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

May 2014

Background

The principal aim of the Welsh Language Commissioner, an independent organisation established under the Welsh Language Measure (Wales) 2011, is to promote and facilitate the use of Welsh. This entails raising awareness of the official status of the Welsh language in Wales, imposing standards on organisations, and by 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”).'*

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

Investigation into an alleged interference are 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.'*

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 discontinue the investigation at any time 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 determination, the Commissioner must inform D of the proposed determination and give D a reasonable opportunity to respond to that proposed determination.

The Commissioner must inform P and D of the determination and, if it is determined that interference has taken place, inform them of the Commissioner’s views.

The Commissioner may give P, D or any other person advice about the alleged interference or any other matter which 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 –*

1. *the application, and*
2. *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 relating to the subject of that report, with P and D's agreement. The Commissioner may also publish a public document without consent if the Commissioner considers that this would be in the public interest.

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

If the Commissioner determines that D has not interfered with P's freedom to undertake a Welsh communication, the public document must not identify D.

1. **Application to the Commissioner**
   1. On 13 May, 2013 the Commissioner received a valid application under section 111 of the Measure from an individual (P). In his application P alleges that his employer at the time, Swinton Group Limited (D), had interfered with his freedom to undertake a Welsh communication with other individuals, namely Welsh speaking Swinton customers in Wales (R). The application alleges that senior members of D's staff had prohibited him and his colleagues, without any warning, from 'speaking Welsh to customers at all'.[[1]](#footnote-1)
   2. In addition to the original application, further information was provided by P in relation to that application during a meeting on 30 September, 2013. At that time P confirmed that he had left his post with D.
   3. The application was made in writing, and provides a contact address that the Commissioner may use to contact P.
   4. The application identifies D and describes the alleged interference. Although the alleged interference became apparent in 2010, as can be seen from the evidence gathered during the investigation, the instruction not to use the Welsh language was valid after 1 April 2012; the date on which the relevant sections of the Measure came into force.
   5. The Welsh communication was undertaken by individuals in Wales who wished to use the Welsh language with each other when undertaking that communication.
2. **Deciding whether to investigate**
   1. In accordance with section 114 of the Measure, the Commissioner asked P and D 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 P and D with the procedure for conducting an investigation under Part 6 of the Measure, and outlined the Commissioner's powers in relation to such investigations, in accordance with section 114(3)(c).
   2. Based on P's application and the further information received from P and D, and after taking into account the specific matters under section 114 of the Measure, the Commissioner decided to initiate an investigation under Part 6 of the Measure during a meeting of the Complaints and Statutory Investigations Panel on 8 January 2014[[2]](#footnote-2).
   3. As part of this process, the Financial Conduct Authority (FCA) was identified as an ‘other person’ relevant to this investigation.
3. **The investigation**
   1. This document serves as the Commissioner's determination in relation to the investigation conducted in response to P's application under sections 115-117 of the Measure and the Commissioner's report under section 118 of the Measure. The aim of the investigation was to enable the Commissioner to determine whether or not D had interfered with P's freedom to undertake a Welsh communication.
   2. Section 115 of the Measure gives the Commissioner discretion to determine the procedure for conducting an investigation. The procedure was outlined to P, D and the FCA in a letter, dated 30 January, 2014. The parties were asked to respond to specific questions relating to the alleged interference and were invited to provide any additional information or views which were, in their opinion, relevant to the investigation.
   3. P, D and the FCA responded as follows:

* No response was received from P.
* An initial response was received from D on 13 February, 2014. Following an extension to the time in which to respond, a full response was received on 26 February, 2014.
* The FCA's response was received on 12 February, 2014.

1. **Investigation findings**

**P's allegation**

* 1. P began working for D in 2009 at a branch of the company in north west Wales. P alleges that he was prohibited by D from using the Welsh language with Welsh-speaking customers (R) from the end of 2010 onwards.
  2. After receiving this instruction, P raised the matter with D. P explained that not using the Welsh language with customers - whom P knew that they were able to and wished to use the language - suddenly and without any reason, could lead to difficulties. P decided to ignore the instruction and continued to use the Welsh language with customers.
  3. An audit was of the office was undertaken; the non Welsh-speaking auditors could not understand P's conversations with customers.
  4. From the information provided, the Commissioner's understanding is that P alleges that he was prohibited by D from using the Welsh language when communicating with D's customers in Wales. The Commissioner has also been given to understand that the instruction not to use the Welsh language was valid after 2 April 2011; the date on which part 6 of the Measure came into force.

**D's response**

* 1. In its response, D notes that it supports the principles that underpin the Commissioner's work:

*‘[D] fully supports the principles that the Welsh language should be treated no less favourably than the English language and that persons in Wales should be able to live their life through the medium of Welsh if they choose to do so.’[[3]](#footnote-3)*

* 1. However, the letter explains that English is the language of all D's business. This is noted in the terms and conditions published on D's website and in D's business terms with its customers in general.
  2. D asserts that the alleged interference results from inconsistencies between the requirements of the FCA’s guidelines and the requirements of the Measure:

*‘In implementing [the requirements of section 3.2.20 of the FCA Handbook] it is necessary to monitor and record all telephone discussions with customers and to be able to transcribe the substance of all conversations with customers where financial products are discussed into English. [D’s] call monitoring resources are based in England and are therefore not able to monitor calls where a language other than English is used. For that reason guidance has been given to branch staff in Wales not to discuss financial products in the Welsh language and for telephone conversations with customers to be conducted in English. This is to ensure compliance with FCA requirements, and, more importantly, to protect the legal position of customers and staff by ensuring accurate, consistent and compliant records are kept.’*

* 1. When referring specifically to the situation in Wales, the letter notes:

*‘[D] has informed branch staff in Wales that it is happy for staff and customers to use the Welsh language provided that when financial products are discussed this is done in English purely for record keeping and compliance purposes.’*

As noted in point 4.10 above:

*‘[...] guidance has been given to branch staff in Wales not to discuss financial products in the Welsh language and for telephone conversations with customers to be conducted in English.’*

* 1. The letter confirms that D had informed members of its staff in Wales to follow the above guidance by e-mail and oral instruction.
  2. According to D, one of the reasons for using English only to discuss financial products with customers is the need to protect the legal position of customers and staff.
  3. As well as referring to the requirements of the FCA Handbook, the letter refers to the potential financial obligations to D of translating conversations from Welsh into English:

*‘[D] accepts that the FCA Handbook does not explicitly state that staff should not speak any other language besides English when discussing products, quotations or sales. However the requirement to record all such discussions in English indirectly results in that outcome. Given [D’s] small presence in Wales, it simply does not have the available resources in Wales for all telephone calls to be monitored by Welsh speakers and for all conversations to be translated from Welsh prior to being recorded in English.’*

* 1. Despite this, D confirms that it is in the process of conducting a further review into the steps which could be taken to assist Welsh customers and staff in the future.
  2. From the information provided, the Commissioner's understanding is that D prohibits its staff from using the Welsh language to discuss financial products with its customers, for the following reasons:
* to ensure compliance with the requirements of the FCA Handbook;
* to protect the legal position of staff and customers; and
* due to a lack of resources to monitor Welsh medium telephone calls and translate records of such conversations into English as required.

**Other relevant person’s response**

* 1. In its response the FCA confirms that it is the organisation responsible for regulating D. The FCA explains that it has been authorised under the Financial Services and Markets Act 2000 to impose rules and guidelines on the organisations for which it is responsible. The FCA Handbook is the name of the document which contains these rules and guidelines. The response notes:

*‘In principle, regulated firms have to comply with our rules, as we have the power under [the Financial Services and Markets Act 2000] to impose sanctions if they do not [...]. Not all firms, however, are subject to all the rules in the Handbook. So it is necessary to consider the “rules of application” to determine whether a particular rule applies to a particular type of firm.’[[4]](#footnote-4)*

* 1. The FCA explains that part 3 of the Handbook is not relevant to insurance brokers, but rather part SYSC 9.1:

*‘[...] SYSC 3 does not apply to insurance brokers such as [D]. Insurance intermediaries are, however, given a high-level rule and accompanying guidance on record-keeping in a different part of SYSC – SYSC 9.1.’*

* 1. Although part SYSC 9.1 requires that organisations are able to reproduce records in English, the organisations may keep records of communications that were not made in that language. The FCA explains:

*The effect of the rule [SYSC 9.1] and guidance is that a firm will comply with the rule if it can reproduce records in English, but it may also “retain a record of a communication that was not made in the English language”.’*

* 1. From the information provided, the Commissioner's understanding is that what is required from an organisation regulated by the FCA is the ability to reproduce records in English, if required. An organisation may keep a record of a communication that was not made through the medium of English.

1. **Concluding the investigation**
   1. Having considered all the information referred to above, the Commissioner has concluded:
      1. D acknowledges that it prohibits its staff in Wales from using the Welsh language to discuss the details of financial products with Welsh speaking customers (R) in Wales. Based on this information, the Commissioner determines that D has interfered with P's freedom to undertake a Welsh communication.
   2. Therefore, the Commissioner provides the following views on the interference (including, but not limited to, the Commissioner’s views on whether the interference may be justified):
      1. The Commissioner acknowledges that regulatory requirements are imposed on D which require D to keep records of telephone conversations with customers. However, the Commissioner is not of the opinion that these requirements means thatD may only use theEnglish to discuss the details of financial products with customers. The evidence provided by the FCA confirms that what is required of D, is the ability to reproduce these records in English.
      2. As a matter of policy, D chooses to instruct its staff to use the English language alone to discuss financial products.
      3. D has also suggested that its small presence in Wales means that there is a lack of resources for monitoring calls in Welsh and translating them into English. As the FCA has explained that it is acceptable to keep records in another language, and only to reproduce or translate them into English when required (for example, following a request by the FCA), the Commissioner is not of the opinion that the argument about lack of resources justifies the interference.
      4. Similarly, the Commissioner is not of the opinion that the need to protect the legal position of D's customers and staff justifies the interference.
      5. D has noted that it is conducting a further review into the steps which could be taken to assist Welsh customers and staff in the future. Despite this, as the Measure has been in force since February 2011 and the duty not to interfere under section 111 has been in force since 1 April 2012, there is no evidence to suggest that D has taken reasonable action within the past two years to refer to or prevent this interference. Therefore, in the Commissioner's opinion, this review does not justify the interference.
      6. The Commissioner is of the opinion that D has interfered with P's freedom to undertake a Welsh communication, and that this interference is not justified. The consequence of the interference in this instance is that an artificial situation has been created where members of D's staff are required to speak English with individuals, whom they know to speak Welsh and wish to do so.
2. **Advice**
   1. In accordance with section 117(7) of the Measure, the Commissioner provides D with the following advice regarding the interference:
      1. Part 1 of the Measure gives the Welsh language official status in Wales. As an organisation conducting its business in Wales, D should fully recognise this official status by changing its policy of using the English language alone when discussing financial products with its customers in Wales.
3. **Enquiries**
   1. The Commissioner wishes to thank the relevant parties for their co-operation in conducting this investigation.
   2. Any enquiries regarding the investigation's report should be addressed to:

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1. P, correspondence dated 9 May 2013. [↑](#footnote-ref-1)
2. Minutes of the Welsh Language Commissioner's Complaints and Statutory Investigations Panel, dated 8 January 2014. [↑](#footnote-ref-2)
3. D, letter dated 26 February 2014 [↑](#footnote-ref-3)
4. Stranack, Emma, letter dated 12 February 2014. [↑](#footnote-ref-4)