CONSULTATION RESPONSE

TO	**Law Commission**
FROM	**Independent Police Complaints Commission**
REGARDING	**Reforming misconduct in public office consultation**

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, manage[1] or supervise[2]

[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 Law Commission's review of the common law offence of misconduct in public office will decide whether the existing offence should be abolished, retained, restated or amended. Earlier this year, the first phase of a public consultation to inform the review was launched. This consultation sought examples and views on a number of specific issues identified with the existing offence. The IPCC submitted a response in March 2016, which is published on our website.[3]

8. The Law Commission has now considered the responses to the first phase consultation and developed provisional law reforms. This second phase consultation seeks views on the provisional reforms proposed in the consultation paper *Reforming misconduct in public office consultation: a consultation paper,* as well as complementary reforms to the sexual offences regime and sentencing guidelines. Three options are proposed to reform the existing law:

    1) Replace the current offence with a new offence addressing breaches of duty that cause or risk causing serious harm when committed by a public office holder with duties concerned with the prevention of harm.

[3] The IPCC's response to the first phase of the Law Commission's consultation about the offence of misconduct in public office can be accessed at: http://www.ipcc.gov.uk/sites/default/files/Documents/consultations/IPCC%20response%20to%20law%20commission%20consultation_misconduct%20in%20public%20office_170316.pdf

2) Replace the current offence with a new offence based on the use of power, authority or position for the benefit of the public office holder or another, or to the detriment of another; and that the use of power, authority or position for that purpose was seriously improper.

3) Abolish the current offence without replacement.

Options 1 and 2 are separate but compatible, and could be implemented together.

Response to the consultation

Consultation question 1: Should "public office" be defined in terms of a public function: (1) exercised pursuant to a state or public power; or (2) which the office holder is obliged to exercise in good faith, impartially or as a public trust?

9. From the IPCC's perspective, the two priorities in defining public office are: 1) a definition that covers *all* persons who perform police functions or functions ancillary to the performance of police functions, regardless of their position, role or the extent of their individual powers; and 2) that it is clear and easy for investigators, prosecutors and others to apply in practice.

10. The definition should be sufficiently broad to include any individual potentially falling under our jurisdiction, including: police officers, police staff, members of other policing-type bodies, police and crime commissioners, and contractors performing policing functions or functions that are ancillary to the performance of policing functions (e.g. police call handlers and health care professionals operating in a custody environment).

11. We agree that there are potential difficulties with both options considered under this consultation question. On balance, however, we consider that option (2) is less problematic. Defining public office in reference to the exercise of a state or public power may delineate the scope of the offence more clearly. We are concerned, however, that it may take some of those people under our jurisdiction, and who currently fall within the definition of a public office holder, outside the scope of the definition; such a position would produce anomalous outcomes.

12. In the context of the IPCC's work, problems may be most likely to arise in cases of breach of duty leading to a risk of serious harm. This includes cases involving a risk of serious harm from the actions of third parties that the police fail to prevent, as in the recent tragic case of Bijan Ebrahimi, cases involving victims of domestic violence, and cases involving serious failures in the care of persons in police custody.

13. If a definition based on public power were adopted, and if it did limit the application of the offence in the way we fear it may, we could find ourselves criminally investigating police officers in circumstances where police staff or contractors may not fall within the ambit of the criminal law: for example, a police officer's alleged failure to respond appropriately to a report of a threat

to a member of the public but not a call handler's failure to do the same;[4] or the alleged failures of custody staff to provide adequate care to a detainee, in circumstances where they relied heavily on the advice of a contractor health care professional, but not the conduct of that health care professional, which we could investigate only as a potential disciplinary offence. As a matter of principle, such a position would be very difficult to justify.

14. From our perspective, it is therefore essential that all such persons would continue to fall within the definition of a public office holder in these circumstances, whatever definition is adopted. Does a health care professional providing advice in a custody environment or a call handler receiving calls from the public perform such functions *pursuant* to a state power, or is their role merely ancillary to a state or public power? The answer to that question is not clear to us. On that basis, of the two options presented, we prefer the second option.

15. A definition based on a public function that must be exercised in good faith, impartially or as a public trust, would seem to us to cover all of those persons who fall under the jurisdiction of the IPCC and who have, on occasion, found themselves under investigation for the existing offence.

Provisional proposal 2 – for the purposes of a reformed offence, public office should not be defined in terms of (1) 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.

16. While we can understand the issues with appropriately limiting the scope of a definition based on an institutional or employment link, we are less clear why a definition based on a state function that the public has a significant interest in seeing performed has been summarily rejected. From the IPCC's perspective, such a definition is attractive. It would be likely to encapsulate all of the persons who come under our jurisdiction and would thus avoid the kinds of anomalous outcomes discussed above.

17. We question whether a "significant interest" test is any less certain than one based on a public function that must be exercised in good faith, impartially or as a public trust. We note that the latter test is the same as that contained in section 3 of the Bribery Act 2010. The CPS guidance in relation to that provision seeks to explain this test by reference to the Law Commission paper that preceded the introduction of the Bribery Act 2010 which said, "the expectation in question is that which would be had, in the circumstances by people of moral integrity... it will be for the tribunal of fact to decide what that expectation amounted to, in the circumstances." That seems to us to leave a good deal of uncertainty. We also wonder whether there is any public function

[4] Police call handlers may be police staff or contractors and the IPCC has jurisdiction over both. A contractor is defined as any "person who has entered into a contract with a local policing body or a chief officer to provide services to a chief officer" (s.12(10) of the Police Reform Act 2002). This is a very broad definition and could, for instance, include persons contracted to provide cleaning services.

that need not be exercised in good faith. If that is correct, such a definition is likely to be at least as broad as the existing definition.

18. The courts' interpretation of a "significant (public) interest" has certainly produced some anomalous outcomes in the context of the current offence. It seems to us, however, that a statutory definition based on a significant interest could be tightened up and focused in a way that would assist the courts with interpreting this concept in the context of any new offence. Ultimately, such a definition may also be clearer than one that rests on the seemingly very broad notion of a function that must be exercised in good faith, *or* impartially, *or* as a public trust. Though such a definition may well cover all of those individuals falling within the jurisdiction of the IPCC, and in that sense it is attractive, it is not clear to us that it improves upon the uncertainty that surrounds the current definition.

Consultation questions 3 and 4: the form the statutory definition of 'public office' should take.

19. Whatever form the definition takes, it should be sufficiently broad to include any individual who performs policing functions or performs functions that are ancillary to the performance of policing functions, and falls under our jurisdiction. To avoid the kinds of anomalies discussed in response to question 1, it should be clear from the moment the new offence comes into force that all persons performing such functions (regardless of their position, role or the extent of their powers), fall within the definition of a public office holder.

20. In our view, options 1 (a general definition) or 4 (a general definition, supplemented by a non-exhaustive list of functions given by way of example) under consultation question 3 would be most likely to achieve this objective. We would have concerns that any definition based on a list of functions would almost inevitably produce anomalous outcomes as particular functions would be forgotten or missed in the drafting process.

21. As we do not consider that a definition based on a list of functions or roles would be helpful, we do not offer any view on whether there should be a power to amend such a list by order subject to the affirmative resolution process.

Option 1: the breach of duty model

Provisional proposal 5: the offence should encompass both positive acts and omissions and the conduct element should refer to a "breach of duty" to reflect this.

22. We agree that the offence should encompass both positive acts and omissions and that the element should refer to "breach of duty" to reflect this.

23. If the offence did not encompass omissions, serious failings of the kind which occurred in the case of Ebrahimi or in relation to the protection of victims of domestic violence, for instance, would cease to be criminal. In our view,

serious failings to perform a positive duty to protect members of the public from serious harm are rightly subject to criminal sanction.

Provisional proposal 6: the offence should be limited to breaches of particular duties concerned with the prevention of harm.

24. Limiting the offence to breaches of particular duties concerned with the prevention of harm would have the benefit of certainty and could appropriately limit the scope of the new offence(s). However, in the absence of an alternative offence (new or existing), it should not be so limited as to remove from criminal liability conduct which would be at present quite properly prosecuted as misconduct in public office.[5] It should be broad enough to cover any person involved in policing functions where that person has any role, direct or ancillary, in preventing harm to others. Again, examples include: call handlers dealing with reports of missing persons or third party threats; health care professionals operating in a custody environment; and Police Community Support Officers (PCSOs) (as well as police officers) dealing with drunk and incapable persons in public.

Provisional proposal 7: the category of public office holders under a particular duty concerned with the prevention of harm should be defined to include public office holders with powers of physical coercion (whether or not it also includes any other public office holders).

25. We agree that the category of public office holder under a duty concerned with the prevention of harm should be defined to *include* those with powers of physical coercion, but not necessarily *in reference to* such powers. That is, we consider that anyone holding such powers should fall within the definition by nature of the kinds of public functions they perform, but that coercive powers are not necessarily the distinguishing feature of such functions. We are concerned that, if the definition makes explicit reference to such powers, there is a risk of unintentionally limiting the scope of the offence to circumstances in which coercive powers have been utilised. That could significantly reduce the current scope of the criminal law and could, for instance, take cases as serious as Ebrahimi outside of it.

26. For the same reason, the definition should not be limited to those holding coercive powers. Those individuals who may come under IPCC investigation in the kinds of breach of duty cases discussed above – police officers, PCSOs, health care professionals and call handlers, for example – should be treated alike. We cannot see any good reason why, in such circumstances, only those holding coercive powers should be liable to criminal sanction.

Consultation questions 8 and 9: should the definition of public office holder under a particular duty concerned with the prevention of harm include those with a duty of protection in respect of vulnerable individuals; and defining 'vulnerable individuals'.

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[5] We are not referring here to cases that have been prosecuted as misconduct in public office where there is an alternative, and arguably more fitting, offence that could be charged; e.g. R v W [2010] EWCA Crim 372. We are concerned only with those cases where there is no alternative offence.

27. Such a definition may address the concerns raised in the previous paragraph and in response to questions 1 and 3. However, it may only do so if vulnerability were defined to include, not only those who are intrinsically vulnerable, but those who are vulnerable by circumstance. This should certainly include all persons in custody (as the Safeguarding Vulnerable Groups Act 2006 (SVGA) definition does), but should perhaps also include drunk and incapable persons outside the custody environment. If drunk and incapable persons fell outside the definition, then a police officer might be guilty of the offence in circumstances where a PCSO, lacking coercive powers, would not (unless PCSOs and others performing police related functions, but not holding coercive powers, were brought within the definition of a public office holder in some other way).[6] If vulnerability is not defined broadly enough to cover such circumstances, the definition of public office holder under a particular duty concerned with the prevention of harm should otherwise include PCSOs.

Consultation question 10 and provisional proposal 11: should the offence be defined to include the breach of every legally enforceable duty to prevent (or not to cause) relevant types of harm, or should there be a more restricted definition of the nature of the duty involved? The proposal is that the offence should be defined as consisting of breach of a particular duty concerned with the prevention of specified harms.

28. A less restricted definition of the nature of the duty would, in our view, be preferable to attempting to specify every possible type of harm, or ranking one type of harm over another.

Consultation questions 12 and 13: the form the definition of 'public office holders with coercive powers' should take.

29. In our view, the definition of those holding coercive powers is less important than ensuring the definition of public office holder incorporates any individual who performs policing functions or performs functions that are ancillary to the performance of policing functions. We are concerned that any definition that emphasises coercive powers risks taking individuals who are rightly considered public office holders under the current law outside that definition and producing the kinds of anomalous outcomes discussed above.

Consultation question 14: the form the definition of 'public office holders with a duty of protection' should take.

30. Again, in our view, option 1 (a general definition) or option 4 (a general definition supplemented by a non-exhaustive list of *functions* given by way of example) would seem most likely to achieve clarity. The increasingly blurred line between the public and private spheres, and the increasing role of contractors in policing is such that one must look to functions, not positions, when determining levels of culpability. A general definition with a focus on

[6] The case of Driver referred to in the background paper (Appendix D) is an example of where this issue could arise.

functions could, in our view, achieve a good degree of certainty and would stand the best chance of producing equivalent outcomes in equivalent cases.

Consultation question 15: if the definition includes a list of functions or positions should there be a power to add to the list by order?

31. As we consider that the definition should include, at most, a non-exhaustive list of functions given only by way of example, we offer no view on whether there should be a power to amend such list by order.

Provisional proposals 16-19: it is sufficient for prosecution that public office holders are aware of their role as a public office holder and their duties concerned with the prevention of harm; the offence should include actual and potential consequences; and the scope of 'public harm' should include death and serious injury, and false imprisonment.

32. The IPCC agrees with provisional proposals 16, 17 and 19.

33. We can see no reason to deviate from the general principle that ignorance of the law is no excuse. Indeed, there is a good argument that those involved in policing should, given their position within the justice system, have a better understanding of their legal obligations than the average person.

34. We agree also that individuals should not be held criminally liable if it cannot be proved that they were aware of circumstances relevant to the content of their duties. In a policing context, for instance, it would be wrong if an individual could be held criminally liable for breaching a duty if they had received no training or otherwise been made aware of duties arising from a particular policy. Mere knowledge of the existence of such duties should suffice, however. If it did not, it would be difficult to establish the offence in any case where a suspect claims to have misunderstood or have a limited knowledge of their duties.

35. In relation to provisional proposal 18, we agree that the offence should include both actual and potential consequences. It is true that misconduct in public office is more frequently charged in cases with actual consequences. However, serious breaches of duty that could result in serious harm but did not, by chance, must be similarly culpable. For example, if the health of a person in police custody seriously deteriorates as a result of a lack of appropriate care but that person later makes a full recovery, it does not, in our view, significantly affect the culpability of those responsible for providing that care. The mischief that the offence must address is a breach of duty leading to a risk of serious harm, not the occurrence of serious harm.

Consultation questions 20-22: for the purposes of the offence: should the risk of serious harm to public order and safety be regarded as public harm? Should the risk of serious harm to the administration of justice and to property be regarded as consequences likely to cause a risk of public harm occurring?

36. We consider that “public harm” for the purposes of the offence should include those types of harm listed at questions 20-22.

37. A risk of serious harm to public order and safety is central to the police’s duty to protect the public and maintain public order, and their duty to prevent serious damage to property is ancillary to this.

38. In our view, it will be necessary to include risk of serious harm to the administration of justice if certain conduct that constitutes the existing offence is to remain subject to criminal sanction. The case of DC Hannah Notley is an example. Ms Notley allegedly failed to properly investigate an allegation of rape and then lied to the victim, her supervisor and the CPS about the outcome of the investigation. She was convicted of misconduct in public office and sentenced to 4 months imprisonment. There was no suggestion that she fabricated or tampered with evidence nor is it clear that it would be possible to establish intention to pervert the course of justice in such circumstances. If that is correct, misconduct in public office would appear to be the only available charge.

39. In our view, such conduct is serious and is rightly subject to criminal sanction. Alternatively, such conduct may be caught by the corruption based model, but only if “benefit” were defined to include the objective of covering up one’s own failings.

Consultation question 23: should the risk of serious economic loss be regarded as a consequence that would be likely to cause a risk of public harm occurring for the purposes of the offence?

40. The IPCC does not have any comments in relation to this question.

Provisional proposals 24-26: liability should only be imposed where risk of serious consequence arises; the fault element of the offence should include recklessness; and the offence should exclude the element of “without reasonable excuse or justification”.

41. The IPCC agrees with proposals 24-26, with one qualification. It may be difficult to define serious consequences in the context of harm to the administration of justice. Any such definition should capture serious misconduct, such as that discussed in relation to question 21, which would not constitute any other offence against public justice.

Consultation question 27: should an offence of breach of duty be introduced?

42. If the existing offence is repealed, the IPCC considers it essential that failings of the kind discussed above continue to attract criminal sanction. An offence of breach of duty by a public office holder would be a suitable replacement for the current offence, in so far is it relates to such cases. By focusing more specifically on the types of duty concerned and the nature of any breach, such an offence could also improve and clarify the application of the criminal law in such cases.

Option 2: the corruption based model

Provisional proposal 28: the offence is committed if a public office holder uses their position, power or authority for their own benefit or to the benefit or detriment of another person; and that the use of position, power or authority for that purpose was seriously improper.

43. We consider that such an offence could, in conjunction with a breach of duty offence, provide a suitable replacement to misconduct in public office. Together these offences would appear to cover most, if not all, of the conduct that is currently subject to criminal sanction under the existing offence. We would hope that the inclusion of all public officers within its scope[7] would mean that all persons performing or involved in policing functions would fall to be treated equally under the law.

44. The following are examples of cases that the IPCC investigated as, and in some instances resulted in prosecutions for, misconduct in public office, but which would not or may not be caught by the breach of duty model: misuse of official information[8]; exploitation of a position of public office to facilitate a sexual relationship; and falsifying records or misleading complainants, superiors and others in circumstances which would not amount to perverting the course of justice.[9]

45. The formulation set out under provisional proposal 28 at 1.89 (2)(b) of the summary document, in our view, improves upon the test set out at s.26(4) of the Criminal Justice and Courts Act 2015. That provision requires an assessment of the conduct in reference to a "reasonable member" of the public's opinion on it. "Seriously improper" may be difficult to define, but it would re-introduce a seriousness threshold absent from the s.26 offence and which is likely to be easier to apply in practice.

Provisional proposals 29-32: the offence should apply to all public office holders; the offence should not require public office holders to be aware that their position in law is considered a public office; the fault element should include the purpose of achieving an advantage for the office holder or another, or a detriment to another; and common law defences should apply.

46. In the interests of achieving equivalent outcomes in equivalent cases, we agree that the offence should include all public office holders, without restriction.

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[7] Cf. the police corruption offence created by section 26 of the Criminal Justice and Courts Act 2015.

[8] See, for example, the case of Thomas Hatton, convicted of four counts of unlawfully obtaining data and one count of misconduct in public office and sentenced to eight months imprisonment, suspended for two years. This case is notable as there was no evidence that the information was provided to any third party in return for any favour. The information was, it seems, used by Mr Hatton to conduct his own private investigations.

[9] As in the case of Notley, cited at paragraph 32.

47. We agree with proposal 30 for the same reasons given in respect of proposal 16; ignorance of the law is no excuse.

48. We broadly agree with proposal 31. However, we consider that, "benefit" (referred to in the proposal as 'advantage') ought to be defined sufficiently broadly to include covering up past failings and initiating inappropriate sexual relationships; unless such conduct will be captured by the breach of duty offence (perhaps unlikely) or, in the latter case, an offence created by way of amendment to the sexual offences regime.

49. It would appear that misuse of official information would be covered by the corruption based offence, but only if the purpose of obtaining or using that information were to achieve a relevant benefit or a detriment. This may remove some such conduct entirely from criminal liability or mean that it would be punishable by way of a fine only.[10] This might be counter-productive in a policing context where public office holders are entrusted with highly sensitive information. Such an outcome may be acceptable where a public officer accesses information out of simple curiosity. It may be less so if the public office holder in a policing context makes further use of that information in a manner that would not easily fall within a benefit/detriment definition. Examples may include where a public office holder uses the information to conduct investigations of their own[11] or shares such information with members of the public or media where no payment changes hands.

50. We agree with proposal 32 that common law defences should apply and that there should be no additional defences. A clearer definition of public office holder combined with the introduction of a seriousness threshold, of the sort proposed at paragraph 1.89 (2)(b) of the summary document, should, in our opinion, suffice to ensure the scope of the offence is not too wide.

Consultation questions 33 and 34: should a corruption based model of the offence be introduced? If such an offence is introduced, should it be introduced on its own or in conjunction with the proposed offence described in option 1?

51. As will be clear from the preceding responses, we consider that a corruption based model would be a necessary part of replacing the existing offence. In order to ensure that the range of conduct that is currently rightly subject to criminal sanction remains so, this would need to be introduced in conjunction with option 1.

Option 3: the abolition of the offence of misconduct in public office without replacement

Provisional proposal 35: the offence should not be abolished without any new offence being introduced to replace it.

[10] Offences under the Data Protection Act 1998 being limited to a fine.
[11] As in the case of Thomas Hatton.

52. We agree. The IPCC considers that abolition without replacement would create unacceptable gaps in the criminal law. Disciplinary sanctions for the kinds of conduct discussed in this response would not adequately reflect the seriousness of such conduct. Moreover, in the case of retired officers, staff and contractors, option 3 could result in such failings going completely unpunished.[12]

Complementary legal reforms

Consultation question 36: should the reform of the sexual offences regime be considered in respect of obtaining sex by improper pressure and/or sexual exploitation of a vulnerable person.

53. Reform of the sexual offences regime may be the most fitting way to address such conduct. It could be useful in relation to inappropriate relationships with vulnerable persons. This is one of the most common scenarios investigated by the IPCC and subsequently prosecuted as misconduct in public office.

54. However, the existing offence ought not to be repealed before any such amendment takes effect, unless such conduct will be caught by the introduction of a breach of duty and/or corruption based offence.

Consultation question 37: should discretion remain in whether the fact a defendant is a public office holder is treated as an aggravating factor for the purposes of sentencing any criminal offence?

55. We agree that the current system, in which public office can be (and often is) considered an aggravating factor by sentencing tribunals but which is not explicitly listed as an aggravating factor in sentencing guidelines, is appropriate. While public office will often aggravate criminal conduct, it does not, in our view, necessarily do so; for instance, in cases involving very minor offences or offences unconnected with the performance of the public office concerned. Sentencing tribunals should, in our view, maintain maximum discretion in this regard.

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[12] The presumption that police officers under investigation or facing disciplinary for gross misconduct will not be allowed to serve notice to resign or retire introduced by regulation 10A of the Police (Conduct) Regulations 2012 addresses this issue to some extent, but does not remove it completely. The presumption does not cover police staff or contractors, nor does it assist in circumstances where allegations against an officer come to light after he or she has ceased to serve with the police.