

Explanatory Memorandum to the Welsh Language Tribunal Rules 2015.

This Explanatory Memorandum has been prepared by the Department of Education and Skills and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Welsh Language Tribunal Rules 2015.

The Right Honourable Carwyn Jones AM

First Minister

02 April 2015

1. Description

The Welsh Language Tribunal Rules 2015 set out required operational framework for cases which appear before the Welsh Language Tribunal (“the Tribunal”).

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

This instrument contains rules (“the Tribunal Rules”) made by the President of the Tribunal, and allowed by the First Minister, in accordance with section 123 of the Welsh Language (Wales) Measure 2011 (“the Measure”). In accordance with section 123(8) and (9) they must be contained in a statutory instrument and laid before the Assembly in accordance with the annulment procedure.

3. Legislative background

The Tribunal is established by Part 7 of the Measure. The relevant provisions, enabling the President and other members of the Tribunal to be appointed, came into force on 7 January 2014 under the Welsh Language (Wales) Measure (Commencement No. 7) Order 2013.

The appointment of Keith Bush QC as the President of the Tribunal (“The President”) took effect on 1 August 2014.

The function of the Tribunal is to determine appeals from, and challenges to, decisions of the Welsh Language Commissioner (“the Commissioner”) in relation to the imposition and enforcement of duties under the Welsh Language Standards made by the Welsh Ministers under Part 4 of the Measure.

According to s.123 of the Measure, there is a duty on the President to make Tribunal Rules governing the practice and procedure to be followed in the Tribunal. The President must submit the Tribunal Rules to the Welsh Ministers to be allowed or disallowed. If the Welsh Ministers allow the Tribunal Rules, they must be contained in a statutory instrument subject to annulment in pursuance of a resolution of the National Assembly.

The President formally submitted the Rules to the First Minister on 25 February 2015 for his consideration. The First Minister allowed the rules on 02 April 2015.

4. Purpose and intended effect of the legislation

The purpose of establishing these operational rules is to ensure that every case which appears before the Tribunal is treated fairly and consistently. Everybody who appears before the Tribunal must understand exactly which

actions they need to take in order to present the facts of the dispute and their arguments effectively to the Tribunal. They and any other party involved with the case must also be aware which other arguments will be considered by the Tribunal.

The Tribunal Rules set out the following:

- Common rules – which deal with some basic common principles and define the specialist terms used in the Rules;
- Provisions regarding choosing the Tribunal members who will hear individual cases;
- How to commence an application to the Tribunal;
- The practical actions which must be taken to prepare a case to be heard;
- The powers which the Tribunal will have to manage cases, including the directions the Tribunal may give to parties on the actions which they must take before a hearing;
- The process followed for hearings and formal decisions made by the Tribunal;
- What happens after a decision has been reached, including arrangements for reviewing the Tribunal's decisions or appealing to the High Court;
- Various other provisions, including: administrative rules regarding the recording of decisions, submission of documents and measuring deadlines.

These Rules set the required operational framework for cases which appear before the Tribunal. It is proposed that this be done in line with Practice Guidance which shall be issued by the Tribunal President under section 124 of the Measure (and in accordance with Rule 26 of the Rules).

The Practice Guidance will include practical advice on interpreting and enforcing the Rules. There will be further consultation on the draft Practice Guidance which will be produced by the President after the Rules come into force.

5. Consultation

Details of consultation undertaken are included in the RIA below.

PART 2: REGULATORY IMPACT ASSESSMENT

1. This Regulatory Impact Assessment has been prepared in accordance with Standing Order 27.1.

Background

2. The Welsh Language Tribunal (“the Tribunal”) is established by Part 7 of the Welsh Language (Wales) Measure 2011 (“the Measure”). The relevant provisions, enabling the President and other members of the Tribunal to be appointed, came into force on 7 January 2014 under the Welsh Language (Wales) Measure (Commencement No. 7) Order 2013.
3. The function of the Tribunal is to determine appeals from, and challenges to, decisions of the Welsh Language Commissioner (“the Commissioner”) in relation to the imposition and enforcement of duties under Welsh Language Standards made by Welsh Ministers under Part 4 of the Measure.
4. According to s.123 of the Measure, there is a duty on the President to make rules governing the practice and procedure to be followed in the Tribunal. The President must submit the Tribunal Rules to the Welsh Ministers to be allowed or disallowed. If the Welsh Ministers allow the Rules, the Rules will be contained in a statutory instrument subject to annulment in pursuance of a resolution of the National Assembly.
5. Keith Bush QC began his role as President of the Tribunal on 1 August 2014. The President undertook the process of drafting the Tribunal Rules immediately.
6. The process of drafting the Rules for the Tribunal is unique. Unlike any other tribunal operating in Wales, the Tribunal has no corresponding body in any jurisdiction in the United Kingdom. The Tribunal’s area of work, that is the Standards imposed under the Measure, is unique to Wales.
7. However, the common aim of tribunals is to decide cases fairly and justly and the primary elements of their procedures are very similar. The draft Rules, therefore, are based on the key features of the latest tribunal rules to be adopted by a Welsh tribunal, which are included in the Special Educational Needs Tribunal for Wales Regulations 2012 (SI 2012 No. 322 W.53)¹. These Rules have been amended significantly to meet the requirements of the Welsh Language Tribunal.
8. On 24 November 2014 the Tribunal and the Welsh Government jointly undertook an 8 week formal consultation on the draft Tribunal Rules.
9. As part of the consultation a series of seminars were held throughout Wales to inform the public of the Tribunal’s purpose and functions, and to

¹ <http://www.legislation.gov.uk/wsi/2012/322/made>

raise awareness of the consultation on the Tribunal Rules. A wide range of stakeholders attended these seminars.

10. A total of 6 responses were received. In general, the responses received were positive. The majority of the responses concerned the scope or effect of the provisions.
11. The President considered the responses and made necessary amendments accordingly. After making the amendments, the President provided the respondents with a further opportunity to comment on the revised Rules from 3 February to 10 February.
12. The President formally submitted the rules to the First Minister on 25 February 2015.

Options

13. This Regulatory Impact Assessment considers two options:

- **Option 1:** Do Nothing
- **Option 2:** Allow the Welsh Language Tribunal Rules.

14. The following analysis considers the costs and benefits associated with each of these options in turn.

Costs

Option 1: Do Nothing

15. There are no additional costs associated with this option.

Option 2: Allow the Welsh Language Tribunal Rules

Costs of establishing the Tribunal

16. The costs incurred by Welsh Government in 2014-15 of establishing the Tribunal is £40,000². These costs include:

- The recruitment process for the President, legally-qualified members and lay members including advertisement of posts; fees of the Appointment Panel; travel & subsistence costs. Total costs £18,000.
- The President's fees - £561 per day, estimated to be £21,000. This includes his time spent on developing the Tribunal rules; recruitment process of the other members of the Tribunal; and general running of the Tribunal i.e. meetings and responding to correspondence.

² To the nearest £1,000

- Other costs include: the costs of holding 4 seminars throughout Wales as part of the consultation process on the Tribunal Rules and purchasing domain names for the Tribunal's website. Total costs £1,000.

Estimated operational running costs of the Tribunal

17. The graduated enforcement system to be introduced by the Measure is intended to ensure that the vast majority of challenges will be dealt with by the Commissioner. At this point in time, as there is no precedent that can be drawn upon, it is not possible to predict with any accuracy how many of the Commissioner's decisions will be appealed to the Tribunal. The estimated costs in this RIA are informed by the experience of the Adjudication Panel for Wales and the Residential Property Tribunal for Wales.
18. Therefore, the budget for the Tribunal, and its forecasts, will be reviewed on a regular basis to take into account its caseload and the impact of the phased roll out of the standards.
19. Programme costs have been estimated at £50,000 for 2015-16; £62,000 for 2016-17; and £62,000 for 2017-18. Most of the estimated budget is based on the Tribunal's case load; the estimated cost of a one-day hearing is outlined in Table 1:

Table 1: Costs of a 1-day Tribunal hearing	
President fee (1 day hearing includes prep)	£561.00
Legal member fee (1 day hearing includes prep)	£478.00
Lay member fees (1 day hearing includes prep)	£202.00
T&S (President)	£80.00
T&S (Legal member)	£80.00
T&S (Lay Members)	£80.00
T&S (appellant/witnesses etc) ³	£50.00
T&S (Secretariat) ⁴	£80.00
Accommodation / Venue hire	£500.00
Simultaneous Translation	£600.00

³ Based on claims by 2 individuals

⁴ Based on 1 member of WG staff

Total	£2711.00 per day
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20. If the Standards come into force by the end of March 2015, the earliest the Commissioner can issue the compliance notice on the set of 26 organisations is April 2015. Therefore, the standards will not be effective until October 2015 at the earliest. Taking into consideration that the Commissioner will have to investigate each complaint, and that organisations will have to appeal to the Commissioner in the first instance, the maximum amount of hearings estimated to appear in front of the Tribunal in 2015-16 is 5. 5 hearings, based on the cost of a hearing at Table 1 would amount to £13,555. It is possible that there will be no hearings at all in 2015-16 and, as mentioned in paragraph 17, it is not possible to predict with any accuracy how many of the Commissioner's decisions will be appealed to the Tribunal.

21. The amount of hearings estimated to appear in front of the Tribunal in 2016-17 and 2017-18 is 10 per year. The estimated caseload has increased for these years as the standards will be effective throughout the period and the number of organisations subject to standards will also have increased significantly. Based on the Welsh Language Commissioner's programme for implementing standards on over 200 organisations that are included in the first 3 tranches. However, our ability to predict with any accuracy how many of the Commissioner's decisions will be appealed to the Tribunal remains limited by the lack of precedent.

22. The caseload of established tribunals can often differ from year to year. The Adjudication Panel for Wales is an independent tribunal that determines alleged breaches by elected and co-opted members of Welsh county, county borough and community councils, fire and national park authorities, against their authority's statutory code of conduct. The Adjudication Panel has received 28 cases over the past 5 years. Here are its figures from the past 3 years⁵:

- During 2013-2014 one case was referred to the Adjudication Panel by the Public Services Ombudsman for Wales. It also dealt with a further two references, one carried over from the 2012-2013 reporting year and one from the 2010-2011 reporting year and three appeals carried over from 2011-2012 reporting year.
- During 2012-13, the Panel received 2 referrals from the Public Services Ombudsman for Wales and 4 appeals against the decisions of local

⁵ Figures obtained from the Adjudication Panel Wales' Annual Reports:
<http://apw.wales.gov.uk/about/annual-reports/?lang=en>

authority standards committees. A further 3 referrals were carried over from 2011-12 reporting year and one from 2010-11 reporting year.

- During 2011-12, the Panel received 3 referrals from the Public Services Ombudsman for Wales and carried over 5 referrals from 2010-11 reporting year. Two appeals were carried over from the 2010-11 reporting year.

23. The change in case load will have a direct effect on the programme costs of a Tribunal. For example, the Adjudication Panel Wales programme allocation decreased from £93,000 in 2013-14 to £53,000 in 2014-15.

24. According to the Commissioner's Annual Report 2013-14⁶ they received 375 complaints in that year from individuals and organisations who felt that they had reason to complain to the Commissioner about difficulties or problems arising from trying to access Welsh medium services. The majority of the complaints received involved potential failures of public organisations in implementing their statutory Welsh language schemes. A significant number of the complaints were resolved informally, by discussing and agreeing on actions with the organisation in question or by advising the complainants to report their concerns directly to the organisation in order to give them reasonable opportunity to respond to their complaint.

25. Other running costs for the Tribunal will include:

- Training for members
- Stationery
- User Group Meetings
- Postage
- Translation of documents
- Subscriptions / Accreditation
- Legal Fees

26. The secretariat function of the Tribunal is to be provided by the Welsh Government. The annual cost is estimated at £71,328, which consists of 1 x Business Manager and 1 x Case Manager, and this will be covered from existing staffing costs. This is in line with the staffing arrangements for the Residential Property Tribunal for Wales.

Estimated costs to the Welsh Language Commissioner for being party to a case in front of the Tribunal

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<http://www.comisiynyddygymraeg.org/english/publications/pages/publicationdetails.aspx?publicationid=6caa3c75-1a0d-425b-871e-3f42f20e4844>

27. As the Commissioner will be party to every case that appears in front of the Tribunal, she was asked to provide information for this RIA.
28. According to the Commissioner the 375 complaints received in 2013-14, which included 104 complaints involving private companies and 72 involving Crown Bodies, must be kept in context of the 405 Welsh Language Schemes in the public sector and 41 Welsh Language Schemes adopted by Crown bodies. Under the new process only 26 organisations will be subject to the Standards in the first instance. There are a further 119 organisations that are subject to a Standards Investigation at the moment and there's a reasonable expectation that they will be subject to the Standards at some point
29. According to the Commissioner there is no way of determining an exact figure of the current costs of dealing with complaints. However, since restructuring in September 2014, there are equivalent to two full time members in the Investigation & Enforcement team and dealing with complaints takes up to 70% of their time.
30. Regarding the current legal costs of dealing with complaints, in the majority of cases it was a matter of investigating administrative issues not legal issues. No legal advice was taken on the following issues: correspondence (88 complaints), publications (53), websites (49), signage (44), phone service (35), and forms (22). Other costs include the costs of translating the investigation reports for publication.
31. The additional/new costs of preparing for a Tribunal hearing the Commissioner can anticipate are preparing statements for the hearings. These new costs will include staffing costs (time) and the costs associated with legal advice.
32. The Commissioner anticipates that there will be more statutory investigations under the new process which will incur more costs, these costs will increase over time as more persons become subject to the standards.
33. Under the Part 5 of Schedule 1 to the Measure the Commissioner is required to submit an estimate of income and expenses to the Welsh Ministers at least five months before the beginning of the financial year. The Welsh Ministers must examine the estimate submitted to them and must then lay the estimate before the National Assembly for Wales with the modifications (if any) they think appropriate.
34. This process will allow the Commissioner to consider the financial impact of the Tribunal on her work and incorporate any costs into her estimate of income and expenses on an annual basis.

Estimated costs to organisations and individuals of making an appeal to the Tribunal

35. It should be remembered that each case heard by the Tribunal will be an appeal. The parties involved will not be asked to produce any new material for the hearing, only to provide what is already in existence. Therefore it is not anticipated that the parties to a hearing will incur excessive costs, it will be for them to decide if they require legal advice prior to the hearing and representation at the hearing, there will be no requirement for this by the Tribunal.
36. As with challenging the imposition of standards, the graduated enforcement process established by the Measure means that the process of dealing with these cases might vary from a simple exchange of letters between the organisation and the Commissioner to an appeal to the Tribunal. The costs involved for the organisation may range from the costs associated with preparing a letter to the cost of legal representation at the Tribunal (at a day rate of around £2k).
37. It is not possible to predict the average cost of such an investigation since the nature of each case will vary. We have given at paragraph 36, however, some indication of the range of costs that could be involved.

Onward appeals to the High Court

38. With regard to onward appeals to the High Court on a point of law, the existence of the Commissioner's proposed enforcement policy, and the Tribunal Rules and Practice Directions, should minimise the number of cases that are referred to the courts. As an illustration, if 10% of the cases considered by the Tribunal led to an appeal to the courts, based on the estimate at paragraph 21 that the Tribunal could hear between 0 to 10 cases a year. Based on each case lasting a day at a rate for legal representation of £2k, this would give rise to costs of £2k for persons appealing. For the Commissioner, the costs would be similar and would need to be absorbed by the Commissioner's running costs.

Benefits

Option 1: Do Nothing

39. This is the baseline option and as such there are no additional benefits associated with this option.
40. Doing nothing would not allow the implementation of the Welsh Language Standards; as the Commissioner cannot issue the compliance notices on organisations to comply with the standards without a functioning Tribunal.
41. This would leave untouched the current Welsh Language Schemes which have been in place since 1993. The regulatory role of the Commissioner would continue along similar lines to that of the Welsh Language Board, while the resource-intensive procedures involved in agreeing and

amending schemes would also continue, as would the current, limited, enforcement regime.

42. In many areas, arrangements for delivering services to the public in Wales have changed since the Welsh Language Act 1993 ('the 1993 Act'), under which the Welsh Language Schemes operated. However, the framework set out by the 1993 Act does not enable these changes to be taken into account in a consistent way. For example, changes to the structure of certain, key public services and new ways of delivering services mean that the public face of some key services fall outside the scope of Welsh Language Schemes. This creates the potential for uncertainty about the services that Welsh speaking customers can expect to receive.
43. In terms of enforcement, the 1993 Act only provided for a single formal mechanism for investigating alleged breaches of schemes and did not provide for any graduated alternatives. A single mechanism may not be appropriate in all cases, and may not achieve the right results for all in each case. In addition, the Commissioner at present lacks the power to require persons to provide it with evidence and information that will assist it with its investigations.
44. The National Survey for Wales, 2013-14: Welsh language use survey⁷, published on 29 January 2015, contains some useful indicators as to the present use of Welsh by the public and employees, especially in relation to fields covered by the service-delivery and operational standards.
45. In the context of receiving services, when dealing with public organisations in Wales the survey showed that 51 per cent of Welsh speakers tried (at least sometimes) to use the Welsh language when dealing with public organisations, and 37 per cent tried to use Welsh to complete official forms.
46. Of those who had a job description at work, 15 per cent had Welsh language skills specified as essential and 27 per cent specified as desirable. For 57 per cent of those with job descriptions, Welsh language skills were not noted.
47. Of those who worked in the public sector, 60 per cent who had a job description had one that specified Welsh language skills as either essential or desirable (compared with 18 per cent in the private sector).
48. We are of the view that the situation, as detailed by the National Survey, is unlikely to improve if Option 1 were adopted

Option 2: Allow the Welsh Language Tribunal Rules

⁷ <http://wales.gov.uk/docs/statistics/2015/150129-welsh-language-use-survey-en.pdf>

49. Allowing the Tribunal Rules is essential to establish the Tribunal. This will ensure that there is a means of challenge, independent of the Commissioner, with regard to the imposition and enforcement of duties.
50. The purpose of these operational rules is to ensure that every case which appears before the Tribunal is treated fairly and consistently. Everybody who appears before the Tribunal must understand exactly which actions they need to take in order to present the facts of the dispute and their arguments effectively to the Tribunal. They and any other party involved with the case must also be aware which other arguments will be considered by the Tribunal.
51. It should be remembered that each case heard by the Tribunal will be an appeal. The parties involved will not be asked to produce any new material for the hearing, only to provide what is already in existence. Therefore it is not anticipated that the parties to a hearing will incur excessive costs, it will be for them to decide if they require legal advice prior to the hearing. Representation at the hearing, there will be no requirement for this by the Tribunal.
52. As with challenging the imposition of standards, the graduated enforcement process established by the Measure means that the process of dealing with these cases might vary from a simple exchange of letters between the organisation and the Commissioner to an appeal to the Tribunal. The costs involved for the organisation may range from the costs associated with preparing a letter to the cost of legal representation at the Tribunal.
53. By allowing these Tribunal Rules and establishing the Tribunal it will allow the implementation of the Welsh language standards. The standards' purpose is to improve the level of service which members of the public can expect to receive. This will establish enforceable rights for Welsh speakers. The standards will make it clear what organisations need to do in terms of the Welsh language, so that people can also be clear about what to expect with regard to Welsh language services. This clarity, for public and organisations alike, will help ensure the standards can be effectively enforced and lead to an increase in the use people make of Welsh language services.
54. The standards build on the Welsh Language Schemes and place more rigorous requirements on organisations. Nevertheless it will be a requirement that the standards imposed on organisations will be reasonable and proportionate, so that no one can be asked to do something that is unreasonable or disproportionate to their circumstances.
55. On a practical level, the standards will simplify the resource-intensive procedures involved in agreeing and amending Welsh language schemes. Commitments outlined in Welsh Language Schemes are at times unspecific and can be open to interpretation both by the organisations

themselves and by members of the public. Where organisations saw commitments as being unspecific, the level of implementation varied from organisation to organisation. Duties imposed by standards will be specific and enforceable.

56. Organisations that will have to comply with standards will now be required to take a more proactive, strategic approach to mainstreaming the Welsh language. Key to this will be the “proactive offer”, which places the onus on the organisation to offer services in Welsh, rather than expect people to have to request them. This will provide a solid foundation to improve services for Welsh speakers.
57. We are of the view that if the Tribunal Rules are made, it will allow the Tribunal to be established which in turn will allow the implementation of the Welsh language standard. By implementing the Welsh language standards we are of the view that the situation described by the National Survey in paragraphs 38 to 42 may improve. Users should be clearer about their rights to access services and the strengthening of the monitoring should encourage organisations to think holistically about the range of Welsh language services they offer, both internally and externally.

Summary of the preferred option

58. Based on the analysis undertaken on both options, it is considered that option 2 should be adopted, i.e. allow the Tribunal Rules.

Consultation

59. On 24 November 2014 the Tribunal and the Welsh Government jointly undertook an 8 week formal consultation on the Rules.
60. As part of the consultation a series of seminars were held throughout Wales to inform the public of the Tribunal’s purpose and functions, and to raise awareness of the consultation on the Tribunal Rules. A wide range of stakeholders attended these seminars.
61. A total of 6 responses were received. In general, the responses received were positive. The majority of the responses concerned the scope or effect of the provisions, especially Rule 6 which relates to the languages of the Tribunal.
62. The President of the Tribunal has considered the responses and made necessary amendments accordingly. After making the amendments, the President provided the respondents with a further opportunity to comment on the revised Rules.
63. A summary of consultation responses will be published shortly at:
<http://gov.wales/consultations/welshlanguage/the-welsh-language-tribunal/?status=open&lang=en>

Competition Assessment

64. Businesses, charities and /or the voluntary sector will not be required to comply with the Standards specified in the Regulations.

Post Implementation Review

65. When the Tribunal is established and hearing cases, parties will be able to feedback their experience of using the process as outlined in the Tribunal Rules. The Tribunal will also be holding usergroup meetings at least once a year, which will provide an opportunity for the Tribunal customers and stakeholders to meet with representatives of the Tribunal to discuss the Tribunal Rules.
66. The President may provide advice to Ministers recommending amendments to the Rules if he sees fit to do so.