

Cymdeithas yr Iaith Gymraeg's response to the consultation on changes to the Welsh Language Commissioner's Enforcement Policy

Introduction

Cymdeithas yr Iaith is an organisation that has peacefully campaigned for the Welsh language and all Welsh communities, as part of the international revolution for freedom and justice, for over 60 years.

The proposed Enforcement Policy generally introduces a number of procedural and substantial changes that would limit the Commissioner's regulatory work to cases that would be considered "in the public interest" and favour internal resolutions over statutory, open investigations.

Emphasis in the proposals is placed on the best use of the Commissioner's resources, rather than on the interests of an ordinary citizen whose human rights to be able to see, hear and use the Welsh language in Wales have been impaired.

We are convinced that this would create additional barriers for individuals seeking to submit complaints directly to the Commissioner. That would reduce the accessibility of the complaints procedure, make the Commissioner less responsive to the everyday experiences of Welsh language users and limit the range and number of people who would complain, which would be in the interest of organisations.

If the changes being proposed are implemented, they will likely result in even fewer statutory investigations being held in cases of failure to comply, and more compromise between the Commissioner and failing organisations, resurrecting the Board's procedure and the Language Act 1993, which proved completely ineffective to guarantee rights for the Welsh language and were abolished for that reason.

Such a move would also remove the reality of attempting to live a fulfilled life in Welsh in Wales, and the barriers that still exist to being able to do so, as transparent and open recording of that experience will not be to the same extent. This would not be accepted in any other area in terms of citizens' rights in Wales today - nor should it be - so it is difficult to see why it would be suitable in the case of the Welsh language.

Section 1(2)(a) of the Welsh Language Measure 2011 clearly states that the enforcement of the Standards on bodies is the way in which the rights of the people of Wales to use the Welsh language come into being. We are concerned that the proposed new Enforcement Policy weakens the voice of Welsh language users and turns back the clock on the rights of Welsh speakers. It needs to be clear that the role of the Welsh Language Commissioner is to prioritise people over organisations and to be a strong advocate for the people of Wales.

There have been several attempts over the years to weaken the role of the Welsh Language Commissioner, and therefore the rights of Welsh speakers. We refer in Appendix 1 of our response to a chronology of those examples. At that time an appropriate legislative process

was followed to bring forward such proposals (even though we did not agree with them at all), and were rejected by vehement opposition.

We are concerned that some of the proposals in this consultation are almost identical to previous proposals, but that no proposals to change primary legislation have been made on this occasion.

The biggest change in our view is the expectation for Welsh language users to complain to an organisation or body about a failure to comply with the Welsh Language Standards before going to the Welsh Language Commissioner. This would be contrary to the current situation which allows a user to complain directly to the Welsh Language Commissioner or the organisation itself, as they wish. As it states quite clearly in the current Policy:

*4.5 The Commissioner encourages complainants to complain to the relevant person in the first instance, in order to give that person an opportunity to respond, and offer a resolution, where there has been a failure to comply. However **it must be made clear that it is not necessary for the complainant to submit a complaint to a relevant person**. Furthermore there is a duty on the Commissioner to consider each complaint received.*

The proposal to introduce an obligation to complain to an organisation in the first instance stems from the 2017-19 period and the Government's White Paper at the time, which was rejected. There do not appear to be sufficient reasons given to explain why the changes being proposed to the Enforcement Policy are necessary.

Statements have been made by previous Welsh Language Commissioners and others in favour of rights to complain to a regulator, and some of those statements can be found in Appendix 2 of this response.

There is no evidence to show that such a change of policy would lead to a situation that is equally accessible and expedient for a citizen to complain about not being able to use Welsh or about less favourable treatment, nor that it would lead to a situation that at least maintains or improves the status quo in giving effect to the objectives and policies of the Welsh Language Measure. No consideration appears to have been given to the impact of these changes on the rights of Welsh speakers to use the Welsh language.

We do not see that an equality impact assessment, for example, has been introduced to enable meaningful consideration of the potential impact of these changes on groups of Welsh speakers who currently have protected or underrepresented characteristics. Who are the current complainants who come to the Commissioner directly, who are currently excluded from the Commissioner's complaints system, and how are these proposals going to have a more positive effect on them? What adverse effects could they have? We cannot say based on this consultation.

It must therefore be asked again on what basis these changes are therefore being proposed, as not a single piece of relevant primary legislation has been changed to enable such a move and it is not proposed to do so.

The consultation process: basis and method

We would like to raise concerns and highlight the oversight of this consultation process. Given that far-reaching changes are being proposed in the proposed new Enforcement Policy, it is a concern that there is no reference to it on the home page of the Commissioner's website.

The Commissioner also does not appear to have issued the same press release about the consultation. There is little if any coverage of the consultation on the Commissioner's social media presence. How then has the Commissioner taken a serious and meaningful approach to seeking the views of Welsh speakers and ordinary Welsh people on this latest attack on their rights as citizens?

We would also like to draw your attention to a number of linguistic errors in the regulatory outcomes that are restated in the Welsh version of the document. While accepting that the mistakes were unintentional so many errors give the impression that the proposals were hastily drawn up.¹

As significant changes to the policy are being proposed it would be good practice to show each change, modification and omission of the policy, rationale for the proposals and their impact on Welsh speakers and the objectives of the Measure.

As part of our response we have created a table of the type, which can be found in Appendix 3.

Regulatory Approach

From the outset the impression is given that regulation is not the role of the Commissioner as this section opens by stating that the Commissioner regulates "to ensure an increase in the opportunities available to use the Welsh language."

Instead we suggest that securing Welsh-language services is a priority for the Welsh Language Commissioner and is therefore part of the regulation purpose. Unfortunately organisations are still failing to comply with Standards or acting in contravention of the Welsh Language Measure and regulation is needed to prevent that, and therefore a strong regulator.

Furthermore we are really concerned that clause 2.3, which proposes to 'encourage' organisations to report in advance if a failure to comply is likely, is an attempt to create a process contrary to the provisions of the Welsh Language Measure.

In preparing a Compliance Notice section 47 of the Welsh Language Measure requires the Welsh Language Commissioner to consult a body on the Standards intended to be imposed. A

¹ Setyliadau > sefydliadau

Ymwybodol or > ymwybodol o'r

Pendertyniadau > penderfyniadau

Sefydliadaun > sefydliadau'n

Threniadau > threfniadau

Llywodrathu > llywodraethu

body then has an opportunity to say if it is likely that it cannot comply, and the Commissioner may extend an Imposition Date (the date on which the body is required to comply with a duty) which gives the body time to make necessary changes to be able to comply by a certain date. If it is dissatisfied with all this a body can seek a final ruling from the independent Welsh Language Tribunal. This is a transparent and public process.

In addition section 55 of the Welsh Language Measure gives a body the ability to challenge duties *which have already been imposed* in a Compliance Notice and so in place. That process is also public and transparent, the independent Welsh Language Tribunal ultimately adjudicates publicly on any dispute over the 'reasonableness and proportionality' of duty.

The body already has several opportunities, during the various phases of the process of imposing a Compliance Notice, and thereafter, to raise by a proper process any situations in which it might be difficult for it to comply. The suggestion that the Commissioner's discretion extends to giving permission in advance of and beyond the process of negotiating a Compliance Notice and challenging a duty or duties clearly and transparently set out in the Measure - for a body not to comply with basic linguistic duties agreed by the Senedd if it gives advance notice - is totally unsatisfactory.

It is not clear what the Commissioner can do with the knowledge that there is a risk of failure to comply, as the Bill does not enable her to allow or facilitate bodies to not comply with the minimum duties that the Senedd has agreed and which have been imposed in a Compliance Notice, were it not for the process in sections 47 and 55 of the Welsh Language Measure that we have described above. It is extremely problematic that the Commissioner is even considering a procedure that would turn a blind eye to offending the language rights of the people of Wales.

The policy should therefore state that if a body wishes to challenge a requirement to comply with a duty that has already been imposed, for whatever reason, it should (BEFORE a case of specific non-compliance or a complaint comes to light, not in response to a complaint) properly challenge the duty, and that the possible consequences could be to reject the challenge, allow and remove the duty completely, or to introduce a variation of the body's Compliance Notice to provide an extended timeframe for compliance or vary the requirement in some other way (e.g. compliance must occur in all circumstances except X). This will enable the public to understand what their rights are when dealing with a relevant body when they look in that body's Compliance Notice, and consistent with the procedure in the Measure.

It is also unclear whether complaints would still be recorded under a regime where a body would give advance notice of failure to comply. Keeping records of failure to comply provides a clear picture of people's expectations and evidencing the weak points facilitates improvement in provision.

In the recent case of Television Licensing there was a failure to provide letters to renew a licence in Welsh as well as English, in compliance with the Standards. We know that many have

complained and been told that TV Licensing had informed the Commissioner that a problem with a change of provider meant that a letter could not be delivered bilingually and there was nothing that could be done in order to comply with the Standard. The problem lasted longer than expected and there was a failure to comply for several months.

In such a case, complaints nor an early or informal resolution would not be recorded under the proposed policy. That would hinder the collection of information about the experiences of Welsh speakers and the extent to which bodies comply with Standards.

Complaints

Proposed clauses 3.3 and 3.4 place an expectation on an individual to complain to a body about a failure to comply with the Welsh Language Standards in the first instance, before complaining to the Welsh Language Commissioner. This, together with the first criterion (a) in proposed clause 3.16 (“the extent to which the complainant has made an initial complaint to the organisation, and completed the organisation’s complaints procedure”), which includes the factors the Commissioner intends to consider when deciding whether or not to open an investigation, would turn back the clock on language rights, given the lack of power ordinary people have compared to bodies and companies.

It must be remembered that complaints and investigations into them can lead to more extensive change than solving a case for an individual.

Following a complaint about Cardiff Council’s self-service machines, the subsequent investigation and the threat to take the Commissioner to the Tribunal, a precedent has been established that all self-service machines throughout Wales must either be defaulted to the Welsh language or offered a proactive preference page in order to comply with the Language Standards.

This is an example of a statutory inquiry and use of the enforcement mechanism that has ensured wider opportunities for the practical use of Welsh throughout Wales. Sound and effective regulation therefore supports efforts to encourage language use, not hinder it as some wrongly argue, as all Welsh citizens must now exercise proactive choice when exposed to the interfaces in question.

The procedure as it stands, of enabling someone to complain to the Welsh Language Commissioner directly, is much more accessible than the old procedure of complaining to bodies, as it was under the Language Act 1993 (and which therefore still exists in the context of complaints of failure under statutory Welsh Language Schemes). Although there is a convention that public bodies should have a two phase process, there are some exceptions amongst county councils and health boards, which have one clause. As there is some diversity, and that information on how to complain must actively be sought, having one procedure by an independent regulator who wants to protect the rights of users, as currently, is more effective from the complainant’s objective.

The Commissioner’s complaints procedure is already lengthy, if an individual has to face the organisation’s complaints procedure before approaching the Commissioner they are unlikely to complain. Please note that what is being proposed here is effectively forced

completion of a body's complaints procedure, before the Commissioner considers a complaint.

In addition, some organisations' complaints procedures refer someone to an Ombudsman if there has been no adequate response to a complaint. That would create uncertainty and confusion for a complainant and possibly an Ombudsman to receive complaints instead of the Welsh Language Commissioner, who has the most suitable expertise and experience. It could also create confusion about the fundamentally different nature of the work of the Ombudsman and Commissioner, as elaborated in Appendix 2.

People's confidence in many public bodies is low and is very easily eroded so if a complaint did not result in a change or resolution by the body, but the body deemed the issue resolved, an individual would be less likely to complain again. Anecdotal information from others about their experience of making a complaint is another barrier for people to complain to a body directly.

Meri Huws also highlighted in her response to the Government's proposal in the Welsh Language Bill White Paper 'Striking the right balance' that complaints are referred directly to a body and given an early resolution, that the standards as they stand do not include a duty for bodies to deal with complaints about the Welsh language, only to record them. She said such a duty should therefore be placed on bodies before introducing any change to the existing arrangements. That hasn't happened.

Being able to complain to an independent regulator also places less burden on the individual, as it is possible to rely on the work of the Commissioner, who has experience of organisations, and is a recognised regulator. That will mean there are fewer opportunities for bodies to confuse people and avoid a fair resolution.

A body like the Welsh Language Commissioner commands credibility, and bodies will take a regulator more seriously and treat all legitimate complaints seriously. In addition, the Commissioner has a capability that members of the public do not have, namely the ability to consider imposing one of the range of enforcement actions for a valid complaint, including highlighting a failure to comply or imposing enforcement actions to change future behaviour or to prevent the failure from being repeated.

Not receiving complaints directly and therefore information about failings could hinder the Commissioner's work with bodies and reduce the information available to her about the experiences of Welsh speakers and the overall status and wellbeing of the language, in a way that is inconsistent with the Measure.

It could also mean that the Welsh Language Commissioner would be an adjudicator in a number of cases. A body might consider that a complaint has been resolved while a complainant is dissatisfied with the outcome. If a complainant went on to complain to the Welsh Language Commissioner as a result the Commissioner would have to rule on whether the body's response to the original complaint is sufficient in determining whether the complaint should be considered valid under the Commissioner's procedure.

By receiving complaints directly it is acknowledged that all complaints are serious if someone has taken the time and gone to the effort of complaining in the first place.

There are a number of circumstances in which it is not appropriate to expect an individual to complain to the body first. Not only that Wales is small, the Welsh-speaking part is even smaller, and people are therefore reluctant to complain personally but personal circumstances prevent some people from complaining directly to an organisation. Someone may be working for the aggrieved body, receiving health treatment or care from them, a witness or a police prisoner, etc. Concern about and the impact of the response of the offending bodies and individuals involved would leave people very reluctant to complain given the power these bodies hold over individuals.

The Commissioner would receive fewer complaints if obliged to complain to a body about a failure to comply before complaining to the Commissioner. The Commissioner would probably try to argue that, under the proposed procedure, she will still, technically, consider all complaints made, in accordance with section 93 of the Measure, under the proposals. However, in practice, the change would significantly restrict, if not abolish completely, the right that section 93 guarantees an individual.

And of course, a complainant has no control over how bodies implement their complaints processes and how effective they are in doing so.

As you know, the Measure places a duty on the Commissioner to "consider" whether or not to conduct an investigation if someone makes a complaint and the complaint is valid. There is no absolute obligation to conduct an investigation even if a complaint is valid. Section 94(2) of the Welsh Language Measure envisages that the Commissioner might decide not to conduct an investigation into a valid complaint and that the only duty is then to inform the complainant of the decision. Adopting a policy requiring a complainant to go through the complaints process of an organisation that has failed to comply with Standards before making a complaint to the Welsh Language Commissioner could add to the criteria that define a 'valid complaint'. As noted that is in direct contradiction to the provision of the existing Policy, which is true to the Measure, which states that it is not 'necessary' to submit a complaint to the offending body first:

4.5 The Commissioner encourages complainants to complain to the relevant person in the first instance, in order to give that person an opportunity to respond, and offer a resolution, where there has been a failure to comply. However it must be made clear that it is not necessary for the complainant to submit a complaint to a relevant person. Furthermore there is a duty on the Commissioner to consider each complaint received.

A change to the status quo, and adding to the 'valid complaint' criteria without changing the Measure itself, could be tantamount to action beyond the Welsh Language Measure, and we would ask that the Commissioner publishes her legal view on the matter as we doubt that this is lawful.

The current policy clearly states that the Welsh Language Commissioner is not required to have received a complaint of failure to comply in order to conduct an investigation, she can do so if she becomes aware of a failure by another source, during an enquiry, through media

information and in other circumstances. It is not clear that the Commissioner intends to continue to do this under the proposed new policy and that a complaint must be received from an individual in order to conduct an investigation. We believe this needs to be clear in the regulatory policy.

While we accept that it is the public's ability to use Welsh that is important and that the public will likely notice any failure, the Commissioner as regulator is likely to encounter examples of failures to comply. By not conducting an investigation, because no complaint has been received, there would be no record of the failure to comply, which would mean that neither an organisation's annual report, nor that of the Commissioner, reflects non-compliance.

Decide whether or not to investigate

3.14 We will not investigate unless we consider that doing so is in the public interest and represents the best use of our resources.

Clause 3.14 suggests that there will be an investigation into complaints only in special circumstances, this is contrary to section 93 of the Welsh Language Measure which is clear that the Commissioner must consider conducting a statutory investigation into a valid complaint, even though there is no obligation to investigate.

We recommend, for clarity, that the proposed regulatory policy makes it clear that it is the Commissioner's duty to consider conducting a statutory investigation if it is suspected that a body has failed to comply with a Standard. Under no circumstances should the unambiguous statement in the existing Enforcement Policy which accurately reflects the Measure be removed.

While working with bodies when there is a suspected failure of compliance can be an easy and quick fix, it is important that there is an investigation into the reasons for failure to comply to prevent similar failure in the future.

What would be considered in the 'public interest' is unclear. How would the public interest be measured and who would do it? And who is meant by "the public" - is it the Welsh speaking public, the public comprising the non-Welsh speaking majority?

Under the existing policy clause 4.19 states that the complainant will be told the reasons for not conducting an investigation. That is not clearly set out in the proposed policy, only that the complainant will be notified if there's no investigation. The requirement for public bodies to give adequate reasons for their decisions is a pivotal principle in public law that cannot be ignored.

We believe that it is important for a complainant to know why an investigation will not take place, and that it is clear that that will happen so that the complainant knows what to expect from the procedure. The same applies if an investigation is terminated.

Frivolous or vexatious complaint

We are concerned that the extensive elaboration offered to what the Commissioner considers to be a frivolous or vexatious complaint is possibly being made for the Commissioner's convenience and to silence complainants deemed 'troublesome'. It must be remembered that receiving complaints is one of the core functions given to the Commissioner by Parliament in legislation. The comparison between the provisions of the existing Policy and the proposed one at this particular point is illustrated below.

Existing Enforcement Policy	Proposed Enforcement Policy
<p>4.13 The Commissioner may conclude that a complaint is frivolous or vexatious in a number of circumstances. These could include circumstances where the complainant submits an unsubstantial complaint or changes the substance of a complaint, raises irrelevant matters, places unreasonable expectations upon the Commissioner or contacts the Commissioner in a way that is considered unreasonable.</p>	<p>A number of circumstances may lead us to conclude that a complaint is frivolous or vexatious. These may include circumstances where he complainant:</p> <ul style="list-style-type: none"> • submits an insubstantial complaint or makes significant changes to the complaint • submits an insincere complaint • submits a complaint which has been made more than once already or relates to the same matter submitted in a previous complaint and does not include any new information • submits a complaint where there is no hope or basis to consider that the complaint would be successful • insists on pursuing a valid complaint in an unreasonable manner • submits a complaint where the cost and/or time taken to investigate are incompatible with the value to the public and best use of our resources • insists that the complaint is treated in a way which is contrary to this enforcement policy or good practice • raises irrelevant matters • sets out unreasonable demands • makes contact in a way which is considered unreasonable.

We are concerned about the subjective nature of some of the new reasons e.g. that the complaint made was invalid, the submission of a complaint where there is no prospect or basis to consider that the complaint would succeed. How would the Commissioner determine what the complainant's intention or understanding is?

It is completely unacceptable that the Commissioner proposes to make a complainant 'frivolous or vexatious' if, for example, they make a complaint 'where the cost and/or time taken to investigate are incompatible with the value to the public and best use of our resources'. We remind you that concepts such as 'value' and 'public interest' do not appear at all in the definition of a valid complaint under section 93 of the Welsh Language Measure, as specified by the Senedd in 2011. Welsh speakers in Wales are members of the public who pay their taxes. We respectfully suggest that a complainant is under no obligation to be considering issues such as cost and resource before lodging a complaint in order to highlight that their basic human rights have been violated.

We note that the Commissioner has tried in the past to argue that appeals brought by complainants before the Welsh Language Tribunal are frivolous or vexatious, but that the Tribunal has ruled that the challenge was neither frivolous nor vexatious.

In WLT/23/02, relating to the lack of Welsh-medium swimming lessons, the Commissioner applied to the Tribunal to quash the appeal on a number of grounds, including that the appeal was 'frivolous or vexatious'. However, the Tribunal stated in its judgment:

*"... the Tribunal does not agree with the Commissioner when she argues that the Appeal is frivolous and vexatious. [The complainant] had brought his Appeal in good faith and based on the information which the Council had provided to him and it was obvious during the hearing that he was sincere in his determination to ensure that members of the public should have as much information as possible in order effectively to insist upon their linguistic rights under the Welsh Language Standards."*²

Deeming a complainant and their complaints as frivolous or vexatious has the effect of not obliging the Commissioner to consider their complaints. We are therefore concerned that any change to the Policy to this effect would further empower the Commissioner to disregard and be harsh on complainants, but weak against the offending organisations. Under this policy of course, as it relates to complaints not appeals to the Tribunal, the Tribunal would not then offer protection to individuals as in the case of the complainant in WLT/23/02. Therefore the proposed Policy must not be more stringent than the existing one.

More people need to be encouraged to complain to assist with the Commissioner's work rather than putting obstacles in people's way. Giving the impression that a complaint needs to be in the public interest could mean that people don't feel they should complain or that their complaint isn't important enough. One public body has the main job of protecting the interests of Welsh speakers and it is important that that body advocates for people.

An equivalent clause to clause 4.2 of the existing policy has disappeared as far as we can see:

If the Commissioner considers the complaint to be frivolous or vexatious, or the complaint is withdrawn, the Commissioner will decide to close the complaint. Closing complaints for the reasons set out in this paragraph is tantamount to saying that the Commissioner would not consider conducting an investigation in accordance with her discretion under section 93(8) of the Measure.

The Commissioner's discretion to open an investigation needs to be retained in the Policy, and should be evident in it – not necessarily in the section on frivolous or vexatious complaints and complainants.

Conducting an investigation

Under the existing policy terms of reference are being prepared and shared with the complainant and the body against whom there is a complaint, which includes a proposed timetable, and there is an opportunity for the complainant to comment on the terms of reference. There is no opportunity in the proposed policy, however, for a complainant to view and comment on the Evidence Notice which shows the questions the Commissioner intends to ask the organisation and shows the progress of the investigation. This would weaken the complainant's voice. The inclusion of a proposed timetable is also important to manage the complainant's expectations.

The complainant and the body against whom the complaint is made are given the opportunity under current policy to make representations during an investigation at the Commissioner's request. The proposed policy does not offer the same opportunity, which again gives the complainant less of a voice as only the content of their complaint will be considered.

In addition, the current policy gives the complainant the opportunity to comment on the ruling of the Commissioner at the end of an investigation. A complainant would have the opportunity to comment on the draft investigation report, which sets out whether or not there has been a failure to comply under the proposed policy. But that would be a step backwards.

From the complainant's point of view, one of the most important stages of the investigation is the resolution and action, as obtaining proportionate resolution is the intention of lodging a complaint. The omission of this stage therefore significantly reduces the power of the complainant.

Omitting all these stages may reduce the duration of the investigation, but a sufficient investigation and outcome will be more important to a complainant who has actively complained than an early resolution.

Nor does the move towards an 'early resolution' recognise that there is not always a 'resolution'. Sometimes the best that can be secured for Welsh language users who have experienced an injustice is to conduct a statutory investigation, to hear their unacceptable experience and to sanction a body. The Commissioner was given powers to investigate and enforce, not just in

order to 'resolve' problems but also in recognition that highlighting insufficient action and imposing punishment is a means of maintaining the status of the Welsh language and rights to use it.

Take no further action

It is not clear in the existing policy that a report on a determination containing reasons for taking no further action is shared with a complainant. The current policy is also not clear on the matter, we think it is important to give reasons for taking no further action, and that it is clear in the regulatory policy that that will happen.

Giving advice or recommendations

Clause 4.15 sets out the circumstances under which the Commissioner would decide to give advice or recommendations rather than enforcement action or punishment to a body. There is no consideration of the impact of the failure to comply on public use of the Welsh language, and that should be one of the Commissioner's main considerations in determining action following an investigation.

It is also stressed that this is not compliance enforcement. The figure at the bottom of clause 8.10 of the existing policy reflects more completely and comprehensively a decision to give advice – it is a gentle attempt to restore compliance, it is not enforcement. The use of this method should not be normalised as the outcome of an investigation. It would be more effective and give the user more confidence that the Commissioner is requiring the body to take specific action, for example, to avoid a repeat failure, rather than just advising it to do something. The new policy makes the boundary between the range of potential outcomes - what is an attempt to restore compliance and what is enforcement - after investigation less clear.

Requirement to take specific action or prepare an action plan

Preventing further failure of compliance is critical, and an action plan may be a key part of ensuring that.

There are no details of a requirement for a body to prepare an action plan. Under the existing policy the Commissioner must approve, set a timetable and ensure a body follows an action plan. The same action is not set out in the proposed policy.

Given the importance of a plan to prevent further failure we believe it is appropriate to include details of the type to reassure a complainant that a requirement to prepare an action plan will be taken seriously by the body. The complainant should have access to the action plan and the Policy should include the Commissioner's commitment to continuously monitor the achievement of enforcement schemes until it is certain that all action has been completed and the body is compliant once again.

Civil penalty

The proposed policy does not specify where money collected through penalty will go. For transparency we think it is important to note that in the policy.

Failure to comply with enforcement action

We do not agree that the factors in clause 3.16 should apply when considering failure to comply with enforcement action. A number of these factors do not relate to non-enforcement action and others that should not be a consideration, as they relate to a complaint, not failure to comply with action to address the effect of that complaint.

Demands / Conclusion

It must be remembered that the purpose of the Welsh Language Commissioner's regulation is to transform duties on public bodies to provide services into rights for people to use the Welsh language. This is clear in the Welsh Language Measure:

1(2)(a) duties on bodies to use the Welsh language, and the rights which arise from the enforceability of those duties, which enable Welsh speakers to use the language in dealings with those bodies (such as the provision of services by those bodies);

Policy changes that impede regulation undermine the Measure itself and deprive the people of Wales of their language rights. These dangerous proposals must be completely reconsidered and aborted.

If the Commissioner continues to want to change the Policy, the consultation needs to be restarted and an appropriate and transparent procedure followed - demonstrating the research basis of the proposals, what exactly is being proposed relative to the existing Policy and the practical impact the Commissioner foresees this having on individuals (including groups with protected characteristics) and on the aims and objectives of the Measure and the ability to assert the right to the Welsh language, and to give adequate reasons for any changes.

Any changes to the existing Enforcement Policy should make it as convenient as possible for users and empower them, and encourage more people to complain, especially as people are generally reluctant to complain.

Next steps

We understand that the Welsh Ministers must approve the policy under section 108(4) of the Measure. We will therefore share our response with Mark Drakeford, Cabinet Secretary for the Welsh Language, the Chair of the Senedd's Culture, Communications, Welsh Language, Sport, and International Relations Committee; party spokespersons on the Welsh language in the

Senedd and the President of the Welsh Language Tribunal so that they are aware of our concerns about changes to the Enforcement Policy.

Appendices to the Response

Appendix 1

This is a summary of the history of efforts to reduce the regulatory function of the Welsh Language Commissioner:

- The then Minister for Welsh Language and Lifelong Learning, Alun Davies AM, published a white paper *Striking the right balance: proposals for a Welsh Language Bill* in August 2017, just 16 months after the regulatory regime became effective on the first round of bodies under standards.
- In the words of the then Minister: “*we cannot justify a bureaucratic and costly system that threatens to choke off goodwill towards the Welsh language*”.

Proposals included:

- Abolishing the post of Welsh Language Commissioner and creating a Commission with a focus on promoting and facilitating the Welsh language.
 - Abolishing all classes of standards except for service delivery.
 - The Government, not an independent Commissioner, to be responsible for setting standards.
 - Requiring the bodies themselves to deal with complaints in relation to the Standards in the first instance and that the proposed Commission should only investigate complaints in serious cases.
- It also emerged during the period that the Government and the Public Services Ombudsman (who had a dubious record on the Welsh language to say the least – please see Cynwyd Council case) had at the time been discussing plans to swallow up the complaints function of the Welsh Language Commissioner.

The proposals were aborted in February 2019 in the face of a furious response and lack of support.

- In August 2019 a new agreement was announced between the Welsh Language Commissioner and Eluned Morgan AM, Minister for Welsh Language and International Relations at the National Eisteddfod in Llanrwst. It later emerged that the Government had agreed to transfer additional promotion and facilitation responsibilities to the Commissioner provided that the Commissioner made changes to the complaints system.
- It was highlighted in 2019 that the Commissioner was opening a significantly smaller number of investigations into complaints and that new pre-investigation arrangements had been introduced. It emerged in correspondence that the Minister for Welsh Language and International Relations had requested that the Commissioner reduce the number of complaints investigations and that the Commissioner confirmed that he was willing to consider that.

- In the 23/24 annual report, the Commissioner stopped reporting on the amount of statutory investigations that were opened after complaints from the public.

Appendix 2

Previous statements of the Welsh Language Commissioner post holders and others on the right to complain

We think it is important and necessary to highlight previous statements in relation to the changes you are proposing. It is becoming clear that it is not just Cymdeithas yr Iaith who are concerned about the emphasis on placing responsibility on a body to deal with complaints and a concept such as finding the 'best possible resolution for the complainant' shows a lack of understanding of the nature of the Commissioner's unique regulatory function.

The Welsh Language Commissioner's response to the 'Striking the Right Balance' White Paper:

"There is a fundamental difference between the mission of a "rectifying" body, such as an Ombudsman, and an "enforcement" regulator, such as the Commissioner. The primary mission of an Ombudsman is to consider the position of a public body and complainant and to seek "rectification" for the complainant at the end of the process. Nevertheless, the mission of the Welsh Language Commissioner is clearly outlined in the Welsh Language Measure and is about promoting and facilitating the use of the Welsh language. The Commissioner's job is therefore not to seek rectification for complainants, but to incentivise and enforce compliance and standards that give effect to the status of the Welsh language and create the rights for Welsh speakers arising from the standards".³

"Complainants currently have the right to make a complaint to the Commissioner. It could be argued that that right puts the citizen first and I am in favour of retaining that right".

The above point was made in the context of the Government's proposal at the time to force individuals to approach the body first in the case of a failure to comply.

"It is important to note that it is generally accepted when discussing equality legislation for example, that any legislation that confers rights may appear burdensome on the incumbent organisation, but that the positive impact it will have on equality is a compromise worth making."

Welsh Language Commissioner's evidence to the Fifth Senedd Culture Committee during the inquiry 'Supporting and promoting the Welsh Language - an inquiry into the legislative, policy and wider context'

³ The Commissioner's response to the White Paper 'Striking the right balance' (translation)

“Even though section 93 of the Welsh Language Measure gives me the discretion to decide whether or not to investigate a valid complaint, the decision must be made in a way that is consistent with the overall aims of the Measure. In a Welsh Language Tribunal case ruling [TyG/WLT/16/8] the Presiding Officer said that “... a decision not to investigate such a complaint has the potential for undermining public confidence in the effectiveness of the Measure as a means of protecting such rights”.

The Measure gives a person an unequivocal right to submit a complaint to the Welsh Language Commissioner and I consider it necessary to reserve the complainant's right to refer a complaint directly to me. That is because there are challenges facing Welsh language users as they seek to complain to an organisation about issues relating to the Welsh language.”⁴

The evidence of Alun Ffred Jones, former Heritage Minister 2008-2011 and former Assembly Member for Arfon, to the Fifth Senedd's Culture, Welsh Language and Communications Committee's Inquiry into the legislative and policy context of promoting the Welsh language

"One thing that they [Welsh Government] want to promote is a one-stop shop. Well, the commissioner is a one-stop shop, isn't she? She deals with the complaints at the moment. If you're unhappy, you can just go straight to the commissioner: 'I know her, I know of her, I know her name'; 'No, we're going to have a commission; no, the commission won't be dealing with complaints; you'll be complaining to the people that you're complaining about'. Well, I'm very sorry, but I'm very doubtful.”⁵

The evidence of Meri Huws, former Welsh Language Commissioner, to the Fifth Senedd's Culture, Welsh Language and Communications Committee's Inquiry into the legislative and policy context of promoting the Welsh language

“Organisations appear to be much more willing to take action to ensure compliance with standards in response to inquiries under the provision of the Measure than they were to inquiries conducted under the provision of the Welsh Language Act 1993.”⁶

“... I consider it necessary to reserve the complainant's right to refer a complaint directly to me. That is because there are challenges facing Welsh language users as they seek to complain to an organisation about issues relating to the Welsh language. My assurance report, A Measure of Success, states that organisations have not taken adequate action to ensure that members of the public can be confident to complain directly to them about issues relating to the Welsh language.”

Correspondence

In correspondence dated 1 August 2019 after the proposals in the White Paper 'Striking the right balance' were abandoned, the Commissioner stated in a letter replying to Eluned Morgan MS:

⁴<https://busnes.senedd.cymru/documents/s78415/Paper%201.pdf> (translation)

⁵Record of Parliament proceedings 20/09/2018 <https://record.assembly.wales/Committee/5113#A45462>

⁶ [Paper 1.pdf](#), paragraph 1.17 (translation)

“As important as it is to be able to complain directly to a public organisation a complainant has the right to approach me directly as a Commissioner and I do not intend to do anything to erode that right.”

Appendix 3

Table showing changes

Policy 2015-2024	Proposed Policy
3.4 In considering the suspected failure of a relevant person to comply, the Commissioner will be proportionate in deciding whether or not a statutory investigation should be undertaken. With this in mind, the Commissioner will consider the facts of each case individually.	2.12 We will make proportionate decisions about whether or not to investigate under section 71 of the Measure ("investigation"). We will consider whether carrying out an investigation is a reasonable and proportionate use of our resources given the seriousness of the matter.
3.5 In deciding what subsequent action to take as a result of determining that has been a failure to comply, the Commissioner will consider what is proportionate in order to prevent the continuation or repetition of the failure.	2.13 Following the conclusion of an investigation, and in deciding what further action to take, we will consider what is proportionate to prevent future non-compliance.
4.5 The Commissioner encourages complainants to complain to the relevant person in the first instance, in order to give that person an opportunity to respond, and offer a resolution, where there has been a failure to comply. However it must be made clear that it is not necessary for the complainant to submit a complaint to a relevant person. Furthermore there is a duty on the Commissioner to consider each complaint received.	3.4 We want to give organisations the opportunity to put these complaints procedures into practice, and to respond and offer a solution to a complaint when something goes wrong.
4.12 If the Commissioner considers a complaint to be frivolous or vexatious, or if the complaint is withdrawn, the Commissioner will decide to close the complaint. Closing complaints for the reasons noted in this paragraph does not mean that the Commissioner would not consider conducting an investigation in line with the discretion available to her under section 93(8) of the Measure.	3.22 If we believe that a complaint is frivolous or vexatious, has already been made several times, or if a complaint is withdrawn, we will not investigate and we will close the complaint.
4.18 It will be the Commissioner's decision whether or not to undertake a statutory investigation. In reaching that decision, the reasons for any decision will be recorded with that decision.	3.15 Our decision about whether or not to investigate will be based on a number of factors. These factors may vary and/or be weighted differently depending on the circumstances. We will consider all relevant factors before deciding whether to investigate, and review the ongoing relevance of those factors

	<p>during an investigation.</p> <p>3.16 These factors include, but are not limited to the following:</p> <ul style="list-style-type: none">(a) the extent to which the complainant has made an initial complaint to the organisation, and completed the organisation's complaints procedure(b) the organisation's response when the matter was brought to its attention(c) the nature of the failure to comply, where relevant, and the extent to which it was intentional or non-intentional(ch) the action taken by the organisation to address any non-compliance(d) the extent to which the matter was the subject of previous complaints or investigations(dd) the likelihood, in our opinion, that this matter will recur(e) the likelihood, in our opinion, that this matter will have a detrimental effect on Welsh language users and, if so, its possible significance(f) the likelihood, in our opinion, that investigating (and any follow-up action where relevant) will have a positive effect on achieving our regulatory outcomes(ff) the extent to which the organisation was aware of the risks taken(g) whether we had provided advice in this area previously, and whether this advice was followed(ng) whether it is possible to respond to the complaint without investigating on the grounds that a legal or statutory solution exists which addresses the basis of the complaint(h) has the complaint been made in the circumstances outlined in paragraphs 3.21-3.23.
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<p>4.19 After making a decision, the Commissioner will notify the complainant and the relevant person, where relevant. If the Commissioner decides not to conduct a statutory investigation, she will explain to the complainant her reasons for not doing so.</p>	<p>3.19 After reaching our decision, we will inform the complainant and the organisation (where relevant).</p>
<p>6.16 The Commissioner, or any person authorised by the Commissioner, has the power to enter premises under the control of a relevant person who is under investigation. Inspection of the premises must be necessary for the purposes of the investigation in the Commissioner's view or that of the authorised person. However this power does not extend to dwellings.</p>	<p>4.2 To mitigate this, we will follow the principles below when investigating:</p> <ul style="list-style-type: none"> ● We will give reasonable notice to any organisation if we decide to exercise our power to enter premises which are under its control
<p><u>Requirement to prepare an action plan for the purpose of preventing the continuation or repetition of the failure</u></p> <p>7.10 When the Commissioner decides to require the relevant person to prepare an action plan for the purpose of preventing the continuation or repetition of the failure, the decision notice will set out what the relevant person is required to do. The decision notice will also specify the timetable for submitting the first draft plan to the Commissioner, and the consequences if the relevant person does not comply with that requirement.</p> <p>7.11 If the first draft plan submitted to the Commissioner is not adequate for the purposes of preventing the continuation or repetition of the failure, the Commissioner will give the relevant person a notice to that effect and require that person to submit a revised draft to the Commissioner within a specified time. The Commissioner may also make recommendations in relation to the content of that revised draft.</p>	<p>Require an organisation to take steps or prepare an action plan</p> <p>4.22 Where an organisation fails to address the non-compliance voluntarily, we will ensure that this happens by requiring the organisation to take specific steps or prepare an action plan.</p> <p>4.23 When we require the organisation to take specific steps, or prepare an action plan, we will set out what it is required to do in our decision notice.</p>

7.12 In considering whether a draft action plan is adequate the Commissioner may issue an evidence notice to any person and/or enter into the premises of the relevant person as she may do in relation to a statutory investigation as noted in clauses 6.6 – 6.17 of this policy.

7.13 The Commissioner may also apply to a county court for an order requiring the relevant person to submit a first draft plan or revised draft plan to the Commissioner by a time specified in the order. In respect of a revised draft plan, the order may also specify any directions about the plan's content.

7.14 An action plan comes into force either:
at the end of a period of six weeks beginning on the date on which a first draft or revised draft is submitted to the Commissioner, if that period expires without the Commissioner giving a notice to the relevant person as noted in clause 7.11 above or without the Commissioner applying to the county court as noted in clause 7.13 above or
upon a county court declining to make an order noted in clause 7.13 above in respect of a revised draft of the plan.

Requirement to take steps for the purpose of preventing the continuation or repetition of the failure

7.15 When the Commissioner decides to require the relevant person to take steps for the purpose of preventing the continuation or repetition of the failure, the decision notice will set out what the relevant person is required to do and the consequences if that person does not comply with that requirement. The specific action takes effect at the end of the 28 day period for submitting an appeal.

Added

If the complainant is not happy with the organisation's response:

3.6 Our main focus will be seeking the best possible solution for the complainant and Welsh language users, whether by bringing the matter – and the need to comply with the requirements of the standards – to the attention of the organisation or, where appropriate, carrying out an investigation.

There is no equivalent step in dealing with direct complaints under the existing policy.

3.14 We will not investigate unless we consider that doing so is in the public interest and represents the best use of our resources.

Removed

4.9 The Commissioner will acknowledge receipt of all written complaints received relating to the conduct of a relevant person within 5 working days. The acknowledgement will inform the complainant whether or not the complaint is valid under section 93 as soon as possible thereafter.

4.10 If it is concluded that the complaint is not a valid one, because it does not comply with the requirements noted in clauses 4.4 and 4.7 of this policy, the Commissioner will explain how the complainant may submit a valid complaint, if appropriate.

4.15 In the majority of cases the Commissioner will contact the relevant person, giving that person the opportunity to provide information to the Commissioner in connection with the complainant's allegations. This is done for practical reasons and to obtain enough information for the Commissioner to decide whether or not to undertake an investigation in connection with the alleged behaviour. The request for information will be clear and will relate to verifying the factual validity of the complaint. The Commissioner will expect a response within 10 working days. However the Commissioner will be open to receiving a request for a reasonable extension (of no more than 10 further working days) by a relevant person, if there are valid reasons for that. The information received (or any lack of information provided) will contribute to the factors that will assist the Commissioner to come to a decision as to whether an investigation should be conducted under section 71.

Section 5:

- Other evidence of a suspected failure of a relevant person to comply with a standard

Section 6:

- Giving the relevant person and the complainant an opportunity to make representations in the course of a statutory investigation
- Giving a relevant person or any other person an evidence notice
- Relevant person able to apply for compensation

7.3 Where it is determined that the relevant person has not failed to comply with a standard, the Commissioner may do the following:

- (i) take no further action or
- (ii) give the relevant person or any other person recommendations and/or advice.

Overall impact of the changes

Although it is for the Commissioner to explain the reasons for the changes she is proposing and justify them, and to consider their overall impact, we believe that the changes seen above are likely to:

- Make the Commissioner less accountable to members of the public (by rescinding the commitments contained in the existing policy about acknowledging complaints within specific timeframes)
- Make it more difficult for a complainant to complain (e.g. by waiving the commitment to provide them with support on how to make a valid complaint)
- Make the Commissioner's arrangements less transparent
- Restrict the Commissioner's ability in a way that erodes the power of Welsh language users (e.g. by presenting the list of factors in 3.16 bodies could argue how the factors for an investigation have not been met)