

## WELSH LANGUAGE (WALES) MEASURE 2011, USE OF WELSH IN THE PUBLIC ADMINISTRATION: A STEP FORWARD?<sup>1</sup>

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### 1 Introduction

The constitutional landscape in Wales changed after the Welsh Language Act of 1993. A process of devolution of power from Westminster to Wales began after the Labour government of Tony Blair came to power in 1997, a National Assembly for Wales was established and further powers were conferred to the National Assembly in 2006 and in 2011.

Concerns about the existing legislation on the Welsh language, and in particular the Welsh Language Act 1993, led to a recognition amongst many policy-makers, participants in civil society, and politicians in Wales that the legislative framework needed to be improved in order to offer an appropriate and effective framework to support the development of Welsh. Strengthening the Welsh language depends on the goodwill of non-Welsh speakers as well as Welsh speakers. The legislation of promotion of minority languages has to be a means of developing rather than endangering consensus<sup>2</sup>.

One of the limits of the Welsh Language Schemes introduced by the Welsh Language Act 1993 is that they do not create any real rights with regard to the use of Welsh; one consequence of this is that there was only a very rudimentary mechanism for the enforcement of any obligations created under such schemes, and, unlike in many other jurisdictions with legislation to protect speakers of a minority language, no obvious mechanism for citizens to go to Court in order to ensure they receive a service offered under a Welsh Language Scheme. The only option available to citizens was to file a complaint with the Welsh Language Board, which itself had only limited powers of enforcement. Thus, the implementation of Welsh Language Schemes depends to a considerable extent on the goodwill of public bodies; some are fully bilingual, and committed to the implementation of their schemes, and others are not; thus, the offer of services in the public sector is not homogeneous. With clear rights, it is possible to have some baseline in terms of service provision which the entire public sector has to meet, thereby increasing the clarity of what the public can expect, and it is also possible to create a stronger mechanism of enforcement, through the ability of citizens whose rights are affected to bring an alleged failure to implement rights to court.

By establishing language rights, the citizens are able to know clearly what they can expect in relation to a Welsh medium service. Also, by creating the possibility of taking public bodies to court in respect of

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<sup>2</sup> <http://www.byig-wlb.org.uk/English/news>.

implementation failures, language rights can put pressure on public bodies to improve the level of their services<sup>3</sup>.

Language rights provide the basis for language planning in many countries<sup>4</sup>, but until 2011, rights were almost completely absent in Wales<sup>5</sup>. At the beginning of 2010, the Welsh Assembly Government succeeded in obtaining a Legislative Competence Order<sup>6</sup> on the language; consequently, the Assembly was for the first time able to legislate on the Welsh language. The proposed Welsh Language (Wales) Measure was laid before the National Assembly for Wales on 4 March 2010, fulfilling the commitments made in the “One Wales” document, the programme of government of the Labour-Plaid Cymru coalition government which was in power in Wales at the time. The preamble to the Proposed Measure set out its scope:

A Measure of the National Assembly for Wales to make further provision about the official status of the Welsh language in Wales; to establish the Office of Welsh Language Commissioner; to provide for an Advisory Panel to the Welsh Language Commissioner; to make provision about promoting and facilitating the use of the Welsh language and promoting equality between the Welsh and English languages; to make provision about standards relating to the Welsh language; to make provision about investigation of interference with the freedom to use the Welsh language; to establish a Welsh Language Tribunal; to abolish the Welsh Language Board and Welsh language schemes; and for connected purposes<sup>7</sup>.

The Welsh Language (Wales) Measure was approved by the National Assembly for Wales on 7 December 2010. It received Royal Assent and became law on 9 February 2011.

Unlike the Welsh Language Act 1993 which it replaced, the Welsh Language (Wales) Measure 2011<sup>8</sup> is an extremely lengthy (150 pages) and complex piece of legislation. One key aim of the Measure is to give clarification about services that Welsh speakers can expect to receive. The Measure will also lead to new duties on select organisations outside the governmental sector, such as key utilities providers, something which the 1993 legislation did not seek to do. The Welsh Language Measure also introduced a much more detailed system of graduated enforcement of the obligations created under the measure<sup>9</sup>.

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<sup>3</sup> The Legislative position of Welsh: a position paper (19-01-2006) <<http://www.byig-wlb.org.uk/english/publications>>.

<sup>4</sup> For example: Canada, the Constitution Act 1982 and the Official Languages Act 1988; Quebec, Law 101, The Charter of the French Language; Ireland, the Constitution of Ireland, 1937, the Official Languages Act 2003; several of the cases in this dissertation, including Catalonia, the Basque Autonomous Community, and Navarre.

<sup>5</sup> The only exception was the right established by the Welsh Language Act 1993 to use Welsh in courts.

<sup>6</sup> Legislative Competence Orders give to the National Assembly for Wales the power to consider and pass Assembly Measures (Welsh Laws) in some areas. The National Assembly for Wales can apply for competence in the 20 fields outlined in Schedule 5 to the Government of Wales Act 2006. See <http://wales.gov.uk/legislation/programme/lcos/lcosexplained/?lang=en>.

<sup>7</sup> Minister for Heritage, Alun Ffred Jones said “The Welsh Language is a source of great pride for the people of Wales. The new legislation confirms the official status of the Welsh language; which creates a strong advocate for Welsh speakers and will improve the quality and quantity of services available through the medium of Welsh. I believe that everyone who wants to access services in the Welsh language should be able to do so, and that is what this government has worked towards” see <http://wales.gov.uk/newsroom/welshlanguage/2011/110211welshlang/?lang=en>.

<sup>8</sup> See the Welsh Language Measure <[http://www.assemblywales.org/welsh\\_language\\_measure\\_as\\_passed-e.pdf](http://www.assemblywales.org/welsh_language_measure_as_passed-e.pdf)>.

<sup>9</sup> 3<sup>rd</sup> Cycle, Committee of Experts’ Evaluation Report, UK, 19-11-2009

<[http://www.coe.int/t/dg4/education/minlang/Report/EvaluationReports/UKECRML3\\_en.pdf](http://www.coe.int/t/dg4/education/minlang/Report/EvaluationReports/UKECRML3_en.pdf)>.

## 2 Welsh Language (Wales) Measure 2011

With regard to its contents, the Measure begins by stating that Welsh has official status in Wales (Part 1, section 1); the Welsh Language Act 1993 made no reference to the status of the Welsh language, and clear reference to the status of the language was something which was very important for Welsh activists. The conferral of official status on Welsh does not, however, affect the status of English language in Wales (section 1(4)). It is not entirely clear, however, what are the precise legal effects of the recognition of the official status of Welsh. Section 1(2) indicates that the official status of Welsh is given legal effect by a number of enactments, set out in considerable detail in sections 1(2) and 1(3), about the Welsh language, which would include the Measure itself. While section 1(2) makes clear that these specific references are ‘without prejudice’ to the general principle set out in section 1(1), that Welsh has ‘official status in Wales’, it is not clear how that status is manifested or will be manifested beyond the specific measures mentioned in sections 1(2) and 1(3). Generally, official status relates to the presence of a language in public institutions, and in the public administration, and therefore this recognition may have implications for the position of Welsh in the public administration more generally. However, as we shall see, the Measure creates a special set of mechanisms for expanding the use of Welsh, and it could be argued that because there is such a mechanism, the broad recognition of the status of Welsh in section 1 of the Measure is not, as a matter of interpretation, intended to create further obligations in respect of the language in the public administration. As with all aspects of the Measure, it is too early to tell for certain, as it is only beginning to be put into practice.

The Measure provides for the abolition of the Welsh Language Board (section 143(1)) and the transfer of certain of the Board’s function to the Welsh Language Commissioner (sections 143(2), (4)), a new office created under Part 2 (section 2) of the Measure. Other aspects of the work of the Board (and related staff) will become the responsibility of the Welsh Assembly Government (section 143(3), and by implication in various other provisions of the Measure). Welsh language schemes will be replaced by Welsh Language Standards (sections 144, 145); the aim is to reduce the bureaucratic burden on organisations, and these will be discussed in a moment. As we shall see, though, through these standards, the measure creates a new system of placing duties on bodies to provide services through the medium of Welsh<sup>10</sup>. The aim is to establish clearly defined duties with regard to the Welsh language, including Welsh language service provision, which apply to a range of the bodies<sup>11</sup>.

The standards are provided for in Part 4 of the Measure. Part 4 is a surprisingly complicated set of provisions, and will only be described briefly here. Under section 26 of the Measure, the Welsh Ministers—essentially, the Welsh Assembly Government—can by regulations make standards of five general sorts: standards relating to service delivery, to policy making, to operations, to promotion, and to record keeping. In terms of the use of Welsh by the public administration, the most important of these standards will likely be the service delivery standards. As the name suggests, service delivery standards relate to a service delivery activity of an organisation to which the standard applies (and such organisations will be discussed below), and is intended to promote or facilitate the use of the Welsh language, or to work

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<sup>10</sup> <http://wales.gov.uk/topics/welshlanguage/legislation/?skip=1&lang=en>.

<sup>11</sup> <http://wales.gov.uk/newsroom/welshlanguage/2011/4792114/?lang=en>.

towards ensuring the Welsh language is treated no less favourably than English when the activity is carried out (section 28(1)). Operational standards (section 30) would also appear to be important, as they relate generally to the use of Welsh in carrying out an organisation's functions, and would therefore appear to apply, for example, to the use of Welsh internally in the workplace. Policy making standards (section 29) have a slightly broader focus, and generally concern the need for organisations which are subject to the standards to consider the impact of any policy decision, whether the policy directly relates to the Welsh language or not (e.g. even a decision on, say, transport policy), on opportunities for people to use the Welsh language and whether the Welsh language is being treated no less favourably than English. Promotion standards are even broader, and relate to the more general promotion of the Welsh language (section 31). Finally, record keeping standards relate to the information which an organisation must keep in relation to the implementation by it of any of the other sorts of standards which apply to it, and, more specifically, to the keeping of information relating to complaints against it in relation to the implementation of standards (section 32).

There are very complex rules in Chapter 3 of Part 4 (sections 33 to 35), and these make reference to four separate Schedules to the Measure. Generally, however, most parts of the public administration in Wales, including organisations such as departments of the Welsh Assembly Government, local councils (local authorities), health boards, the police, and so forth, are potentially subject to the standards. One important innovation is that the standards will also potentially apply to select private and voluntary sector organisations, including those which are providing certain public utility services (such as electricity, home heating and so forth), and organisations receiving significant financial assistance from the public purse. The public sector is generally listed quite comprehensively in the relevant schedules, and therefore if the standards are applied to their full potential, virtually all of the public administration will be covered.

The standards, once made, will only apply to an organisation, however, if the Welsh Ministers authorise the Welsh Language Commission to give a notice, called a 'compliance notice' to a specific organisation or a class of organisations (section 39), and then only if the Commissioner actually gives a compliance notice (section 45); before doing so, the Commissioner must consult with the organisation (section 47), and the organisation may challenge the notice (Chapter 7, Part 4), and such a challenge may ultimately be brought before a new court that has been created under the measure, the Welsh Language Tribunal (section 58), but the decision of the Tribunal may be subject to a further challenge brought to the High Court (section 59).

It is as yet far too early to tell how this new system will work, or indeed how it compares to the existing system of Welsh language schemes under the Welsh Language Act 1993. It is important to remember that those schemes will continue to apply to a particular organisation until such time as the new standards are made to apply to it. In regulating not only the use of Welsh in providing services to the public, but also regulating use of Welsh within the workplace, and also all aspects of policy making that might affect the Welsh language, the new mechanism of standards has the potential to go well beyond the existing Welsh language schemes in their overall regulatory effect. However, although the new system is meant to ensure a wider and more consistent application of requirements to use Welsh across the public sector, the mechanism for standards provides that standards can be made to apply to even a single organisation. Until

the standards begin to appear, and until Welsh Ministers and the Language Commissioner begin to apply them, it is not possible to come to any further and more definitive conclusions on the new mechanism.

The other very significant change introduced by the Welsh Language (Wales) Measure 2011 is the creation of a much more detailed system of enforcement of any duty created by the new standards (Part 5). The Welsh Language Commissioner can investigate whether any organisation subject to a standard has failed to comply with any requirement imposed under that standard (section 71). If the Commissioner finds that an organisation has failed to comply with a standard, the Commissioner may require the organisation to prepare an action plan to deal with the failure, or to take specific measures to deal with the failure; the Commissioner may also, or alternatively, give recommendations or advice, or may choose to take no steps at all (section 77). Interestingly, the Commissioner has the power to impose financial penalties of up to £5,000 in respect of a failure to comply with a standard (sections 83 and 84). Also, if the Commissioner has required the organisation to take steps or to prepare an action plan to address a failure to comply, the Commissioner can apply to a County Court for an order requiring the organisation to comply (sections 88, 89). In addition to investigating suspected failures to comply with a standard of his or her own accord, the Commissioner may also investigate where a complaint about a suspected failure to comply has been made by a member of the public to the Commissioner (section 93). If the Commissioner finds that there has been no failure by the organisation, the person making the complaint can appeal against the Commissioner's decision to the new Welsh Language Tribunal (section 99). Thus, the Measure specifically addresses the role of the individual citizen in the enforcement of standards.

Given the enforcement powers wielded by the Commissioner, a process of appealing their use has been created, so that appeals of decisions of the Commissioner can be made to the new Welsh Language Tribunal (section 93). Both the Commissioner and the organisation involved can appeal a decision of the Tribunal to the High Court (section 97).

Finally, it should be noted that the Measure provides that any member of the public can appeal to the Welsh Language Commissioner when the person feels that anyone has interfered with the person's freedom to communicate with another person in Welsh (section 111). This is meant to ensure, for example, that co-workers in any workplace, whether the workplace is subject to any of the standards or not, are able to speak to each other in Welsh without interference, or to ensure that an employee serving in Welsh a customer who wishes to use Welsh will be able to do so without interference, again, whether or not any standards apply.

It would be appropriate to conclude with a brief discussion of the Welsh Language Commissioner, perhaps the most important new office created under the Measure. As we have already seen, the Commissioner has wide ranging functions and certainly has more power than the Welsh Language Board to ensure the enforcement of provisions of various part of the Measure and, in particular, that, where standards require the delivery of services through the medium of Welsh, that such services are so delivered.

The Welsh Language Commissioner has a wide-ranging role in the new regulatory system, including in the setting of standards, developing codes of practice, and establishing and operating a new enforcement

regime<sup>12</sup>. The broad scope of the Commissioner's role is, however, clear: section 3(1) provides that the Commissioner's principal aim in exercising his or her functions is 'to promote and facilitate the use of the Welsh language', and under section 3(2) the actions that he or she must take in furtherance of this is to work towards increasing the use of Welsh in the provision of services and other opportunities for people to use the Welsh language. In exercising his or her functions, the Commissioner must have regard to a number of things, including the official status of the Welsh language, any duties to use Welsh which are imposed by law, as well as the rights which arise from those duties, the principle that in Wales, the Welsh language should be treated no less favourably than English, and, finally, that in Wales, people should be able to live their lives through the medium of Welsh if they choose to do so (section 3(3)). The Measure provides that the Commissioner is to be appointed by the Welsh First Minister, who is the head of the Welsh Assembly Government; on the one hand, this suggests the high importance of the office of the Commissioner, but on the other hand, it creates the danger that the Commissioner will be a political appointee, and certainly during the discussion of the legislation, there was significant support for a wider role, for example, for the Welsh Assembly itself in the appointment process.

The Welsh Ministers—again, essentially the Welsh Assembly Government—also appoints an Advisory Panel (section 23) of 3-5 members to give advice to the Commissioner, who may consult the advisory Panel on any matter (section 24).

The Commissioner must produce a report every five years on the position of the Welsh language (section 5), and the report must be publicised and must be submitted to the Welsh Ministers, who must also place a copy before the Welsh Assembly. The Commissioner must consult the Advisory Panel when producing the five yearly report. The Commissioner also has a wide ranging power to conduct inquiries into any matter relating to the Commissioner's functions (section 7).

### 3 Conclusions

The declaration in the Welsh Language (Wales) Measure 2011 of Welsh as an official language is an historic achievement in order to allow Welsh language to continue to develop into the 21<sup>st</sup> Century. Although welcoming this important step, for which many activists in Wales have yearned for a long time, many also have some objections to aspects of the legislation, including the failure to create certain key legal rights to services in Welsh. Catrin Dafydd, spokeswoman for Cymdeithas yr Iaith Gymraeg, one of the most important language campaign organisations in Wales, has said: "the Government has not delivered rights as it promised and this is not the Measure we hoped would get to grips with the linguistic landscape in Wales. This law empowers officials, not people, and the flaws in the Measure will demonstrate that in the future"<sup>13</sup>.

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<sup>12</sup> <http://wales.gov.uk/newsroom/welshlanguage/2011/4792114/?lang=en>.

<sup>13</sup> <http://www.mercator-research.eu/news/newsarchive/December-2010/?searchterm=Welsh%20Assembly%20declares%20Welsh%20official%20language>.



Activists have generally felt that the measure does not go far enough<sup>14</sup>, and these concerns have been echoed by prominent experts such as the Cardiff University Professor Richard Wyn Jones and the leading lawyer Emyr Lewis<sup>15</sup>.

Dafydd warned that Cymdeithas yr Iaith Gymraeg “will call for new legislation that would empower citizens by bestowing rights for people to see, hear, learn and use the language in their communities right across Wales”<sup>16</sup>.

The Liberal Democrat and Conservative Parties in Wales also welcomed the measure; however, their representatives agreed that there are also weak points. The Liberal Democrat Eleanor Burnham commented, for example, that the legislation was “too long, too cumbersome and something of a damp squib. The measure dwells heavily on responsibilities rather than rights... the potential loss of Welsh Language Board is extremely worrying”<sup>17</sup>. It was also noted that the question of language rights was not addressed.

One of the criticisms of the Welsh Language Act 1993 was that it was too bureaucratic, but given the complexity of the mechanism of ‘standards’ created under the Welsh Language (Wales) Measure 2011, the same risk is clearly present in the new measure. In particular, there are concerns that the complexity of this measure might create difficulties for its implementation. There are also concerns that far too much is being asked of the Commissioner: in addition to the general promotion role assigned to the Commissioner, the office has a number of specific responsibilities associated with the development of standards, and, of course, in overseeing their implementation.

It is, of course, too early to tell what the impact of the mechanisms created under the Measure will be; even a preliminary assessment cannot properly be made until the standards start to be produced so that their substance can be analysed. As the ongoing scrutiny of the Committee of Experts under the European Charter for Regional or Minority Languages has shown, it would appear that the Welsh language schemes created under the Welsh Language Act 1993 have done a considerable amount to expand the use of Welsh in the provision of services by public authorities to the public through the medium of Welsh, although not all authorities have been as effective as others in this regard, and the Committee of Experts have repeatedly revealed, for example, in the health care system<sup>18</sup>. At very least, the standards mechanism created under the Measure has the potential to expand considerably on the foundations laid by Welsh language schemes, as the standards will require organisations to which they apply, which include public authorities, to take action with regard to expanding the use of Welsh in the workplace, and potentially to consider the impact on Welsh of many other policies that are not expressly directed at Welsh. Again, however, much will depend on the content of the standards, and the extent to which they are applied widely to create certain minimum duties on all public authorities.

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<sup>14</sup> <http://www.linguapax.org/fr/nouvelles/2011/02/18/royal-assent-for-official-status-of-welsh-language>.

<sup>15</sup> <http://www.walesonline.co.uk/news/wales-news/2010/12/08/last-minute-addition-to-language-law-welcomed>.

<sup>16</sup> <http://www.linguapax.org/fr/nouvelles/2011/02/18/royal-assent-for-official-status-of-welsh-language>.

<sup>17</sup> [http://news.bbc.co.uk/2/hi/uk\\_news/wales/wales\\_politics/8548279.stm](http://news.bbc.co.uk/2/hi/uk_news/wales/wales_politics/8548279.stm).

<sup>18</sup> [http://www.coe.int/t/dg4/education/minlang/Report/Default\\_en.asp](http://www.coe.int/t/dg4/education/minlang/Report/Default_en.asp).

The Measure certainly does create a much more detailed mechanism for monitoring enforcement of implementation, and experience in other jurisdictions and under the European Charter indicates that effective monitoring mechanisms can do much to ensure that duties are actually made real. In addition to creating a new office, the Welsh Language Commissioner, with special powers to investigate service failures, the Measure makes specific provision for the participation of members of the public who are affected by alleged failures in service provision to make complaints. Provision is also made for enforcement of outcomes of investigations through court remedies. Thus, while clear rights were not created, it would appear that the Measure represents an important step towards a system of imposition of duties and of enforcement of duties that is more formalised. As has been noted frequently, though, much will depend on the content and application of the standards; much will also depend on the effectiveness of the Commissioner.