

REFORMING MISCONDUCT IN PUBLIC OFFICE

A RESPONSE BY A WORKING PARTY OF THE ECCLESIASTICAL LAW SOCIETY TO THE LAW COMMISSION'S CONSULTATION PAPER: 'REFORMING MISCONDUCT IN PUBLIC OFFICE'

1. The Ecclesiastical Law Society

- 1.1. The Ecclesiastical Law Society is a charity whose object is 'to promote education in ecclesiastical law for the benefit of the public, including in particular:
 - (a) the clergy and laity of the Church of England and (b) those who may hold authority or judicial office in, or practise in the ecclesiastical courts of the Church of England'.
- 1.2. The Society has approximately 700 members, mostly Anglican and resident in the UK, but includes a significant number from other Christian denominations and from overseas. It publishes the *Ecclesiastical Law Journal* and circulates newsletters, as well as organising conferences and seminars for members and non-members. It is active in promoting the teaching of ecclesiastical law at theological colleges and as a component of continuing ministerial education.
- 1.3. It has established many working parties over the past thirty years addressing issues concerning both ecclesiastical and 'secular' law, most recently the preparation of a response to the Law Commission's consultation on burial law. This response is to the Law Commission's *Reforming Misconduct in Public Office: A Consultation Paper* (No. 229, 2016).

2. Misconduct in public office

A status-based test

- 2.1. The consultation document notes that arguments have been advanced that it is a person's status, or a combination of that person's function and status, that denotes a public office holder but that the Commission has concluded that 'the status of the office may be relevant to the question of who is in public office, but will not be determinative of that fact'.¹
- 2.2. The consultation document also notes that the status test can give rise to arbitrary results and that the reasoning of the court in *Ball* that 'Bishops of the Church of England are in public office because of the unique position of the Church in relation to the state' means that 'no minister of any other faith (regardless of seniority), including the Church in Wales, could have been prosecuted for misconduct in public office for the same activities as Ball'.²

A function-based test

- 2.3. The consultation document rehearses the problems with the present formulation of public office: that it requires not only that the public office holder be under a

¹ Consultation document 4.26.

² Consultation document 4.27.

‘duty associated with a state function’ but also that the individual’s duty must be one that the public has a significant interest in seeing performed.³ The consultation document also points out that the core concept of duties that the public has a ‘significant interest’ in seeing performed is something to which there is no definitive answer.⁴

The Peter Ball case

- 2.4. As the Commission is aware, in October 2015 Peter Ball, the former Bishop of Gloucester and, prior to that, Bishop of Lewes, was sentenced to 32 months for misconduct in public office and 15 months for a series of indecent assaults, the sentences to run concurrently. Two charges of indecently assaulting two boys in their early teens were allowed to lie on the file. The case was the subject of a comment in the *Ecclesiastical Law Journal* which is cited at note 11 in the consultation document.
- 2.5. In *R v Peter Ball* (8 September 2015) CCC (unreported), Wilkie J held that a bishop in the Church of England was the holder of a public office for the purposes of the offence. Ball pleaded guilty to the charge of misconduct in public office,⁵ after the judge’s determination. Wilkie J’s ruling was not tested in the Court of Appeal, so there is no appellate jurisprudence addressing the definition of ‘public office’ for the purposes of the offence. There are arguments on the first instance decisions which would have merited an appeal.

The issue for the Church of England

- 2.6. Neither the status-based test nor the function-based test appears sufficiently nuanced to deal with the subtlety of a church established by law in a religiously plural society. Under the present law (as interpreted by Wilkie J) it appears that bishops (certainly) and clergy (possibly) of the Church of England occupy public offices for the purposes of the offence, while – as the consultation document itself points out – no other minister of religion does. The lawfulness of a criminal offence which discriminates on the basis of membership of a particular religious denomination may not survive scrutiny under the European Convention on Human Rights. The mere fact that the Church of England is by law established was not regarded as determinative in *Aston Cantlow* (below).
- 2.7. At the very least, this raises the question of whether or not the duty of a bishop in the Church of England (whatever that may be) is one that the public today has a significant interest in seeing performed. Arguably, the prevailing reality is that it may now be a function to which ‘the public’ is largely indifferent. An untested assumption of public opinion on a matter which is by its nature contentious is not a secure ground to define the *actus reus* of a criminal offence.
- 2.8. If the rationale for the offence in relation to clergy is that ministers of religion are in a position of authority that makes it easier for them to exercise improper influence over adherents – what Wilkie J described as ‘a deliberate and informed exploitation and distortion of the religious and spiritual needs of those who were

³ Consultation document 4.32.

⁴ Consultation document 4.33.

⁵ *R v Peter Ball* 7 October 2015 Sentencing remarks [4].

your victims'⁶ – then that must surely be the case for all faith and denominations, not merely for clergy of the Church of England. If, however, that is *not* the case, then it is difficult to see any logical basis for an offence which can only be committed by Church of England clergy, save historical anachronism.

- 2.9. The decision of the House of Lords in *Aston Cantlow PCC v Wallbank* [2004] 1 AC 546, illustrates the complexity of the presenting issue, notwithstanding that the particular point for consideration had been whether a parochial church council was a 'public authority' for the purposes of the Human Rights Act 1998. The House of Lords rejected the over-simplistic analysis of the Court of Appeal to the effect that that an organ of the Church of England (by law established) whose powers and duties were prescribed by Measure (having the same status as an Act of Parliament) must be a public authority. Lord Nicholls expressly stated: "the Church of England remains essentially a religious organisation ... even though some of the emanations of the church discharge functions which may qualify as governmental".⁷
- 2.10. Following similar reasoning to that in *Aston Cantlow*, the better analysis might be that certain clerical positions are hybrid public offices, in which certain functions exercised by the office holder are of a public nature while others are private (pastoral, spiritual, quasi-contractual). The obvious public function identified by the House of Lords as 'public' was the solemnisation of marriage, which is a priestly rather than Episcopal function. Beyond this lies contested territory.

3. Defining 'public office'

- 3.1. We note that, in its earlier evidence, the Council of HM Circuit Judges thought that the definition of public office was 'a matter of policy and therefore one primarily for Parliament to determine which offices should come within the scope of the offence and which should not' and suggested that a schedule of offices could be created to put the matter beyond doubt.⁸
- 3.2. We recognise that this would have the merit of certainty, a key component of criminal law making. It would resolve the apparent dissonance between the conclusion in *Ball* that a bishop of the Church of England is a public office holder for the purposes of the common law offence and the statutory definition in paragraph 4 of Schedule 6 to the Equality Act 2010 (as amended by section 2 of the Bishops and Priests (Consecration and Ordination of Women) Measure 2014) that '*The office of diocesan or suffragan bishop is not a public office*'. The legislative amendment post-dates Ball's offending, but it is couched in declaratory terms. Whereas the Schedule speaks of certain positions being/not being public offices for specified purposes, there is no such limitation in relation to bishops. Sweeney J gave no reason for disregarding the statutory definition which he rehearses at para 17, on the basis that his ruling is expressed to be 'a provisional conclusion' (see para 27) mindful that the issue would be revisited by Wilkie J.
- 3.3. Church of England clergy (including bishops) fulfil a variety of functions very few of which are truly public in their nature. If the proposal were to be taken forward, the

⁶ *R v Peter Ball* 7 October 2015 Sentencing remarks [7].

⁷ *Aston Cantlow PCC v Wallbank* [2004] 1 AC 546, at [13].

⁸ Consultation document 2.77.

schedule of offices should be based on an objective analysis of the capacity of the holder of a particular position to inflict damage on individuals by virtue of the influence gained from that position. It would not be appropriate to limit a particular class of public office to bishops of the Church of England.

4. Answers to specific questions

- 4.1. Consultation question 1: For the purposes of a reformed offence or offences to replace misconduct in public office, should “public office” be defined in terms of:
(1) a position involving a public function exercised pursuant to a state or public power; or
(2) a position involving a public function which the office holder is obliged to exercise in good faith, impartially or as a public trust?

We would prefer option (2) but on the understanding that an offence can only be committed when the holder of the position is carrying out a public function rather than a private function.

- 4.2. Consultation question 3: For the purposes of a reformed offence or offences to replace misconduct in public office, should the statutory definition of public office take the form of:

- (1) a general definition;
(2) a definition of public office as any position involving one or more of the functions contained in a list;
(3) a list of positions constituting a public office; or
(4) a general definition, supplemented by a non-exhaustive list of functions or positions given by way of example?

Option (3) gives clarity, rather than leaving the matter to one of fact which juries will be ill-placed to determine, but may not prove practical. Option (4) might be preferred, provided the caveat contained in our answer to 4.1 was expressly included to cover ‘hybrid offices’, the holder of which carries out certain functions which are public and others which are private.

- 4.3. Consultation question 4: If the definition of public office includes a list of functions or positions, should there be power to add to the list by order subject to the affirmative resolution procedure?

Yes.

- 4.4. Consultation question 8: Should the category of public office holders under a particular duty concerned with the prevention of harm be defined to include those public office holders with a duty of protection in respect of vulnerable individuals (whether or not it also includes any other public office holders)?

Yes.

- 4.5. Consultation question 9: Should the category of vulnerable individuals be defined:
(1) in the same way as in the Safeguarding Vulnerable Groups Act 2006; or (2) in some other, and if so, what way?

In the same way as in the Safeguarding Vulnerable Groups Act 2006.

- 4.6. Consultation question 10: 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?

We consider that it should be more narrowly and clearly defined, especially in relation to hybrid public offices.

- 4.7. Consultation question 12: Should the definition of the category of public office holders with powers of physical coercion take the form of:
- (1) a general definition;
 - (2) a definition of that type of public office as any position involving one or more of the functions contained in a list;
 - (3) a list of positions constituting that type of public office; or
 - (4) a general definition, supplemented by a non-exhaustive list of functions or positions given by way of example?

We would prefer a list of positions or, failing that, a definition as in option (2).

- 4.8. If the definition of that category (public office holders with powers of physical coercion) includes a list of functions or positions, should there be power to add to the list by order?

Yes, but a draft order should be subject to affirmative resolution.

- 4.9. Consultation question 14: Should the definition of the category of public office holders with a duty of protection take the form of:

- (1) a general definition;
- (2) a definition of that type of public office as any position involving one or more of the functions contained in a list;
- (3) a list of positions constituting that type of public office; or
- (4) a general definition, supplemented by a non-exhaustive list of functions or positions given by way of example?

We would prefer a list of positions or, failing that, a definition as in option (2).

- 4.10. If the definition of that category (of public office holders with a duty of protection) includes a list of functions or positions, should there be power to add to the list by order?

Yes, but a draft order should be subject to affirmative resolution.

- 4.11. Consultation question 20: Should the risk of serious harm to public order and safety be regarded as public harm for the purposes of the offence?

We have no view on this.

- 4.12. Consultation question 21: Should the risk of serious harm to the administration of justice be regarded as a consequence that would be likely to cause a risk of public harm occurring for the purposes of the offence?

We have no view on this.

- 4.13. Consultation question 22: Should the risk of serious harm to property should be regarded as a consequence that would be likely to cause a risk of public harm occurring for the purposes of the offence?

We have no view on this.

- 4.14. 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?

We have no view on this.

- 4.15. Consultation question 27: Should an offence of breach of duty by a public office holder (subject to a particular duty concerned with the prevention of harm, as described in the foregoing provisional proposals) be introduced?
Yes – always provided that a ‘public office holder’ is strictly defined.
- 4.16. Consultation questions 33 & 34: **We have no views on the new proposed offence in respect of abuse of position by a public office holder, for the purpose of either obtaining a personal advantage or causing detriment to another.**
- 4.17. Consultation question 36: Should reform of the sexual offences regime be considered, in respect of:
(1) obtaining sex by improper pressure; and/or
(2) sexual exploitation of a vulnerable person.
Yes.
- 4.18. Consultation question 37: Do consultees agree that whether the fact that a defendant is in public office should be treated as an aggravating factor for the purposes of sentencing any criminal offence should remain a matter of judicial discretion in each case (rather than being set out in sentencing guidelines).
Yes.

HHJ Peter Collier QC, Vicar General of the Province of York, Honorary Recorder of Leeds
Frank Cranmer, Secretary of the Churches’ Legislation Advisory Service
Professor Mark Hill QC, Chairman, Ecclesiastical Law Society
Sir John Saunders, former High Court Judge

December 2016