



Comisiynydd y
Gymraeg
Welsh Language
Commissioner

The Welsh Language Commissioner's Enforcement Policy [Draft]

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1 Background

- 1.1 This policy is a statutory document produced in accordance with section 108 Welsh Language (Wales) Measure 2011 [Welsh Language Measure]. It is a document setting out advice and information on the Welsh Language Commissioner's [the Commissioner] intended approach to the exercise of the Commissioner's functions under Part 5 Welsh Language Measure.
- 1.2 The policy's main target audience are those relevant persons who are required to comply with one or more standards of conduct [standards] in relation to the Welsh language. The policy is also relevant to the public, and to persons¹ wishing to complain to the Commissioner about the alleged conduct of a relevant person.
- 1.3 The Commissioner will continually review the implementation of this policy, publish it on the website and display it in all of the Commissioner's offices and sites.
- 1.4 Further information regarding the Commissioner's other functions can be found on the website.

¹ A person in this context includes any individual or entity with legal personality.

2 Introduction

- 2.1 The Welsh Language Measure establishes a legal framework to impose a duty on some organizations to comply with one or more standards in relation to the Welsh language. Organizations subject to standards are called *relevant persons*. Standards will operate in the following areas:
- service delivery;
 - policy making;
 - operational;
 - promotion;
 - record keeping.
- 2.2 The duties resulting from the standards mean that relevant persons must not treat the Welsh language less favourably than the English language, together with promoting or facilitating the use of the Welsh language. This links in with the two principles that underpin the Commissioner's work namely:
- the Welsh language should be treated no 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.
- 2.3 Compliance notices given to relevant persons by the Commissioner under the Welsh Language Measure detail the specific standards they must comply with, together with the imposition days² for those standards. Copies of those compliance notices that are in force will be on the Commissioner's website.
- 2.4 Whilst a compliance notice specific to him is in force, a relevant person will be required to comply with a standard.
- 2.5 In relation to the above, the Commissioner has statutory regulatory functions under the Welsh Language Measure to ensure that relevant persons comply with their duties. This could include a standard with which the relevant person is required to comply with, an enforcement action³ imposed upon him or a settlement agreement which has been entered into. This policy provides advice and information regarding how the Commissioner will exercise those regulatory functions.
- 2.6 The regulatory functions resulting from Part 5 Welsh Language Measure are:
- produce an enforcement policy document;
 - consider carrying out statutory investigations into suspected failures of relevant persons to comply;
 - deal with complaints regarding the alleged conduct of relevant persons;

² The day from which a person is to be required to comply with the standard or with the standard in a respect.

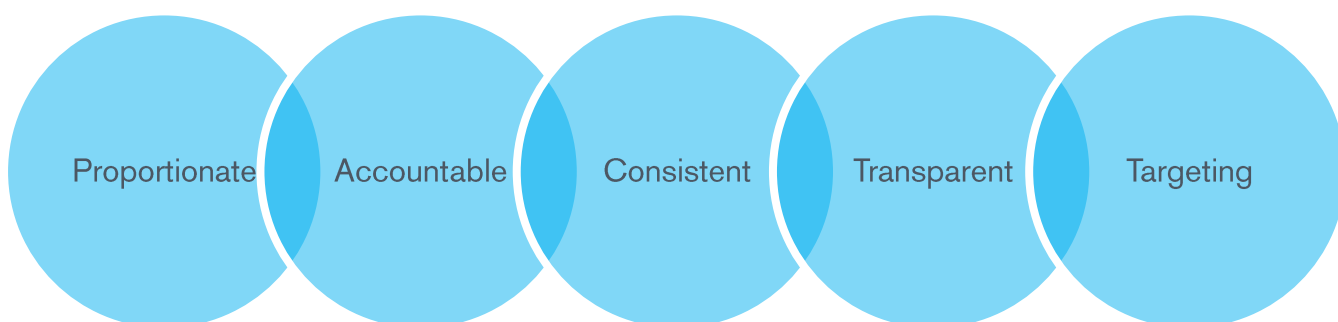
³ Enforcement action is the name given to the actions noted in clause 8.5(ii) of this policy.

- undertake statutory investigations into suspected failures of relevant persons to comply;
- use powers to prevent the continuation or repetition of failures to comply;
- impose civil penalties for the failures of relevant persons to comply;
- make applications to a county court for orders to enforce compliance;
- comply with the duties resulting from appeals and applications for reviews made to the Welsh Language Tribunal [the Tribunal]; and
- create and maintain a register of enforcement action.

2.7 There are statutory processes to be followed as the Commissioner exercises its regulatory functions. This policy details the aspects associated with those processes.

3 Regulation principles

- 3.1 The Legislative and Regulatory Reform Act 2006 requires some regulators⁴ to have regard to the principles of good regulation in exercising specific regulatory functions.
- 3.2 In accordance with section 23 of the act noted above, the Regulators' Code was produced and came into force on 6 April 2014, superseding the previous Regulators' Compliance Code and the Enforcement Concordat. The code provides a clear framework for how regulators should engage with those they regulate. There is no statutory duty on the Commissioner to follow the code, but full consideration was given to it in producing this policy in accordance with the recommendations of the Better Regulation Delivery Office⁵ and the Welsh Government⁶.
- 3.3 The Commissioner will act in a firm but fair manner using the most appropriate powers in order to carry out the Commissioner's functions and ensure compliance. In accordance with the above, the Commissioner will exercise its regulatory functions by following the five principles noted below:



(i) **Proportionate**

- 3.4 In considering a suspected failure of a relevant person to comply, the Commissioner will be proportionate in deciding whether or not a statutory investigation should be undertaken. With this in mind, the Commissioner will consider the facts of each case individually, paying attention to specific criteria in reaching a decision.
- 3.5 In deciding what subsequent action to take as a result of determining that there has been a failure to comply, the Commissioner will consider what is proportionate in order to prevent the continuation or repetition of the failure.
- 3.6 If it becomes apparent that a relevant person has failed to comply with an enforcement action or settlement agreement, the Commissioner will escalate the response and take further action against the relevant person.

⁴ The Commissioner has a relevant regulator status under the provisions of the Local Government (Wales) Measure 2009.

⁵ In their document '*Regulators' Code: Frequently Asked Questions*', the Better Regulation Delivery Office notes "We recommend that regulators acting outside the statutory scope of the Regulators' Code should adopt it on a voluntary basis".

⁶ In its document '*Inspection, Audit and Regulation in Wales*', the Welsh Government notes that it "expect[s] regulatory enforcement in Wales to follow the principles set out" above.

(ii) **Accountable**

- 3.7 The Commissioner will be accountable for the decisions made by receiving comments and feedback about the enforcement work and the way in which powers are used. The Commissioner has a complaints procedure which a person can use in order to express any concerns regarding the Commissioner's work and decisions⁷.
- 3.8 The Welsh Language Measure provides a mechanism that gives relevant persons and complainants the right to appeal to the Tribunal against some of the Commissioner's decisions. Also, with the permission of the Tribunal, complainants may apply to it to review the Commissioner's decision in some cases. Those rights are detailed under the relevant sections in this policy.

(iii) **Consistent**

- 3.9 The Commissioner will be consistent in implementing the enforcement policy and in making decisions regarding it. To this end, consistency does not mean that the Commissioner will take the same action with the same kind of case at all times. Rather, it means that the Commissioner will employ a consistent manner in considering the facts of all cases individually and in deciding on an appropriate response. By acting in this way, the Commissioner will ensure fairness, objectivity and impartiality in dealing with various parties.

(iv) **Transparent**

- 3.10 The Commissioner will be transparent in dealing with its regulatory functions by ensuring that the public and relevant persons understand how those functions are exercised. The Commissioner keeps a record of the details of all statutory investigations undertaken, including any subsequent action taken, by maintaining a register of enforcement action.

(v) **Targeting**

- 3.11 The Commissioner will target the regulatory work by acting on the basis of specific criteria, including risk. The Commissioner will also consider sharing resources with others where possible, in order to avoid any duplication.
- 3.12 The Commissioner may work with the Ombudsman and other commissioners when undertaking a statutory investigation in some cases⁸ or use external parties to collect evidence or take some action on the Commissioner's behalf. The Commissioner will consider the circumstances of the individual case in order to reach a decision on the most appropriate course of action.

⁷ See section 15 of this policy.

⁸ See section 12 of this policy.

4 Statutory complaints under section 93 Welsh Language Measure

4.1 One of the Commissioner's regulatory functions is to deal with complaints under section 93 Welsh Language Measure. The Commissioner's focus in dealing with complaints will be on trying to obtain a satisfactory resolution for the complainant, whether it be by undertaking a statutory investigation or by other means. Where a failure to comply becomes apparent, consideration will also be given to whether subsequent action needs to be taken in order to prevent the continuation or repetition of that failure.

Submitting a complaint to the Commissioner

- 4.2 A person may complain to the Commissioner about the conduct of a relevant person in relation to a standard with which he is required to comply with.
- 4.3 The complainant must have been directly affected by the alleged conduct, or be a person acting on behalf of that person.
- 4.4 The Commissioner will accept written complaints by post, by e-mail and through the website. The Commissioner will not accept complaints through social media but, in order to ensure accessibility, it will be possible for those who cannot submit a written complaint due to their personal circumstances, to contact the Commissioner over the telephone or any other appropriate medium to explain so and to discuss their complaint. The Commissioner will make reasonable provision and provide support for them to submit their complaint through another means.
- 4.5 The Commissioner encourages complainants to complain to the relevant person in the first instance, in order to give them an opportunity to respond, and offer a resolution, where there has been a failure.
- 4.6 A complainant is expected to submit a complaint to the Commissioner within 1 year of becoming aware of the alleged conduct. Otherwise, if a complaint is submitted beyond the period of 1 year, the Commissioner will only consider it if of the opinion that it is appropriate to do so. Such situations may include, but are not restricted to, situations such as the following:
- the alleged conduct continuing;
 - a serious failure to comply becomes apparent;
 - substantial publicity in the case; or
 - the complainant having a valid reason for not submitting the complaint earlier.
- 4.7 A complainant must include adequate details regarding the following in his complaint:
- who the relevant person complained about is;
 - what the alleged conduct is;
 - how the conduct has affected the complainant; and
 - the name and contact details of the complainant.

4.8 Failure to include these details may mean that the Commissioner cannot consider the complaint further.

The Commissioner validating the complaint

4.9 The Commissioner will acknowledge receipt of all written complaints involving the conduct of a relevant person received. In acknowledging, the complainant will be informed whether or not the complaint is a valid one under section 93.

4.10 If it is concluded that the complaint is not a valid one, because it does not comply with the requirements noted in clauses 4.2 – 4.8 of this policy, the Commissioner will explain how the complainant may submit a valid complaint, if appropriate.

4.11 If it is concluded that the complaint is a valid one, then the Commissioner is under a duty to consider undertaking a statutory investigation into the question of whether the alleged conduct of the relevant person amounts to a failure to comply with a standard. Only if the Commissioner suspects that the relevant person has failed to comply with a standard may a statutory investigation be undertaken to this end. Some cases are exempt from this duty namely:

- when the complaint has been made more than 1 year after the complainant became aware of the alleged conduct;
- if the Commissioner considers the complaint to be frivolous or vexatious or one that has already been made repeatedly; or
- if the complaint is withdrawn.

4.12 If the Commissioner considers a complaint to be frivolous or vexatious, one that has already been made repeatedly, or if the complaint is withdrawn, the Commissioner will decide to close the complaint.

4.13 A number of circumstances can lead the Commissioner to conclude that a complaint is frivolous or vexatious. These could include circumstances where the complainant submits an unsubstantial complaint or changes the substance of a complaint, raises irrelevant matters, places unreasonable expectations upon the Commissioner or contacts the Commissioner in a way that is considered unreasonable.

4.14 In circumstances such as those outlined in clauses 4.10 and 4.12, the Commissioner will inform the complainant of its decision and the reasons for it, and inform him of his right, with the Tribunal's permission, to apply to it to review that decision.

4.15 Note however, that the Commissioner has the right to consider voluntarily undertaking a statutory investigation in the following circumstances:

- in the absence of a complaint about the alleged conduct (see section 5 of this policy);
- if the complaint is not a valid one; or
- if the circumstances outlined in clause 4.11 above apply.

The Commissioner dealing with the complaint

4.16 In the majority of cases, the Commissioner will contact the relevant person, giving him an opportunity to respond to the complaint allegations. This is done in order to receive

further evidence regarding the alleged conduct. The Commissioner will expect to receive a response, an explanation and, where there has been a failure, a resolution to the complaint within 10 working days. However, the Commissioner will be open to the receipt of an application for a reasonable extension (of no more than 10 further working days) by a relevant person, if there are valid reasons for doing so.

- 4.17 However, the Commissioner's right to consider undertaking a statutory investigation into the complaint right away is reserved if the individual circumstances of the complaint demand it. Such circumstances may include, but are not restricted to, circumstances such as the following:
- a complaint causing suspicion of a serious failure to comply;
 - a complaint indicating the need for enforcement action;
 - a complaint calling for urgent action; or
 - a complaint which the complainant has already referred to the relevant person.
- 4.18 In the absence of any response from the relevant person within 10 working days, or within the extension period, where such is granted, the Commissioner will consider undertaking a statutory investigation into the complaint.
- 4.19 If the Commissioner receives a response from the relevant person, there are several possible outcomes. The relevant person may reject the allegation of failure. Unless adequate evidence supporting that viewpoint is submitted, whether as part of the response or through further inquiries by the Commissioner, the Commissioner will consider undertaking a statutory investigation into the complaint. Where the evidence means that the Commissioner has no suspicion regarding the failure of a relevant person to comply with a standard, the Commissioner will refrain from undertaking a statutory investigation.
- 4.20 In other circumstances, the relevant person may acknowledge that there has been a failure, and offer an explanation and a resolution to the complaint. Where that response satisfies the Commissioner, in accordance with the criteria outlined in section 6, the Commissioner will decide not to undertake a statutory investigation.
- 4.21 The Commissioner will keep in regular contact with the complainant and the relevant person and provide a contact within the office that they can contact to discuss the complaint.
- 4.22 It will be the Commissioner's decision whether or not to undertake a statutory investigation. In reaching a decision, the Commissioner will pay attention to the criteria outlined in section 6 of this policy. After reaching a decision, the Commissioner will inform the complainant and the relevant person where relevant. If the Commissioner decides not to undertake a statutory complaint, the reasons for doing so will be explained to the complainant.
- 4.23 Should the complainant be dissatisfied with the Commissioner's decision in this respect, it will be possible for him, with the Tribunal's permission, to apply to it to review the decision. The Commissioner will inform the complainant of that right where appropriate.

5 Other evidence of a suspected failure of a relevant person to comply with a standard

- 5.1 As well as through the receipt of statutory complaints, a suspected failure of a relevant person to comply with a standard may come to the Commissioner's attention through other sources of evidence.
- 5.2 One of those sources will be the inspection work carried out by the Commissioner. The purpose of this inspection work will be to verify the compliance of relevant persons with the standards imposed upon them.
- 5.3 Beyond the inspection work, a suspected failure of a relevant person to comply with a standard may become apparent through other sources. These sources may include, but are not restricted to the following:
- information the Commissioner discovers in exercising other functions under the Welsh Language Measure;
 - information that indicates the failure of a relevant person to comply with a relevant provision in a code of practice⁹ issued by the Commissioner;
 - information that appears on the media; or
 - information from the public or any other person.
- 5.4 When a suspected failure of a relevant person to comply with a standard becomes apparent through sources such as the above, the Commissioner will carry out the same action as is outlined in clauses 4.16 – 4.22 of this policy, excepting any references to a complainant and with any reference to a 'complaint' being read as a reference to a 'case'.

⁹ Although the purpose of codes of practice is to provide practical guidance on the requirements of the standards, the Commissioner may rely upon the failure of a relevant person to comply with the contents of a code of practice as tending to establish a failure to comply with a particular standard.

6 The Commissioner's criteria in considering undertaking a statutory investigation

6.1 The Commissioner will consider the following criteria in reaching a decision on whether or not to undertake a statutory investigation.

Impact

- Is the suspected failure likely to affect/or has it affected a large number of people, or has the Commissioner received a number of complaints about the alleged conduct?
- Does the case indicate a serious suspected failure or a case that requires urgent action – e.g. a case in which the suspected failure could affect the welfare of an individual, or a case that follows a strict timetable which means that it is necessary to respond robustly and urgently?
- Is it a strategically important case – e.g. indicating a suspected failure in a policy decision that could have a detrimental long-term effect on the provision of Welsh medium services?

Probability/Risk

- Has the suspected failure or a similar failure happened before by the same relevant person?
- Is the suspected failure likely to happen again?
- Has the relevant person put adequate measures in place in order to prevent the continuation or repetition of the failure, to the extent that it is possible to do so?
- Has the relevant person failed to comply with a requirement imposed upon him following a previous statutory investigation?

Fairness and proportionality

- Would undertaking a statutory investigation be a proportionate response?
- What is the relevant person's compliance history and the nature/seriousness of the suspected failure?
- When did the imposition date come into force?
- Would undertaking a statutory investigation and the likely effect justify the cost and the use of resources to the Commissioner?
- Are there more effective methods of ensuring compliance, by preventing the continuation or repetition of the failure?

Administration

- Is the response of the relevant person to the case unacceptable or unsatisfactory?
- Is the relevant person unwilling to co-operate or has he failed to provide further evidence or information?
- Is there evidence/information from regulators or others indicating further

failures, or confirming the suspected failure?

Justice

- Would undertaking a statutory investigation have a positive effect on Welsh language users?
- Would undertaking a statutory investigation be a means for the Commissioner to ensure that justice is carried out, to the degree that this is possible?

Legal protection

- Would undertaking a statutory investigation help the Commissioner to secure the most effective and permanent positive change?

The Commissioner's regulatory objectives

- Would undertaking a statutory investigation help to achieve the Commissioner's regulatory objectives?

6.2 The criteria outlined above do not impair the Commissioner's ability to consider other matters in reaching a decision. The circumstances of each case are different and other considerations could be relevant in some cases.

6.3 All criteria do not need to be considered in all cases, and no single criterion is more important than others.

7 Statutory investigation into a suspected failure of a relevant person to comply with a standard

- 7.1 After the Commissioner has decided that undertaking a statutory investigation into a suspected failure of a relevant person to comply with a standard is appropriate, whether as a result of receiving a complaint under section 93 or through any other source, the Commissioner will then set about preparing the terms of reference.
- 7.2 The terms of reference will specify the relevant person who is being investigated and the suspected failure in question. The terms of reference may include more than one suspected failure, where relevant.
- 7.3 The relevant person and the complainant, if the statutory investigation follows a complaint made under section 93, will be given a reasonable opportunity to make representations about the proposed terms of reference. The Commissioner will consider any representations made before publishing the final terms of reference, and informing those persons of it.

Giving the relevant person and the complainant an opportunity to make representations in the course of a statutory investigation

- 7.4 In undertaking a statutory investigation, the Commissioner will give the parties mentioned in clause 7.3 above a reasonable opportunity to make representations in relation to the investigation. The Commissioner will inform these parties of the arrangements. The arrangements may include the submission of oral or written representations.
- 7.5 The Commissioner must consider representations made by the relevant person or by a legal advisor acting on behalf of that relevant person. The Commissioner will also consider representations made by a complainant if of the opinion that it is appropriate to do so. If the Commissioner decides to refuse to consider the representations of a complainant, he will be informed of the decision and the reasons for making that decision.

Giving a relevant person or any other person an evidence notice

- 7.6 An evidence notice may include a requirement upon a relevant person or any other person to do one or more of the following:
- provide information in his possession;
 - produce documents in his possession; or
 - give oral evidence.
- 7.7 An evidence notice will not require a relevant person to provide information that he is prohibited from disclosing by virtue of another enactment. Similarly, it will not require him to do anything he could not be compelled to do in proceedings before the High Court.
- 7.8 Persons must disregard an evidence notice where it requires the disclosure of information involving the intelligence service. The exact circumstances are detailed in Part 2, Schedule 10 Welsh Language Measure. In such circumstances, the person must notify the Commissioner that he is disregarding the evidence notice.

- 7.9 A person may apply to the Tribunal to have the evidence notice given to him by the Commissioner cancelled on the basis that a requirement imposed by it:
- is unnecessary having regard to the purpose of the investigation, or
 - is otherwise unreasonable or disproportionate.
- 7.10 The Commissioner may, if it thinks that a person who has received an evidence notice has failed, or is likely to fail to comply with the evidence notice without reasonable excuse, apply to a county court for an order requiring that person to comply with the evidence notice.
- 7.11 The Commissioner may, if thinks fit, pay a person that has complied with an evidence notice given to him:
- sums in respect of expenses properly incurred by the person and
 - allowances by way of compensation for the loss of the person's time.
- 7.12 The sums paid in respect of expenses are restricted to the true costs attached to providing information, producing documents or giving oral evidence. That may include any printing, copying, posting, telephone or travelling costs.
- 7.13 The allowance paid by way of compensation for the loss of the person's time is restricted to £25 an hour for the person's time in locating and extracting or providing the relevant information, document or evidence.
- 7.14 The Commissioner will only pay the allowance by way of compensation for the loss of the person's time when the cost of complying with the evidence notice would be higher than £450. (18 hours: £450 / £25) When the cost of complying with the evidence notice is less than £450, the only costs that can be claimed are the sums in respect of expenses.
- 7.15 The person must apply to the Commissioner if he wishes to claim any costs in this respect. Further details regarding how to make such an application will be given when giving the evidence notice to the person.

Power of entry and inspection

- 7.16 The Commissioner, or any person authorised by the Commissioner, has the power to enter premises under the control of a relevant person who is under investigation. Inspection of the premises must be necessary for the purposes of the investigation in the Commissioner's view or that of the authorised person. However this power does not extend to dwellings.
- 7.17 The Commissioner does not have to make an appointment and may enter without giving notice, at a reasonable time. However, the Commissioner will try to give notice to any relevant person, where it is reasonable to do so.

Contempt of court

- 7.18 If a person has committed any act that would constitute contempt of court if the investigation were proceedings in the High Court, the Commissioner may issue a certificate to that effect to the High Court.
- 7.19 The High Court may inquire into the matter and, if satisfied that the Commissioner's conclusions are correct, may deal with the person in any manner in which it could have dealt with the person had he committed contempt in relation to the High Court.
- 7.20 This power also extends to a case in which a person, without legal excuse, has prevented the Commissioner from carrying out any one or more of its functions under Part 5 Welsh Language Measure.

Deciding to discontinue a statutory investigation

- 7.21 The Commissioner may decide to discontinue a statutory investigation at any time. The reasons for deciding to discontinue a statutory investigation may include, but are not restricted to, circumstances such as the following:
- the investigation indicating disproportionate use of the Commissioner's resources;
 - evidence that a complainant had submitted false information or evidence and had done so in a dishonest way;
 - the investigation indicating early in that the relevant person had not failed to comply and therefore no justification for using resources to continue with the investigation;
 - public interest in discontinuing the investigation; or
 - a relevant person revoked.
- 7.22 On the occasions when the Commissioner decides to discontinue a statutory investigation, the Commissioner will inform those parties noted in clause 7.3 above as soon as possible after the decision is made, together with the reasons for doing so. If the statutory investigation follows a complaint made under section 93, the complainant will be informed of his right, with the Tribunal's permission, to apply to it to review that decision.

Determination of statutory investigation

- 7.23 Before finally determining a statutory investigation, the Commissioner will give the parties mentioned in clause 7.3 above an opportunity to make representations about any proposals attached to the determination the Commissioner is proposing to make. Those parties will be able to make representations, within a period of 28 days. Having given due regard to any representations made, the Commissioner will provide final copies of the decision notice and the statutory investigation report to the parties.
- 7.24 Those parties will be able to make representations about the following proposals:
- notice of the determination which the Commissioner is proposing to make;
 - draft of the proposed statutory investigation report.
- 7.25 The relevant person will also be able to make representations about the following proposals:

- o a notice of whether or not the Commissioner is proposing to take further action, and a statement of the Commissioner's reasons for proposing to do so;
- o if the Commissioner is proposing to take further action, notice of that proposed action, and a statement of the Commissioner's reasons for proposing to take that action; and
- o copies of the draft of the decision notice which the Commissioner is proposing to give.

8 Determination of a statutory investigation into a suspected failure of a relevant person to comply with a standard

- 8.1 Having undertaken a statutory investigation into a suspected failure of a relevant person to comply with a standard, the Commissioner must make a final determination.
- 8.2 The various actions the Commissioner may take, depending on the kind of determination made, are explained below. The Commissioner will inform the relevant person and the complainant (if the investigation follows a complaint made under section 93) of the determination, by giving a decision notice to them.

No failure to comply with a standard

- 8.3 Where it is determined **that the relevant person has not failed** to comply with a standard, the Commissioner may do the following:
- (i) take no further action; or
 - (ii) give the relevant person or any other person recommendations and/or advice.
- 8.4 If the investigation that led to the determination followed a complaint made under section 93, the complainant may appeal to the Tribunal against the determination on the grounds that the relevant person did fail to comply with a standard. An appeal must be made before the end of a 28 day period beginning with the day on which the Commissioner gives the decision notice¹⁰. More details about this right will be given when giving the decision notice to the complainant. In an appeal of this kind, the relevant person may apply to the Tribunal to be added as a party to the proceedings.

Failure to comply with a standard

- 8.5 Where it is determined **that the relevant person has failed** to comply with a standard, the Commissioner may do the following:
- (i) take no further action; or
 - (ii) one or more of the following:
 - o require the relevant person to prepare an action plan for the purpose of preventing the continuation or repetition of the failure
 - o require the relevant person to take steps for the purpose of preventing the continuation or repetition of the failure
 - o publicise the relevant person's failure to comply with a standard
 - o require the relevant person to publicise the failure to comply with a standard
 - o impose a civil penalty on the relevant person; or
 - (iii) one or more of the following:
 - o give the relevant person or any other person recommendations
 - o give the relevant person or any other person advice
 - o seek to enter into a settlement agreement with the relevant person.

¹⁰ The Tribunal may, on a written application by the complainant, allow an appeal to be made after the end of the relevant period of 28 days, in accordance with the requirements of section 99(4) Welsh Language Measure.

- 8.6 Where the Commissioner determines that the relevant person has failed to comply with a standard, that relevant person may appeal to the Tribunal against the determination on the grounds that he did not fail to comply with a standard. An appeal must be made before the end of a 28 day period beginning with the day on which the Commissioner gives the decision notice¹¹. More details of this right will be given when giving the decision notice to the relevant person. In such an appeal, and if the statutory investigation that led to the decision followed a complaint made under section 93, the complainant may apply to the Tribunal to be added as a party to the proceedings.
- 8.7 If any one or more of the actions noted in clause 8.5(ii) above are imposed on the relevant person, the relevant person may appeal to the Tribunal against those actions on the grounds that they are unreasonable and disproportionate. Similarly, an appeal must be made before the end of a 28 day period beginning with the day on which the Commissioner gives the decision notice¹². More details of this right will be given when giving the decision notice to the relevant person.

Explanation of the powers available to the Commissioner

Take no further action

- 8.8 When the Commissioner decides to take no further action, the relevant person will not be required to take any further action. However, the duty to comply with the standard will continue.

Give recommendations and/or advice

- 8.9 When the Commissioner decides to give the relevant person or any other person recommendations and/or advice as a result of a determination of a failure to comply, it will do so with the intention of providing guidance in relation to how to prevent the continuation or repetition of that failure. Where it is determined that there was no failure to comply, the Commissioner will give the relevant person or any other person recommendations and/or advice for the purpose of ensuring continuous compliance.

Requirement to prepare an action plan for the purpose of preventing the continuation or repetition of the failure

- 8.10 When the Commissioner decides to require the relevant person to prepare an action plan for the purpose of preventing the continuation or repetition of the failure, the decision notice will set out what he is required to do. The decision notice will also specify the timetable for giving the first draft plan to the Commissioner, and the consequences if he does not comply with that requirement.
- 8.11 If the first draft plan given to the Commissioner is not adequate for the purposes of preventing the continuation or repetition of the failure, the Commissioner will give the relevant person a notice to that effect and require him to give the Commissioner a revised draft within a specified time. The Commissioner may also make recommendations about the content of that revised draft.

¹¹ The Tribunal may, on a written application by the relevant person, allow an appeal to be made after the end of the relevant period of 28 days, in accordance with the requirements of section 95(6) Welsh Language Measure.

¹² Again, the Tribunal may, on a written application by the relevant person, allow an appeal to be made after the end of the relevant period of 28 days, in accordance with the requirements of section 95(6) Welsh Language Measure.

8.12 In considering whether a draft action plan is adequate the Commissioner may issue an evidence notice to any person and/or enter into the premises of the relevant person as it may do in relation to a statutory investigation as noted in clauses 7.6 – 7.17 of this policy.

8.13 The Commissioner may also apply to a county court for an order requiring the relevant person to give the Commissioner a first draft plan or revised draft plan by a time specified in the order. In respect of a revised draft plan, the order may also specify any directions about the plan's content.

8.14 An action plan comes into force either:

- at the end of a period of six weeks beginning with the date on which a first draft or revised draft is given to the Commissioner, if that period expires without the Commissioner giving a notice to the relevant person as noted in clause 8.11 above or without the Commissioner applying to the county court as noted in clause 8.13 above; or
- upon a county court's declining to make an order as noted in clause 8.13 in respect of a revised draft of the plan.

Requirement to take steps for the purpose of preventing the continuation or repetition of the failure

8.15 When the Commissioner decides to require the relevant person to take steps for the purpose of preventing the continuation or repetition of the failure, the decision notice will set out what he is required to do and the consequences if he does not comply with that requirement. The specific action takes effect at the end of the period of 28 days for making an appeal.

Publicising the failure

8.16 In deciding to publicise the failure of the relevant person to comply with a standard, the Commissioner may decide to publicise any one or more of the following:

- a statement that the relevant person has failed to comply with a standard; or
- the statutory investigation report.

8.17 Similarly, when the Commissioner requires the relevant person to publicise his failure to comply, he may be required to publicise any one or more of the above or any other information relating to the relevant person's failure to comply with a standard.

8.18 The decision notice will set out what the Commissioner is to do and/or what the relevant person is to do in order to publicise, and the consequences if the relevant person does not comply with that requirement. The duty to publicise will take effect at the end of the period of 28 days for making an appeal.

Civil penalties

8.19 When the Commissioner decides to impose a civil penalty on the relevant person, the maximum penalty will be £5,000. Note, however, that the Welsh Ministers may, by order, substitute a different amount to this maximum penalty.

8.20 All civil penalties received will be paid into the Welsh Consolidated Fund¹³.

8.21 In respect of a civil penalty, the decision notice will set out the following details:

- the sum of the civil penalty;
- how the civil penalty may be paid;
- the period within which the civil penalty must be paid;
- the consequences if the civil penalty is not paid; and
- the relevant person's right to appeal against the civil penalty.

8.22 See section 10 of this policy for more details about the Commissioner's decisions in respect of civil penalties.

Settlement Agreements

8.23 In entering into to a settlement agreement the Commissioner will agree not to take enforcement action in respect of the failure whilst the relevant person agrees not to fail to comply with one or more of the standards; and/or to take particular action; and/or to refrain from taking particular action.

8.24 The relevant person does not have to enter into a settlement agreement but if he refuses to do so, the Commissioner may decide to exercise other enforcement powers.

8.25 The relevant person is not to be taken to have admitted the failure by reason only of entering into a settlement agreement.

Appeals by the complainant and the relevant person

8.26 Clauses 8.4, 8.6 and 8.7 of this policy gives details of the right of the relevant person, and a complainant, if the statutory investigation follows a complaint made under section 93, to appeal against the Commissioner's decisions in respect of a determination of a statutory investigation. In determining an appeal, the Tribunal may affirm or annul the Commissioner's determination. In an appeal as noted in clause 8.7, the Tribunal may affirm, vary or annul the enforcement action.

8.27 Any decision of the Tribunal on an appeal has the same effect, and may be enforced in the same manner, as a determination of the Commissioner.

8.28 If neither the relevant person, nor the complainant, if the statutory investigation follows a complaint made under section 93, are parties in an appeal, the Commissioner will inform them of the Tribunal's decision.

8.29 The Commissioner, the complainant or the relevant person, may afterwards, with the permission of the Tribunal or the High Court, appeal to the High Court on a question of law arising out of the Tribunal's decision.

8.30 The High Court may affirm the Tribunal's decision or set its decision aside. If the High Court sets the Tribunal's decision aside, it must either remit the case to the Tribunal for reconsideration or re-make the decision itself.

¹³ The Fund was established by the Government of Wales Act 2006. It is a fund of public money allocated to Wales through various sources.

8.31 Note that the appeals are subject to the Tribunal Rules. Further details about those rules together with details of how to appeal can be obtained by contacting the Tribunal directly.

9 Failure to comply with a standard

- 9.1 Where it is determined, at the end of a statutory investigation into a suspected failure of a relevant person to comply with a standard, that the relevant person has failed to comply with a standard, the Commissioner will go about deciding what action is to be taken in response to that failure.
- 9.2 Outlined below are the criteria the Commissioner will follow in making that decision. As the circumstances of each failure will be different, the Commissioner will consider the individual facts and consider the following:
- Is the relevant person complying in part or not at all?
 - How has the relevant person failed to comply with the standard?
 - Has the relevant person acknowledged that the failure to comply has taken place?
 - Has the relevant person already taken steps to prevent the continuation or repetition of the failure?
 - Does the relevant person have a good or a poor compliance history?
 - Has the relevant person co-operated with the Commissioner in responding to the failure?
 - Was the relevant person aware that the failure existed?
 - Had the relevant person followed the advice and/or recommendations of the Commissioner?
 - Was the failure deliberate?
 - Did the relevant person gain any financial benefit or any other advantage as a result of the failure?
 - Had the relevant person behaved dishonestly?¹⁴
 - Is it a failure that has happened before?
 - Has the failure affected a large number of people?
 - Has the failure affected the health or welfare of an individual?
 - Is the failure the result of an administrative error?
 - Is the failure continuing?
- 9.3 The above list of questions is not exhaustive, but it will be used by the Commissioner as a basis for deciding on what course of action to take, for the purpose of preventing the continuation or repetition of the failure.
- 9.4 To this end, the Commissioner may take action in one or more of the following ways:
- (i) restore compliance following the failure;
 - (ii) enforce compliance following the failure; or
 - (iii) impose a civil penalty for the failure.

¹⁴ If it appears that the relevant person has behaved illegally, the Commissioner will contact the Police if appropriate.

(i) **Restore compliance following the failure**

9.5 As far as possible, the Commissioner will try to ensure that a relevant person restores compliance voluntarily following the failure. The Commissioner will need adequate assurance regarding the willingness of the relevant person to co-operate and to take steps to prevent the continuation or repetition of the failure.

9.6 To this end, there are several steps the Commissioner may decide to take, namely:

- o take no further action; or
- o give the relevant person or any other person advice and/or recommendations; and/or
- o seek to enter into a settlement agreement with the relevant person.

9.7 The exact steps the Commissioner decides to take will depend on the exact nature of the failure in question together with the associated circumstances.

(ii) **Enforce compliance following the failure**

9.8 Where it is not possible to ensure that a relevant person restores compliance voluntarily as a result of the failure, the Commissioner will take steps to enforce him to comply.

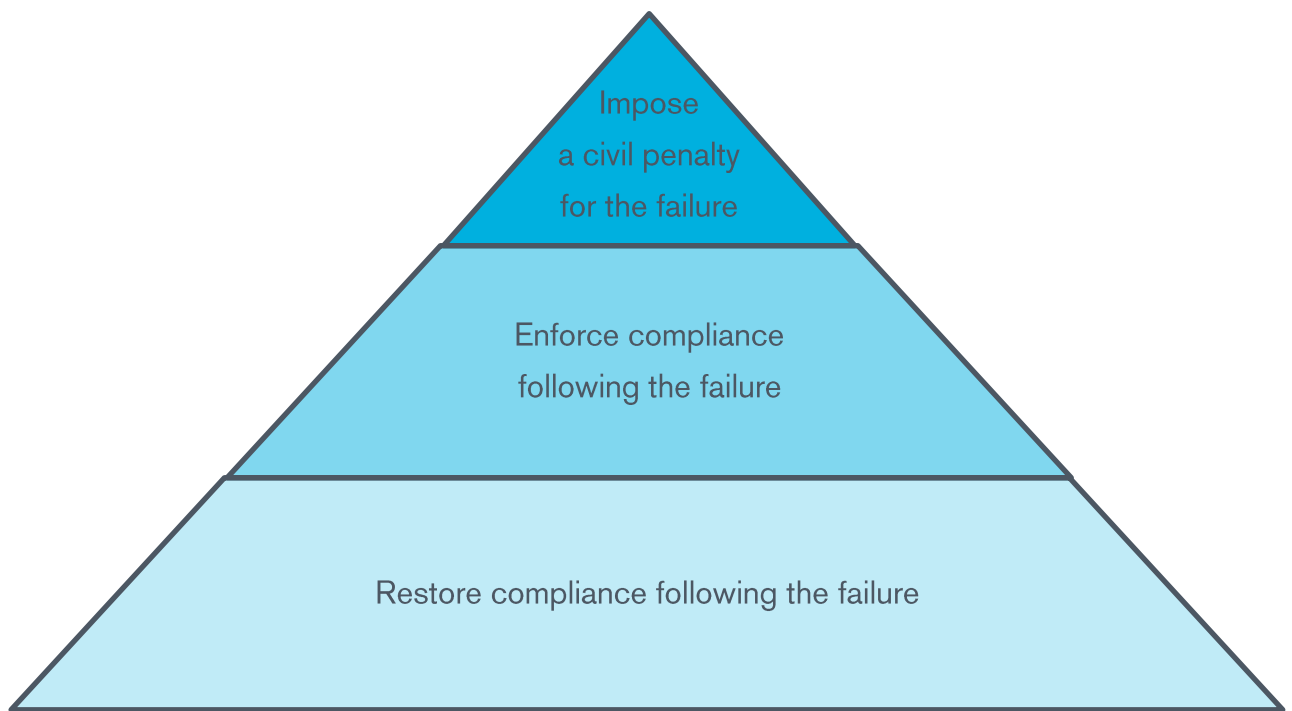
9.9 To this end, there are several steps the Commissioner may decide to take, namely:

- o require the relevant person to take specific steps for the purpose of preventing the continuation or repetition of the failure; and/or
- o require the relevant person to prepare an action plan for the purpose of preventing the continuation or repetition of the failure; and/or
- o publicise the failure of a relevant person to comply; and/or
- o require the relevant person to publicise his failure to comply.

(iii) **Impose a civil penalty for the failure**

9.10 With the most serious failures, the Commissioner will be of the opinion that it is necessary to impose a civil penalty on the relevant person together with other enforcement action, in order to prevent the continuation or repetition of the failure. Imposing a civil penalty on a relevant person will also be a means for the Commissioner to ensure that the rights of Welsh speakers are protected.

9.11 Again, the individual circumstances of each failure will vary from case to case and it is not possible for the Commissioner to follow closed criteria in deciding what action to take. However, the figure below provides an overview of the steps the Commissioner will mostly take. The figure also reflects the Commissioner's aim of concentrating on results in regulating, and to use the civil penalty with the most serious failures only.



Restore compliance following the failure

- Take no further action
- Give the relevant person or any other person advice and/or recommendations
- Seek to enter into a settlement agreement with the relevant person

Enforce compliance following the failure

- Require the relevant person to take specific steps for the purpose of preventing the continuation or repetition of the failure
- Require the relevant person to prepare an action plan for the purpose of preventing the continuation or repetition of the failure
- Publicise the failure of a relevant person to comply
- Require the relevant person to publicise his failure to comply

Impose a civil penalty for the failure

- Impose a civil penalty on the relevant person

10 Civil penalty

10.1 In determining whether to impose a civil penalty on a relevant person for a failure to comply, the Commissioner will have regard to a number of different matters. The Welsh Language Measure places a specific duty upon the Commissioner to have regard to specific matters and any other matters when determining in this respect.

10.2 Those specific matters which the Commissioner must have regard to are the following:

- the seriousness of the matter in respect of which the civil penalty is to be imposed;
- the circumstances of the person on whom the civil penalty is to be imposed; and
- the need to prevent the continuation or repetition of the matter in respect of which the civil penalty is to be imposed.

10.3 The Commissioner will also have regard to any other matters relevant to the statutory investigation in question. None of these matters are more important than others and will be considered alongside each other.

The seriousness of the matter in respect of which the civil penalty is to be imposed:

10.4 In reaching a decision on whether to impose a civil penalty upon a relevant person or not, the Commissioner will use the following decision framework in assessing the seriousness of the failure.

Question 1: Is there a serious failure to comply?

10.5 The kinds of failures that may be considered serious may include, but are not restricted to failures such as, the following:

- a failure that has placed an individual at a disadvantage;
- a failure that has affected a democratic process;
- a failure that has affected the health or welfare of an individual;
- a failure that has caused damage or distress to an individual¹⁵;
- a failure to provide a service that is necessary or compulsory; and
- a failure to comply with a requirement imposed as a result of a previous statutory investigation.

Question 2: Was it a deliberate failure to comply?

10.6 The Commissioner will consider a failure to be deliberate if the relevant person had taken specific steps or had not taken specific steps with the intention of not complying. The fact that a relevant person has not taken steps to ensure compliance can satisfy this condition.

¹⁵ What is meant by 'damage' is any loss that can be measured financially. In terms of 'distress', this may include any physical injury, injury to feelings or any concern caused to an individual.

Question 3: Did the relevant person know or should the relevant person have known that there was a risk of a failure taking place and that risk was likely to be a serious one?

10.7 The Commissioner will conclude that the relevant person knew or should have known that there was a risk of a failure taking place and that risk was likely to be a serious one if:

- the likelihood of a failure would have been obvious to any reasonable person in the Commissioner's opinion;
- the relevant person was aware that the failure was likely and had not taken adequate steps to prevent that failure from taking place; or if
- the relevant person had not taken steps to ensure compliance.

Question 4: Were any reasonable steps taken to try and prevent the failure from taking place?

10.8 The Commissioner may consider that the relevant person had taken reasonable steps to try and prevent the failure from happening if he had acted in accordance with:

- relevant guidelines given by the Commissioner;
- the advice or recommendations of the Commissioner; or
- relevant codes of practice issued by the Commissioner.

10.9 The fact that a relevant person has taken reasonable steps to try and prevent the failure from taking place will not in itself mean that the Commissioner will not impose a civil penalty on him. The Commissioner's decision will depend on the kind of steps taken and whether the seriousness of the failure itself was substantially higher than the steps taken.

The circumstances of the relevant person on whom the civil penalty is to be imposed:

10.10 In reaching a decision on whether to impose a civil penalty on a relevant person or not, the Commissioner will consider whether doing so would be proportionate to the circumstances of the relevant person at the time the decision is made.

The need to prevent the continuation or repetition of the matter in respect of which the civil penalty is to be imposed:

10.11 In reaching a decision on whether to impose a civil penalty on a relevant person or not, the Commissioner will consider whether the imposition of other enforcement steps would be adequate in order to prevent the continuation or repetition of the failure.

Other relevant matters:

10.12 The Commissioner may have regard to any other matter that is relevant, in the Commissioner's view, in deciding whether a civil penalty should be imposed on a relevant person or not.

10.13 As a matter of policy, after the Commissioner has decided to impose a civil penalty upon a relevant person, the sum imposed will be £5,000. In using the maximum, the Commissioner hopes to ensure an adequate deterrent in relation to the failure; prevent other relevant persons from failing to comply in the same manner and ensure that the rights of Welsh speakers are adequately protected.

11 Failure to comply with an enforcement action or a settlement agreement

- 11.1 In cases where the Commissioner has entered into a settlement agreement with the relevant person or imposed one or more enforcement action on him, the Commissioner will verify compliance with those requirements in order to ensure that the regulatory objectives are achieved.
- 11.2 It may become apparent in some cases that a relevant person has failed to comply with these requirements. In such cases, the Commissioner will escalate the response by taking further action against the relevant person.

Failure to comply with a settlement agreement

- 11.3 If it becomes apparent that a relevant person has failed to comply with a requirement in a settlement agreement, the Commissioner may apply to a county court for an order requiring the relevant person to comply with that requirement.
- 11.4 Please note that the Commissioner's right to apply to a county court for an order to require compliance with a settlement agreement remains in force for a relevant period of 5 years beginning on the day when the settlement agreement is entered into.

Failure to comply with an enforcement action

- 11.5 If it becomes apparent that a relevant person has failed to comply with an enforcement action imposed on him, there are several different steps the Commissioner may take against the relevant person. As with the above, the Commissioner may apply to a county court for an order to require the relevant person to comply with the enforcement action. The Commissioner's right to apply to a county court for an order to require compliance with an enforcement action remains in force for a period of 5 years beginning on the day when the decision notice is given to the relevant person, or in relation to a failure to comply with an action plan, the day when the action plan comes into force.
- 11.6 The Commissioner may also undertake a further statutory investigation into whether a relevant person has failed to comply with an enforcement action imposed upon him. The Commissioner will consider the criteria outlined in section 6 of this policy in reaching a decision on the most appropriate course of action.
- 11.7 Unlike a statutory investigation undertaken into a suspected failure of a relevant person to comply with a standard, the Commissioner does not have to suspect that a relevant person has failed to comply with an enforcement action in order to undertake a statutory investigation as outlined in 11.6.
- 11.8 To this end, the Commissioner will not give the relevant person an opportunity to respond to the allegations before deciding whether or not to undertake the investigation. Except for this, the same processes will be followed as outlined in sections 7 – 10 of this policy, excluding any references to a complainant and reading any reference to a 'standard' as a reference to an 'enforcement action'. Note that the Commissioner has the same powers

available as is in a statutory investigation into a suspected failure of a relevant person to comply with a standard.¹⁶

11.9 The above is not relevant in respect of failure to comply with a civil penalty imposed. However, the Commissioner may recover an unpaid civil penalty as a debt owed to the Commissioner. This may include taking legal action against the relevant person in the Civil Court.

¹⁶ Note that only in respect of failure to comply with a standard may the Commissioner seek to enter into a settlement agreement with a relevant person.

12 Working with the Ombudsman and other commissioners

- 12.1 Sections 20 and 21 Welsh Language Measure outline to what degree the Commissioner may work collaboratively with the Ombudsman¹⁷ and other commissioners¹⁸.
- 12.2 If it appears to the Commissioner that the subject matter of the Commissioner's statutory investigation is a matter which could also be the subject of an investigation by the Ombudsman or another commissioner, the Commissioner, if of the opinion that it is appropriate, will do the following:
- inform the Ombudsman or the relevant commissioner of the statutory investigation, including the Commissioner's proposals for undertaking the investigation; and
 - consult with the Ombudsman or the relevant commissioner in relation to the statutory investigation.
- 12.3 If it becomes apparent, as a result of the above, that both parties are investigating the same matter, they may do any or all of the following:
- co-operate with each other in relation to their separate investigations;
 - conduct a joint investigation; and
 - prepare and publish a joint report in relation to their separate investigations or their joint investigation.
- 12.4 If the Commissioner does not undertake a statutory investigation, the Commissioner, if thinks it appropriate, will give the person seeking to bring the case information regarding how to refer the connected matter to the Ombudsman or another relevant commissioner. The Commissioner will also give that information to any other person interested in the case.

¹⁷ Thus being the Public Services Ombudsman for Wales.

¹⁸ Namely the Children's Commissioner for Wales, the Older People's Commissioner for Wales and the Equality and Human Rights Commission.

13 Register of enforcement action

- 13.1 In accordance with section 109(1) Welsh Language Measure, the Commissioner must maintain a register of enforcement action noting details of every statutory investigation undertaken by the Commissioner.
- 13.2 A copy of the current register is available for inspection at the Commissioner's office and an electronic copy is available on the Commissioner's website.
- 13.3 The register includes the following details:
- a description of every statutory investigation undertaken by the Commissioner;
 - the Commissioner's findings on the statutory investigations;
 - the Commissioner's determination on the statutory investigations;
 - a statement noting whether or not the Commissioner took further action;
 - if the Commissioner took further action, a statement of that action;
 - details of decision notices; and
 - details of appeals made to the Tribunal under Part 5 Welsh Language Measure.
- 13.4 The Commissioner will keep the register up to date.

14 Glossary of terms

14.1 The following glossary of terms does not include legal definitions but provides a concise explanation of their meanings.

Term	Explanation
Enforcement action	<p>Enforcement action is the name given for the following actions:</p> <ul style="list-style-type: none"> ○ a requirement upon a relevant person to prepare an action plan for the purpose of preventing the continuation or repetition of a failure to comply; ○ a requirement upon the relevant person to take specific steps for the purpose of preventing the continuation or repetition of a failure to comply; ○ the Commissioner publicising a failure of the relevant person to comply; ○ a requirement upon the relevant person to publicise his failure to comply; and ○ a civil penalty imposed on the relevant person.
Register of enforcement action	<p>This is the name given to the register which the Commissioner must maintain. See section 13 of this policy for more details.</p>
Commissioner	<p>All references to the Commissioner in this document are references to the Welsh Language Commissioner, a post created under the Welsh Language (Wales) Measure 2011.</p>
Statutory complaint	<p>A complaint any person may submit to the Commissioner about the conduct of a relevant person in relation to a standard with which he is required to comply. See section 4 of this policy for more details.</p>
Settlement agreement	<p>Seeking to enter into a settlement agreement is one of the steps the Commissioner may take after determining, as the result of a statutory investigation, that a relevant person has failed to comply with a standard. See clauses 8.23 – 8.25 of this policy for more details.</p>
Imposition day	<p>The day from which a person is to be required to comply with a standard or with a standard in a respect.</p>
Compliance notice	<p>A notice given to relevant persons by the Commissioner detailing the specific standards they must comply with, together with the imposition days for those standards.</p>
Evidence notice	<p>A notice the Commissioner may give to a person in a statutory investigation. An evidence notice may include a requirement upon a person to do one or more of the following:</p> <ul style="list-style-type: none"> ○ provide information in his possession; ○ produce documents in his possession; or

Term	Explanation
	<ul style="list-style-type: none"> ○ give oral evidence. <p>See clauses 7.6 – 7.15 of this policy for more details.</p>
Welsh Language Measure	All references to the Welsh Language Measure in this document are references to the Welsh Language (Wales) Measure 2011.
Relevant person	Relevant person is the name given to an organization that is under a duty to comply with one or more standards of conduct.
Enforcement Policy	<p>This document. It is a document which the Commissioner is required to produce under section 108 Welsh Language Measure and which sets out advice and information on the Commissioner's intended approach to the exercise of the Commissioner's functions under Part 5 Welsh Language Measure.</p> <p>The Commissioner may not produce or amend the document without the approval of the Welsh Ministers.</p>
Power of entry and inspection	<p>A power the Commissioner has in respect of a statutory investigation. The Commissioner may enter premises controlled by a relevant person who is under investigation if of the opinion that it is necessary to inspect them for the purposes of the investigation. See clauses 7.16 and 7.17 for more details.</p> <p>This power also applies in relation to consideration by the Commissioner of the adequacy of a draft action plan. See clause 8.12 for more details.</p>
Standards	<p>All references to standards in this document refer to standards of conduct specified by the Welsh Ministers by regulations. Standards will operate in the following areas:</p> <ul style="list-style-type: none"> ○ service delivery; ○ policy making; ○ operational; ○ promotion; and ○ record keeping.
Regulatory functions	This is the name given to describe the Commissioner's duties and powers under Part 5 Welsh Language Measure.
The Tribunal	All references to the Tribunal in this document are references to the Welsh Language Tribunal. The Tribunal was established by the Welsh Language (Wales) Measure 2011 to deal with appeals and applications for reviews of some of the Commissioner's decisions. More information can be obtained by contacting the Tribunal directly.

Term	Explanation
Statutory investigation	A statutory investigation is an investigation undertaken by the Commissioner under section 71 Welsh Language Measure in order to determine whether or not a relevant person has failed to comply with a requirement imposed on him. Such a requirement may be a standard with which a relevant person is required to comply with or an enforcement action imposed upon him as the result of a previous statutory investigation.

15 Complaints procedure about the actions of the Commissioner

- 15.1 The Commissioner has a specific complaints procedure available if any person wishes to complain about acts or omissions relating to the exercise of the Commissioner's functions.
- 15.2 This procedure has been established in accordance with section 14 Welsh Language Measure.
- 15.3 Further details regarding this procedure are available on the website or by contacting the Commissioner directly.
- 15.4 The Commissioner can be contacted using the details below:

0845 6033 221

post@welshlanguagecommissioner.org

welshlanguagecommissioner.org

Welsh Language Commissioner
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