⁶⁴ including directing them to engage in political and campaign activities or make political contributions;¹⁶⁵ and
- a senior public officer permitting public employment (at public expense) of excessive and unnecessary employees for political purposes prior to an election.¹⁶⁶

In *R v W*, a case involving alleged wilful misuse of a police credit card, the English Court of Appeal concluded that “dishonesty” was “an essential ingredient” of misconduct in public office in respect of this type of conduct,¹⁶⁷ but this conclusion and the research and reasoning which led to it have been rightly criticised.¹⁶⁸ Whilst virtually all such conduct could properly be characterised as “dishonest” and/or “corrupt”,¹⁶⁹ it is submitted that the mental element of the offence will be satisfied

¹⁵⁶ *R v Lewis* [2010] 2 Cr App R (S) 104 at [7]-[11]; *R v Wilkie* [2012] 2 Cr App R (S) 68; *R v Bunyan* [2013] EWCA Crim 1885; *R v S* (2013) 113 WCB (2d) 392.

¹⁵⁷ Scores of recent charges and convictions are referred to at www.cps.gov.uk/news and www.thelawpages.com.

¹⁵⁸ *HKSAR v Chu King Kwok* [2010] HKCFI 343.

¹⁵⁹ *R v Eckhel* (1982) 7 WCB 317.

¹⁶⁰ *R v McKitka* (1982) 66 CCC (2d) 164 at [10]-[11], [14]-[15], [52]-[59].

¹⁶¹ *Chan Tak Ming v HKSAR* [2011] HKLRD 766.

¹⁶² *State v Gleitsmann* 161 A 2d 747 (1960); *R v Sheets* [1971] SCR 614; *R v Harvey* [2007] BCLD 1810; *HKSAR v John* [2012] HKDC 254; [2014] HKEC 318; *Redmond v Worthington* 878 F Supp 2d 822 (2012).

¹⁶³ See the convictions of Richard de Cadenet and John Gallagher referred to at www.thelawpages.com; *R v W* [2010] 1 Cr App R 28. Also see *Re Austin* (1991) 57 A Crim R 220.

¹⁶⁴ See *R v Robinson* (1799), referred to in Chitty J, *Criminal Law* (2nd ed, 1816) Vol 3, p 666; *State v Kollarik* 126 A 2d 875 (1956); *R v Sheets* [1971] SCR 614; *Makwinski v State* 385 A 2d 1227 (1978); *State v Varlese* 409 A 2d 285 (1979); *R v Bowden* [1996] 1 Cr App R 104; *R v Bradt* (2010) 414 NR 219.

¹⁶⁵ See *Chester v State* 363 A 2d 605 (1976); *Leopold v State* 88 A 3d 860 (2014).

¹⁶⁶ *Commonwealth v Brownmiller* 14 A 2d 907 (1940).

¹⁶⁷ *R v W* [2010] 1 Cr App R 28.

¹⁶⁸ Cronin A, “Misconduct in Public Office: Dishonesty is an Element if the Misconduct Amounts to Theft or Fraud” (2010) 74 *Journal of Criminal Law* 290.

¹⁶⁹ See *Re Austin* (1991) 57 A Crim R 220 at 224: “Authority to use the credit facilities ... was invested in the respondents in their capacity as [public officers] and as an incident of their holding office as such. When they exercised that authority for private purposes they corruptly used the public office each of them so held.”

whenever a public officer uses public resources or funds for an unauthorised purpose “knowing it to be wrong or with reckless indifference as to whether it is wrong or not”.¹⁷⁰ Dishonesty is not an essential element of this species of the offence.

Fraud and other dishonest conduct

By the same token, any dishonest conduct by a public officer connected to his or her public office will be sufficient to constitute misconduct in public office if the fourth and fifth elements of the offence are also satisfied.¹⁷¹ The most obvious example is any fraud in office,¹⁷² which includes dishonestly deflecting the performance of a public duty by another officer.¹⁷³

One illustration of this species of the offence is the use by a public officer of his or her official position to secretly make a private gain.¹⁷⁴ For example, in a relatively modern case involving a public officer who secretly sold government property to himself and resold it for a profit, O’Byrne J of the Supreme Court of Victoria directed the jury as follows:

The charge is that he misconducted himself in [public] office, and ... what the Crown says is that in breach of his duty he wickedly, corruptly and unlawfully ... made a secret profit out of his office ...

Gentlemen, an agent of a person is not permitted, without the knowledge and consent of his principal, to acquire any benefit or profit in the course of or by means of his agency, and if this man had authority to sell goods, or if he had authority to allocate goods to an outsider – a third person; if he secretly and without the knowledge of his principal, pretending to allocate them to an outsider, is really allocating them to himself, and then, having got the goods, sells them afterwards and makes a profit, he is making a secret profit, and that is contrary to law. You may say that he did that dishonestly. I do not think the word “corruptly” adds anything more to it, or that the word “wickedly” adds anything more to it, if the transaction is dishonest it is wicked and corrupt.¹⁷⁵

Similarly, in *Clarke*, a public officer responsible for investigating and reporting on the “costs” of furniture merchants secretly received money and furniture from such merchants, which he claimed were rewards for personal work he performed in assisting them to prepare their “costs” and did not affect the content of his official “reports”. He was charged with misconduct in public office for making “a secret profit out of his office” and O’Byrne J ruled that he could be found guilty even if his claims were true, directing the jury as follows:

When a man accepts a position of trust and confidence under the Crown he undertakes duties the pure administration of which is of the utmost importance to the community in which he lives, and the law requires from such a person a very great care in the exercise of his office and he should never put himself in a position in which his own interests may point one way, and the duties which he has undertaken for the Crown point in the opposite direction ...

If you find that he took the secret payment even for nothing more than preparing the costs but that in so doing he deliberately did that which he knew would necessarily and inevitably impede him in the discharge of the public duties which he was by law bound to discharge then you may find him guilty.

Or put another way – if you find that by agreeing to take money or furniture, as the case may be, he consciously and deliberately put himself into a position in which his duty to investigate impartially the

¹⁷⁰ See the text accompanying nn 99-109.

¹⁷¹ For the test of dishonesty, see Lusty D, “The Meaning of Dishonesty in Australia” (2012) 36 Crim LJ 282.

¹⁷² See *R v Bembridge* [1783] 93 ER 679; 22 St Tr 1; *R v Munton* [1793] 170 ER 280; *R v Hedges* (1803) 28 St Tr 1315; *R v Martin* [1809] 170 ER 1151; *R v Baxter* (1851) 5 Cox CC 302 at 312-315; *Booth v Arnold* [1895] 1 QB 571 at 579; *Williams v The Queen* (1986) 39 WIR 129; Greaves, n 29, vol I, p 207; Stephen, n 29, pp 73-74 (art 121); Perkins and Boyce, n 33, pp 543-544; Finn, n 3 at 310, 313-315.

¹⁷³ This species of fraud (which subsists at common law in NSW and Victoria) may be committed by public officers and private persons alike: *Connor v Sankey* [1976] 2 NSWLR 570 at 597-599; *R v Horsington* [1983] 2 NSWLR 72; *Peters v The Queen* (1998) 192 CLR 493 at 525 at 529; 96 A Crim R 250; *R v Turner (No 4)* (2001) 10 Tas R 81; *Wills v Petroulias* (2003) 58 NSWLR 598 at [19]; *Tasmania v Lin* [2011] TASSC 14; *DPP v Shaw* [2013] TASSCA 3.

¹⁷⁴ See *R v Jones* (1809) 31 St Tr 251; *R v Davidson* (1809) 31 St Tr 99; *R v Arnoldi* (1892) 23 OR 201; *HKSAR v Tong* [2008] 1 HKLRD 632; *Blackstock v The Queen* [2013] NSWCCA 172; authorities at nn 175-178.

¹⁷⁵ *R v Jones* [1946] VLR 300 at 303.

costs of an article and make an unbiased report thereon conflicted with his [interests], he is guilty and it does not matter for this purpose that his report might have been the same if he received no secret profit.¹⁷⁶

Likewise, in *State v Furey*, in which a city official was convicted of misconduct in public office for effectively granting a licence to himself (via a third party who was his undisclosed business partner), the Appellate Division of the Superior Court of New Jersey declared that:

A public official acts corruptly and is guilty of misconduct in office when he has an undisclosed interest in a venture which comes before the body of which he is a member, and he acts in favour of that interest through the office which he holds.¹⁷⁷

In these types of cases it is not necessary to prove that the undisclosed benefit obtained by the accused was excessive or that the public or government suffered any pecuniary detriment.¹⁷⁸

Other examples of misconduct in public office constituted by dishonest conduct include:

- police officers seeking to destroy a traffic ticket issued to a friend,¹⁷⁹ creating a false record about an arrest,¹⁸⁰ entering a false intelligence report into a database,¹⁸¹ falsifying timesheets to cover unauthorised absences from duty,¹⁸² providing false information in an application for a search warrant¹⁸³ and falsely claiming to have a search warrant in order to enter a suspect's premises,¹⁸⁴
- a registration and ceremonies officer issuing false birth certificates;¹⁸⁵
- immigration officers issuing refugee passports to ineligible persons¹⁸⁶ and falsifying or removing files to enable ineligible persons to remain in a country;¹⁸⁷
- a motor registry officer assisting applicants to cheat on driver licence tests;¹⁸⁸
- prison officers and administrative staff smuggling contraband into prisons;¹⁸⁹ and
- public officers awarding contracts without following mandatory requirements.¹⁹⁰

¹⁷⁶ *R v Clarke* [1954] Arg LR 312 at 313, 318.

¹⁷⁷ *State v Furey* 318 A 2d 783 (1974) at 787. Also see Finn, n 4 at 316: "In discharging his duties an officer is expected to demonstrate an unselfish and undivided loyalty to the public he serves. The law will not countenance his acquiring interests, or entering into arrangements, which conflict with his official duties. He will be guilty of a common law offence if ... he corruptly uses his official position to obtain any private advantage for himself"; *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at [89]: "[A] public officer committed an offence at common law if that officer corruptly used his or her official position to obtain any private advantage."

¹⁷⁸ *R v Arnoldi* (1892) 23 OR 201; *R v Clarke* [1954] Arg LR 312; *Blackstock v The Queen* [2013] NSWCCA 172 at [36].

¹⁷⁹ *R v Nazir* [2003] 2 Cr App R (S) 114.

¹⁸⁰ *R v Burrows* [2006] 1 Cr App R (S) 92.

¹⁸¹ *Hughes v The Queen* [2014] NSWCCA 15 at [15]-[16], [74]-[76].

¹⁸² *Jansen v The Queen* [2013] NSWCCA 301 at [9].

¹⁸³ *R v Dunn* [2000] NSWCCA 171 at [25], [35].

¹⁸⁴ *DPP v Armstrong* [2007] VSCA 34.

¹⁸⁵ *R v Akpom* [2013] EWCA Crim 2662.

¹⁸⁶ *R v John-Ayo* [2009] 1 Cr App R (S) 71.

¹⁸⁷ *R v Clarke* [2012] 1 Cr App R (S) 93.

¹⁸⁸ *Jaturawong v The Queen* [2011] NSWCCA 168 at [2]-[18].

¹⁸⁹ See *R v Ratcliffe* [2010] 1 Cr App R (S) 51; *R v McDade* [2010] 2 Cr App R (S) 82; *R v Jibona* [2010] EWCA Crim 1390; *R v Talbot* [2012] EWCA Crim 331; *Soylomez v The Queen* [2014] VSCA 23.

¹⁹⁰ *Commonwealth v Succop* 164 A 63 (1933); *Commonwealth v Brown* 175 A 748 (1934); *Commonwealth v Fahey* 40 A 2d 167 (1944); *State v Williamson* 148 A 2d 610 (1959); affirmed by 155 A 2d 7 (1959); nn 215-216.

Partiality and other abuses of official power or authority

I cannot conceive how it is possible for a public officer to shew partiality in the exercise of his office, without being corrupt.¹⁹¹

[I]f they acted even from passion or from opposition, that is equally corrupt as if they acted from pecuniary considerations.¹⁹²

[I]t is notorious that doing a friend a favour may be a most insidious form of corruption.¹⁹³

Arguably the most serious, but difficult to prove, species of misconduct in public office is the exercise of public power or authority for an improper purpose or from an improper motive.¹⁹⁴ Liability turns on the officer's subjective state of mind, rather than objective merits of his or her actions, although an improper state of mind may be inferred from the acts in question. The House of Lords has described the underlying legal principles in this field as follows:

It follows from the proposition that public powers are conferred as if upon trust that those who exercise powers in a manner inconsistent with the public purpose for which the powers were conferred betray that trust and so misconduct themselves. This is an old and very important principle ...

If [public officers] misconduct themselves knowingly or recklessly it is regarded by the law as wilful misconduct.¹⁹⁵

This species of offending most commonly involves motives or purposes described as “corrupt”,¹⁹⁶ “partial”,¹⁹⁷ “dishonest”,¹⁹⁸ “malicious”,¹⁹⁹ or “oppressive”²⁰⁰ (“under which description fear or favour may generally be included”),²⁰¹ but these examples are neither exhaustive nor mutually exclusive (they all involve “corruption” in its general sense).

¹⁹¹ *Kennedy v Bent* [1830] TASSupC 9 (Pedder CJ). Also see *R v Wooler* [1817] 106 ER 71 at 75-76 (Lord Ellenborough CJ): “[I]f he acted partially ... it would be a corrupt exercise of his functions”; *R v Jeyes* [1835] 111 ER 471 at 474 (Lord Denman CJ): “[P]artiality would be a corrupt motive.”

¹⁹² *R v Brooke* [1788] 100 ER 103 at 106 (Ashurst J). Also see *R v Barton* (1850) 5 Cox CC 353.

¹⁹³ *Jansen v The Queen* [2013] NSWCCA 301 at [11] (Campbell J, with whom Basten JA and Price J agreed).

¹⁹⁴ See Stephen, n 29, pp 71-73 (art 119): “Every public officer commits a misdemeanor who ... abuses any discretionary power with which he is invested by law from an improper motive, the existence of which motive may be inferred from the nature of the act, or from the circumstances of the case”; Mahoney, n 42 at 17-30; Finn, n 3 at 318-320; *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 at [72]-[73], [83]-[84], [92]; *R v Boulanger* [2006] 2 SCR 49 at [16]-[19], [55]-[58]; *HKSAR v Wong Lin Kay* [2012] 2 HKLRD 898 at [44]-[45].

¹⁹⁵ *Porter v Magill* [2002] 2 AC 357 at 463-464 (also see at 478, 481, 502-503).

¹⁹⁶ There are countless historical examples from England, including many of the cases referred to at nn 197-201; *R v Hann* [1765] 97 ER 1062; *R v Cozens* [1780] 99 ER 273; *R v Jackson* [1787] 99 ER 1302; *R v Brooke* [1788] 100 ER 103. Early Australian authorities include *In re Bardsley* [1828] NSWSupC 24; *In re Pashley* [1829] NSWSupC 8; *Donnison v Faunce* [1837] NSWSupC 72; *Ex parte Ingless* [1837] NSWSupC 77; *In re Tyler* [1829] NSWSupC 25; *Ex parte Wilson* [1834] NSWSupC 15. Also see *R v Dytham* [1979] QB 722 at 727; *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 at [73]-[76], [81]-[83], [92]; *R v Boulanger* [2006] 2 SCR 49 at [16]-[19], [55]-[58].

¹⁹⁷ See *Anon* [1731] 94 ER 335; *R v Justices of the Peace of the Corporation of Rye* [1752] 96 ER 791; *R v Day* [1755] 96 ER 852; *R v Young* [1758] 97 ER 447; *R v Davie* [1781] 99 ER 371 at 372; *R v Corbett* [1790] 96 ER 875; *R v Borron* [1820] 106 ER 721; *In re Tyler* [1829] NSWSupC 25; *R v Llewellyn-Jones* [1968] 1 QB 429 at 435; *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 at [10]-[13], [40], [73]; *R v Boulanger* [2006] 2 SCR 49 at [55]-[58]; *HKSAR v Tong* [2008] 1 HKLRD 632; *Patel v Fiji ICAC* [2011] FJCA 56.

¹⁹⁸ See *R v Borron* [1820] 106 ER 721; *Booth v Arnold* [1895] 1 QB 571 at 579; *R v Llewellyn-Jones* [1968] 1 QB 429; *R v Dytham* [1979] QB 722 at 726-727; *R v Speechley* [2005] 2 Cr App R (S) 15 at [40]-[45]; *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 at [10]-[13], [42], [73]-[76], [81]-[83], [92], [100]; *R v Boulanger* [2006] 2 SCR 49 at [18]-[19], [55]-[58]; *HKSAR v Michael* [2013] HKCFA 83 at [29].

¹⁹⁹ See *R v Young* [1758] 97 ER 447 at 450-451; *Ex parte Ingless* [1837] NSWSupC 77; *R v Fitzgerald* [1829] NSWSupC 46; *In re Tyler* [1829] NSWSupC 25; *R v Marshall* [1855] 119 ER 174 at 175; *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 at [81]-[92].

²⁰⁰ See *R v Palmer* [1761] 97 ER 767; *R v Williams* [1762] 97 ER 851; *R v Baylis* [1762] 97 ER 851; *R v Borron* [1820] 106 ER 721; *Ex parte Ingless* [1837] NSWSupC 77; *R v Llewellyn-Jones* [1968] 1 QB 429 at 435; *R v Boulanger* [2006] 2 SCR 49 at [55]-[58].

²⁰¹ *R v Borron* [1820] 106 ER 721; *Ex Parte Fentiman* [1834] 111 ER 49 at 50.

The Supreme Court of Canada has observed that “partiality” denotes “unfair bias in favour of one thing ... compared with another”.²⁰² In *Greiner v ICAC*, a decision on the correctness of an administrative finding of corrupt conduct against a State Premier, Mahoney JA opined that partiality involves “the advantaging of a person for an unacceptable reason” and added:

The form of advantage conferred may also vary. Thus, the advantage may be seen in the actual decision, that is, the decision to award a position, a benefit or the like: the advantage may lie in the award of it to one rather than another. But the advantage may lie merely in the process leading to the exercise of a power or grant of a benefit. A person may be preferred by being put in a position of advantage in the process leading to the decision ... or, indeed, by the mere fact of being brought into the contest as one of the contending parties.²⁰³

Mahoney JA further described the concept of partiality as follows:

It is wrong deliberately to use power for a purpose for which it was not given: partiality is a species of this class of public wrong. Public power has limits in addition to those imposed by the terms on which it is granted ... [E]ven where the power derives from an office, for example, the office of Minister, that power must be exercised to achieve only the appropriate public purposes. If a Minister or officer exercises a public power merely to, for example, comply with the wishes of a political party, an employer or a trade union official, that exercise of power, though apparently within the terms of the legislation or office, is wrong and may constitute a crime. If he joins with others to do so, he may be guilty of a criminal conspiracy.²⁰⁴

In a subsequent article, Mahoney P (then President of the Court of Appeal of NSW) persuasively argued that civil remedies for the misuse of public power are inadequate and called for such wrongdoing to be addressed by criminal prosecutions for misconduct in public office, providing the following potential examples:

A power may be exercised by an official to achieve a purpose which is not the purpose for which the power was given to the official. Thus, a power ... is given to locate a public facility (a factory, an airport, a school). It is exercised, not predominantly to locate the facility in the best place suited to achieve its purpose but to attract voters to a particular area or to avoid alienating voters who otherwise would vote in a particular way. A town planning power is exercised not to secure the best planning result, but to benefit a friend, an organisation or a political party. An official is given power to allocate money to encourage, for example, cultural activities. He distributes the money to persons or bodies apt to support a particular political party – or to procure that they do so. A power is given to delineate the boundaries of a municipality or a city. Prima facie the power is given for the purpose of ensuring that local government purposes are achieved to the greatest extent and in the best way. Prima facie, to exercise power so as to secure control of a council by a political party is to exercise the power for a purpose for which it was not given.²⁰⁵

This recognition that it is improper and potentially criminal to exercise public power for political or election purposes is supported by many cases in which it has been concluded that such misbehaviour would constitute the offence of misconduct in public office.²⁰⁶ A clear example of this type of wrongdoing occurred in *Porter v Magill*, in which leaders of a local council pursued a policy of selling council properties in marginal wards for the purpose of achieving electoral advantage for their political party (they believed that home owners were more likely to vote for their party). The House of Lords confirmed the correctness of an administrative finding of “wilful misconduct”, with Lord Bingham (with whom the other Law Lords agreed) stating that “[p]owers conferred on a local authority may not lawfully be exercised to promote the electoral advantage of a political party” and concluding: “[T]his was a deliberate, blatant and dishonest misuse of public power. It was a misuse of power by both of them not for the purpose of financial gain but for that of electoral advantage. In that

²⁰² *R v Boulanger* [2006] 2 SCR 49 at [65], citing *The New Oxford Dictionary of English* (1998) p 1352.

²⁰³ *Greiner v ICAC* (1992) 28 NSWLR 125 at 162. See *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 (charge 1).

²⁰⁴ *Greiner v ICAC* (1992) 28 NSWLR 125 at 160-161.

²⁰⁵ Mahoney, n 42 at 20.

²⁰⁶ *R v Phelps* [1757] 96 ER 1282; *R v Williams* [1762] 97 ER 851; *R v Hand* [1765] 97 ER 1099; *R v Overseers of Bridgewater* [1774] 98 ER 1010; *R v Barrat* [1780] 2 Dougl 466; *R v Cozens* [1780] 99 ER 273; *R v Davie* [1781] 99 ER 371; *R v Williamson* [1820] 106 ER 773; *Commonwealth v Steinberg* 362 A 2d 379 (1976) at 386-387.

sense it was corrupt.”²⁰⁷ Lord Scott similarly remarked:

[T]his is a case about political corruption. The corruption was not money corruption. No one took a bribe. No one sought or received money for political favours. But there are other forms of corruption, often less easily detectable and therefore more insidious. Gerrymandering, the manipulation of constituency boundaries for party political advantage, is a clear form of political corruption. So, too, would be any misuse of municipal powers, intended for use in the general public interest but used instead for party political advantage. Who can doubt that the selective use of municipal powers in order to obtain party political advantage represents political corruption? Political corruption, if unchecked, engenders cynicism about elections, about politicians and their motives and damages the reputation of democratic government. Like Viola’s “worm i’ the bud” it feeds upon democratic institutions from within (Twelfth Night).²⁰⁸

It appears that in cases where a public officer acts with mixed motives, involving both proper and improper considerations, it will be sufficient to constitute misconduct in public office if he or she was “motivated to a significant degree” by improper considerations.²⁰⁹

Other examples of this species of misconduct in public office include:

- any corrupt, partial, oppressive or dishonest exercise of judicial power;²¹⁰
- improper discrimination in the assessment or collection of taxes or rates;²¹¹
- malicious or oppressive refusals to grant licences;²¹²
- improper exclusion of political opponents from an electoral roll;²¹³
- a police officer unlawfully arresting a person out of personal animosity²¹⁴ or promising immunity to a mayor’s son as a favour to the mayor;²¹⁵
- public officers dishonestly or partially causing government contracts to be awarded to companies operated by family members or close friends;²¹⁶
- public officers partially causing licences, permits or government contracts to be granted to themselves (via undisclosed business partners or related entities) or relatives;²¹⁷ and
- a local councillor dishonestly influencing a town planning decision to secure an increase in the value of his own property.²¹⁸

²⁰⁷ *Porter v Magill* [2002] 2 AC 357 at 465, 478.

²⁰⁸ *Porter v Magill* [2002] 2 AC 357 at 503.

²⁰⁹ *R v Speechley* [2005] 2 Cr App R (S) 15 at [38]-[45]. Also see *Porter v Magill* [2002] 2 AC 357 at 465-468.

²¹⁰ See *R v Day* [1755] 96 ER 852; *R v Borron* [1820] 106 ER 721; *R v Badger* [1843] 4 QB 468; *R v Barton* (1850) 5 Cox CC 353; *R v Marshall* [1855] 119 ER 174; *R v Llewellyn-Jones* [1968] 1 QB 429; *Sirros v Moore* [1975] 1 QB 118 at 132.

²¹¹ See *R v Buck* [1704] 87 ER 1046; *Anon* [1731] 94 ER 335; *R v Justices of the Peace of Rye* [1752] 96 ER 791; *R v Davie* [1781] 99 ER 371 at 372.

²¹² See *R v Young* [1758] 97 ER 447; *R v Williams* [1762] 97 ER 851; *R v Hand* [1765] 97 ER 1099; *R v Fitzgerald* [1829] NSWSupC 46.

²¹³ See *R v Phelps* [1757] 96 ER 1282; *R v Cozens* [1780] 99 ER 273; *R v Davie* [1781] 99 ER 371; *R v Williamson* [1820] 106 ER 773.

²¹⁴ *Dizaei v The Queen* [2013] EWCA Crim 88.

²¹⁵ *State v Secula* 380 A 2d 713 (1977).

²¹⁶ *Commonwealth v Steinberg* 362 A 2d 379 (1976); *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793; *HKSAR v Tracy* [2003] HKCFI 335; *HKSAR v Paul* [2009] 4 HKLRD 840. Also see the authorities at n 190.

²¹⁷ *State v Furey* 318 A 2d 783 (1974); *R v Gagne* (2000) 148 CCC(3d) 182; *HKSAR v Tong* [2008] 1 HKLRD 632 at [12]-[13], [54]; *Patel v Fiji ICAC* [2011] FJCA 56.

²¹⁸ *R v Speechley* [2005] 2 Cr App R (S) 15.

Concealed conflicts of interest

All public officers are obliged to avoid, or at least fully disclose, private interests that have the potential to conflict with their public duties (conflicts of interest).²¹⁹ This fundamental duty, which arises at common law and is also an express condition of employment for most officers (often required to be acknowledged in writing), has been described as follows:

[T]he public interest should not be entrusted to an official who has a pecuniary, personal or private interest which is or may be in conflict with the public interest. A public official owes an undivided duty to the public whom he serves, and he is not permitted to place himself in a position which would subject him to conflicting duties or expose him to the temptation of acting in any manner other than in the best interests of the public.²²⁰

Despite some suggestions to the contrary,²²¹ there is considerable authority to the effect that *wilful* non-disclosure or concealment of a material conflict of interest by a public officer, who continues to perform official duties in the area of conflict, can *of itself* constitute misconduct in public office (without proof of additional wrongdoing, such as actual partiality).²²² There is no reason in principle or practice why this should not be so.²²³ In sufficiently serious cases convictions will be justified on the basis that such conduct not only meets the (previously discussed) definition of “wilful misconduct” but also is “dishonest”. In particular, it is well established that wilful non-disclosure of a material fact a person is under a duty to disclose,²²⁴ including wilful concealment of a conflict of interest,²²⁵ is dishonest.

Sexual misconduct

Sexual misconduct by police officers or staff has often resulted in convictions for misconduct in public office (and lengthy custodial sentences), with examples involving such persons:

- abusing their authority to coerce persons into providing sexual gratification;²²⁶

²¹⁹ See *US v Carter* 217 US 286 (1910); *Wilkinson v Osborne* (1915) 21 CLR 89; *Horne v Barber* (1920) 27 CLR 494; *Wood v Little* (1921) 29 CLR 564; *R v Boston* (1923) 33 CLR 386; *R v McKitka* (1982) 66 CCC(2d) 164 at [29]; *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at [87]-[101]; references at nn 220-223.

²²⁰ *Anderson v Zoning Commission of the City of Norwalk* 253 A 2d 16 (1968) at 19, citations omitted. Also see *Anderson v City of Parsons* 496 P 2d 1333 (1972) at 1337: “If [a public officer] acquires any interest adverse to those of the public, without a full disclosure it is a betrayal of his trust and a breach of confidence.”

²²¹ See *State v Begyn* 167 A 2d 161 (1961) at 170; *R v Llewellyn-Jones* (1967) 51 Cr App R 4 at 6-7; *R v Zalm* [1992] BCWLD 1746 at [83]-[90]; Finn, n 7, pp 3, 31; Hall, n 47, p 12.

²²² *R v Whitaker* [1914] KB 1283 at 1298-1299; *R v Clarke* [1954] Arg LR 312; *HKSAR v Shum Kwok Sher* [2001] 3 HKLRD 399 at [78]; *HKSAR v Paul* [2009] 4 HKLRD 840; *Redmond v Worthington* 878 F Supp 2d 822 (2012) at 839-840; *Blackstock v The Queen* [2013] NSWCCA 172 at [24]-[36], [49]; references at n 223. Also see *R v Davis* [1763] 98 ER 534; *R v Arnoldi* (1892) 23 OR 201 at 209-210; *Wilkinson v Osborne* (1915) 21 CLR 89 at 94; *R v Boston* (1923) 33 CLR 386; *State v Furey* 318 A 2d 783 (1974) at 787; *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 at [10]-[13], [42]; *HKSAR v Tracy* [2003] HKCFI 335 at [5], [61], [143], [176]-[177].

²²³ ICAC has thrice concluded that wilful failure of a public official to declare a conflict of interest is sufficient to constitute the offence of misconduct in public office: ICAC, *Investigation into Bribery and Fraud at RailCorp* (September 2008) pp 8-9, 17-18; ICAC, *Investigation into the Undisclosed Conflict of Interest of a Senior Executive of the Sydney Harbour Foreshore Authority* (December 2011) pp 6-8, 35-36; n 251. There have also been recent convictions for this offence against officers for failing to disclose relationships (creating conflicts of interest) they were obliged to report: *R v Arthurs* [2013] EWCA Crim 2407 at [2], [8] (police officer failing to declare personal relationship with a known criminal); *R v King* [2013] EWCA Crim 1599 at [3], [10], [12] (prison officer failing to report sexual relationship with a former prisoner); *R v Cosford* [2014] QB 81 at [5] (prison officers failing to report sexual relationship between another officer and a prisoner).

²²⁴ See *Peters v The Queen* (1998) 192 CLR 493 at [84]; *R v Cuerrier* [1998] 2 SCR 371 at [116].

²²⁵ *Adams v The Queen* [1995] 1 WLR 52 at 63-65; *Peters v The Queen* (1998) 192 CLR 493 at [32], [84]; *Kwok v The Queen* (1997) 175 A Crim R 278; *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 at [42]; *R v Petroulias (No 1)* (2006) 177 A Crim R 153; *Parer v John Fairfax Publications Pty Ltd* [1998] ACTSC 138 at [37].

²²⁶ See *R v Wu Chi Wai* [1997] HKCA 121; *HKSAR v Chow Koon Shing* [2007] 3 HKLRD 10; *R v Iqbal* [2008] EWCA Crim 2066; *People v Gladden* (unreported, Court of Appeals of Michigan, 30 January 2014).

- abusing their positions to pursue sexual relations (while on or off duty) with vulnerable persons encountered in the performance of their duties, including victims of crime, witnesses, and persons with mental health or substance abuse problems;²²⁷ and
- engaging in consensual sexual relations while on duty.²²⁸

There are also many recent examples of convictions for misconduct in public office obtained against prison officers and employees for engaging in prohibited sexual relationships with prisoners.²²⁹ Judges have observed that such relationships have a corrupting influence, undermine discipline and security within a prison, expose officers to the threat of blackmail, involve a breach of public trust and damage public confidence in the prison system.²³⁰

Misconduct by Members of Parliament (including Ministers)

A member [of parliament] is the watch-dog of the public; and Cerberus must not be seduced from vigilance by a sop.²³¹

As previously observed, Members of Parliament (or MPs) are public officers. Accordingly, they can be prosecuted for misconduct in public office in appropriate cases.²³² Given the vital public duties MPs are entrusted to perform, there is a compelling public interest in bringing prosecutions when they culpably abuse their privileged positions and betray their public trust.

MPs have been described as “sentinels of the public welfare”.²³³ The high standards expected of them has been recognised since at least the time of Blackstone: “[I]t is a matter most essential to the liberties of this Kingdom, that such members be delegated to this important trust, as are most eminent for their probity, their fortitude, and their knowledge.”²³⁴

The public duties of MPs extend well beyond their core legislative responsibilities. They also play a crucial “ombudsman role”²³⁵ in assisting constituents and “superintendence role”²³⁶ in scrutinising the executive branch of government (including Ministers, departments and other public authorities). The latter role has been described as follows:

When a man becomes a member of Parliament, he undertakes high public duties. Those duties are inseparable from the position: he cannot retain the honour and divest himself of the duties. One of the

²²⁷ See *R v Lewis* [2010] 2 Cr App R (S) 104; *Quach v The Queen* (2011) 216 A Crim R 376 at [124]; *R v Fletcher* [2012] 1 Cr App R (S) 62; *R v Wilkie* [2012] 2 Cr App R (S) 68; *R v Bunyan* [2013] EWCA Crim 1885; *People v Paravas* (unreported, Court of Appeals of Michigan, 15 April 2014); convictions of Jordan Powell, Lee Wilcox, Simon Jones, Peter Jee, Mark Fisher, Stephen Mitchell and Lee Kershaw referred to at www.thelawpages.com.

²²⁸ See *R v Stone* [2011] EWCA Crim 1602 at [1]-[2], [17]; convictions of Ricci Giff, Matthew Fisher, Karl Cliff, Mark Witcher and Andrew Lang referred to at www.thelawpages.com. However, it is doubtful that mere sex on duty with a fully consenting adult (without any other misuse of position or potentially serious consequences arising from an unauthorised absence from active duty) would generally be sufficient to warrant conviction: see *People v Perkins* 662 NW 2d 727 (2003); *R v Stone* [2012] EWCA Crim 2011 at [37].

²²⁹ See *R v McDade* [2010] 2 Cr App R (S) 82; *R v Belton* [2011] 1 Cr App R 20; *R v Wright* [2012] 1 Cr App R (S) 21; *R v Cosford* [2014] QB 81; convictions of Amritpal Ahluwalia, Julie Turton, Yasemin Ozyukselen, Russell Thorne, Lisa Harris, Jade Watson and Andre Edman referred to at www.thelawpages.com.

²³⁰ See *R v Ratcliffe* [2010] 1 Cr App R (S) 51 at [7]-[13]; *R v Wright* [2012] 1 Cr App R (S) 21 at [8]-[10]; *R v King* [2013] EWCA Crim 1599 at [13]; conviction of Yasemin Ozyukselen, n 229.

²³¹ *R v Boston* (1923) 33 CLR 386 at 410 (Higgins J).

²³² In prosecutions for alleged corruption or fraud by MPs or Ministers, courts have rejected bold arguments that such misconduct has been so notorious yet unpunished in the past that it must not be a crime or that courts have no jurisdiction because of parliamentary privilege: *R v Vaughan* (1769) 4 Burr 2494 at 2499; *R v White* (1875) 13 SCR (NSW) (L) 322; *US v Brewster* 408 US 501 (1972); *R v Greenway* (London Central Criminal Court, 25 June 1992, Buckley J), reported at [1998] PL 356; *R v Chaytor* [2011] 1 AC 684.

²³³ *Wilkinson v Osborne* (1915) 21 CLR 89 at 105 (Isaacs J), approved in *R v Boston* (1923) 33 CLR 386 at 403.

²³⁴ Blackstone W, *Commentaries on the Laws of England* (1765) Bk 1, Ch 2, p 157.

²³⁵ *Dixon v British Columbia (Attorney General)* [1989] 4 WWR 393 at 413; Reference re Provincial Electoral Boundaries [1991] 2 SCR 158 at [26]-[27]; *McGinty v Western Australia* (1996) 186 CLR 140 at 186, 287-288.

²³⁶ See *Egan v Willis* (1998) 195 CLR 424 at [10], [42]-[46], [81], [100]-[107], [152]-[155]; *Egan v Chadwick* (1999) 46 NSWLR 563 at [15]-[26], [137], [152].

duties is that of watching on behalf of the general community the conduct of the Executive, of criticizing it, and, if necessary, of calling it to account in the constitutional way by censure from his place in Parliament – censure which, if sufficiently supported, means removal from office. That is the whole essence of responsible government, which is the keystone of our political system, and is the main constitutional safeguard the community possesses.²³⁷

Important non-legislative public duties (including authorised functions) of MPs include:

- assisting and representing constituents, especially in dealings with the executive;²³⁸
- investigating, scrutinising and criticising executive decisions and actions;²³⁹
- vigilantly controlling and faithfully guarding public finances and revenue;²⁴⁰ and
- seeking to influence actions and decisions of the executive, including Ministers.²⁴¹

When MPs engage in such activities, especially when seeking to influence the executive, they cannot divest themselves of their official position or character;²⁴² they act in an official capacity, or at least *in connection to* their public office, for the purpose of the second element of offence of misconduct in public office.²⁴³

In performing their official functions MPs are obliged to act impartially in the public interest and avoid (or, at the very least, fully disclose) any personal or private interests that could conflict with their public duties.²⁴⁴ For example, in *R v Boston*, Isaacs and Rich JJ observed:

The fundamental obligation of a member in relation to the Parliament of which he is a constituent unit still subsists as essentially as at any period of our history. That fundamental obligation, which is the key to this case, is *the duty to serve* and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community.²⁴⁵

Heightened responsibilities and obligations apply to Ministers. As Lee J has observed:

We live, and are fortunate to live, in a democracy in which members of Parliament decide the laws under which we shall live and cabinet ministers hold positions of great power in regard to the execution of those laws. A cabinet minister is under an onerous responsibility to hold his office and discharge his function without fear or favour to anyone, for if he does not and is led into corruption the very institution of democracy itself is assailed and at the very height of the apex. Democracy can only survive when ordinary men and women have faith in the integrity of those whose responsibility is the

²³⁷ *Horne v Barber* (1920) 27 CLR 494 at 500 (Isaacs J), approved in *R v Boston* (1923) 33 CLR 386 at 401 (Isaacs and Rich JJ) and *Egan v Chadwick* (1999) 46 NSWLR 563 at [24] (Spigelman CJ).

²³⁸ In addition to the references at n 235, see *US v Brewster* 408 US 501 (1972) at 512, 524, 557; *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 365; *Egan v Chadwick* (1999) 46 NSWLR 563 at [131]-[133]; *R v Field* [2011] 1 NZLR 784 at [4], [95]; *Sneddon v NSW* [2012] NSWCA 351 at [61]-[65], [215].

²³⁹ See *Wilkinson v Osborne* (1915) 21 CLR 89 at 98-105; *Horne v Barber* (1920) 27 CLR 494 at 499-501; *R v Boston* (1923) 33 CLR 386 at 393-394, 401-404, 410; *Sneddon v NSW* [2012] NSWCA 351 at [214]-[225]; *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 365.

²⁴⁰ See *R v Boston* (1923) 33 CLR 386 at 394, 401; *Wilkinson v Osborne* (1915) 21 CLR 89 at 97-98, 104; *Egan v Willis* (1998) 195 CLR 424 at [100]-[104].

²⁴¹ See *R v Boston* (1923) 33 CLR 386 at 392-394, 402-403, 409; *Attorney-General of Ceylon v De Livera* [1963] AC 103 at 121-127; *R v Bruneau* [1964] 1 CCC 97; *US v Brewster* 408 US 501 (1972) at 512-513, 524, 526, 540; *R v Arseneau* [1979] 2 SCR 136 at [15]-[16], [29]-[33]; *R v Field* [2011] 1 NZLR 784 at [4], [95].

²⁴² See *Horne v Barber* (1920) 27 CLR 494 at 499-500; *R v Boston* (1923) 33 CLR 386 at 393, 403, 409; *Herscu v The Queen* (1991) 173 CLR 276 at 282-284, 287. Also see *Wilkinson v Osborne* (1915) 21 CLR 89 at 93, 105.

²⁴³ See the text accompanying nn 90-98 above, especially the references at n 98.

²⁴⁴ See *Wilkinson v Osborne* (1915) 21 CLR 89; *Horne v Barber* (1920) 27 CLR 494; *R v Boston* (1923) 33 CLR 386; *Sneddon v NSW* [2012] NSWCA 351 at [62]-[64], [218]-[224]; Carney G, *Members of Parliament: Law and Ethics* (2000) pp 248-250.

²⁴⁵ (1923) 33 CLR 386, 400. Also see *Horne v Barber* (1920) 27 CLR 494 at 500 (Isaacs J): “[T]he law will not sanction or support the creation of any position of a member of Parliament where his own personal interest may lead him to act prejudicially to the public interest by weakening ... his sense of obligation of due watchfulness, criticism and censure of the Administration”, 501 (Rich J): “Members of Parliament are donees of certain powers and discretions entrusted to them on behalf of the community, and they must be free to exercise these powers and discretions in the interests of the public unfettered by considerations of personal gain or profit.”

preservation of integrity of Parliament in all its workings. It is particularly important that those who have the privilege, the honour and the responsibility of cabinet rank should not, for their personal advantage, abuse their position.²⁴⁶

Similarly, in *Greiner v ICAC*, Mahoney JA stated:

It is important to have regard to the standard of conduct required of a Premier and a Minister. It is commonplace that more is expected of those to whom more is given. This is so not the least in respect of public power. In the case of a high official the power of his office carries, by its nature, influence over others. This is particularly so in the case of a Minister who may exercise not merely legal but political power. In the exercise of such power and influence, a Minister may be subject to little or no formal scrutiny: he is trusted to exercise the power properly. The misuse of public power in breach of such trust may be regarded as of particular seriousness.²⁴⁷

MPs and Ministers, like all other public officers, will commit the offence of misconduct in public office if they engage in wilful misconduct in connection with their office that is serious and without reasonable excuse. Actual or potential examples include:

- MPs making false claims for official entitlements or allowances;²⁴⁸
- MPs misusing public resources, including human resources, for personal²⁴⁹ or political campaigning purposes;²⁵⁰
- a MP (and former Minister) repeatedly misusing his official position and influence to benefit financial interests of his own family and/or political donors by making representations to Ministers and public servants to change government policies or engage in commercial dealings without disclosing the relevant interests;²⁵¹
- a Minister endorsing a policy for Cabinet approval while deliberately concealing that his close friend's family would benefit financially from the policy;²⁵²
- a Minister repeatedly exercising his official functions in a dishonest and/or partial manner to advance business interests of friends, including by creating a mining tenement, granting a mining licence and disclosing confidential government information;²⁵³
- a Minister fraudulently obtaining an undue financial benefit from the government in relation to a commercial transaction;²⁵⁴ and
- two Ministers corruptly selling state land for substantially less than its market value to a company owned and/or controlled by one of them.²⁵⁵

CONCLUSION

In *R v Bembridge*, the leading historical case on misconduct in public office, Lord Mansfield remarked that “the principle upon which this prosecution is instituted [is] as old as the constitution” and is “so

²⁴⁶ *R v Jackson* (1988) 33 A Crim R 413 at 435. Also see *Herscu v The Queen* (1991) 173 CLR 276 at 284.

²⁴⁷ *Greiner v ICAC* (1992) 28 NSWLR 125 at 175.

²⁴⁸ ICAC, *Report on Investigation into the Conduct of the Hon Malcolm Jones MLC* (July 2003) pp 28-31; *R v Walsh* (2009) 902 APR 34; ICAC, *Report on Investigation into the Submission of False Claims for Sitting Day Relief Payments by a NSW MP & Members of her Staff* (July 2010) pp 16-18; *D'Amore v ICAC* [2012] NSWSC 473; *D'Amore v ICAC* [2013] NSWCA 187; Carney, n 244, pp 299-300.

²⁴⁹ *R v Lavigne* 2011 ONSC 1335 at [2], [77]-[96]. Also see *Re Austin* (1991) 57 A Crim R 220.

²⁵⁰ ICAC, *Report on Investigation into the Conduct of the Hon Malcolm Jones MLC* (July 2003) pp 28-29.

²⁵¹ ICAC, *Investigation into the Conduct of the Hon Edward Obeid MLC and Others Concerning Circular Quay Retail Lease Policy* (June 2014) (Obeid Circular Quay Lease Policy) pp 6-7, 59-61. ICAC, *Investigations into the Conduct of the Hon Edward Obeid MLC and Others in Relation to Influencing the Granting of Water Licences and the Engagement of Direct Health Solutions Pty Ltd* (June 2014) pp 6-7, 44-45, 59-60.

²⁵² ICAC, Obeid Circular Quay Lease Policy, n 251, pp 7, 57-61.

²⁵³ ICAC, *Investigation into the Conduct of Ian MacDonald, Ronald Medich and Others* (July 2013) pp 5, 35-38; ICAC, *Investigation into the Conduct of Ian MacDonald, Edward Obeid Senior, Moses Obeid and Others* (July 2013) pp 8-11, 143-155; ICAC, *Investigation into the Conduct of Ian MacDonald, John Maitland and Others* (August 2013) pp 8-9, 16, 136-144.

²⁵⁴ *Williams v The Queen* (1986) 39 WIR 129. Also see *Walter v The Queen* (1980) 27 WIR 386.

²⁵⁵ *Marin & Coye v Attorney General of Belize* [2011] CCJ 9 (CJ) at [27]-[44].

essential to the existence of the country and the constitution, that ... I may fairly say the constitution would not exist without it".²⁵⁶ In a similar vein, the High Court of Australia has recently observed that Australian governments have "constitutional obligations to act in the public interest"²⁵⁷ and the current Chief Justice of Australia has referred to "the constitutional proposition" that "Public offices are created for public purposes and for the benefit of the public".²⁵⁸

Indeed, the offence of misconduct in public office is truly of constitutional significance in a representative democracy. It provides a crucial mechanism for seeking to ensure that those elected or appointed to serve the people do so with requisite honesty, integrity and fidelity. The role of criminal law in this field is deeply rooted in the history and tradition of all common law jurisdictions and its importance has only grown over time as the government plays an ever-increasing role in regulating the lives and activities of its citizens.

A few decades ago the offence was somewhat ill-defined, but this is no longer the case.²⁵⁹ Its specific elements are now sufficiently certain and stringent to weather criticisms based on asserted vagueness. This has not prevented calls for it be abolished and replaced by one or more statutory offences,²⁶⁰ but, in this author's opinion, it would be a mistake to do so.

In 1976, a Royal Commission chaired by Lord Salmon concluded that the common law offence of misconduct in public office "should be retained in its present form" and specifically recommended against codification, stating "We doubt whether the task could be satisfactorily performed".²⁶¹ A similar opinion was more recently expressed by Sir Anthony Mason NPJ:

The common law offence of misconduct in public office is necessarily cast in general terms because it is designed to cover many forms of misconduct on the part of public officers. An alternative way of dealing with misconduct by public officers would be to enact a statute formulating specific offences for particular categories of misconduct in public office. The adoption of that course would involve a loss of flexibility and run the risk that the net would fail to catch some forms of serious misconduct. To suggest that the offence requires further definition would be to pursue a degree of definition which is unattainable, having regard to the wide range of acts and omissions which are capable of amounting to misconduct by a public officer in or relating to his office. The offence serves an important purpose in providing a criminal sanction against misconduct by public officers.²⁶²

A few years ago, the Court of Appeal of Fiji even called for reintroduction of the common law offence to supplement existing statutory offences.²⁶³

For many centuries the common law offence of misconduct in public office has provided society with a potent weapon against errant officials who culpably betray their public trust. This offence has stood the test of time and withstood many legal challenges in different jurisdictions. Its recent resurgence and continued existence serves as a vital safeguard of the people's entitlement to integrity in government.

²⁵⁶ *R v Bembridge* (1783) 22 St Tr 1 at 150 & 156.

²⁵⁷ *Commissioner of Taxation v Day* (2008) 236 CLR 163 at [34].

²⁵⁸ French (2011), n 14, p 7.

²⁵⁹ See *Re Clare Montgomery QC* [2013] HKCFI 785 at [16].

²⁶⁰ Clark D, "Officers Behaving Badly" (2006) 156 NLJ 969; Spencer JR, "Police Behaving Badly – the Abuse of Misconduct in Public Office" (2010) 69 CLJ 423; Parsons S, "Misconduct in Public Office – Should it Still be Prosecuted?" (2012) 76 J Crim L 179; Samuels A, "Misconduct in Public Office" (2013) 215 Crim Law 4; Law Commission, *Misconduct in Public Office*, <http://lawcommission.justice.gov.uk/areas/misconduct.htm>.

²⁶¹ Royal Commission on Standards of Conduct in Public Life, n 37.

²⁶² *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 at [91].

²⁶³ *Patel v Fiji ICAC* [2011] FJCA 56 at [85].