

Reforming Misconduct in Public Office

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This article seeks to critique the Law Commission consultation paper on Reforming Misconduct in Public Office.¹ This project has been a major undertaking as the offence of misconduct in public office (MIPO) covers a wide range of circumstances. The consultation paper is extremely detailed and, in common with other papers, is academically rigorous. The paper was preceded by an issues paper,² which set out the Commission's initial thinking. The greatest success of the issues paper appears to be that it provoked additional research. Whilst the issues paper contained a detailed appendix setting out recent cases, the responses to the issues paper highlighted other examples of how it was being used.³ The consultation paper puts forward ideas as to how MIPO could be reformed, with the intention of making it clearer and more certain in its application.

MISCONDUCT IN PUBLIC OFFICE

This article does not seek to provide a detailed analysis of the history of the offence, partly because the Law Commission does this so well. In the issues paper an appendix was included that provided a comprehensive and analytical history of the offence.⁴ This is to be commended and is of very high quality. Its inclusion is particularly notable because there is a relative scarcity of academic literature on this crime.⁵

Misconduct in public office (MIPO) is an ancient offence⁶ and whilst it went through a fallow period when it was rarely used, it has enjoyed a renaissance in the 21st Century. It is perhaps most recently famous, or infamous, due to its use as part of *Operation Elveden*, the investigation into illegal payments to public officials for the disclosure of confidential information. MIPO was used in *Operation Elveden* both as a substantive offence⁷ against principals, but also as part of inchoate and secondary liability. The latter was particularly controversial as it targeted journalists⁸ and ultimately all but one journalist was acquitted.⁹

It has been noted that there are 'a great variety of circumstances in which the offence of [MIPO] may be charged'.¹⁰ It is one of the broadest crimes in that it encapsulates a wide-range of people who are classified as office-holders, and behaviour that can constitute misconduct. The leading (modern) statement of the offence is set out by the Court of Appeal in *Attorney-General's Reference (No 3 of 2003)*¹¹ where it was held that the key elements of the offence are:

¹ Law Commission Consultation Paper No 229. (Hereafter 'Consultation Paper').

² 'Misconduct in Public Office Issues Paper 1: The Current Law' (published 20 January 2016). (Hereafter 'Issues Paper')

³ See chapter 2 of the consultation paper for an explanation of responses.

⁴ Appendix A, *Issues Paper*.

⁵ That said, some of the more notable pieces include S. Parsons 'Misconduct in a public office – should it still be prosecuted?' (2012) 76 *Journal of Criminal Law* 179-185; D. Lusty 'Revival of the Common Law Offence of Misconduct in Public Office' (2014) 38 *Criminal Law Journal* 337-363 and a short note by Spencer: J. Spencer 'Police behaving badly – the abuse of misconduct in office' (2010) 69 *Cambridge Law Journal* 423-425.

⁶ *Issues Paper*, Appendix 1. See also *R v Chapman et al* [2015] EWCA Crim 539 where Lord Thomas CJ states that the offence dates back to the thirteenth century (at [17]).

⁷ Where, in particular, police officers and prison officers were convicted of the offence (see Appendix D of the *Issues Paper* for a useful summary of this).

⁸ They were charged with conspiracy to commit MIPO (s.1, *Criminal Law Act 1977*).

⁹ One journalist was convicted but had their conviction quashed (*R v France* [2016] EWCA Crim 1588) and one (Dan Evans, a former journalist of the *Mirror* and *News of the World*) pleaded guilty and received a suspended sentence of imprisonment.

¹⁰ *Attorney-General's Reference (No 3 of 2003)* [2004] EWCA Crim 868 at [54].

¹¹ [2004] EWCA Crim 868.

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

Little will be said about many of these elements at this point as they constitute the principal arguments in the consultation paper and, therefore, this article. However, it's worth pausing on the second element, as this explains its breadth. Whilst few would argue that neglecting duty is deserving of punishment – with the leading exemplar being *R v Dytham*¹² where a police officer on duty watched, and failed to intervene, when a person was attacked – the second form 'wilful misconduct' could mean almost anything. It has been used in contexts that would perhaps be understandable, for example the disclosure of confidential information as in *Operation Elveden*. However, MIPO has also been used for other forms of misconduct. For example, in *R v W*¹³ a police officer was charged with MIPO in respect of misusing a police-issued credit card. This does not obviously relate to his role as a police officer (as civilian staff are also issued with corporate credit cards in many companies or institutions, including the police). It is worth noting that there is nothing in law that requires the misconduct to be criminal in its own right. The offence merely requires wrongful conduct, so long as the other elements (particularly the degree to which it abuses the public's trust) are met.

The Law Commission notes a number of problems with the offence as currently understood:

- The definition of 'public office' is vague.
- Too many people are arguably caught by the definition 'public office'.
- Too many forms of behaviour are included within the offence.
- It is unfair if conduct is criminalised in a particular way because D is a public officer, but not if D was a private citizen.

It is these broad criticisms that the consultation paper seeks to address, including through the suggestion of introducing new offences. It should be noted that the Law Commission canvasses the possibility that MIPO should be abolished without replacement,¹⁴ but it ultimately does not propose this.¹⁵ For the reasons set out below, it is agreed that there is a need for some form of MIPO and therefore no more shall be said of this option.

DEFINITION OF PUBLIC OFFICE

Perhaps the key criticism of MIPO concerns the definition of 'public office'. This is partly because contrary to the name of the offence, it is very clear that it does not merely apply to those who hold a public office (for example, civil servants, police officers, judges etc) but also to employees. This dates back at least to the civil case of *Henly v Lyme Corporation*¹⁶ where it was said '...everyone who is appointed to discharge a public duty and receives a compensation in

¹² [1979] QB 722.

¹³ [2010] EWCA Crim 372.

¹⁴ *Consultation Paper*, p.11.

¹⁵ Indeed, it is noted that nobody, in the response to the issues paper, called for the complete abolition of the offence.

¹⁶ (1828) 5 Bing NC 91.

whatever shape...is constituted a public officer'. Thus, in contemporary usage, this has meant that whilst some office holders have been prosecuted, so have relatively low-level employees.¹⁷

One criticism advanced is that the number of categories of people who can be subject to MIPO means that it is unclear who is caught and who is not. The Law Commission note that this means that the offence could be considered vague, potentially breaching Article 7 of the ECHR.¹⁸ This is an often-cited 'problem' of common-law offences¹⁹ but it is one that the courts rarely uphold. Whilst the Law Commission note that Article 7 was raised in one case,²⁰ the Court of Appeal has specifically rejected the argument that MIPO breaches Article 7.²¹

A stronger argument for requiring greater certainty is that the current definition of 'public office' leads to inconsistencies of application. Sometimes the reason for this is obvious, but in other cases there is merely an *appearance* of inconsistency, but the application is correct. A classic example of the former is illustrated by the prosecution of Bishop Peter Ball, the former Bishop of Gloucester. Ball pleaded guilty to two counts of indecent assault and one count of misconduct in public office, the latter being an all-encompassing charge relating to persistent sexual abuse and its covering up. The trial judge (Wilkie J) held that a bishop of the Church of England held an 'office' because of the constitutional position of the Church of England. When being sentenced, the judge noted that much of the conduct was, in law, consensual but was undoubtedly an abuse of office.²² This is something worth pausing on. Whilst Ball was an office-holder, a bishop in the Roman Catholic Church would not be and nor would an (Anglican) bishop in Wales or Scotland. It is difficult to reconcile this purely on the basis of the ancient establishment of the Church of England.

The second category where there is an *appearance* of inconsistency can be seen where there appears to be inconsistencies as to who is, or is not, within the remit of MIPO. Police officers are obvious examples of those who are covered by the offence, but so are many local government employees whereas medical professionals are not.²³ Without an understanding of the offence it may be thought that this is inconsistent. A doctor, nurse or paramedic receives money from the public purse. Would the public not consider them to be examples of those who are employed by the State to look after the public? Yet the courts do not consider them to be public office holders, partly because they do not owe a general duty to the public.²⁴

It is unnecessary to consider in depth the current definition of 'public office', because it is clear that the Law Commission has demonstrated a need to alter the definition. The Commission considers a number of alternatives but ultimately decides on two. It argues a person should be considered to be in public office if:

1. they are in a position involving a public function exercised pursuant to a state or public power, or

¹⁷ For example, in *R v McClear* (2014, Belfast CC, unreported) a council CCTV operator was convicted of MIPO.

¹⁸ *Consultation Paper*, p.18 citing *R v Mitchell* [2014] EWCA Crim 318.

¹⁹ For example, public nuisance (*R v Rimmington* [2005] UKHL 63) and conspiracy to defraud (*R v H* [2015] EWCA Crim 46) doubting the first-instance decision of *R v Evans* [2014] 1 WLR 2817).

²⁰ *Consultation Paper*, p.112, citing *R v Mitchell* [2014] EWCA Crim 318.

²¹ *R v Norman* [2016] EWCA Crim 1564 at [49].

²² Sentencing remarks of Mr Justice Wilkie in *R v Ball* 7th October 2015 at [17]. Available online at: <https://www.judiciary.gov.uk/wp-content/uploads/2015/10/r-v-ball-sentencing.pdf>.

²³ *R v Mitchell* [2014] EWCA Crim 318.

²⁴ Discussed further below.

2. they are in a position involving a public function which the office holder is obliged to exercise in good faith, impartiality or public trust.²⁵

In doing so, they reject two other possibilities:

1. that they are in a position with an institutional or employment link to one of the arms of the state; or
2. a position where the person occupying it has a duty associated with a state function, which the public has a significant interest in seeing performed.²⁶

It must be correct to reject the latter two options as the terms used are too vague or would make the offence too broad. The first potentially includes every public-sector employee irrespective of the function that they hold. It can never have been intended that this would be the scope of the offence. The second rejected option is, in essence, a continuance of the status quo and the Law Commission note that this has proven problematic, with some arbitrary decisions being made as to who is in public office,²⁷ and that the blending of public and private-funded functions means that ‘distinctions [would be] drawn between individuals in similar yet different positions that would be unworkable in modern life’.²⁸

The two alternatives that are retained as possible tests differ quite significantly in terms of who could be caught. The first – a public function exercised pursuant to a state or public power – is arguably the narrower of the two. It has the attraction of linking it to the abuse of power. The consultation paper noted that a former Attorney-General believed this was the most important factor that justified the offence²⁹ and this must be correct. If one looks at the contemporary use of the offence,³⁰ it can be seen that most prosecutions relate to a small number of occupations:

1. Politicians.³¹
2. Police officers.
3. Prison officers.
4. Civilian police and prison staff.³²
5. Court staff.³³
6. Local government employees.
7. Home Office detention officers (e.g. Borders Agency).

There were, of course, smaller groupings, including members of the Crown Prosecution Service³⁴ and a small number of military staff. However, this list encompasses the vast majority of people

²⁵ *Consultation paper*, pp.120-121.

²⁶ *Consultation paper*, p.121.

²⁷ The Law Commission make specific reference to bishops of the Church of England, something that will be explored further below.

²⁸ *Consultation paper*, p.111.

²⁹ *Consultation paper*, p.117 citing the Rt. Hon. Dominic Grieve QC MP.

³⁰ This is set out extensively in Appendix D of the *Issues Paper*.

³¹ Damien Green MP was investigated, although not charged, for misconduct in public office. At the time of writing it has been alleged that the police have been asked to investigate whether Keith Vaz MP has committed misconduct in public office. Two MEPs have also been charged with misconduct following allegations surrounding their expense claims. There have also been convictions of councillors.

³² Including PCSOs (police service) and educational and administrative staff employed in the prison service.

³³ No judge has been reported to be investigated for this crime and the staff have primarily included administrative staff and jury bailiffs.

³⁴ Both for conduct that could broadly be summarised as perverting the course of justice.

that are covered by the offence. In each case it can be stated they are exercising a power given to them by the State. The powers of the police, prison service and Borders Agency are self-explanatory. They are powers that relate to the enforcement of the law and prevention of crime. The powers of politicians, civil servants and local authority employees are probably also well understood: they are exercising powers of governance. Whilst there may be some dispute as to who fits within these groupings, as a general principle it can be accepted. Similarly the position of judges and court staff are self-explanatory. They hold, or facilitate, the power of justice, one of the most important powers of the State. Even then, however, there are possible contradictions. A barrister employee of the Crown Prosecution Service who leaks information could commit MIPO but an independent practising barrister who is instructed by them cannot.³⁵

The advantage of this first proposal is that it does narrow down the pool of people who are exercising a power. Where someone is not exercising a public function but is an employee of the state then they would not be caught. A good example would be a council 'lolly-pop' lady, helping children to cross a road outside a school. It would be difficult to argue that this was the exercise of a public function and is therefore outside the scope of MIPO.

The second test that the Law Commission propose is perhaps less neat. A person holds a public office if 'they are in a position involving a public function which the office holder is obliged to exercise in good faith, impartiality or public trust.' On the one hand this could seem similar to the first test and would certainly capture, for example, the police, politicians, judiciary, civil servants etc. but it arguably raises greater uncertainty as to who would be captured by the offence and indeed may raise the issue of inconsistent application again. Let us return to the example of a Church of England bishop. Under the first test – public power – it is unlikely that a bishop would be deemed to be in a public office as administering a religion is not a *power* of the state, although it is arguably (due to establishment) a *function* of the (English) state. Under the second test, the bishop may be included. It would be difficult to argue that a bishop is not expected to act in good faith, in an impartial way or according to public trust. Thus a Church of England bishop could still be a public officer and yet a Roman Catholic bishop would not. For that reason it is submitted that the first definition is more appropriate, especially as it links expressly to the concept of power and therefore, by implication, to abuse of power.

Whichever test is adopted, the question then arises who decides whether a person satisfies that test? The Law Commission argue there are three possibilities:

1. A statutory test is created, meaning that the courts decide who meets the definition.
2. The creation of a statutory list that sets out the factors to be considered in determining whether a position is a public office.
3. The creation of a list of particular persons constituting public office.³⁶

In terms of a list there is then the question as to whether it should be a non-exhaustive exemplar list (thus allowing for the canon of *eiusdem generis*) or whether the list should be set out in a schedule of the Act, allowing for amendment through secondary legislation.

³⁵ The independent barrister is not because they are an independent contractor and neither an office holder nor someone receiving money from the state for a state function. The same would undoubtedly be true under the Law Commission's proposals.

³⁶ *Consultation Paper*, p.121.

Given one of the principal criticisms of MIPO has been uncertainty, it is suggested that any new definition should be clear. The most obvious way of doing this is through a list. The Law Commission notes that few countries have provided a comprehensive list of those covered by an offence and, instead, have tended to create a list of functions.³⁷ There is an attraction to this in that functions rarely change but the description of those who do may. So, for example, the *National Crime Agency* has changed its name on numerous occasions, as has the *Borders Agency* and *HM Revenue and Customs*. Whilst some functions changed, many of their functions did not, but the change of name would cause a difficulty if they were included in a list.

A list of functions also avoids the problem that ‘labelling’ posts can have. For example, the label ‘civil servant’ covers perhaps one of the broadest range of employees. It ranges from the Cabinet Secretary to an apprentice working in the post-room of a Whitehall department. There may be good reason for covering even the most junior personnel within MIPO – including the person who sorts the mail and who copies correspondence to ministers and sells it to lobbyists – but there may well be a number of civil servants who should not be covered. For example, a press officer of the UK Space Agency is undoubtedly a civil servant but do they need to be subject to MIPO (as distinct to other offences)?

HM Council of Judges argue that a list of offices (rather than functions) should be produced,³⁸ arguing that this brings greater certainty. That is true, but as the Law Commission notes, it brings the potential of being overtaken by events as offices change. An obvious retort would be that when Parliament changes an office it could, by the same instrument, change the list. However, some of the functions are not exercised by Parliamentary power. A good example of this is control of agencies. Until 2013 immigration was a matter for the *UK Border Agency* but this was changed by ministerial directive. The functions of the agency were returned to the Home Office and a new body – UK Border Force – was created. No statute was required, it was an exercise of ministerial power. Therefore the relevant minister would need to (a) recognise the list needed changing, (b) decide whether those employed required to be on the list and (c) arrange the statutory instrument to come into force at the same time as the ministerial decree.³⁹ Clearly there is the potential for this to be missed and thus a list of functions is to be preferred.

Whether a person is a public office holder under current law relates to whether there is a ‘significant link’ between the holder and a wider public duty. This is perhaps best-encapsulated by Sir Brian Leveson P. in *R v Mitchell*:⁴⁰

[D]oes the fulfilment of [his] duties represent the fulfilment of one of the responsibility of government such as that the public have a significant interest in the discharge of that duty which is additional to or beyond an interest in anyone who might be directly affected by a serious failure in the performance of that duty?⁴¹

The Law Commission argue that this is too vague as ‘significant interest’ decries a definition.⁴² They believe that a list of functions would make the offence clearer and it is difficult to argue

³⁷ *Consultation Paper*, p.123.

³⁸ *Consultation Paper*, p.124.

³⁹ Of course the counter-argument is that ‘civil servant’ could be an office listed and as employees of both the *UK Borders Agency* and *UK Border Force* were civil servants this would suffice. However, as noted above, ‘civil servant’ covers a variety of roles, not all of whom should necessarily fall within the scope of MIPO.

⁴⁰ [2014] EWCA Crim 318.

⁴¹ [2014] EWCA Crim 318 at [16].

⁴² *Consultation Paper*, p.112.

against this. However, what test is used to identify public functions? The latter part of the extract from *Mitchell* above provides a clue. In it, Leveson P. differentiated between those who have a wider duty to the public, and those who owe a duty to the individual.

Mitchell was a paramedic who was accused of behaving in a (sexually) inappropriate manner towards a vulnerable female patient that he was transporting to hospital by ambulance. It was thought inappropriate to charge a substantive sex offence and thus he was charged with MIPO. He submitted that he did not hold a public office, something rejected by the trial judge, at which point he pleaded guilty.

The Court of Appeal quashed his conviction, holding that he was not in public office:

In this case, the nature of the duty undertaken by ambulance paramedics was to treat and provide emergency health care to the individual patients for whose care they become responsible by reason of the circumstances in which they came into contact with them: it is a duty to the individual.⁴³

This can be contrasted with, for example, police officers who owe a duty that is significantly wider than the individual who reports being the victim of crime. The Law Commission support this logic and state that ‘an important distinction can be made between those who perform public functions, including the provision of ‘public’ services, and those who only provide services *to* the public.’⁴⁴ The distinction here is that the former is much wider than the latter. They provide the example of a government minister or civil servant who will be exercising public function powers because their performance is directed to the public at large. Similarly, the police will be performing a public function as it is not directed towards an individual. However, a nurse or teacher would not be performing a public function but rather is providing a service to the individual they deal with. Whilst the health service or education authority may be performing a public service, the individual teacher or nurse is dealing with an individual and is not exercising any powers over the general public. MIPO should only apply to those that have responsibilities to the public at large.

BEHAVIOUR THAT SHOULD NOT BE CAUGHT

Another significant criticism advanced by the Law Commission is that too much behaviour is included within the offence of MIPO, and that some of this conduct should be left to the civil law. The Law Commission believe a considerable amount of misconduct should be treated as a regulatory or disciplinary matter, pointing out that this is what happens with many professions.⁴⁵ The demarcation between criminal and civil responses is interesting and complicated. It is not possible to identify a clear boundary, although that is perhaps unsurprising given that the boundary is rarely clear in any other area of the criminal law.⁴⁶

The Law Commission believes that treating the matter as a regulatory or disciplinary matter would be appropriate because this often involves the imposition of sanctions, including dismissal, something it argues ‘will often be an adequate social condemnation’.⁴⁷ The terminology

⁴³ *R v Mitchell* [2014] EWCA Crim 318 at [19].

⁴⁴ *Consultation Paper*, p.115.

⁴⁵ Doctors and lawyers perhaps being the most obvious examples.

⁴⁶ For a general discussion see the introductory pages of D. Ormerod and K. Laird *Smith & Hogan's Criminal Law* (14th Edn, 2015: Oxford. OUP).

⁴⁷ *Consultation Paper*, p.81.

here is interesting. What does ‘social condemnation’ mean? Certainly, a victim *may* be satisfied that wrongful action has led to an officer losing their job, but it is equally possible that they may believe that the loss of employment is insufficient. Also, there may be little sense of *public* condemnation. One of the principles behind criminal law is that (ordinarily) it is discharged in public so that the public are reassured that there are consequences for those who break the rules. Regulatory matters will not necessarily be held in public. Whilst the regulators for doctors and lawyers publish their findings, not all will. The dismissal of an employee is rarely public knowledge and therefore there is a material difference between the civil and criminal law in terms of condemnation. Of course, by itself this is not a justification for criminalisation but it is worth questioning whether the belief of social condemnation is necessarily correct.

The Law Commission believes that ‘seriousness’ separates the criminal law from the civil law. It concedes that in many instances, the misconduct could constitute a wrong or cause harm, but believes that only where it involves serious harm can criminal law be justified. Whilst this is a logical statement, it is controversial in its application, particularly in respect of sexual misconduct. Setting aside those cases where there is the exploitation of a vulnerable person (as that will be discussed later), the principal concern is that a sexual relationship can cause harm not to the individual but to the public and the public service employed by them. The Law Commission refer to *R v Cosford*⁴⁸ where a nurse employed by the Prison Service engaged in (consensual) sexual activities with a prisoner. The argument for criminalising *Cosford* is not that the relationship was exploitative, but that it undermined prison discipline and the proper functioning of the prison regime. Prison is about the punishment of those who break the rules and (arguably) correcting this behaviour. A sexual relationship between those employed to enforce prison discipline and those who are incarcerated undermines public trust. The same could be said of *R v Belton*⁴⁹ which concerned a member of the independent monitoring board.⁵⁰ Members of monitoring boards are tasked by society to ensure that prisons are being run properly and that prisoners are safe. A sexual relationship between the visitor and prisoner undermines this scheme: it casts doubt on the impartiality of the regime and causes questions to be asked about whether the report can be trusted.

Does the fact that sexual relationships such as these cause harm to the public interest justify the imposition of a criminal offence? The Law Commission does not believe so.⁵¹ It argues that the ‘wrong is primarily disciplinary rather than criminal. For a prison officer to enter into a sexual relationship with an inmate is no doubt very reprehensible, but in most cases the solution lies in dismissal’.⁵² This does raise an interesting question in the examples of *Cosford* and *Belton* above. Whilst both can, of course, be dismissed, only *Cosford* was remunerated. Thus *Cosford* will suffer financial detriment but *Belton* will not. Members are unpaid and therefore do they suffer any sanction beyond the revocation of their status? The fact that they are not remunerated is not reason to impose criminal liability but it does demonstrate that, in the absence of the criminal law, there could be very different outcomes to exactly the same conduct.

It has to be questioned whether the behaviour in *Cosford* and *Belton* could be considered disciplinary in nature. Sexual relationships in such circumstances impact on public trust. Whilst it can be argued that this conduct is no different to situations involving non-public office holders,

⁴⁸ [2013] EWCA Crim 466; *Consultation Paper*, p.85.

⁴⁹ [2010] EWCA Crim 2857.

⁵⁰ Established under s.6, *Prisons Act 1952*. They are lay persons who inspect the safety and security of the prison, including meeting prisoners.

⁵¹ Whilst they suggest creating an offence relating to sexual

⁵² *Consultation Paper*, p.89.

e.g. doctors and lawyers,⁵³ there is a difference. Office holders are given additional powers by the state. They are given these powers in exchange for their proper use and discharge. The conduct offends against these principles. What of *Belton*? Can it be said that she had additional powers? Yes. They may not be as obvious as the prison officer, but she has the powers to enter a prison in a way that no other lay person does. She has the power to report abuses and for that conduct to be taken seriously. If a member was to allege that staff X had acted inappropriately, the Prison Service would take that seriously and investigate that person in a detailed way. This could lead to suspension and personal consequences for the staff member but the investigation would occur because they need to take such reports seriously. The public surely expects that the abuse of the state's powers warrants punishment.

Before leaving this issue, it should be noted that the Law Commission have concerns over two aspects of behaviour that are currently within MIPO but which they do not seek to address in the paper. The first relates to data protection. The issues paper notes there are a considerable number of cases where public servants (most notably police officers) have accessed 'confidential information' in improper circumstances.⁵⁴ However, the Law Commission believe that this should be dealt with separately as part of a review of offences relating to official data, rather than remaining within MIPO.

The second issue relates to sexual misconduct. A considerable number of cases of MIPO relates to sexually problematic behaviour.⁵⁵ As noted already, the Law Commission believe that some sexual misconduct should be dealt with as a disciplinary issue. They concede that not all can, however, and concentrate on behaviour that is exploitation. They make the (perfectly reasonable) point that sexual exploitation is not restricted to public offices, and that a separate offence under the *Sexual Offences Act 2003* may be more appropriate.⁵⁶ In this article it is not possible to address this point, but it is conceded that it is perhaps inappropriate that sexual exploitation cannot be dealt with in the same way irrespective of the 'status' of the exploiter.

UNFAIRNESS

The third principal criticism of MIPO is that it is used to treat public servants more harshly than would happen for the same conduct committed by a private individual, something that could be considered unfair. Part of the argument relates to the point above about conduct that is only criminal because the individual is a public officer. The second part of the argument is that MIPO is used in preference to statutory offences, particularly in those circumstances where the statutory penalty is considered relatively light.

The basis of this argument is that Parliament has prohibited specific conduct through the creation of statutory offences but that prosecutors are choosing instead to prosecute MIPO, believing that this provides more appropriate punishment. Perhaps the classic example of this is in respect of inappropriate accessing or disclosing of data. The issues paper provides several examples where a police officer accesses the Police National Computer to find information he is not entitled to and, in some cases, passes this information to a third-party.⁵⁷ This is classic behaviour that is capable of being prosecuted either under the *Data Protection Act 1998*⁵⁸ or the

⁵³ *Consultation Paper*, p.88.

⁵⁴ *Issues paper*, Appendix D.

⁵⁵ *Issues Paper*, Appendix D. An analysis of this appendix suggests that approximately one-third of all cases where MIPO was charged related to sexual impropriety.

⁵⁶ *Consultation Paper*, p.104.

⁵⁷ Appendix D, *Issues Paper*.

⁵⁸ s.55, *Data Protection Act 1998*. Triable only summarily, the maximum sentence is a fine.

Computer Misuse Act 1990.⁵⁹ Why, therefore, should it be prosecuted under MIPO? Is it because MIPO is a common-law offence and thus punishable more severely? If so, does that contradict the will of Parliament?

Arguably not. Parliament must be aware of the existence of MIPO. Therefore, when it passes laws such as the *Data Protection Act 1998* and *Computer Misuse Act 1990* it could have chosen to disapply MIPO to such offences. Doing so would be simplicity itself. Admittedly there were few cases of MIPO in the 1990s so perhaps this is a slightly weaker argument but when the use of MIPO rose significantly, Parliament had numerous opportunities to reform it if it believed MIPO was unfair.

It is far from clear that it is unfair to prosecute in these circumstances. HM Council of Judges, in their response to the issues paper, stated that using MIPO in these circumstances is appropriate and should be used where the sentence under a substantive offence would be inappropriate.⁶⁰ Critics would argue that this is wrong and if Parliament intended a more severe sentence to be passed, it would set the maximum sentence accordingly. It could even, for example, provide alternative sentences depending on the factual circumstances of the offence. For example, it could say “where the offence is committed by a public servant, the maximum sentence shall be *x*”. However, that would be cumbersome and would require several statutes to be amended.

There are two principal difficulties with the suggestion that it is wrong to use MIPO in this way. The first is that there are numerous examples within English law of conduct that can be prosecuted in different ways.⁶¹ Thus MIPO is not unique in doing this. The second, but most important argument, is that wrongful conduct by a public servant may be materially different from the same conduct by a private citizen. The argument for retaining MIPO is that if we provide additional powers to the state, we can expect higher standards and, therefore, graver penalties for breaching those powers. Consider two similar situations:

A is an employee of a bank. He looks up a former school-friend (X) on the computer to see whether he is earning more than A because A has always been jealous of X.

B is a police officer. He accesses the Police National Computer to find the location of Y, the man who is having an affair with his wife.

Whilst both are examples of data protection breaches, the second would seem more serious. Arguably both A and B are in positions of trust (defined in the broader sense) in that we expect our details to be kept private, but we can expect higher standards from those who we ask to guard us, to protect us and to uphold the laws. The second example is also the deliberate use of a public database and therefore could be seen as an abuse of the privileges given to state officials. This is perhaps further strengthened if ‘public officer’ becomes, as has been suggested, linked to the granting of powers from the state. MIPO would become an offence about the abuse of those powers and this makes it materially different from situations involving private actors.

⁵⁹ s.1, *Computer Misuse Act 1990*. Whilst *R v Bignall* [1998] 1 Cr App R 1 cast doubt on its applicability, the House of Lords decision in *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Government of the USA* [2000] 2 AC 216 has led to it being a more appropriate offence. Triable either-way, the offence is punishable by a maximum sentence of two years’ imprisonment.

⁶⁰ *Consultation Paper*, p.198.

⁶¹ Most of the non-fatal offences regime is subject to overlap. An obvious overlap (albeit one that has been heavily criticised) is that which exists between s.1, *Malicious Communications Act 1988* and s.127, *Communications Act 2003* which cover almost identical behaviour.

Whilst this is an example that relates to a minor offence – data protection – the principle applies in a wider way. It is therefore difficult to suggest that it is somehow unfair that MIPO exists.

THE REPLACEMENT OFFENCES

The Law Commission believes that MIPO should be replaced by one, or both, of two offences. These are designed to address the criticism discussed above, particularly by making the particulars of the offence clearer, and by limiting the people and behaviour that will be subject to the offence(s).

The first offence is based on the breach of a duty, and it seeks to push those who breach a duty to protect the public from harm. The second offence is based on corruption, and is designed to punish those who seek to benefit from misconduct linked to their duties.

BREACH OF A DUTY MODEL

The first replacement offence proposed is based on breach of a (public) duty. In essence, the model requires the following elements:

1. A public office holder must have a duty to prevent harm.
2. They must breach that duty.
3. The breach must either cause harm or have the potential to cause harm to a specified level.
4. The breach must occur with the necessarily fault element.

Public officer with relevant duty

It will be remembered that the definition of ‘public office’ will already change as a result of the wider reforms, but the Law Commission believes that not all public office holders should be subject to this new offence. Instead, they intend to limit the offence to those who owe a duty to keep the public safe, as it is thought that it is this element – either causing, or failing to prevent, harm – that is most deserving of punishment.

They propose that a person holds a relevant duty if:

1. they occupy a position that carries with it powers of physical coercion, or
2. they occupy a position that includes a duty of protection.

The first is perhaps the easiest to explain and understand. The state gives certain powers to those it wishes to enforce the law. This can include the right of arrest, the right of detention and other regulatory functions. These powers are accompanied with the right to use physical violence to exercise these rights⁶² and therefore it is right that they should be held to account when such powers are improperly used.

An important subsection of this first duty is that the Law Commission argue that those with coercive powers also have a commensurate duty to prevent harm. They cite the example of *R v Driver*⁶³ which concerned a police officer who did not adequately check the well-being of two intoxicated persons. Clearly this should be within any new offence as those public officers who

⁶² Most notably, s.3, *Criminal Law Act 1967*.

⁶³ Unreported first-instance case but referenced in Appendix D of the *Issues Paper*.

held the duty identified above are paid to ensure the public are safe and well. An omission to do so must be within the offence.

The proposal to include those possessing powers of coercion is unproblematic and indeed it would have been more worrying had such persons not been included. The second group of persons who are within the scope of the offence are those who owe a duty of protection. This includes, for example, those who have a duty to keep the peace but do not have powers of coercion (for example, Police Community Support Officers who do not have any formal right of arrest,⁶⁴ and certain positions within prisons). More than this, however, they recognise that some will have a duty to protect the vulnerable. There is undoubtedly an overlap in that those within the first category will automatically have the duty to protect the vulnerable, but they are not alone in having this duty and thus the second category is important.

Of course, the question then immediately becomes who is vulnerable? The Law Commission notes that this is not an easy question to answer as there is no definition of vulnerability. Ultimately the Law Commission suggest that vulnerability could be defined in the same way as in the *Safeguarding Vulnerable Groups Act 2006*. Section 59 of that Act defines vulnerability in a series of ways including by their accommodation status, the fact that they are detained, under the supervision of the courts, are under health care etc. The list would cover most of the circumstances when an adult is considered vulnerable. There is no point in re-inventing the wheel and thus s.59 is generally appropriate. However, by itself, it would not cover everyone in a vulnerable position. Section 59 refers to adults and not children. How then should the new offence apply to those who owe a duty to children? One possibility is that those under 18 could be deemed to be intrinsically vulnerable, although politically that may cause some eyebrows to be raised. Extending s.59 to children for these purposes (i.e. replicating the list but extending it to children) would not assist as there are some obvious omissions, most notably education. One possibility would be to use the list used in the *Sexual Offences Act 2003* which governs the abuse of trust⁶⁵ but this list is itself problematic in some contexts, not least because it is aimed at sexual offending. So, for example, whilst it refers to an educational establishment, it does not make reference to apprenticeships or traineeships. The growth of apprenticeships in the public sector certainly makes it conceivable that a public office holder may have management responsibility for an apprentice and who could abuse this for their own ends. Section 21 also refers to accommodation in hospital but s.59 refers to the provision of any health care, so s.21 would mean that fewer situations were covered, potentially putting people at risk.

There is no doubt that those who look after the vulnerable should be within the scope of the new offence. However, there needs to be a better definition of 'vulnerable'. The two options put forward have difficulties and neither would adequately define 'vulnerable'. Defining vulnerability is extremely difficult with most definitions receiving some criticism.⁶⁶ The Law Commission believe that statutory tests bring greater certainty, but one cannot help wonder whether this is an issue best left to the courts. The statute could say the offence applies to a public officer who has a duty to protect the vulnerable, but leave the courts to decide who is vulnerable. This does arguably introduce a degree of uncertainty but it would be modest as most vulnerable relationships are obvious. Creating a definitive test for these purposes would be difficult and arguably would go no further than if it were left to the courts.

⁶⁴ Although they do have a limited power to detain (Schedule 4, *Police Reform Act 2002*).

⁶⁵ Section 21, *Sexual Offences Act 2003*.

⁶⁶ Something discussed in the consultation paper, pp.140-141.

Breach of the Duty

Once the duty has been established, then it is necessary to show breach. The Law Commission spends a considerable period of time on aspects of this but this section will be relatively brief. The Commission discusses whether breach should include omissions and little will be said on this because it is inarguable that omissions should not be included. The decision in *R v Dytham*⁶⁷ continues to demonstrate its need.

A more interesting question regarding the breach is what acts or omissions should be within the offence? Under the current offence, any misconduct by a public officer leaves him open to prosecution, not just matters connected to his duty. The Law Commission believes that this is wrong and note that this may mean that a person could be prosecuted for harassing a colleague, something that would ordinarily be dealt with as a disciplinary/employment issue if the person was not a public officer. Quite whether this would ever be prosecuted is perhaps more difficult to ascertain but it is conceded that there is at least the potential for this to happen, which may seem unwise. The Law Commission are particularly concerned about MIPO being used to circumvent rules on fraud in respect of expenses.⁶⁸ This is a good point and certainly outside of what most people would probably consider the mischief of MIPO, which is to safeguard the public, or the public's trust, from the abuse of officials.

Limiting the offence to conduct within the duty would be appropriate, and would partly address the criticism that too much behaviour is criminalised by MIPO. Yet at the same time, serious breaches that risk harm to the public will remain within the scope of the offence.

Harm

Perhaps the more controversial aspect of the proposed model is that a breach of the duty must be to a certain level. The Law Commission talk of 'serious consequences' which they initially define as one of two harms:

1. Death or serious injury (including psychiatric illness).
2. False imprisonment.

The harms need not be caused, it would suffice that the breach leads to a risk that such harms will occur (although there must be an awareness of the risk). This is justified in the context of this offence because the office holders who are within the scope of this offence have a duty to protect. Thus criminalising breaches where there is a risk of serious consequences will mean that the duty becomes that the office holder should not endanger the victim, i.e. cause or allow the victim or victims to be placed in a position whereby the consequences happen or could happen.

Death or serious injury would be an obvious harm but the question of threshold must be raised. The Law Commission argues the offence should only apply to serious harms and thus adopted that approach to physical violence. Serious injury will be given its usual meaning, i.e. the equivalent of grievous bodily harm. However, that means the threshold for this offence is high. Whilst the Law Commission present a number of examples of how the offence could be justified in circumstances where, for example, an office holder neglects to safeguard a person who dies,⁶⁹ there is less consideration about the justification for exempting lesser injuries from the offence.

⁶⁷ [1979] QB 722.

⁶⁸ *Consultation Paper*, p.163.

⁶⁹ *Consultation paper*, p.157.

Whilst it is conceded that the Law Commission are trying to suggest that MIPO should not be used for trivial offences (although it could be argued that is the role of prosecutorial discretion), the Commission has arguably, in this section at least, lost sight of what the purpose of the offence is. The actual level of injury inflicted is less relevant than the circumstances in which the injury was caused or risked. Let us take an example:

D is a police officer. He stands and watches X, a colleague, punch V several times in the stomach and once in the face. V suffers some bruising and a split lip.

X could be prosecuted for a non-fatal offence but D probably cannot or would not, not least because the law of complicity regarding someone standing in silence is questionable.⁷⁰ However, the more obvious crime in this situation would be MIPO. This is a clear example of when current MIPO would currently be used. It may be chosen in respect of X to provide greater sentencing powers (as discussed above). In respect of D, standing by and watching the assault without intervening would be classed as a neglect of duty in the same way as in *Dytham*. Thus there would be no need to rely on complicity, as D would commit the act as a principal. However, under the Law Commission proposals, this type of conduct would no longer be within MIPO as it does not constitute serious injury. That must be wrong. In a moment, it will be noted that false imprisonment is considered a serious harm because the deprivation of liberty is significant. Why? Because it is an abuse of the power of the state. The same is true of the example above. The injuries are less important than the fact that the powers of the state were abused to cause the injury. This applies as much to D – who should have stopped, arrested or reported X to his superiors – as it does to X. *Any* violence committed by a public officer who has a duty through powers of physical coercion is an abuse of the authority of the state and should be criminalised through MIPO.

The Law Commission include psychiatric harm, which is important, although the law has a relatively high threshold for psychiatric harm and if there is a requirement for *serious harm* then this would mean serious psychiatric harm, which limits it further. They provide the example of a social worker knowingly allowing a 16-year-old child to be removed from a child care home to be repeatedly sexually abused. The logic is that prolonged sexual abuse would cause (or risks causing) serious psychiatric harm and thus the social worker could be culpable. Is this true though? It could be read as meaning that culpability is based on the resilience of the victim. Also, whilst it is clear that repeated sexual abuse may lead to *serious* psychiatric (rather than psychological) harm, it does not follow that a single instance necessarily will, particularly where they are being groomed. Yet, knowingly allowing a child to be removed to facilitate abuse must be an example of when MIPO should be committed irrespective of what harm the child suffers. Social workers (and others) are there to protect children and knowingly allowing them to be used for sexual gratification must be misconduct in public office worthy of punishment.⁷¹

False imprisonment

The Law Commission suggest that false imprisonment should be considered a serious harm that would suffice for this offence. The Commission are undoubtedly correct to argue this, given the

⁷⁰ *R v Coney* (1882) LR 8 QBD 534 cf. *R v Clarkson* [1971] 3 All ER 344. It is possible that a failure to arrest would be more relevant following the ruling in *R v Dytham* [1979] QB 722.

⁷¹ Whilst it is possible that such acts could be caught by s.14, *Sexual Offences Act 2003* (arranging or facilitating the commission of a child sex offence) it would depend on D *intending* that the sex act took place. Where, for example, D did not care whether V was being let out of the care home for sexual exploitation or other purposes, it is likely s.14 could not be committed whereas MIPO undoubtedly could.

importance society attaches to liberty, but it does raise again an oddity in respect of violence. Let us take the following example:

D, a police officer, receives a complaint that two 15-year-olds are causing nuisance outside an elderly person's house. He arrives and sees X and Y, who he knows. He decides that the paperwork will be too onerous to arrest them, especially as the magistrates would not take their case particularly seriously. He decides instead to "teach them a lesson" and therefore he locks them in a shed and says he will be back for them later. He returns three hours later and lets them go.

Quite rightly the Law Commission would consider this to be an example of when MIPO could be used. A police officer has arbitrarily detained a child and this can only be seen as an abuse of the powers of the state. However is it more harmful than if D gives them both a 'clip around the ear' to teach them a lesson? What if X and Y were aged 11? An assault by a police officer in such circumstances could be as traumatic as being locked in a shed and yet this would not constitute MIPO and would presumably only constitute the (minor) offence of common assault. Yet both examples involve an abuse of power.

Further Harms

Whilst the Law Commission argue that death/serious injury and false imprisonment *should* constitute serious harms, they question whether two further harms should also be included. These are:

1. Serious harms to public order and safety.
2. Serious harms to the administration of justice.

Public order & safety are important aspects of the duty imposed on those with coercive powers. It is important that the public are protected but it is difficult to conceive of a situation where a serious harm to public order or safety is created that does not also create the risk of death or injury.

Harms to the administration of justice is more interesting as that is certainly not linked to the concept of physical violence. It is about the subversion of the justice system. Of course, one issue that would then need to be answered is how MIPO can be differentiated from offences relating to perverting justice. The common-law offence of perverting the course of justice is a similarly wide offence although it does appear to be directed towards conduct that is seen to be interfering with the natural course of justice. There may be circumstances when conduct could undermine public confidence in the justice system and yet not necessarily interfere with the course of justice. The Law Commission discusses the case of Elaine Hemblade, a jury officer who was tasked to oversee jury selection. Hemblade ensured that her neighbour and son were selected to sit on a jury panel. It would be difficult to argue that this interfered with the natural course of justice because the neighbour and son could still have sat through the trial and executed their jury oath conscientiously. However, it would undoubtedly undermine the confidence of the justice system if discovered. Presumably, the same would be true of a jury officer who ensured that a black person was never called to a jury panel. The public would expect a jury to be randomly selected and thus it would have its confidence undermined by such an approach. However, proving that this interfered with the ordinary course of justice for a case could be difficult.

The Law Commission discuss the judicial oath but it is difficult to think of circumstances when a judge does something that could cause harm to the justice system that did not also act as an interference in the course of justice. One possible example could involve administrative duties:

D is the resident judge of *Anywhere Crown Court*. Whenever a defendant is a member of a particular club he ensures that it is tried by Judge X who, he believes, gives lenient sentences.

It would be difficult to see how this could constitute perverting the course of justice (as the sentence may be lawful, it is just that judge X, for example, has more faith in non-custodial sentences than another judge) but it undoubtedly undermines the justice system. However, the chances of such a case arising is extremely small. It is perhaps for this reason that care has to be taken to separate out the theoretical instances a crime could occur from its realistic prospects.

Harm to the administration of justice should be within the scope of the offence. However, it must be questioned whether we need to specifically identify the harms. It has been seen that violence has its problems as does administering justice. Public order & safety are probably subsumed within violence but it may not be the most obvious link. Perhaps the solution is not to list harms but rather require the breach to be serious. Whilst it is conceded that this could be considered to introduce a degree of uncertainty into the offence, it is a measured risk. The courts are already left to decide whether offences are serious,⁷² and in the context of manslaughter by gross negligence, are already asked whether a breach is sufficiently serious to warrant criminalisation. It is not immediately clear why a court could not be left with the same test for this offence? It would probably ensure that the trivial cases the Law Commission is concerned about are weeded out but allowing strong cases to proceed.

Mental Fault Requirement

The Law Commission argue that the *mens rea* should be recklessness.⁷³ In so doing, they reject the suggestion that it should be a crime of negligence or one requiring ulterior intent. Ulterior intent should be rejected because it could make it too restrictive but also because it could criminalise someone who intends a risk and yet does not create that risk.⁷⁴

Negligence is also rightly rejected. Whilst negligence has begun to creep into the criminal law, it is something that should be resisted so far as possible. Negligence is a standard that is best thought of as a civil wrong. It will be remembered that misconduct in public office is also a tort⁷⁵ and so where a person discharges their duty negligently, they could be accountable through civil action.⁷⁶

It has been noted that a separate mental fault requirement is that D must be aware of the risks that are created by the breach. That said, the Law Commission proposes recklessness will suffice and thus the question is whether they know that the circumstances *might* give rise to the serious consequences. This is partly to take account of those who wilfully fail to act when they should realise that there may be a risk of serious consequences. The Law Commission refers to *R v*

⁷² When deciding whether an injury constitutes Actual Bodily Harm or Grievous Bodily Harm.

⁷³ *Consultation paper*, p.168.

⁷⁴ *Consultation paper*, p.169.

⁷⁵ Where it is known as malfeasance, misfeasance or nonfeasance in public office.

⁷⁶ Or their employer could be depending on their status and whether vicarious liability applies.

*Driver*⁷⁷ as a good example. In *Driver* a police officer did not give adequate attention to two people who were drunk. He had not realised that they were close to death but that was because he did not check their status. If intent / direct knowledge was required, then *Driver* would have needed to intend for the victims to die or be seriously injured. This is unlikely. Instead, it is more likely that *Driver* decided that they were ‘just drunks’ and that checking their condition in detail would generate paperwork. He undoubtedly realised that there was a risk in leaving them on a cold night but did not care. Clearly this should be within MIPO and the Law Commission proposal will ensure that this occurs.

An interesting question is whether D needs to know that he is a public officer? The Law Commission suggests that it would be odd to impose liability if a person did not know, or have any cause to suspect, that he was in public office,⁷⁸ although a number of cases have turned on whether a person did, in fact, hold public office⁷⁹ which suggests it is not unreasonable to query this. However it is slightly more nuanced than this. Whilst D need not know whether, in law, he holds a public office, he should know the factual circumstances that lead to the office. For example, a police officer will know that they are a police officer and that they have a duty to uphold the law, safeguard the public and protect individuals. Similarly, a member of the Border Force will know that they have coercive powers and that they have a duty to enforce the law. Of course, if Parliament did create a statutory list of public office holders then it will become easier for people to know that they are subject to this offence.

CORRUPTION-BASED MODEL

The second offence that the Law Commission put forward is an offence that has corruption at its heart. They note that one of the mischiefs of MIPO is to deter public servants from abusing their position for personal gain,⁸⁰ which must be correct. The second proposed offence is designed to meet this mischief and it could be introduced alongside the previous offence, not least because they address subtlety different things.

Is an offence of corruption required? Arguably corruption is already dealt with in a number of ways, including bribery. The Law Commission do not believe that their proposal will undermine the new bribery offence, in part because they believe the matter can be dealt with through prosecutorial guidelines.⁸¹ It has to be questioned whether this faith is necessarily well-placed. There are numerous examples where there is overlap between different offences and the CPS choose one offence or the other. Whilst there will clearly be reasons in some cases why one form has been chosen rather than others, in other cases it is less than clear why a particular charge is preferred.⁸²

Where the Law Commission believes there is an obvious overlap is in respect of the offence under s.26, *Criminal Justice and Courts Act 2015*. This prohibits the corrupt or improper exercise of police powers. Section 26 is an unusual offence in that it was introduced almost from nowhere. There had been no public call for s.26 and instead it was a political response to a belief that the

⁷⁷ *Consultation paper*, p.137. Unreported first-instance.

⁷⁸ *Consultation Paper*, p.151.

⁷⁹ *R v Ball* (unreported) and *R v Cosford* [2013] EWCA Crim 466

⁸⁰ *Consultation Paper*, p.96 and see also Chapter 6 of the consultation.

⁸¹ *Consultation Paper*, p.175.

⁸² Or indeed why both are charged. In *R v Patel* [2012] EWCA Crim 3075 the defendant pleaded guilty to both bribery and MIPO. Presumably both were preferred because it allowed greater sentencing possibilities for the court to take account of the breach of trust, but could this not be done by treating breach of the public’s trust as an aggravating factor?

police were acting inappropriately in certain circumstances. However, it is less clear that the conduct of the police warranted an offence simply for them, even taking into account the political situation of the time.⁸³ There are a number of public servants who could act inappropriately but s.26 only applied to the police. The Law Commission suggests that s.26 could be repealed if option 2 is adopted and it is submitted that there is little merit in keeping such a narrow offence.

What then do the Law Commission propose? It suggests:

1. A public officer abuses his position, power or authority.
2. Thus abuse is through exercising that position, power or authority for the purpose of achieving
 - a. a benefit to himself or herself; or
 - b. a benefit or a detriment for another person.
3. That this abuse was seriously improper.

Public Office

It will be remembered that the breach of duty model would only apply to a subset of public offices. This was, in part, a response to the Law Commission's view that too many people were subject to MIPO. The common-law offence of MIPO did not differentiate between offices, meaning that anyone holding a public office was at risk of prosecution for behaviour that would not otherwise be criminal. Whilst a limitation on the number of offices could be justified for the breach of duty model, the same cannot be true of a corruption-based model. The mischief behind this offence is a public officer abusing his or her position for gain and thus it is important that it applies to all public offices, defined under the new (proposed) test.

Abuses his or her position

It will be remembered that a criticism of the current offence of MIPO is that it applies to any misconduct perpetrated by an office holder irrespective of whether such conduct falls within their office. This proposed offence would not have this problem. The wording is clear that the breach is of their duty, power or responsibility.

Two examples are provided by the Law Commission. The first concerns an immigration officer who does not grant access to the UK without receiving a bribe. This abuse of his power – denying access to the United Kingdom – is clearly linked to his position as a member of the Border Force. The example is also interesting because it concerns bribery and the example given would be covered by s.2, *Bribery Act 2010*. It will be remembered that the Law Commission argued that this proposed offence would not undermine bribery but the example they use is perhaps a good example of how MIPO overlaps with statutory offences.

The second example is the case of *R v W*⁸⁴ which concerned improper use of a credit card by a police officer. They note that this would not be caught by the revised offence as the misconduct does not arise from his office. This must be correct. The fact that W was a public servant does not mean that he should be punished differently. The conduct constitutes fraud and whilst it is conceded that the additional expenditure came from the public purse, this cannot by itself be a justification for treating W differently. If a private contractor committed fraud by, for example,

⁸³ This was at the time of the Hillsborough inquiry and also the furore that erupted over the conduct of undercover police officers.

⁸⁴ [2010] EWCA Crim 372; *Consultation Paper*, p.178.

artificially over-charging a public-sector agency the same result would have been achieved – the public purse would suffer a (wrongful) reduction – but only where it was a public office holder would MIPO be available, something not tenable.

Benefit or detriment

As was discussed above, this option is based on corruption and this has been defined as accruing a benefit for oneself or another or causing detriment to another. At first sight this, would appear uncontroversial. Where a person seeks to exploit their position to benefit themselves or another, then this would be a paradigm of corruption. The Law Commission is, however, silent as to what ‘benefit’ and ‘detriment’ means. Will it include intangible benefits (goodwill, promotion prospects etc) or only those that can be quantified in a proprietary way? If the definitions are drawn too broadly, there is a danger that anyone could show some form of benefit or detriment and the courts will become confused over the nature and purpose of the offence. However, if they are defined too narrowly (eg by being tied to financial benefits or detriment) then some types of corrupt behaviour would not be captured (eg where a person acts in return for sexual favours).

Seriousness

As with the breach of duty model, the Law Commission does not believe that any wrongful decision taken for benefit or detriment should be culpable and instead they suggest a seriousness threshold is imposed. Unlike the approach adopted in respect of the first model, the Law Commission recommend that ‘serious’ should not be defined and instead it should be left to the courts. This is undoubtedly a pragmatic solution, not least because it is difficult to define seriousness in this context. However, it does raise the question why the same approach cannot be adopted for the breach of duty model. It will be remembered that this has quite specific definitions of seriousness but which may leave gaps, particularly where violence is involved. Adopting this alternative approach of leaving it to the tribunal of fact would be preferable.

Fault requirement

What should the *mens rea* be? Again, this option appears simpler. The most logical fault requirement is that of ‘purpose’. As the Law Commission recognises, this is different from intention or knowledge. Whilst knowledge would be overly restrictive, in that person would need to have direct knowledge that their actions would cause a benefit to himself or another or detriment to another, intent is arguably wider, not least because it would ordinarily include oblique intention. ‘Purpose’ however would seem more restricted in that it must be shown D acted for corrupt purposes. What of the situation where there is more than one purpose? Statutes have in the past allowed for ‘one of the purposes’⁸⁵ and this perhaps makes sense in this context as that better encapsulates our understanding of what the word ‘corruption’ means.

The Law Commission do not believe that a person should know that they are, in law, a public office holder although they should know the factual circumstances that would lead to a court deciding that they are a public office holder.⁸⁶ Of course, if ‘public office’ is defined through a statutory list then a person should know this.

⁸⁵ See, for example, s.1(1), *Malicious Communications Act 1988*.

⁸⁶ *Consultation Paper*, p.186.

The Law Commission also concludes that there is no need to prove that D knew that he had a duty not to be corrupt.⁸⁷ Again, this must be correct. It would be odd to prove this since a person who is aware that he exercises a public function such as to make him a public office holder should did not know that this meant he should not act corruptly.

CONCLUSION

As the fall-out from *Operation Elveden* showed, MIPO is a controversial offence. There is little doubt that some form of offence is required to ensure that those who hold authority over us, can be held to account either for actions that harm us, or for not protecting us. However, concerns have been raised that too much conduct is the subject of MIPO and that too many people are within the scope of the offence.

As a common-law offence, its scope and limits have been set by the courts, largely when dealing with individual cases. This has meant that there has been little opportunity to think about why the offence exists and what conduct should be within it. The fact that some public servants can be convicted of something when a private citizen cannot is not by itself problematic in all cases. Public servants may be given additional powers or have additional responsibilities, for which they should be held to account. However, the scope of who is included and the limits of the offence should be identifiable. In other cases, e.g. sexual exploitation, it is more difficult to understand why a public servant can be liable but an employer cannot. Is this a fault of MIPO or a fault of sexual offences law? Arguably both, and yet the common-law is impotent to advance sexual offences law.

The Law Commission has produced a well thought-out consultation paper that poses difficult questions for the law. As has been noted in this article, it is not easy to change an offence that dates back to the 13th century. Whatever they do will be subject to debate and criticism, but the paper should be broadly welcomed and the principal recommendation to replace MIPO with two new offences should be accepted, although both models will require further work. What those offences will look like will undoubtedly be based on the responses to the consultation paper and it will be interesting to see how the nuances of the common-law offence will find their way into its statutory replacements. To that extent, the final report of the Law Commission will be as interesting a read as the consultation paper that precedes it.

⁸⁷ *Consultation Paper*, p.187.