

Public Office (Accountability) Bill: **Misconduct in Public Office Measures**

Background

The Government is clear that what happened following the Hillsborough disaster must never happen again:

- Police officers lying and changing witness statements to protect reputations;
- Families bereaved by a major disaster facing an inquest process with no funding for legal representation - while public bodies were free to appoint multiple legal teams to protect their own interests;
- A 25-year fight for an inquest to reach the right conclusion; and
- Investigations undermined by a lack of a duty of candour.

This Bill represents a powerful new package of measures to address these failings and others seen at Grenfell Tower, in the infected blood and Horizon scandals - and in too many other examples over too many years.

As part of the Government's fight against corruption and serious wrongdoing in public office, the Bill will also abolish the current common law offence of misconduct in public office and replace it with two new statutory offences. This follows recommendations made by the Law Commission following a thorough review, which concluded there were several problems with the current offence, including the clarity of its elements and its increasing use in contentious contexts.

These new measures will provide greater certainty as to who the offences apply to and what type of conduct is captured – ensuring that those who abuse their position or fall short of the behaviour expected of those who hold public office will continue to face serious sanctions, including time behind bars.

Reform of Misconduct in Public Office

What are we going to do?

The existing common law offence of misconduct in public office is currently committed by a public office holder who, while acting in their capacity as public office holder either wilfully neglects to perform their duty or misconducts themselves to such a degree that it amounts to an abuse of the public's trust in that office. It carries a maximum sentence of life imprisonment. There is no list of public office holders for the purposes of the offence – whether someone is caught by the offence is determined by a test established by case law, which centres on whether they were performing a function of government in their role.

To tackle the problems identified, the Law Commission recommended that the current offence is abolished and replaced with two new statutory offences that broadly replicate the common law, while making it clearer and easier to use and understand.

How are we going to do it?

The Law Commission proposed two offences to broadly replicate the common law, and that is the approach this Bill takes. The first is an offence to cover the current common law offence's scope in tackling 'wilful misconduct' - this will be done through the "seriously improper acts" offence. The second is an offence of a "breach of duty to prevent death or serious injury", which covers the 'wilful neglect' limb of the current common law offence. In addition, as recommended by the Law Commission, the Bill sets out a list which sets out who is a "public office holder" for the purposes of these two new offences. Both offences also contain a "functional test" which ensure that it is only actions taken in connection with their role as a public office holder, which are caught by the offences.

The two new offences in the Bill do not widen or significantly change the scope of the common law offence as it currently exists, or the type of conduct it captures. The new offences are intended to replace the common law offence and continue to capture wrongdoing at the most serious level.

To ensure the penalty for these offences is commensurate with other corruption type offences such as fraud or bribery, the penalties for the new offences will be between 10- and 14-years maximum imprisonment, rather than the current maximum of life for the common law offence.

Finally, to ensure the right cases are prosecuted and to prevent vexatious private prosecutions against public officials, including those regularly in the public eye such as politicians, the consent of the Director of Public Prosecutions will be required to bring a prosecution for both or either offence. This will ensure that that only those cases which are serious in nature and justify criminalisation are prosecuted.

Seriously Improper Acts offence

What are we going to do?

This new offence is committed when a person who holds a public office, uses this office to obtain a benefit (for themselves or another person); or to cause another person to suffer a detriment. They must also know (or ought to know) that their behaviour is seriously improper. "Uses" a public office includes using, and failing to use, a power or position they have (or purport to have) through their role.

The types of behaviour captured are intended to be wide, to ensure that the offence will continue to capture the full range of conduct currently caught by the common law offence. "Benefit" and "detriment" can include financial gain or loss; protection or enhancement of, or damage to, a person's reputation; as well as benefits or

detriments of a physical or sexual nature. The inclusion of "protection or enhancement of, or damage to, a person's reputation" is intended to capture seriously improper conduct by a public official with the aim of protecting the reputation of a person or organisation – much like the type of behaviour observed in public inquiries such as Hillsborough.

How are we going to do it?

An act under this offence is seriously improper if a reasonable person would consider it to be so, and the offence sets out a list of factors a jury must consider in determining whether an act is seriously improper. This is designed to reflect the common law offence's concept of an act constituting an "abuse of the public's trust". This seriousness threshold ensures that the offence only captures conduct worthy of criminal sanction, and does not capture, for example, routine decision-making undertaken by public office-holders in the course of their official duties - including decision-making implementing a political mandate - unless that conduct is seriously improper.

There will be a defence for this offence where a person charged can show they had a reasonable excuse for their action. This might include difficult or unusual circumstances that require a public official to, for example, disregard minor infringements when investigating more serious offences – such as not taking immediate action on minor benefits infringement in order to uncover a larger scale benefits fraud.

The offence will be indictable only and will carry a maximum sentence of up to 10 years' imprisonment.

Breach of Duty to Prevent Death or Serious Injury offence

What are we going to do?

This new offence is committed when a person who holds public office is under a duty to prevent, or to prevent a risk of, another person suffering critical harm; and they intentionally or recklessly breach that duty by causing, or creating a significant risk of causing, another person to suffer critical harm. The offence can therefore only be committed by a public office holder whose role inherently involves a duty to prevent critical harm to others - such as service personnel, firefighters, policing or any other public facing role where a member of the public is reliant on them to protect them from critical harm (or the risk of it). It therefore does not apply to public office holders whose roles do not put them under a duty to protect the public from critical harm.

How are we going to do it?

This offence is only committed if the public official knows, or ought to know, that they are under the duty to prevent critical harm. There is no requirement that any critical harm materialises – it is sufficient that a significant risk of the harm materialising is

caused by the public official's breach of duty. But the offence is not committed where only a negligible risk is created – this ensures that only the most serious conduct and breaches are caught.

There is a seriousness threshold that must be satisfied to establish the offence - the public office holder's action must fall far below the standard that could reasonably be expected of them in the circumstances. Honest mistakes, or finely balanced operational decisions, made in challenging circumstances will not be captured.

There will also be a defence for this offence where a person charged can show that they had a reasonable excuse for either taking – or failing to take – the action that breaches their duty.

This offence will be indictable only and will carry a maximum sentence of up to 14 years' imprisonment.