Investigation under section 17 of the Welsh Language Act 1993

National Offender Management Service

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

Ref. 048
Background

The principal aim of the Welsh Language Commissioner, an independent body established by the Welsh Language (Wales) Measure 2011, is to promote and facilitate the use of the Welsh language. This is done by 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 should be treated no less favourably in Wales 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

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 through a series of statutory instruments.

Part II Welsh Language Act 1993

1. Compliance with schemes — Investigations

An investigation is held into the possible failure of a public body to implement 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.

2. Compliance with schemes — Complaints for non-compliance

Section 18 of the Act applies when an individual submits a complaint regarding a public body's failure to implement 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.

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\(^1\) The Welsh Language Board was abolished on 31 March 2012 and investigatory power was transferred to the Welsh Language Commissioner on 1 April 2012. Any reference to the Board in this foreword should also be taken to refer to the Commissioner.
Compliance with schemes – Reports on investigations

A report is to be 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 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 – Instructions from the Secretary of State

If, following the publication of a report, the Commissioner believes that a public body has failed to implement the actions recommended by her, she 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.

The Crown – Persons acting on behalf of the Crown

Section 21 of the Act applies where an investigation is conducted into the failure of a Crown body to implement its language scheme:

21. – (1) References in this Part of this Act to public bodies do not include references to any person acting as the servant or agent of the Crown; but the […] provisions of this section shall apply where such a person has adopted or proposes to adopt a Welsh language scheme.

Following the establishment of the National Assembly for Wales in 1999, reports under section 19 of the Act are sent to the Welsh Government Minister responsible for the Welsh language.
(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.

The National Offender Management Service is a Crown body. In accordance with section 21 of the Act, where a Crown body adopts a Welsh language scheme, sections 17-19 of the Act shall be applicable, in the same way as they apply to other public bodies. These sections give the Commissioner the authority to conduct a statutory investigation into the implementation of the National Offender Management Service's Welsh language scheme.

Section 20 of the Act does not apply to Crown bodies. This means that the Commissioner does not have the power to refer cases relating to the National Offender Management Service to the Minister responsible for the Welsh language.

The investigation was conducted as a result of doubts raised during communications and meetings between the Commissioner and the National Offender Management Service. The report is based on correspondence between the National Offender Management Service and the Commissioner and documentation received.
1 Context

1.1 The National Offender Management Service (NOMS) is an executive agency of the Ministry of Justice, created in 2008. NOMS has responsibility, on behalf of the Secretary of State for Justice, for commissioning and providing probation services for England and Wales.

1.2 NOMS' Welsh Language Scheme was approved on 22 May 2013.

1.3 The language scheme states that NOMS has adopted the principle that, in the conduct of public business and the administration of justice in Wales, it will treat the English and Welsh languages on a basis of equality. The scheme identifies how NOMS will achieve that principle in providing public services in Wales.

1.4 The main objective of this report is to draw conclusions, based on the evidence gathered, on NOMS' compliance with specific clauses of its language scheme when recruiting for the new prison, HMP Berwyn. It does not draw conclusions on NOMS' general performance in delivering its language scheme.

1.5 This is the first investigation conducted under section 17 of the Act in relation to NOMS. The investigation was conducted in private by officers from the Investigation and Enforcement team. I would like to thank NOMS for its cooperation during the investigation.

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2 Basis of the investigation

2.1 Following correspondence and meetings between my officers and NOMS, I suspected that NOMS was not complying with the requirements of its Welsh language scheme in recruiting for posts at the new prison based in Wrexham, namely HMP Berwyn.

2.2 I received correspondence and statements of concern from individuals, including elected members, about the lack of 'Welsh essential' posts at HMP Berwyn. The recruitment process had also received public attention\(^4\). The content of the letters I received from NOMS in the run-up to the opening of the new prison raised doubts about the recruitment process in relation to the Welsh language scheme. My meetings with NOMS officers failed to quash my doubts about the recruitment process. As a result, I decided to conduct a statutory investigation into the recruitment process for HMP Berwyn.

2.3 Article 6(3)(a) of the European Convention on Human Rights gives a person charged with a criminal offence the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him. This highlights the key role that language plays in administrating justice in a fair and effective manner. Although this right is afforded in a very specific context, the principle established could be considered relevant to any aspect of justice administration, including dealing with prisoners in a language or languages that they are familiar with using. The quality of the service provided to prisoners is largely dependent on the language of that service, and failing to provide a Welsh language service for Welsh-speaking prisoners can be a barrier to the effective rehabilitation of those individuals.

2.4 A higher than average percentage of prisoners are vulnerable, for example, they suffer mental health problems, are addicted to drugs or alcohol or have attempted suicide\(^5\). Providing a service in the preferred language of vulnerable people is essential.

2.5 Effective communication is essential to the standard of service provided and the welfare of the user in the field of justice. The UK Government has committed to meeting a number of the requirements of the European Charter for Regional or Minority Languages and this includes Article 10, paragraph 3(a) which refers to the need to ensure that public authorities use the minority language, Welsh in this case, in the provision of public authority services. Therefore, it is essential that prisoners from Wales are able to communicate with the officers charged with their care through the medium of Welsh, and that their family and friends are also able to do so.

2.6 According to the Welsh Affairs Committee's Report 'Prisons in Wales and the treatment of Welsh Offenders', published in December 2014, 900 prisoners from north Wales were in prisons outside of the area. The report also notes that accurate figures on the number of Welsh-speaking prisoners are not collected. It states that HMP Berwyn will not only accommodate prisoners from Wales, but it will mean that prisoners from Wales will be able to serve their sentence, or the final part of their sentence, closer to home.\(^6\)


\(^5\) Standards for Prison Mental Health Services, Royal College of Psychiatrists, 2015

3 The investigation

3.1 I decided to exercise my powers under section 17 of the Act and conduct an investigation in order to ascertain whether NOMS had failed to implement clauses within its Welsh language scheme. The NOMS Director for Wales was informed of this in a letter dated 24 October 2016. This letter explained the nature of the investigation and included questions for the purpose of gathering information.7

3.2 I explained that the investigation would consider the implementation of relevant clauses of the language scheme, relating specifically to section 5.1, Recruitment. A series of questions were asked on the following clause of the Welsh language scheme:

5.1 Recruitment
Where adverts are to be placed in publications circulated in Wales, NOMS Agency offices will do so in bilingual format, in accordance with NOMS recruitment guidelines.

When recruiting staff within a location that deals with people from Wales, the Welsh language capacity of current staff will be considered and if necessary the opportunity may be taken to tackle shortfalls in the Welsh Language capacity of the location. The linguistic nature of the area that it serves and its service users will also be taken into account to inform Welsh language requirements. In these instances we will consult the Welsh Language Commissioner's guidance document – 'Recruitment: Welsh Language Considerations'. NOMS offices based in Wales will offer guidance to any location recruiting for posts that have a Welsh language component.

NOMS Agency recruitment guidance will be amended to include Welsh Language skills. When considering if Welsh language skills are essential, desirable or not required the following criteria will be applied:
- amount of contact with people from Wales
- current skills levels within the department
- current skills levels within the location/office

We will employ a sufficient number of bilingual staff to enable Welsh language work to be carried out effectively and efficiently within the set timescales.

3.3 I explained in the letter that other clauses within the language scheme may be considered as more information came to light during the investigation.

3.4 It was noted that the investigation would be conducted in private by the Investigation and Enforcement team.

3.5 I asked NOMS to respond to my questions by 11 November 2016. NOMS requested an extension and I agreed to extend the response date to 21 November 2016. I received a response from NOMS on 21 November 2016 and further details on 29 November 2016.8

3.6 The report is based on information and evidence received from NOMS in correspondence dated 21 November 2016 and 29 November 2016. A copy of the correspondence can be found in the appendices.

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7 Welsh Language Commissioner, letter dated 24 October 2016. See Appendix 1.
8 NOMS evidence dated 21 and 29 November 2016. See Appendix 2.
4  The evidence

4.1  Consideration 1: Recruitment

There were grounds to believe that the Service had failed to carry out the following clause of its Welsh language scheme:

- **5.1 Recruitment**

Where adverts are to be placed in publications circulated in Wales, NOMS Agency offices will do so in bilingual format, in accordance with NOMS recruitment guidelines.

When recruiting staff within a location that deals with people from Wales, the Welsh language capacity of current staff will be considered and if necessary the opportunity may be taken to tackle shortfalls in the Welsh Language capacity of the location. The linguistic nature of the area that it serves and its service users will also be taken into account to inform Welsh language requirements. In these instances we will consult the Welsh Language Commissioner's guidance document – ‘Recruitment: Welsh Language Considerations’. NOMS offices based in Wales will offer guidance to any location recruiting for posts that have a Welsh language component.

NOMS Agency recruitment guidance will be amended to include Welsh Language skills. When considering if Welsh language skills are essential, desirable or not required the following criteria will be applied:

- amount of contact with people from Wales
- current skills levels within the department
- current skills levels within the location/office

We will employ a sufficient number of bilingual staff to enable Welsh language work to be carried out effectively and efficiently within the set timescales.

4.1.1 In order to determine whether the Service had complied with clause 5.1, I asked a number of questions about the process of assessing linguistic needs and recruiting officers to work at HMP Berwyn.

4.1.2 According to NOMS’ response to the request for information for the investigation, all external vacancies at HMP Berwyn were advertised in Welsh and English. NOMS provided the text for the job advertisements in Welsh as part of its evidence that advertisements are bilingual in accordance with NOMS recruitment guidelines.

4.1.3 In order to determine whether NOMS had considered the ability of staff to use the Welsh language, I asked whether an assessment had been conducted before making the decision to denote Welsh as a requirement for posts. According to the information I received from NOMS, a linguistic assessment was not considered necessary and the ability to speak Welsh was not identified as an essential or desirable component for any of the posts advertised at HMP Berwyn. According to NOMS’ evidence, 10% of the staff who have been appointed to work at the prison are Welsh speakers. NOMS did not present any evidence to explain whether or not it feels that this is sufficient.
4.1.4 According to the information I received from NOMS, 270 posts had been advertised at the start of this investigation, including Chaplains, Heads of Functions and administrative posts, and another 574 posts are expected to be advertised during the process of recruiting for the new prison. In its evidence, NOMS states that, going forward, all NOMS vacancies in Wales will specify that the ability to communicate in Welsh is desirable when appointing staff. None of the 270 posts already advertised included linguistic requirements.

4.1.5 Clause 5.1 identifies the need to consider the linguistic nature of the area that is being served in order to inform Welsh language requirements.

4.1.6 In order to determine whether NOMS had considered the linguistic nature of the area and its service users, I asked for its prediction or estimates regarding the likely number of Welsh-speaking inmates at HMP Berwyn. According to the evidence received, NOMS could not predict the number of Welsh-speaking men at HMP Berwyn as it has not identified those suitable for transfer to the prison. It states that other criteria will be used to decide who will be transferred. Amongst the criteria noted in the evidence, men must be Category C prisoners and non-smokers. The ability or desire to speak Welsh is not included in the criteria provided in NOMS' evidence. It states that any language needs will be identified during the induction process following the decision to transfer prisoners to the prison.

4.1.7 I asked NOMS to confirm whether the Welsh Language Commissioner’s guidance document on recruitment had been considered when recruiting for the new prison (this is the guidance which has replaced the Welsh Language Board’s recruitment guidance identified in NOMS’ language scheme). The purpose of the document ‘Recruitment: Welsh Language Considerations’ is to assist organisations to develop a bilingual workforce. The document is relevant to all public organisations who implement a statutory Welsh language scheme and provides guidance on planning for a bilingual workforce and human resources policies and standard practices.

4.1.8 The guidance details how public organisations such as NOMS should plan, develop, implement and invest in a bilingual workforce in accordance with the statutory guidance published under Section 9 of the Welsh Language Act 1993 ‘Welsh Language Schemes – Their preparation and approval in accordance with the Welsh Language Act 1993’. The guidance details the following:

- the need to map language skills needs per individual workplace and post against the aim of the organisation
- providing guidance on how to assess the linguistic requirements of posts
- possible criteria for posts where Welsh is identified as an essential / desirable skill, for example, posts where there is a great deal of contact with users, comparing the need for a Welsh language service with the ability to provide that service per department, team etc
- when should linguistic requirements of jobs be discussed.

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9 The Welsh Language Commissioner’s recruitment guidance
4.1.9 In order to comply with the Equalities Act 2010, the guidance states that “the processes and methods used to determine language skills and appoint staff to those posts need to be fair, transparent and official, following accepted best practice in employment”.

4.1.10 According to NOMS, full consideration was given to the recruitment guidance. It supports this by explaining that all advertisements were provided in Welsh and English and that it will record staff language skills following their appointment and deploy its Welsh-speaking staff across all shift patterns to offer the men access to Welsh-speaking staff. It also notes that staff interested in learning Welsh will be encouraged and supported by HMP Berwyn Management.

4.1.11 I asked NOMS to elaborate on the guidance provided by NOMS offices in Wales in relation to recruiting staff for HMP Berwyn. According to NOMS' response, NOMS in Wales' Equality Manager is based in Cardiff and project manages the Community Cohesion Work Stream. This work stream attempts to mainstream and embed the NOMS Equality Strategy and the NOMS Welsh language scheme into the HMP Berwyn community. A series of workshops and training sessions have been held where discussion was tailored to support specific work streams.

4.1.12 I asked NOMS to provide a copy of the recruitment guidelines in Wales. It provided a copy of the document 'A Guide to the National Vacancy Filling Scheme including parallel running'. Clause 5.1 of NOMS' language scheme states that NOMS recruitment guidelines will be amended to include information on Welsh language skills. There are no references in NOMS recruitment guidelines to the Welsh language or the language scheme.

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10 A guide to the National Vacancy Filling Scheme including parallel running
4.2 Consideration 2: Partnerships

There were grounds to believe that the Service had failed to carry out the following clause of its Welsh language scheme:

- 7.8 Services delivered in Prisons by others

  Specifications for services delivered in prisons will include relevant measures relating to the use of Welsh. Any organisation that applies to or works within a prison in Wales may be expected to provide those services in Welsh as well as English.

4.2.1 NOMS provided me with information about partnerships. According to the evidence presented by NOMS, some services provided at HMP Berwyn will be delivered by contracted providers whose staff will not be employed by NOMS. Other services will be provided by partners as part of their usual functions, for example, the local Health Board. Examples are given of staff who will be employed by others such as local authority staff, Community Rehabilitation Contract staff and learning and skills staff. NOMS states that it includes measures for organisations to apply the principle of equality for both English and Welsh languages for delivery of services. No reference is made to including conditions relating to assessing linguistic needs of roles in contracts.

4.2.2 According to the details in the NOMS job advertisements provided as part of the evidence, the prison will be run by the public sector and 34% of the services provided will be outsourced.
5 Conclusions

5.1 This report determines NOMS’ compliance with its statutory Welsh Language Scheme on the basis of the evidence found by myself and the evidence provided by NOMS.

5.2 In light of the information available, there is reason to believe that NOMS has failed to carry out clauses 5.1 and 7.8 of its language scheme in recruiting and planning for HMP Berwyn.

5.2.1 Conclusion 1

There are several commitments in clause 5.1 of NOMS’ language scheme. If NOMS had complied with clause 5.1 in recruiting to HMP Berwyn, it would have achieved all of the following:

- advertised vacancies bilingually,
- assessed the need to identify Welsh as an essential or desirable skill for every post,
- predicted the linguistic profile of service users,
- followed the Commissioner’s recruitment guidance,
- ensured that NOMS officers in Wales provide guidance on considering the Welsh language,
- included Welsh language skills within its recruitment guidelines,
- considered specific criteria when considering whether Welsh language skills are essential, desirable or not required,

and

- employed a sufficient number of bilingual staff to enable work to be carried out effectively.

From the information provided, my understanding is that NOMS advertised vacancies bilingually but did not assess the need to identify Welsh as an essential or desirable skill for any post as it did not consider this necessary. As a result, none of the advertised posts were designated as Welsh essential posts. NOMS did not say why it believed a linguistic skills assessment of posts to be advertised was unnecessary.

As NOMS did not assess the language skills needed for posts and did not designate language prerequisites for posts, it did not manage the recruitment of staff in accordance with the clause in the Welsh Language Scheme in order to organise the service. If NOMS had done this, it is possible that they could have managed the process of introducing a Welsh language service more effectively.
In managing the recruitment process, NOMS has not ensured that Welsh speakers are taking up the necessary posts and there is no evidence either that 10% of the posts that have already been filled is sufficient.

NOMS did not predict the linguistic profile of service users, stating that it did not believe that it could do so. I do not agree with that, it only needed to predict the situation. NOMS could have predicted the percentage of Welsh-speaking men by looking at the percentage of Welsh-speaking Category C prisoners from north Wales and predicting what percentage of men at HMP Berwyn would be from north Wales. The prison will have a resettlement function for male service users from north Wales and there will be room for 200 men on remand. A proportion of these will be received from courts in north Wales. Just over 30% of the population of the six counties in north Wales speak Welsh according to the 2011 Census and one can assume with some certainty that there will be Welsh speakers at the prison and that preparations will need to be made for that.

It does not appear that NOMS has followed my recruitment guidance; if it had done so, it would have conducted a language assessment for every post, set criteria for deciding whether Welsh is essential or desirable for posts and mapped language skills needs per workplace and post against the aim of the organisation.

According to the evidence provided by NOMS, it will designate Welsh as an essential skill for every post advertised for the prison from now on. Public bodies need to assess whether the ability to speak Welsh is an 'essential' or 'desirable' requirement for a post. Setting a general designation for every post without assessing linguistic needs is not consistent with the interpretation of the law in the document 'Recruitment: Welsh Language Considerations':

5.11 The Commissioner accepts that advertising a vacancy which states that Welsh is essential or desirable may discriminate against racial groups which have a lower than average percentage of Welsh speakers. However, this may be justified due to the need for public organizations to recruit Welsh speakers in order to meet their statutory commitments in relation to the Welsh language, provided the need to speak Welsh is 'essential' or 'desirable' for the role.

According to the evidence provided by NOMS, the Equality Manager for Wales has attempted to mainstream and embed NOMS' Equality Strategy and NOMS' Welsh language scheme within the new prison's community and has attended community events which promote diverse and inclusive recruitment. However, what prison recruitment staff needed was guidance on Welsh language considerations and it does not appear that such guidance has been provided.

No reference is made to Welsh language skills in the recruitment guidelines provided as part of the evidence and NOMS did not consider specific criteria in considering whether Welsh language skills are essential, desirable or not required. In the clause in question, reference is made to employing "a sufficient number of bilingual staff to enable...work to be carried out effectively". As NOMS has not predicted the linguistic profile of service users nor assessed how many employees need to be bilingual (and which ones), it is not

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possible for NOMS or anyone else to know whether they have employed a sufficient number of bilingual staff to carry out the work effectively.

Given that NOMS did not carry out an assessment of language needs before advertising posts, consider the language of service users, follow the recruitment guidance document or include references to Welsh language skills in its recruitment guidelines, I believe that it has failed to comply with clause 5.1 of its Welsh language scheme.

5.2.2 Conclusion 2

From the information provided, my understanding is that a significant proportion of prison posts are being advertised by other public sector organisations. According to the evidence provided by NOMS, it has included measures to ensure that organisations will apply the principle of equality for both Welsh and English languages for delivery of services. In my opinion, NOMS needs to impose conditions on organisations providing outsourced prison services to ensure that linguistic assessments are conducted before posts are advertised in order to decide whether they need to be advertised with the Welsh identified as an essential or desirable skill or without any linguistic requirements. This will ensure that organisations providing prison services do so in Welsh as well as English, in accordance with the language scheme. This is essential as education and health services are provided by other organisations within the prison.

Where partners are responsible for staffing, they are expected to comply with their own language scheme at all times, follow the advice in the document 'Recruitment: Welsh Language Considerations' and comply with any other statutory language duties. If this is done, it is likely that organisations will conduct their own linguistic assessment and appoint staff in accordance with the results of those assessments.

NOMS is expected to include relevant measures relating to the use of the Welsh language in specifications for the provision of prison services in order to comply with clause 7.8 of its language scheme.

NOMS' language scheme also states that any organisation that applies to work in a prison in Wales or already works in a prison in Wales is expected to provide services in Welsh. In order to do so, organisations need to ensure that they conduct an appropriate recruitment campaign to ensure that prospective prison staff possess the relevant language skills.

When awarding contracts for the provision of inmate services at HMP Berwyn, due consideration needs to be given to NOMS' statutory duties to ensure that Welsh language services are provided. Contracts are expected to include full details of the Welsh language services expected by providers.

Given that NOMS has not taken steps to ensure that other organisations providing services within the Prison conduct linguistic assessments before advertising posts, I believe that it has failed to implement clause 7.8 of its Welsh language scheme.
6. Recommendations

6.1 Based on this investigation’s conclusions, the Commissioner is of the opinion that the National Offender Management Service should act in accordance with the following recommendations:

- **Recommendation 1**

  The National Offender Management Service guidance on recruitment should be amended to ensure that clause 5.1 of the Welsh Language Scheme is implemented fully.

  *This recommendation should be implemented by 30 November 2017*

- **Recommendation 2**

  The National Offender Management Service should assess the language needs of each vacancy and advertise every post with the appropriate language designation.

  *This recommendation should be implemented from the publication date of this report*

- **Recommendation 3**

  When the National Offender Management Service places prison services on contract they should adopt a procedure to ensures that they consider the need to impose conditions on assessing language needs for jobs in the contract.

  *Please provide evidence that this recommendation has been implemented by 30 November 2017*

- **Recommendation 4**

  Contracts with other organisations that provide services within prisons should include full details of the Welsh language services expected of providers.

  *Please provide evidence that this recommendation has been implemented by 30 November 2017*
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