

PROSECUTING SERIOUS MISCONDUCT IN TASMANIA: THE MISSING LINK

October 2014

Interjurisdictional review of the
offence of 'misconduct in public
office'



The objectives of the Integrity Commission are to –

- improve the standard of conduct, propriety and ethics in public authorities in Tasmania;
- enhance public confidence that misconduct by public officers will be appropriately investigated and dealt with; and
- enhance the quality of, and commitment to, ethical conduct by adopting a strong, educative, preventative and advisory role.

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Contents

Executive summary.....	2
Introduction	4
The elements of the offence.....	10
1. A public officer/official.....	12
2. In the course of their public office role	19
3. Acting willfully and intentionally	22
4. Commits misconduct	24
Additional aspects of the offence.....	29
Penalties and indictments.....	29
Former public officers.....	30
Aggravated forms of the offence.....	31
Definitions for particular words	31
Case studies and relevance of the offence to integrity entity investigations.....	33
Comparative table of statutory MIPO offences	37
Other potentially relevant offences in Tasmania’s Criminal Code.....	40
Conclusion and recommendations	43
Appendix: MIPO offences in full	45

Executive summary

Tasmania's Integrity Commission ('the Commission') was established on the recommendation of the Tasmanian Parliamentary Joint Select Committee on Ethical Conduct's report 'Public Office is Public Trust'. Under the *Integrity Commission Act 2009* (Tas) ('IC Act'), one of the three objectives of the Commission is to:

[E]nhance public confidence that misconduct by public officers will be appropriately investigated and dealt with.¹

One of the methods by which the Commission is to achieve that objective is by 'making findings and recommendations in relation to its investigations and inquiries'.²

The Commission has now been established for four years. It therefore has some experience of the type and extent of misconduct that is commonly seen in Tasmania. During its four years of operation, the Commission has encountered examples of serious misconduct which, apart from anything else, have resulted in significant financial loss for the state government.³

Although examples of misconduct on this scale appear to be relatively infrequent, it is vital that, in accordance with the objectives of the Commission, they be investigated and dealt with appropriately. The Commission considers that some of the misconduct it has seen has been worthy of criminal punishment, and believes that appropriately dealing with it should have included a referral to Tasmania Police or the Director of Public Prosecutions for potential criminal charges. However, in considering options for prosecuting serious misconduct in Tasmania, the Commission has encountered the problem of the dated and 'ambiguous' legislative regime.⁴ It has also emerged that Tasmania's criminal code⁵ is lacking the key misconduct offence: the offence of 'misconduct in public office' (MIPO). Every other jurisdiction in Australia – including the Commonwealth and both the territories – has some form of this offence.

In light of this, the Commission undertook to complete an interjurisdictional review of the offence, with the view to recommending it be introduced into the criminal law of Tasmania. The Commission believes that providing it with the option to recommend consideration of criminal charges in cases of the most serious misconduct would enable it to more effectively meet the objectives of the IC Act.

¹ *Integrity Commission Act 2009* (Tas) s 3(2)(b) ('IC Act').

² *Ibid* s 3(3)(d).

³ See, for example, Integrity Commission, *An investigation into allegations of nepotism and conflict of interest by senior health managers*, Report No. 1 (2014) 2.

⁴ Joint Select Committee on Ethical Conduct, Parliament of Tasmania, *Public Office is Public Trust* (2009) 118–9 [15.5]–[15.6] ('*Public Office is Public Trust Report*').

⁵ *Criminal Code Act 1924* (Tas) sch 1 ('*Criminal Code Tas*').

Structure of this paper

This paper is divided into four chapters. The introductory chapter provides some background to the Commission's motivations in releasing this paper, as well as an overview of the history of the offence of MIPO. The second chapter is a comparative analysis of the four main elements of the offence across all Australian jurisdictions. The third chapter offers some additional information on the offence, such as its relevance to investigations undertaken by other Australian integrity agencies. The last chapter provides an analysis of two corruption offences already in the *Criminal Code Act 1924* (Tas), and explains why they are not sufficient to capture some forms of serious misconduct.

The conclusion of this paper includes three recommendations.

The full text of all Australian MIPO offences may be found in the Appendix. Also of note is the table starting on page 37; it provides a comparative analysis of the statutory MIPO offences across Australian jurisdictions.

Introduction

In 2009, the Tasmanian Parliamentary Joint Select Committee on Ethical Conduct ('the Committee') released its final report, titled 'Public Office is Public Trust'. One of the outcomes of that report was the establishment of the Integrity Commission ('the Commission') under the *Integrity Commission Act 2009* (Tas) ('IC Act'). In Chapter 15 of that report, the Committee recounted the difficulties experienced by the state in prosecuting public office corruption offences. In that chapter, the finding of the Committee was that:

[T]here is a need for a review of the Criminal Code Act [*Criminal Code Act 1924* (Tas)]. Notwithstanding the amendments made to the Act, the original statute was enacted in 1924 and the Committee concurs with the view that much has changed since that time.

Chapter 15 was concluded with two recommendations:

Recommendation 27 - The Committee recommends that the Attorney-General initiate a review of section 69 of the Criminal Code Act 1924 to ascertain its current applicability or the need for an amendment to remove any ambiguity or perceived ambiguity.

Recommendation 28 – The Committee recommends that the Attorney-General request the Tasmania Law Reform Institute to examine and report upon the Criminal Code Act 1924 with a view to proposing recommendations for any necessary legislative change. Such review to be adequately funded by the Government.

Both the finding and Recommendation 28 appear to be calling for a full review of the *Criminal Code Act 1924* (Tas) sch 1 ('Criminal Code Tas'). However, the chapter was dealing solely with regulation of 'the most serious of potential unethical conduct' of 'public officers, whether elected Parliamentary representatives or servants of the State'.

There is no indication that any progress has been made on Recommendation 28,⁶ and it does not appear to be on the Tasmania Law Reform Institute's agenda at this point in time.

Misconduct in Tasmania

The Commission has now been established for four years, and thus has some experience of the kind of misconduct that is most commonly seen in Tasmania. In general, that kind of misconduct could often be characterised as 'mid-range' abuse of office. In the main, it does not amount to fraud and bribery, but more often involves nepotism, misuse of resources and favoritism. Some of this misconduct has been deserving only of disciplinary or administrative action. However, some of this misconduct has, in the opinion of the Commission, been serious and may have merited some form of criminal punishment.

In considering referring misconduct for prosecution, the Commission has encountered the problem identified in 'Public Office is Public Trust': the corruption provisions in the Criminal Code Tas are antiquated and difficult to understand. Moreover, the Code lacks a broad offence that captures serious abuse of public office. Indeed, the Commission has found that the criminal law of Tasmania is lacking an offence found in every other Australian jurisdiction in some form – the offence of 'misconduct in public office' (MIPO).

⁶ Recommendation 27 is beyond the scope of this paper.

One of the Commission's three objectives – enhancing public confidence that misconduct by public officers will be appropriately investigated and dealt with⁷ – has thus been hampered not only by the form of the current legislative regime, but also by the absence of a MIPO offence. The Commission therefore undertook to complete a comparative review of the MIPO offence across Australian jurisdictions, with the view to recommending the introduction of the offence into Tasmanian law. This would enable the Commission to more effectively meet one of its three objectives set by the IC Act.

In regard to the scope of this paper, it is true that Chapter 15 of 'Public Office is Public Trust' refers to a series of specific offences from the Criminal Code Tas which may be relevant to corruption.⁸ However, to undertake a full review of all those provisions and their equivalents across all Australian jurisdictions would be onerous, and beyond the limited resources of the Commission. The Commission therefore chose to focus on the offence which it believes will be of primary relevance to its work in future.

Common and codified criminal law – a brief background

The criminal law applied in Australian states and territories is derived from the 'common law' of England. Common law was developed over hundreds of years in the English courts through a system of precedents set by judges in particular cases. As common law is constantly evolving, it may develop differently across jurisdictions. For example, a common law offence in New South Wales may be different from a common law offence in Victoria, even if they originally derived from the same English offence. Australian courts do, however, have regard to precedents set in other jurisdictions – particularly other Australian jurisdictions.

Some jurisdictions in Australia have chosen to completely abolish criminal common law by the introduction of a 'criminal code' – a comprehensive statute which largely represents a codification of the common law at the time it was enacted. The only criminal common law jurisdictions now left in Australia are New South Wales, South Australia and Victoria. However, even those states also have criminal statutes, some of which have abolished particular common law offences. The other states and territories introduced criminal codes which abolished the common law in the following years:

- Queensland: 1899
- Western Australia: 1902
- Tasmania: 1922
- Northern Territory: 1983
- Australian Capital Territory: 2002.

Under incidental powers derived from the *Constitution*, the Commonwealth also introduced its own criminal code in 1995.⁹

⁷ IC Act s 3(2)(b).

⁸ *Public Office is Public Trust Report*, above n 4, 117 [15.2], 118 [15.4].

⁹ For more information, see Parliament of Australia, *History of criminal law*, <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/Crimlaw/Historycrimallaw>.

The common law offence of MIPO

The common law offence of MIPO was formed in England in the mid-18th century. As Australian states and territories adopted the common law of England, the offence was also historically present in all jurisdictions in this country. The offence has been variously referred to as, for example:

- misfeasance in office
- misconduct in public office
- official misconduct
- breach of official trust
- misbehavior in public office
- abuse of public office.

The offence captures conduct such as nepotism, favoritism, willful neglect of duty,¹⁰ and use of information gained in public office for private benefit, but the type of conduct captured by the offence will depend on the role of the office bearer.¹¹ The rationale for the offence is that it:

strikes at the public officer who deliberately acts contrary to the duties of the public office in a manner which is an abuse of the trust placed in the office holder and which, to put it differently, involves an element of corruption. It may be that the mere deliberate misuse of information is sufficient to give rise to an offence, but the further allegation of an intent to receive a benefit clearly, in my opinion, brings the matter within the ambit of the common law offence.¹²

MIPO has been referred to as a 'vague' offence:¹³

By at least the middle of the eighteenth century the common law had evolved a general, though ill-defined offence ... To this day the precise metes and bounds of this offence remain uncertain. Indeed, there has been - and still is - a tendency to regard 'official misconduct' as but a descriptive formula for a series of specific but inter-related offences such as oppression, neglect of duty, abuse of official power, fraud in office, etc. As a general offence it is, nonetheless, still recognised and applied as part of the common law of England ... Unlike with the more narrow offences of bribery and extortion, official misconduct is not concerned primarily with the abuse of official position for pecuniary gain, with corruption in the popular sense. Its object is simply to ensure that an official does not, by any wilful act or omission, act contrary to the duties of his office, does not abuse intentionally the trust reposed in him.¹⁴

¹⁰ For instance, in *R v Dytham* [1979] QB 722, a uniformed police officer was held to have committed misconduct in public office when he did not intervene in an assault in which a man was kicked to death, see *R v Quach* [2010] VSCA 106, [18].

¹¹ For examples, see Crime and Misconduct Commission, *Public duty, private interests* (December 2008) 27–8, 31 ('*Public duty, private interests report*'); The Crown Prosecution Service, *Misconduct in Public Office* <http://www.cps.gov.uk/legal/l_to_o/misconduct_in_public_office/> ('*CPS Report*').

¹² *Question of Law Reserved (No. 2 of 1996)* (1996) 67 SASR 63, [13] (Doyle CJ), quoted in *Blackstock v Regina* [2013] NSWCCA 172, [14].

¹³ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 3: Theft, Fraud, Bribery and Related Offences* (December 1995) 283 ('*MCCOC Report Chapter 3*'), citing Review of Commonwealth Criminal Law, *Fourth interim report* (November 1990) 281–7.

¹⁴ *Question of Law Reserved (No. 2 of 1996)* (1996) 67 SASR 63, [3], quoting Paul Finn, 'Official Misconduct' (1978) 2 *Criminal Law Journal* 307, 307–8.

What is Tasmania lacking in comparison to other Australian jurisdictions?

In New South Wales and Victoria, the common law offence of MIPO still applies, albeit – due to precedents set over time – it is now slightly different to the contemporary common law offence that applies in England. Although South Australia is a common law jurisdiction, it is likely that the common law MIPO offence was abolished in 1992 with the introduction of a suite of corruption offences into the *Criminal Law Consolidation Act 1935* (SA) ('Criminal Act SA').¹⁵

Apart from Tasmania, all code jurisdictions have some form of the offence in their criminal code (and Queensland effectively has two MIPO offences in its code). In regard to the codification of the offence, a 2011 article stated (emphasis in original):

The common law misfeasance offence retains a degree of flexibility that makes it less certain than statutory offences, and attempts to codify it have been resisted in England in the belief that the advantages of flexibility outweigh the gains of certainty. The common law offence covers acts or omissions of public officers in the course of or in relation to their public office, which amount to misconduct with a degree of culpability that warrants public condemnation and criminal punishment. ... Misconduct is probably an offence defined by conduct rather than outcome, so that the actuality or risk of harmful consequences serve only as bases for inferring the relevant degree of seriousness, which is a jury issue. ... Some Australian jurisdictions have replaced the common law offence with statutory offences that appear to be narrower, and are certainly more determinate. ... The ... *criminal* offence of misfeasance or misconduct in public office is unconcerned with whether the power is public or private, focusing instead on the status of the public officer and the gravity of his or her misconduct. The gist of the statutory offence is the improper use of either the power *or* the influence that comes with the position, and the common law offence can be committed by serious misconduct that disgraces the office.¹⁶

Like other code jurisdictions, with the introduction of its criminal code in 1922, Tasmania abolished all common law offences. All other code jurisdictions in Australia have introduced some form of the MIPO offence into their criminal codes (or included it in the original version of their code); however, in Tasmania, MIPO was not included as an offence in the criminal code. Tasmania is therefore the only jurisdiction in Australia without some form of MIPO offence.

The common law MIPO offence in Victoria and New South Wales

The contemporary common law offence of MIPO is broad and designed to capture acts such as nepotism and favoritism. It is to be distinguished from the offences of bribery and extortion:

Unlike bribery, these [MIPO] acts are unilateral on the part of the office holder: the office holder does not act at the instigation of another or seek to influence another. Unlike blackmail, they do not involve threats or coercion.¹⁷

¹⁵ And the introduction, into the Criminal Act SA, of Schedule 11, which abolished a slew of common law corruption offences, including: bribery or corruption in relation to judges or judicial officers; bribery or corruption in relation to public officers; buying or selling of a public office; obstructing the exercise of powers conferred by statute; oppression by a public officer; breach of trust or fraud by a public officer; neglect of duty by a public officer; refusal to serve in public office, see *R v McGee & McGee* [2008] SASC 328, [236]–[237].

¹⁶ Mark Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35 *Melbourne University Law Review* 1, 16–7, 39–40 (citations omitted).

¹⁷ MCCOC Report Chapter 3, above n 13, 283.

At common law, the offence is indictable¹⁸ and the penalty is 'at large'. That is, it will be determined on a case-by-case basis. In determining the penalty, the court will have regard to 'any corresponding statutory offence as a reference point',¹⁹ and the 'extent of punishment is determined by the severity of the misconduct'.²⁰ In Victoria, however, the maximum penalty (ten years imprisonment) for the offence has been set by statute.²¹

Although the common law MIPO offence is broader than the statutory offences, it is not a common charge in New South Wales and Victoria.²² Most cases in Victoria appear to have involved police officers. Former New South Wales Independent Commission Against Corruption (ICAC) commissioner Jerrold Cripps has written that the 'reason for the reluctance of the authorities to lay charges is not clear'.²³ In New South Wales, a parliamentary inquiry into prosecutions arising out of ICAC investigations is currently underway.²⁴ One of the inquiry's terms of reference is 'whether there is a need to create new criminal offences that capture corrupt conduct'.²⁵ Many of the submissions that answer this aspect of the terms of reference call for the common law MIPO offence in that jurisdiction to be codified.²⁶

Although it is not a frequent charge, even without a codified version of the offence, it is of undeniable usefulness when suitable cases do emerge – ICAC annual reports indicate that

¹⁸ Aronson, above n 16, 15.

¹⁹ Lenny Roth, 'Corruption offences' (e-brief 11/2013, NSW Parliamentary Research Service, September 2013) 3.

²⁰ Jerrold Cripps, 'Misconduct charges must be made' *The Australian* (online) 11 October 2013 <<http://www.theaustralian.com.au/business/legal-affairs/misconduct-charges-must-be-made/story-e6frg97x-1226737045472>>.

²¹ *Crimes Act 1958* (Vic) s 320; also, in Victoria, the offence is indictable but may be heard summarily in the Magistrates' Court, see *Criminal Procedure Act 2009* (Vic) ss 28–9.

²² According to one report, between January 2006 and December 2012, there were four sentencing cases in NSW where misconduct in public office was the principal offence, see Roth, above n 19, 4; *DPP v Marks* [2005] VSCA 277, [35].

²³ Cripps, above n 20.

²⁴ The inquiry came about as a result of the recent perceived lack of prosecutions following ICAC findings of corrupt conduct against senior NSW politicians. For more information, see Committee on the Independent Commission Against Corruption, *Prosecutions arising from Independent Commission Against Corruption investigations (Inquiry)*, Parliament of New South Wales <<http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/8C8E67E249288F02CA257CFC001BBC04>>.

²⁵ Committee on the Independent Commission Against Corruption, *Inquiry into prosecutions arising from Independent Commission Against Corruption investigations – Terms of reference*, Parliament of New South Wales <<http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/8C8E67E249288F02CA257CFC001BBC04>>.

²⁶ ICAC Commissioner Megan Latham, Submission No 8 to Parliament of New South Wales Committee on the ICAC, *Inquiry into prosecutions arising from Independent Commission Against Corruption investigations*, 1 August 2014, 6; David Ipp, Submission No 2 to Parliament of New South Wales Committee on the ICAC, *Inquiry into prosecutions arising from Independent Commission Against Corruption investigations*, 8 July 2014, 5; Director of Public Prosecutions Lloyd Babb, Submission No 4 to Parliament of New South Wales Committee on the ICAC, *Inquiry into prosecutions arising from Independent Commission Against Corruption investigations*, 29 July 2014, 3; Inspector of the ICAC David Levine, Submission No 17 to Parliament of New South Wales Committee on the ICAC, *Inquiry into prosecutions arising from Independent Commission Against Corruption investigations*, 7 August 2014, 2.

MIPO is a functional but uncommon charge.²⁷ Moreover, according to current ICAC Commissioner Megan Latham, the 'offence is increasingly prosecuted in NSW'.²⁸

Parliamentary intentions in introducing MIPO offences

The explanatory memoranda for the bills which introduced the MIPO offences in the Australian Capital Territory (ACT) and the Commonwealth shed some light on the intentions of Australian parliaments which have introduced the offence into their codes. They also highlight the difference between MIPO and bribery. From the explanatory memorandum for the Commonwealth bill which introduced the MIPO statutory offence into that jurisdiction in 2000:

The abuse of public office offence is also new for the Commonwealth. ... It concerns using influence, one's duties or information acquired in an official capacity with a view to dishonestly obtaining benefits. ... [It] would bring the Commonwealth standard in this respect up to that of offences found in State legislation and is based on section 20.5 of the Model Criminal Code.²⁹ It has its origin in the common law 'misfeasance of office' offences which includes everything from nepotism to misuse of planning information. ... [Unlike bribery] the abuse of public office does not require that the office holder act at the instigation of another or seek to influence another, and it differs from unwarranted demands ... in that it does not involve threats. Therefore the proposed maximum penalty is 5 years imprisonment, less than the penalty for unwarranted demands or bribery.³⁰

From the explanatory statement for the ACT bill which introduced the MIPO statutory offence into that jurisdiction in 2004:

The offences in this clause have their origins in the common law offence of 'misfeasance of office', which deals with public office holders who improperly use their position for their own benefit. Some examples of misfeasance are nepotism (eg improperly appointing a relative to a position) or the use of information gained in public office (eg a public servant who passes information to undisclosed business associates who put in a winning tender for a government contract). The important difference between these offences and bribery is that the abuse of public office does not require the office holder to act at the instigation of another or seek to influence another. Also these offences differ from blackmail because they do not involve threats or coercion.³¹

²⁷ See, for example, Independent Commission Against Corruption New South Wales, *Annual Report 2012–13* (October 2013) 94, 97, 99, 101 ('*ICAC Annual Report 2012–13*').

²⁸ Latham, above n 26, 6.

²⁹ See page 10 of this paper for an explanation of the Model Criminal Code.

³⁰ Explanatory Memorandum, Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999 (Cth).

³¹ Explanatory Statement, Criminal Code (Theft, Fraud, Bribery and Related Offences) Amendment Bill 2003 (ACT).

The elements of the offence

Australia's code jurisdictions have codified the MIPO offence in different ways. The offence in the Northern Territory and one of the two offences in Queensland are substantially the same; they are the oldest codified versions of the offence (they were included in the original criminal codes) and require 'abuse of authority'.

Most modern codified versions of the offence draw heavily on the 1995 recommendations of the Model Criminal Code Officers Committee (MCCOC). The MCCOC was a committee established in the 1990s to develop a model criminal code for Australia.³² The codified MIPO offence recommended by the MCCOC was similar to that which had already been introduced in Western Australia (WA) in 1988. The main difference between the two is that one aspect of the WA offence requires 'corrupt' conduct, whereas all aspects of the MCCOC offence require 'dishonesty'.

The Commonwealth and the ACT have similar versions of the offence; they include the MCCOC's recommended element of 'dishonesty', but also have additional provisions. The offence in South Australia also borrows from the MCCOC in form, but instead of dishonesty, it requires 'improper' conduct. The most recently introduced statutory offence – the second abuse of office offence to be codified in Queensland – is also similar to the MCCOC offence, and does require 'dishonesty'. This second offence was introduced on the recommendation of the former Crime and Misconduct Commission (CMC),³³ as the CMC had evidence of criminal behaviour which under the then legislation would have been difficult to prosecute.³⁴

The majority of the remainder of this paper will be dedicated to drawing out and comparing the various elements of the MIPO offence in Australian jurisdictions (most of which are statute based). The structure of this discussion is broadly based around the contemporary elements of the common law offence.³⁵ The comparison will include the codified version of the offence recommended by the MCCOC.

Particular aspects of MIPO offences in certain Australian jurisdictions are also worthy of special note. These are canvassed in the next chapter of this paper ('Additional aspects of the offence'). To view the full offences as they are written in statute in each jurisdiction, the current common law elements of the offence in Victoria and New South Wales, and the MCCOC's recommended version of the offence, see the Appendix.

Note that as Tasmania does not have a MIPO offence, generally Tasmania does not feature in this chapter. One element of the offence (the 'public officer') is, however, relevant to the

³² Law Council of Australia, *Model Criminal Code and Harmonisation of Criminal Law and Procedure* <<http://www.lawcouncil.asn.au/lawcouncil/index.php/conferences/10-divisions/122-model-criminal-code-and-harmonisation-of-criminal-law-and-procedure>>.

³³ The name of Queensland's CMC has recently been changed to 'Crime and Corruption Commission' (CCC).

³⁴ *Public duty, private interests report*, above n 11, 31; Queensland, *Parliamentary Debates*, Legislative Assembly, 4 August 2009, 1343 (Langbroek).

³⁵ Note that although there has been a recent case setting out an authoritative version of the offence in Victoria (*R v Quach* [2010] VSCA 106), the same cannot be said of New South Wales, see Latham, above n 26, 6. The elements of the NSW offence used in this paper are taken from the most recent published NSW decision that referred to the elements (*Blackstock v Regina* [2013] NSWCCA 172).

Criminal Code Tas in its current form. Thus Tasmania's definition of 'public officer' will be compared to that in other jurisdictions. Additionally, this report will also canvas in a later chapter ('Other potentially relevant offences in Tasmania's Criminal Code') the closest offences Tasmania does have to MIPO.

MIPO offences compared in this report

Jurisdiction	Common law or code jurisdiction?	Offence
Australian Capital Territory (ACT)	Code	<i>Criminal Code 2002</i> (ACT) s 359 'abuse of public office'
Commonwealth (Cth)	Code	<i>Criminal Code Act 1995</i> (Cth) s 142.2 'abuse of public office'
New South Wales (NSW)	Common law	Common law offence of misconduct in public office
Northern Territory (NT)	Code	<i>Criminal Code Act 1983</i> (NT) s 82 'abuse of office'
Queensland (Qld)	Code	<i>Criminal Code Act 1899</i> (Qld) s 92 'abuse of office' <i>Criminal Code Act 1899</i> (Qld) s 92A 'misconduct in relation to public office'
South Australia (SA)	Common law	<i>Criminal Law Consolidation Act 1935</i> (SA) s 251 'abuse of public office'
Victoria (Vic)	Common law	Common law offence of misconduct in public office
Western Australia (WA)	Code	<i>Criminal Code Act Compilation Act 1913</i> (WA) s 83 'corruption'

1. A public officer/official

One element common to all MIPO offences is the involvement of a 'public officer/official' or equivalent. In order for a public servant to be convicted of a MIPO offence, it must first be proven that they come within the scope of the offence – in most jurisdictions, this means that they must be a 'public officer'.

Common law: public officer

The definition of 'public officer' given in the case of *R v Whitaker*³⁶ is applied in relevant Australian case law:

A public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the duties he discharges, he is a public officer.³⁷

The earlier definition from *Henly v Lyme Corporation*³⁸ that 'everyone who is appointed to discharge a public duty and receives a compensation in whatever shape, whether from the Crown or otherwise' is a public officer, also stills holds sway in Australia.³⁹ According to the majority judgment in *Cannon & Rochford v Tahche & Ors*,⁴⁰ *Henly* is a case 'which is often regarded as the starting point for the ascertainment of whether a person is a public officer'.⁴¹ Note, however, that it is likely that volunteers can now also be found guilty of MIPO.⁴²

Nevertheless, the definition is by no means simple,⁴³ and '[e]mployment with the Crown is not necessarily a public office'.⁴⁴ Decisions will be made on a case-by-case basis with reference to past decisions (which may possibly be drawn from jurisdictions such as the United Kingdom) and any relevant statutory definitions.⁴⁵

³⁶ *R v Whitaker* [1914] 3 KB 1283.

³⁷ *Ibid*, quoted in *Edwards & Anor v Olsen & Ors; Murphy v Stevens & State of SA No. SCCIV-86-2556, SCCIV-87-742* [2003] SASC 238, [645]; *Cannon & Rochford v Tahche & Ors* [2002] VSCA 84, [50].

³⁸ *Henly v Lyme Corporation* [1828] EngR 701; (1828) 5 Bing 91.

³⁹ *Ibid*, quoted in *Holloway v State of Tasmania* [2005] TASSC 90, [5]; *State of Tasmania v Johnston* [2009] TASSC 60, [37].

⁴⁰ *Cannon & Rochford v Tahche & Ors* [2002] VSCA 84.

⁴¹ *Ibid* [50].

⁴² See *R v Belton* [2011] 2 WLR 1434, reported in Justice P W Young (ed), 'Recent cases' (2011) 85 ALJ 730, 731.

⁴³ *CPS Report*, above n 11.

⁴⁴ *Tampion v Anderson* [1973] VicRp 70; [1973] V.R. 715 (FC), 720, quoted in *Cannon & Rochford v Tahche & Ors* [2002] VSCA 84, [50].

⁴⁵ See, for example, *State of Tasmania v Johnston* [2009] TASSC 60.

Tasmania: public officer

In the IC Act, a broad definition is given to the term 'public officer', which:

means a person who is a public authority or a person who holds any office, employment or position in a public authority whether the appointment to the office, employment or position is by way of selection or election or by any other manner but does not include a person specified in section 5(2).⁴⁶

Section 5(1) of the IC Act includes a comprehensive definition of 'public authority', which includes, amongst other people, members of parliament, ministerial employees, and those working in state service agencies, government business enterprises, the University of Tasmania, local government, and the police service.⁴⁷ A list of persons who are not public authorities – such as judges – is given in s 5(2).

However, 'public officer' does not share the same definition across Tasmanian legislation.⁴⁸ Under the Criminal Code Tas, the definition of public officer is:

a person holding any public office, or who discharges any duty in which the public are interested, whether such person receives payment for his services or not.

'Public office' is not defined.

In the recent case *State of Tasmania v Johnston*,⁴⁹ it was made clear that the definition in the Criminal Code Tas encompasses both the commissioner of police, and the secretary of the Department of Police and Emergency Management. It would also, apparently, include the role of premier and treasurer.⁵⁰ Yet, in *State of Tasmania v Johnston*, Evans J was at pains to explain that public officer does have a somewhat limited definition in the Criminal Code Tas:

That term is defined in the Code quite differently to the definitions given to the phrase 'a person employed in the Public Service' and the term 'Commonwealth officer' in the Acts [from other jurisdictions] containing those references. ... In each of the [Tasmanian] examples referred to, except the *Police Offences Act*, the definition encompasses employees of the State. It seems that in Tasmania it is only in legislation that deals with crimes or offences involving a public officer's duty or duties that a more traditional and confined definition of that term has been adopted. ... [T]he Code retains a definition of 'public officer' that harks back to the last century and beyond ... Unlike the wide meaning that has been given to that term in the other legislation referred to [from other Tasmania statutes], it does not encompass every person employed in any capacity in the public service of the State.⁵¹

The relevant common law definition of public officer at the time the Criminal Code Tas was enacted was that discussed above, deriving from the cases of *Henly v Lyme Corporation* ('everyone who is appointed to discharge a public duty and receives a compensation in whatever shape, whether from the Crown or otherwise')⁵² and *R v Whitaker* ('an officer who

⁴⁶ IC Act s 4(1).

⁴⁷ Ibid s 5(1).

⁴⁸ *State of Tasmania v Johnston* [2009] TASSC 60, [36].

⁴⁹ Ibid.

⁵⁰ The 1940s case against the then premier (*R v Cosgrove* [1948] TASStRp 1; [1948] Tas SR 99), and the 1950s case against the then treasurer (*Regina v Turnbull* [1958] TASStRp 18; [1958] Tas SR 80) – discussed on page 41 of this paper – indicate that the definition includes those roles.

⁵¹ *State of Tasmania v Johnston* [2009] TASSC 60, [34], [36]–[37].

⁵² *Henly v Lyme Corporation* [1828] EngR 701; (1828) 5 Bing 91, quoted in *Holloway v State of Tasmania* [2005] TASSC 90, [5]; *State of Tasmania v Johnston* [2009] TASSC 60, [37].

discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public').⁵³ These cases were referred to by Evans J in *State of Tasmania v Johnston*.⁵⁴

Due to past cases, there is a degree of clarity on some of the roles that are included in the term. However, what is not clear is exactly which public servants would be excluded by the 'more traditional and confined' term of public officer that applies to Criminal Code Tas offences. In any case, it does not appear that the definition of public officer in the Criminal Code Tas is likely to correspond with the modern understanding of the phrase.

Australian Capital Territory: public official

The ACT MIPO offence applies to a 'public official'. The definition for this in s 300 of the Criminal Code ACT is expansive and clear:

public official means a person having public official functions, or acting in a public official capacity, and includes the following:

- (a) a territory public official;⁵⁵
- (b) a member of the legislature of the Commonwealth, a State or another Territory;
- (c) a member of the executive of the Commonwealth, a State or another Territory;
- (d) a member of the judiciary, the magistracy or a tribunal of the Commonwealth, a State or another Territory;
- (e) a registrar or other officer of a court or tribunal of the Commonwealth, a State or another Territory;
- (f) an individual who occupies an office under a law of the Commonwealth, a State, another Territory or a local government;
- (g) an officer or employee of the Commonwealth, a State, another Territory or a local government;
- (h) an officer or employee of an authority or instrumentality of the Commonwealth, a State another Territory or a local government;
- (i) an individual who is otherwise in the service of the Commonwealth, a State, another Territory or a local government (including service as a member of a military or police force or service);
- (j) a contractor who exercises a function or performs work for the Commonwealth, a State, another Territory or a local government.

Note that the definition extends to a 'contractor'.

⁵³ *R v Whitaker* [1914] 3 KB 1283, quoted in *Edwards & Anor v Olsen & Ors; Murphy v Stevens & State of SA No. SCCIV-86-2556, SCCIV-87-742* [2003] SASC 238, [645]; *Cannon & Rochford v Tahche & Ors* [2002] VSCA 84, [50].

⁵⁴ *State of Tasmania v Johnston* [2009] TASSC 60, [37].

⁵⁵ Under the same section, a territory public official means a person having public official functions for the territory, or acting in a public official capacity for the territory, and includes the following: (a) a member of the Legislative Assembly; (b) a minister; (c) a judge, magistrate or tribunal member; (d) the master of the Supreme Court; (e) the registrar or other officer of a court or tribunal; (f) a public servant; (g) an officer or employee of a territory authority or instrumentality; (h) a statutory office-holder or an officer or employee of a statutory office-holder; (i) a police officer; (j) a contractor who exercises a function or performs work for the territory, a territory authority or instrumentality or a statutory office-holder; (k) an authorised person, or a territory service authorised person, under the *Utilities Act 2000* (ACT).

Model Criminal Code Officers Committee: public official

The MCCOC offence applies to a 'public official', who was recommended to be defined as:

any official having public official functions or acting in a public official capacity, and includes the following:

- (a) A member of Parliament or of a local government authority.
- (b) A Minister of the Crown.
- (c) A judicial officer.
- (d) A police officer.
- (e) A person appointed by the Government or a Government agency to a statutory or other office.⁵⁶

Western Australia: public officer

The West Australian MIPO offence applies to a 'public officer', which is defined in s 1 of the Criminal Code WA (emphasis in original):

The term **public officer** means any of the following —

- (a) a police officer;
- (aa) a Minister of the Crown;
- (ab) a Parliamentary Secretary appointed under section 44A of the *Constitution Acts Amendment Act 1899*;
- (ac) a member of either House of Parliament;
- (ad) a person exercising authority under a written law;
- (b) a person authorised under a written law to execute or serve any process of a court or tribunal;
- (c) a public service officer or employee within the meaning of the *Public Sector Management Act 1994*;
- (ca) a person who holds a permit to do high-level security work as defined in the *Court Security and Custodial Services Act 1999*;
- (cb) a person who holds a permit to do high-level security work as defined in the *Prisons Act 1981*;
- (d) a member, officer or employee of any authority, board, corporation, commission, local government, council of a local government, council or committee or similar body established under a written law;
- (e) any other person holding office under, or employed by, the State of Western Australia, whether for remuneration or not;

Of note is that the definition of 'public officer' expressly includes volunteers, ministers, and members of parliament.

⁵⁶ MCCOC Report Chapter 3, above n 13, 250.

Commonwealth: Commonwealth public official

The Commonwealth MIPO offence applies to a 'Commonwealth public official' which, under the Criminal Code Cth Schedule (Dictionary), means:

- (a) the Governor-General; or
- (b) a person appointed to administer the Government of the Commonwealth under section 4 of the Constitution; or
- (c) a Minister; or
- (d) a Parliamentary Secretary; or
- (e) a member of either House of the Parliament; or
- (f) an individual who holds an appointment under section 67 of the Constitution; or
- (g) the Administrator, an Acting Administrator, or a Deputy Administrator, of the Northern Territory; or
- (h) the Administrator, an Acting Administrator, or a Deputy Administrator, of Norfolk Island; or
- (i) a Commonwealth judicial officer; or
- (j) an APS employee; or
- (k) an individual employed by the Commonwealth otherwise than under the *Public Service Act 1999*; or
- (l) a member of the Australian Defence Force; or
- (m) a member or special member of the Australian Federal Police; or
- (n) an individual (other than an official of a registered industrial organisation) who holds or performs the duties of an office established by or under a law of the Commonwealth, other than:
 - i. the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*; or
 - ii. the *Australian Capital Territory (Self-Government) Act 1988*; or
 - iii. the *Corporations Act 2001*; or
 - iv. the *Norfolk Island Act 1979*; or
 - v. the *Northern Territory (Self-Government) Act 1978*; or
- (o) an officer or employee of a Commonwealth authority; or
- (p) an individual who is a contracted service provider for a Commonwealth contract; or
- (q) an individual who is an officer or employee of a contracted service provider for a Commonwealth contract and who provides services for the purposes (whether direct or indirect) of the Commonwealth contract; or
- (r) an individual (other than an official of a registered industrial organisation) who exercises powers, or performs functions, conferred on the person by or under a law of the Commonwealth, other than:
 - i. the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*; or
 - ii. the *Australian Capital Territory (Self-Government) Act 1988*; or
 - iii. the *Corporations Act 2001*; or
 - iv. the *Norfolk Island Act 1979*; or
 - v. the *Northern Territory (Self-Government) Act 1978*; or
 - vi. a provision specified in the regulations; or
- (s) an individual who exercises powers, or performs functions, conferred on the person under a law in force in the Territory of Christmas Island or the Territory of Cocos (Keeling) Islands (whether the law is a law of the Commonwealth or a law of the Territory concerned); or
- (t) the Registrar, or a Deputy Registrar, of Aboriginal and Torres Strait Islander Corporations.

Note that the definition extends to a 'contractor'.

South Australia: public officer

The South Australian offence applies to a 'public officer'; the definition is given in Criminal Act SA s 237 as (emphasis added):

- (a) a person appointed to public office by the Governor; or
- (b) a judicial officer; or
- (c) a member of Parliament; or
- (d) a person **employed in the Public Service of the State**; or
- (e) a member of the police force; or
- (f) any other officer or employee of the Crown; or
- (g) a member of a **State instrumentality** or of the governing body of a State instrumentality or an officer or employee of a State instrumentality; or
- (h) a member of a local government body or an officer or employee of a local government body; or
- (i) a person who personally performs work for the Crown, a State instrumentality or a local government body as a contractor or as an employee of a contractor or otherwise directly or indirectly on behalf of a contractor,

Note that the definition appears to include – and extend beyond – a 'contractor'.⁵⁷

Section 237 also states that 'public office has a corresponding meaning', and provides that 'state instrumentality' means:

an agency or instrumentality of the Crown or any body (whether or not incorporated) that is established by or under an Act and—

- (a) is comprised of persons, or has a governing body comprised of persons, a majority of whom are appointed by the Governor, a Minister or an agency or instrumentality of the Crown; or
- (b) is subject to control or direction by a Minister.

Although 'Public Service' is not defined in the Criminal Act SA, it is likely to be the same as that given in Part 6 of the *Public Sector Act 2009* (SA) which, in s 24, states that the public service 'consists of administrative units which may take the form of (a) a department; or (b) an attached office'. Part 6 then goes on to expand on that definition, including a list of exceptions in s 25.

Northern Territory: person employed in the public service

Unlike the common law and other statutory provisions, the NT offence does not apply to a public officer or official, but rather someone 'employed in the public service'. Under s 1 of the Criminal Code NT (emphasis in original):

employed in the public service includes employed in an Agency under the *Public Sector Employment and Management Act*, as a police officer or to execute any process of a court of justice.

Section s 3(1) of the *Public Sector Employment and Management Act 1993* (NT) states (emphasis in original):

Agency means a unit of government administration, office or statutory corporation:

- (a) nominated in an Administrative Arrangement Order as an Agency for this Act; or

⁵⁷ Latham, above n 26, 8.

(b) declared by another Act to be an Agency for this Act.

In *Isles v McRoberts*, the magistrate stated that the definition in s 1 of the Criminal Code NT ‘requires “employment”’.⁵⁸ As a result, in that case, it was found that the commissioner of police (who is ‘appointed’ under statute and is not an employee under the *Public Sector Employment and Management Act*) did not meet the definition of ‘employed in the public service’.⁵⁹ The magistrate highlighted the distinction at law between an employee and an office holder,⁶⁰ holding that s 82 was only intended to apply to those who work under a contract of employment, and not statutory office holders.⁶¹

Queensland: person employed in the public service (s 92); public officer (s 92A)

The MIPO offence in s 92 of the Criminal Code Qld applies to a ‘person employed in the public service’, which:

includes police officers, staff members under the *Ministerial and Other Office Holder Staff Act 2010* and persons employed to execute any process of a court of justice, and also includes the chief executive officer of a rail government entity and persons employed by a rail government entity.⁶²

‘Public service’ means persons who are employed under the *Public Service Act 2008* (Qld).⁶³

Conversely, the MIPO offence found in s 92A of the Criminal Code Qld applies to a ‘public officer’, which under s 1 of the Criminal Code Qld:

means a person other than a judicial officer, whether or not the person is remunerated—

- (a) discharging a duty imposed under an Act or of a public nature; or
- (b) holding office under or employed by the Crown;

and includes, whether or not the person is remunerated—

- (c) a person employed to execute any process of a court; and
- (d) a public service employee; and
- (e) a person appointed or employed under any of the following Acts—
 - i. the *Police Service Administration Act 1990*;
 - ii. the *Transport Infrastructure Act 1994*;
 - iii. the *State Buildings Protective Security Act 1983*; and
- (f) a member, officer, or employee of an authority, board, corporation, commission, local government, council, committee or other similar body established for a public purpose under an Act.

There is no definition of ‘public service employee’, although it is possible it means the same as ‘person employed in the public service’ (see discussion above). There is also no definition of ‘holding office under or employed by the Crown’.

⁵⁸ *Isles v McRoberts* [2011] NTMC 1, [8].

⁵⁹ *Ibid* [25].

⁶⁰ *Ibid* [12]–[14].

⁶¹ *Ibid* [20].

⁶² *Criminal Code Act 1899* (Qld) sch 1 cl 1 (‘*Criminal Code Qld*’).

⁶³ *Acts Interpretation Act 1954* (Qld) s 36; *Public Service Act 2008* (Qld) s 5.

2. In the course of their public office role

All MIPO offences require that the act/series of acts must have sufficient connection to the duties of the public officer. The phrasing of this element of the offence is slightly different in the two common law jurisdictions:

- in Victoria, it is ‘in the course of or connected to his/her public office’; and
- in New South Wales, it is ‘in the course of or in relation to his/her public office’.

The interpretation of this element seems to be relatively broad. A narrower definition of the element – that the official must be ‘acting as such’ – appears to have been rejected by the Australian courts, or at least given a broader interpretation than the words might otherwise suggest.⁶⁴ In *R v Quach*⁶⁵ it was stated that:

The official's conduct will be linked to their office when in doing the impugned act, the official did something he or she was duty bound to refrain from doing, according to the responsibilities of the office. ... In my opinion the relevant misconduct need not occur while the officer is in the course of performing a duty or function of the office. Certain responsibilities of the office will attach to the officer whether or not the officer is acting in the course of that office. Where the misconduct does not occur during the performance of a function or duty of the office, the offence may be made out where the misconduct is inconsistent with those responsibilities. It may be connected to a duty already performed or to one yet to be performed or it may relate to the responsibilities of the office in some other way. The misconduct must be incompatible with the proper discharge of the responsibilities of the office so as to amount to a breach of the confidence which the public has placed in the office, thus giving it its public and criminal character. Accordingly, use of knowledge or information acquired by the office holder in the course of his or her duties for a private or other impermissible purpose may be inconsistent with the responsibilities of the office and calculated to injure the public interest. If the misuse of the information is of a serious nature and is likely to be viewed as a breach of the trust reposed in the office so as to bring the office into disrepute, the conduct will fall within the ambit of the offence whether or not it occurs in the course of public office. It will in such circumstance have the necessary connection to that office.⁶⁶

The misconduct must have ‘a relevant relationship with the defendant’s public office’,⁶⁷ but this is defined broadly:

[M]isconduct otherwise than in the performance of the defendant’s public duties may nevertheless have such a relationship with his public office as to bring that office into disrepute, in circumstances where the misconduct is both culpable and serious and not trivial.⁶⁸

The public official need not be on duty at the time of the offence,⁶⁹ and ‘the acceptance of a ‘general sweetener’ by a public officer could, in appropriate circumstances, amount to misconduct in public office’.⁷⁰

⁶⁴ *R v Quach* [2010] VSCA 106, [36].

⁶⁵ *Ibid.*

⁶⁶ *Ibid* [38], [40].

⁶⁷ *Ibid* [32], quoting *Sin Kam Wah & Ip v HKSAR* [2005] HKLRD 375, [47] (Mason NJP).

⁶⁸ *R v Quach* [2010] VSCA 106, [32], quoting *Sin Kam Wah & Ip v HKSAR* [2005] HKLRD 375, [47] (Mason NJP).

⁶⁹ *R v Quach* [2010] VSCA 106, [33], [38].

⁷⁰ *Ibid* [33], quoting *Sin Kam Wah & Ip v HKSAR* [2005] HKLRD 375, [48] (Mason NJP).

In *Bunning v The Queen*,⁷¹ it was accepted that:

the offence of misconduct in public office requires ... that as a consequence of the office [the official] was under a duty or responsibility which existed and which was breached at the time of the offending conduct ... [and] this did not necessitate that the conduct occur in the performance of [the official's] office.⁷²

Despite this broad interpretation, it is evident that there must be *some* connection to the public official's duties. In *Re Mullen*,⁷³ for example, it was held that an off duty police officer who punched another driver in a road rage incident was not guilty of MIPO.

Codified offences

In all but two of the statutory MIPO offences, this aspect of the offence is formulated in a similar manner, with most jurisdictions having a variation of the MCCOC's recommendations. The MCCOC's codification was, however, preceded by the WA offence, which also is similarly formulated. In WA, the official must have been:

- (a) acting upon any knowledge or information obtained by reason of his office or employment;
- (b) acting in any matter, in the performance or discharge of the functions of his office or employment, in relation to which he has, directly or indirectly, any pecuniary interest; or
- (c) acting corruptly in the performance or discharge of the functions of his office or employment.

Although (b) could be seen as somewhat constraining because it requires there to be a pecuniary interest, (c) is correspondingly broad.

The MCCOC's recommendation for this aspect of the offence was that the public official must have been:

- (a) exercising any function or influence that the official has because of his or her public office;
- (b) refusing or failing to exercise any function the official has because of his or her public office; or
- (c) using any information the official has gained because of his or her public office.

The provision in South Australia is similar; in SA, the official must have been:

- (a) exercising power or influence that the public officer has by virtue of his or her public office; or
- (b) refusing or failing to discharge or perform an official duty or function; or
- (c) using information that the public officer has gained by virtue of his or her public office,

The Commonwealth version of the offence is similar as well, although it does not include the option for the official to be exercising a function, and instead introduced the option that the official could be 'engaging' in conduct. In the Commonwealth, the official must have been:

⁷¹ *Bunning v The Queen* [2008] HCASL 267.

⁷² *Ibid*, cited in *R v Quach* [2010] VSCA 106, [36].

⁷³ *Re Mullen* [1995] 2 Qd R 608, cited in *R v Quach* [2010] VSCA 106, [39].

- (a) exercising any influence that the official has in the official's capacity as a Commonwealth public official;
- (b) engaging in any conduct in the exercise of the official's duties as a Commonwealth public official; or
- (c) using any information that the official has obtained in the official's capacity as a Commonwealth public official.

The ACT legislation included both the exercising a function provision and the engaging in conduct provision, but left out the MCCOC's 'refusing' to exercise a function wording. In the ACT, the official must have been:

- (a) exercising any function or influence that the official has as a public official;
- (b) failing to exercise any function the official has as a public official;
- (c) engaging in any conduct in the exercise of the official's duties as a public official; or
- (d) using any information that the official has gained as a public official.

The inclusion of a refusal or failure to exercise a function does bring a codified offence closer to the original common law offence, which clearly applies to failures to act and omissions, including neglect of duty.

The Queensland provision is slightly different again. In Queensland, under Criminal Code Qld s 92A, the official must have been:

- (a) dealing with information gained because of office;
- (b) performing or failing to perform a function of office; or
- (c) without limiting paragraphs (a) and (b), doing an act or makes an omission in abuse of the authority of office.

The two offences that are most dissimilar are the older 'abuse of office' provisions in the Northern Territory and Queensland. In those offences the connection to an official role requirement is phrased as 'abuse of the authority of the person's office'.

3. Acting willfully and intentionally

The common law MIPO offence in both New South Wales and Victoria requires that the official committed the misconduct ‘willfully’ – that is, the official knew it was wrong, but proceeded to commit the act/s (or refused to commit the act/s) anyway. The act/refusal to act must be intentional;⁷⁴ the conduct must not be ‘merely inadvertent’ or accidental.⁷⁵

[T]he misconduct must be both wilful *and* intentional ... this conjunctive formulation ‘signifies knowledge or advertence to the consequences, as well as intent to do an act or refrain from doing an act’.⁷⁶

In regard to omissions, there must be ‘deliberate failure and willful neglect’.⁷⁷

In the statutory offences, the official must have intended to do the act/s (or to have refused to do the act/s), *and* to have intended to gain a benefit or cause a detriment from the act/failure to act. This is narrower than the common law requirement, which simply calls for the officer to intend to do the act/s (or to have refused to do the act/s) while knowing that it is wrong. As pointed out by Queensland’s then CMC, instances of serious misconduct that do not involve an intent to gain a benefit or cause a detriment may, and have, occurred, and this narrow formulation of the statutory offence means that certain gross abuses of office are not captured.⁷⁸

In Western Australia, the offence requires that the official acted:

so as to gain a benefit, whether pecuniary or otherwise, for any person, or so as to cause a detriment, whether pecuniary or otherwise, to any person.

Note that the West Australian provision does not include the word ‘intention’; rather, it uses the phrase ‘so as to’. In the drafting of this provision, legislators were particularly careful to ensure that they covered non-pecuniary benefits, and benefits going to third parties, including associations and corporations.⁷⁹ Thus, the term ‘person’ is defined in s 1 of the Criminal Code WA to include associations and corporations, such as political parties. This is significant because it allows the MIPO offence to capture acts which benefit corporations

⁷⁴ *Shum Kwok Sher v HKSAR* [2002] HKCFA 27; [2002] 2 HKLRD 793; (2002) 5 HKCFAR 381; [2002] 3 HKC 117; FACC 1/2002, [3]; *Blackstock v Regina* [2013] NSWCCA 172, [13].

⁷⁵ *Public duty, private interests report*, above n 11, 29.

⁷⁶ *Blackstock v Regina* [2013] NSWCCA 172, [13], citing *Shum Kwok Sher v HKSAR* [2002] HKCFA 27; (2002) 5 HKCFAR 381, 817–8, [84]–[86].

⁷⁷ *Shum Kwok Sher v HKSAR* [2002] HKCFA 27; [2002] 2 HKLRD 793; (2002) 5 HKCFAR 381; [2002] 3 HKC 117; FACC 1/2002, [75], [82], quoting *R v Dytham* [1979] QB 722, 727G–728A.

⁷⁸ The then CMC gave the example, in that jurisdiction, of a case in which a ‘police officer [who,] purporting to be engaged in the recruitment of covert informants, under the pretence that it was a requirement for the position, cut off samples of pubic hair from several female recruits’. The case had to be prosecuted as a stealing offence. The CMC also cited the case of *R v Dytham* [1979] QB 722, in which a uniformed police officer did nothing to prevent an assault which resulted in a man being kicked to death. Due to the requirement for an intent to gain a benefit/cause a loss, such a case would not be able to be prosecuted under any of the current statutory MIPO offences that require an intent to gain a benefit or cause a detriment. See Crime and Misconduct Commission, *Response to the Queensland Government Green Paper Integrity and Accountability in Queensland* (16 September 2009) 31–2 (‘CMC Response to the Queensland Government Report’).

⁷⁹ Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 November 1988, 5631 (Grill).

and political parties, rather than just those that benefit the individual officer committing the corrupt act.

The MCCOC's subsequent formulation was that the officer must have been acting 'with the intention of obtaining a benefit for the official or another person or causing a detriment to another person'. The requirement in the ACT, the Commonwealth, and in s 92A of the Criminal Code Qld is, for all intents and purposes, the same. In South Australia, the phrasing is slightly different; there, the official must have been acting:

with the intention of—

- (a) securing a benefit for himself or herself or for another person; or
- (b) causing injury or detriment to another person.

Additionally, in South Australia, in order to meet the element of 'improper' conduct (which will be discussed in the next section of this report), the officer must have acted (emphasis added):

knowingly or recklessly ... contrary to the standards of propriety generally and reasonably expected by ordinary decent members of the community to be observed by public officers of the relevant kind, or by others in relation to public officers or public offices of the relevant kind.⁸⁰

The older provisions in the NT and Queensland are, naturally, substantially different; they do not require an intent to gain a benefit or cause a detriment, only that the act was an 'arbitrary act prejudicial to the rights of another'. However, they do both include 'aggravated' versions of the offence where, if the official was acting 'for purposes of gain', they are potentially liable for an extra year imprisonment.⁸¹

⁸⁰ *Criminal Law Consolidation Act 1935* (SA) s 238(1).

⁸¹ For further information on the aggravated forms of the offence, see page 31 of this paper.

4. Commits misconduct

The final elements of the offence in Victoria (where there are five elements to the offence) are:

- that there be no reasonable excuse or justification; and
- the misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.

The final element of the offence in New South Wales (where there are four elements) is that the official has ‘culpably misconducted himself’.

The use of the word ‘culpable’ in the final NSW element is similar to the Victorian requirement that there be no reasonable excuse or justification, as where misconduct is without reasonable excuse or justification, it is culpable.⁸²

‘[C]ulpably misconducts himself’ connotes ‘serious misconduct’ which ‘is to be determined having regard to the responsibilities of the office and the office holder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities’.⁸³

South Australia and Western Australia are the only jurisdictions that include this element in their offence. Western Australia’s offence requires that the official acted ‘without lawful authority or a reasonable excuse’. In South Australia, it is not included in the main provision, but a separate provision⁸⁴ ensures that those acting with ‘lawful authority or a reasonable excuse’ are exempt from the offence.

Severity/degree of the conduct

The degree of the conduct necessary to meet these final elements of the offence was the subject of some discussion in the recent Victorian case of *R v Quach* (emphasis added):

The misconduct must be ‘serious having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects’⁸⁵ ... the ‘serious departure from proper standards ... **must be so far below acceptable standards** as to amount to an abuse of the public’s trust in the office holder’. I do not regard this to be part of the definition of the offence although it serves to emphasise the degree of departure from the proper standard that must be established.⁸⁶

Under the common law offence, ‘the conduct complained of may *not* involve corruption or dishonesty but must be of a sufficiently serious nature’;⁸⁷ it ‘must be of such a degree that

⁸² *R v Quach* [2010] VSCA 106, [8], quoting *Sin Kam Wah & Lam Chuen Ip v Hong Kong Special Administrative Region* [2005] HKLRD 375, [391] (Mason NPJ).

⁸³ *Blackstock v Regina* [2013] NSWCCA 172, [13], citing *Shum Kwok Sher v HKSAR* [2002] HKCFA 27; (2002) 5 HKCFAR 381, 817–8, [84]–[86].

⁸⁴ *Criminal Act SA* s 238(3)(b).

⁸⁵ *R v Quach* [2010] VSCA 106, [43].

⁸⁶ *Ibid* [44].

⁸⁷ *Ibid* [16]; *Shum Kwok Sher v HKSAR* [2002] HKCFA 27; [2002] 2 HKLRD 793; (2002) 5 HKCFAR 381; [2002] 3 HKC 117; FACC 1/2002, [76]; *Public duty, private interests report*, above n 11, 28.

the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment'.⁸⁸

The MCCOC noted that for many lesser offences that could be characterised as MIPO, administrative and disciplinary avenues would be more appropriate than the imposition of criminal liability.⁸⁹ This fear – that lesser offences may be captured – was also referred to briefly in *R v Quach*:

As in the case of criminal negligence, and offences such as culpable driving and dangerous driving, it is recognised that it is necessary to distinguish the conduct sufficient to attract criminal sanction from less serious forms of conduct which may give rise to civil proceedings.⁹⁰

This is perhaps why statutory forms of the offence have generally attempted to avoid capturing these lesser acts by imposing a requirement that the conduct was 'dishonest', 'improper', or 'corrupt'. As can be seen from the quote above, however, the requirement for the conduct to be corrupt or dishonest is certainly not a necessary element of the common law offence.⁹¹

Corruptly

Western Australia has the broadest provision in this respect, as only one of three possible offences under its 'corruption' provision require this element in addition to the intention to be gaining a benefit or causing a detriment. That offence, under s 83(c) of the Criminal Code WA, applies to officers who act 'corruptly' in the performance or discharge of the functions of their office or employment.

'Corruptly' is not defined in the Criminal Code WA, although it has been discussed in case law, including recently in *The State of Western Australia v Burke*,⁹² where Buss JA said:

A person will act 'corruptly' if the action is motivated by an improper purpose.⁹³

The second reading speech for the 2002 amendments to the Criminal Code WA stated:

Essentially, corruption involves a public officer using his or her position in bad faith rather than in the service of the best interests of the community.⁹⁴

A West Australian Corruption and Crime Commission (CCC) report released in 2010 discussed the definition of 'corruption' (emphasis added):

The leading authority in Western Australia on the meaning of corruption is *Willers v R* (1995) 81 A Crim R 219. In that case Malcolm CJ said that section 83 of *The Criminal Code* (WA), 'is **concerned with the use of power or authority for improper purposes**'. ... Ultimately Malcolm CJ concluded that an exercise of lawful authority for an improper purpose can amount

⁸⁸ *Shum Kwok Sher v HKSAR* [2002] HKCFA 27; [2002] 2 HKLRD 793; (2002) 5 HKCFAR 381; [2002] 3 HKC 117; FACC 1/2002, [75], quoting *R v Dytham* [1979] QB 722, 727G-728A; but see also *R v Quach* [2010] VSCA 106, [42], in which the court confirms that an actual 'calculation' to injure the public interest does not need to be made out.

⁸⁹ MCCOC Report Chapter 3, above n 13, 283.

⁹⁰ *R v Quach* [2010] VSCA 106, [47] (citations omitted).

⁹¹ For Tasmania, it is relevant to note that 'misconduct' is referred to in the *Public Interest Disclosures Act 2002* (Tas), and that both 'misconduct' and 'serious misconduct' are defined in *IC Act* s 4.

⁹² *The State of Western Australia v Burke* [2011] WASCA 190, [277]–[280], [283], [285].

⁹³ *Ibid* [280].

⁹⁴ Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 May 2002, 10047a (McGinty).

to corruption under section 83 of *The Criminal Code* (WA). Malcolm CJ's ratio decidendi should not be taken as an exhaustive definition of the meaning of corruption.

...

In the criminal law, the notion that a person may act corruptly does not of itself necessarily involve the gaining of a benefit or the causing of a detriment. As *Willers* demonstrates, section 83 of *The Criminal Code* (WA) makes it an offence for a public officer, without lawful authority or a reasonable excuse, to act "corruptly" in the performance or discharge of the functions of his office or employment, so as to gain a benefit for, or cause a detriment to, any person. The meaning of "corruptly" therefore cannot necessarily involve an intent (or purpose) to obtain a benefit or cause a detriment.⁹⁵

Despite, *prima facie*, being narrower than the other two offences in s 83, s 83(c) actually appears to be the most common offence used in prosecutions arising from investigations undertaken by the CCC.⁹⁶

Improperly

All three of the offences under s 251(1) of the Criminal Act SA require the official to have acted 'improperly', which is defined broadly⁹⁷ in s 238 of the Criminal Act SA (emphasis in original):

- (1) For the purposes of this Part, a public officer acts improperly, or a person acts improperly in relation to a public officer or public office, if the officer or person knowingly or recklessly acts contrary to the standards of propriety generally and reasonably expected by ordinary decent members of the community to be observed by public officers of the relevant kind, or by others in relation to public officers or public offices of the relevant kind.
- (2) A person will not be taken to have acted improperly for the purposes of this Part unless the person's act was such that in the circumstances of the case the imposition of a criminal sanction is warranted.
- (3) Without limiting the effect of subsection (2), a person will not be taken to have acted improperly for the purposes of this Part if—
 - (a) the person acted in the honest and reasonable belief that he or she was lawfully entitled to act in the relevant manner; or
 - (b) there was lawful authority or a reasonable excuse for the act; or
 - (c) the act was of a trivial character and caused no significant detriment to the public interest.
- (4) In this section—

act includes omission or refusal or failure to act;

public officer includes a former public officer.

That the officer must have been acting 'contrary to the standards of propriety generally and reasonably expected by ordinary decent members of the community' is similar to the requirement in other jurisdictions that the official must have been acting dishonestly 'according to the standards of ordinary people' (see discussion below).

⁹⁵ Corruption and Crime Commission, *Special Report by the Corruption and Crime Commission on its Reporting Function with Respect to Misconduct under Part 5 of the Corruption and Crime Commission Act 2003* (WA) (21 October 2010) 12, [60], 13–4, [65].

⁹⁶ Corruption and Crime Commission, *Annual Report 2011–2012* (September 2012) 27–9, [99], 29–30 [100] ('CCC Annual Report 2011–12'). Unfortunately the CCC's most recent report (2013–14) does not contain this information.

⁹⁷ Aronson, above n 16, 17 n 100.

Dishonestly

The ACT, the Commonwealth and Queensland's s 92A all require that the official acted 'dishonestly'. This is derived from the MCCOC's recommended version of the offence, and represents its biggest departure from the original West Australian provision. The MCCOC stated:

As for the other corruption offences, the key fault element is dishonesty ... The term 'dishonestly' has to carry the full burden of the distinction between legitimate and illegitimate benefits ...⁹⁸

The MCCOC's recommended definition of 'dishonestly' was:

[D]ishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people.⁹⁹

This definition is replicated in the statutory definitions of dishonesty in both the ACT and the Commonwealth. In the ACT, one further aspect to the dishonesty requirement is contained in s 354 of the Criminal Code ACT, which states that:

The provision of a benefit can be dishonest even if the provision of the benefit is customary in a trade, business, profession or calling.

Both the ACT and the Commonwealth codes state that the determination of dishonesty is a 'matter for the trier of fact'.

The Criminal Code Qld, however, does not define dishonesty. In Queensland, the requirement for dishonesty did not form part of the then CMC's original recommendation to introduce the provision. The explanatory memorandum of the bill which introduced s 92A included this explanation for requiring a dishonest intent:

The Bill deviates from the common law approach by including, as an element of the offence, an intention to dishonestly gain a benefit for or cause a detriment to, any person and in doing so provides clarity to officials as to the conduct to be expected of them. Such an approach is based on section 142.2 of the Criminal Code (Cwlth). ... A key element of the offence is the 'dishonest intent'. The flexibility of the dishonesty concept is that it allows an assessment of a public officer's conduct against the standards of ordinary honest members of the community.¹⁰⁰

It is therefore apparent that the Queensland Parliament did intend for the meaning of dishonesty in s 92A to align with that first recommended by the MCCOC. Shortly after the introduction of the provision, the CMC called for changes to remove this element:

While financial gain, dishonesty and corruption are often aspects of the [common law] offence, they do not constitute elements of it. ... The [CMC] is concerned that this offence does not adequately cover the range of conduct involving serious abuse of public office other existing criminal offences do not capture. This is because the new s 92A offence includes an element of

⁹⁸ MCCOC Report Chapter 3, above n 13, 283. In regard to 'legitimate benefits', the MCCOC stated, 'All public servants exercise their power to benefit themselves in the sense that they are paid a salary. Similarly, they often leave the public service and set up in business as consultants and use the information they have accumulated as public servants in the new business for their own benefit.'

⁹⁹ Ibid 309. As noted in this section of the paper, this definition of 'dishonesty' has been incorporated into the criminal codes of a number of Australian jurisdictions; additionally, it has been incorporated into the *Crimes Act 1900* (NSW) s 4B.

¹⁰⁰ Explanatory Notes, Criminal Code and Other Legislation (Misconduct, Breaches of Discipline and Public Sector Ethics) Amendment Bill 2009 (Qld) 3, 8.

intent to dishonestly benefit or dishonestly cause a detriment. There can occur cases of serious abuse of public office which do not involve an intent to gain a benefit or cause a detriment.¹⁰¹

In abuse of authority

The older offences in the Northern Territory and Queensland require the officer to have been acting in 'abuse of the authority' of their office. The requirement appears to be broad – perhaps as broad as the common law requirement – but there also seems to have been few prosecutions under these sections.

¹⁰¹ *CMC Response to the Queensland Government Report*, see above n 78 and accompanying text (citations omitted).

Additional aspects of the offence

Penalties and indictments

The maximum term of imprisonment for each MIPO offence is listed in the table below.

	Offence	Maximum term of imprisonment	Indictable? ¹⁰²
ACT	Criminal Code ACT s 359 'abuse of public office'	5 years	Yes ¹⁰³
Cth	Criminal Code Cth s 142.2 'abuse of public office'	5 years	Yes ¹⁰⁴
NSW	Common law offence of misconduct in public office	None – 'at large'	Yes
NT	Criminal Code NT s 82 'abuse of office'	2 years – 3 years for aggravated offence	Yes ¹⁰⁵
Qld	Criminal Code Qld s 92 'abuse of office'	2 years – 3 years for aggravated offence	Yes ¹⁰⁶
	Criminal Code Qld s 92A 'misconduct in relation to public office'	7 years – 14 years for aggravated offence	Yes ¹⁰⁷
SA	Criminal Act SA s 251 'abuse of public office'	7 years – 10 years for aggravated offence	Yes ¹⁰⁸
Vic	Common law offence of misconduct in public office	10 years	Yes ¹⁰⁹
WA	Criminal Code WA s 83 'corruption'	7 years	Yes ¹¹⁰

¹⁰² If an offence is indictable, it generally means that (in certain circumstances) it may be heard before a jury, as opposed to a judge or a magistrate.

¹⁰³ *Legislation Act 2001* (ACT) s 190(1)(a).

¹⁰⁴ *Crimes Act 1914* (Cth) s 4G.

¹⁰⁵ *Criminal Code Act 1983* (NT) sch 1 cl 3.

¹⁰⁶ *Criminal Code Qld* s 3(2)–(3).

¹⁰⁷ *Ibid.*

¹⁰⁸ *Summary Procedure Act 1921* (SA) s 5.

¹⁰⁹ *Crimes Act 1958* (Vic) s 320; *Criminal Procedure Act 2009* (Vic) ss 28–9.

¹¹⁰ *Interpretation Act 1984* (WA) s 67(1a).

In contrast to the criminal code offences in the table above, all offences (with some limited exceptions) committed under the Criminal Code Tas are punishable by a maximum penalty of 21 years imprisonment.¹¹¹ This blanket maximum term of imprisonment for criminal code offences is unique amongst Australian jurisdictions. In all other jurisdictions, the maximum penalty is set in accordance with the actual offence – as can be seen by the statutory offences in the Appendix of this paper, which all specify the maximum penalty. The then Tasmania Police commissioner's submission to the Parliamentary Joint Select Committee on Ethical Conduct appears to be alluding to this difference:

What is also currently lacking in Tasmania is a suite of clear and unambiguous simple offences which cover misconduct by public officers in performing the functions of their office or employment which is criminal, but less serious in nature and could be dealt with by the Magistrates Court.¹¹²

The then commissioner was also commenting on the fact that Criminal Code Tas offences are all indictable. However, as can be seen from the table, this does accord with the MIPO offences in other Australian jurisdictions, which are all indictable.

Former public officers

The MIPO offences in the ACT, the Commonwealth, South Australia and Queensland (s 92A only) include a section which applies specifically to former public officials. This is because '[c]oncerns have been raised for many years about public servants and police officers being able to escape liability for official misconduct or disciplinary charges by resigning their employment'.¹¹³ The ability to capture some acts committed by former public officers was seen as an improvement on the offence recommend by the MCCOC.¹¹⁴

The offences that apply to former public officers are, however, narrower than those that apply to current public officials, in that they apply only to misuse of information. As with the offences that apply to current public officials, one of the required elements in the ACT, Commonwealth and Queensland (s 92A) is 'dishonesty'; in South Australia it is 'improperly'.

¹¹¹ *Criminal Code Tas* s 389(3) states: 'Subject to the provisions of the *Sentencing Act 1997* or of any other statute, and except where otherwise expressly provided, the punishment for any crime shall be by imprisonment for 21 years, or by fine, or by both such punishments, and shall be such as the judge of the court of trial shall think fit in the circumstances of each particular case.'

¹¹² *Public Office is Public Trust Report*, above n 4, 119, [15.5].

¹¹³ Crime and Misconduct Commission, *Annual Report 2009–10* (September 2010) 30.

¹¹⁴ Explanatory Memoranda, Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999 (Cth).

Aggravated forms of the offence

Some jurisdictions have ‘aggravated’ forms of the MIPO offence. People who commit the aggravated form of the offence are liable to a greater maximum term of imprisonment.

In Queensland (s 92 only) and the Northern Territory, if the act is done ‘for purposes of gain’, the official is liable to a maximum term of imprisonment of three years (as opposed to two for the basic offence).

Under the Criminal Code Qld’s s 92A the maximum term of imprisonment doubles from seven to 14 years if the ‘person who dishonestly gained a benefit, directly or indirectly, was a participant in a criminal organisation’. This provision was inserted in 2012 as part of the Queensland Government’s ‘anti-bikie gang’ legislation. Under Criminal Code Qld s 92A(4B) ‘it is a defence to the circumstance of aggravation to prove that the criminal organisation is not an organisation that has, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity’.

Similarly, in 2012, anti-bikie legislation in South Australia introduced an aggravated form of the offence (where the person who benefitted belongs to a criminal organisation), which attracts a maximum prison term of 10 years, as opposed to seven for the basic offence.

Definitions for particular words

In some jurisdictions, the codes contain definitions and explanations for particular words used in the MIPO offences.

Obtain a benefit, advantage: ACT, Commonwealth, Queensland, Western Australia

Section 355(1) of the Criminal Code ACT states (emphasis in original):

For this part, a person (**A**) is taken to **obtain** a benefit for someone else (**B**) if A induces a third person to do something that results in B obtaining the benefit.

The provision in the Commonwealth is similar – Criminal Code Cth s 140.2(1) specifies:

For the purposes of this Part, a person is taken to have obtained a benefit for another person if the first-mentioned person induces a third person to do something that results in the other person obtaining the benefit.

The Criminal Code ACT dictionary states that ‘benefit includes any advantage and is not limited to property’; the Criminal Code Cth contains the same definition (in s 140.1).

Under s 1 of the Criminal Code Qld, benefit ‘includes property, advantage, service, entertainment, the use of or access to property or facilities, and anything of benefit to a person whether or not it has any inherent or tangible value, purpose or attribute’.¹¹⁵

¹¹⁵ The case of *R v Saba* considered the meaning of the word ‘benefit’ within the Criminal Code Qld in some detail, see *R v Saba* [2013] QCA 275. In that case (at [29]–[30]), Jackson J discussed the West Australian case of *Moylan v The State of Western Australia* [2007] WASCA 52, in which it was found that the gaining of the opportunity to apply for a job was the gaining of a ‘benefit’.

As noted above, in Western Australia legislators were particularly careful to ensure that the offence covered non-pecuniary benefits, and benefits going to third parties, including associations and corporations.¹¹⁶

Duty, function, authority, power: ACT, Commonwealth, Queensland

Section 300 of the Criminal Code ACT states (emphasis in original):

duty, of a person who is a public official, means a function that—

- (a) is given to the person as a public official; or
- (b) the person holds himself or herself out as having as a public official.

Under Criminal Code Cth s 130.1 (emphasis in original):

duty:

- (a) in relation to a person who is a Commonwealth public official—means any authority, duty, function or power that:
 - i. is conferred on the person as a Commonwealth public official; or
 - ii. the person holds himself or herself out as having as a Commonwealth public official; and
- (b) in relation to a person who is a public official—means any authority, duty, function or power that:
 - i. is conferred on the person as a public official; or
 - ii. the person holds himself or herself out as having as a public official.

In Queensland, the explanatory memorandum for the bill which introduced the Criminal Code Qld s 92A MIPO offence in 2009 included this statement:

Further, the offence refers to the public officer's 'functions' of office and as such goes beyond the concept of 'duty'.¹¹⁷

Gain: Northern Territory

Under s 1 of the Criminal Code NT, 'gain' means gain of property and includes temporary gain and a gain by keeping what one has.

¹¹⁶ *Criminal Code Act Compilation Act 1913 (WA)* s 1 ('*Criminal Code WA*'); Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 November 1988, 5631 (Grill).

¹¹⁷ Explanatory Notes, Criminal Code and Other Legislation (Misconduct, Breaches of Discipline and Public Sector Ethics) Amendment Bill 2009 (Qld) 8.

Case studies and relevance of the offence to integrity entity investigations

Most jurisdictions in Australia now have some form of integrity entity similar to Tasmania's Integrity Commission.¹¹⁸

In New South Wales and Western Australia, the MIPO offences are used to prosecute misconduct uncovered by the integrity entities. In its 2012–13 annual report, NSW's ICAC reported that there had been sufficient evidence to proceed with charging four people with a total of seven common law MIPO offences that year.¹¹⁹ In order to further increase the offence's usefulness in the prosecution of misconduct uncovered by the ICAC, the ICAC's Commissioner has recently called for MIPO to be codified in NSW.¹²⁰

In the year 2011–12, WA's CCC reported that of the 546 charges laid against four individual public officers, 24 charges had been laid under its MIPO offence in Criminal Code WA s 83(b), and 135 under the MIPO offence in s 83(c).¹²¹ The 420 convictions recorded against three individual public officers in that year included 20 counts under s 83(b) (14 months imprisonment; eligible for parole in seven months) and one count under ss 7,¹²² 83(c) (18 months imprisonment fully suspended for two years; fined \$7,500).¹²³

The importance with which prosecution of serious misconduct and corruption is viewed in other jurisdictions is demonstrated by the amendments made to the West Australian MIPO offence in 2002. The amendments increased the maximum penalty from three to seven years,¹²⁴ so that 'a person will now be found guilty of a crime rather than a misdemeanour'.¹²⁵ This change enabled the then newly established CCC to obtain a telecommunications interception warrant to assist in the investigation of MIPO (and other corruption) offences.¹²⁶

The entity in South Australia – the Independent Commission Against Corruption (ICAC) – is still new, and it is yet to be seen whether South Australia's MIPO offence will be useful in prosecuting misconduct uncovered by the ICAC.

In Queensland, it is not clear how frequently the old (Criminal Code Qld s 92) and new (s 92A) MIPO offences have been used. However, the fact that it was the then CMC that called for the creation of the new offence suggests that the older offence is not often utilised.

¹¹⁸ The exceptions are the Northern Territory, the ACT and the Commonwealth.

¹¹⁹ *ICAC Annual Report 2012–13*, above n 27, 94, 97, 99, 101.

¹²⁰ Latham, above n 26, 6.

¹²¹ *CCC Annual Report 2011–12*, above n 96, 27–9, [99]. Unfortunately the CCC's most recent report (2013–14) does not contain this information.

¹²² *Criminal Code WA* s 7 is the provision relating to those who aid or enable the commission of a criminal offence.

¹²³ *CCC Annual Report 2011–12*, above n 96, 29–30 [100].

¹²⁴ It also did this for a number of other corruption offences in the Criminal Code WA.

¹²⁵ Western Australia, *Parliamentary Debates*, Legislative Council, 19 June 2002, 11595b (Peter Foss).

¹²⁶ Previously this had not been possible as the offence was punishable by a maximum sentence of less than seven years, see Western Australia, *Parliamentary Debates*, Legislative Council, 15 May 2002, p10397b–10399a (Kim Chance).

The CMC's calls¹²⁷ to alter the new offence suggest it also has not been as useful as anticipated.

MIPO is excluded from the jurisdiction of Victoria's new anti-corruption body, the Independent Broad-based Anti-corruption Commission (IBAC). However, in the report released on its first anniversary of establishment, the IBAC argued that the offence should be included in its jurisdiction:

The IBAC Act does not include the common law offence of [MIPO] as something IBAC can investigate in its corrupt conduct jurisdiction. This contrasts with other integrity regimes in Australia, and has been criticised publicly. According to Hansard, MIPO was not included as an offence that IBAC itself could investigate principally because it can be based on less than serious offences. Furthermore, as IBAC is intended to investigate only serious corrupt conduct, other bodies such as Victoria Police and the VO [Victorian Ombudsman] can and should investigate credible allegations of MIPO. However, the offence of MIPO can be serious indeed. And whilst the legislation is clear that IBAC should investigate only the most serious allegations or concerns of corrupt conduct, MIPO clearly can fall into this category and less serious instances of possible MIPO could still be referred by IBAC to other prescribed bodies for investigation. Once this is appreciated, it must follow that a body like IBAC, whose primary functions include the exposure of serious corrupt conduct within the public sector, should be able to investigate allegations of serious MIPO.¹²⁸

In response to this report, the Victorian Government has recently introduced legislation to, amongst other things, bring the common law MIPO offence within the IBAC's jurisdiction.¹²⁹ The bill¹³⁰ is currently under debate in the Victorian Parliament.

In some jurisdictions¹³¹ there are useful published case studies that illustrate the operation of the MIPO offence – note that not all of these cases arise from integrity entity investigations.

A 'corruption' offence in Western Australia¹³²

An investigation by the CCC resulted in the jailing in January 2014 of a former Department of Health facilities manager for corruptly using his position to obtain almost \$500,000 over six years. Wathumullage 'Tikka' Wickramasinghe awarded work on hospital projects to his associate's firm, which then subcontracted work back to Wickramasinghe, with invoices issued under private business names to conceal that the payments were in fact being made to the Health Department employee. Wickramasinghe did not have permission from the Department of Health to engage in secondary employment and he acted corruptly, to conceal the kickbacks, from his superiors. Wickramasinghe was charged in 2011 and pleaded guilty to 10 counts of corruption (under Criminal Code WA s 83) in November 2013; he was jailed for four years.

¹²⁷ See discussion on page 27 of this paper.

¹²⁸ Independent Broad-based Anti-corruption Commission, *Special report following IBAC's first year of being fully operational* (April 2014) 26 (citations omitted).

¹²⁹ Premier of Victoria, 'Reforms to further strengthen Victoria's integrity regime' (Media Release, 16 September 2014) <<http://www.premier.vic.gov.au/media-centre/media-releases/10973-reforms-to-further-strengthen-victoria-s-integrity-regime.html>>.

¹³⁰ Integrity Legislation Amendment Bill 2014 (Vic).

¹³¹ Unfortunately illustrative published cases were unable to be located for all jurisdictions.

¹³² *Kalani v The State of Western Australia* [2013] WASCA 132; Corruption and Crime Commission, 'Former Health Department manager jailed for four years' (Media Statement, 17 January 2014) <<http://www.ccc.wa.gov.au/Publications/MediaReleases/Media%20Releases%202014/Former%20Health%20Department%20manager%20jailed.pdf>>.

Wickramasinghe's associate, Adeshir Kalani, pleaded guilty to nine counts of corruption. Kalani – who was not a public officer¹³³ – was sentenced to two years' jail.

An 'abuse of public office' offence in South Australia

The 2004 case of *R v Dunn*¹³⁴ involved an unsuccessful appeal against a sentence of imprisonment for six years with a non-parole period of three years (due to mitigating circumstances) for 18 offences of abuse of public office contrary to s 251 of the Criminal Act SA and 61 offences of improperly accepting a benefit contrary to s 249(2) of the same act. The appellant, Dunn, had held a senior position in the South Australian Housing Trust.¹³⁵ He had worked there for a significant period of time and had risen to a management position, in which he had responsibility for authorising building work.¹³⁶ In 1994, he arranged for former employee 'P' to be allocated work from the Housing Trust.¹³⁷

He approved invoices submitted by P ... These cheques were paid into the appellant's bank account, and on most occasions the appellant took one half of the proceeds, paying the balance to P ... [Other] cheques payable to P were paid into P's account. P then paid about half the amount of each cheque to Mr Dunn ... Overall, the payments to Mr Dunn amounted to at least \$274,000.00 approximately.¹³⁸

A common law MIPO offence in New South Wales

In August 2008, the ICAC found a long-time former employee of the NSW public authority concerned with rail infrastructure, RailCorp, 'engaged in corrupt conduct by funneling more than \$4 million in track repair work to a private company with which he was involved'.¹³⁹

Michael Blackstock was a project manager by the time his conduct came under ICAC scrutiny. He had channeled RailCorp projects to a company he had specifically set-up for that purpose. After the ICAC investigation, the public prosecutor charged Blackstock, and he pleaded guilty to MIPO, as well as some statutory criminal offences.¹⁴⁰ On 24 February 2012, he was sentenced overall to 4.5 years full time custody with a non-parole period of 3.5 years;¹⁴¹ the MIPO offence attracted a 'term of imprisonment with a non-parole period of three years ... and an additional term of one year'.¹⁴² On 23 July 2013, the Court of Criminal Appeal dismissed Blackstock's appeal against the sentence for the MIPO offence.¹⁴³

¹³³ As such, *Criminal Code WA* s 7 (the aiding and abetting provision) was used to bring Kalani within the ambit of *Criminal Code WA* s 83, see *Kalani v The State of Western Australia* [2013] WASCA 132, [3].

¹³⁴ *R v Dunn* [2004] SASC 316.

¹³⁵ *Ibid* [8].

¹³⁶ *Ibid* [8]–[9].

¹³⁷ *Ibid* [10].

¹³⁸ *Ibid* [11]–[13].

¹³⁹ Independent Commission Against Corruption New South Wales, *ICAC finds corrupt conduct against former RailCorp employee after \$4 million contract scam* (13 August 2008) <<http://www.icac.nsw.gov.au/investigations/past-investigations/article/3052>>.

¹⁴⁰ Independent Commission Against Corruption New South Wales, *Recommendations for prosecutions and updates (all reports)* <<http://www.icac.nsw.gov.au/investigations/past-investigations/article/2467>> ('ICAC prosecutions report').

¹⁴¹ *Ibid*.

¹⁴² *Blackstock v Regina* [2013] NSWCCA 172, [3].

¹⁴³ *ICAC prosecutions report*, above n 140.

A common law MIPO offence in Victoria

The case of *Soyleman v The Queen*¹⁴⁴ concerned a prison officer, Soyleman, who pleaded guilty to one charge of MIPO and two charges of possession of a drug of dependence after smuggling heroin into a prison for the use of a prisoner. He was sentenced to two years and three months' imprisonment on the misconduct charge.

¹⁴⁴ *Soyleman v The Queen* [2014] VSCA 23.

Comparative table of statutory MIPO offences

The table below provides a comparison of the different aspects of statutory MIPO offence across Australian jurisdictions.

	ACT	Cth	NT	Qld – s 92	Qld – s 92A	SA	WA
Year introduced	2004	2000	1983	1899	2009	1992	1988
Applies to	Public official	Commonwealth public official	Person employed in the public service	Person employed in the public service	Public officer	Public officer	Public officer
Formulation of requirement for conduct to be committed in the course of public office role	(a) exercises any function or influence that the official has as a public official; or (b) fails to exercise any function the official has as a public official; or (c) engages in any conduct in the exercise of the official's duties as a public	(a) exercises any influence that the official has in the official's capacity as a Commonwealth public official; or (b) engages in any conduct in the exercise of the official's duties as a Commonwealth public official; or	in abuse of the authority of his office	in abuse of the authority of the person's office	(a) deals with information gained because of office; or (b) performs or fails to perform a function of office; or (c) without limiting paragraphs (a) and (b), does an act or makes an omission in abuse of the authority of office	(a) exercises power or influence that the public officer has by virtue of his or her public office; or (b) refuses or fails to discharge or perform an official duty or function; or (c) uses information that the	(a) acts upon any knowledge or information obtained by reason of his office or employment; or (b) acts in any matter, in the performance or discharge of the functions of his office or employment, in relation to which he

	ACT	Cth	NT	Qld – s 92	Qld – s 92A	SA	WA
	official; or (d) uses any information that the official has gained as a public official	(c) uses any information that the official has obtained in the official's capacity as a Commonwealth public official				public officer has gained by virtue of his or her public office	has, directly or indirectly, any pecuniary interest; or (c) acts corruptly in the performance or discharge of the functions of his office or employment
Must they be acting with the intention to gain a benefit/cause a detriment?	Yes. Official must have an intention to: (a) dishonestly obtain a benefit for the official or someone else; or (b) dishonestly cause a detriment to someone else.	Yes. Official must have an intention to: (a) dishonestly obtain a benefit for himself or herself or for another person; or (b) dishonestly cause a detriment to another	No – it must be an 'arbitrary act prejudicial to the rights of another'. Aggravated form of the offence is where the official acted 'for purposes of gain'.	No – it must be an 'arbitrary act prejudicial to the rights of another'. Aggravated form of the offence is where the official acted 'for purposes of gain'.	Yes. Official must have an intention to: (a) dishonestly gain a benefit for the officer or another person; or (b) to dishonestly cause a detriment to another	Yes. Official must have an intention of: (a) securing a benefit for himself or herself or for another person; or (b) causing injury or detriment to another person.	Yes. Official must have been acting so as to: (a) gain a benefit, whether pecuniary or otherwise, for any person; or (b) cause a detriment, whether pecuniary or otherwise, to

	ACT	Cth	NT	Qld – s 92	Qld – s 92A	SA	WA
		person.			person.		any person.
Severity/degree of the conduct	Dishonest	Dishonest	Arbitrary and prejudicial to the rights of another	Arbitrary and prejudicial to the rights of another	Dishonest	Improper	Without lawful authority or a reasonable excuse. For one of the three offences, the conduct must have been 'corrupt'.
Does the offence apply to former public officers?	Yes – for misuse of information	Yes – for misuse of information	No	No	Yes – for misuse of information	Yes – for misuse of information	No
Is there an aggravated form of the offence?	No	No	Yes	Yes	Yes	Yes	No
Maximum term of imprisonment for basic offence	5 years	5 years	2 years	2 years	7 years	7 years	7 years
Maximum term of imprisonment for aggravated offence	n/a	n/a	3 years	3 years	14 years	10 years	n/a

Other potentially relevant offences in Tasmania's Criminal Code

As noted previously, Tasmania is now the only jurisdiction in Australia to not have an offence of MIPO in some form.¹⁴⁵ Moreover, the corruption offences that are contained in the Criminal Code Tas are somewhat dated. The Tasmanian Government's submission to the Parliamentary Joint Select Committee on Ethical Conduct asserted that:

most of Tasmania's law in relation to corrupt conduct by public officials is covered in the Criminal Code Act 1924. The Act was intended as a codification of the criminal law which existed at the time it was drawn up and the origins of some of its provisions go back considerably before 1924.¹⁴⁶

There have been few changes to the sections of the Criminal Code Tas relevant to corruption since it was enacted. The dated legislation is perhaps one the reasons that few people have ever been prosecuted under its corruption offences. There are, however, two offences in particular that some may argue could be of use in prosecuting offences uncovered by Integrity Commission investigations.

Criminal Code Tas s 83: corruption of public officers

The closest offence in the current Criminal Code Tas to MIPO is found in s 83:

83. Corruption of public officers

Any person who –

- (a) being a public officer, corruptly solicits, receives, or obtains, or agrees to receive or obtain, any property or benefit of any kind for himself or any other person on account of anything done or omitted, or to be done or omitted, by him in or about the discharge of the duties of his office; or
- (b) corruptly gives, confers, or procures, or promises or offers to give, confer, or procure, or attempt to procure, to, upon, or for any public officer, or any other person, any property or benefit of any kind on account of anything done or omitted, or to be done or omitted, by such officer in or about the discharge of the duties of his office –

is guilty of a crime.

Charge:

- (a) Official corruption.
- (b) Bribery of a public officer.

Section 83 is an original provision which has not been amended since the code was enacted. Both the Northern Territory and Queensland have equivalent provisions in their criminal codes,¹⁴⁷ in addition to the MIPO offences.

For a discussion of the constraints imposed by the use of the term 'public officer' in s 83, see pages 13–4.

¹⁴⁵ It is, however, relevant to note that 'misconduct' is referred to in the *Public Interest Disclosures Act 2002* (Tas), and that both 'misconduct' and 'serious misconduct' are defined in *IC Act* s 4.

¹⁴⁶ *Public Office is Public Trust Report*, above n 4, 119, [15.6].

¹⁴⁷ *Criminal Code Act 1983* (NT) sch 1 cl 77; *Criminal Code Qld* s 87.

Solicits, receives, or obtains, or agrees to receive or obtain

A key difference between this offence and MIPO is the requirement that the public official solicits, receives, or obtains, or agrees to receive or obtain any property or benefit. This would not cover a situation where the public official 'improperly takes action for the benefit of another person without ... having solicited, received, or been offered a benefit'.¹⁴⁸ Indeed, it is the converse of the MIPO offence, in which the officer may have been acting unilaterally – basically, it requires the officer to have been acting with someone else. Section 83 is therefore comparable to a bribery offence, and thus is much narrower than MIPO.

Corruptly

Another element of s 83 is the requirement for the officer to be acting 'corruptly'. Although there is nothing specifically deriving from Tasmanian case law, the meaning of corruptly under the equivalent Queensland offence was discussed recently in the case of *R v Moran* [2007] QCA 428:

The charge of official corruption in contravention of s 87(1)(a) of the Criminal Code is concerned with the obtaining of property corruptly by a person employed in the public service. 'Corruptly' in this context is not the equivalent of 'dishonestly'. As was explained in *Re Austin by McPherson SPJ* (as his Honour then was), the corrupt obtaining of property in this context connotes the deliberate use of public office to obtain private advantage.¹⁴⁹

Prosecuted s 83 'corruption' offences

The only published case which involves a s 83 charge dates back to the 1940s, when the then premier Robert Cosgrove was accused of bribery, corruption and conspiracy.¹⁵⁰ The charges included six counts of official corruption, under s 83, for taking a bribe (he was also charged with six counts of bribery under s 71, and two counts of conspiracy under s 297).¹⁵¹ However, Cosgrove was eventually acquitted of all charges by a jury,¹⁵² and went on to be re-elected as premier.¹⁵³

The charging in 1958 of the then treasurer, Dr Reginald Turnbull, with official corruption under s 83 is also briefly mentioned in a published case, but details are slim.¹⁵⁴

¹⁴⁸ Roth, above n 19, 11.

¹⁴⁹ *R v Moran* [2007] QCA 428, [61] (citations omitted); further discussion can be found in M J Shanahan, P E Smith, and S Ryan, *Carter's Criminal Law of Queensland* (LexisNexis Butterworths, 18th ed, 2011) 185–8.

¹⁵⁰ *R v Cosgrove* [1948] TASStRp 1; [1948] Tas SR 99.

¹⁵¹ *Ibid* 100–1.

¹⁵² 'Tasmania Premier to Resign', *The West Australian* (Perth) 23 February 1948, 2.

¹⁵³ W A Townsley, *Cosgrove, Sir Robert (1884–1969)* (1993) Australian Dictionary of Biography <<http://adb.anu.edu.au/biography/cosgrove-sir-robert-9832>>.

¹⁵⁴ *Regina v Turnbull* [1958] TASStRp 18; [1958] Tas SR 80. The charges were unsuccessful, although sources conflict as to why: one states that a 'private police enquiry dismissed the allegation', see Stefan Petrow, *Corruption* (2006) The Companion to Tasmania History <http://www.utas.edu.au/library/companion_to_tasmanian_history/C/Corruption.htm>; another states that he 'was acquitted after an appeal, but sacked from the Labor Party', see Philip Jones, 'The political maverick who didn't fit in', *The Sydney Morning Herald* (online) 26 July 2006 <<http://www.smh.com.au/news/obituaries/the-political-maverick-who-didnt-fit-in/2006/07/25/1153816178782.html>>.

Both of these cases involved some form of bribery, thereby further highlighting the narrow application of s 83.

Criminal Code Tas s 266: secret commissions

Section 266 of the Criminal Code Tas makes it an offence to take 'secret commissions', which is basically private sector bribery.¹⁵⁵ The equivalent provision in NSW¹⁵⁶ legislation has been used to prosecute offences uncovered by the ICAC,¹⁵⁷ and thus in theory it may be of some use to offences uncovered by the Commission. Both the NSW and Tasmanian provisions apply to 'agents', not public officials; however, the definition of agent in Tasmania appears to be narrower than that in NSW.¹⁵⁸ Under Criminal Code Tas s 266(3)(a), agent 'includes any person employed by or acting for another, and any person serving under the Crown or under any corporation or public body'.

Like Criminal Code Tas s 83, s 266 also requires that the agent 'corruptly solicits, receives, obtains, or agrees to accept', and this similarly limits its ambit to bribery-type offences where the officer was not acting unilaterally.

Local Government Act 1993 (Tas) s 339A: 'misuse of office'

The scope of this report is restricted to offences in the main criminal statute of each jurisdiction. It has not, for instance, covered the *Police Offences Act 1935* (Tas) or any equivalent legislation in other jurisdictions. For the sake of completeness, it should be noted that there is no MIPO offence in the Police Offences Act. There is, however, a 'misuse of office' offence in the *Local Government Act 1993* (Tas). The offence – which only applies to persons covered by the Local Government Act – is narrower than MIPO; it appears in full below.

- (1) A councillor, an employee or a member must not procure the doing or not doing of anything by the council to gain, directly or indirectly, an advantage or to avoid, directly or indirectly, a disadvantage for –
 - a. the councillor, employee or member; or
 - b. a close associate of the councillor, employee or member; or
 - c. a member of the councillor's, employee's or member's family.

Penalty:

Fine not exceeding 50 penalty units.

- (2) In addition to any penalty imposed under this section, a court may make an order –
 - a. barring the councillor from nominating as a candidate at any election for a period not exceeding 7 years; or
 - b. dismissing the councillor or member from office.

¹⁵⁵ *MCCOC Report Chapter 3*, above n 13, 235.

¹⁵⁶ The *Crimes Act 1958* (Vic) also has a similar provision, in s 176. It is yet to be seen whether it will commonly be used in prosecutions for corruption uncovered by the IBAC.

¹⁵⁷ For instance, see the information on 'Operation Jarek' in Independent Commission Against Corruption, *ICAC prosecution outcomes* (26 August 2014)

<<http://www.icac.nsw.gov.au/investigations/prosecution-briefs-with-the-dpp-and-outcomes>>.

¹⁵⁸ Even in New South Wales, members of parliament may not fall within the definition of 'agent', see Roth, above n 19, 11.

Conclusion and recommendations

In regard to the offence of MIPO, Tasmania is out of step with other Australian jurisdictions. While it is true that the offence did stagnate for a period in the mid-twentieth century, all other states have now recognised its value in prosecuting the kinds of public sector corruption uncovered by modern integrity agencies. As noted by Queensland's then CMC (emphasis in original):

The reasons for this resurgence include the fact that a single charge may be used to reflect an entire course of conduct, whose individual acts may be minor but which accumulate into a pattern of abuse of trust, and the offence *'may be used to reflect serious misconduct which is truly 'criminal' but which cannot be satisfactorily reflected by any other offence'*.¹⁵⁹

As has been the case in other jurisdictions, the Commission's work has identified a need for the offence to be introduced into Tasmania. With that in mind, this report has provided a comprehensive overview of the formulation of the offence in all Australian jurisdictions. It has highlighted similarities and differences, negatives and positives. The Commission's recommended formulation of the offence is below.

Recommendation 1

It is recommended that, to bring Tasmania into line with all other Australian jurisdictions, an offence which captures 'misconduct in public office' be introduced into the Criminal Code of Tasmania.

To be of true value in prosecuting modern corruption offences, it is the opinion of the Commission that the offence should be formulated in a similar manner to that found in the s 83 of the Criminal Code WA. It is therefore recommended that, in formulating the new offence, regard be had to Criminal Code WA s 83. It is the opinion of the Integrity Commission that this is the most satisfactory codified version of the offence of misconduct in public office. However, the offence should not require that the officer acted with any intent to gain a benefit or cause harm/detriment/loss. The Commission considers that this adversely narrows the offence, and some gross abuses of office will not be captured if an intent to benefit/cause harm is included in the offence.

The Commission also notes that the common law form of the offence does not require the officer to have been acting dishonestly, improperly or corruptly. It is acknowledged that one misconduct in public office offence under the Criminal Code WA does require the officer to have been acting corruptly, but the Commission considers this to be sufficiently broad (if it is confined to one of the three offences). The Commission does not recommend adopting the element of 'dishonesty'; this would prevent the offence from capturing a broad range of 'abuse of office' behaviours.¹⁶⁰

In formulating the new offence, it should be ensured that it covers:

- former public officials;
- failures and omission, as well as positive acts;

¹⁵⁹ CMC Response to the Queensland Government Report, above n 78, 31–2.

¹⁶⁰ For instance, in situations of nepotism, the public officer may genuinely believe that they are doing the right thing by all parties involved – including their employer – and may not actually have any 'dishonest' intent.

- benefits and detriments going to third parties (if there is to be a requirement that the act was committed with the intent to gain a benefit or cause a detriment);
- benefits and detriments going to corporation, associations and the like (if there is to be a requirement that the act was committed with the intent to gain a benefit or cause a detriment); and
- non-pecuniary benefits and detriments (if there is to be a requirement that the act was committed with the intent to gain a benefit or cause a detriment).

Recommendation 2

It is recommended that the definition of ‘public officer’ in the Criminal Code of Tasmania be amended to align with modern standards, other Tasmanian legislation, and community expectations.

The definition given in the *Integrity Commission Act 2009* would be a suitable replacement, or at least a suitable starting point. Regard could also be had to the definition of ‘public official’ contained in the Criminal Code of the ACT.

In formulating the new definition, it should be ensured that it covers:

- employees who work under a contract of employment;
- local government;
- contractors;
- volunteers;
- statutory office holders; and
- ministers and members of parliament.

Recommendation 3

It is recommended that a review be undertaken to ensure that the Criminal Code of Tasmania’s aiding and abetting provisions are as robust as those in Western Australia, and that they would capture people who facilitate the commission of misconduct in public office offences.¹⁶¹

¹⁶¹ For an example of this, see the West Australian case study on page 34 of this report.

Appendix: MIPO offences in full

Jurisdiction	Offence
Australian Capital Territory	<p>'Abuse of public office' in s 359 of the <i>Criminal Code 2002</i> (ACT); inserted in 2004 – a minor amendment was made in 2005:¹⁶²</p> <p>(1) A public official commits an offence if—</p> <ol style="list-style-type: none"> a. the official— <ol style="list-style-type: none"> i. exercises any function or influence that the official has as a public official; or ii. fails to exercise any function the official has as a public official; or iii. engages in any conduct in the exercise of the official's duties as a public official; or iv. uses any information that the official has gained as a public official; and b. the official does so with the intention of— <ol style="list-style-type: none"> i. dishonestly obtaining a benefit for the official or someone else; or ii. dishonestly causing a detriment to someone else. <p>Maximum penalty: 500 penalty units, imprisonment for 5 years or both.</p> <p>(2) A person commits an offence if—</p> <ol style="list-style-type: none"> a. the person has ceased to be a public official in a particular capacity; and b. the person uses any information the person gained in that capacity; and c. the person does so with the intention of— <ol style="list-style-type: none"> i. dishonestly obtaining a benefit for the person or someone else; or ii. dishonestly causing a detriment to someone else. <p>Maximum penalty: 500 penalty units, imprisonment for 5 years or both.</p> <p>(3) Subsection (2)(a) applies to a person—</p> <ol style="list-style-type: none"> a. whether the person ceased to be a public official as mentioned in the paragraph before, at or after the commencement of this section; and b. whether or not the person continues to be a public official in another capacity.

¹⁶² Changing the language in s 359(1)(b)(i) from 'himself, herself' to 'the official', and in s 359(2)(c)(i) from 'himself, herself' to 'the person', see *Criminal Code (Administration of Justice Offences) Amendment Act 2005* (ACT) sch 2 cls [2.19]–[2.20].

Commonwealth

'Abuse of public office' in s 142.2 of the *Criminal Code Act 1995* (Cth); inserted in 2000 – has not been amended:

- (1) A Commonwealth public official is guilty of an offence if:
- a. the official:
 - i. exercises any influence that the official has in the official's capacity as a Commonwealth public official; or
 - ii. engages in any conduct in the exercise of the official's duties as a Commonwealth public official; or
 - iii. uses any information that the official has obtained in the official's capacity as a Commonwealth public official; and
 - b. the official does so with the intention of:
 - i. dishonestly obtaining a benefit for himself or herself or for another person; or
 - ii. dishonestly causing a detriment to another person.

Penalty: Imprisonment for 5 years.

- (2) A person is guilty of an offence if:
- a. the person has ceased to be a Commonwealth public official in a particular capacity; and
 - b. the person uses any information that the person obtained in that capacity as a Commonwealth public official; and
 - c. the person does so with the intention of:
 - i. dishonestly obtaining a benefit for himself or herself or for another person; or
 - ii. dishonestly causing a detriment to another person.

Penalty: Imprisonment for 5 years.

- (3) Paragraph (2)(a) applies to a cessation by a person:
- a. whether or not the person continues to be a Commonwealth public official in some other capacity; and
 - b. whether the cessation occurred before, at or after the commencement of this section.

Model Criminal Code Officers Committee

Report released in 1995:

A public official who dishonestly:

- (a) exercises any function or influence that the official has because of his or her public office; or
- (b) refuses or fails to exercise any function the official has because of his or her public office; or
- (c) uses any information the official has gained because of his or her public office,

with the intention of obtaining a benefit for the official or another person or causing a detriment to another person, is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.¹⁶³

¹⁶³ MCCOC Report Chapter 3, above n 13, 282.

New South Wales	<p>From 2013 case of <i>Blackstock v Regina</i>.¹⁶⁴</p> <ol style="list-style-type: none"> 1. A public official; 2. who in the course of or in relation to his public office; 3. wilfully and intentionally; 4. culpably misconducts himself.
Northern Territory	<p>‘Abuse of office’ in s 82 of the <i>Criminal Code Act 1983</i> (NT); original provision – has not been amended:</p> <ol style="list-style-type: none"> (1) Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another is guilty of a crime and is liable to imprisonment for 2 years. (2) If the act is done or directed to be done for purposes of gain he is liable to imprisonment for 3 years.
Queensland (s 92)	<p>The offence of ‘abuse of office’ in s 92 of Schedule 1 of the <i>Criminal Code Act 1899</i> (Qld); original provision – a minor amendment was made in 1988.¹⁶⁵</p> <ol style="list-style-type: none"> (1) Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of the person’s office, any arbitrary act prejudicial to the rights of another is guilty of a misdemeanour, and is liable to imprisonment for 2 years. (2) If the act is done or directed to be done for purposes of gain, the person is liable to imprisonment for 3 years.

¹⁶⁴ Note that currently there is no authoritative version of the offence in New South Wales, see Latham, above n 26, 6. The elements of the NSW offence used in this paper are therefore taken from the most recent published NSW decision that referred to the elements of the offence (*Blackstock v Regina* [2013] NSWCCA 172, [13]). The four elements set out in *Blackstock v Regina* were from *Shum Kwok Sher v HKSAR* [2002] HKCFA 27; (2002) 5 HKCFAR 381 (Mason NPJ).

¹⁶⁵ This included making the language of the section gender neutral.

**Queensland
(s 92A)**

The offence of 'misconduct in relation to public office' in s 92A of Schedule 1 of the *Criminal Code Act 1899* (Qld); inserted in 2009 and amended in 2013:¹⁶⁶

- (1) A public officer who, with intent to dishonestly gain a benefit for the officer or another person or to dishonestly cause a detriment to another person—
- deals with information gained because of office; or
 - performs or fails to perform a function of office; or
 - without limiting paragraphs (a) and (b), does an act or makes an omission in abuse of the authority of office;

is guilty of a crime.

Maximum penalty—7 years imprisonment.

- (2) A person who ceases to be a public officer in a particular capacity is guilty of a crime if, with intent to dishonestly gain a benefit for the person or another person or to dishonestly cause a detriment to another person, the person deals with information gained because of the capacity.

Maximum penalty—7 years imprisonment.

- (3) Subsection (2) applies whether or not the person continues to be a public officer in some other capacity.

- (4) A reference in subsections (1) and (2) to information gained because of office or a particular capacity includes information gained because of an opportunity provided by the office or capacity.

- (4A) The offender is liable to imprisonment for 14 years if, for an offence against subsection (1) or (2), the person who dishonestly gained a benefit, directly or indirectly, was a participant in a criminal organisation.

- (4B) For an offence defined in subsection (1) or (2) alleged to have been committed with the circumstance of aggravation mentioned in subsection (4A), it is a defence to the circumstance of aggravation to prove that the criminal organisation is not an organisation that has, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity.

- (5) In this section—

authority, of office, includes the trust imposed by office and the influence relating to office.

deals with includes the following—

- uses;
- supplies;
- copies;
- publishes.

function includes power.

information includes knowledge.

office, in relation to a person who is a public officer, means the position, role or circumstance that makes the person a public officer.

participant, in a criminal organisation, see section 60A.

performs includes purportedly performs and in relation to a power, exercises and purportedly exercises.

¹⁶⁶ The amendment in 2013 included the addition of the aggravated version of the offence in ss 92A(4A)–(4B), see Explanatory Notes, Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013 (Qld) 16.

South Australia

The offence of 'abuse of public office' in s 251 of the *Criminal Law Consolidation Act 1935* (SA) ('Criminal Act SA'); inserted in 1992 – amended in 2003 and 2012.¹⁶⁷

(1) A public officer who improperly—

- (a) exercises power or influence that the public officer has by virtue of his or her public office; or
- (b) refuses or fails to discharge or perform an official duty or function; or
- (c) uses information that the public officer has gained by virtue of his or her public office,

with the intention of—

- (d) securing a benefit for himself or herself or for another person; or
- (e) causing injury or detriment to another person,

is guilty of an offence.

Maximum penalty:

- (b) for a basic offence—imprisonment for 7 years;
- (c) for an aggravated offence—imprisonment for 10 years.

(2) A former public officer who improperly uses information that he or she gained by virtue of his or her public office with the intention of—

- (a) securing a benefit for himself or herself or for another person; or
- (b) causing injury or detriment to another person,

is guilty of an offence.

Maximum penalty:

- (a) for a basic offence—imprisonment for 7 years;
- (b) for an aggravated offence—imprisonment for 10 years.

Victoria

From 2010 case of *R v Quach*.¹⁶⁸

- (1) a public official;
- (2) in the course of or connected to his public office;
- (3) wilfully misconduct himself; by act or omission, for example, by wilfully neglecting or failing to perform his duty;
- (4) without reasonable excuse or justification; and
- (5) where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.

¹⁶⁷ Section 251(2) was inserted by the 2003 amendment. The 2012 amendment was the addition of the aggravated version of the offence in ss 251(1)–(2).

¹⁶⁸ *R v Quach* [2010] VSCA 106, [46].

West Australia

The offence of 'corruption' in s 83 of the schedule of the *Criminal Code Act Compilation Act 1913* (WA); inserted in 1988 – amended in 2002:¹⁶⁹

Any public officer who, without lawful authority or a reasonable excuse —

- (a) acts upon any knowledge or information obtained by reason of his office or employment; or
- (b) acts in any matter, in the performance or discharge of the functions of his office or employment, in relation to which he has, directly or indirectly, any pecuniary interest; or
- (c) acts corruptly in the performance or discharge of the functions of his office or employment,

so as to gain a benefit, whether pecuniary or otherwise, for any person, or so as to cause a detriment, whether pecuniary or otherwise, to any person, is guilty of a crime and is liable to imprisonment for 7 years.

¹⁶⁹ The amendments made to the section in 2002 increased the maximum penalty from three to seven years.