

Briefing Note re Evidence to be provided on 18 November 2024 to the
Senedd Members Standards of Conduct Committee Inquiry
into Members' Accountability

This paper is prepared on behalf of the Criminal Bar Association of England and Wales, by Jonathan Elystan Rees KC, Owen Edwards KC and Alexander Greenwood, the Welsh Representatives on the Criminal Bar Association Executive Committee ('the authors'). Mr Rees KC, Mr Edwards KC and Mr Greenwood are criminal practitioners based at chambers in Wales and Chester, practice primarily in the courts in Wales and are registered voters within Wales.

1. The authors have drafted this note in response to the proposal made by the Institute for Constitutional Democratic Research ('ICDR') in the document entitled, "A Model for Political Honesty: A White Paper proposing legislation for the disqualification of politicians who are found guilty of deliberate deception by an independent judicial process" ("White Paper").

2. In the Executive Summary of the White Paper it is stated that:

The Welsh Government has publicly undertaken to introduce a new law whereby:

Politicians or candidates who are found guilty of deliberate deception by an independent judicial process will be disqualified from office.

3. The proposal in the White Paper does not meet that objective, but instead provides for a model whereby a politician or candidate may be disqualified from office without any explicit finding of *deliberate deception*.
4. The stated threshold of a finding of *deliberate deception* is necessarily and properly a high threshold, to which the protection of the burden of proof falling upon the claimant to establish the deliberate deception should apply.
5. Similarly, the claimant should bear the burden of establishing that there has been a deliberate deception to the highest standard of proof.
6. It is clear from the publicly stated intention of the Welsh Government above, using the language of “guilt” and “deliberate deception”, that the Welsh Government recognises the criminal nature of the issue at stake for the parties. Where the criminal law is engaged, the standard should be that the tribunal of fact is nothing less than sure that there has been a deliberate deception on the part of the politician or candidate.
7. A failure to make a correction, following a previous finding that on the balance of probabilities that the politician or candidate has failed to establish that the statement was true, does not amount to a finding by the tribunal of fact that it is sure that the politician or candidate is guilty of *deliberate deception*. It is itself misleading to equate the two.

8. Even where the standard of proof is stated to be a balance of probabilities, such as in civil disciplinary procedures, the courts have made it clear that in appropriate cases, “the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability”¹. The allegation of a deliberate deception on the part of a politician or candidate is a serious allegation. However, the procedure proposed in the White Paper does not require *any* evidence that the politician or candidate has used a deliberate deception.
9. A procedure whereby a failure to make a correction may lead to disqualification from office, following a previous finding that on the balance of probabilities that the politician or candidate has failed to establish that the statement was true, does not amount to a procedure which recognises that the allegation of a deliberate deception on the part of a politician or candidate is a serious allegation, and hence the stronger should be the evidence before any court concludes that the allegation is established. Instead it is itself a device to avoid the implications of *B (Children), Re* [2008] UKHL 35, [2008] 4 All ER 1, [2009] 1 AC 11 and the protections for those facing serious allegations of misconduct.
10. The criminal law has long recognised that a “lie” is a deliberate untruth: i.e. it does not arise from confusion or mistake².

¹ *B (Children), Re* [2008] UKHL 35, [2008] 4 All ER 1, [2009] 1 AC 11 at paragraph

² *Lucas* (1981) 73 Cr App R 159, CA

11. The intention of the Welsh Government that only those “Politicians or candidates who are found guilty of deliberate deception by an independent judicial process will be disqualified from office” is consistent therewith.
12. It is, however, misleading to suggest as the White Paper does that a “lie” can be established without proof of “intent to lie” (see paragraph 27 thereof). A lie is a deliberate untruth.
13. It is also misleading to suggest that the model proposed in the White Paper is based on existing regulatory law (see the Executive Summary thereof) and that “implementing the proposed regime will, therefore, not require the courts to do anything that they are not already experienced at doing” (see paragraph 24 thereof).
14. The examples given in the White Paper of analogous procedures are the use of planning enforcement notices requiring the removal of unlawful buildings³, temporary stop notices requiring a cessation in unlawful development⁴, abatement notices requiring the recipient to cease committing a statutory nuisance⁵, and community protection notices requiring cessation of anti-social behaviour⁶.

³ Town and Country Planning Act 1990, s.172 (‘TCPA’)

⁴ Town and Country Planning Act 1990, s.171E

⁵ Environmental Protection Act 1990, s.80 (‘EPA’)

⁶ Anti-social Behaviour Crime and Policing Act 2014. S.43 (‘ASBCPA’)

15. They are not, in fact, analogous and do not support either the proposition that the proposed model is based on existing regulatory law or that the proposed regime will not require the courts to do anything that they are not already experienced at doing.
16. The issuing party in each of the above procedures is not the court *on application by any person*. Instead the power to make such notices is reserved to bodies which have particular expertise:
- (a) In the case of planning enforcement notices, stop notices and abatement notices
Local authorities; and
 - (b) In the case of community protection notices, “authorised persons”, namely a constable, or a person designated by the local authority for the purpose of issuing community protection notices.
17. In contrast to *any registered voter*, such bodies are subject to statutory checks and balances to ensure that there is an adequate evidential platform before they act and that any such action is compliant with their statutory duties - in many instances that means an assessment that the public interest test used by the Crown Prosecution Service, and adopted by many other statutory agencies, is met⁷.

⁷ <https://www.cps.gov.uk/publication/code-crown-prosecutors>

18. In stark contrast with the proposal from the ICDR, there is no reverse burden of proof upon the potential subject of the notice in the above procedures under the TCPA, EPA and ASBCPA:

(a) Under section 43 of the ASBCPA 2014, an authorised person may issue a community protection notice only “if satisfied on reasonable grounds that – (a) the conduct of the individual or body is having a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality, and (b) the conduct is unreasonable”;

(b) Under section 80(1) of the EPA 1990, the local authority shall serve an abatement notice only if satisfied that a statutory nuisance exists, or is likely to occur or recur;

(c) Under section 171E of the TCPA 1990, the local authority may issue a temporary stop notice only if it thinks that there has been a breach of planning control in relation to any land and that it is expedient that the activity which amounts to the breach is stopped immediately; and

(d) Under section 172 of the TCPA 1990, the local authority may issue an enforcement notice only where it appears to them that there has been a breach of planning control and that it is expedient to issue the notice.

19. The local authority in the examples in paragraph 16(c), (d) and (e) above must have reasonable grounds before they can be satisfied/think that a nuisance/breach of planning control has exists/has occurred.
20. Further a local authority as a creature of statute can only act when it is in the interests of the inhabitants of their area.⁸ Thereafter adequate evidence has to be obtained to justify action in respect of criminal proceedings in accordance with their enforcement code which almost universally adopt the Code for Crown Prosecutors test that there must be a realistic prospect of a conviction and any prosecution must be in the public interest.
21. These important safeguards act as a gateway to prohibit unmeritorious or vexatious accusations ever reaching court, and ensure that the courts are not overly burdened.
22. Such decisions, thereafter, remain open to challenge in the High Court, and often are, causing significant additional delay and costs. The White Paper proposals as to proceedings in the Magistrates' Courts would also be open to such challenges. The authors have no confidence that the model proposed in the White Paper ('the ICDR Model') will meet the stated intention of the White Paper that any new enforcement regime must "provide swift resolution" (see paragraph 22 thereof).

⁸ S222 Local Government Act 1972

23. If the above procedures under the TCPA, the EPA and the ASBCPA operated on the model proposed by the ICDR, it would fall on each potential subject of a notice to prove on a balance of probabilities that:

(a) His/her conduct was not having a detrimental effect on the quality of life in the locality, and that his/her conduct was reasonable; or that

(b) a statutory nuisance did not exist/not likely to occur or recur; or that

(c) that there had been no breach of planning control;

or otherwise be made subject to a behaviour notice.

24. None of the above examples employ the IDRC Model gateway threshold of “real possibility”. The term “real possibility” is not a recognised legal term of art. Contrary to the misleading impression given in the White Paper at paragraph 24, the “real possibility” test is a “building block” of the proposed regime which is *not* an existing legal concept⁹. It is unclear to the authors of this paper what is meant by a “real possibility”, other than it being something other than impossibility.

⁹ It does not feature, for example, in *Jowitt's Dictionary of English Law*, *Stroud's Judicial Dictionary of Words and Phrases*, or *Osborn's Concise Law Dictionary*

25. None of the above examples (under the TCPA, the EPA or the ASBCPA) employ the IDRC Model of a “leave” stage of review by a District Judge or Deputy District Judge within 24 hours of the application being issued (to filter out applications which are “vexatious” or have “no real prospect of success”).
26. Leaving aside for the moment the huge resource implications for the Magistrates’ Courts of requiring District Judges and Deputy District Judges to be available to review applications open to any registered voter within 24 hours, the introduction of a “leave” stage prior to an application in the Magistrates’ Courts is a further novel mechanism, to which District and Deputy District Judges will have no familiarity (unlike High Court Judges, who deal with applications for judicial review in the High Court or applications for leave to appeal conviction and/or sentence in the Court of Appeal Criminal Division).
27. Further, within a model where a successful application does not have to prove anything, it is difficult to envisage an application for a correction notice which may be said to have no real prospect of success (other than an application where it can be said that it is impossible that the statement is false).
28. The initiation of criminal matters in the Magistrates’ Courts is presently governed by the Criminal Procedure Rules (“CrimPRs”) 2020 as amended. The requirements to apply for a warrant, summons or requisition are stringent and necessitate setting out full details of the conduct which comprises the commission of the offence, the legislation under which the application is made and compliance with any statutory

time limits on proceedings. It is anticipated any new procedure would require amendment to the CrimPRs.

29. Importantly, the CrimPRs require the applicant seeking to commence proceedings in the Magistrates' Courts to *disclose to the court all the information that is material to what the court must decide* (recognising that the first step of proceedings takes place without the participant of the potential subject of proceedings).
30. In the case of false statements, this rule should require the applicant seeking to commence proceedings to disclose *at the earliest stage all known material which may have a bearing upon the question of truth or falsity*. It is a rule which exists to ensure fairness to the party who may potentially be made subject of proceedings, and should not be avoided by device. It is a rule which the authors believe would quite properly create a huge resource burden on both applicants and the courts, in seeking to resolve allegations that politicians/candidates have made statements which are said to be objectively untrue.
31. Questions over compliance or otherwise by an applicant seeking to commence proceedings in the Magistrates' Courts with what is known as the "duty of candour" has led, in other fields, to complex proceedings in the High Court. The authors state again that they have no confidence that the model proposed in the White Paper ('the ICDR Model') will meet the stated intention of the White Paper that any new enforcement regime must "provide swift resolution" (see paragraph 22 thereof).

32. The resource implications for the Magistrates' Courts in dealing with applications under the ICDR Model are potentially huge. The White Paper does not suggest that any research has been conducted into the likely volume of applications which may be anticipated. It is easy to envisage coordinated complaints in which registered voters in different areas of Wales make applications based upon the same or similar comments by a politician. There appears to be no filter envisaged by the scheme which would allow for this likely scenario.

33. In England and Wales there is a backlog of over 382,972 cases in the Magistrates' Courts alone, with too few magistrates (13,340 rather than 17,000), too few court legal advisors, and with criminal solicitors leaving the profession in droves. The most recent survey of the Magistrates' Courts in April 2024 portrayed overworked and overburdened Crown Prosecutors and Criminal Solicitors. This scheme would require district judges and deputy district judges to devote time to filtering out applications rather than address the backlog. The pressures on Magistrates' Courts are expected to increase rather than diminish because of plans to increase their remit and sentencing powers. The Magistrates' Courts backlog in Wales in the final quarter of 2023 amounted to 17,480 cases, the highest since modern records began in 2012. The backlog in Wales increased by over 16.6 percent in that year twice the rate of increase in England.

34. The suggestion of an appeal to the Crown Court *strictly limited* to points of law no doubt envisages relatively few such appeals. As the body of this report makes clear

we feel that there would be a plethora of legal issues to consider if this legislation was passed. The Crown Courts have no spare capacity to deal with such issues and certainly would not be in a position to deal with appeals speedily.

35. Each month, the number of new cases reaching the Crown Court outweighs the number of cases which are dealt with. That means that the backlog of 67,573 Crown Court cases at the end of 2023 is not reducing. That backlog represents a 23 year high from a record low of 32,935 in 2018. On current projections the backlog is expected to increase to 80,000 driven in part by reduced court sittings planned for this year.

36. In Wales the Crown Court backlog at 31 December 2023 was 2,595 up 20 percent in one year and nearly twice the 2018 level.

37. Over a quarter of criminal cases which have been sent to the Crown Court now wait for a year or more to be heard, prolonging distress for every participant in every trial. There are an increasing number of cases, 6,523, where people have been waiting over two years for a trial. As Sam Townend KC, Chair of the Bar Council has repeatedly said, "Our call for sufficient resources is set against the backdrop of a 22.4% decrease in public spending on the justice system under the last Government in real per person terms taking account of inflation, with the cut most acutely felt in legal aid – the spending on barristers is reduced by over 39%."

38. The criminal law already caters for politicians who deliberately lie, where their conduct is sufficiently serious and where the politician was discharging the duties of a public office (such as a Member of the Senedd) at the time.

39. The common law offence of misconduct in public office ('MIPO') penalises conduct where the following four elements are present¹⁰:

- (a) A public officer acting as such
- (b) Wilfully neglects to perform his duty and/or wilfully misconducts himself
- (c) To such a degree as to amount to an abuse of the public's trust in the office holder,
- (d) Without reasonable excuse or justification.

40. The need for the impugned conduct to be of such a degree as to amount to an abuse of the public's trust in the office holder requires an assessment to be made of the seriousness of the conduct, and in particular, whether the conduct is so serious that the jury should decide that it amounts to a crime. This is a high threshold, as the Court of Appeal Criminal Division has recently observed¹¹.

¹⁰ *Mohammed Adnan Ali v Rex* [2023] EWCA Crim 1464 at paragraph 21

¹¹ *Mohammed Adnan Ali v Rex* [2023] EWCA Crim 1464 at paragraph 25

41. A failure to insist upon a high threshold would place a constraint upon the conduct of public officers in the proper performance of their duties which would be contrary to the public interest¹².
42. A decision to charge an individual under the MIPO provisions is taken at the very highest level of the CPS after scrutiny by a senior lawyer. The offence is indictable only and a person charged would be guaranteed a jury trial. By contrast, the White Paper proposals envisage offences triable summarily only, albeit the consequences of a conviction for dishonesty (“deliberate deception” by the standards of ordinary reasonable people¹³ is dishonest) may well be profound including effective disqualification from many professional occupations (not just from the political sphere under any specific disqualification order).
43. It is correct that *political campaigning* has been held to fall outside the ambit of the common law offence of misconduct in a public office (on the basis that the political campaigner is not, when campaigning, discharging the duties of any public office that they may concurrently hold).
44. It is also correct that the problem of false statements in the course of political campaigning is not new. The UK Parliament has previously legislated to control certain false campaign statements which are to be considered illegal practices - for

¹² *Mohammed Adnan Ali v Rex* [2023] EWCA Crim 1464 at paragraph 26, quoting with approval Pill LJ; see also *R (Johnson) v Westminster Magistrates’ Court* [2019] 2 Cr App R 30 at paragraph 24

¹³ *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2018] 1 Cr App R 12 at paragraph 47

example, section 106(1) of the Representation of the People Act 1983 which makes it an offence before or during an election for the purpose of affecting the return of any candidate makes or publishes any false statement of fact.

45. Section 106(1) of the 1983 Act properly requires the prosecution to prove that the impugned statement is false to the criminal standard of proof, and provides thereafter for a defence where the defendant shows, on the balance of probabilities, that he had reasonable grounds for believing and did believe, the statement to be true.

46. In the view of the authors of this note, any extension to the scope of the criminal law in this area is fraught with peril, and certainly should not involve a wholesale change in the approach of the criminal law to the making, and resolution of, allegations of falsity, such as placing the burden of proof upon the politician to demonstrate truth.

47. As the Electoral Commission has recognised, political discourse requires campaigners to debate the relative merits of the arguments and claims being made by those campaigning for the opposing outcome:

“Even official data can and will be presented by campaigners in a way that favours their argument – that is the nature of political campaigns. It will not always be possible to establish the truth about campaign claims in an independent truly objective sense.”¹⁴

¹⁴ Quoted in *R (Johnson) v Westminster Magistrates’ Court* [2019] 2 Cr App R 30 at paragraph 37

48. Legal argument is often of a similar character, containing disputed assertions of fact.
49. It will be clear from the above, that the authors are of the view that the White Paper is misleading in a number of respects.
50. It is noted that the IDRC Report Working Group which produced and published the White Paper includes a sitting Member of the Senedd.
51. It is an irony that under the IDRC Model, which does not require proof of an intent to mislead, the said Member might well be required to prove in a court of law and on a balance of probabilities that the statements made within the IDRC Report were true (for example, that the “building blocks” of the IDRC Model are all existing legal concepts and that implementing the proposed regime will, therefore, not require the Magistrates’ Courts to do anything that they are not already experienced at doing).
52. It will also be clear from the above that the authors suggest that such a procedure may have a chilling effect on argument and be wholly inappropriate.
53. We are sympathetic with the aim of providing a more robust system of accountability in the Senedd and are willing, with colleagues at the Bar in Wales, to advise and assist in considering proposals for disciplinary procedures and mechanisms for Senedd members.

54. It is acknowledged that the Senedd has expressed the view that the current system may offer insufficient available sanctions against members of the Senedd who engage in misconduct including deliberate deception. There are many ways in which available sanctions can be extended in accordance with the Nolan principles, for example, by way of providing for the disqualification of elected Members through the process of recall.

55. However, the stated aim of increasing trust in politics by penalising the making of false statements by members and candidates will not in our view be met unless any new regime meets the tests of fairness and practicability.

56. We believe further that great care should be exercised before creating a new criminal offence. The criminal law should be used sparingly, in line with the overriding objective to deal with all cases justly to acquit the innocent and convict the guilty.

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