

To: **Members of the Standards Committee**

**Councillors, C Fitzsimmons (Chairman)
S Bland, B Maher, T McCarthy and J Wheeler**

Parish Councillors M Banner, S Barlow and T Gartland

**(Invitations extended to Mr D Clarke, Mr K Horseman
and Mrs S Mason as Independent Persons)**

Professor Steven
Broomhead
Chief Executive

Town Hall
Sankey Street
Warrington
WA1 1UH

23 September 2014

Standards Committee
Wednesday, 1 October 2014 at 6.30pm
Council Chamber, Town Hall, Warrington

Agenda prepared by Louise Murtagh, Democratic Services Officer – Telephone (01925) 442111
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AGENDA

Part 1

Items open to members of the public (including the press) subject to any statutory right of exclusion.

	Page Number
1. <u>Apologies for Absence</u>	
To record any apologies for absence received	
2. <u>Code of Conduct – Declaration of Interests</u>	
Members are reminded of their responsibility to declare any personal or prejudicial interest they have in any item of business on the agenda no later than when the item is reached.	
3. <u>Minutes</u>	1
To confirm the minutes of 17 April 2014 as a correct record.	
4. <u>Update on Standards Related Matters</u>	3
Report of the Monitoring Officer	

Part 2

Items of a “confidential or other special nature” during which it is likely that the meeting will not be open to the public and press as there would be a disclosure of exempt information as defined in Section 100I of the Local Government Act 1972.

Nil

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STANDARDS COMMITTEE

17 APRIL 2014

Present: Councillors C Fitzsimmons, B Maher and T McCarthy
Independent Persons – Mr D Clarke and Mr K Horseman

ST10 Apologies for Absence

Apologies for absence were received from Councillors S Bland and Walker; Parish Councillors M Banner, S Barlow and T Gartland and Mrs S Mason.

ST11 Code of Conduct

There were no declarations of interest made.

ST12 Minutes

The Minutes of the meeting held on 25 September 2013 were agreed as a correct record and signed by the Chair. It was noted that the meeting of 12 February 2014 had been cancelled.

ST13 The Localism Act 2011 – The Amended Standards Regime

The Committee received the report of the Solicitor to the Council which provided an overview of the operation of the new Standards Regime following implementation of the relevant provisions of the Localism Act 2011.

Section 27 of the Localism Act 2011 ('the Act') required local authorities to promote and maintain high standards of conduct by members and co-opted members of the authority. In pursuit of that duty, a local authority must adopt a Code of Conduct dealing with the conduct that is expected of its members when they are acting in that capacity. A copy of the code of conduct was appended to the report.

Section 28 of the Act relates to failures in complying with the code of conduct and the arrangements under which allegations can be investigated and the decisions following investigations. The Council adopted these procedures on 10 September 2010.

In terms of dealing with misconduct complaints the Monitoring Officer was appointed to receive complaints of failure to comply with Code of Conduct and was given delegated power, after consultation with the Independent Persons, to determine whether a complaint merited formal investigation and to arrange for such an investigation when so merited. Whenever practicable, resolution of complaints without formal investigation was sought.

An anonymised summary table of complaints had been provided at appendix 2 and this highlighted a growing trend towards complaints surrounding social media, including Facebook, Twitter and other online fora.

Members discussed the sanction available when a breach of the code of conduct had occurred. These included censure of the member; restriction for

a period not exceeding 6 months of that member's access to the premises of the authority or that members use of the resources of the authority; suspension for a period not exceeding six months; the requirement to submit a written apology in a form specified by the Standards Committee; an obligation to undertake training; and a requirement to participate in statutory reconciliation.

Should a criminal offence be disclosed this is referred directly to the Police. In line with this the Solicitor of the Council had requested a single point of contact within Cheshire Constabulary for the reporting of such.

Members discussed the offence of misconduct in public office and how this could be applied to Councillors and Parish Councillors. The Crown Prosecution Service (CPS) had produced briefing notes relating to Misconduct in Public Office and the Solicitor to the Council suggested copies of these were circulated to Members.

Decision, That the Committee

1. commented on and noted the content of the report
2. requested that a copy of the CPS guides be circulated to Councillors and Parish Councillors
3. Ratified the decision of the Solicitor to the Council to request a single point of contact from Cheshire Constabulary.

Dated.....

Signed.....

WARRINGTON BOROUGH COUNCIL

STANDARDS – 1 October 2014

Report of the: Monitoring Officer
Report Author: Timothy Date, Solicitor to the Council and Assistant Director Corporate Governance
Contact Details: Email Address: Tdate1@warrington.gov.uk Telephone: 01925 442150
Ward Members: All

TITLE OF REPORT: UPDATE ON STANDARDS RELATED MATTERS

1. PURPOSE

- 1.1 To update members of the Standards Committee about current issues affecting member conduct.

2. CONFIDENTIAL OR EXEMPT

- 2.1 This report contains information which is neither confidential nor exempt

3. INTRODUCTION AND BACKGROUND

- 3.1 This report seeks to update members of the standards committee on five separate matters as follows:-

- Current complaints
- Disclosable Pecuniary interests
- Misconduct in public office
- Parish Council complaints
- Countywide collaboration

4. SCHEDULE OF COMPLAINTS

- 4.1 The attached schedule sets out an anonymised schedule of complaints. The only outstanding unresolved complaints are those numbered The next stage in the agreed procedures in relation to those outstanding complaints is to determine the necessity for an investigation in consultation with the independent members.

5. DISCLOSABLE PECUNIARY INTERESTS

- 5.1 The reason for bringing this matter to the Standards Committee's attention is to provide a reminder of the essential principles relating to declaration of interests.

- 5.2 The relevant requirements in relation to registration and declaration of interests are to be found in Part 1 chapter 7 of the Localism Act 2011.
- 5.3 The primary requirement under Section 29 of the Localism Act is that the Monitoring Officer must establish and maintain a register of interests of members and co-opted members of the Council. Separately, all members are required to notify the Monitoring Officer of any “disclosable pecuniary Interests” which the member may hold.
- 5.4 The definition of what constitutes disclosable pecuniary interest is set out in regulations made under the Localism Act 2011 and those matters are set out in the attached Appendix 1.
- 5.5 At its September 2012 meeting the Council determined that the matters listed in the regulations should form the basis of the Register of Interests required under Section 29.
- 5.6 As well as being under an obligation to register any relevant interests in the register of interests the member must not participate in any discussion the matter affected by the interest at a meeting or participate in any vote taken at such a meeting. The failure to observe those requirements constitutes a criminal offence.
- 5.7 Even if an item under consideration does not involve a disclosable Pecuniary interest a member may be prevented from participating in discussion of a matter if he or she is affected by some issue or bias or predetermination. In essence, if a member has a closed mind on a particular issue he or she should not participate in any consideration of the matter at a committee. The formal position is now captured in section 25 of the Localism Act 2011 the intention of which was to enable members to have greater freedom to participate in matters upon which they had previously expressed an opinion. Unlike a failure to declare a disclosable pecuniary interest section 25 of the Localism Act 2011 does not provide a criminal sanction in the event of its terms not being fulfilled. A breach of Section 25 could, however, lead to a successful challenge of a relevant decision by anyone adversely affected by it.
- 5.8 It remains the case that council officers will give guidance upon issues of disclosure and predetermination but it is ultimately a matter for the member concerned to ensure that he or she has acted properly. It is always good practice for a member to seek advice upon a relevant matter before a meeting commences rather than raising the issue in the course of the meeting.
- 6.0 **MISCONDUCT IN PUBLIC OFFICE**
- 6.1 Attention has been previously been drawn to the doctrine of misconduct in public office. It appears that the Police and Crime Prosecution Service are placing

increasing reliance upon the common law offence of misconduct in public office to tackle inappropriate behaviour by public officials. The requirements of the offence are wide enough capture misconduct on the part of both elected councillors and non-elected council employees.

- 6.2 Members will be aware of the varied circumstances in which misconduct in public office has latterly been used. In particular, members may be aware of prosecutions in relation to both the "Plebgate" affair and phone hacking in which misconduct in public office prosecutions were used. Interestingly, neither of those situations involved local government members or officer but the increased reliance upon the offence by both the police and the Crown Prosecution Service is clear.
- 6.3 The attached Crown Prosecution Service document provides a simple outline of the key issues relating to the offence of misconduct in public office and members will particularly note the concepts of wilful neglect and misconduct, abuse of the public's trust and dishonesty and corruption.
- 6.4 Measures have been taken to draw the nature of the offence to the attention of both members and officers and the recommendations in this report (below) are designed to further promote understanding of the issues by both members and officers.

7.0 **PARISH COUNCIL COMPLAINTS**

- 7.1 The Localism Act 2011 makes specific provision in relation to the role of the Monitoring Officer to Parish Councils.
- 7.2 In particular, Section 29 (6) of the Localism Act requires the Borough Council's Monitoring Officer to ensure that a copy of the Parish's register of interest is available for inspection and that it is published on the principle Council's website. If a Parish Council has a website the parish council must secure that its register is published on that website.
- 7.3 Under Section 28 of the Localism Act 2011 a Council other than a parish council must have in place arrangements under which allegations of a breach of a code of conduct can be investigated and arrangements under which the decisions on allegations can be made. In this connection it would be noted that the specific words of the Act specifically exclude parish councils from having such arrangements.
- 7.4 Under the regime pre dating the Localism Act 2011 there was a clear obligation upon Monitoring Officer of the principle council to manage complaints in relation to relevant parish councils. Traditionally, Warrington parish council's have generated relatively few complaints and since the implementation of the 2011 Act Warrington Borough Council's Monitoring Officer has continued to deal with such complaints.

7.5 Discussion with neighbouring Councils has disclosed that there has been a tendency for principle authorities not to deal with complaints arising from Parish Council's and it is considered timely for the Borough Council to review existing arrangements in this respect.

8.0 COUNTY-WIDE COLLABORATION

8.1 All four councils in the Cheshire sub region liaise and share good practice about matters relating to standards. All the substantive issues identified in this report are issues for our neighbouring authorities as well.

8.2 It is sometimes the case that when a complaint is received a Monitoring Officer might have a conflict of interest in dealing with a specific complaint that may be made. Again, under previous arrangements Government guidance made provision for circumstances such as those. However, under the "lie to touch" arrangements under the Localism Act 2011 no such guidance is available. However, it is very much open to individual Councils to make their own arrangements for certain steps in the complaints process to be undertaken by others where, for example, its own Monitoring Officer may be compromised by having a conflict of interest.

8.3 Informal preliminary conversations have taken place to identify whether there is any appetite across Cheshire to implement a reciprocal arrangements for the circumstances described in this paragraph. Those discussions are at a very early stage but given the relatively low number and infrequency of complaints that have arisen in Warrington under the existing statutory arrangements there appears to be no immediate urgency to conclude those discussions.

9. FINANCIAL CONSIDERATIONS

9.1 Financial considerations would include the cost of dealing with potential complaints from Parish Councillors.

9.2 Historically Warrington Borough Council has received few complaints about councillors. Should the decision be taken to move forward with a pan Cheshire approach to Standards complaints there will be need for further investigations into the number of complaints dealt with by the other authorities.

9.3 The budgets sits within Democratic and Member Services but it would need to include a financial element for the Monitoring Officers time.

10. RISK ASSESSMENT

10.1 Strategic Risk Register Reference 4 - Inadequate Strategic Governance

arrangements leading to failure to deliver the Council's objectives/statutory. Ensuring there are robust standards arrangements in place will assist in the mitigation of risk

11. EQUALITY AND DIVERSITY / EQUALITY IMPACT ASSESSMENT

11.1 Democratic and Member Services have an Equality Impact Assessment in place.

12. CONSULTATION

12.1 Previous consultation with the Standards Committee

13. REASONS FOR RECOMMENDATIONS

13.1 To fulfil the committee's role in promoting high standards of ethical behaviour by monitoring all relevant procedures and practices.

14. RECOMMENDATIONS

14.1 The committee is recommended to:

- (i) Note the current schedule of complaints
- (ii) Note the position regarding the declaration of pecuniary interests and to instruct officers to further advise members of relevant legal requirements in this respect.
- (iii) To note the considerations relating to misconduct in public office and to instruct officers to further disseminate information thereon to both officer and members
- (iv) To consider the issues relating to parish council complaints and to request that the Monitoring Officer raises the issue with Parish's via the Parish Liaison Group and report back to a future meeting of the Standards Committee.
- (v) To note the discussions that have taken place in terms of County Wide Collaboration and to instruct officers to issue those discussions and report back to a future meeting of the Standards Committee.

15. BACKGROUND PAPERS

Contacts for Background Papers:

Name	E-mail	Telephone
Timothy Date	tdate1@warrington.gov.uk	01925 442150

APPENDIX 1

Status: Law In Force

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Relevant Authorities (Disclosable Pecuniary Interests) Regulations 2012/1464

Schedule 1

This version in force from: **July 1, 2012 to present**

« » (version 1 of 1) « »

Subject	Prescribed description
Employment, office, trade, profession or vocation	Any employment, office, trade, profession or vocation carried on for profit or gain.
Sponsorship	Any payment or provision of any other financial benefit (other than from the relevant authority) made or provided within the relevant period in respect of any expenses incurred by M in carrying out duties as a member, or towards the election expenses of M.
	This includes any payment or financial benefit from a trade union within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992.
Contracts	Any contract which is made between the relevant person (or a body in which the relevant person has a beneficial interest) and the relevant authority—
	(a) under which goods or services are to be provided or works are to be executed; and
	(b) which has not been fully discharged.
Land	Any beneficial interest in land which is within the area of the relevant authority.
Licences	Any licence (alone or jointly with others) to occupy land in the area of the relevant authority for a month or longer.
Corporate tenancies	Any tenancy where (to M's knowledge)—
	(a) the landlord is the relevant authority; and
	(b) the tenant is a body in which the relevant person has a beneficial interest.
Securities	Any beneficial interest in securities of a body where—
	(a) that body (to M's knowledge) has a place of business or land in the area of the relevant authority; and

	(b) either—
	(i) the total nominal value of the securities exceeds £25,000 or one hundredth of the total issued share capital of that body; or
	(ii) if the share capital of that body is of more than one class, the total nominal value of the shares of any one class in which the relevant person has a beneficial interest exceeds one hundredth of the total issued share capital of that class.

 **Modifications**

Whole Document	Modified in relation to a Part 2 panel and the members of such a panel, and an English Part 3 panel and the members of such a panel by Police and Crime Panels (Application of Local Authority Enactments) Regulations 2012/2734, reg. 6, Police and Crime Panels (Application of Local Authority Enactments) Regulations 2012/2734, reg. 6, Police and Crime Panels (Application of Local Authority Enactments) Regulations 2012/2734, reg. 6, Police and Crime Panels (Application of Local Authority Enactments) Regulations 2012/2734, reg. 6, Police and Crime Panels (Application of Local Authority Enactments) Regulations 2012/2734, reg. 6, Police and Crime Panels (Application of Local Authority Enactments) Regulations 2012/2734, reg. 6
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Subject: Local government

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APPENDIX 2

The Crown Prosecution Service.

Misconduct in Public Office

- Principle
 - Scope of the offence
 - Policy
- Definition of the offence
 - A public officer
 - Acting as such
 - Wilful neglect or misconduct
 - Nature of the neglect or misconduct
 - Meaning of 'wilful'
 - Abuse of the public's trust
 - Seriousness of the neglect or misconduct
 - Consequences
 - Motive
 - Without reasonable excuse or justification
- Charging Practice
 - General principles
 - Level of misconduct required
 - Breaches of duty
 - Dishonesty or corruption
- Useful links

How to use this Legal Guidance

CPS Public Consultations

We want to hear your views about our prosecution policy and so we conduct consultations to help inform our policy making.

Visit the [consultations page](#) to view the [current and previous consultations](#)

Principle

Scope of the offence

Misconduct in public office is an offence at common law triable only on indictment. It carries a maximum sentence of life imprisonment. It is an offence confined to those who are public office holders and is committed when the office holder acts (or fails to act) in a way that constitutes a breach of the duties of that office.

The Court of Appeal has made it clear that the offence should be strictly confined. It can raise complex and sometimes sensitive issues. Prosecutors should therefore consider seeking the advice of the Principal Legal Advisor to resolve any uncertainty as to whether it would be appropriate to bring a prosecution for such an offence.

Policy

Where there is clear evidence of one or more statutory offences, they should usually form the basis of the case, with the 'public office' element being put forward as an aggravating factor for sentencing purposes.

The decision of the Court of Appeal in Attorney General's Reference No 3 of 2003 [2004] EWCA Crim 868 does not go so far as to prohibit the use of misconduct in public office where there is a statutory offence available. There is, however, earlier authority for preferring the use of statutory offences over common law ones. In *R v Hall* (1891) 1 QB 747 the court held that where a statute creates (or recreates) a duty and prescribes a particular penalty for a wilful neglect of that duty the remedy by indictment is excluded.

In *R v Rimmington, R v Goldstein* [2005] UKHL63 at paragraph 30 the House of Lords confirmed this approach, saying:

good practice and respect for the primacy of statute require that conduct falling within the terms of a specific statutory provision should be prosecuted under that provision unless there is good reason for doing otherwise.

- The use of the common law offence should therefore be limited to the following situations:
Where there is no relevant statutory offence, but the behaviour or the circumstances are such that they should nevertheless be treated as criminal;
- Where there is a statutory offence but it would be difficult or inappropriate to use it. This might arise because of evidential difficulties in proving the statutory offence in the particular circumstances;
- because the maximum sentence for the statutory offence would be entirely insufficient for the seriousness of the misconduct.

Definition of the offence

The elements of the offence are summarised in Attorney General's Reference No 3 of 2003 [2004] EWCA Crim 868. The offence is committed when:

- a public officer acting as such
- wilfully neglects to perform his duty and/or wilfully misconducts himself
- to such a degree as to amount to an abuse of the public's trust in the office holder
- without reasonable excuse or justification

A Public Officer

The prosecution must have evidence to show that the suspect is a 'public officer'. There is no simple definition and each case must be assessed individually, taking into account the nature of the role, the duties carried out and the level of public trust involved.

The courts have been reluctant to provide a detailed definition of a public officer. The case-law contains an element of circularity, in that the cases tend to define a public officer as a person who carries out a public duty or has an office of trust. What may constitute a public duty or an office of trust must therefore be inferred from the facts of particular cases.

The judgment of Lord Mansfield in *R v Bembridge* (1783) 3 Doug KB 32 refers to a public officer having:

'an office of trust concerning the public, especially if attended with profit ... by whomever and in whatever way the officer is appointed'.

It does not seem that the person concerned must be the holder of an 'office' in a narrow or technical sense. The authorities suggest that it is the nature of the duties and the level of public trust involved that are relevant, rather than the manner or nature of appointment.

In *R v Whitaker* (1914) KB 1283 the court said:

'A public office holder 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.'

This approach was followed in a series of cases from other common law jurisdictions: *R v Williams* (1986) 39 WIR 129; *R v Sacks* [1943] SALR 413; *R v Boston* (1923) 33 CLR 386.

In *R v Dytham* (1979) 1 QB 723 Lord Widgery CJ talked of 'a public officer who has an obligation to perform a duty'.

Remuneration is a significant factor, but not an essential element. In *R v Belton* [2010] WLR (D) 283 the defendant was an unpaid voluntary member of the Independent Monitoring Board. The Court of Appeal held that remuneration was not an indispensable requirement for the holding of a public office, or for liability to prosecution for the offence of misconduct in a public office.

The fact that an individual was a volunteer might have a bearing on whether there had been wilful misconduct, but was only indicative rather than determinative of whether an individual held a public office.

The court in Attorney General's Reference No 3 of 2003 [2004] EWCA Crim 868 referred to the unfairness that could arise where people who carry out similar duties may or may not be liable to prosecution depending on whether they can be defined as 'public officers'. What were once purely public functions are now frequently carried out by employees in private employment. An example is the role of the court security officer.

The court declined to define a public officer, however, but said:

'This potential unfairness adds weight, in our view, to the conclusion that the offence should be strictly confined but we do not propose to develop the point or to consider further the question of what, for present purposes, constitutes a public office.'

The following have been accepted as holding a public office by the courts over several centuries:

- Coroner (1675) *R v Parker* 2 Lev 140
- Constable (1703) *R v Wyatt* 1 Salk 380

- Accountant in the office of the Paymaster General (1783) *R v Bembridge* 3 Doug K.B. 32
- Justice of the Peace (1791) *R v Sainsbury* 4 T.R 451
- Executive or ministerial officer (1819) *R v Friar* 1 Chit.Rep (KB) 702
- Gaoler (1827) *R v Cope* 6 A&E 226
- Mayor or burgess (1828) *Henly v Mayor of Lyme* 5 Bing 91
- Overseer of the poor (1891) *R v Hall* 1 QB 747
- Army officer (1914) *R v Whitaker* 10 Cr.App.R.245
- County Court registrar (district judge) (1968) *R v Llewellyn-Jones* 1 Q.B.429
- Police officer (1979) *R v Dytham* 69 Cr.App.R.387
- Council maintenance officer (1995) *R v Bowden* 4 All E.R 505
- Local councillor (2004) *R v Speechley* [2004] EWCA Crim 3067
- Member of the Independent Monitoring Board for prisons (2010) *R v Belton R v Belton* [2010] EWCA Crim 2857

This list is illustrative only of the roles or functions that have been accepted by the courts over the years as falling within the definition of public officer. Each case must be taken on its own facts. The comments of the Court of Appeal in Attorney General's Reference No 3 of 2003 [2004] EWCA Crim 868 must be borne in mind concerning potential unfairness. The court took into account the fact that public functions are now frequently carried out by employees in private employment, for example those concerned with security at courts and the transport of defendants. There was the potential for unfairness if those holding a public office, such as police officers, were to be liable to a sanction not applicable to those in private employment who do similar work.

It is extremely difficult to extract from the cases any general identifying features of public officers in a contemporary context. A person may fall within the meaning of a public officer where one or more of the following characteristics applies to a role or function that they exercise with respect to the public at large:

- Judicial or quasi-judicial
- Regulatory
- Punitive
- Coercive
- Investigative
- Representative (of the public at large)
- Responsibility for public funds

This list is not exhaustive and cannot be determinative of whether a person is properly described as a public officer, when acting in a particular capacity. The characteristics should be treated only as a guide and considered in the context of all the facts and circumstances of the particular case.

Acting as such

The suspect must not only be a 'public officer'; the misconduct must also occur when acting in that capacity.

It is not sufficient that the person is a public officer and has engaged in some form of misconduct. The mere fact that a person is carrying out general duties as a public officer at the time of the alleged misconduct does not mean he or she is necessarily acting as a public officer in respect of the misconduct.

There must be a direct link between the misconduct and an abuse, misuse or breach of the specific powers and duties of the office or position.

The offence would also not normally apply to the actions of a public officer outside that role, unless the misconduct involved improper use of the public officer's specific powers or duties arising from the public office.

A deliberate misuse by an off-duty police officer of the powers of a constable, for example, may mean that the officer is 'acting as such' by virtue of his or her assumption of the powers of the office. Such a situation might arise if an off-duty police officer arrested an innocent man with whom he had a personal dispute or took steps in order to prevent or frustrate an enquiry.

The principles involved apply equally to holders of all public offices. In the case of a school governor or a local authority official or other such member of a public body, for example, it will be necessary to show that the misconduct was closely connected with exercising (or failing to exercise) the relevant public function.

Wilful neglect or misconduct

Nature of the neglect or misconduct

The wilful neglect or misconduct can be the result of a positive act or a failure to act. In the case of *R v Dytham* [1979] QB 722, for example, a police officer was held to have been correctly convicted when he made no move to intervene during a disturbance in which a man was kicked to death.

There must also be an element of knowledge or at least recklessness about the way in which the duty is carried out or neglected. The test is a subjective one and the public officer must be aware that his/her behaviour is capable of being misconduct.

Meaning of 'wilful'

In Attorney General's Reference No 3 of 2003 the court approved the definition of 'wilful' as 'deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not'.

In *R v G* [2003] UK HL 50 Lord Bingham said with respect to inadvertence:

It is clearly blameworthy to take an obvious and significant risk of causing injury to another. But it is not clearly blameworthy to do something involving a risk of injury to another if one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment.

Lord Steyn added:

the stronger the objective indications of risk, the more difficult it will be for defendants to repel the conclusion that they must have known. (*R v G* [2003] UK HL 50)

Abuse of the public's trust

Public officers carry out their duties for the benefit of the public as a whole. If they neglect or misconduct themselves in the course of those duties this may lead to a breach or abuse of the public's trust.

Seriousness of the neglect or misconduct

The behaviour must be serious enough to amount to an abuse of the public's trust in the office holder. In *R v Dytham*, Lord Widgery said that the element of culpability: must be of such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment.

In Attorney General's Reference No 3 of 2003 the court said that the misconduct must amount 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".

Consequences

The likely consequences of any wilful neglect or misconduct are relevant when deciding whether the conduct falls below the standard expected:

"It will normally be necessary to consider the likely consequences of the breach in deciding whether the conduct falls so far below the standard of conduct to be expected of the officer as to constitute the offence. The conduct cannot be considered in a vacuum: the consequences likely to follow from it, viewed subjectively ...will often influence the decision as to whether the conduct amounted to an abuse of the public's trust in the officer".

(Attorney General's Reference No 3 of 2003).

Whilst there is no need to prove any particular consequences flowing from the misconduct, it must be proved that the defendant was reckless not just as to the legality of his behaviour, but also as to its likely consequences.

The consequences must be likely ones, as viewed subjectively by the defendant. Although the authorities do not say so, likely can probably be taken to mean at the very least 'reasonably foreseeable'; it is arguable that likely may mean 'probable' in this context.

Motive

In order to establish whether the behaviour is sufficiently serious to amount to the offence, the officer's motive is also relevant:

"...the question has always been, not whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive, or corrupt motive, under which description, fear and favour may generally be included, or from mistake or error..."

"To punish as a criminal any person who, in the gratuitous exercise of a public trust, may have fallen into error or mistake belongs only to the despotic ruler of an enslaved people, and is wholly abhorrent from the jurisprudence of this kingdom".

(*R v Borron* [1820] 3 B&Ald 432: Abbott CJ, at page 434.)

At its highest the motive may be malice or bad faith but they are not prerequisites. Reckless indifference would be sufficient

Without reasonable excuse or justification

It is not necessary for the prosecution to prove the absence of a reasonable excuse or justification, although the nature of the prosecution evidence should in practice negate any such element.

The defendant may advance evidence of a reasonable excuse or justification. It is for the jury to determine whether the evidence reveals the necessary culpability.

Charging Practice

General principles

Where there is clear evidence of one or more statutory offences, they should usually form the basis of the case, provided the offences give the court adequate sentencing powers. The 'public office' element can be put forward as an aggravating factor for sentencing purposes.

A comparison may be made with charges of perverting the course of justice. In *R v Sookoo* (2002) EWCA Crim 800 the Court of Appeal held that adding a charge of attempting to pervert the course of justice along with counts for the principal offence or offences was only appropriate where a case had serious aggravating features (such as wasted police time and resources or detention of members of the public following false implication of them in the offence by the accused).

Similar reasoning should apply to the charging of misconduct in public office. When charging such an offence the prosecutor should provide a detailed review note of the reasons for doing so in the particular case. The note should make reference to any relevant factors referred to in this guidance, particularly where a statutory offence covering the behaviour in question is either charged or could have been charged.

For example an assault by a police officer committed on duty should not automatically be considered as misconduct in public office. A charge of assault would normally provide the court with adequate sentencing powers and the ability to take into account the breach of trust by the officer as an aggravating factor. See *R v Dunn* (2003) 2 Cr.App.R.(S).

Similarly, prosecutions for unauthorised access to or use of computer or other data systems should normally be conducted using the specific offence provided in section 55 Data Protection Act 1998. Only where the circumstances are such that a fine would not be an appropriate or sufficient penalty should a prosecution for misconduct in public office be considered.

Misconduct in public office should be considered only where:

- there is no suitable statutory offence for a piece of serious misconduct (such as a serious breach of or neglect of a public duty that is not in itself a criminal offence);
- there was serious misconduct or a deliberate failure to perform a duty owed to the public, with serious potential or actual consequences for the public;

- the facts are so serious that the court's sentencing powers would otherwise be inadequate

Level of misconduct required

The offence is, in essence, one of abuse of the power or responsibilities of the office held.

Misconduct in public office should be used for serious examples of misconduct when there is no appropriate statutory offence that would adequately describe the nature of the misconduct or give the court adequate sentencing powers.

The third element of the definition of the offence provides an important test when deciding whether to proceed with an offence of misconduct in public office. Unless the misconduct in question amounts to such an abuse of trust, a prosecution for misconduct in public office should not be considered.

The culpability 'must be of such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment' (*R v Dytham* 1979 QB 722).

The fact that a public officer has acted in a way that is in breach of his or her duties, or which might expose him/her to disciplinary proceedings, is not in itself enough to constitute the offence.

Examples of behaviour that have in the past fallen within the offence include:

- wilful excesses of official authority;
- 'malicious' exercises of official authority;
- wilful neglect of a public duty;
- intentional infliction of bodily harm, imprisonment, or other injury upon a person; frauds and deceptions.

Breaches of duty

Some of the most difficult cases involve breaches of public duty that do not involve dishonesty or corruption.

- In all cases, however, the following matters should be addressed:
- Was there a breach of a duty owed to the public (not merely an employment duty or a general duty of care)?
- Was the breach more than merely negligent or attributable to incompetence or a mistake (even a serious one)?
- Did the defendant have a subjective awareness of a duty to act or subjective recklessness as to the existence of a duty?
- Did the defendant have a subjective awareness that the action or omission might be unlawful?
- Did the defendant have a subjective awareness of the likely consequences of the action or omission.

- Did the officer realise (subjective test) that there was a risk not only that his or her conduct was unlawful but also a risk that the consequences of that behaviour would occur?
- Were those consequences 'likely' as viewed subjectively by the defendant? Did the officer realise that those consequences were 'likely' and yet went on to take the risk?
- Regard must be had to motive.

Dishonesty or corruption

Dishonesty or corrupt behaviour are not essential elements of the offence of misconduct in public office.

If, however, an allegation of misconduct in public office arises from circumstances involving the acquisition of property by theft or fraud, or where the holder of a public office is alleged to have made improper claims for public funds in circumstances said to be criminal, an essential ingredient of the offence is proof that the defendant was dishonest.

In *R v W* [2010] EWCA 372, a police officer used an official credit card for personal purchases. The Court of Appeal held that an essential ingredient of the offence of misconduct in public office in such circumstances was that the defendant was dishonest, and had not merely flagrantly broken the rules governing the use of the card.

When the allegation does involve the acquisition of property by theft or fraud, any misconduct should normally be prosecuted using appropriate statutory offences on the basis that an appropriate statutory offence should always be used where available in accordance with *R v Rimmington*, *R v Goldstein* [2005] UKHL63. (See Policy above). The fact that the offence was committed in the course of a public office is an aggravating element.

Useful Links

Archbold 25-381

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

R v Bembridge (1783) 3 Doug KB 32

R v Whitaker (1914) KB 1283

R v Williams (1986) 39 WIR 129

R v Sacks (1943) SALR 413;

R v Boston (1923) 33 CLR 386.

R v Dytham (1979) 1 QB 723

R v W (2010) EWCA 372

R v G (2003) UK HL 50

R v Borron (1820) 3 B&Ald 432

R v Dunn (2003) 2 Cr.App.R.(S)

R v Sookoo (2002) EWCA Crim 800
