



Cymdeithas y
Cyfreithwyr
The Law Society

Written evidence: Senedd Members Standards of Conduct Committee Inquiry into Members' Accountability

05 December 2024

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Introduction

This submission provides an initial analysis of the proposals in the Institute for Constitutional Democratic Research (ICDR) White Paper, *"A Model for Political Honesty,"* within the context of the Senedd Members Standards of Conduct Committee Inquiry into Members' Accountability. This response specifically addresses our members thoughts around the potential implications on fairness, legal standards, and practical enforcement.

1. Misalignment with Objectives

The White Paper outlines a legislative framework aiming to disqualify politicians found guilty of deliberate deception. While the stated intention is to penalise deliberate dishonesty, the mechanisms appear to be misaligned with this objective in the following ways:

a) Absence of Clear Deliberate Deception Standard

- The White Paper does not adequately ensure that a finding of deliberate deception, as understood in legal standards, is a prerequisite for disqualification. Instead, it conflates:
 - A failure to correct statements deemed false on a balance of probabilities, and Intentional acts of deception.

b) Undermining Accountability Goals

- By failing to distinguish intent from error or oversight, the proposed model undermines both the clarity of the process and the confidence of the public in its fairness. Political discourse is inherently complex, and allegations must be adjudicated based on evidence of intent, not merely incorrectness.

2. Standards of Proof and Procedural Safeguards

The principles of justice necessitate adherence to appropriate evidentiary standards and procedural safeguards. The ICDR Model fails to address these adequately:

a) *Burden of Proof*

- Allegations of deliberate deception carry severe reputational and professional consequences. They must therefore meet the **criminal standard of proof**, where the tribunal of fact must be sure beyond a reasonable doubt.
- The proposed reliance on the civil standard of balance of probabilities is inadequate and risks unjust outcomes, particularly where complex evidentiary issues arise.

b) *Legal Precedents*

- Case law such as *Re B (Children)* [2008] highlights the importance of higher evidentiary standards for serious allegations, even in civil cases. This principle should be mirrored in procedures involving public officials.
- The concept of a “lie,” as defined in *Lucas (1981)*, requires intent. By allowing findings of dishonesty without proving such intent, the ICDR Model strays from established legal definitions.

3. Procedural and Resource Challenges

The ICDR Model introduces procedural frameworks that are not only novel but also likely to impose severe burdens on the judicial system, particularly:

a) *Impact on Magistrates’ Courts*

- The White Paper proposes a “leave” stage for District or Deputy District Judges to review applications within 24 hours. This places significant additional strain on already overstretched Magistrates’ Courts.

- At the end of 2023, backlogs in Magistrates' Courts in Wales reached 17,480 cases, the highest recorded since 2012, with the situation worsening. Adding a high-volume, expedited process risks overwhelming the system further.

b) Resource Implications for Appeals

- The suggested appeal process to the Crown Court on points of law introduces a layer of complexity and delays, with Crown Court backlogs also at unsustainable levels (2,595 cases in Wales as of December 2023).
- Without significant investment in judicial capacity, these procedural demands are unlikely to achieve the stated aim of swift resolution.

c) Increased Litigation Risks

- The novelty of the ICDR Model, including concepts such as the "real possibility" test, invites legal challenges. The lack of clarity in its framework may lead to prolonged disputes and delays, compounding the resource burdens on the justice system.

4. Broader Implications

The ICDR Model, if implemented, risks creating significant unintended consequences:

a) Effect on Political Discourse

Political discourse often involves complex, contested claims. Penalizing statements without clear evidence of deliberate deception risks deterring open debate, an essential feature of democratic systems.

As noted by the Electoral Commission, political campaigns involve presenting data in ways favourable to one's argument. The subjectivity inherent in such presentations must be recognized to avoid criminalizing routine political expression.

b) Existing Legal Protections

- These existing mechanisms balance the need for accountability with fairness, requiring proof of intent and providing safeguards against misuse.

c) Practical Barriers to Implementation

- The White Paper fails to consider the administrative and procedural burdens associated with its proposals, including the risk of vexatious or coordinated complaints overwhelming the system.
- The lack of adequate filtering mechanisms exacerbates these risks, increasing the likelihood of frivolous or unmeritorious cases proceeding unnecessarily.

Potential Next Steps

To achieve the stated goal of enhancing accountability while maintaining fairness and practicality, the following recommendations are proposed:

a) Strengthening Existing Frameworks:

- Refine existing disciplinary procedures to include robust sanctions for deliberate deception without creating parallel legal frameworks that dilute standards of proof.

b) Clear Evidentiary Standards:

- Any new procedures must require proof of intent to deceive, meeting the criminal standard of proof where necessary.

c) Judicial and Resource Considerations:

- Conduct a comprehensive impact assessment to evaluate the resource implications of any proposed changes, ensuring that judicial and administrative capacity can meet the demands.

d) Safeguards Against Misuse:

- Introduce strict thresholds for initiating complaints and mechanisms to filter out frivolous or vexatious claims early in the process.

e) Stakeholder Engagement:

- Collaborate with legal and civic organizations to design practical accountability mechanisms that are both fair and efficient.

Conclusion

The aspiration to improve accountability in public life is commendable, but it must be pursued with care. The ICDR Model, as currently proposed, risks undermining public trust through its procedural flaws and lack of fairness. Our members believe that a more considered, evidence-based approach is required to achieve the intended objectives without compromising justice or practicality.