

# Legislation Committee No.2

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## Emyr Lewis' Response to the Proposed Welsh Language (Wales) Measure 2010

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Thank you for the invitation and the opportunity to provide evidence regarding this proposed measure. I should emphasise that this note is my own personal opinion .

I would like to start by saying that legislation is but one part of the effort to ensure the continuation of a minority language. There are many other practical things that governments can do, in areas such as the economy and education, for instance. And ultimately, of course, it is the desire and willingness of individuals, families and communities to use and transfer the language that counts.

Having said this, legislation is important. Like a number of minority languages around the world, the Welsh language has suffered as a result of the legal and administrative system of the state in which it is spoken. For centuries enactments and judicial decisions, along with official procedures and practices, have prohibited or restricted the use of the Welsh language.

It has only been during the second half of the twentieth century that things have begun to change, following the 1967 and 1993 language acts, and then with the advent of the National Assembly.

I see the Measure as a historical opportunity to lay a firm foundation stone for the future of the Welsh language in Wales.

This is the best opportunity for centuries to form a legislative framework to protect and promote the Welsh language, by a legislature where every party understands the value of the language, and is committed to supporting it. There is no way of knowing if the circumstances will ever be so good again.

The proposed Measure is lengthy and complicated. It needs detailed analysis in order to understand it, and also to offer a thorough commentary on it. I hope that the Committee does not mind that I do not offer such a commentary. Rather, I have chosen to concentrate, in a fairly concise way, on some themes that seem significant to me.

### **The status of the Welsh language - official and equal**

Schedule 5, matter 20(1) of the Government of Wales Act 2006 enables the Assembly to legislate in relation to

Promoting or facilitating the use of the Welsh language; and the treatment of the Welsh and English languages on the basis of equality.

This would enable the Assembly to make a formal and definitive statement with regards to the status of the Welsh language in a Measure. For example, it could be stated that the Welsh and English languages are official languages in Wales, and that they are equal. That would be consistent with the aim in the One Wales Agreement to confirm official status for both the Welsh and English languages.

An enactment has psychological and social effect, as well as legal power. Confirming in a Measure that the Welsh language is an official language in Wales, and is equal to the English language, would be an appropriate and effective way to bring to an end the destructive effect of the laws that established, over centuries, the norm of excluding the Welsh language from Welsh public life, and from so many other domains; a norm that is still a real psychological and social power in our society.

That would also conclude some of the unfinished business of the Welsh Language Act 1993. On that Act's passage through both Houses in Westminster, every political party in Wales, apart from the government of the day, supported including a definitive statement that the Welsh language is an official language. (Incidentally, this was also supported by the ex-Secretary of State, Lord Crickhowell, Nicholas Edwards, contrary to his party's position.)

In the Proposed Measure, Clause 1:

states that the Measure makes further provision with regard to the official status of the Welsh language in Wales

lists some other acts that also make provision with regard to this

states that the Measure has no effect on the status of the English language in Wales

Therefore there is no definitive statement that the Welsh is an official language in Wales. Nor the English language either. There is no definitive statement that both languages are equal. That is a shame.

Indeed, it could be argued that this clause has no purpose, as it only chronicles other provisions.

There are some who argue that using the word "official" without defining it in detail would create unacceptable legal ambiguity. This was, I believe, the nature of the United Kingdom Government's objection during deliberations on the 1993 Act. In my opinion, that is not reason enough not to include a definitive statement regarding the official nature of both languages in the Measure.

Also, there is a precedent in British legislation for using such a statement to deal with a bilingual situation, namely the Canada Act 1982 which offers a useful starting point:

English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

There is another provision in the same act that says the same thing about these languages with regards to the state of New Brunswick.

I would therefore like to suggest this new Clause 1 for the proposed Measure:

Welsh and English are the official languages of Wales, and have equality of status.

I also believe that it would be appropriate to confirm that anything that is done through the medium of Welsh within Wales is as legally valid as it would be if it were done in English.

### **The Language Commissioner - the regulatory functions and the citizen**

I welcome the creation of the post of Language Commissioner. It will be a statutory voice, separate from the Government, an advocate for the best interests of the Welsh language, with wide ranging and comparatively strong investigative and enforcement powers.

The comparative weakness of the Welsh Language Board's regulatory powers has been subject to criticism since it was formed. The 1993 Act created a "soft" regulatory. The Board has no powers to compel evidence nor to impose sanctions.

Since passing the 1993 Act, new systems have developed in Wales to investigate the practices and actions of public bodies and others, and to ensure accountability and compliance.

It is now fair to say, I believe, that compulsory investigative powers are the norm in this context, which oblige witnesses to cooperate with the investigator, to give evidence and to disclose documents. The Children's Commissioner for Wales and the Older People's Commissioner for Wales have such powers.

In that respect, by giving the Commissioner regulatory powers, the proposed Measure modernises of the current system under the Welsh Language Act 1993.

That which isn't entirely satisfactory in the proposed system is the role, or lack of role, of the citizen within it. The citizen can complain about failure to comply with a compliance notice, and can give evidence, but beyond that, the citizen has no more formal involvement in the process.

Another aim within the One Wales programme was to establish linguistic rights in the provision of services. Though duties are created (through "standards"), the Commissioner is the person responsible for enforcing them. The system of defining, imposing and enforcing standards is a highly complicated one, on paper. It does not, however, create rights, apart from (ironically enough) the "Right to Challenge" given in Part 4, Chapter 7 of the measure. This is not the right of the citizen, but the right of the body that does not wish to comply with a language standard.

I would like to see more of a place in this system for the wronged citizen. For example, consideration could be given to providing some kind of remedy to the citizen who has suffered following the failure of a public authority to comply with language standards within certain contexts, for example, primary health care, social care or access to Welsh-medium education. (Compare the situation of the Public Services Ombudsman for Wales where there has been maladministration, and someone has suffered as a result - though there is no right to a remedy as such, the system means that this does happen in appropriate cases).

It is worth noting in this context that the Welsh Language Board has been largely successful in earning the trust, and therefore the cooperation, of the public sector by taking a fairly friendly, though firm, approach to establishing and monitoring Welsh language schemes. That approach would not need to change following the creation of a stricter system. Indeed, I would argue that this approach is essential for progress to continue; but strengthening the authority of the regulator would be a means of ensuring that the regulated bodies take compliance with language obligations seriously.

### **The Language Commissioner - the promotional functions**

One of the strengths of the 1993 Act was ensuring that the Welsh Language Board could operate at arm's length from government, not only as a regulating body but also as a promotional and advisory body. This has helped to remove language issues from party politics.

Clause 3 of the Proposed Measure gives the Commissioner powers to promote the language that are similar to the Welsh Language Board's current powers.

It is not clear whether the Commissioner will inherit the Board's exact functions in the field of language promotion. According to clause 134 (2) and (3), those functions could be transferred to Welsh Ministers. We could therefore face a situation where the responsibilities for the excellent work which the Board does at present regarding language strategy and planning (and which is acknowledged internationally) could be transferred to the Government. The risk then is that this work could be sidelined, and the expertise lost, as a result of political compromises when determining priorities and resources, which are part of every government's daily life. In order to avoid this risk, I would like to see clause 134(3) removed from the measure.

## **The Language Commissioner - accountable to whom?**

The First Minister is responsible for appointing and removing the Commissioner (see Schedule 1 of the proposed Measure).

That is consistent with the positions of the Children's Commissioner for Wales and the Older People's Commissioner for Wales

But there is a basic difference between the proposed Language Commissioner and these other Commissioners, namely that the Language Commissioner will be able to impose sanctions on Welsh Ministers (e.g. a civil penalty under clause 76(3)(e)) or bring proceedings against Welsh Ministers as a part of his/her regulatory functions. The other Commissioners do not have similar powers.

It is therefore fair to ask, whether the National Assembly itself should not make this appointment. (Compare the Public Services Ombudsman for Wales and also the Auditor General, who are nominated by the Assembly and appointed by the Queen).

Similar arguments are also relevant to the Tribunal created by the draft Measure. If anything, they are stronger, in light of its judicial function. It is fair to ask whether it is appropriate that the Executive (in the person of Welsh Ministers) should be responsible for appointing its members.

The independence of the Commissioner from the Government could also be strengthened by considering (1) a longer term appointment, rather than five years with a second appointment (2) funding the work of the Commissioner through the Welsh consolidated fund, and (3) removing the right of Welsh Ministers to instruct the Commissioner. The inter-relationship between the functions of Welsh Ministers and the functions of the Commissioner in preparing, imposing and enforcing standards also needs detailed scrutiny.

## **Language standards**

One of the most complicated aspects of the proposed Measure is the system for defining, imposing and enforcing language standards.

I understand the feeling that language schemes under the current system are inappropriate for a stricter regulatory system, and that excessive bureaucracy needs to be avoided. Having said that, it seems to me that the suggested system could be more bureaucratic, and definitely more complicated, than the current system.

Perhaps it would be easier to see how these provisions are likely to work if we had examples of what the Government has in mind as standards, and how they would be incorporated in compliance notices, which are the documents that correspond closest to language schemes under the new system. It would be very useful if the Government were to share its vision for this.

Nevertheless, even if more information were received, I believe that there is scope to examine the relevant clauses to see if such complicated provisions are needed.

If one chose to go to the other extreme, it could be possible, for example, to create statutory duties within the Measure, along the lines of:

Every specified body must treat the Welsh language and the English language equally

- (a) in public signs, material and statements in Wales
- (b) in discussions or correspondence with the public in Wales
- (c) in the planning and delivery of services to the public in Wales
- (d) etc.

except to the extent where it would be unreasonable or disproportionate to do so."

I feel that the solution is somewhere between this extreme and the approach in the proposed Measure.

## **Transitional Problems**

There are a large number of tiers and stages to the different processes that lead on from initially determining language standards, through to ultimately enforcing them in individual cases. My concern is that these processes will drain the Commissioner's energy and resources, especially so in the early years, as Welsh Ministers create standards, and as compliance notices are established.

At the same time, appropriate bodies will continue to implement Language Schemes, and they will be monitored by the Commissioner.

I believe that this could be risky.

First of all, as far as the citizen is concerned, there is a risk of stagnation, where nothing of any value will happen in ensuring Welsh language services, as bodies will not be taking their Welsh Language Schemes seriously and as the Commissioner will not have sufficient resources to work on two fronts.

From the perspective of those bodies which are being regulated, it will be necessary to deal with two regulatory streams. Once again, this could overstretch resources.

At the same time, the Commissioner will be expected to continue with the work of promoting work and facilitating the use of the Welsh language.

Therefore might it be possible to get a smoother transition from the Welsh Language Board to the Commissioner? Would it not be possible, for example, to retain the Board as a statutory body but change its name and composition to a Welsh Language Commission, with a Chief Commissioner and deputies? It might then be easier to manage the process of moving from one system to another. Would it not be worth looking at this anyway, even if only to see whether some savings could be made in the reorganisation costs?

### **The Freedom to speak Welsh**

Part 6 of the Proposed Measure is about the freedom to speak Welsh.

It derives from matter 20.2 of the Government of Wales Act 2006:

Provision about or in connection with the freedom of persons wishing to use the Welsh language to do so with one another (including any limitations upon it).

It empowers the Commissioner to investigate cases, and to make a report where there has been interference with the freedom of a person to "to undertake a Welsh communication with another individual", where both individuals wish to use Welsh. That is, it relates to interference with conversation or correspondence between consenting individuals, which is the most fundamental freedom of speech. I can see that there might be some use for this Part in some specific contexts where no investigation is otherwise possible. I am concerned, however, that it could also mean formal intervention in situations where that would not be appropriate. I fear that these provisions suggest regulation of the circumstances in which people can speak Welsh together. For that reason, I would prefer to see this Part being dropped from the Measure.