

Bridgit Tai

BPP University (London Holborn) - 2025~2026

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Misconduct in Public Office: Institutional Function, Individual Duty, and the Limits of Common Law Development

I. The Question in Its Context

The common law offence of misconduct in public office has four established elements, restated authoritatively by the Court of Appeal in *Attorney General's Reference (No 3 of 2003)* and confirmed in *R v Chapman*.¹ Its orientation towards function rather than status was settled as long ago as *R v Whitaker*² and has not been seriously contested since. What remains deeply uncertain, and what the ruling of HHJ Baumgartner in *R v Pearce* [2025] EWCR 12 illustrates with precision, is the threshold question on which criminal liability most often turns: whether the individual defendant, as distinct from the institution that employs him, holds public office at all. That question is determined by the judge as a matter of law, not the jury, a principle confirmed in *R v Cosford*³ and engaged in *Pearce*⁴ at a pre-trial hearing under s 40 of the Criminal Procedure and Investigations Act 1996.

¹*Attorney General's Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73 [61]; confirmed in *R v Chapman* [2015] QB 883 [17] per Lord Thomas CJ, Cranston and William Davis JJ; and applied in *R v Pearce* [2025] EWCR 12 [7] per HHJ Baumgartner. The four elements of the offence are: (i) a public officer acting as such; (ii) wilful neglect or misconduct; (iii) to a degree amounting to an abuse of the public's trust in the office holder; and (iv) without reasonable excuse or justification. The offence as it currently stands carries a maximum sentence of life imprisonment: Government Impact Assessment, *Public Office (Accountability) Bill: Misconduct in Public Office* (Ministry of Justice, September 2025) [2] ('IAMiPO2').

²*R v Whitaker* [1914] 3 KB 1283, 1296 per Lawrence J (giving judgment of the Court of Criminal Appeal): 'A public officer is an officer who discharges any duty in the discharge of which the public are interested.' Identified in *R v Pearce* [2025] EWCR 12 [11] as the most often cited common law definition of public officer.

³*R v Cosford* [2013] EWCA Crim 466, [2014] QB 81 [38] per Leveson LJ (as he then was, now Sir Brian Leveson): the public officer question is one of law for the judge and not of fact for the jury. The procedural basis in *Pearce* was s 40 of the Criminal Procedure and Investigations Act 1996, which permits a judge to determine any question of law at a pre-trial hearing: *Pearce* (n 4) [2].

⁴*R v Pearce* [2025] EWCR 12 (Crown Court at Southwark, HHJ Baumgartner, The Honourable Recorder of Westminster, 14 November 2025). Published pursuant to s 41(6) of the Criminal Procedure and Investigations Act 1996.

Three distinct enquiries are embedded within that broader question. First, how courts approach the institution-individual distinction. Secondly, whether the balance currently struck is defensible. Thirdly, whether precedent remains a sufficient instrument, or whether a statutory definition is required in the interests of consistency and foreseeability. Each is addressed in turn.

II. How Courts Approach the Issue

The central difficulty arises from the structure of most prosecutions: defendants are typically employed by organisations that perform governmental functions, and the temptation is to treat institutional character as determinative of individual status. The courts have firmly rejected that conflation. The analytical framework formulated in *R v Mitchell*⁵ and confirmed by the Court of Appeal in *R v Evans*⁶ as the current operative test, focuses exclusively on the specific duties that the defendant was required to discharge.

The *Mitchell* framework poses three questions in sequence: what position did the defendant hold; what duties attached to that position; and did the fulfilment of those duties represent the fulfilment of one of the responsibilities of government, such that the public had a significant interest in their discharge beyond an interest in those directly affected?⁷ The third question is always decisive, and it is directed at the defendant's actual functions, not the institutional mission of the employer. That principle was articulated with particular clarity by Sir Brian Leveson (then Leveson LJ) in *R v Cosford*:

⁵*R v Mitchell* [2014] EWCA Crim 318.

⁶*R v Evans* [2025] 4 WLR 104 (Holroyde LJ, May J and Wall J), described in *Pearce* (n 4) [16] as 'the most recent authority on the meaning of "public office"'.

⁷*Mitchell* (n 5), as cited in *Pearce* (n 4) [14]: 'First, what is the position held? Second, what is the nature of the duties undertaken by the employee or officer in that position? Third, does the fulfilment of those duties represent the fulfilment of one of the responsibilities of government such that the public have a significant interest in the discharge of that duty which is additional to or beyond an interest in anyone who might be directly affected by a serious failure in the performance of that duty?' Confirmed as operative in *Evans* (n 6); applied in *Pearce* (n 4) [16], [24]. **Note on judicial title:** citations to *Cosford* use 'Leveson LJ (as he then was)' following *Pearce* [5]; citations to *Mitchell* use 'Sir Brian Leveson P' following *Pearce* [14], [24]: see *Pearce* (n 4) [13].

the enquiry must be addressed to the nature of the duty itself and whether it represents the fulfilment of a governmental responsibility in which the public has a significant interest beyond those directly affected by any individual failure in its performance.⁸

R v Evans illustrates the framework. The defendant was employed as operational support grade in a prison. His duties included conducting prisoner welfare checks during the night shift; he failed to perform them, and a vulnerable prisoner sustained fatal injuries. The Court of Appeal upheld the conviction, finding that the public had a significant interest in the performance of those specific duties rather than merely in the existence of a custodial service. *Evans* confirms that seniority of role and significance of individual duty, for the purposes of the offence, are analytically distinct.

Pearce applied that analysis to a Pound Assistant (Band F) at the Metropolitan Police Service vehicle pound at Perivale, whose functions comprised supervising vehicle intake, completing administrative paperwork and moving vehicles within the site.⁹ He had no investigative role, no evidence-handling responsibilities, and he worked alongside private sub-contractors. He was charged with two counts of misconduct after photographing and sharing images of human remains found inside a recovered vehicle.

HHJ Baumgartner's ruling rested on three determinative propositions. First, aspirational language in the defendant's job advertisement describing the MPS's wider institutional purpose was characterised as 'puf' bearing no relationship to his actual functions and could not supply a public duty in law.¹⁰ Secondly, the MPS's institutional importance did

⁸*Cosford* (n 3) [34] per Leveson LJ (as he then was, now Sir Brian Leveson): 'Nothing in the authorities justifies the conclusion that the "strict confinement" should be to the position held by whomsoever is carrying out the duty: rather, it should be addressed to the nature of the duty undertaken and, in particular, whether it is a public duty in the sense that it represents the fulfilment of one of the responsibilities of government such that the public have a significant interest in its discharge extending beyond an interest in anyone who might be directly affected by a serious failure in the performance of the duty.' See also *Pearce* (n 4) [10(4)] (listing prison officer and related authorities establishing that position as public office).

⁹*Pearce* (n 4) [4], [18]-[23], [25]-[27]. The relevant facts were agreed for the purpose of the pre-trial application.

¹⁰*Pearce* (n 4) [28]-[29].

not determine the character of the defendant's individual role: his duties were logistical and administrative, bearing no relationship to any governmental responsibility as measured against *Mitchell* and *Evans*.¹¹ Thirdly, the prosecution's submission that the unexpected presence of human remains in the recovered vehicle generated a public duty on the defendant was rejected: the conceded evidence was that human remains should not have been in the vehicle and no such duty had been anticipated; the prosecution's approach was characterised as the retrospective imposition of a duty rather than the proper application of existing law.¹²

III. Has the Balance Been Got Right?

On one reading, *Pearce* demonstrates the framework working as intended: a careful judge applied a coherent test on agreed facts and reached a principled result. It does not, however, fully account for the structural difficulties the case also discloses.

The third *Mitchell* question requires an evaluative judgment that the legal materials do not themselves determine. Whether the public has a significant interest in the discharge of a defendant's specific duties is a question of degree, and reasonable judges may assess it differently on materially comparable facts. The contrast between *Cosford* and *Mitchell* illustrates this. In *Cosford*, nurses within a prison held public office because their duties were inseparable from the governmental function of secure detention. In *Mitchell*, an ambulance paramedic did not, because the public lacked a significant interest in the duties of each individual paramedic, as distinct from the maintenance of a paramedic service as

¹¹*Mitchell* (n 5); *Evans* (n 6); *Pearce* (n 4) [41]. At paras [32]-[35], HHJ Baumgartner distinguished the defendant's role from three cases where the degree of public trust was materially greater: *Bowden* [1996] 1 WLR 98 (local authority maintenance manager, public funds); *Attorney General's Reference (No 140 of 2004)* [2004] EWCA Crim 3525 (DVLA employee, confidential vehicle ownership records); and *Gallagher* [2010] EWCA Crim 3201 (civilian police call handler, sensitive intelligence on 43 occasions).

¹²*Pearce* (n 4) [45]: 'For the Prosecution to look to this Court to impose such a duty ex post facto would be to ignore the very clear authorities on the matter and the clear evidence that no such duty was expected of this Defendant. Such an approach suggests a retrospective application of the law to facts, rather than the proper approach, which is the reverse.' See also ECHR art 7; Human Rights Act 1998, s 1 and sch 1; *Kokkinakis v Greece* (1994) 17 EHRR 397 [52]; *SW v United Kingdom* (1995) 21 EHRR 363.

a whole.¹³ Both conclusions are internally coherent. Neither is dictated by the legal materials alone. The Law Commission acknowledged in its 2020 report that the outcome in *Mitchell* was not obviously foreseeable before it was decided: candid acknowledgment that the framework generates genuine uncertainty at precisely the point where criminal liability is determined.¹⁴

The procedural architecture compounds this difficulty. Because the threshold question is resolved on agreed facts, those facts necessarily simplify the texture of an employment relationship into propositions both parties accept. More significantly, a ruling terminating a prosecution at the pre-trial stage rarely generates a Crown appeal; *Pearce* may itself prove to be a case in point. The doctrine therefore develops predominantly through the correction of prosecutorial overreach, in a structurally asymmetric fashion only partially subject to appellate review. The outsourcing cases illustrate a further dimension: whether an individual performing a given role holds public office may turn on procurement decisions rather than on the character of what that individual actually does.¹⁵

The most fundamental objection is foreseeability. The prosecution in *Pearce* was sufficiently arguable to be brought; the defendant faced the burden of criminal proceedings before the framework could vindicate him. A different judge applying the same test might reasonably have characterised his role differently. Where the threshold question of a serious criminal offence admits of that degree of legitimate variation, the rule of law's requirement that those within the law's reach can foresee their exposure in advance¹⁶ is not reliably satisfied.

¹³*Mitchell* (n 5); *Pearce* (n 4) [15]: 'the public had a significant interest in the maintenance of a paramedic service' but 'did not have a significant interest in the performance of the duties of each individual paramedic'. See Law Commission, *Misconduct in Public Office* (Law Com No 397, 3 December 2020) (hereafter 'Law Com No 397').

¹⁴Law Com No 397 (n 13) [2.49].

¹⁵*Cosford* (n 3) [34] per Leveson LJ (as he then was, now Sir Brian Leveson); *Pearce* (n 4) [21], [30], [42].

¹⁶See also Tom Bingham, *The Rule of Law* (Penguin 2010) ch 2 (for the proposition that the law must be accessible and, so far as possible, intelligible, clear and predictable - the first of eight sub-rules Bingham identifies as components of the rule of law); ECHR art 7; *Kokkinakis v Greece* (1994) 17 EHRR 397 [52] (foreseeability requirement); *SW v United Kingdom* (1995) 21 EHRR 363; *R v R* [1992] 1 AC 599 (HL).

IV. Precedent or Statute?

The case for retaining common law development has genuine force. The identification of public office is inherently contextual, and adjudication is well suited to calibrated outcomes. *Cosford* demonstrated that the governmental character of custodial detention survives contracting out; a fixed list of qualifying employers could not have reached that conclusion without legislative amendment.

That argument cannot answer the foreseeability objection. The Law Commission identified, in Law Com No 397,¹⁷ that the common law offence should be abolished and replaced by statutory offences setting out clearly which conduct and which office holders are caught. The Public Office (Accountability) Bill¹⁸ currently at report stage represents the most substantial legislative response. Clause 16 abolishes the common law offence. Clause 12 creates an offence of using public office to obtain a benefit or cause detriment, knowing the act to be seriously improper, carrying a maximum of ten years' imprisonment; clause 13 creates an offence of breach of a duty to prevent death or serious injury where the breach is intentional or reckless and falls far below what would be expected, carrying fourteen years. Director of Public Prosecutions consent is required for both offences. The replacement of the current maximum of life imprisonment with calibrated penalties is itself a structural improvement the common law cannot achieve.

The Bill's primary mechanism for addressing the foreseeability problem at the identity stage is Schedule 4, which enumerates holders of public office in categories running from Ministers and civil servants through Parliament, policing, fire and rescue, state detention, the judiciary, the armed forces and local government. Paragraph 14, which captures persons exercising functions in relation to persons in state detention, resolves the *Cosford*

¹⁷Law Com No 397 (n 13). See also Law Commission, *Misconduct in Public Office (Issues Paper 1: The Current Law)* (20 January 2016) [4.21]-[4.22], cited in *Pearce* (n 4) fn 1.

¹⁸*Public Office (Accountability) Bill* HC Bill (2024-26) [341] (as amended in Public Bill Committee, 4 December 2025). Introduced 16 September 2025; second reading 3 November 2025; report stage pending. cl 2 (duty of candour); cl 9 (ethical conduct framework); cl 12 (seriously improper acts); cl 13 (duty to prevent death or serious injury); cl 16 (abolition of common law offence). The current common law maximum is life imprisonment: IAMiPO2 (n 1) [2].

position by statute: no court need evaluate whether prison nurses hold public office. For the named categories, the threshold question is answered prospectively and with certainty.¹⁹

The position is different for persons outside the enumerated categories. Civilian support workers at police forces who are not designated officers within the policing provisions of paragraphs 6 to 12 of Schedule 4 fall instead under the residual category in paragraph 22. Paragraph 22(4) expressly preserves the judicial allocation confirmed in *Cosford*: whether a function is of a public nature is a question of law. Paragraph 22(5)(b) codifies the decisive evaluative element in the statute: the judge must have regard to whether the function meets a responsibility of government such that the public, beyond persons directly affected, have a significant interest in its exercise. The *Mitchell* third question is now on the face of the Act. On the *Pearce* facts: a Pound Assistant performing administrative and logistical functions without governmental character would fail the paragraph 22(5) test on the same reasoning as the common law. The Bill resolves evaluative uncertainty for the enumerated categories; for the residual category, it gives that judgment statutory form rather than eliminates it.

The second structural question concerns the 'seriously improper' standard in clause 12. The Bill provides jury guidance in clause 12(3), directing attention to factors including the degree of dishonesty, the nature of any benefit obtained and the potential to undermine public confidence in the holder's office.²⁰ This structures the evaluative

¹⁹*Public Office (Accountability) Bill* HC Bill (2024-26) [341], sch 4. Named categories run from Ministers of the Crown (para 1) through civil servants (para 3), Parliament (para 4), policing (paras 6-12), fire and rescue (para 13), state detention (para 14), the judiciary (paras 17-18), service law (para 19) and local government (paras 20-21). Para 22 provides a residual category: persons exercising functions of a public nature for a body established by prerogative, enactment or Ministerial action, where the public nature question is one of law (para 22(4)) determined by reference to para 22(5). The Secretary of State may amend sch 4 by affirmative regulations (cls 15(3) and (6)).

²⁰Clause 12(2)(c): an act is 'seriously improper' if 'a reasonable person would consider it to be seriously improper'. See Dan Tench and Rosie Coles, 'The Public Office (Accountability) Bill and its implications for public sector transparency and misconduct' (CMS Legal, 19 September 2025); *HC Deb* 3 November 2025, cols 662-663 (Dr Kieran Mullan MP, shadow minister for justice).

judgment rather than eliminating it, and whether the standard in practice reduces the uncertainty of the equivalent concept in the common law is a question that parliamentary scrutiny and, in due course, the courts must resolve.

What the analysis nonetheless demonstrates is that the common law has been developed, through *Mitchell*, *Evans* and *Pearce*, to the extent of its capacity for principled elaboration. The Law Commission's recommendation for codification²¹ is well-founded, and the Bill gives it substantial expression. The question has been answered in principle; the task that now falls to Parliament is to answer it in detail.

V. Conclusion

The doctrinal trajectory from *Whitaker* through *Cosford* and *Mitchell*, through *Evans*, to *Pearce* represents a genuine analytical achievement. The *Mitchell* framework correctly reorients the enquiry from institutional character to individual duty; *Evans* confirms its authority as the operative Court of Appeal test; and HHJ Baumgartner applied it with the rigour the framework demands. The rulings are defensible.

What the trajectory also discloses is the inherent limitation of defining the boundary of a serious criminal offence entirely through adjudication. The third *Mitchell* question has no legally determinate answer. The doctrine has developed through a process that is structurally asymmetric and only partially subject to appellate correction. The foreseeability that the criminal law owes to those within its reach is not delivered by a framework whose critical evaluative stage admits of legitimate variation between reasonable judges. These are not failures of judicial reasoning; they are the natural consequences of asking courts to perform, through case-by-case development, the task that the rule of law assigns to Parliament: the prospective, accessible and certain definition of the boundary of criminal liability. Whether Parliament discharges that task with the precision the subject demands, in particular whether Schedule 4 is sufficiently

²¹Law Com No 397 (n 13). The Law Commission also recommended that prosecutions require the consent of the Director of Public Prosecutions and that the statutory list of qualifying positions be amendable by affirmative instrument to accommodate structural changes in public service delivery.

comprehensive and the 'seriously improper' standard sufficiently clear, will determine whether the Public Office (Accountability) Bill delivers in practice the consistency that common law development has not.

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