

CONSULTATION RESPONSE

TO	Law Commission
FROM	Independent Police Complaints Commission (IPCC)
REGARDING	Misconduct in public office – Issues paper 1: the current law

The IPCC and its remit

1. One of the IPCC's primary statutory functions is to secure and maintain public confidence in the police complaints system in England and Wales. We are independent, and make decisions independently of the police, government and interest groups. We investigate the most serious complaints and incidents involving the police across England and Wales, as well as handling certain appeals from people who are not satisfied with the way police have dealt with their complaint.
2. The IPCC was established by the Police Reform Act 2002 and became operational in April 2004. Since that time our remit has been extended to include:
 - Police and Crime Commissioners and their deputies
 - the London Mayor's Office for Policing and Crime and his deputy
 - certain specialist police forces (including the British Transport Police and the Ministry of Defence Police)
 - Her Majesty's Revenue and Customs (HMRC)
 - staff who carry out certain border and immigration functions who now work within the UK Border Force and the Home Office
 - the National Crime Agency (NCA)
 - staff who are contracted to provide services to a chief officer
3. The majority of complaints against the police are dealt with by the relevant police force (or agency) without IPCC involvement. However, certain types of complaints and incidents must be referred by the police to the IPCC. These include where someone has died or been seriously injured following direct or indirect contact with police, as well as allegations of serious corruption, serious assault, and criminal offences or behaviour liable to lead to misconduct proceedings which are aggravated by discrimination. We then decide whether an investigation is necessary and, if so, what level of involvement we should have in the investigation of the matter. We may choose to conduct our own independent investigation, manage¹ or supervise²

¹ A managed investigation is conducted by the appropriate authority (for example, the police force subject of the investigation) under the direction and control of the IPCC. The IPCC manages the scope of the investigation, investigative strategy and findings of the report. Tasks such as writing the final report will be carried out by the investigator from the appropriate authority under the IPCC's direction. The IPCC will confirm the investigation has met the terms of reference.

² A supervised investigation is conducted by the appropriate authority under the supervision of the IPCC. The IPCC agrees the scope of the investigation (the terms of reference) and the investigation plan.

a police investigation, or decide that the matter can be dealt with locally by the police.

The IPCC's role in relation to criminal offences

4. The IPCC will conduct a criminal investigation where it considers that there is an indication that a person serving with the police may have committed a criminal offence. In a managed or independent investigation, the IPCC is responsible for referring cases to the Crown Prosecution Service (CPS) where appropriate.
5. A decision of whether or not to refer a matter to the CPS must be taken upon completion of an investigation, although there are occasions when a referral may be made at an earlier stage. When determining appeals against the findings of a local or supervised investigation, the IPCC will direct the appropriate authority to refer the matter to the CPS where it considers that the statutory conditions for referral are met.
6. In both investigations and appeals, the conditions for referral to the CPS are:
a) there is an indication that a person to whom the investigation relates may have committed a criminal offence; and b) the IPCC considers that it is appropriate for the matter to be considered by the CPS. Once a referral is made, it is for the CPS to decide whether to pursue a prosecution and, if so, for which offence(s).

The consultation

7. The consultation paper *Issues Paper 1: the current law* seeks examples and views on a number of specific issues identified with the existing common law offence of misconduct in public office. The offence is highly relevant to the IPCC's work. However, as we have no power to decide when an individual should be charged with any criminal offence and as the threshold at which the IPCC must make a referral to the CPS is a low one (i.e. requiring only an *indication* that a person to whom an investigation relates *may* have committed a criminal offence), we are not best placed to comment on particular problems of interpretation with the elements of the offence. For that reason, we are not in a position to fully answer the consultation questions.
8. We have therefore provided some comments about our experience of dealing with cases where the offence of misconduct in public office is relevant and responded briefly to the more general consultation questions (10 and 11) posed in the issues paper. We have also made some comments on the new offence of corrupt or other improper exercise of police powers and privileges (under section 26 of the Criminal Justice and Courts Act 2015).

IPCC cases of misconduct in public office

9. In the five year period between 1 April 2009 and 31 March 2015, the IPCC opened and closed 19 managed and independent investigations where a referral was made to the CPS for consideration of charges of misconduct in

public office. A further two cases were referred to the CPS for other offences and the CPS decided to charge with misconduct in public office instead³.

10. Of these 21 cases, the CPS proceeded with charges in 12 cases, prosecuting 12 individual officers. These resulted in 11 convictions for misconduct in public office.
11. The types of cases involved included: neglect of duties (for example, failure to pursue routine enquiries and falsification of evidence); sexual exploitation by a police officer of a member of the public (often vulnerable women); and misuse of police systems and inappropriate disclosure of information from police systems to members of the public.

The IPCC's views on the current offence

Consultation question 10: Do consultees have any views on whether the offence of misconduct in public office reflects a distinctive wrong?

12. As outlined above, the range of circumstances in which the IPCC tends to encounter the offence of misconduct in public office are relatively narrow. This may suggest that the offence, as it stands, does not so much reflect any distinctive wrong as fill what are considered certain gaps in the criminal law.
13. For instance, where there is a serious and wilful neglect of the police service's duty to protect the public from violence – as in the recent and tragic case of Bijan Ebrahimi – or where a police officer uses their position to sexually exploit a vulnerable victim or witness, there is a strong argument that criminal sanction should at least be a possibility. In the absence of the existing offence of misconduct in public office or a relevant replacement, it is unlikely there would be any such possibility in these types of cases.

Consultation question 11: Do consultees have any views on whether the offence of misconduct in public office fulfils an important role from the perspective of fair labelling?

14. In the view of the IPCC, the role that the current offence plays in ensuring that such conduct is subject to criminal sanction is more important than the question of fair labelling. Moreover, any labelling function that the current offence does perform is less important than what members of the public may perceive to be a lack of consistency in how the offence is applied.
15. Currently, the existing law may criminalise the conduct of certain public servants (including persons serving with the police) but not the conduct of other public servants acting in the same or a similar manner, simply because of the type of role they hold. For example, members of the public may be surprised that medical professionals caring for a patient could not be found guilty of misconduct in public office in circumstances in which police officers

³ This data was collated in November 2015. There is currently no equivalent data available in respect of IPCC directions to appropriate authorities to refer cases to the CPS following appeal determinations.

may be⁴. Such apparent inconsistencies call into question the extent to which the offence may be considered to reflect a distinctive wrong or at least suggest what can be deemed to be misconduct in public office is ambiguous.

The IPCC's view on the new offence of corrupt or other improper exercise of police powers or privileges

16. The issues paper asks for examples of problems with the new offence. The IPCC has not yet completed any cases where the new offence would be relevant. As explained previously, our role in determining a criminal offence to be pursued is limited. We are therefore only able to provide some general comments.
17. It is clear the intention is for the new offence to deal with perceived gaps in the criminal law on corruption. However, the concern is that it is possible the new offence will be used more widely than intended.
18. The offence of misconduct in public office involves a public officer wilfully neglecting to perform their duty and/or wilfully misconducting themselves. The new offence of corrupt or other improper exercise of police powers or privileges does not have a similar seriousness threshold or requirement of 'bad faith'. This could potentially criminalise conduct which would normally be investigated as misconduct but not criminality.
19. We are also uncertain about the relationship between the two offences; when they would overlap and how to determine which is the most appropriate offence when they do. We are exploring these issues with the CPS.

Independent Police Complaints Commission
March 2016

⁴ See, for example, Mitchell [2014] EWCA Crim 318.