

Malfesance in public office

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.

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; or 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.

Sch -- "Misconduct"

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