

## SENEDD STANDARDS COMMITTEE INQUIRY: INDIVIDUAL MEMBER ACCOUNTABILITY (POLITICAL DECEPTION)

---

### RESPONSE TO THE COMMITTEE'S FOLLOW-UP QUESTIONS

---

#### Introduction

1. This note responds to the Committee's letter of 2 December 2024. The ICDR is incredibly grateful for the opportunity to offer some answers to the Committee's questions and is delighted to offer its ongoing commitment to assisting the Committee in any way.
  
2. We have taken account of the evidence provided by others thus far. In view of this, we would like to propose two amendments to the ICDR model. These are not necessarily intended to replace the existing provisions of the ICDR Model but, rather, to provide alternatives and demonstrate how the model can be adapted to take account of different concerns while maintaining its fundamental integrity:
  - (a) **The Gatekeeper Option** – this will make the Standards Commissioner the only person who is empowered to apply for a Correction Order or Disqualification Order. This is intended to take account of concerns about individual citizens being permitted to hold politicians to account under this regime and those who sought to bring the Commissioner into the regime.
  
  - (b) **The Panel Option** – this will provide for the ICDR Model to be administered by an administrative panel rather than the courts.

3. The structure of this note is, therefore, as follows:
  - (a) The main body of the note provides answers to the Committee's written questions.
  - (b) Appendix 1 sets out the Gatekeeper Option and Panel Option.
  - (c) Appendix 2 provides updated suggested legislation for the ICDR Model (taking into account proposed updates and amendments).
  - (d) Appendix 3 provides responses to other issues which have arisen over the course of the Committee's inquiry.
4. For convenience, the appendices are attached as a separate document.

### **Responses to the Committee's Questions**

*What are your views on how the regulatory model proposed by the IDCR is compliant with the European Convention on Human Rights for example (Article 10) and freedom to stand in an election (Article 3 of Protocol No. 1 - Right to free elections) of the European Convention on Human Rights?*

5. The ICDR Model does not impose any new restriction on the Article 10 or A1P3 rights in respect of Members of the Senedd. As set out in the ICDR White Paper, MS are already required to speak truthfully and to correct themselves where they fail to do so. The ICDR Model does not impose a new regulatory burden but, rather, a fairer and more effective mechanism of enforcing an existing duty.
6. It is already well established that the government may place limitations on both the Article 10 and the A3P1 rights in a political context. Political speech is, for example, limited by the National Assembly for Wales (Representation of the People) Order 2007. The law allows for individuals to be disqualified from holding elected office (and for

people to be prevented from standing in an election for a variety of other of other reasons).<sup>1</sup>

7. Article 10 of the ECHR provides that the right to free expression “carries with it duties and responsibilities” and may, therefore be subject:

*to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society,... for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others...*

8. Any measure which impacts on speech is a potential *prima facie* interference with the right to free expression. It is well established, however, that certain limitations on free expression are lawful under the ECHR. Examples of this include defamation laws.<sup>2</sup>

9. The ICDR Model will be permitted by the ECHR because:

- (a) It is “prescribed by law”, in that it will be set down in statute;

- (b) It is necessary in a democratic society because,

- (1) Citizens in a democracy are entitled to receive truthful information from politicians.

- (2) For the reasons set out in the ICDR’s previous submissions (and by a number of other witnesses), political deception represents a genuine threat to the functioning of democracy and, by extension, to the rights of citizens

---

<sup>1</sup> For a complete list see: <https://www.electoralcommission.org.uk/guidance-candidates-and-agents-local-government-elections-england/what-you-need-know-you-stand-a-candidate/qualifications-and-disqualifications-standing-election/disqualifications> (last accessed 9 December 2024).

<sup>2</sup> Defamation Act

which are best realised in such a democracy (as recognised in the preamble of the ECHR).

(c) It is a proportionate measure:

(1) A Correction Order represents only a minor interference with free expression and one that addresses a significant threat to the functioning of democracy (the erosion of public trust in democratic politics caused by political deception) and, by extension, the rights of others.

(2) A Disqualification Order will only arise after the subject has been given every opportunity to correct the record. The court or panel will have a significant degree of discretion about what sanction to impose and will be able to take the requirements of the ECHR into account when deciding what sanction to impose.

10. A3PI does not confer a stand-alone right to stand in elections. It protects the rights of citizens to:

...free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of legislature.

11. All democratic states disqualify persons from office (and even from voting). This is permitted by AIP3 where they are justified and pursue a legitimate aim.<sup>3</sup> For the reasons set out above, the ICDR Model (and, indeed, the other proposals before the Committee of which the ICDR is aware) meet that test. Indeed, the purpose of these measures is to enhance the freedom of elections by protecting citizens from misleading information and restore public trust in democracy.

---

<sup>3</sup> See, for example, *Py v France* 66289/01, [2005] ECHR 7, [2006] 42 EHRR 26

*What are your views on how a new criminal offence would interact with existing offences during an election period, specifically the National Assembly for Wales (Representation of the People) Wales Order 2007, which states that it is illegal to make a false statement concerning the personal character or conduct of a candidate for the purpose of affecting their return as a candidate.*

12. Having taken full account of the CBA submissions, the ICDR view is that this measure should not take effect in criminal law. The ICDR Model will work as well, if not better, in Civil Law and Appendix A to this document sets out how it can be given effect as a purely administrative measure. It should, therefore, have no interaction at all.
13. That aside, the 2007 Order offences serve an entirely different purpose from the measure under consideration in this inquiry. The offences in articles 14, 30, and 31 all target, what might be broadly be described as “voter fraud”. These are concerned with various forms of casting a ballot fraudulently.
14. Similarly, the offence at section 106 of the Representation of the People Act 1983 also serves a different purpose. It is designed specifically to protect the reputations of candidates.
15. The measure before the Committee is entirely different. It is designed to protect the public from misinformation spread by politicians and to start the process of restoring public trust in politics more broadly. The harm it targets is not focused on the reputations of other politicians but, rather, the representation of basic facts in public discourse. More importantly, the ICDR Model is concerned, first and foremost, with ensuring that misinformation is corrected (thereby empowering citizens to vote based on accurate information and rebuilding public trust in democracy), the question of sanction only arises if a correction is not made.
16. While there may be some (minor) partial overlap between the ICDR Model and the section 106 offence (such as when a false statement is made which impacts on the reputation of another candidate), the two regimes will do entirely different things. The section 106 offence will be concerned with sanction. The ICDR Model measure will be concerned with correction. This overlap is similar to the existing overlap between the

section 106 offence and the law of defamation (which may, in limited circumstances, be relevant to the same incident but concern very different things).

17. The ICDR Model will also act much more quickly, providing a correction in a matter of weeks (and, in many cases, in advance of the relevant election). The section 106 offence will not be tried for many months after the alleged offence has been committed (almost certainly well after the relevant election).

## **Definitions**

*Could you provide information on your proposals for defining false statements and why you have chosen this formulation.*

18. The language of the ICDR Model was originally based on section 2(2) of the Fraud Act 2006. This was chosen because it is an existing legal definition of a false statement and so one with which the courts will be familiar.
19. On reflection, and having listened to the comments of other respondents, we have now formed the view that a better basis will be section 2 of the Defamation Act 2013. This provides for a court to determine whether a statement is or is not “true” for the purposes of a defamation claim (the truth of a statement is a complete defence to a claim of defamation). We, therefore propose the following language:

The imputation conveyed by the statement complained of is false or misleading.

20. This draws on the language of both the Fraud Act and the Defamation Act. It is preferable because:
  - (a) It acknowledges that the court must first reach a clear decision on the meaning of the Qualifying Statement;
  - (b) It reflects the Civil Law in which (it is proposed) the ICDR Model should take effect;

(c) It draws on existing concepts that the courts have a proven record of implementing.

21. A court or administrative panel, seised with a claim for a Correction Order (or other measure, if the ICDR Model is not used), must ask itself:

(a) What is meant by the statement in question? This is a common exercise in defamation proceedings, where the court will determine the meaning of the statement in question in order to decide whether it is defamatory.

(b) Is that meaning “false or misleading”? This requires the court to weigh up the evidence presented by both sides and determine which, given the context of the statement, is more compelling.

*What are your views on what evidentiary basis/ material could be required to prove that statements were ‘wilfully deceitful’ or on the ‘balance of probabilities’ false.*

22. The two phrases quoted mean different things:

(a) A statement is false “on the balance of probabilities” if, having weighed up the evidence presented by both sides, the court considers the evidence for the falsity of the statement outweighs the evidence for the truth of the statement.

(b) A statement is “wilfully deceitful” if:

(1) It is false or misleading (as set out above, assuming the balance of probabilities test is used); and

(2) The maker intended the statement to make people believe something that is false or misleading.

23. A court will determine whether a statement is false or misleading, on the balance of probabilities, in exactly the same way it would determine whether a statement is true on the balance of probabilities in any other civil claim: It will consider the evidence from

both sides, ask itself whether the evidence is convincing and determine which side has the most compelling case.

24. In most cases it is likely that the question will be relatively simple. For example, the question: Is the statement “More illegal immigrants entered the country last year than any year in history” false or misleading would be answered by:
  - (a) Identifying the year to which the statement refers (e.g. if it was said in 2024 then “last year” would, to the reasonable person, mean 2023);
  - (b) Determining the meaning of “illegal immigrant” (including the legal definition);
  - (c) Looking at the publicly available records for each year to determine whether there were more illegal entries in any year other than 2023.
  - (d) Considering any other evidence which suggests the publicly available records are inaccurate and determining whether reliance can be placed on them.
  
25. The ICDR’s view is that the “wilfully deceitful” test is inappropriate in this context for the following reasons:
  - (a) Other respondents and serving politicians have expressed concerns about a lack of clarity in the phrase “wilfully deceitful”. They are concerned they may be sanctioned based on a test they don’t understand. The ICDR Model, by focusing on correcting false or misleading statements (and only moving to sanction if correction is refused) avoids this problem.
  - (b) If a politician makes a false or misleading statement, then the public will be equally harmed regardless of whether the politician intended to deceive them: the statement is equally false (and, therefore, equally in need of correction) regardless of whether the intent exists. The ICDR Model proposes the non-punitive measure of requiring a simple correction to settle the matter before any sanction is considered.

(c) The phrase “wilfully deceitful” is more appropriate in a criminal law context where the court is considering whether to impose a criminal sanction on a defendant. The ICDR Model is primarily about correction rather than sanction and the ICDR prefers the civil to the criminal model.

26. It would, however, be entirely possible for a court to determine whether a statement is “wilfully deceitful” (although it would, however, be preferable to adopt the existing legal language and describe the statement as “dishonest” - as in section 2 of the Fraud Act 2006 - so that it replicates an existing legal term). When determining cases under the Fraud Act, the court must determine (*inter alia*) whether the defendant intended for the recipient of the statement to be deceived. The courts consider dishonesty in a variety of criminal offences (such as theft). It will conduct the same exercise as in these offences, asking whether the evidence justifies the conclusion (likely on the higher “beyond all reasonable doubt” test) that the defendant was dishonest.

*If a new offence on deception were introduced what are your views on what defences should be available to an individual, for example making a false statement for reasons of national security.*

27. The ICDR does not think that it is necessary for there to be a criminal offence of deception. A civil regulatory regime would be preferable (and an administrative regime may also work).

28. In any of the above regimes, however, there should be defences available:

29. As to a Correction Notice: There will be times (such as for the purpose of national security, the protection of individuals, or the prevention and detection of crime) that it is necessary for a politician to make a misleading statement. It would, however, likely cause problems down the line if the statute was to attempt an exhaustive list of these (because it is impossible to predict every set of circumstances that will occur in the future).

30. We therefore recommend that the statute adopt a similar exercise to that used in Part II of the Freedom of Information Act 2000 and the Environmental Information Regulations 2004. These require the court to weigh the public interest in favour

of/against making an order. The ICDR Model should adopt a similar test. We suggest a clause which provides for a public interest test and offers a non-exhaustive list of circumstances in which it will apply (this has the added benefit of offering guidance for the court about the level of seriousness of the unlisted circumstances which will qualify).

For example:

(1) The [court/panel] shall not make a Correction Notice if it concludes that in all the circumstances of the case the public interest in not making an order outweighs the public interest in making an order.

(2) Circumstances in which the public interest in not making an order will outweigh the public interest in making an order include but are not limited to:

(a) It was necessary to make the false or misleading statement for reasons of national security.

(b) It was necessary to make the false or misleading statement for the prevention or detection of crime.

(c) [Other examples can be added to this list]

31. As to a Disqualification Order: We suggest a defence of “reasonable excuse”. This is a common defence to regulatory claims (a number of examples are set out in the ICDR’s White Paper). It requires the respondent to provide the court with an explanation for their failure to comply with the Correction Order. This will encompass questions of national security and the prevention and detection of crime but it will also acknowledge that other circumstances may justify a failure to comply. The “reasonable excuse” defence is already built in to the ICDR Model drafting.

## Procedure

Could you explain your rationale for allowing registered voters to make complaints directly to the courts and to set out how you propose voters would be informed of any such process, and how it would work in practice.

32. The rationale for this proposal is explained in the ICDR White Paper. For ease of reference, it is repeated here:

*It is preferable, as a general principle, for politicians to be directly accountable to voters whenever possible. The best way to empower voters in respect of political lying would be to allow any registered voter to apply for a Correction Notice. This is the model used for judicial review and regulatory regimes like the Freedom of Information Act 2000. It will reduce any resource implications and avoid the necessity of adding new tasks to an existing regulatory body. If legislators do not want voters to have direct involvement in the regime then the ICDR Model would also work in the same way if an existing regulatory body (such as the Standards Commissioner or the Public Services Ombudsman).<sup>4</sup>*

33. As set out in the ICDR White Paper and in Appendix 1, the ICDR Model could also function with the sole power to seek a correction notice being given to a regulatory body, such as the Standards Commissioner (as would be the case if the Gatekeeper Option is applied).

34. The way that it would work in practice is set out in the sample clause “Application for A Correction Notice”. This was included in the appendices to the White Paper and, for convenience, is also included in Appendix 2 to this paper. In short:

35. Under the “direct access version”

- (a) An applicant must make an application to the County Court/administrative panel using the existing process set out in the Civil Procedure Rules or whatever rules

---

<sup>4</sup> Fowles, “A Blueprint for Political Honesty”, (ICDR, 2024), §39

are adopted by the administrative panel. This involves an application form (which already exists) and a witness statement setting out why the applicant believes a false or misleading statement has been made and exhibiting documentary evidence in support.

- (b) If a judge concludes that the application is not vexatious and has a real prospect of success then the papers will be sent to the respondent and they will have the opportunity to put in their own evidence (or may simply agree to correct the record). The court may then make directions for a hearing.
- (c) The court will hold a hearing to listen to the evidence and argument and question witnesses (if necessary). The court will determine whether to make a Correction Notice on the basis of the written evidence and evidence given at the hearing.

36. Under the Gatekeeper Option:

- (a) A member of the public would make a complaint to the Standards Commissioner.
- (b) The Standards Commissioner would be required to evaluate the complaint, decide whether an application for a Correction Notice would (a) have a better than 50% chance of success, and (b) be in the public interest. If the answer to both questions is affirmative then the Commissioner would be required to make an application for a Correction Notice (using the same procedure as above – likely without the necessity of an initial review by a judge).

37. An application for a Disqualification Notice would follow the same procedure. Both sides may put in evidence about whether the respondent (a) complied with the correction notice, and (b) had a reasonable excuse for not doing so.

38. For many areas of law, the government or a relevant organisation publishes informal or formal guidance. It would be sensible to do the same in this case. If the Committee think it appropriate then, it may wish to include a provision requiring the government to provide guidance. A provision of this nature is found at section 182 of the Licensing Act 2003.

*What is your response to the view of Transparency International UK that creation of a criminal offence could create risks similar to those of SLAPP (Strategic Litigation against Public Participation) litigation, where those with resources can manipulate the system.*

39. The ICDR Model contains stronger safeguards against SLAPP claims than any other legislative scheme (certainly more than the Defamation Act 2013, under which most SLAPP claims are brought). In particular:
- (a) We propose that it will be a criminal offence to make a vexatious claim. A SLAPP would fall squarely within the definition of a vexatious claim.
  - (b) An application can be avoided entirely if the politician corrects the record.
  - (c) Each application will be reviewed by a judge (or the Standards Commissioner) to determine if it is vexatious before the respondent is even required to respond. The vast majority (arguably all) of SLAPP claims will, therefore, never reach the stage where they require a response.
  - (d) The existing costs regime in the civil courts will require the losing party to pay the successful party's costs (the losing party's liability is limited if they concede at an early stage). This will be the case for the civil law version of the ICDR Model and the same rule can be applied to the administrative panel version.
  - (e) As a further guard against SLAPP claims, we suggest adding a provision which allows the court to impose costs on the "indemnity basis" (essentially a punitive costs award) if it finds that an application is a SLAPP.
  - (f) SLAPP are effective because defamation claims are some of the most expensive litigation (largely because claims take so long so costs run up). The time limits and case management requirements in the ICDR Model mean that this would not happen.

- (g) The “Gatekeeper Option” will introduce a new level of protection by only allowing the Standards Commissioner to instigate an application for a Correction Order (see Appendix I).

*In your view, what appeals process should be available as part of any process and what arrangements should be in place in relation to legal costs, for example where a Member or Candidate contest an allegation of lying successfully.*

40. This is set out in the White Paper and the appeals process is already defined in civil law.
41. There should be a right to appeal on a point of law as there is with any other civil or administrative claim. If the regime is given to an administrative panel rather than the courts, then there should be a right to appeal from the decision of the administrative panel on a point of law (see Appendix I).
42. The ICDR’s view on costs is set out above. We also suggest that legal aid (or an equivalent scheme) should be made available.

### **Sanctions**

*What are your views on the comments made by the Criminal Bar Association in their written evidence to this Committee, where they stated:*

*“There are many ways in which available sanctions can be extended in accordance with the Nolan principles, for example, by way of providing for the disqualification of elected Members through the process of recall.”*

43. The Correction Notice part of the ICDR Model is the most important stage. It would be possible to combine the ICDR Model with recall as a sanction. For example, the penalty for failure to comply with a Correction Notice could be a recall election or petition. This, for the reasons set out below, would not (in the ICDR’s view) be as effective as a Disqualification Notice, but it would be better than doing nothing.

44. The chief drawback of recall as a sanction is that it lacks speed. By the time that a recall petition completed, and an election can be organised, the public discourse will have moved on, leaving any correction or consequences meaningless.
45. It also suffers from the drawbacks of the “Pure Politics Model” of regulation, which are set out in the White Paper. For convenience, the relevant section is repeated here:

***The Pure Politics Model** – This is the model which appears to be preferred by the Senedd Standards Commissioner. It essentially involves “leaving the matter to voters”. This model is prima facie attractive but, in reality, does voters a great disservice:*

***It’s a “Catch-22”** - Political lying denies voters the opportunity to make an informed decision. Imposing politicians’ false or misleading statements on voters is unfair and undermines confidence in the democratic process.*

***It doesn’t work if there’s no alternative** – Voters distrust all politicians. The unchecked extent of political misrepresentation means that voters do not distinguish between trustworthy and untrustworthy politicians. Telling voters to “just vote for someone else” only works if there’s a genuine alternative. At the moment, voters do not see that there is.*

***It doesn’t work in practice** – Voters only get the opportunity to vote for politicians in the Senedd every five years. It is very difficult to hold politicians accountable at the ballot box for a false or misleading statement if they are not up for election for another half decade. The possibility of recall, which can take up to a year, does not offer substantial mitigation for this problem.*

*The Westminster Parliament, in 2015, introduced recall petitions as a potential sanction for (inter alia) breach of privilege (which can include misleading Parliament). The sanction has not proved effective in respect of political lying:*

*Since 2015 trust in politics has declined. The years since 2015 have arguably seen an increase in political dishonesty (and certainly the public perception of political lying).*

*The process takes too long (there is often more than a year between the false or misleading statement and the recall petition).*

*Why do you believe that disqualification would be an appropriate sanction if a new criminal offence on deception as introduced.*

46. As set out above, the ICDR does not believe a criminal offence is necessary. This question is, therefore, answered from the point of view of a civil or administrative regime (although the same points will apply to a criminal regime).
47. The ICDR believes disqualification is appropriate for the following reasons:
  - (a) First, it is what was promised. The Counsel General's statement made specific reference to disqualification. Abandoning that now would send a message to the public that the Senedd is abandoning its commitment and would further damage public trust in the democratic system (and, in particular, the parties currently in the Senedd).
  - (b) Second, because, for the reasons set out above, a recall petition is not an appropriate deterrent.
  - (c) Third, political deception goes to the heart of a person's suitability for office. We currently disqualify people from holding office if they (for example) have been involved in corrupt practices.<sup>5</sup> A refusal to correct the record after a statement

---

<sup>5</sup> See <https://www.electoralcommission.org.uk/guidance-candidates-and-agents-local-government-elections-england/what-you-need-know-you-stand-a-candidate/qualifications-and-disqualifications-standing-election/disqualifications> (last accessed 9 December 2024)

has been proven, in a court of law, to be false or misleading falls squarely within any reasonable person's understanding of corrupt practices.

SAM FOWLES

For the ICDR  
16 December 2024