INSTITUTE for CONSTITUTIONAL and DEMOCRATIC RESEARCH

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

RESPONSE TO THE COMMITTEE'S FOLLOW-UP QUESTIONS

- APPENDICIES -

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APPENDIX 1: SUGGESTED AMENDMENTS TO THE ICDR MODEL

Introduction

1. The ICDR welcomes the critiques of the ICDR Model across this Inquiry. While we do not agree with some of them (as set out in the ICDR Response Note – App. 3), we have nevertheless sought to offer some amendments to the ICDR Model which take them into account.

2. The principal concerns appear to be:

   (a) The risk of vexatious claims or SLAPP claims;

   (b) The risk of the courts being overwhelmed;

   (c) The feeling that this matter is inappropriate for the Criminal Courts;

3. The ICDR offers two amendments to address these:

   (a) **The Gatekeeper Option** – The Standards Commissioner will be given the sole power to bring claims for Correction Orders and Disqualification Orders and an explicit power to prosecute those who make vexatious claims. This will provide for a control against trivial and vexatious claims and against the courts being overwhelmed. The Standards Commissioner will be held accountable for their decisions by a right of appeal to the courts.

   (b) **The Panel Option** – The power to make Correction Orders and Disqualification Orders will be given to an administrative panel, overseen by the Standards Commissioner. This will be held accountable by a right to appeal to the courts on a point of law.

The Gatekeeper Option

4. The Standards Commissioner will have the exclusive power to ask the court for a Correction Order or Disqualification Order. The Commissioner will, in effect, act as

the regulator for the rules against political deception and will be empowered to seek court orders as part of that regulatory role. This reflects the powers of other regulators (such as the Information Commissioner) who have exclusive powers to seek certain court orders (including punitive orders) as part of their regulatory role.

5. The ICDR has already expressed our concern that the Standards Commissioner is insufficiently accountable for their decisions and works too slowly. This will be addressed by making the Standards Commissioner accountable to the courts for their decisions. The Standards Commissioner, on receiving a report from a member of the public, will have a duty to seek a Correction Order or Disqualification Order where they conclude:

   (a) It is in the public interest to do so; and

   (b) There is a better than 50% prospect of success.

   This draws on the test applied by the CPS before initiating a prosecution.

6. Given that (as already set out) misleading statements by politicians harm the political discourse and public trust as a whole, it is right that the Standards Commissioner is held accountable for his decisions by a body that the public trusts (the ICDR has already provided the Inquiry with data about the high level of public trust in the courts). Many public bodies are accountable to the courts for their regulatory decisions. Alcohol licensing authorities, for examples, can have many of their decisions reviewed by the courts. We therefore propose that, should the Standards Commissioner decline to seek a relevant order, having received a complaint from a member of the public, that person should have the right to ask the courts to review that decision. There is no need for a similar review provision if the Commissioner does seek a relevant order because, under the law as it stands, the respondent will already be able to ask the court to strike out the application as an abuse of process or seek a judicial review.

7. For the reasons set out in the ICDR's previous submissions, it is vital that these proceedings happen quickly. For that reason, we recommend imposing statutory time

limits on the Standards Commissioner's decision-making in this area (it is relatively common for regulators to be subject to time limits).

8. There will be some resource implications for this system. It adds to the work of the Standards Commissioner and will require relatively swift decision-making. It will likely be necessary for the Standards Commissioner to appoint a number of caseworkers to handle the workload and to instruct lawyers to handle applications to the court. For the reasons already set out by the ICDR, the number of complaints is likely to be relatively low, so the resource implications are likely to be commensurately relatively low.

9. A sample clause giving effect to the above can be found at Appendix 1 of this Note.

The Administrative Panel Option

10. Should the Committee decide that it would prefer to keep the matter out of the courts so far as possible, we have also given some thought to how the ICDR Model could work if enforced by an administrative panel.

11. While the comments given in the ICDR White Paper, the Rebuttal Note, and by Sam Fowles in oral evidence, which address the advantages of the court system (in terms of independence, transparency, speed, and public trust) we nevertheless wanted to give the Committee an option that would work in an administrative context.

12. We therefore propose the following:

    (a) The Senedd creates (by statute) a "Standards Panel". If the Standards Commissioner does not have a role in bringing claims for Correction Orders or Disqualification Orders, then this may be set up under the auspices of the Commissioner. If the Commissioner does have such a role, then it should be independent.

(b) The Standards Panel will have the power to make Correction Orders and Disqualification orders on the same terms as proposed for the courts in the White Paper.

(c) The Standards Panel would sit with a legally qualified chair and two lay "wing members". This replicates the constitution of the First Tier Tribunal and many disciplinary panels (such as police disciplinary panels). It would be sensible to recruit a pool of legally qualified chairs and lay members to ensure availability. Panel members would likely work on a "fee paid" basis (as with members of police disciplinary panels) rather than a full-time basis so would only need to be paid for the time they work.

(d) The Panel should be required by statute to adopt procedure rules which offer an equivalent standard of procedural fairness to the rules of the most appropriate court (it is suggested that the First Tier Tribunal would be an appropriate comparator). Alternatively, such rules could be set down by secondary legislation.

(e) To ensure the panel is accountable for its application of the rules, there should be a right of appeal, on a point of law, to an appropriate court (it is suggested either the County Court or the High Court would be appropriate).

SAM FOWLES
For the ICDR
6 December 2024

APPENDIX 2: SAMPLE LEGISLATION

Please not that these clauses are intended of examples of how sample legislation could look. They are intended to offer a starting point for discussion, not a finished product.

The Gatekeeper Option

Standards Commissioner's Duty

(1) On receiving a complaint from a member of the public or otherwise becoming aware that:

(a) A Qualifying Person has made a Qualifying Statement; and

(b) The Qualifying Statement is false or misleading;

The Standards Commissioner shall consider whether to make an application for a Correction Notice.

(2) On receiving a complaint from a member of the public or otherwise becoming aware that a person who is subject to a Correction Notice has failed to comply with the requirements of that notice within the time specified in the notice the Standards Commissioner shall consider whether to make an application for a Disqualification Notice.

(3) The Standards Commissioner shall make an application for a Correction Notice, or a Disqualification notice if he forms the view that:

(a) There is a public interest in making the application; and

(b) The application has a better than fifty percent prospect of success.

(4) Within seven days of receiving a complaint under this section the Standards Commissioner must:

(a) Apply for an order under [relevant subsequent provisions – Correction Order/Disqualification Order]; or

(b) Publish a decision notice explaining why he has decided not to seek an order under [relevant subsequent provisions – Correction Order/Disqualification Order]; or

(c) Publish a decision notice explaining that exceptional circumstances mean that it is not possible for the Standards Commissioner to do either (a) or (b) in the time available and stating the reasons for this and the date by which he will do either (a) or (b).

Appeal against a decision of the Standards Commissioner

(1) A person who:

(a) Has made a complaint to the Standards Commissioner; and

(b) Is dissatisfied with the Standards Commissioner's response to that complaint

may appeal to the [insert relevant court].

(2) An appeal under subsection (1) may not be made unless more than seven days have passed since the Standards Commissioner received the complaint.

(3) On receipt of an appeal under this section the [insert relevant court] may exercise any power that the Standards Commissioner could have exercised on receipt of the original complaint.

Power to issue a Correction Notice

(1) This provision applies when a Qualifying Person makes a Qualifying Statement.

(2) A Qualifying Person is a person who is a Member of the Senedd or a candidate for election to the Senedd.

(3) A Qualifying Statement is a statement that:

(a) Is published; and

(b) A reasonable person could understand to be a statement of fact;

(c) A statement of fact shall not include a statement of honest opinion.

(4) Where [a court/the Standards Panel] finds that a Qualifying Person:

(a) Has made a Qualifying Statement; and

(b) The statement was made in the course of their conduct as a Qualifying Person or there is a public interest in whether the statement is false or misleading; and

(c) The imputation conveyed by the statement complained of is false or misleading;

It shall make and issue a Correction Notice to the in respect of that statement.

(5) A Correction Notice is a notice which requires the Qualifying Person named therein to correct the Qualifying Statement specified in the notice in the manner specified in the notice.

(6) [the court/the Standards Panel] shall not issue a correction notice if:

(a) The false or misleading aspect of the Qualifying Statement is trivial; or

(b) It was necessary to make the Qualifying Statement including the false or misleading aspect for the purposes of national security or law enforcement.

(7) A person named in a Correction Notice must comply with the notice by publishing the required correction in the same forum as they made the statement specified in the Notice within seven days of the date of the Notice.

(8) If it is not reasonably possible to make the required correction in the same forum as the Qualifying Statement was made then they must make the correction in a forum of equivalent or greater prominence.

(9) The Standards Commissioner shall cause the Correction Notice to be published on a public register which is available online and to be published in hard copy and online in a newspaper which is of national prominence in Wales.

(10) Appeal against a decision to issue a Correction Notice lies to the Crown Court and may only be made on a point of law.

(11) The standard of proof for any matter in this section shall be the balance of probabilities. Where [a court/the Standards Panel] finds that there is a real prospect that:

(a) A Qualifying Statement is false or misleading; or

(b) Did not have an evidential basis at the time that it was made

The evidential burden of proving the truth of the Qualifying Statement shall lie with the person who made that statement.

[ALTERNATIVELY: (11) The standard of proof for any matter in this section shall be the balance of probabilities]

(12) [a court/the Standards Panel] exercising any power under this section must acknowledge its duty under section 3 of the Human Rights Act 1998.

(13) 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.

(14) 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]

(14) Definitions

a. A candidate for election to the Senedd has the same meaning as in section 7 of the Government of Wales Act 2006.
b. A statement is "published" if it is a "publication" according to the law of defamation.
c. "Honest opinion" shall have the same meaning as in the Defamation Act 2013.

Application for a Correction Notice

(1) An application for a Correction Notice may be made by any person who is registered to vote in Wales.

ALTERNATIVELY: An application for a Correction Notice may be made by [INSERT APPROVED AUTHORITIES]

(2) An application under this part must be made by the same process as is used for starting a prosecution.

(3) An application under this part must be served on the respondent within 24 hours of the information being laid.

(4) An application under this part must be heard by a magistrates' court no later than seven days after it is served on the respondent.

(5) A District Judge sitting in the magistrates' court must review an application under this part on the papers within [x] hours of the information being laid.

(6) An application under this part must be dismissed without a hearing if a District Judge determines that it is vexatious or has no real prospect of success.

(7) An application may not be made under this section after:

(a) More than six months have passed since the date on which the relevant Qualifying Statement was made; or

(b) More than six months have passed since the date on which sufficient evidence to establish on the balance of probabilities that the relevant Qualifying Statement was false or misleading or contained false or misleading aspects became available to the public.

Whichever is longer.

(8) Where it is reasonably necessary for a party to an application under this part to rely on information to which one of the exemptions in Part II of the Freedom of Information Act would otherwise apply:

(a) [the court/the Standards Panel] may exclude any person before considering that information.

(b) Where [the court/the Standards Panel] excludes a party to the application that party may be represented by a special advocate during the parts of the hearing from which they are excluded.

Failure to comply with a correction notice

(1) If [a court/the Standards Panel] is satisfied beyond all reasonable doubt that person named in a Correction Notice failed without reasonable excuse to comply with that notice within the time specified then any person who is registered to vote in Wales may apply for a Disqualification Order in respect of the person named in the notice.

(2) If on an application under sub-section (1) [a court/the Standards Panel] finds that a person named in a Correction Notice has not complied with the notice within a specified time then [the court/the Standards Panel] must make a Disqualification Order.

(3) An application under subsection (1) must be accompanied by a witness statement.

(4) A Disqualification Order shall prohibit the subject from being a member of the Senedd until such a time as shall be specified in the order.

(5) The amount of time specified in the order must be at least as long as the maximum period of time before the next Senedd election.

(6) In determining the length of the Disqualification Order [the court/the Standards Panel] shall have regard to:

(a) Any harm caused by the Qualifying Statement;

(b) The extent to which the Qualifying Statement was published;

(c) Whether the defendant should reasonably have been aware that the Qualifying Statement was false or misleading or included false or misleading elements;

(d) Whether the defendant has previously been convicted of an offence under this section or has been the subject of a Correction Order.

(7) Schedule 1A of the Government of Wales Act 2006 is amended to add the following words:

"(9) A person who is subject to a Disqualification Order which has not expired."

Offence of making a vexatious application [ALTERNATIVELY: report]

(1) It shall be an offence to make a vexatious application [ALTERNATIVELY: report with the intention that it shall cause or influence an appropriate authority to make an application under this part.

(2) The offence in (1) shall be triable summarily and shall be punishable by a fine.

Power to take over applications

(1) [Insert relevant public authority] may take over an application for a Correction Order or an application for a Disqualification Order at any stage.

Administrative Panel

Standards Commissioner's Duty

(1) On receiving a complaint from a member of the public or otherwise becoming aware that:

(a) A Qualifying Person has made a Qualifying Statement; and

(b) The Qualifying Statement is false or misleading;

The Standards Commissioner shall consider whether to make an application for a Correction Notice.

(2) On receiving a complaint from a member of the public or otherwise becoming aware that a person who is subject to a Correction Notice has failed to comply with the requirements of that notice within the time specified in the notice the Standards Commissioner shall consider whether to make an application for a Disqualification Notice.

(3) The Standards Commissioner shall make an application for a Correction Notice, or a Disqualification notice if he forms the view that:

(a) There is a public interest in making the application; and

(b) The application has a better than fifty percent prospect of success.

(4) Within seven days of receiving a complaint under this section the Standards Commissioner must:

(a) Apply for an order under [relevant subsequent provisions – Correction Order/Disqualification Order]; or

(b) Publish a decision notice explaining why he has decided not to seek an order under [relevant subsequent provisions – Correction Order/Disqualification Order]; or

(c) Publish a decision notice explaining that exceptional circumstances mean that it is not possible for the Standards Commissioner to do either (a) or (b) in the time available and stating the reasons for this and the date by which he will do either (a) or (b).

Appeal against a decision of the Standards Commissioner

(1) A person who:

(a) Has made a complaint to the Standards Commissioner under this part; and

(b) Is dissatisfied with the Standards Commissioner's response to that complaint

may appeal to the [insert relevant court].

(2) An appeal under subsection (1) may not be made unless more than seven days have passed since the Standards Commissioner received the complaint.

(3) On receipt of an appeal under this section the [insert relevant court] may exercise any power that the Standards Commissioner could have exercised on receipt of the original complaint.

The Standards Panel

(1) There shall be a body called the Standards Panel.

(2) The Standards Panel shall have the powers set out in sections [insert as appropriate].

(3) The Standards Panel must conduct itself according to procedural rules which provide for a standard of procedural fairness which is equivalent to that conferred by the [for example Civil Procedure Rules].

(4) The Standards Panel shall sit with three members. These shall be:

(a) A person who is a member of the Bar of England and Wales or who is a qualified solicitor.

(b) Two persons who are not legally qualified.

(5) All members of the panel must have appropriate professional experience and be able to demonstrate a high level of integrity.

(6) The legally qualified member of the panel shall act as the chair.

Power to issue a Correction Notice

(1) This provision applies when a Qualifying Person makes a Qualifying Statement.

(2) A Qualifying Person is a person who is a Member of the Senedd or a candidate for election to the Senedd.

(3) A Qualifying Statement is a statement that:

(a) Is published; and
(b) A reasonable person would understand to be a statement of fact.
(c) For the purposes of this section a statement of fact shall not include a statement of honest opinion.

(4) Where the Standards Panel finds that a Qualifying Person:
(a) Has made a Qualifying Statement; and
(b) The statement was made in the course of their conduct as a Qualifying Person or there is a public interest in whether the statement is false or misleading; and
(c) The Qualifying Statement in question is not true or is misleading;
It shall make and issue a Correction Notice to the in respect of that statement.

(5) A Correction Notice is a notice which requires the Qualifying Person named therein to correct the Qualifying Statement specified in the notice in the manner specified in the notice.

(6) The Standards Panel shall not issue a correction notice if:

(a) The false or misleading aspect of the Qualifying Statement is trivial; or

(b) It was necessary to make the Qualifying Statement including the false or misleading aspect for the purposes of national security or law enforcement.

(7) A person named in a Correction Notice must comply with the notice by publishing the required correction in the same forum as they made the statement specified in the Notice within seven days of the date of the Notice.

(8) If it is not reasonably possible to make the required correction in the same forum as the Qualifying Statement was made then they must make the correction in a forum of equivalent or greater prominence.

(9) The Standards Commissioner shall cause the Correction Notice to be published on a public register which is available online and to be published in hard copy and online in a newspaper which is of national prominence in Wales.

(10) Appeal against a decision to issue a Correction Notice lies to the Crown Court and may only be made on a point of law.

(11) The standard of proof for any matter in this section shall be the balance of probabilities. Where the Standards panel finds that there is a real prospect that:

(a) A Qualifying Statement is false or misleading; or

(b) Did not have an evidential basis at the time that it was made

The evidential burden of proving the truth of the Qualifying Statement shall lie with the person who made that statement.

[ALTERNATIVELY: The standard of proof for any matter in this section shall be the balance of probabilities]

(12) The Standards Panel exercising any power under this section must acknowledge its duty under section 3 of the Human Rights Act 1998.

(14) 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.

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a. A candidate for election to the Senedd has the same meaning as in section 7 of the Government of Wales Act 2006.
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(2) An application under this part must be made by the same process as is used for starting a prosecution.

(3) An application under this part must be served on the respondent within 24 hours of the information being laid.

(4) An application under this part must be heard by a magistrates' court no later than seven days after it is served on the respondent.

(5) A District Judge sitting in the magistrates' court must review an application under this part on the papers within [x] hours of the information being laid.

(6) An application under this part must be dismissed without a hearing if a District Judge determines that it is vexatious or has no real prospect of success.

(7) An application may not be made under this section after:

(a) More than six months have passed since the date on which the relevant Qualifying Statement was made; or

(b) More than six months have passed since the date on which sufficient evidence to establish on the balance of probabilities that the relevant Qualifying Statement was false or misleading or contained false or misleading aspects became available to the public.

Whichever is longer.

(8) Where it is reasonably necessary for a party to an application under this part to rely on information to which one of the exemptions in Part II of the Freedom of Information Act would otherwise apply:

(a) The Standards Panel may exclude any person before considering that information.

(b) Where the Standards Panel excludes a party to the application that party may be represented by a special advocate during the parts of the hearing from which they are excluded.

Failure to comply with a correction notice

(1) If the Standards Panel is satisfied beyond all reasonable doubt that person named in a Correction Notice failed without reasonable excuse to comply with that notice within the time specified then any person who is registered to vote in Wales may apply for a Disqualification Order in respect of the person named in the notice.

(2) If on an application under sub-section (1) the Standards Panel finds that a person named in a Correction Notice has not complied with the notice within a specified time then the Standards Panel must make a Disqualification Order.

(3) An application under subsection (1) must accompanied by a witness statement.

(4) A Disqualification Order shall prohibit the subject from being a member of the Senedd until such a time as shall be specified in the order.

(5) The amount of time specified in the order must be at least as long as the maximum period of time before the next Senedd election.

(6) In determining the length of the Disqualification Order the Standards Panel shall have regard to:

(a) Any harm caused by the Qualifying Statement;

(b) The extent to which the Qualifying Statement was published;

(c) Whether the defendant should reasonably have been aware that the Qualifying Statement was false or misleading or included false or misleading elements;

(d) Whether the defendant has previously been convicted of an offence under this section or has been the subject of a Correction Order.

(7) Schedule 1A of the Government of Wales Act 2006 is amended to add the following words:

"(9) A person who is subject to a Disqualification Order which has not expired."

Offence of making a vexatious application [ALTERNATIVELY: report]

(1) It shall be an offence to make a vexatious application [ALTERNATIVELY: report with the intention that it shall cause or influence an appropriate authority to make an application under this part.

(2) The offence in (1) shall be triable summarily and shall be punishable by a fine.

APPENDIX 3: RESPONSE TO OTHER MATTERS ARISING DURING THE INQUIRY

Should Correction Notices have a higher standard of proof?

13. *B (Children)*[1] the (then) House of Lords rejected the principle that more serious allegations require a higher standard of proof when a protective order is concerned. As Lady Hale (with whom the other members of the curt agreed) put it:

> *Lord Lloyd, at pp 577–578 on the other hand, took a more straightforward line: "In my view the standard of proof under [section 31(2)] ought to be the simple balance of probability however serious the allegations involved … mainly because section 31(2) provides only the threshold criteria for making a care order …*
>
> *My Lords, Lord Lloyd's prediction proved only too correct. Lord Nicholls's nuanced explanation left room for the nostrum, "the more serious the allegation, the more cogent the evidence needed to prove it", to take hold and be repeated time and time again in fact-finding hearings in care proceedings: see, for example, the argument of counsel for the local authority in In re U (A Child) (Department for Education and Skills intervening) [2005] Fam 134 , 137. It is time for us to loosen its grip and give it its quietus.*[2] [Emphasis added]

14. The *ratio* of the court's decision was that a care order is intended to protect the child, not to punish anyone (although the parents in question may well see it as a punishment). The Correction Order is of entirely the same nature. It is intended to protect the public from false information. It is not intended to punish the politician who makes the correction (although, as with the parents of a child taken into care, they may subjectively view it as such). The aspect of the ICDR Model which is intended to punish and deter is the Disqualification Order. The ICDR agrees that if a criminal law route is considered appropriate (although the ICDR believes the civil route is preferable) then the standard of proof for a Disqualification Order should be "beyond reasonable doubt".

Does the ICDR Model sanction "deliberate deception" or just "deception"?

[1] [2008] UKHL 35, [2008] 4 All ER 1, [2009] 1 AC 11
[2] Re B (Children) (Care Proceedings: Standard of Proof) [2009] 1 A.C. 11

15. The ICDR Model is clear that only deliberate deception will be sanctioned. As the White Paper sets out:

> *If a MS or candidate fails to comply with a correction notice within seven days, then they will have demonstrated that:*
>
> > *(a) They are aware that, on the balance of probabilities and given the best evidence, their statement was false [*or misleading*];*
> >
> > *(b) They have been given an opportunity to correct the statement and have not done so.*
> >
> > *(c) They knew they were liable to sanction if they failed to correct the statement and have nevertheless chosen not to correct it.*
>
> *It is, therefore, fair to impose the sanction at this point. It is, therefore, right that the court should have the power to impose sanction (see below) at this point.*

Does the ICDR Model allow claims to be brought "without any evidence"?[3]

16. All applications for Correction Orders (and Disqualification Orders) must be supported by evidence. Under the ICDR Model a person wishing to bring a claim must:

    (a) Establish that it is not vexatious and has a real prospect of success;

    (b) Establish that the defendant is a "Qualifying Person";

    (c) Establish that the statement in question is a "Qualifying Statement";

    (d) Establish, on the balance of probabilities (i.e. by adducing evidence), that there is a "real possibility" that the statement is false or misleading or did not have an evidential basis at the time that it was made.

17. Only if all the above can be proven, will the politician be required to prove, on the balance of probabilities, the truth of their statement.

18. This is well established in regulatory matters. Examples include:

[3] Meeting 18 November 2024, Transcript, 220

(a) Companies Act 2006, s. 451;

(b) Health and Safety at Work Act, ss. 2, 3, and 40;

(c) Criminal Justice Act 1988, s. 139

(d) Female Genital Mutilation Act 2003, s. 3A

19. It is well established that regulatory offences can place the burden on the defendant to prove that they had a reasonable excuse for failing to comply with a regulatory requirement. For example:

(a) Town and Country Planning Act, s. 179;

(b) Housing Act 2004, ss. 30, 32, and 72.

Would the ICDR Model require a change to the Criminal Procedure Rules?[4]

20. The ICDR Model will not take effect in criminal law. It will not require a change to the civil procedure rules (as set out above).

21. If Magistrates Courts were to be given responsibility for enforcing the regime, then the existing procedure rules would remain in place and would not need to be changed. Magistrates Courts use the Criminal Procedure Rules ("**CrimPR**") for both criminal and non-criminal cases.

22. Appendix 2 of the ICDR White Paper makes clear that the procedure for seeking a Correction Order (if the Magistrates Court Route is preferred) should be conducted in accordance with the existing Criminal Procedure Rules;

> *(2) An application under this part must be made by information to a magistrates' court in Wales and must be accompanied by a witness statement.*

23. Part 7 of the Criminal Procedure rules provides:

[4] "Briefing Note" §§28-31

Note. In some legislation, including the Magistrates' Courts Act 1980, an application for the issue of a summons or warrant is described as an 'information' and serving an application on the court officer or presenting it to the court is described as 'laying' that information.

24. If that is not sufficiently clear from the drafting of the sample clause then it can be clarified (and has been in Version 2 of the White Paper). It may also be helpful to specify that the requirements of Part 8 of the CrimPR (initial details of the prosecution case) should also be complied with. This would put a substantial burden on the person seeking a Correction Order. Such a burden seems to be appropriate in this context.

Is the single judge review stage a new invention?

25. Before any prosecution can be brought, the prosecutor must apply to the Magistrates' Court for a summons. A relevant judge (either a magistrate or a District Judge) must review the application and determine whether it meets the test to begin a prosecution. The High Court has confirmed that the threshold for issuing a summons is, for offences of this kind, "a high one".[5]

26. It is, therefore, established that a judge will review any criminal prosecution to ensure that it meets basic thresholds. In respect of certain matters, this must happen quickly (see, for example, Anti-social Behaviour Crime and Policing Act 2014, s. 80(3)). In judicial review, in the High Court, a High Court judge will conduct a process which is almost identical to that proposed in the ICDR Model before permission is given to bring a judicial review. This can be done on an urgent basis (including within 24 hours).

[5] See, for a summary of the position, the Westlaw summary of ***R (Johnson) v Westminster Magistrates* [2019] EWHC 1709 (Admin),** available at https://uk.westlaw.com/Document/ID8F008309D9811E993F0E72A9C5818AD/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0a89c37e0000019340c5d31a0399ca43%3Fppcid%3D54514ed1fc56477282e36200bbdb9dc7%26Nav%3DUK-CASES%26fragmentIdentifier%3DID8F008309D9811E993F0E72A9C5818AD%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=169837ea4c6ce983d8dbba77ef85301b&list=UK-CASES&rank=1&sessionScopeId=1e51a13c88b52332ce2678ffe7dd79ae8eec510ee3c4e6176f3c34a2ecb431fb&ppcid=54514ed1fc56477282e36200bbdb9dc7&originationContext=Search%20Result&transitionType=SearchItem&contextData=(sc.Search)&comp=wluk&navId=FEC1646E31EA8A31E6B54EEB0AD4BD73 (last accessed 18 November 2024)

27. The ICDR Model provides for a hybrid of these. It doesn't replicate either exactly but draws on concepts familiar to lawyers and judges.

Does the ICDR Model lack the safeguards in place in other areas of the law?

28. This criticism appears to be targeted at the version of the ICDR Model whereby any registered voter in Wales would be entitled to bring a claim for a Correction Notice. It should be noted that the Model proposes, in the alternative, that the power be limited to the CPS or an alternative regulatory body. This would appear to be a complete answer to such criticism.

29. It is, however, simply wrong to say that the "registered voter" version does not contain the procedural safeguards present in other areas of criminal law:

    (a) Any citizen can bring a private prosecution in England and Wales (save for in very limited circumstances). The Attorney General has a power to "take over" (and, if it so chooses, discontinue) private prosecutions. Such a power could be extended to applications for Correction Notices and subsequent disqualification claims. Version 2 of the ICDR Model incorporates this amendment.

    (b) The ICDR Model addresses the fact that any citizen can bring a claim by imposing stricter measures to block vexatious claims at the application stage. These include:

        (1) The power for a judge to dismiss claims which are vexatious or have no prospect of success on the papers;

        (2) Making a vexatious application will be a criminal offence in and of itself;

        (3) Where a claim is not vexatious, the claimant will still be required to prove their case. A court, under existing rules, will have a discretion to impose a cost sanction if the claim fails.

Does the common law offence of "misconduct in public office" provide a satisfactory alternative?

30. First, the Law Commission has investigated the efficacy of the common law offence and found that "due to the concerns with the terms and practical effects of the common law offence", it should be abolished in its current form. The Law Commission has recommended that it be replaced with two statutory offences which deal with (a) corruption and (b) breach of duty that leads to death or serious injury. These are clearly not appropriate to deal with the instant matter.[6]

31. Second, the common law offence has already been tested in the context of political deception and the Divisional Court made clear that it is not an appropriate instrument. In ***R (Johnson) v Westminster Magistrates* [2019] EWHC 1709 (Admin)**, the High Court considered whether Boris Johnson could lawfully be prosecuted under the common law offence for allegedly false statement(s) made in the context of the Brexit campaign. Lord Justice Rafferty and Mr Justice Supperstone held (*inter alia*):

> *Mr Coppel accepts that there is no precedent for any office holder being prosecuted for misconduct in public office for wilfully making/endorsing a misleading statement in and for the purposes of political campaigning, or even any comparable case. He is thus obliged to submit that this matters not since what is alleged falls within the principles applicable to the offence. It does not.*
>
> And
>
> *All the cases to which we have referred and many more we were shown share the common feature of corrupt abuse of public power for personal gain, or gross neglect in failing to comply with the core duties of the office. Such conduct is capable of satisfying the connected tests of breach of duty and the gravity necessary for the offence to be established. The offence will be made out only if the manner in which the specific powers or duties of the office are discharged brings the misconduct within its ambit. Consequently, at the time of the alleged misconduct the individual must be acting as, not simply whilst, a public official.* [Emphasis added]

32. Third, the common law offence is targeted at corrupt abuse of an office. It does not apply to candidates or to members of parliament when they are campaigning. Political deception is an entirely different beast. Any mechanism to combat political deception must deal with statements made during campaigns and must encompass candidates.

[6] https://lawcom.gov.uk/project/misconduct-in-public-office/ (last accessed 24 November 2024)

33. Fourth, the common law offence targets an entirely different harm ("corrupt abuse of public office for personal gain"). The instant issue is not about misuse of office or personal gain. It is to protect the public against false or misleading statements made by politicians. The common law offence should not be twisted into something for which the courts have made clear it is ill suited.

34. Fifth, the common law offence applies in England and Wales. Attempting to both amend the offence and set it on statutory footing such that it only applies in Wales would mean that the same offence has different meanings on either side of the border. This is a recipe for confusion.

35. Sixth, the common law offence suffers from the very problem that the ICDR Model is designed to avoid. There is no clarity as to what it means (in the common law offence) for a politician to "wilfully" make a false or misleading statement. There is no justification for adopting a measure with this lack of clarity.

Is the ICDR Model compatible with the European Convention on Human Rights?

36. First, the requirement for the politician to prove the truth of their statement does not arise in respect of a criminal sanction. It only arises at the Correction Notice stage. The ICDR does not propose that a Correction Notice is treated as a criminal sanction (any more than a planning enforcement notice, closure notice, of information notice is a criminal sanction). It, rather, provides for a regulatory step which allows the subject to correct the record while avoiding criminal sanction. The Magistrates Courts regularly administer regulatory procedures that are not criminal sanctions (see, for example, proceedings under the Licensing Act 2003).

37. It is not clear why politicians would object to saying "I made an error, please allow me to correct the record". Indeed, doing so would likely increase public trust in politicians (polling suggests only 9% trust politicians to tell the truth – the lowest level in recorded history).[7]

[7] https://www.ipsos.com/en-uk/ipsos-trust-in-professions-veracity-index-2023 (last accessed 19 November 2024)

38. Second, a politician would only be required to prove the truth of their statement if the claimant first established that there is a "real prospect" (formerly "real possibility" – see below) that the statement is false or misleading. It is well established that the burden of proving that statement falls on the maker. For example, section 2 of the Defamation Act 2013 requires a that a person relying on the defence of "truth" must show that "the imputation conveyed by the statement complained of is substantially true."

39. Third, even if the ICDR Model did impose a reverse burden in respect of a criminal sanction, the criticism would still be wrong. Both the European Court of Human Rights and the (then) House of Lords (now Supreme Court) have already ruled on this point:

40. In ***Salabiaku v France* (1988) 13 EHRR 379**, the ECtHR held (in respect of reverse burdens):

> *Clearly the Convention does not prohibit such presumptions in principle.*

41. In ***Jobe v UK* (2011) 53 E.H.R.R. 17** the ECtHR held that a provision which placed the burden on the defendant to prove that he had a "reasonable excuse" did not violate the Convention.

42. The House of Lords/Supreme Court has also held that a reverse burden can be interpreted compatibly with the Convention.[8] This matter would not arise in judicial consideration of the ICDR Model but, if it did, then the courts could apply it in a manner that is compatible. Version 2 of the ICDR Paper contains a small amendment to make this clear.

Will the ICDR Model lead to a large number of claims?[9]

43. The ICDR is accused of not conducting any research on the likely volume of claims. The ICDR relies on the evidence already before the Standards Committee which demonstrates that the "floodgates" argument has never been borne out.

[8] For example: ***R (Kebilene) v Director of Public Prosecutions* [2000] 2 AC 326**; ***R v Lambert* [2001] UKHL 37**; ***R v Carass* [2001] EWCA Crim 2845**

[9] "Briefing Note", §32

44. It may assist the Committee to be reminded that it is already in receipt of analysis, from the Senedd's own lawyers, which details similar provisions in other jurisdictions, none of these have resulted in a "floodgates" situation.

45. In previous debates the comparison was drawn with the Hate Crime and Public Order (Scotland) Act 2021. Despite similar predictions, reports under that Act never reached overwhelming numbers. There are around 22 reports per week under the 2021 Act[10] in a country of 5.3 million people (i.e. 5.4 million potential defendants). For the vast majority of the time, there will only be 60-90 potential respondents to a Correction Notice claim (i.e. the number of MS). As an illustration, if the rate of complaint for the 2021 Act were to be repeated in respect of the ICDR Model, we can expect a rate of 0.00066 claims per week before 2026.

Does the ICDR Model risk "politicising the courts"?

46. The courts are to be preferred as a tribunal precisely because they are non-political. Polling by the Constitution Unit at University College London shows that most people believe that the courts should play an important role in ensuring that politicians "operate within the rules".

47. Judges rank fourth in the league table of professions who people in the UK trust to tell the truth (70% trust judges "a great deal" or "a fair amount"). Politicians (Members of Parliament) rank second last (76% trust them "not much" or "not at all"). This is despite a sustained period of argument, by governments found to have broken the law, that judges who rule against them are "political".

48. The British public is clearly intelligent enough to distinguish between "interfering in politics" and "enforcing the rules". The suggestion that allowing courts to arbitrate on matters of fact and law will somehow "politicise" them, mistakes a political attack line for substantial analysis.

[10] Not including anonymous reports, which would not be possible under the ICDR Model

Is there a risk of "lawfare"?

49. It has been suggested that the ICDR Model would somehow lead to US-style electoral lawfare. The comparison between the UK and US systems on this point is, with respect, a poor one. In the US, judges are politically appointed. This makes the courts a ground of political combat. That is not the case in the UK. Judges in the UK are not only politically neutral as a matter of fact and law but, as set out above, are clearly trusted as such by the public.

What are the drawbacks of an administrative procedure?

50. Various "administrative" alternatives have been proposed which involve either expanding the Standards Commissioner's powers or setting up some form of internal tribunal. None of these have been fleshed out so it is difficult to comment on them in detail. There are, however, some clear issues of principle:

(a) **They lack public trust** – The evidence above clearly demonstrates that the public trust the courts. Giving the courts the role of enforcing the rules on truth-telling means that the public can have confidence that it is in the hands of a trusted institution. Giving it to an administrative body will likely be seen by the public as empowering another quango.

(b) **They lack independence** – All of the proposals either involve a procedure that is ultimately subject to political control (like the existing Standards Commissioner system) or sits within the existing institution. These will either lack independence or be seen as lacking independence.

(c) **They lack accountability** – None of the administrative proposals set out how those sitting in judgment will be accountable for their decisions. Independent courts are accountable because judges' decisions can be overturned by more senior courts.

(d) **They lack clarity and predictability** – None of the administrative proposals offer the clarity that comes with the doctrine of precedent applied in courts. This means that courts of first instance are bound by the decisions of more senior

courts on points of law. This ensures that the interpretation of law is consistent and (consequently) understandable. The administrative proposals will essentially allow decision makers to apply the law or rules arbitrarily.

(e) **They lack speed** – The courts, when required, are able to resolve the issues before them quickly. The Standards System tends to take months if not years to reach a decision.

(f) **They lack transparency** – Unlike the courts, which are public, the current standards system involves evidence and decision making behind closed doors. In Westminster, the Public Accounts Committee is conducting an inquiry into the use of arm's length regulatory bodies because, in the words of its Chair, we should be "alarmed by the lack of accountability and transparency" of many arm's length bodies.[11]

Does the ICDR Model impact on Senedd privilege?

51. It has been suggested that the proposal will impact on parliamentary privilege. It should be noted that:

(a) The Senedd "privilege", as it currently stands, will not be impacted by the ICDR Model (or any equivalent proposal) because it does not protect MS from legal action save for defamation and contempt of court.

(b) Even if Article IX of the Bill of Rights is extended to the Senedd, that provision does not give politicians the right to make false or misleading statements. Both Westminster and Senedd politicians are already bound by rules which prohibit misleading statements. The current measures under discussion simply concern how those existing duties are enforced. It is within the Senedd's power to waive that privilege in cases of deliberate deception.

[11] https://www.ft.com/content/897c7451-b615-4097-8a80-fbae505b529d (last accessed 24 November 2024)

Is the "real possibility" test appropriate?

52. The ICDR Model envisaged the use of the "real prospect" test (which is very much a "recognised legal term of art")[12] rather than the "real possibility" test. The drafting should be corrected accordingly (and has been in Version 2).

Does the White Paper contain misleading statements?

53. We have not been able to identify any misleading statements in the ICDR White Paper (save for those which were corrected in Version 2). The paper is fully referenced, and its veracity can be confirmed from those references. Where new information has required updates, these have been included in Version 2 of the ICDR White Paper. It is important to distinguish between statements which are "false or misleading" and statements which contain differences of opinion. The courts are experienced at distinguishing between statements of fact and opinion because they are already required to by section 3 of the Defamation Act 2013. The ICDR Model accounts for this by limiting its application purely to statements of fact. We have adjusted the drafting of the model clauses to make it clear that the regime should not apply to statements of opinion.

[12] See, for example, ***Mansell v Tonbridge and Malling Borough Council*** **[2017] EWCA Civ 1314.**