Submissions to the Standards of Conduct Committee of the Welsh Senedd as requested in email dated 9/12/24.

A. Scope

I have been asked to comment on 3 options under consideration by the Senedd Standards of Conduct Committee for dealing with individual member accountability:

'1. The creation of a criminal offence of deception which would be investigated by the police and tried before the Criminal courts.

2. Using an existing investigative body such as the Public Services Ombudsman and an independent Welsh tribunal, such as the Adjudication Board for Wales (if the making of false or deceptive statements of fact is to be a matter for civil sanction).

3. Strengthening the existing Code of Conduct (rule 2) ….to prohibit more explicitly willful lying or deception and strengthen the sanctions which could be applied. These would continue to be dealt with through the existing mechanisms of the Senedd Commissioner for Standards and considered by the Standards of Conduct Committee and Senedd.'

I was also invited to consider any other proposals.

I note that the email to me suggested that the terms of reference of the committee were restricted to considering mechanisms for disqualification of Members and candidates. No mention was made of other sanctions (criminal or civil) although option 1 refers to a criminal offence and option 2 refers to civil sanctions. The discussions before the Committee to date have included consideration of criminal sanctions and it is unclear to me whether this possibility has now been excluded. I discuss (and support) it but accept this may be beyond the scope of my invitation.

B. Personal Background.

I am most grateful to be given this opportunity and I should start by saying that I do not profess to have any expertise in the Welsh system of governance. I have considered the submissions and oral testimony to date, am mindful of the task which the Senedd has taken on and make my comments with what I hope is appropriate humility.

I am a qualified solicitor specializing in major inquests and Inquiries., a non- executive director of an NHS trust in England and a director of Hillsborough Law Now (HLN), a pressure group set up to introduce among other things a duty of candour for public officials enforceable through the criminal process. I am also part of the lawyer's drafting group for Whistleblower UK. I have represented bereaved families in the Hillsborough inquests, the Birmingham pub bombings inquests, the Manchester Arena Inquiry and currently the Covid Inquiry. The views expressed here are however my own.

C. Hillsborough Law

It might be helpful to set out the history of the Hillsborough Law campaign and why HLN considers that a criminal process with criminal sanctions is necessary.

The Hillsborough Disaster occurred during a football match between Liverpool FC and Nottingham Forest on 15 April 1989. An influx of Liverpool fans into the standing-only stalls in the Leppings Lane stand of Sheffield's Hillsborough Stadium caused overcrowding of the pens. This overcrowding resulted in 97 deaths and 766 injuries – the highest death toll in British sporting history.

The 1990 Taylor Inquiry Report on the incident found that the police had neglected their duty by opening all of the gates in an attempt to ease overcrowding, subsequently leading to the crush in the pens as fans rushed in. The police subsequently fed the press stories which were found by the inquest to be false. They blamed the crush on Liverpool supporters – alleging it was due to their hooliganism and drunkenness. The impact of this has persisted even after Lord Justice Taylor's report, which found no fault on the side of the supporters, and failure of control by South Yorkshire Police. A 2009 Independent Panel resulted in similar findings, and a second coroner's inquest in 2016 found the 96 (now 97) supporters were unlawfully killed due to gross negligence by the police and ambulance services. However, besides a single conviction of the stadium's health and safety officer (resulting in a £6500 fine), all prosecutions have failed..

It became clear to us that a statutory duty of candour combined with criminal sanctions for failure to comply was the only effective mechanism for ensuring that public servants tell the truth to inquiries.

Bishop Jones was asked to write a review following the Hillsborough Inquests and this – 'The patronising Disposition of Unaccountable Power' -was laid before the UK parliament in November 2017. The bishop included Hillsborough Law as drafted by us in his report and recommended that once the Law Commission finished its work on the offence of Misconduct in Public Office (now finished) consideration should be given to the Bill. The Bill (formal title: The Public Authority (Accountability) Bill) is now under consideration. The bishop also recommended that a Charter for bereaved families should be adopted by leaders of public bodies. That Charter – accepting the need for openness – has not made a shred of difference that I can see to the conduct of public bodies. This makes the point that only legislation with effective sanctions can actually change the position.

D. The failure of the NHS duty of candour.

HLN was always of the view that while codes of conduct may have a role to play in, they will not succeed in changing behaviour unless backed up by a system of enforcement which includes effective sanctions.

I emphasis 'effective' and in this respect would mention the failure of the NHS duty of Candour. This requires some elaboration.

In response to the Mid Staffordshire Inquiry, a duty of candour was imposed on the NHS in The Health and Social Care 2008 (Regulated Activities) 2014. It was doomed to failure from the start. It requires that:

'As soon as reasonably practicable after becoming aware that a notifiable safety incident has occurred a health service body must—

(a)

notify the relevant person that the incident has occurred in accordance with paragraph (3), and

(b)

provide reasonable support to the relevant person in relation to the incident, including when giving such notification.'

Its main weakness is that it imposes a duty on organisations not individuals. Furthermore, even when an offence is proved the penalty imposed on the organisation (again, not an individual) is minimal - a level 4 fine, with a current maximum of £2500.

There have been a few, very few, prosecutions since the duty of candour was introduced.

The first reported prosecution which went to court was when a Mrs. W suffered a perforated oesophagus during an endoscopy in December 2017.

The procedure was abandoned, and Mrs. W was transferred to a ward for observations. She collapsed on the ward and later died.

Under the regulations, Mrs. W's family were entitled to a full explanation and a prompt apology. Unfortunately, Mrs. W's family received neither a prompt apology nor a full explanation regarding the tragic events that took place prior to her death.

CQC brought a prosecution against University Hospitals Plymouth NHS Trust for their failure to disclose the details of how she died and the failure to apologise within a reasonable timeframe.

The Trust admitted guilt and was fined £1600 by Plymouth Magistrates Court., plus a £120 victim surcharge and £10,845.43 in court costs.

Prior to that Bradford Teaching Hospital in January 2019 was fined £1,250 for failing to apologise to the family within a reasonable period of time, following the death of their baby

boy in July 2016. There also appears to have been a prosecution resulting in the Royal Cornwall Hospitals NHS Trust being fined £16,250 for 13 fixed penalty notices, again for failing to comply with the duty of candour.

Notably absent from this list are the many NHS scandals leading to inquiries.

In 2020 the CQC published a report into maternity services at the Princess Royal hospital and said that the Trust must 'ensure grading of incidents reflects the level of harm, to make sure the duty of candour is carried out as soon as possible.'. The Princess Royal hospital is part of the Shrewsbury and Telford Hospital NHS Trust and of course featured heavily in the Ockenden Inquiry into their maternity services. This report found many instances of a failure to observe the duty of candour - investigating without notifying the mother (page 60) ; not following the duty of candour following a failed forceps delivery (and subsequently failing to train the junior doctor who had not complied with his duty) (P.109) - see the Shrewsbury and Telford Maternity services Inquiry .

Further examples of NHS scandals abound, the ongoing Letby Inquiry being the most recent. They all have in common a theme of issues being raised and ignored by senior management despite the statutory duty of candour.

The conclusion I draw is that a voluntary code of conduct is ineffective as is any regime, statutory or otherwise, which has no effective 'bite'.

The only regime likely to be effective is one which has sufficiently grave sanctions as to act as a deterrent. What those sanctions need to be will inevitably vary from case to case.
The Senedd initiative comes against a background of mistrust of politicians (as discussed in much of the oral testimony to this committee), of politicians and candidates misleading the public and a culture of what might be termed 'misleadership'.
There is an urgent need to restore trust in the democratic process (again this has been discussed in committee) which in turn requires the restoration (or perhaps introduction) of integrity into public service.
No single measure will achieve this and any consideration of sanctions for MS's should take this into account.
We need and expect in addition a statutory duty of candour for public officials. We need a whistleblowing regime which will protect whistleblowers in public life (and in this respect `I would refer you to the website of Whistleblower UK - WBUK.com) . Finally, a review of the effectiveness of the Nolan criteria is due - I would hope the criteria could be tightened up and backed up by a more effective sanctions system.

E. The 3 options
Turning now to the 3 options mentioned at the top of these submissions:
Option 3 -in effect a process relying on the Senedd and/or one of its committees - has the disadvantage that the range of sanctions is limited, and the process is internal. It seems unlikely that this will assuage public concerns about integrity. It also carries the substantial risk of becoming politicised. In this respect I note that the Guardian on 25/12 reported that the Parliamentary Modernising Committee is to recommend that complaints about MP's conduct relating to bullying harassment and sexual misconduct be referred to the Independent Complaints and Grievance system (ICGS) instead of letting political parties deal with them. (See article by Eleni Courea, The Guardian 25/12/24).

Option 1 - The most effective system for dealing with lies by MS's and candidates would be the criminal process. There is no doubt that the prospect of imprisonment focusses the mind. However, it is considered by some that using the criminal process has implications for separation of powers and there are other reservations such as the floodgates argument. I do not believe there is a separation of powers issue here. The Senedd has the power to regulate the conduct of its members in any way it sees fit. I do recommend and recognize that what S' say in the Senedd should (as in the UK parliament) be fully protected and this

is what I understand to be parliamentary privilege. This protection is essential to enable MSs to raise injustices on behalf of their constituents without fear of reprisal. I would suggest this is accompanied by the responsibility to filter out wild and speculative accusations but that is another matter.
. Hillsborough Law Now considered whether to extend the duty of candour to politicians. We decided this was not feasible because there was no prospect of garnering political support (among MP's) for this, but we were also conscious of the constitutional difficulties. I do not think it constitutionally impossible to fashion a criminal offence although consideration needs to be given to the implications and the sanctions.
I have seen argument before you that using Judges will help reassure the public as Judges are trusted more than MP's. That may turn out to be flawed. Judges enjoy public trust to some extent because they are largely separate from the political process – the more Judges are involved in it the more the possible threat to their perceived independence and thereby the public trust in them. Ultimately the primary aim is not to reassure the public, it is to restore integrity to public life. The reassurance should follow from that.

There is a distinction to be drawn here between lying by MS's and lying by political candidates. Candidates do not have the protection of parliamentary privilege, nor do they have the constitutional protection of being part of the legislature. Indeed, the committee has heard from Chief Constable Amanda Blakeman that s.106 of the Representation of the People Act 1983 creates a criminal offence of making a false statement while a candidate. I would suggest that candidates can and should be subject to a standard criminal process with such sanctions as the government considers appropriate (including imprisonment). I would suggest that the objections to criminal process for candidates can all be surmounted. The 'floodgates' argument is a red herring -there is no evidence that there would be a flood of prosecutions or even complaints and the police are well able to deal with frivolous/vexatious complaints. Objections have been raised that proving the elements of a criminal offence beyond reasonable doubt would be difficult, but that is as it should be. It would be preferable for any offence to be triable only by a judge and jury as this would involve trial by peers.
Once someone is elected by a democratic process it is still possible to justify a criminal process as the authority for that will come from the legislation passed by the Senedd itself.

Option 2 - Using an independent body and empowering it to impose civil sanctions.
The effectiveness of this depends on the quality of the process and the sanctions which the body could impose. Would it be empowered to suspend/disqualify a sitting MS? Would it have the ability to act as a judicial or quasi-judicial body? Would the alleged miscreant be allowed legal representation? Would there be a prosecutor equivalent with adequate resources to investigate? Would civil sanctions ensure compliance? Any MS with a substantial backer could happily accept a fine. Finally, as raised in oral hearing before you, would it send the right message to the public?

In conclusion I would suggest that Option 3 is inappropriate and ineffective, Option 2 has limitations and is unlikely to be successful and Option 1 – a criminal process ensuring full rights for the accused MS/candidate – is the most sensible and appropriate of the three suggested.

I thank the Committee for their invitation to submit and would be happy to expand on any of these points if thought helpful.

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