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LEGISLATING FOR CANDOUR?

WHAT THE HILLSBOROUGH LAW IS LIKELY TO DO TO GOVERNMENT

Conor Casey, Richard Ekins KC (Hon) and
Sir Stephen Laws KCB, KC (Hon)

Preface by Rt Hon Lord Butler of Brockwell
KG GCB CVO

Foreword by Lord Faulks KC

Policy Exchange
Project 2029
A Plan to Reshape Britain

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Preface

Rt Hon Lord Butler of Brockwell KG GCB CVO, Cabinet Secretary 1988-1998

This paper by Professor Ekins, Sir Stephen Laws and Dr Casey describes their misgivings, as lawyers, about the Public Office (Accountability) Bill, aka the "Hillsborough Bill". From my different perspective as a former civil servant, I share their misgivings.

The authors compare the Bill with the Freedom of Information Act, which Sir Tony Blair's government passed in 2000 and which Tony came to regret bitterly. Having admitted his responsibility for it, Sir Tony went on to say "Where was Sir Humphrey when I needed him?"

I was Sir Tony Blair's Sir Humphrey at the beginning of his Administration. He must feel that the Civil Service did not warn him adequately about the consequences of the Freedom of Information legislation. We did not do so because the legislation was promised in the Labour party's 1997 manifesto and the Government was committed to it. Moreover, since the Civil Service was widely believed to be the part of the government most addicted to self-protective secrecy, the reaction would have been "They would say that, wouldn't they?" So we saw it as our duty to help the government pass the Bill and make the best of it.

Much the same now applies to the Hillsborough Bill. This saddens me because I have attended meetings organised in the House of Lords by protagonists of the Bill and I have seen at first hand the passion with which the victims of the Hillsborough tragedy, the post office scandal and the infected blood debacle have worked for the Bill over many years. I have also noted the importance which our recent Prime Minister, Sir Keir Starmer, attached to getting the Bill through the House of Commons as one of his final acts.

My sadness is that the Bill will not achieve what its well-intentioned proponents hope for. Legislation and codes of behaviour do not make good people. Those who are good do not need them; those who are bad ignore them or find ways around them. Paradoxically, as Professor Ekins, Sir Stephen and Dr Casey argue, the Bill is likely to make public servants more secretive, not less. It will slow down and add greater bureaucracy to the processes of government when the reverse is necessary. It will damage trust between politicians and civil servants, and between our government and others, who will believe that legitimate confidences will not be protected.

I have concluded with regret that reversal of the course on which the

Government has set itself in passing the Bill is past praying for. But the Government and the public should be aware of the damage which many with experience of the law and government believe that the Bill is likely to do. If all that is now possible is to amend and improve the Bill, this paper's recommendations deserve careful consideration.

Foreword

Lord Faulks KC, former Justice Minister and Chair of the Independent Review of Administrative Law

The Public Office (Accountability) Bill is, and will continue to be, referred to as the "Hillsborough law". When a particular tragedy or scandal gives its name to a piece of legislation, there is a danger that there will not be the same level of parliamentary scrutiny that a potentially far-reaching change in the law deserves. Particularly when the legislation is substantially, if not wholly, contained in a party's manifesto, and where there can be no real doubt about the many serious failings of the public authorities in their handling of the tragedy itself and the investigation into it. Nor can there be any real issue about the need for candour in our public officials.

It is understandable why opposition parties have largely stood back from opposing, or even criticising, the legislation. In part because of the manifesto commitment, but also because arguing against a duty of candour or seeking to modify the scope of such a duty is politically unattractive.

The authors of this paper have done Parliament, and the public, a real service. They have pointed out the many unintended consequences that may follow the enactment of the Bill. The comparisons with the now, much regretted, Freedom of Information Act are particularly apposite. Has that Act resulted in better decision making or simply changed the audit trail when decisions are made? Will this piece of legislation result in inappropriate and oppressive prosecutions of public officials, including Ministers? Will it compromise the flow of information between officials and ministers? Will it create a great deal of legal uncertainty?

The unstated premise behind the legislation is that there is a general lack of candour in our public officials. I am not convinced of this. Nor am I convinced that existing means of holding officials to account are so inadequate that they merit such a radical change in the law. This paper should serve as a wakeup call.

Clause 12, which creates an offence of misleading the public is particularly worrying. The requirement of the DPP's consent before a prosecution is launched is intended to be a safeguard. But the vagueness of the ingredients of the offence and the width of the definition of a public official give very little assistance to a prosecuting authority, or the DPP, as to when to prosecute. Such decisions may have an unwelcome political component and run the risk of inhibiting free speech.

In the course of the forthcoming debates, the House of Lords should

consider amending the Bill, or at the very least should seek reassurance in relation to the points that this paper so clearly highlights.

Executive Summary

The Government has proposed a major change to the framework of government, comparable in its significance, and in its likely deleterious consequences, to the Freedom of Information Act 2000. This legislation, the Public Office (Accountability) Bill, more commonly known as the "Hillsborough Law", will almost certainly be enacted because the Opposition has not opposed it and because the House of Lords has a constitutional duty to assent to legislation that gives effect to a manifesto commitment. The Government says that this new legislation "places a new legal duty on public servants to act truthfully and fully support investigations into the state, ensuring wrongdoing is not concealed and delivering justice for victims."[1] In fact, as this report shows, the legislation is likely to damage the way in which government functions, while doing very little to help ensure transparency. Parliamentarians should question this legislation carefully, considering its likely implications for how we are governed, and requiring the Government to explain, if it can, how the significant risks that it poses can be managed.

The Public Office (Accountability) Bill completed its Commons stages on 14 July 2026 and is now in committee in the House of Lords.[2] It does two quite different things. The first is to create a statutory duty of candour owed by public authorities and officials to inquiries and investigations, backed by a new criminal offence, together with provision about legal aid and "parity of arms" at inquests. That is what the 2024 Labour manifesto promised. The second is a set of general duties and offences that have nothing in particular to do with inquiries: a statutory duty on every public authority to promulgate an ethical code; a new offence of misleading the public, applying to Ministers and officials alike; and the abolition of the common law offence of misconduct in public office in favour of two statutory offences. These were not mentioned in the 2024 manifesto.

The Bill rests on a premise that should not lightly be accepted: that lying, stonewalling and obfuscation are a general feature of the UK public sector, serious enough to warrant the imposition of far-reaching (and poorly defined) criminal sanctions across the whole public sector. Hillsborough was a grave scandal, as were the Horizon postmaster and infected blood scandals. These scandals all involved appalling examples of dishonesty and conscious neglect of the obligations of public service. They caused great suffering on those affected that should never be repeated and should have been exposed and remedied much sooner than they were. But each came to light through the institutions we already have, and none of them shows that the state as a whole has a candour problem distinct from

1. Hillsborough Law Bill, Policy Paper, 16 September 2025 https://www.gov.uk/government/publications/hillsborough-law-bill
2. Public Office (Accountability) Bill, HL Bill 42 (2026–27), as brought from the Commons on 16 July 2026. Second reading in the Lords, 1 September 2026. Running lists of committee stage amendments were published through September and into October 2026.

what is common in any large, complex, institution. They may, though, raise questions about whether public inquiries are the most expeditious and effective way of addressing the sort of issues they involved.

The Bill is likely to lay another layer of costly and debilitating legal process over a government machine that is slow and defensive enough as it is. The Freedom of Information Act 2000 is the obvious precedent. It was proposed and enacted as a law that would make government more open, and transparency is a precondition of meaningful political accountability. But what that Act produced, as both its own sponsor and the Prime Minister that proposed it came to admit, was a government that writes less down and is less internally candid. The Government has not done enough in this instance to show that this Bill will not reproduce the mischiefs of the Freedom of Information Act, this time with criminal sanctions attached; or that it will not reinforce the culture, where it exists within the public sector, of obstructing proper scrutiny and failing to acknowledge mistakes.

The new offence of misleading the public (clause 12) is the most objectionable provision in the Bill and should be removed. It is drafted in open-textured moral language ("dishonesty", "obfuscation", "harm", "distress", "seriously improper", "what is to be expected"), turns on what a defendant "ought to know", and reaches deep into the ordinary cut and thrust of political argument. The Law Commission recommended abolishing the common law offence of misconduct in public office because it was too vague to satisfy the requirements of the rule of law. Later provisions of the Bill put that offence into a new statutory form which is still, as drafted, potentially inconsistent with those requirements.

One risk is that the new offence of misleading the public will inhibit open political debate and be used as a weapon of political complaint. But the risk of actual prosecution is also real and not precluded on the face of the bill. The Bill's requirement that the Director of Public Prosecutions (DPP) consent to any prosecution is intended as a safeguard against vexatious prosecutions, but it will place enormous pressure on the DPP to resolve the vagueness of the offence. A future DPP will have to decide whether, for example, a Minister's statements about migration, tax, the NHS or net zero were "seriously improper" and "misleading". It is worth noting too that the definition of a public official is wider for the purposes of clause 12 than for the Bill's misconduct offences, and appears to include, for example, a teacher at a state school.[3]

The Government accepts that Article 9 of the Bill of Rights 1689 protects what is said in the Houses of Parliament. It also says that the offence applies to Ministers, who are public authorities in their own right, whenever they speak outside it. If one concedes the argument that there are strong reasons why extending the criminal law into debate in the Houses is a bad idea, it is hard to see why these reasons do not apply with similar force elsewhere in respect of a press conference or media interview or a social media post.

The Inquiries Act 2005 already lets the chair of an inquiry compel

3. Schedule 2, paragraph 2(1)(j), lists "a school or further education provider" among the public authorities for the purposes of Chapters 1 and 3 of Part 2, and paragraph 3(1)(a) makes anyone who "works for" such an authority a public official; under clause 25(3) that includes anyone employed by it ("school" in clause 25(1) means the proprietor of a maintained school or an Academy). By contrast, Schedule 4, paragraph 26(4), provides for the purposes of Part 3 of the Bill that a person does not hold public office for the purposes of the Part 3 offences "solely by virtue of working for a school".

evidence and already makes it an offence to obstruct a statutory inquiry or to suppress or destroy documents. A duty to come forward unprompted – which is what the Hillsborough Law will introduce – makes sense in the context of a narrow, tightly framed inquiry. Applied to the sprawling, multi-year inquiries the United Kingdom now runs as a matter of habit, and applied, as clause 8 of the Bill provides, to inquiries already under way, including the Covid-19 Inquiry, it is a standing instruction to every official to document defensively, and it casts uncertainty over what their legal duties are. It is at least conceivable, though we put it no higher, that the result will be inquiries that are slower, less focused and less well-informed, rather than better served.

Personal criminal liability will change the relationship between Ministers and civil servants in ways the Government has not thought through. Officials exposed to prosecution may end up doing less and refusing more instructions; if Ministers are exposed to prosecution, this will give officials a legal reason to decline instructions.

We recommend that Parliament: remove clause 12 (the new offence of misleading the public) from the Bill; remove clause 10 (the duty to promulgate ethical codes) from the Bill, or in the alternative amend the clause to make departures from the code non-justiciable; amend clause 5 (the "candour offence") to require intention rather than recklessness and to confine the offence to statutory inquiries; amend the Bill to introduce an express saving for Article 9 of the Bill of Rights 1689 (the freedom of speech in Parliament); require the Government to explain to Parliament's satisfaction, before agreeing to pass the Bill, how the Government expects the Covid-19 Inquiry and other ongoing inquiries to operate effectively under the new duties.

None of these changes requires parliamentarians to thwart legislation that gives effect to a manifesto commitment. But these changes, or others like them, are necessary if the Hillsborough Law is to avoid undermining effective government and free political discourse. The gravity of the Hillsborough scandal does not mean that whatever legislation is proposed in response should be enacted without amendment or debate. On the contrary, legislation that risks having such damaging consequences should not be enacted without careful thought and robust debate, neither of which, with respect, has characterised the legislative process up until this point.

Recommendations

1. **Remove clause 12.** The offence of misleading the public is drafted in terms too uncertain to satisfy the rule of law, reaches the ordinary conduct of political argument, invites politicised complaint and politically charged prosecution decisions, and will alter the relationship between Ministers and officials for the worse. Conduct of the kind the Government describes, such as a police force or hospital knowingly putting out a false account of an incident, is already criminal and would in any event be caught by the candour offence (clause 5) once an inquiry or inquest is under way. If the Government insists on a free-standing offence, it should be confined to formal statements by public bodies about specific incidents, require knowledge rather than negligence, and exclude Ministers.
2. **Add an express saving for Article 9.** The Bill should provide, in the terms of section 1 of the Parliamentary Standards Act 2009, that nothing in it is to be construed by any court as affecting Article 9 of the Bill of Rights 1689.
3. **Tighten clause 5.** The candour offence should require intention to impede the inquiry, as section 35 of the Inquiries Act 2005 already does, and should not extend to recklessness. The Government should explain why the existing offences in section 35 were inadequate and why the maximum penalty should double.
4. **Confine the duty of candour to inquiries that can bear it.** The duty should apply only to statutory inquiries, coronial investigations and such non-statutory inquiries as the Secretary of State designates by name. The Government should set out, before the Bill passes, how it expects the Covid-19 Inquiry and the other inquiries caught by clause 8 to operate under the new duties.
5. **Remove clause 10 or amend it to make departures from the code non-justiciable.** The duty to promulgate ethical codes risks adding a new ground of judicial review without evidence that it will improve conduct.
6. **Reconsider the "ought to know" and "reasonable person" formulae in clause 13** in light of the criticisms of clause 12.
7. **Confront the Freedom of Information Act precedent.** Before Parliament legislates again on the assumption that a statutory duty of openness produces openness, the Government should be asked to explain why this Act will not aggravate the damage to internal deliberation that the Freedom of Information Act has already done.

1. Introduction

The Government has proposed a major change to the framework of government, comparable in its significance, and in its likely deleterious consequences, to the Freedom of Information Act 2000. The legislation, which has yet to complete its passage through the House of Lords, is commonly known as the Hillsborough Law because its political origins lie in the long campaign by the families of those who died at Hillsborough in 1989 to hold the police and other public bodies to account, both for what happened that day and for what was said about it afterwards.[4] The Public Office (Accountability) Bill was introduced in the House of Commons on 16 September 2025, was carried over into the current session, completed its Commons stages on 14 July 2026 and was brought to the Lords two days later as HL Bill 42.[5] It had its second reading in the Lords on 1 September and is now in committee. This paper explains what the Bill does, and why the Government says it is necessary, and then comments critically on the provisions that we think are most likely to do harm.

Nobody who has read the 2012 report of the Hillsborough Independent Panel[6] or Bishop James Jones's 2017 report,[7] can doubt that the bereaved families were lied to by the police force and then kept from the truth for a generation by official denials and prevarication. While we deeply sympathize with the families who were lied to and obstructed for a generation, and agree that nobody should be treated in that way again, it does not follow that the whole framework of government should be changed in response. We are concerned by many of the Bill's provisions and by the fact that it is receiving relatively muted parliamentary scrutiny. In the Commons, the Bill passed its second reading on 3 November 2025 and its third reading on 14 July 2026 without a division.[8]

People holding public office should tell the truth and act properly and honourably. The question that this Bill raises, however, is whether this reasonable expectation about the conduct of people in public life is best met by imposing the strictures of the criminal law, and whether the attempt to meet it in that heavy-handed way will result, not in government being more transparent and more willing to acknowledge mistakes, but in its being simply more defensive and risk averse. In answering that question, this report aims to contribute to Policy Exchange's Project 2029 programme, the point of which is to strengthen parliamentary government and ministerial accountability, thus helping to make it possible for elected governments to act effectively for the public good.

4. A reader who is unsure about what happened at Hillsborough will not fully understand the Bill. On 15 April 1989, ninety-six Liverpool supporters were crushed to death at the Hillsborough stadium in Sheffield during an FA Cup semi-final, after the South Yorkshire Police commander ordered an exit gate opened and the crowd flowed into pens that were already full; a ninety-seventh victim died of his injuries in 2021. Within hours senior officers were briefing the egregious lie that drunken and ticketless fans had forced the gate, and that account ran on the front pages. Lord Justice Taylor's inquiry found within months that the main cause of the disaster was a failure of police control, but the first inquests, in 1991, returned verdicts of accidental death and many continued to accept the police officers' account. Lord Justice Stuart Smith examined and reported in 1998 on changes made to draft witness statements including the reasons why they had been altered on legal advice. In 2012, the report of the Hillsborough Independent Panel concluded that the narrative blaming the supporters had been constructed and sustained by the police force itself. The original verdicts were then quashed, fresh inquests concluded in 2016 that the dead had been unlawfully killed and that the supporters bore no responsibility, and the criminal prosecutions that followed failed, the last of them in 2021. The 2016 inquests were conducted on the wider footing required by Article 2 of the European Convention on Human Rights, and this is sometimes cited as evidence of the value of the Human Rights Act 1998. The decisive steps, however, were the Panel's disclosure exercise, which was non-statutory, and the quashing of the original verdicts by the High Court on the application of the Attorney General under section 13 of the Coroners Act 1988. Neither owed anything to the 1998 Act.
5. Public Office (Accountability) Bill, HL Bill 42 (2026–27), as brought from the Commons on 16 July 2026. Second reading in the Lords, 1 September 2026.
6. The Report of the Hillsborough Independent Panel (September 2012), https://www.gov.uk/government/publications/the-report-of-the-hillsborough-independent-panel.
7. The Right Reverend John Jones KBE, A report to ensure the pain and suffering of the Hillsborough families is not repeated (1 November 2017), https://assets.publishing.service.gov.uk/media/5a82c1cce5274a2e8ab5931d/6_3860_HO_Hillsborough_Report_2017_FINAL_updated.pdf.
8. HC Deb, 14 July 2026 (remaining stages). HC Deb, 3 November 2025 (second reading, no division).

2. What the Bill does

The Bill is in five Parts and runs to six Schedules. The Bill's clauses can be divided into two main clusters.[9]

The first cluster concerns inquiries and investigations. Clause 2 imposes on public authorities and public officials a "duty of candour and assistance" in their dealings with inquiries and investigations. "Inquiry" means an inquiry under the Inquiries Act 2005, a non-statutory inquiry of the kind described in Schedule 1, or a local authority inquiry; "investigation" means a coronial investigation in England and Wales or Northern Ireland, a fatal accident investigation or inquiry in Scotland, or any further investigation the Secretary of State specifies by regulations (clause 9). The Government, of course, already accepts and is bound by obligations of candour in other contexts, such as judicial review proceedings. It is unclear, other than by reference to the particular incidents said to have triggered the legislation, why the mechanisms that support those obligations elsewhere need to be reinforced by the duties and criminal sanctions the Bill proposes specifically for inquiries. And there is an element of obtuseness in the explanation, if it is the explanation, that any failure to enforce the legal consequences of misconduct exposed by inquiries is to be addressed by imposing severe sanctions for a lack of candour towards the inquiry. The point at which law and practice should incentivise candour is much earlier – a point that the offence in clause 12 of misleading the public may indeed be an attempt to address, although it does so in a way that, as we argue, is extremely problematic.

The duty of candour and assistance proposed by the Bill has three limbs. An authority or official must notify the inquiry, unprompted and on their own initiative, if they have grounds to believe their own acts may be relevant or that they hold relevant information (clause 2(3)). A further obligation arises only once it is triggered by a direction from the person leading the inquiry.[10] Once directed, a person must give "all reasonable assistance", which expressly includes producing information, drawing attention to material of particular significance, correcting earlier errors, providing a position statement and answering further questions (clause 2(4)). The third limb is that the person in charge of an authority must take all reasonable steps to secure its compliance with the other two (clause 2(5)). Compliance must be expeditious and "without favour" to the authority's own position.

Clause 2(1) purports to impose a general duty on public authorities and officials to act "at all times" with "candour, transparency and frankness"

9. Clause numbers in this paper are those of HL Bill 42. Commentary written on the Commons prints, including the House of Lords Library's note on the offence, numbers the misleading the public offence as clause 11; it is clause 12 in the Lords print.

10. This is a feature of the duty that the drafting of the Bill fails to make sufficiently obvious: it is postponed from clause 2 to clause 3(4), and the identification of the persons to whom a direction is to be, or may be, given is relegated to Schedule 1.

in their dealings with inquiries and investigations. But subsection (2) then says that this duty "comprises" the obligations in subsections (3) to (5). On the proper meaning of the word "comprises", that makes the list exhaustive and the general duty will add nothing to the three limbs.[11] It has to be said, though, that given the common misuse of "comprise" in modern writing, and its acceptance as a synonym for "includes" in at least some modern dictionaries, the choice of word is unfortunate, not least because clause 5 attaches criminal sanctions to the duty and subsection (1) is not itself drafted with the precision the rule of law requires of a criminal offence. A reader who takes "comprises" to mean "includes" will find in subsection (1) a free-standing and wholly open-ended duty, breach of which is a criminal offence

Clause 4 extends the duty of candour beyond the public sector to anyone who had a "relevant public responsibility" in connection with an incident, including contractors delivering public services and persons with health and safety responsibilities towards the public. Clause 5 makes breach a criminal offence, punishable by up to two years' imprisonment, where the person intends their failure to impede the inquiry or, in the case of the assistance duties, is reckless as to whether it will. Clause 6 applies the regime, with modifications, to the intelligence services, Defence Intelligence, the National Crime Agency and counter-terrorism policing, routing protected information through the head of the relevant body and making allowance for the application of the existing law on restriction orders and public interest immunity.

Clause 8 provides that the duty applies not only to inquiries started after the Act is passed but to any inquiry that "started before that date and remains ongoing on that date".

Part 4 and Schedule 6 deal with what the Bill calls parity. Public authorities must have regard to guidance promoting candour and supporting the inquisitorial character of inquiries, may use legal representatives only where necessary and proportionate, and must answer concerns raised about their conduct. Bereaved families receive non-means-tested legal aid at inquests where a public authority is an interested person. It is unclear what contribution, if any, these provisions are meant to make to forestalling the regular and regrettable tendency of UK inquiries to slide from inquisitorial into adversarial process; and the grant of legal aid to some participants, alongside a restriction on the use of legal representation by public authorities, are proposals that seem to pull in different directions.

This cluster is drawn from the 2024 Labour manifesto. The relevant commitment reads, in full: "Labour will introduce a 'Hillsborough Law' which will place a legal duty of candour on public servants and authorities, and provide legal aid for victims of disasters or state-related deaths."[12] The then Prime Minister, Sir Keir Starmer KC MP, told the party conference in September 2024 that the duty would carry criminal sanctions.[13] The manifesto itself, as one can see, did not promise criminal liability, although of course neither did it promise anything else.

The second cluster of clauses has no necessary connection with inquiries

11. See eg Sir Ernest Gowers, *The Complete Plain Words* (2nd edn, Pelican, revised by Sir Bruce Fraser, 1973) pp. 58-59: "The difference between include and comprise is that comprise is better where all the components are enumerated and include when only some of them are."

12. Labour Party, *Change: Labour Party Manifesto 2024*, p. 73.

13. Sir Keir Starmer KC MP, speech to Labour Party Conference, 24 September 2024; see Jim Dunton, "New 'duty of candour' for officials will include criminal sanctions, Starmer says", *Civil Service World*, September 2024.

at all. Clause 10 requires every public authority to "promote and take steps to maintain high standards of ethical conduct" among its staff, defines ethical conduct by reference to the seven Nolan principles, and requires each authority to adopt and publish a code of ethical conduct dealing with candour, disciplinary consequences, internal reporting and external complaint. Clause 11 lets Ministers issue guidance to which authorities "must have regard".

Clause 12 creates an offence of misleading the public by public officials. Clauses 13 and 14 create offences of committing seriously improper acts in public office and of breaching a duty to prevent death or serious injury, and clauses 17 and 18 consequentially abolish the common law offence of misconduct in public office in England and Wales and Northern Ireland. These clauses define "Public authority" as including a Minister of the Crown and a government department, as well as the devolved administrations, the armed forces, police forces, local authorities, NHS bodies, schools and any other body with functions of a public nature. The term "public official" is defined to include anyone who works for or holds office under such a body. The holders of public office for the purposes of the new misconduct offences in Part 3 are listed separately, in Schedule 4, and that list has exceptions which Schedule 2 lacks: those who work for a school, for instance, are excluded from Part 3 (Schedule 4, paragraph 26(4)) but not from clause 12. Both Houses of Parliament are excluded bodies.[14]

The Government has explained the misleading the public offence as a response to the behaviour of some public officials in the wake of Hillsborough and as "aimed squarely at those who aim to mislead the public or cover up the truth".[15] But the manifesto spoke of a duty of candour to inquiries, and that is a very different thing from a free-standing criminal offence applying to every public statement made by every public body and every Minister. The fact this was not in the 2024 manifesto is significant for the Lords, for the Salisbury Convention does not extend to provisions the manifesto never mentioned.

14. HL Bill 42, Schedule 2, Part 2.

15. Ministry of Justice, Public Office (Accountability) Bill: Equalities Impact Assessment, quoted in House of Lords Library, "Offence of misleading the public: Public Office (Accountability) Bill" (2026).

3. Why the Government is doing this

The Government's case is set out in the Explanatory Notes and in the then Prime Minister's public statements. With respect to the Hillsborough tragedy, bereaved families were failed by the state twice. In the first instance by the state's failure to protect their relatives, and then subsequently by the obstruction of their search for the truth about what happened. The same pattern, the argument goes, can be seen in the Horizon scandal, the infected blood scandal, and controversies surrounding Windrush, and Grenfell. Then Prime Minister Sir Keir Starmer KC MP supported the introduction of the Bill arguing it was needed to ensure "truth and justice" were not "concealed behind the closed ranks of the state" and that the Bill will ensure "the State can never hide from the people it is supposed to serve".[16] On this view, the problem of the British State with respect to candour and honesty is systemic and therefore the remedy must be sweeping too.

There is a narrower and wider version of the then Prime Minister's claim about the state closing ranks in the wake of a scandal and blocking truth and justice, and the Bill wrongly conflates them. The narrower version is that when things go badly wrong, public bodies and the individuals in them have strong incentives to protect themselves, and that those incentives have on occasion produced cover-ups. That is undoubtedly true of the British State, as sadly shown by its response to several major scandals in the previous decades, from the handling of the Hillsborough tragedy to the decades of denial over infected blood. The wider version of the claim, which the Bill's drafting seems to assume, is that misleading conduct is a general and distinctive feature of the British State, found across the whole public sector and in the ordinary conduct of Ministers, and is serious enough to warrant a criminal offence of general application.

We do not accept the wider version of how the British State acts, and we do not think the Government has tried, let alone succeeded, in establishing that this is the case, or that its proposals would provide an effective remedy if the mischief were what it is assumed to be. The cases it cites are not sufficient evidence of it. Hillsborough was the result of the severe misconduct of one police force, whose lies were eventually exposed by a panel, an inquest and a prosecution, which is to say by the existing machinery working slowly and late. The awful treatment of sub-postmasters and their families was a failure by a state-owned post office and its lawyers and, arguably, also of the justice system These failings

16. Prime Minister's statement on introduction of the Bill, September 2024; Explanatory Notes to HL Bill 42, Policy background.

were eventually exposed by public campaigns and litigation led by Sir Alan Bates, a public inquiry, and an ITV television drama. There are important and hard questions to ask about each incident about why the existing machinery of accountability took so long to work, but it is very likely that the answers have to do with particular institutions, people and incentives rather than with a major gap in the criminal law.

4. Slowing down government

One of our main concerns with the Bill is that it lays another layer of legal process over the whole of government, and some of that process involves the creation of criminal offences that are unworkable and unfair.

The Government seems to assume that if Parliament legislates to strengthen the duties of officials and attach criminal sanctions, then greater candour naturally follows. But we have existing legislative precedents that suggest this is not necessarily the case. Over the last twenty-five years Parliament has enacted a series of statutes that were meant to change how officials behave, including the Freedom of Information Act 2000, the Human Rights Act 1998 and the public sector equality duty in the Equality Act 2010. Each statute, in turn, has produced its own form of defensive response. Officials now think hard about what gets recorded, how internal advice is worded, how a submission is structured, which equality analysis to include, how a sensitive meeting is minuted, how legal risk is described, and how a decision will read when it is challenged. The questions civil servants ask themselves has shifted, from what the right policy is to how the decision will look in disclosure, in a freedom of information (FOI) response, in a judicial review. The ever more detailed refinement of process and of ensuring that it is fully documented has tended to displace an acceptance of the need for responsible judgement.

The Freedom of Information Act 2000 (FOIA) was presented as a law that would change the "culture of secrecy" within Whitehall, and it assumed that a legal duty of openness would produce greater candour amongst ministers and civil servants. A quarter century on and many well-informed persons have argued that the Act has, in fact, made frank discussion within government harder, because people stopped committing their frankness to paper. Few who have dealt with Whitehall since 2005 would say that the Act has made the state more transparent in any sense that matters, only more careful about what it commits to paper, which is a very different thing from being more careful in the decisions it takes.

Many distinguished senior officials and former Ministers, who are not opposed to greater transparency as such, have pointed out the risks and perverse consequences of the FOIA. Lord O'Donnell, Cabinet Secretary from 2005 to 2011, told the Justice Committee's post-legislative review in 2012 that "the great cost from FOI is uncertainty": because "there is a public interest test to everything and you just don't know" what will be released, people "find a medium that is not covered by FOI" and "things are not going to be written down", which "makes for much worse government".[17] He gave the example of the 2010 coalition negotiations,

17. Lord O'Donnell, oral evidence to the Justice Committee, 27 March 2012, Q251–252, in Justice Committee, *Post-legislative scrutiny of the Freedom of Information Act 2000*, First Report of Session 2012–13, HC 96-II.

which went unrecorded by the civil service for exactly that reason, and said that Cabinet minutes had been stripped of "the quotable quotes" and put "in rather plain prosaic language"; civil servants, he said, "are not saying what they ought to say to each other and to Ministers".[18] Jack Straw, the Minister who took the Act through Parliament, told the same inquiry that it "has led to a reluctance to commit the process of decisions to records, so in one sense it has made it more difficult to secure accountability rather than less"; that he knew of departments which "went in for unminuted meetings because they were anxious that there should not be a trail of accountability"; and that the result would be "a lot of quasi-decision making through text and BlackBerry messaging".[19] Lord Turnbull, Cabinet Secretary from 2002 to 2005, made the point that the Information Commissioner and the Tribunal "have tended to focus narrowly on the information sought in the request, not the wider signal that the disclosure produces".[20] The then Attorney General, Dominic Grieve KC, told the Committee that the real risk was that "you end up getting decisions made that are not recorded".[21] Lord O'Donnell's successor, Sir Jeremy Heywood, although a defender of the Act, accepted in 2015 that "there are some chilling effects, no doubt about it".[22] Tony Blair, who led the Government that enacted it, wrote in his memoirs that the Act "isn't used, for the most part, by 'the people'. It's used by journalists", and described his own decision to introduce it in striking terms as the decision of an "idiot…naïve, foolish, irresponsible nincompoop. There is really no description of stupidity, no matter how vivid, that is adequate…I quake at the imbecility of it."[23]

These are the rueful observations of those who worked at the top levels of government under the Act, and their common theme is that a statutory duty of openness, enforced against individuals, helped to depress candour in many important areas and, on the account of those well placed to judge, made government worse on the merits.

At the very least, this Government should be challenged to explain why this Bill is not set to become a kind of FOIA 2.0 and bring about the kind of impact that led former proponents of the first iteration to regret their decision. Any organisation that takes the duty of candour seriously, and the clause 5 and clause 12 offences make sure that it will, must respond with more legal screening of its internal material, tighter control over who says what to whom, and an approach to writing and keeping documents structured with a possible future inquiry foremost in mind. It is predictable that this may result in:

- officials becoming more reluctant to put provisional, frank or controversial views on paper;
- difficult or sensitive judgments being taken orally, or in a smaller circle;
- minutes and notes being written with external scrutiny in mind;
- officials demanding legal approval on a widening range of public statements, further aggravating the sclerotic effect on government

18. Ibid., Q251, Q260 and Q267. On risk registers he predicted "a real chilling effect", with Ministers asking officials to "kindly just stick to the more likely outcomes": Q270.

19. Jack Straw, oral evidence to the Justice Committee, 17 April 2012, Q327, Q329 and Q351, HC 96-II. He also described the Act as "not a particularly well constructed Act intellectually or jurisprudentially" (Q342) and called for a class exemption for the formulation of government policy and ministerial communications (Q343).

20. Lord Turnbull, written evidence, quoted in Justice Committee, HC 96-I, para. 197.

21. Dominic Grieve, oral evidence to the Justice Committee, 16 May 2012, quoted at HC 96-I, para. 193. Francis Maude, Minister for the Cabinet Office, said in the same session that it was "the question mark that hangs" over disclosure which made advice less frank: para. 196.

22. Sir Jeremy Heywood, remarks at the Institute for Government, 24 September 2015, reported in Civil Service World, "Jeremy Heywood on Freedom of Information: public doesn't stand for secrecy". He added that the Act had been "a very big positive". In evidence to the Public Administration and Constitutional Affairs Committee in July 2015 he said it "probably would lead people to be less candid in writing than they otherwise would".

23. Tony Blair, *A Journey* (2010) 516.

created by legal risk aversion.

The irony and perversity of all this is that it is readily foreseeable that it will make government less transparent, not more. If officials are concerned that every note may one day be read out at an inquiry, with the risk of prosecution to hand if they are later thought to have "obfuscated", they have every incentive not to write the note. Nor is that the only factor in play that will tend to reduce the extent to which records are properly kept. Stringent future requirements of disclosure carry the risk of having to commit significant resources to ensuring that archives are kept and are identifiable and retrievable in ways that ensure the capacity for complete compliance. In theory that might prompt the development of more efficient storage and retrieval systems. In practice, it is very likely that a major contribution to more efficient storage and retrieval will be made by ensuring that less is stored, so that less needs to be retrieved.

5. Impact on the relationship between Ministers and officials

The Bill will clearly bear on – change – the relationship between Ministers and civil servants, but the Government has said nothing about how it expects this to unfold. A Minister of the Crown is a public authority; a civil servant is a public official. Each is exposed to personal criminal liability under clause 12, and each is exposed under clause 5 in respect of any inquiry.

Civil servants who are concerned that the public statements they draft, or a departmental line that they are asked to defend, may later be characterised as "concealment" or "obfuscation" on a matter of public concern, and that they themselves may answer for it in criminal proceedings, have an incentive to adapt their behaviour accordingly. They might be more prone to decline to draft statements or releases or to insist on caveats that no press office would run. Government lawyers might also get involved more often in these issues and advise caution in the face of an imprecisely defined offence. Overall, the practical effect could be to limit what officials are willing to do for Ministers, and to give officials a legal ground for the limitation. If a Minister is personally exposed to a prosecution for misleading the public, officials acquire a new, weighty, reason to refuse instructions, on the grounds that carrying it out might expose the Minister, and the official too, as a secondary party,[24] to criminal liability. These risks are all significantly enhanced by the added incentives produced by the provisions of clauses 10 and 11 (which, while not creating criminal offences, are also likely – relying on even more imprecise concepts – to create opportunities for civil or public law proceedings against public bodies and disciplinary proceedings against public officials).

This all has implications for the constitutional relationship, in which the Minister decides and answers to Parliament and the official advises and implements but does not veto. The Bill's *own* Explanatory Notes recognise part of the problem. They say that "unprepared comments made by Ministers during political interviews" should be viewed differently from "a formal statement made by the Minister and released through a government department".[25] It should be noted that this distinction is not made in the Bill but only proffered as a factor a prosecutor or jury might weigh in deciding whether the statute has been breached. Even more alarming in our view is the fact the notes are telling every official who drafts a formal departmental statement that this is *exactly* the kind of document the offence is aimed at.

24. Under section 8 of the Accessories and Abettors Act 1861 a person who aids, abets, counsels or procures the commission of an indictable offence is liable to be tried and punished as a principal offender, and Part 2 of the Serious Crime Act 2007 adds the inchoate offences of intentionally encouraging or assisting an offence. An official who drafts or clears a statement that is later said to have misled the public is squarely within reach of these provisions.

25. Explanatory Notes to HL Bill 42, para. 205.

These questions so far as they relate to the criminal law all arise on the basic offences as drafted, but things risk becoming more complex when factoring potential liability for inchoate and ancillary offences, from encouraging or assisting an offence, conspiracy, and attempt to assisting an offender after the event, and the Bill's own provision that where a body commits the offence with the "consent or connivance" of a director, manager or similar officer, that officer commits it too.[26]

26. Schedule 3, paragraph 3.

6. The duty of candour and inquiries

Public bodies already owe substantial legal duties to inquiries. The Inquiries Act 2005 gives the chairman of a statutory inquiry power to require any person to attend to give evidence and to produce documents (section 21). Section 35 makes it an offence, punishable by up to 51 weeks' imprisonment, to fail without reasonable excuse to comply with such a notice; to do anything intended to distort or alter evidence or prevent it reaching the inquiry; or intentionally to suppress, conceal, alter or destroy a relevant document.[27] Coroners have their own powers to compel evidence and their own sanctions. Perverting the course of justice and perjury remain available. An official who lies to a statutory inquiry, or shreds files for example, is already committing a crime.

What the Bill adds to all this is a duty to come forward unprompted; a duty, once directed to do so, to volunteer what is significant, correct what was wrong and produce a position statement; a doubling of the maximum sentence; a lower mental element, recklessness, for the assistance duties; and the extension of all this to non-statutory inquiries, to coroners' investigations, and to whatever further investigations the Secretary of State later chooses to name. Clause 4 also extends the duty, and with it the criminal offence, beyond the public sector altogether, to private contractors and others with a "relevant public responsibility". Firms that supply services to government will price the legal risk and the enhanced record keeping obligations into their contracts, so the Bill may quite literally raise the cost of doing government business.

Nobody doubts that those who hold relevant information should cooperate with an inquiry, and nothing in this paper suggests otherwise. The question is whether a duty of this breadth, enforced through the criminal law, is workable, and the answer depends on the kind of inquiry it is applied to. In a narrow, tightly framed inquiry into a specific incident, whose terms of reference identify the bodies and the period concerned, the duties in clause 2 may be tolerable, because everyone knows who is in scope and what is relevant.

The United Kingdom does not, for the most part, run inquiries like that. It has become addicted to inquiries that are very broad and very long. The Iraq Inquiry sat for seven years. The Undercover Policing Inquiry was established in 2015 and has still not reported. The Grenfell Tower Inquiry took seven years; the Infected Blood Inquiry six; the Post Office Horizon IT Inquiry four. The Independent Inquiry into Child Sexual Abuse ran for

27. Inquiries Act 2005, ss. 21 and 35. The maximum is 51 weeks in England and Wales and six months in Scotland and Northern Ireland (s. 35(7) and (8)).

seven years, from 2015 to 2022, across fifteen separate investigations, with terms of reference so open-ended that no institution in England and Wales that had ever had contact with a child could be sure it was out of scope. The Covid-19 Inquiry, established in 2022, is now in its fifth year, has divided itself into ten modules covering everything from procurement to the care sector and the impact on children. It is on course to be the most expensive public inquiry in British history.[28] An inquiry of this kind can become a rolling audit of a whole field of government over a period of years.

Applying the new duty of candour (clause 2) to an inquiry like that ensures that the notification duty applies to every public authority and every official who "has grounds to believe" that his acts "may be relevant" or that he holds information that "may be relevant" to an inquiry whose terms of reference run to several pages. For an inquiry into the state's whole response to a pandemic, that is every official in every department and every NHS body who did anything in 2020 or 2021. The assistance duty then requires each of them to draw attention to material "of particular significance", correct errors in anything previously provided, and answer further questions, expeditiously and without favour to their own position, on pain of prosecution if they are reckless as to whether a failure impedes the inquiry. There is a notice problem here too. The duty to notify arises as soon as an official has grounds to believe that his acts or his information may be relevant, and it runs from the moment he becomes aware that the inquiry exists; but nothing in the Bill requires anyone to tell him that it exists, or what its terms of reference are, or when they change. There is also, as a result, a significant compliance cost problem with every public authority there is having to commit public resources to establishing and maintaining systems for alerting it to circumstances in which its obligations under the Bill might arise – and to maintaining its records in a form that enable it to comply with those obligations when they do arise.

Whether a given document was "of particular significance" is a judgment the inquiry will make with hindsight. The safe course for the official who must act before the inquiry pronounces is to disclose everything and to record everything with that in mind. If the duty is taken literally, it is difficult to see how large parts of the day-to-day work of the public sector would not have to be set aside in favour of committing every available resource to compliance. It should also be recognised that strict adherence to what is proposed will make whatever inquiries it applies to take even longer to reach their conclusions. It is sometimes suggested that the setting up of a public inquiry can be abused as a tactic for delaying the moment of accountability. There is a significant risk that the duty of candour will make it an even more effective tool for that purpose.

Clause 8 applies the duty of candour to any inquiry "started before that date [the date of Royal Assent] and remains ongoing on that date". The Covid Inquiry, the Undercover Policing Inquiry and every other inquiry and inquest ongoing on when the Bill is passed will fall under the new regime.[29] The Government should be asked how it expects that to work.

28. The UK Covid-19 Inquiry was established under the Inquiries Act 2005 on 28 June 2022.

29. The Institute for Government counted 22 public inquiries ongoing or announced as at September 2026. Those established under the Inquiries Act 2005 and still sitting include the Covid-19 Inquiry (2022), the Undercover Policing Inquiry (2015), the Omagh Bombing Inquiry (2024), the Lampard Inquiry into mental health inpatient deaths in Essex (2023), the Finucane Inquiry, the Southport Inquiry (2025), the Nottingham Attacks Inquiry (2025), the Orgreave Inquiry (2025) and the national inquiry into grooming gangs chaired by Baroness Longfield; the Cranston Inquiry into the Channel deaths of November 2021 is non-statutory. Inquests are another matter again: tens of thousands are opened in England and Wales every year, and every one in which a public authority is an interested person is caught by the duty.

Will every department already engaged with the Covid Inquiry have to reconsider its disclosure against the new standard? Will officials who gave evidence under the old regime be exposed to an allegation under the candour offence (clause 5) if they fail to "correct" it? The Bill is silent on all of this but leaves these important matters to be dealt with (if at all) by transitional regulations. That would be a wholly inappropriate use of a power to make subordinate legislation, and the Delegated Powers and Regulatory Reform Committee of the House of Lords should say so.

The offences themselves are not retrospective. So, nothing in the Bill applies clauses 5 or 12 to conduct before commencement.[30] But the Covid Inquiry itself is still open and conduct contrary to the Bill, after commencement, will be covered.

It is also worth reflecting, as a thought experiment on how the Bill might work in future, on how the Government's handling of the Covid-19 crisis would have interacted with the Bill's clauses, had it been in force at the time. Consider what the public communications of 2020 would have looked like under the offence of misleading the public (clause 12): the data modelling, the "protective ring" around care homes, the statements on PPE, on testing capacity, on school closures, on the risks/safety of the vaccine and of refusing it. Every one of those was a statement by a public authority on a matter of significant public concern; many were later shown to be wrong or overstated, several were accused at the time of being knowingly wrong; all had the potential to cause harm, including distress, to a section of the public. Tempers ran very high about all of this across British society, at the time and afterwards, and they have not cooled in many cases. The point here is not that governments should get a free pass on telling the truth in an emergency. It is that disentangling lies from exaggeration or honest mistake in the public communications of a crisis is not easy, and that the attempt to do it through the criminal courts invites the kind of dynamic we can see, for example, in the United States.

In the last year, Dr Anthony Fauci, the public face of the federal public health response to the pandemic, became the object of congressional investigation and repeated demands for his prosecution, to the point that the outgoing President issued him a pre-emptive pardon in January 2025. We take no view on the merits of any of that. It is the dynamic of the criminal law being used to police political disagreement that matters and is worrying. The Government will (we assume) say that none of the then government's statements during the pandemic was "seriously improper". Prosecutors in the CPS and perhaps a jury might well agree. Our point of concern, which the Government has not addressed with any detail, is that under this Bill the question would be one for the DPP and a jury, and every official or minister drafting such a statement in the next emergency will know it.

They will also know that, if there is a public inquiry, every piece of information that is put in the public domain by the duty of candour has the potential subsequently to be exploited as incriminating evidence against present or future Ministers and officials in respect of offences under clause 12.

30. Clause 27 commences the offences by regulations; nothing in the Bill applies them to conduct before commencement. The Explanatory Notes do not address the point directly.

7 The clause 5 offence

Two features of the candour offence in clause 5, which criminalises a failure to comply with the duty of candour where the person intends to impede the inquiry or, in the case of the assistance duties, is reckless as to whether it will, deserve particular attention. First, the mental element for the assistance duties is recklessness, and the offence is committed where the person "is reckless as to whether" their failure "will impede the inquiry or investigation achieving its objectives". Recklessness is an appropriate standard for offences of physical endangerment, but less apt for an offence that consists of conduct impeding the objectives of a process whose "objectives" are set by an inquiry's understanding of its terms of reference and may change over the years. In a way, the inquiry itself, by defining its objectives, will be setting, and may from time to time vary, the parameters of criminal conduct for those obliged to cooperate with it. That seems to us to be an alarming precedent.

The implication is that every official within scope must keep any inquiry and its evolving objectives in mind at all times, in everything they do after the establishment of the inquiry and in considering or acting on anything they wrote or decided not to write before that. Section 35 of the 2005 Act required intention. We can see no reason to depart from that. Secondly, the duties in clause 2(4) are framed by reference to what is "reasonable", "relevant" and "of particular significance", and the person in charge must take "all reasonable steps". This introduces an element of negligence into the elements of the offence that is not mitigated by the requirement of intention or recklessness The criminal law does punish carelessness, but it is unusual and we think inappropriate to attach an objective test of fault (rather than a wholly subjective one) to a serious indictable offence intended to carry the stigma of dishonesty; here a want of reasonableness, judged after the event, is enough to put an official in breach of the criminal law.

The recklessness test also opens up the possibility that criminal liability will turn on the reliability of a public body's record-keeping and retrieval systems and an official's assessment of the risk that the information those systems return may or may not be accurate and complete.

8. The offence of misleading the public

Clause 12 is the most objectionable provision in the Bill. It provides that a public authority or public official commits an offence if, in that capacity, "(a) they act with the intention of misleading the public or are reckless as to whether their act will do so, and (b) they know, or ought to know, that their act is seriously improper" (clause 12(1)). An act is seriously improper only if it meets the condition in subsection (3) and "a reasonable person would consider it to be seriously improper, taking account of all the circumstances of the case" (clause 12(2)). The condition in subsection (3) "is that the act:

(a) involved dishonesty that was significant or repeated (whether by means of falsehood, concealment, obfuscation or otherwise) in respect of matters of significant concern to the public,
(b) caused, or contributed to causing, harm to one or more other persons, or had the potential to do so, and
(c) departed significantly from what is to be expected in the proper exercise of the person's functions as a public authority or public official."

"Harm" includes "physical harm, psychological harm (including distress) and economic loss"; "the public" includes "a section of the public" (clause 12(8)). Journalism by a recognised news publisher is excluded (clause 12(4)). It is a defence to prove that the act was necessary for the proper exercise of a function of an intelligence service or of the armed forces on active service, or to show that the person otherwise had a reasonable excuse, the latter being an evidential burden only (clause 12(6) and (7)). The maximum sentence is two years. Prosecution requires the consent of the DPP (Schedule 3).

The rule of law objection

The Law Commission recommended in 2020 that the common law offence of misconduct in public office be abolished because its elements were unclear and it was increasingly being invoked in contentious contexts.[31] The Government accepts that recommendation and acts on it in clauses 13, 14, 17 and 18. It then, in clause 12, purports to create an offence whose central terms are at least as uncertain as the common law offence, and whose field of application includes the very contentious field of public

31. Law Commission, *Misconduct in Public Office* (Law Com No 397, 2020).

statements by Ministers and officials on matters of public concern.

Many core concepts in the clause remain undefined. "Misleading" is not defined. On its ordinary meaning it includes giving a false impression by true statements, by selection, by emphasis and by omission: the kind of communication endemic to press releases. Whether a particular statement crosses the line from presentation to misleading is a judgment on which reasonable people will differ according to their politics, which is a poor foundation for a criminal offence.

The mental element in subsection (1)(a) includes recklessness "as to whether their act will" mislead the public. A Minister who is confident of their figures but aware that their opponents dispute them is arguably reckless as to whether their statement will mislead a section of the public, if, that is, the Minister is open-minded enough to accept that the fact that others disagree with the figures signifies a risk that they might be wrong. The Bill does not obviously exclude this kind of scenario from criminal liability.

The mental element in subsection (1)(b) is "know, or ought to know". This is essentially a negligence standard for whether one's conduct is seriously improper, which sits uneasily with a condition that requires "dishonesty". A person can be dishonest without knowing it, on the objective test the Supreme Court adopted in *Ivey v Genting Casinos*;[32] the Bill adds that he can also commit this offence without knowing that his conduct was seriously improper, so long as he ought to have.

"Dishonesty" is then expanded, by the parenthesis in subsection (3)(a), to include "concealment, obfuscation or otherwise". Obfuscation is potentially very broad as it covers many statements made by the government in response to awkward or difficult questions. "Or otherwise" leaves the category open to outcome inspired extrapolation. Dishonesty "that was significant or repeated" imports a further judgment of degree as does the phrase "Matters of significant concern to the public".

"Harm" includes distress and "the potential" to cause it. This is alarmingly broad given that there is no public statement on any contested matter that lacks the potential to cause distress to a section of the public.

Perhaps the test in subsection (3)(c), that there must have been a departure "from what is to be expected in the proper exercise of the person's functions", has content for a police force issuing a statement about an incident. But for the Minister and his or her key officials it is far from helpful. What is to be expected in the proper exercise of a Minister's functions when announcing a policy, defending a record or attacking an opponent is a question of political ethics, or perhaps just of political controversy, on which there is no settled view.

Subsection (2)(b) provides that an act is seriously improper only if a reasonable person would consider it seriously improper. This is a circular provision and does not define the term for the jury so much as it asks the jury to define it themselves.

Finally, "in their capacity as such an authority or official" is undefined for the case that matters most. A Minister is at once a member of the

32. *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67, applied to criminal dishonesty in *R v Barton* [2020] EWCA Crim 575. The Supreme Court held at para 74 that "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was dishonest is to be determined by the factfinder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

Government, a member of Parliament, a party politician, and a prospective future candidate in an election. The Explanatory Notes' distinction between the political interview and the departmental statement shows that the drafters know this, and also draws attention to the fact that the Bill does nothing about it.

This criminal offence gives no fair warning of what it prohibits and, as such, risks bringing about a situation in which all contested public statements can be characterised as criminal, and it is left to prosecutors and juries to decide which are to be treated as criminal acts.

Politics as crime

The Government may say the offence is aimed at cover-ups, not stifling the rough and tumble or rhetorical excesses of ordinary politics. The Explanatory Notes give several examples of the conduct it ostensibly seeks to target: a hospital chief executive instructing staff to lie to the press, a police force issuing a statement it knows to be false, a department covering up the harmful consequences of a policy.[33] The third example should be a cause of deep alarm to parliamentarians, because it describes what every opposition says every government is doing all the time. This fact is a striking illustration of what the difficulty with this clause is, which is how awkwardly and dangerously it sits with the conduct of ordinary democratic politics.

In contested policy areas, political actors insist not only that the other side is wrong but that it is knowingly wrong – by suppressing the truth, manipulating statistics, concealing consequences, misleading Parliament and the public. Nor is the problem confined to what are clearly statements of fact. A broken political promise is regularly characterised as having been "a lie" when made, which assumes that it was given by someone who knew, or ought to have known, that it could never be fulfilled. On that assumption any political promise can be said to have been misleading unless it is fulfilled or the person who made it did not realise that there was a risk it might not be. No doubt many think that politicians who break their promises *should* be criminally liable, but many more will see why the prospect of every political promise being potentially liable to criminal prosecution if not fulfilled is in deep tension with how democratic politics works (or could ever work) in this country.

Debates over economic forecasts, migration numbers, hospital waiting lists, tax burdens, crime trends and the predicted effects of major legislation would all be caught within the broad scope of the Bill. Ministers, oppositions, parties and campaigners constantly simplify, select, dramatise, overstate, frame their own position charitably and their opponents' uncharitably; this is a banal mainstay of British democratic politics. The distinctions between a factual claim, a prediction, a judgment, a statement of aspiration and a promise (which all matter enormously in deciding whether a statement is "misleading") are not drawn by the Bill at all. One distinction is drawn, though: between the statements of those in power and those of their opponents. The offence will not apply to the

33. Explanatory Notes to HL Bill 42, para. 204.

latter, although it will apply to relatively junior officials and, as the Bill stands, to teachers in state schools.[34]

The effect is to create a standing invitation to politicised complaints that use the language of the criminal law. Every serious controversy could generate an allegation that Ministers or officials were "misleading the public" within the meaning of the Act. The language of the criminal law would enter disputes that belong to politics and fine distinctions that need to be drawn risk being lost: for example, between an official lying to an inquiry after a disaster and a Minister advancing tendentious claims about the economy in ordinary political combat. The Bill recasts failures of rhetoric, framing, spin and evasive advocacy as matters for the Crown Court. The traditional remedies for those failures – parliamentary challenge, ministerial responsibility, select committee scrutiny, the press, resignation and the ballot box – remain the right remedy for the mischief in question.

Who prosecutes

The contention that nobody would try to use these provisions to bring the criminal law to bear on ordinary political debate is in need of justification, especially in the light of recent history. Moreover, any argument that the potential excessive width of a criminal offence will be mitigated by prosecutorial discretion is always a bad one, relying as it does on what amounts to an executive "dispensing power".

Consider, for example, the attempted prosecution of Boris Johnson. In 2019 a private prosecutor, Marcus Ball, crowdfunded a prosecution against Mr Johnson for alleged misconduct in public office over his claim, made during the 2016 referendum campaign, that if the United Kingdom left the EU it would ensure £350 million a week more for the NHS. A District Judge at Westminster Magistrates' Court issued a summons. The Divisional Court eventually quashed the summons and held that the judge had erred because that there was no prima facie case that statements made in a political campaign could constitute the offence.[35] The case is not on all fours with clause 12, and it was stopped. But it shows the *type* of legal risk the Bill could bring about, viz, politically motivated prosecutions, funded by opponents and campaign groups, over disputed political claims and ordinary (if maybe exaggerated) political rhetoric.

The Bill's supposed safeguard against this risk is DPP consent. Under Schedule 3 no prosecution may be brought in England and Wales without the consent of the Director of Public Prosecutions. Schedule 3 imposes the same requirement in Northern Ireland, by reference to the Director of Public Prosecutions for Northern Ireland; in Scotland prosecution is in any event in the hands of the Lord Advocate. Requiring DPP consent prevents unilateral private prosecutions but it does little to stop, for example, the zealous campaigner assembling a file with an allegation that a Minister or official has misled the public, applying for consent from the DPP, and then judicially reviewing a refusal for consent or the CPS' failure to take over the case. Even though the courts are very deferential

34. Schedule 2, paragraphs 2(1)(j) and 3(1)(a), read with clause 25(3); compare Schedule 4, paragraph 26(4), which excludes school staff from the Part 3 offences.

35. *R (Johnson) v Westminster Magistrates' Court* [2019] EWHC 1709 (Admin) (Rafferty LJ and Supperstone J). The summons was issued by District Judge Coleman on 29 May 2019 and quashed on 7 June 2019, with reasons given on 3 July.

in reviewing prosecutorial discretion, the application and judicial review itself will inevitably be viewed as political events. Whichever way the decision goes the Director will be accused of taking sides: if consent is refused, of a "cover up", or of "lawfare" if it is given. Future Directors will come under pressure of a kind the office has not had to bear, and the Government should expect judicial review of refusals.

Nor is concern about partiality a fanciful concern. The Director of Public Prosecutions is a lawyer with views, and one recent holder of the office subsequently became Prime Minister. A Director might, with complete sincerity, find it easier to see the lies and process failures of those for whom he or she lacks political sympathy than others, whether because he or she does not share their "progressive" perspective or because they are Brexiteers, immigration sceptics, or opponents of net zero. Fears of two-tier justice are already widespread in this country. The United States has shown in recent years what politics looks like once criminal process becomes a routine instrument of partisan conflict, with each side prosecuting the other's leaders and each prosecution treated by half the country as a serious abuse of the criminal law. We should be jealously concerned to avoid importing this into our constitutional culture and practice of democratic politics.

Parliament, Ministers and Article 9

The Bill excludes both Houses of Parliament from the definition of public authority. It does not exclude Ministers, who are public authorities in their own right, and it contains no saving for proceedings in Parliament. Asked in the Lords in February 2026 why MPs and peers were excluded, the Minister, Baroness Levitt, said the offence was aimed at "those working in government and the wider public sector who take decisions on behalf of the state"; that "individual MPs and Peers do not directly take decisions on behalf of the state"; that "parliamentary proceedings are rightly privileged and cannot be questioned in a court of law"; and that the offence applies to "Ministers and other politicians in executive roles, but not MPs and Peers".[36]

It is unlikely that Article 9 of the Bill of Rights 1689 would be held to be impliedly repealed by this Bill so as to allow a Minister's statement to the House to be made the subject of a prosecution under clause 12. However, Parliament should, for the avoidance of doubt, spell this out. Several Labour MPs tabled amendments in the Commons to extend the offence to Parliament, and the Government should make it clear, on the face of the Bill, that it has rejected that unconstitutional course.[37]

In some respects, the more important and telling point is what the exclusion of the Houses from the scope of the bill implicitly reveals. The Government here accepts that extending the criminal law into political debate in the Chamber would be wrong, on the basis it would chill debate and subject the judgment of elected politicians (or peers), and the rough and tumble of political rhetoric, to the judgment of courts and juries. But the principled concern remains that, if the objection to criminalising

36. HL Deb, 26 February 2026, oral question from Baroness Jones of Moulsecoomb, answered by Baroness Levitt.

37. Amendments tabled at Commons stages by Luke Myer MP and others to extend the offence to members of both Houses; see House of Lords Library, "Offence of misleading the public" (2026).

political speech in Parliament is sound – and it is – the objection carries the same weight beyond the Palace of Westminster.

A worked example: the Mandelson vetting affair

It may help to test the Bill against a recent episode. We take no view on who is telling the truth in it.

In early 2026 it emerged that UK Security Vetting had recommended against granting Lord Mandelson developed vetting clearance before his appointment as Ambassador to Washington, and that officials in the Foreign, Commonwealth and Development Office had nevertheless granted the clearance on conditions. The Prime Minister had told the House of Commons that due process had been followed. He said he had not been told of the vetting recommendation until April 2026. The Permanent Under-Secretary at the FCDO, Sir Olly Robbins, was dismissed for failing to inform him. Sir Olly then told the Foreign Affairs Committee that he had been under serious pressure from Downing Street to push the appointment through, and that the recommendation was not the final decision, which it was his to make. The Cabinet Office Permanent Secretary told the same committee that Sir Olly had declined to hand over the vetting material to her. The Opposition accused the Prime Minister of misleading the House; he denied it and said blame lay with the Foreign Office.[38]

If clause 12 had been in force, the then Prime Minister's statement in the House and the evidence given to the Foreign Affairs Select Committee would be protected by Article 9. But other statements the PM had also made about the same subject matter, to the press for example, would not be. Was Sir Keir reckless as to whether his remarks would mislead the public? On the Foreign Office side, officials who decided not to accept the recommendation of UK Security Vetting and did not tell No. 10 are public officials. Was the non-disclosure "concealment" on a matter of significant public concern, departing significantly from what is to be expected and reckless as to whether the public would be misled when (as he might reasonably be thought likely to do) the PM relied on it in public statements? Seriously improper concealment is certainly what the then Prime Minister more or less said it was. If he was wrong about that and Downing Street had applied pressure to get a result and then said publicly that due process had been followed, would that have been "obfuscation"? The conflicting accounts here would each make the other a candidate for a clause 12 complaint. It is very likely in the current political climate that someone would have made a complaint and asked for consent to prosecute. The file would have gone to the Director of Public Prosecutions, an office the Prime Minister once held, for a decision on whether to consent to the prosecution of the Prime Minister or of his most senior diplomat (or even, conceivably, of both of them). Either approach would no doubt have seemed an attractive tactic in the context of the impending legal proceedings over Sir Olly's dismissal.

This scenario shows the kind of conduct the Bill could facilitate, by

38. The account in the text draws on the reporting of April 2026, including the Prime Minister's Commons statement of 20 April 2026, Sir Olly Robbins's evidence to the Foreign Affairs Committee on 21 April 2026 and Cat Little's evidence to the same committee on 23 April 2026.

taking a dispute about candour between a Minister and his officials, of a kind that the constitution resolves through Parliament, select committees, resignation and the press, and making it potentially a question of criminal liability. That would be a dangerous novelty in our constitution.

9. Codes of ethical conduct and the litigation layer

Clause 10 requires every public authority to promote and maintain "high standards of ethical conduct", defined by reference to selflessness, integrity, objectivity, accountability, openness, honesty and leadership, and to adopt a published code giving those principles practical content, specifying disciplinary consequences, and addressing internal reporting and external complaint. Authorities must have regard to ministerial guidance.

The Nolan principles are a good statement of what we are entitled to expect from those in public life. But they were never meant to be legally enforceable obligations, and they would be unworkable as law. Once enacted as a statutory duty, clause 10(1) becomes a potential foundation for proceedings for judicial review, not only so far as the general requirements of the code are concerned, but also potentially in relation to its application in individual cases.[39] It is certainly an invitation to initiate extensive, time-consuming and expensive litigation over whether an authority has adequately "promoted" objectivity, or whether a particular decision was consistent with "openness", or whether the authority's code gives the principles enough practical content, or whether the code has had sufficient regard to the guidance. If a claimant cannot show that an authority or one of its officials breached its own code, he can argue instead that the code does not comply with the Act. Every public body in the country, from a government department to a parish council or a further education college, acquires a new set of uncertain legal obligations layered on top of the existing grounds of review.

There is no evidence that any of this will in practice raise standards of conduct. The civil service, the police, the NHS and local government already have codes, most of them already built on the Nolan principles, and the scandals the Bill cites occurred under them. Effect is already given to these codes in the disciplinary procedures applying to public servants. If (as it does) the Government wishes to require every public authority to have a code, it should say so and should make clear that judicial review proceedings are not available to enforce compliance with the duty to promulgate the relevant code or to enforce compliance with the terms of the code, including by authoritatively interpreting the code or evaluating whether public servants have (adequately) taken its terms into account.

39. See eg Lady Hale in *Nzolameso v City of Westminster* [2015] UKSC 22, para 22 ff

10. Replacing misconduct in public office

Clauses 13, 14, 17 and 18 abolish the common law offence of misconduct in public office in England and Wales and Northern Ireland and replace it with two statutory offences: using public office to obtain a benefit or cause a detriment in a way the holder knows or ought to know is seriously improper (clause 13, ten years), and breaching a duty to prevent death or serious injury (clause 14, fourteen years). Both follow the Law Commission's 2020 report, and the Explanatory Notes say there is no intention to widen the scope of the existing law.[40]

We do not think it necessary to oppose these clauses outright. The common law offence was uncertain, and the Commission's criticism of it was well founded. Replacing it with offences whose elements are set out in statute is, in principle, a proper exercise of legislative power. We would note only that clause 13 carries the same "ought to know" formula and the same "reasonable person would consider it seriously improper" test as clause 12, and that the problems with those formulae are not confined to that one clause. If the House of Lords amends clause 12, or removes it, as we recommend, the House should look again at whether the same drafting in clause 13 is acceptable in an offence carrying a maximum sentence of ten years imprisonment.

40. Explanatory Notes to HL Bill 42, Policy background, on clauses 13 and 14: "There is no intention to widen or change the scope of the common law offence as it currently exists, or the type of conduct it captures."

Conclusion

Whenever the Government invites Parliament to enact legislation that changes the framework of government, parliamentarians should consider carefully the case for change and should ask searching questions about unintended consequences, especially when these concern the relationships between Ministers and officials and public servants and the public. The need for care is all the more pronounced when the legislation imposes criminal liability on Ministers and officials. The Hillsborough Law will certainly change how we are governed, partly by extending the reach of the criminal law into the everyday processes of government. Yet Parliament has not robustly questioned whether these changes are warranted.

This report has outlined a series of problems to which the Hillsborough Law is likely to give rise, problems that should weigh heavily in the deliberation of parliamentarians and which the Government should be required to address. Under our constitution, the House of Lords cannot properly refuse to enact legislation that gives effect to a manifesto commitment. But even in relation to those parts of the Bill that do give effect to the 2024 manifesto, peers can and should fearlessly test the case that has been made for the provisions in question, asking whether they can be recast more effectively or, as we would put it, less damagingly. And in relation to those parts of the Bill that were never promised in the manifesto, including most notably clause 12, peers can and should challenge them robustly, without fearing that in so doing they go beyond the rightful limits on their constitutional role.

If the Bill is not amended, the Hillsborough Law threatens to undermine effective government, to hamstring Ministerial control over the public service, and to criminalise politics – and quite possibly to politicise the application of the criminal law. These are serious risks. They deserve serious consideration by Parliament.

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