



Comisiynydd y
Gymraeg
Welsh Language
Commissioner

Part 6 of the Welsh Language (Wales) Measure 2011: Freedom to use Welsh

The Welsh Language Commissioner's determination and report on an investigation into an application under section 111 of the Welsh Language (Wales) Measure 2011

Betsi Cadwaladr University Health Board
Ref. 32



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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 reviewing and investigating compliance with the Measure. 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 the Welsh language if they choose to do so

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Foreword

Part 6 of the Welsh Language (Wales) Measure 2011 ('the Measure') establishes the principle that in Wales an individual has the freedom to undertake a Welsh communication with another individual. This foreword provides a summary of the main rights and duties under Part 6 of the Measure to provide a general context only. It is not a complete statement of the law and does not include all aspects of the details and actions of that Part.

Application to the Commissioner

Under section 111 of the Measure:

An individual (P) may apply to the Commissioner for the Commissioner to investigate whether a person (D) has interfered with P's freedom to undertake a Welsh communication with another individual (R) (the "alleged interference").

In this context, Welsh communication means a communication in Welsh between two individuals in Wales who wish to use the Welsh language with one another in undertaking that communication.

For the purposes of the Measure, D is to be taken to interfere with P's freedom to undertake a Welsh communication with R in any of the following cases:

113. – (2) Case 1 is where D indicates that P or R should not undertake –

- (a) a particular communication in Welsh that is a Welsh communication, or*
- (b) a category of communications in Welsh consisting (wholly or partly) of one or more Welsh communications.*

(3) Case 2 is where D indicates that P or R will be subjected to a detriment (by D or any other person) because P or R has undertaken –

- (a) a particular communication in Welsh that is a Welsh communication, or*
- (b) a category of communications in Welsh consisting (wholly or partly) of one or more Welsh communications.*

(4) Case 3 is where D, or a person acting at D's instigation, subjects P or R to a detriment because P or R has undertaken –

- (a) a particular communication in Welsh that is a Welsh communication, or*
- (b) a category of communications in Welsh consisting (wholly or partly) of one or more Welsh communications.*

(5) But, in a case falling within subsection (2)(b), (3)(b) or (4)(b), D is to be taken to interfere with P's freedom to undertake a Welsh communication only insofar as the category of communications consists of one or more Welsh communications.

(6) For the purposes of subsection (2), the circumstances in which D is to be taken to indicate that P or R should not undertake a particular communication, or a category of communications, include, but are not limited to, circumstances where -

- (a) *D instructs P or R not to undertake the communication or category of communications,*
- (b) *D indicates that P or R will be subjected to a detriment (by D or any other person) if P or R undertakes the communication or category of communications, or*
- (c) *D, or a person acting at D's instigation, subjects P or R to a detriment in connection with P or R undertaking the communication or category of communications.*

(7) *For the purposes of this section, it is irrelevant –*

- (a) *whether or not D or any other person has authority to give an indication, and*
- (b) *whether or not D or any other person has authority to enforce an indication.*

(8) *In this section, references to P or R being subjected to a detriment include P or R being intimidated, bullied, harassed or humiliated.*

Deciding whether to investigate

It is for the Commissioner to decide whether or not to investigate an alleged interference. When deciding, the Commissioner must take into account the context in which the interference is alleged to have taken place. The Commissioner may ask P, D, or any other person, for information or views relating to the alleged interference. If the Commissioner decides to do so, P and D must be given the relevant information about investigations.

Investigations

An investigation into an alleged interference is conducted under sections 115-117 of the Measure:

115. – (2) The Commissioner may ask P, D, or any other person, for information or views relating to the alleged interference.

In conducting the investigation, the Commissioner must, so far as it is practicable, give D the opportunity to respond to the allegations made by P.

Discontinuing investigations

The Commissioner may, at any time, discontinue an investigation in accordance with section 116 of the Measure.

Concluding investigations

If the Commissioner decides to investigate an application, and does not discontinue that investigation, the Commissioner must determine whether or not D has interfered with P's freedom to undertake the Welsh communication. If the Commissioner determines that D has interfered with P's freedom to undertake the communication, the Commissioner must also give her views on the interference (including her views on whether the interference was justified).

Before making a final determination, the Commissioner must inform D of the determination she is proposing to make and, so far as it is practicable, give D the opportunity to respond to that proposed determination.

The Commissioner must notify P and D of the final determination and, if the determination is that interference has taken place, inform them of her views on the interference.

The Commissioner may give P, D or any other person advice about the alleged interference or any other matter that relates to the alleged interference.

Reports

A report is produced under section 118 of the Measure, based on the findings of the investigation.

118. – (2) The Commissioner may produce, and give the Welsh Ministers, a report on –

(a) the application, and

(b) the action taken by the Commissioner in response to the application.

The Commissioner must give copies of any such report to P and D.

The Commissioner may publish a report, or a version of that report or any other document that relates to the subject matter of the report, with P and D's agreement. The Commissioner may also publish a public document without their consent if she considers that it is in the public interest to do so.

Before publishing a public document the Commissioner must, so far as is practicable, notify P and D of the intention to publish it. This will give P, D or any other person the Commissioner considers appropriate, the opportunity to provide the Commissioner with their views about publication of a public document.

In relation to any application in which the Commissioner determines that D has not interfered with P's freedom to undertake a Welsh communication, a public document must not identify D.

1 Application to the Commissioner

- 1.1 The Commissioner received a valid application under section 111 of the Welsh Language (Wales) Measure 2011 on 1 May 2014 from an individual (P). The application alleged that a doctor employed by Betsi Cadwaladr University Health Board (D) had interfered with the individual's freedom to undertake a Welsh communication with another individual (R), in this case a child.
- 1.2 The application alleges that the doctor told the parent and child that they should not speak with each other in Welsh, as this was a cause for concern for the member of staff.
- 1.3 The application was made in writing, and provides an address that the Commissioner may use to contact P.
- 1.4 The application identifies D and describes the alleged interference.
- 1.5 Two individuals undertook a direct Welsh communication in Wales. The individuals concerned wished to use the Welsh language with one another in undertaking the communication.

2 Deciding whether to investigate

- 2.1 In accordance with section 114 of the Measure, the Commissioner asked the parent and Betsi Cadwaladr University Health Board (the Health Board), as the doctor's employer, for information or views relating to the alleged interference in order to decide whether or not to investigate. At the same time, the Commissioner provided both parties with the procedure for conducting an investigation under Part 6 of the Measure and outlined the Commissioner's powers in relation to such an investigation in accordance with section 114(3)(c).
- 2.2 Based on the parent's original application, and the further information received from the parent and the Health Board, the Commissioner decided to initiate an investigation under Part 6 of the Measure during a meeting of the Complaints and Statutory Investigations Panel on 3 June, 2014. In coming to that decision, the following particulars were taken into account, in accordance with section 114 of the Measure:

114. – (3) When deciding whether to investigate the alleged interference, the Commissioner –

- (a) must take into account the context in which interference is alleged to have taken place (including, but not limited to, the relationships, if any, that exist between D and P and between D and R);*
- (b) may ask P, D, or any other person, for information or views relating to the alleged interference;*
- (c) must, if he or she asks P or D for information or views, give P or D the relevant information about investigations.*

3 The investigation

- 3.1 The aim of the investigation was to enable the Commissioner to determine whether or not the doctor had interfered with the parent and the child's freedom to undertake a direct Welsh communication with one another. This document serves as the Commissioner's determination in relation to the investigation under sections 115-117 of the Measure and the Commissioner's report under section 118 of the Measure.
- 3.2 Section 115 of the Measure gives the Commissioner discretion to determine the procedure for conducting an investigation. The investigation procedure was outlined in a letter to the parent dated 23 June, 2014. A similar letter was sent to the Chief Executive of the Health Board on the same date. Both parties were asked to respond to specific questions relating to the alleged interference and were invited to provide any additional information or views which, in their opinion, were relevant to the investigation.
- 3.3 The parent was asked to confirm whether anybody else was present at the time who could have heard what was said by the doctor. The parent was asked to confirm that the original application was factually accurate, and was invited to provide any additional information to support that application.
- 3.4 The Health Board was asked to explain the nature of the doctor's role and to provide a statement from the doctor describing what happened on the occasion in question. The Commissioner also asked the Health Board to confirm whether the doctor had received language awareness training and, if so, to provide an outline of the nature of the training.
- 3.5 Having contacted the Health Board to request information or views relating to the alleged interference (as noted in point 2.1 above), the Commissioner became aware that the Health Board itself had conducted an investigation into the case. Finally, the Health Board was asked to outline the findings and outcomes of that investigation.
- 3.6 The parent and the Health Board responded as follows:
 - A response was received by the parent on 30 June, 2014.
 - Following an extension to the time in which to respond, a full response was received from the Health Board on 11 July, 2014.

3.7 The parent's allegation:

- 3.7.1 In April 2014, the child received medical treatment from the doctor in particular department of a hospital under the care of the Health Board. The following is a copy of the parent's application to the Commissioner under section 111 of the Measure:

Following a visit to [a particular department of the hospital in question], I would like to draw your attention to the [...] behaviour of one of the doctors at the unit.

My child [...] was seen by a doctor [and] had received confirmation [...] that [the child] would not have to go to the children's unit, and when the doctor said that [the child] would have to go there, things went from bad to worse. [...] my child started speaking to me in Welsh, as it is [the child's] first language. I responded in Welsh and it was clear that the doctor wasn't pleased. [The doctor] told us 'I know you are Welsh but please stop talking in Welsh as I am taking it as a personal offence'.

It's hard to believe that it's acceptable to be racist towards the Welsh in this country, [the doctor] wouldn't dare say that to any other nationality. [...] This is shameful, all members of staff should be informed about the Language Policy.

3.7.2 From the information provided, the Commissioner understands that the parent alleges that the doctor prohibited the parent and the child from using the Welsh language in undertaking a direct Welsh communication with one another.

3.8 The Health Board's response:

3.8.1 In its response, the Health Board confirms that the doctor in question works on a locum basis in a particular department of the hospital in question.

3.8.2 As part of the Health Board's investigation into the case, the doctor was interviewed and prepared a written statement describing what happened. In accordance with the Health Board's legal duty to protect the personal information of the child, this written statement was not shared with the Commissioner. However, the Health Board did provide a summary of the doctor's statement.

3.8.3 For reasons relating to confidentiality, the findings of the Health Board's investigation into the case were not shared in full with the Commissioner.

3.8.4 The response notes that the child visited the hospital with the parent and was consulted by the doctor. The child required urgent care. According the Health Board, the doctor tried his best to 'engage with the patient' in order to help the child.

3.8.5 The Health Board acknowledges what happened and elaborates on the reasons why the doctor intervened in such a way:

The doctor has confirmed that at this point the patient began to speak in Welsh only with [the] parent and the Doctor was so concerned about the patient's safety in a clinically urgent situation that [the doctor] asked [the child] to stop speaking in Welsh.

3.8.6 The Health Board explains why the doctor felt personally offended by the Welsh communication:

[The doctor] took this as a personal offence because unless [the doctor] was able to communicate with [the child] directly, [the doctor] would be unable to give [the child] the urgent help [that the child] needed.

3.8.7 The response notes that the doctor had evaluated the situation and acknowledges that the choice of words was inappropriate:

The doctor did apologise for this comment at the time as it was evident that the patient and [...] parent were upset. On reflection the doctor understands that [the] choice of words was clumsy and could cause offence. This was not [the] intention. Without doubt [the doctor] accepts this was a genuine error and use of the wrong word in a very difficult and changing situation. The Doctor's first and only priority was the patient's life and safety.

3.8.8 The response confirms that all locum doctors working for the Health Board receive a site specific induction pack. The pack includes information on providing services bilingually. The Health Board notes that it is in the process of updating the pack to

reinforce the information provided about the Health Board's responsibilities in accordance with its statutory Welsh language scheme. Relevant sections of the current pack, in relation to providing bilingual services, were quoted in the response.

- 3.8.9 The response states that had the doctor been a permanent member of Health Board staff, the doctor would have received more Welsh language awareness training:

The session [for permanent staff] covers the Health Board's obligations under the Welsh Language Act 1993 and the onset of the Welsh Language Standards, as well as detailed reference to the Welsh Government's Strategic Framework for Health, Social Services and Social Care, 'More than just words'. Language sensitivity and the importance of delivering services in the patient's language of need is stressed as an essential element of better care provision.

- 3.8.10 In concluding, the Health Board states that it is 'fully committed to ensuring that the lessons learnt from this incident are implemented'.

- 3.9 From the information provided by the Health Board, the Commissioner understands that the doctor asked the child to stop speaking in Welsh with the parent. The response states that the use of the Welsh language between the parent and child caused personal offence to the doctor. According to the Health Board, offence was caused because the parent and child's use of Welsh prevented the doctor from providing the emergency care needed by the child.

- 3.10 Despite this, the doctor has acknowledged that the choice of words was unwise and that an apology was issued to child and parent at the time.

- 3.11 Further information from the Health Board:

3.11.1 Section 117(4) of the Measure states that the Commissioner must inform D of the proposed determination in relation to the interference and of the views which the Commissioner is proposing to give. In accordance with this duty the Health Board was informed of the Commissioner proposed determination and views on 30 September, 2014. Following this, additional information was received from the Health Board in written correspondence dated 7 and 9 October, 2014. The additional information contained within these letters did not provide further information regarding the incident, but rather confirmed the Health Board's position in relation to the interference.

- 3.11.2 The first response, dated 7 October, asserts that the Health Board does not condone any interference with an individual's freedom to use the Welsh language. The Health Board's previous letter, dated 11 July 2014, was intended to provide information for the purposes of the investigation:

The information in our letter dated 11 July 2014 was provided as background information setting out the extenuating and unique circumstances of the case. It was never intended as a statement seeking to condone the actions of the doctor.

- 3.11.3 The response states that the doctor's main concern was the child's medical condition and that the doctor acted to gather necessary clinical information in order to treat the child:

The doctor was attempting to ascertain crucial clinical information to ensure urgent assessment and treatment.

3.11.4 The response confirms that the interference occurred as part of the clinical assessment process:

The Health Board wishes to clarify that the interference took place during the clinical assessment process and the doctor's concerns were therefore integral in ensuring accurate diagnosis and treatment in order to protect the patient's health as well as the safety of others.

However, the response stresses that the Health Board does not seek to justify the doctor's actions and that it does not condone such behaviour.

3.11.5 The response asserts that the Health Board's commitment to arrange language awareness training for its staff reiterates its opposition to the doctor's behaviour:

We recognise that the actions taken by the doctor were unacceptable and that is why steps have been taken to address issues in terms of awareness training to ascertain understanding of such issues amongst the workforce.

3.11.6 Assurance is given that the Health Board intends to develop the training given to staff in order to raise awareness of an individual's freedom under the Measure use the Welsh Language:

Future sessions will be amended to fully reflect that the Health Board will not intervene with individuals' freedom to use the language Welsh with each other.

3.11.7 Further confirmation is given, in a second letter dated 9 October, of the Health Board's position in relation to the interference and the extent to which the interference was necessary:

The Health Board recognises and fully accepts that on this occasion there was interference by the doctor with the patient's freedom to use the Welsh language [...] we acknowledge that the doctor should have discharged [the] duty of care to the patient without interfering with [the child's] freedom to use [the language].

3.11.8 The letter notes that the Health Board intends to send a further letter to the child and its parent apologising for the interference with their freedom to use the Welsh language with one another.

3.12 From the information provided by the Health Board, after having informed it of the Commissioner's proposed determination, the Commissioner understands that the Health Board does not condone any interference with and individual's freedom to use Welsh. It acknowledges the doctor's interference with the child and parent's freedom to undertake a communication in Welsh with one another and that there is no justification for this interference.

4 Determining the investigation

4.1 Having considered all the information referred to above, the Commissioner has come to the following conclusions:

4.1.1 The doctor has acknowledged that he asked the parent and child not to speak in Welsh with one another. Based on this information, along with the parent's evidence and correspondence from the Health Board, the Commissioner determines that the doctor interfered with the parent and child's freedom to undertake a Welsh communication with one another, namely a 'Welsh communication between two individuals' as defined in section 112 of the Measure.

4.1.2 For the purposes of Part 6 of the Measure, it is determined that the interference is consistent with section 113(2) of the Welsh Language Measure which states:

113. – (2) Case 1 is where D indicates that P or R should not undertake –

(a) a particular communication in Welsh that is a Welsh communication

5 The Commissioner's views on the interference

Preliminary comments

5.1 The Commissioner gives her views on the interference below (including, but not limited to, her views on whether the interference was justified):

5.1.1 The Measure does not provide guidance on the kinds of actions which would justify interference with the freedom to use Welsh. Although the Commissioner does not have the right to form an opinion based on human rights, it is reasonable to consider related principles.

5.1.2 The main field which deals with freedoms, and assesses offences against those freedoms, is the human rights field under the Human Rights Act 1998. Article 8 in particular addresses the right to respect for private and family life. Article 14 elaborates that this right shall be enjoyed without discrimination on many grounds, including language. The right stated in Article 8 has also been limited in some specific cases as follows:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

5.1.3 As interference with the freedom in Article 8 can be justified under some circumstances in order to protect health, it is reasonable for the Welsh Language Commissioner to apply the principles of the related assessment, as used by the courts, in forming her opinion on the extent to which interference with the freedom to use Welsh can be justified in this case.

The legal basis of the interference for the purpose of providing care

5.2 The Commissioner accepts that the doctor had genuine concerns about the welfare and safety of the child on the instance in question. The Commissioner also acknowledges the

doctor's need to communicate clearly and directly with the child in order to provide the emergency care that the child needed in a critical clinical situation.

- 5.3 Health workers have a responsibility to provide a standard of care to a patient that a responsible body of medical opinion would consider appropriate for the illness in question (Bolam Test - *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582, and amended by *Bolitho v. City and Hackney Health Authority* [1997] 4 All ER 771). Although the NHS has a duty under the National Health Service (Wales) Act 2006 to provide a service to care for people suffering from illness, it does not have the right to treat a patient without their consent. It is the patient's decision to accept treatment or, if the patient is a child who cannot make the decision for themselves, the responsible parent's decision. Where the medical condition of the patient (or vulnerable child) is a cause for concern, a formal process is followed by a doctor to assess whether the patient is capable of making their own decisions. This formal process includes listening to the patient's views.
- 5.4 Although the Health Board states that the doctor was concerned about the child's safety, there is no suggestion that the child was not able to make decisions for itself, or with the parent's help. The Commissioner does not believe that the interference with the parent and child's freedom to use Welsh with one another can be justified on the basis that the doctor was fulfilling a legal obligation of obtaining agreement from the patient to medical care or treatment.

Necessity of the interference

- 5.5 As noted in 5.1.3 above, interference with the right in Article 8 of the Human Rights Act 1998 can be justified under some circumstances in order to protect health. If the doctor's intention in telling the parent and child not to speak Welsh with one another was to try and understand whether the patient was agreeing to the treatment offered, it may be argued that there was some justification for the interference on the grounds of protecting the patient's health. However, even if the doctor was concerned about the patient's care, and was trying to fulfil a legal duty by obtaining the child's agreement, the method used on this occasion was excessive. If the doctor was concerned that the discussion between the parent and child could affect the child's decision on whether or not to accept treatment, the doctor could have asked the parent or child for their decision at the end of the conversation, or cut the conversation short if the matter was urgent. Instead, the doctor stated that the parent and child should not undertake any Welsh communication at all. There was no need to take this disproportionate step.
- 5.6 The Health Board has attempted to provide an explanation of what was meant by the doctor in stating that the parent and child's actions caused 'personal offence'. Namely, that their use of Welsh in undertaking the communication in question prevented the doctor from providing the emergency care that the child required. However, the Health Board has also recognised in its response that there is another way of fulfilling its duty of care without interfering with this freedom under the Measure, namely asking the child (or parent) about its decision.
- 5.7 In its response, the Health Board states that this case has highlighted a need to improve language awareness training for all members of staff and steps have already been taken to identify key areas to be targeted. As a result of this incident, the Health Board states that it intends to adapt its processes and training for staff. It is clear that the Health Board's current measures do not adequately deal with locum doctors on temporary contracts and that it intends to adapt these measures. The Health Board notes its intention to strengthen mechanisms to support both clinical and non-clinical staff as they provide services.

6 Summary of the Commissioner's views on the interference

- 6.1 In this case, there is a direct conversation between a parent and child. Not only has the doctor ignored their freedom under the Measure, the doctor has also attempted to justify wholly disproportionate actions by arguing that it was done to protect the child's health. The Commissioner does not believe that this interference can be justified on the basis that the interference was necessary in order to allow the doctor to fulfil his legal duty to provide the patient with medical treatment.

7 Advice

- 7.1 In accordance with section 117(7) of the Measure, the Commissioner gives the following advice regarding the interference:
- 7.1.1 Betsi Cadwaladr University Health Board should reflect within a policy document that it does not condone interfering in conversations between parents and children who are exercising their freedom to consider and discuss the healthcare offered to them as a family unit through the medium of Welsh.
 - 7.1.2 The Health Board should apologise to the parent and child for interfering with their freedom to use Welsh with one another.
 - 7.1.3 Any proposed training should fully comply with the requirements of Part 6 of the Welsh Language (Wales) Measure 2011 to ensure that members of staff in the employment of the Health Board do not wrongfully intervene with individuals' freedom to use the Welsh language with each other.

8 Enquiries

- 8.1 The Commissioner wishes to thank the relevant parties for their co-operation in conducting this investigation.
- 8.2 Any enquiries relating to the investigation report should be addressed to:

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