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THE WELSH LANGUAGE TRIBUNAL

RESPONSE TO THE WELSH GOVERNMENT'S CONSULTATION DOCUMENT: "STRIKING THE RIGHT BALANCE: PROPOSALS FOR A WELSH LANGUAGE BILL"

Introduction

1. As a judicial body, it would not be appropriate for the Tribunal to express an opinion on any matter of policy discussed in the consultation paper to amend the provisions of the Welsh Language (Wales) Measure 2011 which do not relate to the functions of the Tribunal. The only purpose of this response, therefore, is to provide relevant information to the Welsh Government in relation to those proposals which touch on the functions of the Tribunal, based on the experience of the Tribunal in the exercise of those functions.

2. In doing so, it is relevant to note the limits of that experience. Although the Measure was passed in 2011, the key step of beginning to serve compliance notices on public bodies under the Measure was not reached until the end of September 2015 and, therefore, no Welsh language Standard came into operation until the end March 2016. That means that the processes that could lead to an appeal to the Tribunal against the inclusion of a particular Standard in a compliance notice did not begin until September 2015. And it did not become possible for a complaint to the Commissioner about the failure to comply with a Standard, a move that could ultimately lead to an appeal to the Tribunal, to be made until March 2016. Consequently, the Tribunal did not receive its first case until April 2016. Since then, another 10 cases have been received. But it is clear that the Tribunal's experience of dealing with cases under the Measure is still limited. Although that experience is enough to enable the Tribunal to come to some broad conclusions about the machinery of the Measure, and therefore about the proposals in the consultation paper, we cannot claim that we have again a very extensive experience of operating the Measure.

3. We base our comments on the principle that the Measure's machinery for imposing and enforcing standards (including procedures for appealing to the Tribunal) should be judged on the basis of the following criteria, namely:

    - Efficiency (in relation to the aim of promoting and facilitating the use of the Welsh language);
    - Clarity;

- Accessibility;
- Freedom from ambiguity.

4. Because these comments are limited to certain aspects of the consultation paper (see paragraph 1 above) they do not respond to every question asked in the paper and they do not necessarily correspond in detail even to those questions which are relevant to our comments. But we draw attention, in respect of each topic discussed below, to those questions which appear to us as being the most relevant to those subjects.

Transferring the function of imposing Standards on bodies from the Commissioner (or Commission) to the Welsh Government (questions 24 and 28)

5. We do not wish to make any comment on the principle of the proposed change, which is based on the Government's assessment that this change would help to simplify and speed up the process of imposing Standards (an aim which we naturally support). The change would not, in principle, affect the work of the Tribunal. There would still be an appeal to the Tribunal under section 58 of the Measure (by a body which argues that a requirement for it to comply with a Standard is unreasonable or disproportionate). But such an appeal would, of course, become an appeal against a decision of the Government rather than that of the Commissioner's decision (or Commission). It is the Welsh Government, of course, that provides the Tribunal's administrative infrastructure (under section 127 of the Measure) and it is the Welsh Ministers, under section 120, who formally appoint the members of the Tribunal, although there are procedures in place to ensure that appointments are made on the basis of independent authoritative advice.

6. The possibility of having to decide a case in which the Government is a party to that case already exists in relation to appeals arising out of investigations into complaints that the Government has failed to comply with a standard which applies to it. There have been no such cases so far. It is possible that the transfer to the Government of the function of imposing specific Standards on bodies would increase the number of cases where the Tribunal would have to decide a dispute to which the Government was a party. Although we do not foresee any pressure being placed on the Tribunal to side with the Government in such a case, public perception is of key importance in order to protect public confidence in the decisions of the Tribunal. We suggest, therefore, that consideration should be given to additional provisions in the Measure that would defend and strengthen the independence of the Tribunal.

7. One change that would, of course, have a significant impact on the work of the Tribunal is that set out in paragraphs 197 to 199, namely that the Welsh Government should be able to impose Standards on certain sectors through regulations alone, doing away with the need to give individual notices to every body or individual within that sector. An example given is that of community councils, a sector which includes over 700 individual bodies.

8. We can well understand the administrative complexity of giving over 700 compliance notices and how attractive it would be to be able to substitute one set of regulations that would define the linguistic duties of every council in one document. But our experience of considering appeals under section 58 of the measure has shown us the benefit of the current system, which makes it possible to tailor linguistic duties in order to respond effectively to the linguistic profile of an area. The consultation paper accepts that there is a strong case for retaining the ability to vary Standards within a sector, in order to respond to such differences, and therefore the need, if that ability is to continue, to protect the right of appeal to the Tribunal against the imposition of particular Standards on different bodies. But the paper does not explain how one could reconcile administrative convenience with the need for a system which reflects the needs of individual organisations. We must therefore warn against overlooking the importance of an element of diversity in Standards so as to be able to reflect the diversity of the linguistic profile of the relevant part of Wales.

Imposing conditions on the duty of the Commission to consider investigating a complaint (Questions 30 and 32).

9. The idea that an individual who has a complaint against the conduct of a body should have (usually) to exhaust any complaints machinery of the body itself before being able to seek the assistance of an officer such as an ombudsman or a commissioner is not a new one. That is the situation in the case of the Public Services Ombudsman for Wales, in accordance with section 6 of the Public Services Ombudsman (Wales) Act 2005.

10. There are arguments for and against such a procedure. If it works properly, it can result in faster and less costly solution to the complaint. On the other hand, if the body in question does not deal with the complaint fairly and effectively, requiring the complainant to go through that process, before proceeding with a complaint to the ombudsman or commissioner, can delay effective resolution. We also feel, based on the experience of

members of the Tribunal of complaints procedures in other areas, which some people find it more difficult to complain effectively to a body that has already let them down than to ask an independent officer to take up the matter with that body on their behalf part.

11. It is for the Welsh Government to evaluate these considerations and come to a conclusion about the advantages and disadvantages of the proposed rule. Such a rule would not affect the function of the Tribunal – once the complainant had exhausted a body's complaints procedure and chooses to take the matter to the Commission, the nature of the decisions which the Tribunal would have to make would not change.

12. The same is not true of the other proposal to place a filter on the ability of individuals to receive the assistance of the Commission, namely that the Commission should not intervene unless the matter is "serious".

13. Examples are given in paragraph 219 of the consultation paper of the kind of situations that may be counted as "serious". Some of them are easy to define and apply them to individual cases, for example a complaint about a particular failure of which the body had already been guilty of committing on several occasions or which it had, on a previous occasion, bound itself not to repeat. But there are other examples (denial to the complainant of the "substance" of a right or significant flaw in an internal investigation by a body) that would require the Commission to exercise a high degree of judgment based on the individual circumstances.

14. If the Commission refuses to investigate a matter on the basis that the matter was not "serious" enough (in accordance with whoever definition the Measure adopted) it is likely that the complainant would have the same right as at present under section 103 to request a review of the Commission's decision. The Tribunal's experience shows that the complainants, if they feel that their complaints have not received fair play from the Commissioner, are very willing to take the case to the Tribunal. Out of the 11 cases that have come to the Tribunal to date, 7 of them have been requests for a review under section 103. From the point of view of the Tribunal, any ambiguity in the Measure's definition of the concept of "seriousness" would create considerable difficulty as the Tribunal considered whether the Commission had applied that concept correctly.

15. In the opinion of the Tribunal, one should therefore be very careful before imposing the proposed filter. Rather than reducing the burden on the Commission, it could lead to an unnecessary increase in applications for review by the Tribunal of decisions by the

Commission to refuse to investigate a complaint, particularly as there would inevitably be an element of uncertainty about the extent of the "seriousness" test.

16. That does not mean that the seriousness of a complaint (however that concept is defined) should not be relevant when the Commission comes to decide whether to investigate the complaint or not. The Tribunal's ruling in the case of TyG/WLT/16/8 stressed that the Commissioner has a discretion in making such a decision, and that she has the right (indeed is under a duty) to consider a range of relevant factors before making a decision:

> "The Measure itself gives no guidance as to what factors the Commissioner would be expected to take into account when deciding whether or not to conduct an investigation. It would be wrong of the Tribunal purport to provide an exhaustive list. Circumstances vary from case to case. Generally, it would be for the Commissioner to decide what factors are relevant in particular cases (provided she does not ignore obviously relevant ones) and to decide how much weight to give to those factors. " (paragraph 27)
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> "Whilst it was a matter for the Commissioner to identify those factors (i.e. those relevant in the particular case), matters such as the relative seriousness of the alleged failure, the quality of the evidence of the failure and any previous history of non-compliance with standards seem almost certain to be relevant." (paragraph 34).

17. The Commissioner's current Enforcement Policy already includes the seriousness of the subject matter of the complaint as one of the factors that the Commissioner is to take into account when deciding whether or not she will conduct a statutory inquiry into a complaint:

> "4.16 The Commissioner's right to consider undertaking an immediate statutory investigation into the complaint is reserved if the individual circumstances of the complaint require. Such circumstances may include, but are not restricted to, circumstances such as:
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> - a complaint regarding a suspected serious failure to comply
> - a complaint requiring urgent action and
> - where indisputable evidence has already been provided by the complainant as part of the complaint."

18. It is not clear, therefore, how the imposition of a statutory "seriousness" filter on the right of the Commission to investigate complaints would add to the existing power of the Commissioner to refuse to investigate a complaint on the grounds of lack of seriousness. Indeed, it can be argued that to do so, and therefore to place particular emphasis on one relevant factor, would limit the ability of the Commission to take account of other relevant factors or to decide to investigate a case which did not, in itself, will reach the Measure's "seriousness" threshold but which, for some other reason, warranted conducting an investigation.

19. The Tribunal, by submitting these comments about the value and feasibility of imposing a "seriousness" filter on complaints, does not seek to raise doubts about the existence of an important question that needs to be considered. We have already received evidence from the Commissioner's staff about the burden of conducting statutory inquiries under section 71 of the Measure. That evidence was consistent with the point made in paragraph 211 of the consultation paper, namely that the process of carrying out a statutory inquiry (in accordance with the procedure prescribed in Schedule 10 to the Measure) can be slow and cumbersome.

20. Although the justification for such a strict procedure is probably to be found in the fact that an investigation may lead to serious enforcement action such as a civil penalty, it appears that no investigation by the Commissioner has, to date, led to any more serious step than a reminder to the body concerned of its duties. This suggests that complaints can be resolved effectively, in many cases, through more informal and flexible mechanisms than those which are prescribed by Schedule 10. The Tribunal feels that there should be a review, therefore, of the way in which formal investigations into complaints are governed by that Schedule, with a view to giving more discretion to the Commission to tailor its approach to investigating complaints to the requirements of particular cases, in order to reduce the resources currently demanded by even the most simple complaint. It must be remembered, of course, that any body which feels that the result of a statutory investigation has been unfair has a right of appeal to the Tribunal.

Requiring the permission of the Tribunal before being able to bring any application or appeal before the Tribunal (Questions 38 and 39)

21. To date, the burden of the Tribunal's caseload has not been sufficient to place unreasonable demands on the resources of the Tribunal. As explained above (paragraph

2) the first case was received by the Tribunal in April 2016. Only 11 cases have been received to date - an average of about one case every 7 weeks. But as the Standards regime, involving appeals to the Tribunal, is brand new, one can expect the number of cases to increase and that this could lead to a situation where the ability of the Tribunal to deal with cases came under pressure. It must also be remembered that cases – all of them involving some kind of challenge to a decision by the Commissioner – impose an administrative burden upon the Commissioner (or Commission). We accept, therefore, that the imposition of some sort of filter on the ability to bring a case before the Tribunal could be of practical value in the future.

22. The measure already imposes a filter on the right to bring one sort of case before the Tribunal. One cannot make an application to the Tribunal under section 103 of the Measure without the Tribunal's permission. The nature of an application under section 103 is that it is a request for a review of a decision of the Commissioner to refuse to hold a statutory investigation into a complaint that a body has failed to comply with a Standard. The Tribunal must deal with a request in accordance with the same principles applied by the High Court in respect of applications for judicial review. The requirement for permission before being able to bring the case reflects the procedure of the High Court in such a case. If the Tribunal gave permission, and gives full consideration to the application, that consideration is restricted to the legality of the Commissioner's decision – whether she has acted within the powers conferred on her by the Measure. The Tribunal's inquiry is therefore a legal inquiry. If it appears that the Commissioner has acted within her powers, that is the end of the matter. The Tribunal has no right to question the substance of the Commissioner's decision.

23. The test which the Tribunal must apply when considering giving permission is based on the practice of the High Court. The applicant must demonstrate either that the application "would have a reasonable prospect of success" or that "there is some other compelling reason why the application should be heard." The decision to grant or to refuse permission is made by the President of the Tribunal (or, with the consent of the President, another member of the Tribunal qualified in the law) and if permission is refused the applicant has the right to ask for that decision to be reconsidered by a panel of Tribunal members.

24. So far, seven applications under section 103 have been received. Permission to make the application was refused in four of them. Of the other three, one has been decided, after a

hearing, in favour of the applicant. In another, the Commissioner accepted that the interpretation of the Measure on which her decision had been based was incorrect and the application was withdrawn by agreement. The third is yet to be determined. No request for reconsideration of the decision of the Tribunal to refuse permission was received in any of the four cases. It seems that, so far, the requirement to obtain the permission of the Tribunal before bringing a relevant application is working satisfactorily.

25. The consultation paper suggests that the procedure which applies in respect of applications under section 103 could be extended to include the other types of application which can be made to the Tribunal. But one must remember that the nature of applications to the Tribunal varies and that the characteristics of an application under section 103 do not apply to each of the other possible applications.

26. The type of applications that is most similar to an application under section 103 is that of applications under section 58, namely an appeal to the Tribunal against a decision by the Commissioner to impose a specific Standard on body is neither unreasonable nor disproportionate. But the technical difference must be noted between *a review* under section 103 and an *appeal* under section 58. One relates to the *legality* of the Commissioner's decision. The other relates to the *correctness* of the decision of the Commissioner. But it is not clear, in practice, why an applicant's ability to challenge the Commissioner's decision should be so different when the Commissioner, in both situations, is exercising functions which are so similar – namely to apply her expert opinion in a field in which she exercises such wide statutory functions. The only obvious explanation for the difference is the fact that the legislative competence of the Assembly, when it passed the Measure, was subject to the proviso that any Measure that placed duties on a body must include a right for that body " to challenge those duties, as they apply to that person, on grounds of reasonableness and proportionality. "

27. As that restriction no longer exists, it would be possible to recast the right to challenge a decision to impose a Standard on a body in similar terms to the right to challenge a decision not to investigate a complaint, that is, as a right to request a review, namely the right available under section 103. If that were to happen, the imposition of a filter similar to the one contained in section 103 (4) would be a natural step. But even if the nature of the challenge under section 58 were to remain as it is – an appeal rather than an application for review – there does not appear to be any difficulty in applying the same sort of requirement for permission contained in section 103 (4).

28. The other potential applications to the Tribunal all relate to statutory inquiries and are, by their nature, all appeals rather than reviews. They include, for example, appeals by a body against a ruling by the Commissioner that that the body has failed to comply with a Standard. The nature of an appeal is that it considers the correctness (as opposed to the legality) of the decision. The Tribunal's inquiry is expected to be wider, in such a case, including the weighing of factual evidence and even, under certain circumstances, consider new evidence. As a result, the evidence before the Tribunal when considering, at the outset, the appeal's chances of success may be incomplete. Consideration of an appeal may include, in principle, a wide range of materials, some of which may not even have been collected, when an application is received by the Tribunal. As a result, the imposition of a condition in the same terms as those of section 103 (4) could mean that the task of the Tribunal of weighing the strength of the appeal would be a difficult one and that the test could be seen as unworkable.

29. It is not uncommon, of course, that the right to appeal to a court or tribunal is restricted. There is no appeal from the County Court to the Court of Appeal without the permission of one court or the other, and the threshold for giving consent (rule 52.3 (6) of the Civil Procedure Rules 1998) is similar to that in section 103(4) of the Measure (although the Rules refer to a "real prospect of success" rather than a "reasonable prospect of success" as does the Measure). On the other hand, it is not necessary to obtain permission to appeal from the Magistrates' Court to the Crown Court, or to appeal from the decision of a local authority to the Special Educational Needs Tribunal for Wales.

30. There is ground for arguing, therefore, that the imposition of a filter which includes the need to weigh up the likelihood that the appeal will succeed is more appropriate where the appeal relates to questions of legal principles and correctness of reasoning than in cases where factual conclusions are key.

31. So far, no appeal has been received by the Tribunal against the Commissioner's decision in respect of a statutory investigation. There is, therefore, no evidence of a practical need to impose a filter on the right of appeal in such a case. The broader experience of members of the Tribunal suggests, also, that such a filter can cause unexpected and unintended complications, by generating many more applications for review by the Tribunal of its decision to refuse permission, thereby complicating and delaying resolution of the dispute.

32. It should also be noted that the Tribunal already has strong powers to bring weak cases to a conclusion, once it has enough information about the case to be able to do so fairly. Under rule 28 of the Welsh Language Tribunal Rules 2015 the Tribunal may, of its own initiative or at the request of the Commissioner, strike out an application at any time if it appears that there are no reasonable grounds for it or that it is frivolous or vexatious.

33. The Tribunal is not convinced, therefore, of the need to impose a filter on the complainant's right to appeal to the Tribunal, where the appeal is one under section 95 or 99 of the Measure or under paragraphs 9 or 10 of Schedule 10 to it. In the opinion of the Tribunal, its powers under rule 28 of the Tribunal Rules already enable it to bring hopeless cases to an end before they impose an excessive administrative burden on the Tribunal or on the Commissioner.

Summary

34. In the opinion of the Tribunal, therefore:

(i) Transferring the function of giving compliance notices from the Commissioner to the Welsh Government, while retaining the right to appeal to the Tribunal against the contents of the notice, call for consideration of additional provisions in the Measure in order to underline the independence of the Tribunal;

(ii) The ability to vary the Standards applicable to different bodies so as to respond to the linguistic profile of the relevant area should be retained;

(iii) The imposition of a "seriousness" filter on the right to make a complaint to the Commissioner would not add to the Commissioner’s existing discretion to refuse to commence a statutory investigation into a complaint on the basis of the lack of seriousness of the subject matter of the complaint and the imposition of such a statutory filter could give rise to difficulties in terms of the definition of "seriousness" and lead to an increase in applications to the Tribunal for a review of Commission decisions under section 103 of the Measure, applying that filter;

(iv) Consideration should be given as to how to provide greater freedom for the Commission to tailor the process of carrying out a statutory inquiry into a complaint in order to be able to respond more flexibly to the characteristics of individual cases;

(v) The procedure requiring permission of the Tribunal to be obtained before making an application for a review under section 103 of a decision by the Commissioner to refuse to undertake a statutory investigation into a complaint is working well; there is no reason why the requirement could not be extended to appeals to the Tribunal under section 58 (against the imposition of a particular Standard);

(vi) When doing so, consideration should be given to changing the technical legal nature of an application under section 58 from an appeal against the decision to an application for review of it, as in the case of an application under section 103;

(vii) There is, at present, no evidence of the need for a filter which would require a complainant to obtain permission of the Tribunal before appealing under sections 95, 99 and paragraphs 9 and 10 of Schedule 10 of the Measure; imposing such a filter could give rise to unintended and unexpected complications.

On behalf of the Welsh Language Tribunal
Keith Bush QC
President of the Tribunal
October 2017