



Comisiynydd y
Gymraeg
Welsh Language
Commissioner

Investigation under Section 17 of the Welsh Language Act 1993

HM Courts and Tribunals Services

The Welsh Language Commissioner's report and recommendations issued
under section 19 of the Welsh Language Act 1993

Reference Number 64

Publication date: 15 February 2022



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Background

The principal aim of the Welsh Language Commissioner, an independent body established by the Welsh Language (Wales) Measure 2011, is to promote and facilitate the use of Welsh. This entails raising awareness of the official status of the Welsh language in Wales, by imposing standards on organizations, and by reviewing and investigating compliance with the Measure and the Welsh Language Act 1993. This, in turn, will lead to the establishment of rights for Welsh speakers.

Two principles will underpin the work:

- In Wales, the Welsh language should be treated no less favourably than the English language
- Persons in Wales should be able to live their lives through the medium of Welsh if they wish to do so.

Contact details:

- Tel: 0845 6033 221
- Email: post@welshlanguagecommissioner.org
- Website: welshlanguagecommissioner.org

Welsh Language Commissioner
Market Chambers
5–7 St Mary Street
Cardiff
CF10 1AT

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Foreword

This investigation report is issued by the Welsh Language Commissioner (the Commissioner) in accordance with section 19 of the Welsh Language Act 1993 (the Act) following the transferral of relevant functions under the Act to the Commissioner by means of a series of statutory instruments.

Part II Welsh Language Act 1993

○ Compliance with schemes - Investigations

An investigation is held into the possible failure of a public body to implement its language scheme, under section 17 of the Act:

17. - (1) Where it appears to the Board¹, whether on a complaint made to it under section 18 below or otherwise, that a public body may have failed to carry out a scheme approved by the Board, the Board may conduct an investigation in order to ascertain whether there has been a failure.

(2) The procedure for conducting an investigation under this section shall be such as the Board considers appropriate in the circumstances of the case, and in particular, an investigation may be conducted in private.

○ Compliance with schemes - complaints of non-compliance

Section 18 of the Act applies where a person complains about the failure of a public body to implement its language scheme:

18. – (1) This section applies where –

(a) a written complaint is made to the Board by a person who claims to have been directly affected by a failure of a public body to carry out a scheme approved by the Board,

(b) the complaint is made within the period of twelve months beginning with the day on which the complainant first knew of the matters alleged in the complaint, and

(c) the Board is satisfied that the complainant has brought the matter complained of to the notice of the public body concerned and that that body has had a reasonable opportunity to consider it and to respond.

(2) Where this section applies, the Board shall either investigate that complaint under section 17 above or shall send to the complainant a statement of its reasons for not doing so.

¹ The Welsh Language Board was abolished on 31 March, 2012 and the power to investigate was transferred to the Welsh Language Commissioner on 1 April, 2012. Any reference to the Board in this foreword equates to a reference to the Commissioner.

○ Compliance with schemes - Reports on investigations

A report is produced under section 19 of the Act, based on the findings of the investigation:

19. - (1) Where the Board undertakes an investigation under section 17 above, it shall send a report of the results of the investigation to the public body concerned, to the Secretary of State² and, where the investigation is conducted on a complaint made under section 18 above, to the complainant.

(2) Where the Board considers that it would be appropriate for a report of the results of an investigation to be published, either in the form of the report made under subsection (1) above or in some other form, the Board may arrange for publication in such manner as it thinks fit.

(3) Where, on completing an investigation, the Board is satisfied that the public body concerned has failed to carry out the scheme, the Board may include in its report recommendations as to which action needs to be taken by the public body in order to remedy the failure or to avoid future failures.

○ Compliance with schemes - Directions from the Secretary of State

If, following the publication of a report, the Commissioner believes that a public body has failed to implement the actions recommended by him, he may refer the matter to the Minister responsible for the Welsh language:

20. – (1) If at any time it appears to the Board that a public body has failed to take any action recommended in a report under section 19 above, the Board may refer the matter to the Secretary of State.

(2) If on a reference under this section the Secretary of State is satisfied, after considering any representations made to him by the Board and by the public body concerned, that the body has failed to take any action recommended in the report, he may give such directions to the public body as he considers appropriate.

(3) Any directions given by the Secretary of State under subsection (2) above, may be enforced, if he submits an application, via mandamus.

² Following the establishment of the National Assembly for Wales in 1999, reports under section 19 of the Act are sent to the Welsh Government Minister responsible for the Welsh language.

1 Context

- 1.1 His Majesty's Courts and Tribunals Service (HMCTS) has a Welsh language scheme prepared under section 21 of the Welsh Language Act 1993 (the Act). The language scheme was approved on 31 January 2019.
- 1.2 The language scheme states that HMCTS has adopted the principle that it will treat the Welsh and English languages on the basis of equality in the conduct of public business in Wales. The scheme states how HMCTS will apply that principle when delivering services to the public.
- 1.3 The main purpose of this report is to draw conclusions, based on the evidence gathered, on HMCTS's compliance with specific clauses of its Welsh language scheme. The report does not draw conclusions regarding HMCTS's general performance with regard to compliance with its language scheme.
- 1.4 The investigation was conducted in private by the Commissioner's regulatory officers. I wish to thank HMCTS for its cooperation during my investigation.

2 Basis of the investigation

- 2.1 This investigation was opened at the initiative of the Commissioner. Evidence was received from a body that raised doubts about the compliance of HM Courts and Tribunals Service with its language scheme. I was informed that members of the Council's workforce had recently been called by HM Courts & Tribunals Service to give evidence at an Employment Tribunal.
- 2.2 As a result of temporary arrangements due to COVID-19 restrictions, Council officers had to attend court in Caernarfon to provide their evidence in order to facilitate simultaneous translation arrangements. This was a different arrangement to that for parties to the case who wished to use the English language (or did not use the Welsh language). Those individuals were able to contribute remotely.
- 2.3 On 18 January 2022, the Commissioner contacted the Court Service, whose view was that the CVP (Cloud Video Platform) virtual meeting facility used by the service did not facilitate simultaneous translation. It was necessary for either the person whose evidence is being translated, or the recipient of the translation (one or the other) to attend court with the interpreter and the judge.
- 2.4 The Commissioner's officers have contacted HMCTS and established their interpretation of the way in which the language scheme meets Clause 22 of Part III of the Welsh Language Act 1993³. They state that they *"believe that the requirements of the language scheme have been met"*.
- 2.5 However, it is considered that Clause 22 of Part III of the 1993 Act can be defined more widely than merely considering whether Welsh speakers have been able to use the Welsh language in any individual case.
- 2.6 The purpose of conducting this investigation is therefore to reach a clear conclusion regarding the extent of Clause 22 of Part III of the Welsh Language Act 1993.
- 2.7 Clause 22 is fully codified in the Language Scheme (section 5.24). It was not a mistake to include clause 22 in its entirety as it is essential that complaints relating to clause 22 can be processed under the Language Scheme. There is no other audit or complaints process under the 1993 Act, so this strengthens the view that this is the appropriate procedure to follow.

³ [c-language-language-language-language-1993.pdf \(welshlanguagecommissioner.wales\)](#)

3 The investigation

- 3.1 I decided to exercise my powers under section 17 of the Act to conduct an investigation in order to ascertain whether the HMCTS had failed to comply with the Welsh language scheme. HMCTS were informed of this on 20 July 2022.
- 3.2 On 20 July 2022, a letter was sent to HMCTS explaining the subject and structure of the investigation and asking questions for the purpose of gathering information. It was explained that the investigation would consider compliance with the following clauses of the Welsh language scheme:

Use of the Welsh language in Legal Proceedings

5.21 We will ensure that any online service that we provide will be available in Welsh and we will work with Government Digital Services to ensure an end to end Welsh service i.e. a Welsh landing page on GOV.UK.

5.24 Section 22(1) of the Welsh Language Act 1993 provides that:

“In any legal proceedings in Wales the Welsh language may be spoken by any party, witness or other person who desires to use it, subject in the case of proceedings in a court other than a Magistrates’ Court to such prior notice as may be required by rules of court; and any necessary provision for interpretation shall be made accordingly.”

This does not provide the right to a Welsh hearing but in some situations e.g.

Magistrates’ court hearings a case can progress in Welsh where all parties are bilingual. In view of this we will not translate evidence provided orally in court from English to Welsh unless it can be shown that a party to a case has a lack of understanding of the English language.

Any witness who has elected to give evidence in Welsh but is questioned in English by non Welsh speaking Counsel will be given the choice of having the English questions translated into Welsh if that makes the process of giving evidence in Welsh easier.

- 3.3 It was also noted that the investigation would be conducted in private by the Commissioner's Investigation and Enforcement team, and that it would include the following steps:
1. Receive information and evidence from HMCTS by 19/08/2022.
 2. Undertake a desktop analysis of the information received and consider whether any further information is required, for example by meeting with HMCTS officers.
 3. Prepare a draft report on the investigation's findings and give HMCTS an opportunity to check its facts.
 4. Send a copy of the final report to HMCTS and the Minister responsible for the Welsh language.
 5. Publish the final report.
- 3.4 This report considers HMCTS's compliance with specific clauses in its Welsh language scheme. It is based on information and evidence received from HMCTS in

a letter dated 26/08/2022 and further information received in correspondence on 26/01/2022 and 31/01/2022. A copy of this letter is found in Appendix 1 of this report.

4 The evidence

Consideration 1: Use of the Welsh language in Legal Proceedings

There were doubts as to whether HMCTS had achieved the following clauses in its Welsh language scheme:

Use of the Welsh language in Legal Proceedings

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Magistrates’ court hearings a case can progress in Welsh where all parties are bilingual. In view of this we will not translate evidence provided orally in court from English to Welsh unless it can be shown that a party to a case has a lack of understanding of the English language.

Any witness who has elected to give evidence in Welsh but is questioned in English by non Welsh speaking Counsel will be given the choice of having the English questions translated into Welsh if that makes the process of giving evidence in Welsh easier.

- 4.1 In order to comply with the above clauses that appear in the language scheme, HMCTS needs to ensure that all persons wishing to use the Welsh language in legal proceedings are able to do so, and that it has provision that facilitates simultaneous translation on a virtual basis.
- 4.2 The Council claimed that their officers had to attend the court at Caernarfon Justice Centre to give their evidence, something that wasn’t necessary for parties not wishing to use the Welsh language. Those individuals were able to participate in the hearing remotely.
- 4.3 It is the Council’s view that participating in a hearing virtually, from a location of your choice, offers an additional element of convenience and amenity not available to participants attending court.
- 4.4 According to its evidence dated 26 August 2022, HMCTS explained: “the hearing was originally listed in June 2020 but we were unable to proceed with it as face-to-face hearings were suspended due to the pandemic (March – July 2020). The hearing was then listed between the 4th and the 7th of May 2021, but had to be adjourned on the first day due to problems with CVP. It was then rescheduled for the 10th – 14th of January 2022, and its current status is that it was partly heard. In January 2022, HMCTS imposed restrictions on the number of people allowed in a

hearing room at the same time due to Covid and as a result of guidance from Welsh Government and Public Health Wales. Due to the number of people involved in this case (parties, witnesses, the counsel and the panel of 3) the Tribunal had no choice but to list the hearing as a hybrid hearing, with some people attending remotely". The nature of the problems from the point of view of the CVP was not elaborated.

- 4.5 HMCTS noted that it had received an enquiry about someone attending in person and was concerned that the only reason witnesses had to attend in person was because they were giving evidence in Welsh.
- 4.6 HMCTS stated that decisions on the format of a hearing and the attendees are made by a judge. They said that the judge's guidance was that those giving evidence in Welsh – and those who wanted to hear the English translation – had to attend in person. This was due to problems experienced with simultaneous translation on CVP.
- 4.7 The Council noted that it "doubted" HMCTS Welsh Language Unit's statement that there is no system in place that facilitates simultaneous translation virtually, as Zoom had proved to be effective for them.
- 4.8 In correspondence dated 26/01/2022, HMCTS referred to four different ways of conducting court/tribunal hearings, explaining that it is a decision for each individual judge how it conducts its proceedings and what provision is most convenient, whilst respecting the right of an individual to speak Welsh. The four different ways are:
 - A combination of Teams and BTMeetMe with all the parties on Teams and the translation provided over the phone, i.e. the non-Welsh speaking contributors having to use a mobile phone to listen to the translation
 - A hearing on the CVP (Cloud Video Platform)
 - Hybrid hearing involving some parties on a CVP and some at court
 - A face-to-face hearing with everyone in court

5 Conclusions

- 5.1 This report provides an opinion on HMCTS' compliance with its Welsh language scheme. Based on the evidence available, I conclude that HMCTS has failed to comply with clauses 5.21 & 5.24 of its Welsh language scheme.

Conclusion 1: Use of the Welsh language in Legal Proceedings

There were doubts as to whether HMCTS had carried out the following clauses in its Welsh language scheme:

Use of the Welsh language in Legal Proceedings

5.21 We will ensure that any online service that we provide will be available in Welsh and we will work with Government Digital Services to ensure an end to end Welsh service i.e. a Welsh landing page on GOV.UK.

5.24 Section 22(1) of the Welsh Language Act 1993 provides that:

“In any legal proceedings in Wales the Welsh language may be spoken by any party, witness or other person who desires to use it, subject in the case of proceedings in a court other than a Magistrates’ Court to such prior notice as may be required by rules of court; and any necessary provision for interpretation shall be made accordingly.”

This does not provide the right to a Welsh hearing but in some situations e.g.

Magistrates’ court hearings a case can progress in Welsh where all parties are bilingual. In view of this we will not translate evidence provided orally in court from English to Welsh unless it can be shown that a party to a case has a lack of understanding of the English language.

Any witness who has elected to give evidence in Welsh but is questioned in English by non Welsh speaking Counsel will be given the choice of having the English questions translated into Welsh if that makes the process of giving evidence in Welsh easier.

- 5.2 I considered that it is the responsibility of HM Courts & Tribunals Service (HMCTS) to ensure these rights for Welsh speakers, and the service's language scheme outlines how they will ensure this.
- 5.3 The complaint stems from a situation where a person has failed to use the Welsh language at a virtual hearing, and the individual (or individuals) has felt that they are being disadvantaged by having to travel to court during a pandemic to give evidence because of their conscious decision to use the Welsh language.
- 5.4 Clause 22 part III 1993 notes that, ‘in any legal proceedings in Wales the Welsh language may be spoken by any party, witness or other person who desires to use it, subject in the case of proceedings court other than a Magistrates’ Court to such prior

notice as may be required by rules of court; and any necessary provision for interpretation shall be made accordingly’.

- 5.5 I consider that “any legal proceedings” extends to cases that take place virtually, hybrid cases or by telephone, and HMCTS confirms that they share this view. Furthermore, I believe that “any necessary provision” extends to ensuring that there is adequate provision to ensure that cases can be conducted virtually online.
- 5.6 I considered that the CVP virtual meeting facility used by the court service does not facilitate simultaneous translation, which contravenes the principles of the language scheme. I am concerned about the Court’s statement that there are no systems available that facilitate simultaneous translation, as systems such as Zoom have proved effective for many organisations since the initial period of the pandemic.
- 5.7 In 4.8 above, four different ways of conducting court/tribunal hearings are listed. The Court admits that option 2 is not available in Welsh at all and, if Welsh speakers are forced to attend Court, it appears that option 3 is also unavailable. System 1 does not sound ideal and it therefore appears that the only option that favours the Welsh language is for a case to be conducted face-to-face, with everyone in Court at the same time.
- 5.8 In this case, the arrangements affected Welsh language users, and I feel that they were placed at a disadvantage compared with parties who did not wish to use the Welsh language. The circumstances appear to favour parties who are able to join remotely and therefore avoid the risks associated with coronavirus.
- 5.9 Apart from clause 22, the relevant part below of the Language Scheme also requires attention:
- 5.21 “We will ensure that any online service that we provide will be available in Welsh...”*
- 5.10 I considered that HMCTS had noted that it believed 5.21 had been considered out of context, and that the sentence related to digital services “e.g. a request for probate”, as the claim was that remote video hearings were not in operation when the Scheme was approved in 2019. However, I disagree. The Commissioner's interpretation is wider than that and includes any digital service including simultaneous translation.
- 5.11 The principle that everyone has a fair right to use the Welsh language in the Courts is at the heart of clause 22. On one hand, I considered that part of clause 22 had been met, namely that individuals were offered the opportunity to speak and use the Welsh language in the case in question. If there are additional obstacles and costs involved in using the Welsh language, and these costs and obstacles do not apply when using the English language, the reality is that clause 22 has not been achieved. See the words of Susan Acoland-Hood in the foreword to the Welsh Language Scheme 2018-2021:
- “Our programme of reform will provide entirely new ways to access justice, re-shaping our services so that they work best for all users... Simple matters will be dealt with rapidly online; there will be exponentially more use of video in court.... Welsh speakers should expect to benefit in just the same way as everyone else from the once-in-a-generation changes that we are making to our service... This gives us a*

very strong platform on which to continue to build upon in order to provide a Welsh service that meets the expectations of 21st Century Welsh speakers."

I considered that the Court is trying to say that this is not possible in this case.

- 5.12 When submitting observations on the draft report, HMCTS noted that Section 5 of the Language Act states that the purpose of the Welsh Language Scheme is to implement, *"so far as is both appropriate in the circumstances and reasonably practicable, to the principle that in the conduct of public business and the administration of justice in Wales the English and Welsh languages should be treated on a basis of equality"*. HMCTS said they did everything that was reasonable and practical to try to ensure the functionality of simultaneous translation during this period.
- 5.13 I quote from the guidance document 'Welsh language schemes' which states: *the starting point for all schemes will be the principle of equality laid down in the Act. Organisations preparing a scheme should strive towards giving full effect to that principle so far as is appropriate in the circumstances and reasonably practicable. These qualifying phrases apply to individual schemes and measures, and not to the underlying principle itself.*
- 5.14 The guide explains that the question of considering whether the measures within any organisation's scheme implement the principle of equality *"as far as is appropriate in the circumstances and reasonably practicable"* is central to the Commissioner's task when considering every scheme submitted for approval. This has to be considered objectively every time. The guidance states *"It will not be acceptable for those preparing schemes to adopt a highly subjective and restricted view of what is appropriate in their circumstances or reasonably practicable"*.
- 5.15 The Welsh Language Act 1993 established the principle that, when conducting public business and administering justice in Wales, the Welsh and English languages should be treated on the basis that they are equal. As a result, I believe that HMCTS ' point of view is wrong, and that the clause cannot be reinterpreted under the circumstances of the pandemic. If the Commissioner concludes that a particular activity by a body represents a failure to comply with a clause within the language scheme, the fact that the 1993 Act (and the language scheme itself) does not indicate that it should treating Welsh and English on the basis that they are equal *"as far as is appropriate under the circumstances and reasonably practicable"* changes that.
- 5.16 HMCTS explained that it is a decision for each individual judge how they conduct their cases, and what provision is most convenient. It appears that the Lord Chief Justice instructed criminal and civil judges that hearings should, where possible, be held in court as that is what is best for everyone. On that basis, the Welsh Language Liaison Judge wrote to all criminal and civil judges in Wales encouraging this; however it is understood that the President of Tribunals provided no such guidance to tribunal judges.
- 5.17 The right to use the Welsh language must be respected and realised, regardless to the Judge's point of view. The language scheme is a statutory document and I consider that it is necessary to clearly state what the arrangements are for compliance. I consider that HMCTS needs to consider further how the commitment can be implemented in practice.

- 5.18 I am of the view that the situation is unfair and that the Court should ensure that simultaneous translation is an essential part of its systems for virtual hearings. It appears that the current arrangements of the Courts service leads to differential treatment of individuals based on language choice, which concerns me. I am concerned that the current situation has implications in relation to the right of Welsh speakers to use the language in court in accordance with the provisions of the Welsh Language Act 1993 and HM Courts & Tribunals Service's Welsh language scheme.
- 5.19 Recent research by me shows that there are a number of influences on users' language decisions. One example recorded is concern that trying to use Welsh where it is not available would lead to awkwardness or embarrassment, or that using the Welsh language service would mean they are at a disadvantage.
- 5.20 The research shows that when the Welsh language service was not obvious or if there was any obstacle, delay or trouble to deliver it, some of the participants decided to use English rather than persevere in order to get a Welsh language service. Therefore, fewer people use the Welsh language when the Welsh language service is more of a problem.
- 5.21 By virtue of my main aim of promoting and facilitating the use of the Welsh language I draw the attention of Her Majesty's Courts Service to research findings regarding the promotion and facilitation of the use of the Welsh language by individuals when in contact with organisations. (par 5.15 and 5.16). They are absolutely central to enabling individuals to exercise their linguistic right in court hearings.
- 5.22 I considered that the complaint raises important issues in terms of access to the rights arising from clause 22, the effect on the use of the Welsh language in the courts, and the fact that some people choose the 'easiest' option. This is a relevant and timely matter as HMCTS undertakes a project to modernise court and tribunal services, and as online cases become increasingly standard. There is therefore an opportunity to think more fundamentally and far-reaching about how the technical provision is planned for the future, as organizations move to the electronic side of working.
- 5.23 In conclusion, I would like to add that I accept the need for the justice system to continue to operate during the pandemic period. I accept that efforts have been made by HMCTS throughout the period to try to facilitate the use of the Welsh language in court hearings and steps are in place to achieve that. However, on this particular occasion, the system failed, despite the efforts made to offer a service in Welsh, to enable those individuals to give their evidence on zoom, like those who wished to do so in English.

Based on the above, I believe that HMCTS has failed to comply with the above clauses in its Welsh language scheme.

6 Recommendations

- 6.1 Based on the findings of this investigation, I believe that HMCTS should act in accordance with the following recommendations made under section 19 of the Act:

Recommendation 1

It is recommended that His Majesty's Courts and Tribunals Service ensure that, in modernising court and tribunal services, the new system called 'Fully Video Hearings' enables simultaneous translation virtually.

Recommendation 2

It is recommended that His Majesty's Courts and Tribunals Service implements a system urgently (until the new 'Fully Video Hearings' system becomes operational) which allows Welsh speakers to give evidence in legal proceedings in Wales in a way that is compatible with the parties who do not wish to use the Welsh language.

Recommendation 3

It is recommended that Her Majesty's Courts and Tribunals Service re-examines the way it communicates with witnesses / parties from the first point of contact to the last contact. In particular, how they plan for cases when offering or making translation arrangements.

I acknowledge that GLITEF has completed the above recommendations, and evidence has been provided to the Commissioner.

7 Index of appendicesⁱ

Appendix 1

Letter dated 26 August 2022 by Her Majesty's Courts and Tribunals Service

ⁱ Documentation is attached in the language in which it was presented or published.