Investigation under section 17 of the Welsh Language Act 1993

Nursing and Midwifery Council

The Welsh Language Commissioner’s report and recommendations under section 19 of the Welsh Language Act 1993

Ref. 37

Date of publication: 1 October, 2015
Background

The principal aim of the Welsh Language Commissioner, an independent organisation established by the Welsh Language (Wales) Measure 2011, is to promote and facilitate the use of the Welsh language. This entails raising awareness of the official status of the Welsh language in Wales, by imposing standards on organisations, and by reviewing and investigating compliance with the Measure and the Welsh Language Act 1993. This, in turn, will lead to the establishment of rights for Welsh speakers.

Two principles will underpin the work:

- The Welsh language shall not be treated less favourably than the English language in Wales
- 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

This investigation report is issued by the Welsh Language Commissioner (the Commissioner) in accordance with section 19 of the Welsh Language Act 1993 (the Act) following the transferral of relevant functions under the Act to the Commissioner by means of a series of statutory instruments.

Part II of the Welsh Language Act 1993

Compliance with Welsh language schemes – Investigations

An investigation is held into the possible failure of a public body to carry out its language scheme under section 17 of the Act:

17. — (1) Where it appears to the Board\(^1\), whether on a complaint made to it under section 18 below or otherwise, that a public body may have failed to carry out a scheme approved by the Board, the Board may conduct an investigation in order to ascertain whether there has been a failure.

(2) The procedure for conducting an investigation under this section shall be such as the Board considers appropriate in the circumstances of the case, and in particular an investigation may be conducted in private.

Compliance with Welsh language schemes – Complaints of non-compliance

Section 18 of the Act applies where a person complains about the failure of a public body to carry out its language scheme:

18. — (1) This section applies where —

(a) a written complaint is made to the Board by a person who claims to have been directly affected by a failure of a public body to carry out a scheme approved by the Board,

(b) the complaint is made within the period of twelve months beginning with the day on which the complainant first knew of the matters alleged in the complaint, and

(c) the Board is satisfied that the complainant has brought the matter complained of to the notice of the public body concerned and that that body has had a reasonable opportunity to consider it and to respond.

(2) Where this section applies, the Board shall either investigate that complaint under section 17 above or shall send to the complainant a statement of its reasons for not doing so.

\(^1\) The Welsh Language Board was abolished on 31 March, 2012 and its powers to investigate were transferred to the Welsh Language Commissioner from 1 April, 2012. Any reference to the Board in this foreword is synonymous with a reference to the Commissioner.
Compliance with schemes – Reports on investigations

A report is produced under section 19 of the Act, based on the findings of the investigation:

19. — (1) Where the Board undertakes an investigation under section 17 above, it shall send a report of the results of the investigation to the public body concerned, to the Secretary of State\(^2\) and, where the investigation is conducted on a complaint made under section 18 above, to the complainant.

(2) Where the Board considers that it would be appropriate for a report of the results of an investigation to be published, either in the form of the report made under subsection (1) above or in some other form, the Board may arrange for publication in such manner as it thinks fit.

(3) Where on completing an investigation the Board is satisfied that the public body concerned has failed to carry out the scheme, the Board may include in its report recommendations as to action to be taken by the public body in order to remedy the failure or to avoid future failures.

Compliance with schemes – Directions by Secretary of State

If, following the preparation of a report, the Commissioner is of the opinion that a public body has failed to recommendations of that report the Commissioner may refer the matter to the Minister responsible for the Welsh language:

20. – (1) If at any time it appears to the Board that a public body has failed to take any action recommended in a report under section 19 above, the Board may refer the matter to the Secretary of State.

(2) If on a reference under this section the Secretary of State is satisfied, after considering any representations made to him by the Board and by the public body concerned, that the body has failed to take any action recommended in the report, he may give such directions to the public body as he considers appropriate.

(3) Any directions given by the Secretary of State under subsection (2) above shall be enforceable, on an application made by him, by mandamus

This investigation was conducted as a result of the Commissioner’s compliance monitoring work. Although no complaint was received under section 18 of the Act, the Commissioner decided to exercise her powers under section 17 to conduct an investigation. This report is based on correspondence between the Welsh Language Commissioner and the Nursing and Midwifery Council and documentation sent.

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\(^2\) Following the establishment of the National Assembly for Wales in 1999, reports under section 19 of the Act are sent to the relevant Minister within the Welsh Government, who is responsible for the Welsh language.
1 Context

1.1 The Nursing and Midwifery Council (NMC), which has been in operation since 2002, is the statutory body charged with regulating nurses and midwives in Wales, England, Scotland and Northern Ireland. It is responsible for setting standards of education, training, conduct and performance so that nurses and midwives can deliver high quality healthcare. It is also responsible for ensuring that nurses and midwives keep their skills and knowledge up to date and uphold the standards set out in their professional code.

1.2 According to the NMC's Welsh language scheme, around 660,000 nurses and midwives are registered, with around 30,000 living in Wales.

1.3 The NMC's language scheme states that it has adopted the principle that in the conduct of its public business in Wales it will treat the English and Welsh languages on a basis of equality. The language scheme sets out how the NMC will give effect to that principle when providing services to the public. The language scheme was approved by the Welsh Language Board on 19 January, 2011.

1.4 The main objective of this report is to draw conclusions, based on the evidence gathered, on the NMC's compliance with specific clauses of its language scheme. It does not draw conclusions regarding the NMC's general performance in carrying out its language scheme.

1.5 This is the first investigation conducted by the Welsh Language Commissioner (the Commissioner) under section 17 of the Welsh Language Act 1993 in relation to the NMC. The investigation was conducted in private by officers from the Commissioner's Investigation and Enforcement team. The Commissioner would like to thank the NMC for its cooperation during the investigation.

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2 Investigation basis

2.1 On 29 January, 2015, the NMC published a revised code of practice. The code of practice outlines the professional standards which must be upheld by registered nurses and midwives in order to work in the UK. The revised code of practice came into force on 31 March, 2015.

2.2 Section 7 of the revised code of practice, Communicate clearly, requires practitioners to communicate clearly. The following are listed as requirements to achieve this:

7.1 – use terms that people in your care, colleagues and the public can understand

7.2 – take reasonable steps to meet people's language and communication needs, providing, where possible, assistance to those who need help to communicate their own or other people's needs

7.3 – use a range of verbal and non-verbal communication methods, and consider cultural sensitivities, to better understand and respond to people’s personal and health needs

7.4 – check people’s understanding from time to time to keep misunderstanding or mistakes to a minimum

7.5 – be able to communicate clearly and effectively in English

2.3 The NMC’s annual monitoring report on the implementation of its language scheme for 2013-14 reported that the body's policy development framework and project management process requires staff to undertake an equality analysis as part of the work. It also noted that its policy development and project management processes require an assessment of Welsh language requirements at an early stage and that guidance had been prepared to assist staff with the work. It was reported that an ‘equality analysis’ had been conducted in relation to the revised code of practice.

2.4 In response to the annual monitoring report, the Commissioner requested a copy of the equality analysis conducted in relation to the needs of Welsh speakers. A copy was provided by the NMC on 2 February, 2015. It contained one reference to the Welsh language:

2.14 – Other groups: Welsh language

It is our intention that the code and PPE statement should be readily available to all and in accordance with the Welsh Language Act and our Welsh Language Scheme

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both documents will be translated into Welsh and available on line and in print format on request.

Guidance that is of a professional and/or technical nature will also be available in Welsh on request.  

2.5 The document implied that the NMC had assessed the linguistic consequences in terms of its ability to comply with clause 32 of its Welsh language scheme which states that 'information aimed at patients and members of the public will be available in English and Welsh'. However, there was suspicion regarding the NMC's assessment of the linguistic consequences of the revised code of practice in terms of its ability to comply with any other clause in its language scheme.

2.6 On its website, the NMC published a report providing a narrative for how evidence informed the draft code of practice. It summarised the feedback received as part of the consultation on the draft version of the revised code of practice. It stated that its aim was to ensure that the final revised code of practice was evidence-based. According to the report, qualitative evidence was collated through evidence-based interviews with 16 organisations representing seldom heard audiences, such as the elderly and those with disabilities. It also stated that events were held with stakeholders across the UK. The NMC's annual monitoring report confirms that one such event was held in Cardiff in June 2014.

2.7 The evidence report made no mention of the language scheme nor the use of the Welsh language. As a result, there was suspicion regarding the consideration given to the commitments made in the language scheme during the process of collating evidence for the revised code of practice.

2.8 While the above evidence was being considered, the Commissioner received correspondence from a nursing and midwifery practitioner expressing concern about the content of section 7 of the revised code of practice. The practitioner believed that clause 7.5 of the code was unacceptable to practitioners in Wales without also referring to the Welsh language.

2.9 The evidence received from the NMC, and the information collated by the Commissioner, reinforced the Commissioner's suspicion with regard to the implementation of the language scheme. There was insufficient evidence to suggest that the impact of the revised code of practice on the NMC's ability to fulfil the commitments of its language scheme had been considered, apart from the commitment in clause 32 to publish bilingual information for the public in Wales.

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3 The investigation

3.1 The Commissioner decided to exercise her powers under section 17 of the Welsh Language Act 1993 to conduct an investigation to ascertain whether the NMC had failed to carry out its language scheme. The NMC’s Chief Executive and Registrar was informed of this decision by letter dated 5 May, 2015. The letter explained the nature of the investigation along with its procedure, and included questions for the purpose of gathering information.\textsuperscript{11} It explained that the investigation would be consider the implementation of clause 9 of the language scheme:

- **New policies and initiatives**

  9. – *When we plan and formulate new policies or initiatives, or update existing policies, we will assess the language consequences to make sure that they meet with the commitments given in this scheme. This will be conducted as part of the NMC’s equality impact assessment (EqIA) process.*

3.2 In accordance with clause 9, the NMC is required to consider the impact of new policies and initiatives on its ability to fulfil every commitment in its language scheme. It was stated that the investigation would focus specifically on the consideration given to the impact of the revised code of practice on the NMC’s ability to fulfil the following:

  1. – *The Nursing and Midwifery Council (NMC) has adopted the principle that it will treat the Welsh and English languages equally when conducting public business in Wales.*

  8. – *The NMC is committed to ensuring that nurses and midwives meet the needs of the Welsh speaking community and to working with partners in Wales to ensure this occurs.*

3.3 It was noted that the investigation would be conducted in private by the Commissioner’s Investigation and Enforcement team and that the process for carrying out the investigation was as follows:

- Receive information and evidence from the NMC by 19 May, 2015.
- Undertake a desktop analysis of the information received and consider whether any further information is required, for example by meeting with NMC officers.
- Prepare a draft report on the investigation findings and provide the NMC with an opportunity to verify the facts of the report.
- Send a copy of the final report sent to the NMC and the Minister responsible for the Welsh language.
- Publish the final report.

3.4 The NMC was asked to respond to the Commissioner’s questions by 19 May, 2015. Following the Commissioner’s agreement to extend this timescale at the NMC’s request, a response was received on 3 July 2015.

\textsuperscript{11} Welsh Language Commissioner, letter dated 5 May, 2015. Available at Appendix 3.
3.5 This report evaluates the consideration given to specific clauses within the NMC’s language scheme during the process of revising its code of practice. It is based on information and evidence received from the NMC in correspondence dated 29 June, 2015.

3.6 A draft of this report was shared with the NMC’s Chief Executive and Registrar in order to give the body an opportunity to verify its factual contents. The NMC’s comments, dated 17 September 2015, were considered in formulating the final report.

3.7 Copies of this correspondence are available in the report’s appendices.
4 The evidence

4.1 Consideration 1: New policies and initiatives

There were suspicions that the NMC had failed to carry out the following clause of its Welsh language scheme:

- 9. – When we plan and formulate new policies or initiatives, or update existing policies, we will assess the language consequences to make sure that they meet with the commitments given in this scheme. This will be conducted as part of the NMC’s equality impact assessment (EqIA) process.

4.1.1 In order to ascertain whether the NMC had complied with this clause, the Commissioner requested information and evidence in relation to the consideration given to the impact of the revised code of practice on the body’s ability to fulfil clauses 1 and 8 of its language scheme.

1. – The Nursing and Midwifery Council (NMC) has adopted the principle that it will treat the Welsh and English languages equally when conducting public business in Wales.

8. – The NMC is committed to ensuring that nurses and midwives meet the needs of the Welsh speaking community and to working with partners in Wales to ensure this occurs.

4.1.2 The Commissioner asked about the factors considered, and the evidence gathered, as part of the equality impact assessment (EqIA) for the revised code of practice. According to the information received, the EqIA’s main focus was the way in which the revised code of practice impacted on the different groups protected by the Equality Act 2010.12 The document contains one reference to the Welsh language:

**2.14 – Other groups: Welsh language**

It is our intention that the code and PPE statement should be readily available to all and in accordance with the Welsh Language Act and our Welsh Language Scheme both documents will be translated into Welsh and available on line and in print format on request.

Guidance that is of a professional and/or technical nature will also be available in Welsh on request.13

4.1.3 The response claims that the NMC considered the following relevant factors as part of the EqIA:

Factors which related to the needs of the Welsh speaking community; impacts on carers; people who lived in remote areas, and people from different socio-economic backgrounds.

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13 NMC, Revision of the Code, p.12.
4.1.4 In order to comply with clause 32 of the language scheme, documents relating to the consultation and relevant to the public in Wales were translated into Welsh.

4.1.5 It was enquired who was responsible for conducting and authorising EqIAs, including the EqIA conducted in relation to the revised code of practice. According to the response, the member of staff responsible for preparing or revising a specific policy is also responsible for conducting the EqIA. However, on this occasion, an equality consultant was commissioned to undertake the work on behalf of the NMC.

4.1.6 A copy of the NMC’s policy development framework and the guidance provided to staff to support them during the EqIA process was also requested. In response, two forms used as part of the equality analysis process were provided, along with a copy of a guidance document entitled *Equality Analysis Detailed Guidance*.

4.1.7 The first form is a screening form which asks members of staff to list the evidence considered when conducting an EqIA. The screening form is used to ascertain whether the policy will have differential impacts on certain groups. Staff are asked to state whether the policy will impact on the nine protected characteristics identified by the Equality Act 2010, namely race, gender, disability, age, sexual orientation, religion and belief, gender reassignment, pregnancy and maternity, and marriage and civil partnership.\(^\text{14}\) If it is found that a policy will have a differential impact on any of these characteristics, staff are asked to provide the reasons for this. Similarly, if it is found that a policy will not impact on the protected characteristics, staff are asked to outline the evidence used to support their decision.

4.1.8 The screening form contains three questions relating to the Welsh language:

- *Will the policy impact on Welsh language speakers?*
- *Is the policy a public facing document?*
- *Will the policy be translated into Welsh?*

4.1.9 Staff are asked to provide ‘yes’ or ‘no’ answers in response to these questions. If the answer to any of these questions is ‘yes’, staff are asked to contact the Legislative Compliance Manager after the policy has been approved. The Nursing and Midwifery Council’s methodology for the development of standards states that policies must be approved before any planning can commence:

> At this stage […] approval will be given either at director or board / advisory group level, usually after initial consideration, suggested amendment and clearance by the relevant assistant director.\(^\text{15}\)

4.1.10 If any significant differential impacts are identified by the screening form, the NMC’s staff are expected to complete a full equality analysis form. This comprehensive form requires staff to elaborate on the policy’s impact on the protected characteristics identified by the Equality Act 2010 and the evidence considered in drawing their conclusions.\(^\text{16}\)

4.1.11 The full EqIA form contains a section entitled *Other Identified Groups*. Here staff are asked to state whether the policy will have an impact on Welsh speakers, and whether consideration was given to the language scheme as part of the EqIA.

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\(^{16}\) NMC, *Full equality analysis form* (October 2013). Available at Appendix 7.
4.1.12 The NMC’s detailed guidance on analysing the impact of policies on equality makes specific reference to the Welsh language under the heading Other groups. The document notes that the impact of the policy on Welsh speakers and the contents of the NMC’s language scheme should be considered.\footnote{Nursing and Midwifery Council, Equality analysis detailed guidance, p. 11. Available at Appendix 8.}

4.1.13 The Commissioner wished to know more about the evidence offered by members of the Patient and Public Engagement Forum as part of the consultation on the revised code of practice. The forum includes over 15 representatives from different organisations which protect the interests of patients and protected groups. According to the response, no issues were raised in relation to the needs of Welsh speaking patients, nor the way in which those needs could be met through the revised code of practice during a meeting of the forum on 24 November, 2014.\footnote{NMC, minutes of the Patient and Public Engagement Forum’s meeting held on 24 November, 2014. Available at Appendix 9.}

4.1.14 The Commissioner asked what factors were considered as part of the NMC’s consultation in order to assess the impact of the revised code of practice on the body’s ability to carry out its language scheme. According to evidence provided by the NMC, the implementation of the language scheme was not mentioned as part of the consultation:

For the revised Code consultation, we did not present specific questions on our Welsh Language Scheme, as the purpose of the consultation was to focus on the content and applicability of the revised Code.\footnote{NMC, letter dated 29 June, 2015, p. 3.}

4.1.15 A copy of the questionnaire used to gather public opinion as part of the consultation was also requested. In response, two questionnaires were provided; one for the public and one for registered nurses and midwives. Both questionnaires ask for views on the contents of the revised code of practice using a tick box system. The questionnaires do not ask any specific questions about the Welsh language.\footnote{NMC, NMC Consultation Response Form. Available at Appendix 10.}

4.1.16 The Commissioner enquired about the evidence gathered in relation to the needs of Welsh speakers as part of the interviews conducted with 16 organisations representing seldom heard audiences. According to the response provided by the NMC, two in depth interviews were held in Wales with two organisations representing seldom heard groups. No evidence was presented with regard to the needs of Welsh speakers as part of the interviews.\footnote{NMC, letter dated 29 June, 2015, p. 4.}

4.1.17 The Commissioner enquired about the evidence gathered in relation to the needs of Welsh speakers as part of four events held across the UK with demographically diverse groups of patients and members of the public. According to the evidence provided by the NMC, a deliberative workshop was held in Cardiff with ‘around 25 members of the public and patients’.\footnote{NMC, letter dated 29 June, 2015, p. 3.} In addition, four discussion groups were held with nurses and midwives in Wales. No evidence was presented with regard to the needs of Welsh speakers as part of the sessions.

4.1.18 The Commissioner also enquired about the evidence gathered in relation to the needs of Welsh speakers as part of the stakeholder summit held in June 2014. According to the NMC’s response, attendees were invited to provide feedback on the core principles of the

\footnote{Nursing and Midwifery Council, Equality analysis detailed guidance, p. 11. Available at Appendix 8.}
revised code of practice and a copy of the feedback received was given to the Commissioner. The evidence contains one reference to the Welsh language. It relates specifically to section 7.5 of the revised code of practice which states that nurses and midwives should be able to communicate clearly in English. The feedback states:

*It was noted that in Wales, this might be the Welsh language rather than English. The sentence could be changed to 'an appropriate language' which would take into account the different languages that people might speak. Others felt, however, that this paragraph could be removed, as paragraph 31 covered everything necessary about clear communication.*

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4.1.19 No other information was provided in relation to the NMC’s response to this comment.

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23 NMC, feedback from the stakeholder summit, Cardiff, June 2014.
5 Conclusions

5.1 This report draws conclusions regarding the NMC’s compliance with one aspect of its Welsh language scheme. This report is final and makes recommendations under section 19 of the Welsh Language Act 1993.

5.2 In light of the information and evidence available there is reason to believe that the NMC failed to carry out clause 9 of its language scheme when revising its code of practice:

- **New policies and initiatives**

  The Commissioner understands that the NMC assessed the impact of its revised code of practice on the protected characteristics determined by the Equality Act 2010. The tool used by the NMC to assess the impact of its revised code of practice included consideration of the Welsh language. The language was considered a characteristic and its users a ‘group’ under the provisions of the Equality Act 2010. Despite the fact that the impact assessment was carried out under the provisions of equalities legislation, the purpose of this investigation report is to conclude whether that assessment fulfilled the requirements of the NMC Welsh language scheme.

  Clause 9 of the language scheme states that the NMC will assess the linguistic consequences of new policies and initiatives to ensure that they meet all of the scheme’s commitments. In light of the evidence available, it is concluded that the tool used to assess the revised code of practice’s impact did not fulfil the requirements of the language scheme, except in one circumstance, namely the requirement outlined in clause 32.

  No evidence was provided to suggest that any consideration was given to the commitment in clause 8 to ensuring that ‘nurses and midwives meet the needs of the Welsh speaking community and [work] with partners in Wales to ensure [that] this occurs’. No evidence was provided to suggest that consideration was given to the commitment in clause 1 to treat Welsh and English on the basis of equality when conducting public business in Wales.

  It is the Commissioner’s opinion that the NMC’s procedures for assessing the linguistic consequences of its policies are fundamentally flawed. This investigation has uncovered that the impact assessment in relation to the revised code of practice was carried out under the provisions of the Equalities Act 2010. As a result only marginal consideration was given to the Welsh language and the needs of its users. There is reason to believe that the NMC’s conclusions regarding the linguistic consequences of its revised code of practice would have been different had it conducted an appropriate assessment of its impact under the provisions of its language scheme.

  On the basis that the linguistic consequences of the revised code of practice were not assessed to make sure that they meet with the commitments given in the NMC’s Welsh language scheme, it is concluded that the NMC failed to carry out clause 9 of that scheme.
6 Recommendations

6.1 On the basis of the findings of this investigation, the Commissioner is of the opinion that the Nursing and Midwifery Council should implement the following recommendations:

- **Recommendation 1**
  
  The Nursing and Midwifery Council should review the way in which it assesses the language consequences of its new policies and initiatives to ensure that it fully fulfils the requirements of its Welsh language scheme.
  
  *Evidence should be provided that this work has been completed by 31 March, 2016.*

- **Recommendation 2**
  
  The Nursing and Midwifery Council should reconsider the revised code of practice consulted upon in relation to the Welsh language.
  
  *Evidence should be provided that this work has been completed by 31 March, 2016.*

- **Recommendation 3**
  
  The Nursing and Midwifery Council should amend its guidance on equality analysis to ensure that it adequately reflects the body’s statutory duty, under the Welsh language scheme, to assess the language consequences of new policies and initiatives.¹
  
  *Evidence should be provided that this work has been completed by 31 March, 2016.*

- **Recommendation 4**
  
  The Nursing and Midwifery Council should put arrangements in place to ensure that comprehensive records are kept of the consideration given to the linguistic consequences of its new policies and initiatives.
  
  *Evidence should be provided that this work has been completed by 31 March, 2016.*

¹ Information on assessing the impact of policies and initiatives on the Welsh language is included in the publication *Advice on Mainstreaming the Welsh Language*. Available at http://www.webarchive.org.uk/wayback/archive/20120330033229/http:/www.byig-wlb.org.uk/Cymraeg/cyhoeddiadau/Cyhoeddiadau/5146.pdf [accessed on 12 August, 2015].
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 Documentation is appended in the language in which it was produced or published.