



Ministers behaving badly

How to assess the standards for ministerial misconduct? **John Gould** reports on the slippery slope leading to loss of public trust

Back in January, I examined the limitations of the Ministerial Code as a pseudo-regulatory regime ('No Minister', *NLJ*, 28 January 2022, p7) and, very presumptuously, put forward ways in which it might be improved. Although it may be true generally that, in politics, circumstances change very rapidly, this year seems to be an exception and the same issues of ministerial conduct continue to come around like a painted pony on a carousel.

In January, I suggested that Lord Geidt should be able to initiate his own investigations rather than have a potentially endless wait to be prompted by the prime minister; that the outcome or sanction should be proportionate to the seriousness of the breach; that it was wrong to state that any breach of the code (however trivial) should lead to resignation; that only serious issues of fitness and public confidence should be investigated; and that the outcome of any process should be an unspun statement of the facts and an assessment of seriousness. The consequences of a breach should be political, not legal.

On 27 May, the Cabinet Office announced changes incorporating each of these elements, which is to be welcomed, but even though the system has been improved, conceptual issues of substance remain.

Confusion still appears to reign as to what conduct is or is not permissible or appropriate on the part of ministers, including the prime minister. This is not because the description in the Ministerial Code of 'good behaviour' is wrong or inadequate, but because the ways in which it is suggested that the seriousness of breaches can be identified are undeveloped and inconsistent. The code puts forward a gold standard of behaviour, but in reality the important questions are always ones of degree and consequences.

Whether or not a minister receives a fixed penalty notice may be politically significant, but it is not, as has been suggested, in itself determinative of the seriousness of misconduct. The context for assessing the culpability of a prime minister is very different from that of an irresponsible partying 18-year-old, even if they appear to have a close resemblance and both receive fixed penalties. It is, in any case, problematic to delegate the assessment of culpability, for code purposes, to the police, who are unqualified to consider anything beyond the offence and its application to the policing of the population as a whole.

Although it is important not to lose sight of the political context—politicians must ultimately answer to the electorate—the debate relating to prime ministerial conduct would be better informed if it were

anchored in the same concepts as have long informed the assessment of misconduct by professionals such as lawyers and doctors. So, if I were a member of Parliament, how should I approach my assessment of prime ministerial conduct?

A dirty business?

Over recent months, commentators have repeatedly suggested that the only consideration relevant to Conservative MPs is a calculation of their own personal electoral interest. In doing so, those commentators have tended to legitimise the illegitimate. Front and centre ought to be an MP's best judgement of the public interest and a minister's fitness for their office. Public service must not be about some tawdry political calculation.

It is often said in conduct regimes that maintaining public confidence and trust in the particular profession is the key objective. For politicians this is more difficult, because trust in politicians is already very low and on a long-term downward trend.

A YouGov survey at the end of 2021 found that almost two thirds of British people saw politicians as merely 'out for themselves'. In 1944, just one in three held that view, rising to just under half by 2014. It is also the case that levels of trust are not the same across all types of voter, varying, for example, according to education and geography. So issues which tend to increase or diminish trust among the majority of voters are particularly important.

Professor Will Jennings, professor of political science and public policy at the

University of Southampton, summed up the position: 'Politics has always been seen as a dirty business by voters, but there is little doubt that trust in our political class has reached new lows in recent years. Citizens increasingly see British politicians as self-serving rather than wanting to do the best for their country.'

This loss of trust is seen as a significant threat to our democratic system. It might be argued that the threat is even more fundamental because, like it or not, politicians are cultural influencers. Each report of low ethical standards by those in power chips away at everyone's certainty of the difference between right and wrong. The most powerful leadership is by example, and the most powerful example is given by a steady adherence to a moral code. Hypocrisy is the enemy of the ethical.

Truth & lies

So, starting at the moral bottom, as it were, the base standard must be honesty—or rather, the absence of dishonesty. Dishonesty is not a term with a precise legal definition; it is what is known as a jury question. Honesty is a universal standard required of everyone. Whether or not a person is dishonest does not depend on their own opinion of what is or is not honest. Neither does it depend on what they think others might think about the conduct in question. It is an objective question. A person's factual knowledge is, however, relevant (see *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords)* [2017] UKSC 67).

If I genuinely believe that the bottles of champagne in the office fridge are available to drink as a perk, I am not being dishonest when I take some and share them with my hardworking colleagues who are fond of drink. If when challenged by the owner of the bubbly in relation to its disappearance, I deny any knowledge of its consumption, I am lying and being dishonest.

It is dishonest to tell untruths when it matters. If a minister resorts to untruths in connection with complying with the law or official business, that would nearly always matter. Put another way, the more important the false statement is to the maker or the recipient, the more likely it is to be viewed as dishonest. Fine distinctions as to whether, as Shakespeare put it, it is the lie circumstantial or the lie direct, simply make it harder to get caught.

Next we have cheating. A gambler who improves his odds by finding ways of fixing the deck of cards is cheating. Although they will often be dishonest, the key idea is that the framework of the game is being subverted for advantage. A minister needs to be relied upon to play by the rules rather

than break them or collaborate in their circumvention.

Integrity is perhaps the most important concept in professional regulation. It is the ethical standard expected of a person in a particular profession. In most professions, the standard expected by society is higher than simply being honest. A person who is dishonest lacks integrity, but not all failures to act with integrity are dishonest (see *R (on the application of Wingate) v Solicitors Regulation Authority* [2017] EWHC 1269 (Admin)).

Examples of conduct which lacks integrity are not hard to find. A person who deliberately flouts the rules relating to their conduct; subordinates the interests of those to whom they owe duties to their own interest; takes advantage of their position to secure a personal advantage; participates in illegal activities; or is reckless in establishing facts before making formal representations to a court or other body, may be found to be lacking integrity.

Generally, incompetence does not amount to misconduct, but it can if the incompetence is sufficiently gross or persistent. The competence of ministers falls to be judged by the prime minister, no matter the depths to which it may sink. The prime minister's competence is a matter for the MPs who keep the government in office. If they fail, it is their position which is a matter for the electorate.

Where functions are properly delegated, the responsibility for misconduct may also be devolved, provided the delegate is sufficiently supervised; however, the accountability for some key responsibilities cannot be deflected by delegation. If such responsibilities are delegated, it is at the delegator's own risk, and even permitted delegation must take place within proper and reliable systems if misconduct is to be avoided. Long ago, ministers resigned simply on the basis of a formal responsibility for the failings of their civil servants. Now, the failings or alleged failings of civil servants may keep a minister in office if they are lucky.

A professional would be expected to stop misconduct by subordinates as soon as they ought to have been aware that it was taking place. There can be no turning of blind eyes and no passive acceptance.

Which brings me to the question of illegality. Not all crimes are created equal, and the stigma of conviction obviously depends on the offence in question in its context. A poor person may steal a loaf of bread to eat and be imprisoned, while a powerful person may park in a disabled space through arrogance and a sense of impunity and receive a fixed penalty. We expect professionals not to break the law,

but they do—probably everyone does who drives a car or discards a sweet wrapper. Like breach of the Ministerial Code, a conviction doesn't, of itself, always provide the answer—it rather depends on what you did and why.

Sometimes misconduct arises not from a single act but from a course of repeated conduct. Even acts which may be thought not to be that serious, may be serious when taken together. Repeated actions over a period are unlikely to be the product of a transitory misjudgement or slowness in dealing with a new situation. They suggest acceptance of the misconduct as permissible or a belief that it will remain undetected and therefore may be excused.

Slipping standards

In the end, it is likely to come down to a judgement about the character of the person and their fitness for the responsibilities vested in them. If a person whose conduct has shown them to be unfit continues to be allowed to practise or hold office, not only is their profession or office debased, but the strong ethical standards still observed by the majority of professionals and those in public life may come to be seen as individual moral eccentricities rather than the required minimum standard. If that happens, the legitimacy of the enforcement of ethical codes is undermined.

In the political arena, the defence of misconduct by allies can be just as damaging. Downplaying misconduct by trivialising it or claiming that no-one is concerned by it, lowers the perception of the standards that should be expected. The idea that misconduct should be overlooked because ministers have important responsibilities to discharge is a logical reversal. The more important the tasks, the more important it is that the person undertaking them is fit to do so. Misconduct cannot be overlooked for the very reason that ministers do have important responsibilities. A solicitor who argued that their lack of integrity should be overlooked because they needed to deal with the urgent needs of many clients would open themselves to ridicule.

Time will tell whether the trend of falling public confidence can be reversed, but undoubtedly the reassertion of individual ethical values could play a part. The question, however, should always be an ethical one, and not what MPs each think the voters will think that they ought to have thought.

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