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## Translating *y Cofnod*: Translation policy and the official status of the Welsh language in Wales

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### ABSTRACT

It might safely be said that no issue is as politically contentious in Wales as that of the status of the Welsh language in society in general and in public life in particular, along with its relationship to the English language. This article draws upon a range of papers from within the National Assembly for Wales (NAfW) and the Welsh Government, some of which have been made available only as a result of a series of Freedom of Information (FOI) requests, in its careful examination of how the translation policy of the Welsh Assembly became the subject of a very excited and divisive public row. Moreover, the article shows how this translation problem evolved into a matter of constitutional difficulty, as yet unresolved, at the highest level of public life in Wales.

### KEYWORDS

Welsh language; official language; translation policy; constitution; language law; sovereignty

This article comprises an in-depth examination of the development of the Welsh–English/English–Welsh translation policy of the Commission of the National Assembly for Wales (henceforth “the Commission”) as it led to the National Assembly for Wales (Official Languages) Act 2012.<sup>1</sup> It examines the origins of the 2012 Act by tracing the development of the politicized and, at times, public dispute regarding the purpose and function of the translation of the official record of the proceedings of the National Assembly for Wales (NAfW), known as “*y Cofnod*”. The nature of the policy development process is subject to special scrutiny, revealing a substantive constitutional issue lying at the heart of the problem of translating *y Cofnod*. This issue is most revealing with regard to Welsh political sovereignty. On the surface, the difficulties encountered by the elected members of the NAfW and their civil servants, along with their expert advisors, turn upon the meaning and purpose of the activity of translation as the NAfW conducts its daily business on behalf of the people of Wales, a polity in which both Welsh and English have official status. However, in attempting to resolve this ostensibly practical concern, these various actors gradually opened up a problem of much greater complexity regarding the nature of political power and the constitutional relationship of certain public bodies operating at the apex of political life in Wales.

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## The Commission and y Cofnod

The term “y Cofnod” may be translated literally as “the Record”. It refers to the official record of the proceedings or, to put it more specifically, the plenary meetings of the NAFW and it may be understood simply as the Welsh equivalent of the UK Parliament’s Hansard. It is central to enabling the NAFW to operate as a bilingual (Welsh/English) institution. The Commission has, through statute, namely under Section 27 of the Government of Wales Act 2006, responsibility for y Cofnod.

In July 2009 the Commission announced a change of practice in that the Record would be made only of the words spoken in the language in which they were spoken, thereby ceasing the practice of translating contributions made in English to the Welsh language.<sup>2</sup> This change, it was argued by the Commission, would save around £250,000 per annum.

There then followed a public dispute, during which Cynog Dafis AM (Assembly Member) Plaid Cymru argued that such a change meant that the Welsh language had lower status than that of the English language in the NAFW.<sup>3</sup> The Welsh Language Board (WLB) intervened, declaring that this was counter to the commitments made in the *Welsh Language Scheme* of the NAFW. As reported by news media at the time (BBC, August 13, 2009), the WLB noted in a letter to the president of the Commission that in the *Welsh Language Scheme* of the NAFW the following commitment is made: “Cyhoeddir Cofnod gair-am-air dwyieithog o bob Cyfarfod Llawn” (A bilingual word-for-word Record of each Full Meeting will be published). The specific commitment in the English-language version of the Welsh Language Scheme is as follows: “A bilingual verbatim record is published of each Plenary meeting”, noting that this had been implemented “since May 2004 and continually” (National Assembly for Wales 2007, para. 4.8).

By 30 September 2009 an interim agreement was reached between the Commission and the NAFW to publish an English-to-Welsh translation of the proceedings within 10 days rather than within 24 hours, as previously, and that the issue be subject to a “full and transparent” review (National Assembly for Wales 2009). However, it is clear from the minutes of the 21 September 2009 Commission meeting at which these issues were discussed that the members were in fact divided and able to arrive at only a majority decision.<sup>4</sup>

## The independent review panel

The NAFW determined to resolve the issue by creating an independent review panel to examine the matter and propose a way forward. The Panel comprised authoritative lay and expert academic members. The Panel’s deliberations were also informed by evidence provided by other, anonymous expert academics whose evidence was not made available publicly, in contrast with the practice that characterized the other stages. They remain unknown and their evidence unpublished. In taking up his appointment in autumn 2009, the chair asserted that the Panel would canvas opinion in the form of a series of public consultations as well as accepting submissions from the public and interested parties.

The Panel reported in May 2010. Much of its report turns around a single key question, defined by the Panel as follows: “Many of our deliberations focused on the principles that define what is a ‘true’ record, not only of what is said in discussion but also how and where it is preserved for posterity” (National Assembly for Wales Independent Review Panel 2010, para. 62). The Panel then answered its own question: “We concluded that, in its

purest sense, the authentic record of proceedings is firstly, the complete audio-visual record and secondly, the published transcripts of what is actually said, in either English or Welsh, in the Senedd Chamber or committee room” (para. 65). Moreover, the Panel concluded that the practice of the translation of contributions made in English into Welsh is to create what is in effect an alternative narrative:

We then reviewed whether this authentic record should continue to be translated to render the English language contributions into a Welsh version. We decided that to do so is, in effect, a construction and interpretation of the authentic verbatim record of actual proceedings. (para. 66)

The Panel recommended that the official record of the NAfW proceedings be a word-for-word record in the language or languages as actually used, together with a record of the simultaneous translation from Welsh to English as spoken in the Chamber of the NAfW at the time.

The Panel asserted that the “most valid and faithful” record of proceedings was the video simulcast *senedd.tv*, along with the “oral translation” into English “as it occurred during proceedings” (National Assembly for Wales Independent Review Panel 2010, para. 71). The Panel further recommended that there be a “Cofnod y Werin”, literally translated as “the People’s/Welsh Folk’s Record”, but referred to in the Panel’s report as “the Citizen’s Cofnod” (page 8, also Section B2) comprising a summary in Welsh and English of the speakers, the matters discussed and the decisions reached (paras. 72, 73).

The Panel’s report was published on 19 May 2010 and on the same day its recommendations were welcomed and accepted by the Commission (National Assembly for Wales, May 19, 2010). A postscript to the press release usefully notes that “in a statement last September, the Commission gave a commitment that any changes recommended by the panel relating to arrangements for the translation of plenary proceedings would be implemented” (National Assembly for Wales, May 19, 2010). Clearly, the Commission’s view was that discussion of the report’s content was not necessary and, indeed, that, whatever that content might have been, the NAfW was bound by an a priori commitment. The minutes of the Commission meeting at which the Panel’s report was discussed, on 19 May 2010, show that the legal meaning of the WLB’s intervention regarding the statutory status of the NAfW’s Welsh Language Scheme was the main issue of discussion (National Assembly for Wales Assembly Commission, May 19, 2010). Specifically, the director of legal services noted that while the Commission and the WLB had “taken different views on the status and meaning of the Assembly’s Welsh Language Scheme ... he was confident that the means were available to implement [the Panel’s] recommendations lawfully” (National Assembly for Wales, May 19, 2010).

In welcoming the report, the presiding officer and chair of the Commission said that it was determined to “gather opinions from a wide range of people” and grateful to the Panel for “seeking the views of as wide an audience as possible”. He also noted that he was committed to “strengthening the position of Welsh in the work of the Commission and the Assembly, in a way that is effective, practical and relevant” (National Assembly for Wales Assembly Commission, May 19, 2010), highlighting the following of the Panel’s recommendations:

- (a) the provision of a verbatim text record of proceedings to be published in the original language(s) spoken, together with a record of the contemporaneous translation of Welsh to English, as heard during Assembly proceedings.
- (b) that Senedd TV should become the principal comprehensive stored record for researchers and future historians. (Ibid.)

By way of conclusion, the Commission asserted its belief that the Panel's work provided "an excellent basis from which to achieve the Assembly's ambition to become a 'truly bilingual institution' ... as well as delivering better value for money". The former ambition is laid out in the *Welsh Language Scheme* of the NAFW (National Assembly for Wales 2007, para. 2.2). A final point is made in the press release that "the Commission has confirmed that it will be examining ways in which detailed provision guaranteeing the equal status of the two languages in the business of the Assembly can be embedded in legislation and reflected in working practice" (National Assembly for Wales, May 19, 2010). Clearly, this is addressed at Cynog Dafis' concern regarding the legal status of the Welsh language. The immediate effect of the Commission accepting the Panel's recommendations was that the production of a fully bilingual record of proceedings of the NAFW came to an end in July 2010.

### **The National Assembly for Wales (Official Languages) Act 2012**

Based upon the Panel's report, the NAFW determined to bring forward legislation in order to settle the matter on a statutory basis. Thus, the NAFW consulted publicly on a draft National Assembly for Wales (Official Languages) Bill and a related and accompanying draft Bilingual Services Scheme based upon the Panel's recommendations between August and October 2011, prior to presenting the Bill itself in January 2012. As a result of this consultation the Commission agreed to produce a fully bilingual record of proceedings within five working days of the pertinent meeting (National Assembly for Wales 2012b, 8) and the Bilingual Services Scheme was restyled as an Official Languages Scheme. In addition, the Commission asserted that a duty to provide a fully bilingual record of the proceedings would not be placed on the face of the Bill.

The NAFW, having set out an open invitation to potential witnesses to present evidence on their own initiative, gave consideration to a wide range of evidence with regard to the Bill, together with the draft Scheme, during its passage through the NAFW from its introduction on 30 January 2012 until the Plenary on 3 October 2012 (National Assembly for Wales 2013). In particular, the Bill was considered in detail by the Communities, Equality and Local Government Committee during the spring. The Committee published its report in May 2012, recommending that the NAFW amend the Bill and the Official Languages Scheme. With specific regard to translation, those recommendations that led to amendments to the Bill were as follows: that y Cofnod be fully bilingual in Welsh and English and that a commitment to ensure that this is done be placed on the face of the Bill (National Assembly for Wales Communities, Equality and Local Government Committee 2012, 5–8).

Subsequent to amendments being adopted, the Bill was passed on 3 October 2012 and the National Assembly for Wales (Official Languages) Act 2012 given Royal Assent on 12 November 2012, the first Act passed by a Welsh legislature in over 600 years.<sup>5</sup> One of the constitutional impacts of the Act was to effect changes to the Government of Wales Act 2006.<sup>6</sup> The crucial section of the Act with regard to the translation of y Cofnod is as follows:

1. Amendment to section 35 of the act (Equality of treatment)

- (1) Section 35 of the Government of Wales Act 2006 9c.32) ("the Act") is amended as follows.

- (2) For subsection (1), substitute –
- (1) The official languages of the Assembly are English and Welsh.
  - (1A) The official languages must, in the conduct of Assembly proceedings, be treated on a basis of equality.
  - (1B) All persons have the right to use either official language when participating in Assembly proceedings.
  - (1C) Reports of Assembly proceedings must, in the case of proceedings which fall within section 1(5)(a) (proceedings of the Assembly), contain a record of what was said, in the official language in which it was said, and also a full translation into the other official language.

In short, the difference between the Act and the Bill as introduced in relation to the translation of *y Cofnod* is captured therefore in subsection (1C) above, in which the commitment to produce a fully bilingual version of *y Cofnod* is made.

### ***The Commission, Crown bodies, sovereignty***

The problem regarding the issue of translating *y Cofnod* is not merely a matter of best practice but rather one of sovereignty. Here, one must understand the Commission's status as a Crown body, along with the precise legal status of the content of the Welsh Language Scheme of the NAFW. The Explanatory Memorandum to the National Assembly for Wales Commission (Crown Status) Order 2007<sup>7</sup> provides a succinct and accurate summary of the constitutional concerns at work which resulted in the Commission being “treated as a Crown body” subsequent to the GOWA (Government of Wales Act) 2006, as follows:

- 4.1 Currently, under the Government of Wales Act 1998 (GOWA 1998), the National Assembly for Wales (“the GOWA 1998 Assembly”) is a corporate body which exercises its functions on behalf of the Crown. Under GOWA 2006, this corporate body will cease to exist and there will be a separate legislature (the National Assembly for Wales, “the new Assembly”) and executive (the Welsh Assembly Government, including Welsh Ministers). GOWA 2006 also sets up the National Assembly for Wales Commission, which will provide property, staff and services to the Assembly. The executive functions that are currently vested in the GOWA 1998 Assembly will be transferred to and vested in the Welsh Ministers. The new Assembly will have new legislative powers to pass Assembly Measures.
- 4.2 Separation will help clarify the respective roles of the legislature and the executive. However, post separation, unlike the Welsh Ministers, the National Assembly for Wales Commission (“the Assembly Commission”) will not be a Crown body (i.e. a body which is a servant or agent of the Crown, such as government departments).
- 4.3 The Order provides that the Assembly Commission should be treated as a Crown body for certain purposes of the following enactments ... (e) The Welsh Language Act 1993. (UK Legislation 2012)

By adopting a Welsh Language Scheme, the Commission, in accordance with the Welsh Language Act 1993, placed itself in a situation where it was, in fact, bound by statute to implement the commitments outlined in its Welsh Language Scheme and also rendered it therein accountable to the WLB. In other words, it was a legally binding agreement voluntarily entered into on the part of the NAFW and the Commission. Moreover, it

was a commitment that could not simply be set aside unilaterally as the Commission had bound itself, in the legal sense, to the commitment that “No changes will be made to this Scheme without the approval of the Welsh Language Board” (National Assembly for Wales 2007, para. 6.10). Taken as read, this means that no part of the Welsh Language Scheme can be set aside without the approval of the WLB, at least for the duration of the said Welsh Language Scheme, which in this case was for up to four years from 11 July 2007 (National Assembly for Wales 2007, para. 6.10). If that was indeed the case then that would mean that the Commission’s actions arising out of its decision of 7 July 2009 about the translation of *y Cofnod* were unlawful, despite arguments to the contrary at that time, whether by the president of the Commission or the director of legal services then in post.

Considerable clarity can now be cast upon this issue in two ways. First, the judgement of a recent judicial review during which various legal implications arising from the voluntary submission of a Crown body to the Welsh Language Act 1993 were robustly examined may be brought to bear on the case of *y Cofnod*.<sup>8</sup> Second, the results of the analysis of a range of materials obtained under the Freedom of Information Act 2000 may also be applied to this case; these are described in this article as “Welsh Policy Papers”.

The matter of subjecting the Crown, Ministers of the Crown and Crown bodies to Welsh language law has been the subject of considerable public policy debate, including during the process of devolving legislative powers over the language from the UK Parliament at Westminster to the Welsh Assembly via the National Assembly for Wales (Legislative Competence) (Welsh Language) Order 2012 (popularly termed “the Welsh language LCO”) and subsequent development of the Welsh Language (Wales) Measure 2011. During the policy cycle discussion pertaining to these matters, between June 2008 and April 2009,<sup>9</sup> it was noted that “there are issues (for instance, the interaction between Crown Ministers and the framework) which will need more detailed consideration” and that “[p]articular difficulties might also arise in relation to negotiating with other Crown Ministers” (Welsh Policy Paper 1 2008, 1, 7).

It was noted in another paper during this stage that the WLB perceived there to be problems regarding enforcement under the Welsh Language Act 1993 in relation to Ministers of the Crown and Crown bodies, leading that paper’s author to suggest that, in fact, Crown bodies operate under a separate regulatory regime under the 1993 Act (Welsh Policy Paper 2 2008, 4). It is also noted in the same Welsh Policy Paper that under the Government of Wales Act (GOWA) 2006 the Welsh Assembly has no power to remove or modify any function of a Minister of the Crown, other than that the Secretary of State consents to that (*ibid.*). In addition, the paper differentiates between Ministers of the Crown (e.g. UK Government department) and Crown bodies (e.g. HM Revenue & Customs) asserting that the latter term is used in the 1993 Act and, significantly to the mind of the author of the policy paper, concludes that it is the wider term of the two (*ibid.*, 5).<sup>10</sup> Thus, the paper asserts that Ministers of the Crown are more privileged, being exempted from the reach of the Assembly under GOWA 2006 than are Crown bodies (*ibid.*). Thereby, the specific policy advice at this point was that “negotiations will need to take place promptly if Ministers wish to pursue the option of ensuring that Ministers of the Crown are subject to the same regulatory framework as other organisations” (*ibid.*, 15). It is noted in that paper’s appendix, by way of informative gloss, that the Equality Act applies to Ministers of the Crown (*ibid.*, 20).

## The National Assembly for Wales (Legislative Competence) (Welsh Language) Order 2012: The LCO

In the context of preparing for formal dialogue with Whitehall regarding the LCO that would empower the Assembly to introduce its own legislation in relation to the Welsh language, it seems rather quickly to have become clearer that Ministers of the Crown would be protected by the Secretary of State, whose “consent” would, in all likelihood, be required (Welsh Policy Paper 8 2008, 3). It had been agreed that officials would ask the question of Whitehall as to “whether the LCO could confer competence on the National Assembly to confer or impose new functions or duties on Ministers of the Crown” (ibid., 5). Clearly, the answer to that question was no, except with the Secretary of State’s consent. It was determined, therefore, that Ministers of the Crown would be beyond the scope of the LCO (Welsh Policy Paper 9 2008, 2): “Although it is a policy aim to ensure that the provisions within a Measure apply to Ministers of the Crown, these will fall outside the LCO unless agreement is reached with Whitehall regarding their inclusion” (ibid.). This fact was also noted at that time in an advice note to MPs at Westminster where it is stated simply:

The 1993 Act does not apply to Crown bodies, although UK Government departments and public bodies have schemes on a voluntary basis. The general principle, of course, is that the Welsh Assembly, even when it gains legislative competence in an area hitherto reserved to Westminster, can only make legislation having application in Wales. (Ward 2009, 10)

Ward then quotes from the Welsh Government’s Explanatory Memorandum for the LCO that “the Welsh Ministers intend to require Crown bodies, including Ministers of the Crown, to comply with broadly the same duties as all other public bodies, where the Secretary of State consents” (ibid.). The Explanatory Memorandum makes it clear, in some detail, that the consent of the Secretary of State will be central to engaging with Ministers of the Crown with the Welsh language regulatory regime (Welsh Assembly Government 2009a, 10–11; Welsh Assembly Government 2009b, 24–26).

At a later stage of the policy cycle it is noted in the policy instruction paperwork, in “introduction and context” with regard to “Welsh Language Schemes and Standards”, that under the 1993 Act, “the Board [WLB] has no powers to compel Crown bodies to prepare schemes and, as such, often finds itself in a weak negotiating position” (Welsh Policy Paper 15 2009, 27). In the section entitled “detailed instructions – Welsh Language Schemes” of the same policy paper it is noted that provision should be made to enable “Ministers of the Crown and other persons acting as servant or agents of the Crown to be named and placed under duties ... to the extent that they fall within the scope of the proposed Welsh Language LCO” (ibid., 29). It is noted in this section also that

lawyers will need to consider how Ministers of the Crown should have schemes, or amendments to schemes, imposed on them should they and the [Welsh Language] Commissioner fail to reach agreement with regard to their preparation. For other persons (including Crown bodies, but excepting Ministers of the Crown), Welsh Ministers will be able to impose schemes on them by following a procedure as set out in section 14 of the Welsh Language Act 1993. (Ibid., 35)

As we shall see, a subsequent judicial review appears very much to contradict this claim. That said, in making this differentiation, it is understood in this paper that Ministers of the



Crown are beyond the Assembly's authoritative reach while Crown bodies are not and may indeed, therefore, be imposed upon by Welsh Ministers.

It is noted elsewhere in this policy paper, when explaining “legislative context” in relation to “enforcement and remedies”, that the 1993 Act has

limited impact on Crown bodies (including the Assembly Government). In particular, s.20 does not cover Crown bodies. Whilst it is possible to conduct an investigation into a Crown body, it is not possible to pursue provisions under s.20 of the Act against a Crown Body. It could be argued that there are 3 regulatory regimes in operation under the existing legislation: one for public bodies, another for Crown bodies, and a third for organisations which voluntarily prepare language schemes. (Welsh Policy Paper 15 2009, 50)

Section 20 of the 1993 Act refers to Directions by the Secretary of State, namely the power of mandamus. This is the case because constitutional theory holds that the Crown cannot be divided against itself. Note that the 1993 Act does not differentiate between Ministers of the Crown and Crown bodies: the section is entitled “The Crown” and explained in the marginalia as pertaining to “persons acting on behalf of the Crown” (Welsh Language Act 1993, § 21). Having said all that, it appears to be significant that neither Ministers of the Crown nor Crown bodies are in fact referred to specifically in the “policy aims” or in the “detailed instruction” of this policy instruction paper. In other words, the concerns articulated with regard to persons acting on behalf of the Crown pertain to context-setting, as opposed to robustly informing agenda-setting.

### **The Welsh Language (Wales) Measure 2011**

During the course of the legislative cycle relating to the Welsh Language (Wales) Measure 2011, between March and December 2010 in particular, public reference to the Crown, Ministers of the Crown and Crown bodies at Committee stage (National Assembly for Wales Legislation Committee No. 2 2010a) is made. That said, there was apparently significant discussion in camera as to whether the National Assembly for Wales Commission, as a Crown body, ought to be specifically named in the Measure (Schedule 6) as a person to whom the Welsh language Standards proposed under the Measure as a replacement for Welsh Language Schemes may be potentially applicable. Schemes, of course, were the central mechanism to the regulatory regime overseen by the WLB. There are two whole policy papers on this issue (Welsh Policy Paper 31 2010; Welsh Policy Paper 39 2010; dated 3 September 2010 and 18 November 2010 respectively).

It is noted in the first of these that “officials have questioned whether or not the National Assembly for Wales Commission ... is currently included within a description of person in Schedule 6. Inclusion in Schedules 5 and 6 to the Measure renders the person in question capable of being required to comply with standards” (Welsh Policy Paper 31 2010, 1). The paper notes that

the policy intention, when seeking the competence underlying this Measure, was that the categories of person in respect of whom language duties could be subsequently imposed by Measure should be sufficiently widely drawn to capture those persons currently operating schemes under the Welsh Language Act 1993. ... Given that the Commission has had a scheme in place since July 2007, it meets this criterion. (Ibid.)

The paper's only recommendation is as follows:

It is recommended that a Government amendment be tabled to add the entry "National Assembly for Wales Commission" to the table in Schedule 6 in order to provide certainty that the policy intention for the Commission to be capable of being required to comply with standards is reflected in the Measure. (Ibid., 2)

This was agreed by the Welsh Government and an Amendment (83) was tabled on 5 October 2010. The amendment, however, was withdrawn (National Assembly for Wales Legislation Committee No. 2 2010b, 30), and this would seem to have been done without having been subject to any obvious discussion by the Committee at either of its Stage 2 meetings (14 or 21 October).

This particular issue appears to have snowballed somewhat by November 2010 as it was then subject to a second paper (Welsh Policy Paper 39, 2010), with substantial circulation at the highest level in Welsh Government and crossing key policy domains. The paper was seeking a decision as a matter of urgency (paper dated 18 November, decision needed 23 November) from the minister and "members of the Cabinet Committee on Legislation" on the matter, "as to whether or not the National Assembly for Wales Commission (the Commission) should be added to the table in Schedule 6 to the Proposed Welsh Language (Wales) Measure (the Measure)" (ibid., 1). In the paper it is recommended that "Ministers are invited to agree to table an amendment at Stage 3 of the National Assembly's scrutiny of the proposed measure in order to add the Commission to the table in Schedule 6" (ibid.). It is also noted that Amendment 83 had been tabled without consulting with the Commission, according to the director of legal services, who adds that as "the Commission were going to be introducing its own Measure setting out the Assembly and the Commission's commitment to the Welsh language ... it was inappropriate for the Commission to be included in the Government's Measure" (ibid., 2). The Commission asked for the Amendment to be withdrawn and the Government did so "on the basis that this issue would be discussed with the Commission, with a view to reintroducing the amendments [sic] for consideration at Stage 3" (ibid.).

The paper records that there are arguments for and against and that "it would be possible to defend either scenario" (Welsh Policy Paper 39 2010, 2). The Commission's argument was that it is not appropriate "for a Government appointee to place duties on an elected Assembly, given that the Government is answerable to the Assembly, not vice versa" (ibid., 3). The paper draws the arguments together, noting that "we conclude that the Commission should be added to the table in Schedule 6 to the Government's Measure by Government amendments tabled at Stage 3" (ibid., 5).

It is also noted in the paper that "ultimately this is a matter for political judgment but it clearly be preferable to reach an agreed position on this matter with the Commission" (Welsh Policy Paper 39 2010, 5), adding that "that does not seem possible" (ibid.). The author of the recommendation anticipates an unwelcoming response on the part of the Commission: "It seems likely, therefore, that a decision to add the Commission via amendments at Stage 3 will, again, draw a critical response from the Presiding Officer's office" (ibid., 3). The government decided against the recommendation. As a result of this, the Commission would not fall within the scope of the Measure nor would it be subject in any way to the oversight of the Welsh Language Commissioner as proposed by the Measure; in short, the Commission was free to pursue its own agenda.

## The Welsh Language Commissioner

Since the passing of the Welsh Language (Wales) Measure 2011, a Welsh Language Commissioner has replaced the WLB, and while some of her functions differ from that of the WLB, her office also inherited certain of its functions, in particular in relation to ensuring the effective implementation of Welsh Language Schemes until their replacement by Welsh Language Standards. The issue of the Crown reappears fairly quickly during the operation of this new public office. Specifically, the Commissioner initiated a judicial review in relation to the Crown body, National Savings and Investments (NS&I), revoking its Welsh Language Scheme (Welsh Language Commissioner 2014, 7).

The results of this case are of immediate relevance to developing a fuller understanding of the relative legal weight of the respective arguments regarding the translation of *y Cofnod*. The Commissioner based the action on the following three grounds:

- (1) Having adopted a Welsh Language Scheme under the 1993 Act, NS&I has no legal power to revoke it;
- (2) NS&I's decision to revoke the Scheme frustrates the legislative purpose of Section 21(5) of the 1993 Act;
- (3) In the face of NS&I's agreement in the Scheme not to make any changes to it without the approval of the Commissioner, the failure of NS&I to consult with the Commissioner and/or obtain her approval before the decision to withdraw the Scheme was unlawful. (Hickinbottom 2014, 42–43)

Certain aspects of the case of NS&I are of immediate interest here. The judgment arrived at by Mr Justice Hickinbottom relating to the three grounds upon which the Commissioner brought that action was as follows: “Ground 1 and 2 fail” (Hickinbottom 2014, 55). The matter of ground 3 is quite nuanced, having several contrastive aspects. The bench found that the Scheme gave rise to no wider a legitimate expectation than that the Commissioner would be consulted before any change be made (*ibid.*, 60). It also found that NS&I was entitled to change it without the approval of the Commissioner (*ibid.*, 62–63). Thus, the bench concludes that the NS&I's decision was unlawful only in that it failed to consult properly with the Commissioner (*ibid.*, 84).

Therefore, the simple reality is that the judicial review confirmed that NS&I indeed has the legal power to revoke its Welsh Language Scheme but that its decision to do so in these particular circumstances was unlawful only because it had been taken without the required consultation. The Commissioner has no power over Ministers of the Crown or Crown bodies under the Welsh Language Act 1993 and this would also have been the case with regards to the WLB. The Commissioner confirmed her right to be consulted when a Crown body decides to revoke its Scheme, but at the same time confirmed that she has no power to prevent it. This is in line with Varuhas' (2009) assertion that it would be an undesirable state of affairs were any court to attempt to scrutinize as a matter of course the substantive rationality<sup>11</sup> of a decision of a Minister of a Crown or a Crown body, as opposed to the simple procedural legality of the decision.

## The statutory guidelines for Welsh Language Schemes

Also during the course of the judicial review, the WLB's statutory guidelines on Welsh Language Schemes were subjected to some scrutiny. The pertinent document (Welsh

Language Board 1996) is comprised of two parts: Part 1 is merely advisory, while Part 2 comprises the statutory guidelines themselves. Counsel for NS&I submitted evidence showing that the WLB's guidelines ran counter to the 1993 Act in eliding "Crown organizations" with public bodies in general with regard to changing or amending Schemes. The problem first arises in Part 1 in the sections entitled "approving schemes" and "disagreement". Here, it is simply asserted that Crown organizations will be treated in "exactly the same way as other public bodies" (*ibid.*, 1.22) and, elsewhere in Part 1, that organizations that cannot agree a matter in relation to their Scheme will be subject to the respective powers of the WLB and the Secretary of State (now Welsh Ministers) in deciding upon the Scheme (*ibid.*, 1.36 & 1.37). Neither the WLB nor the Secretary of State has such powers under the 1993 Act.

With specific regard to the statutory guidelines themselves, the problem relates to the text where it is stated that the "organisations may propose amendments under section 16 of the Act ... and The Board will consider each proposal on its merit" (Welsh Language Board 1996, 20). Section 16 of the Act applies only to public bodies – persons acting on behalf of the Crown are explicitly excluded and are subject to completely different terms with regard to making changes. Specifically, in Section 21(4) of the 1993 Act it is clear that Crown bodies do not require the approval of the WLB under any circumstances.

Noting this, the bench put this ambiguity to Counsel for the Welsh Language Commissioner so as to ascertain the precise status of the guidelines – in other words, the question was whether the guidelines had, in fact, been approved, having been laid before Parliament by the Secretary of State, and also, given the above anomaly, whether they had been subject to challenge. While neither Counsel, in fact, seems to have been in a position to confirm any of this, the bench took the view in its judgment "that policy guidance must have been approved by the Secretary of State", adding that "it is still in effect" (Hickinbottom 2014, 15).

In reaching this view, the bench referred to statements made by the UK government in Parliament that

Government departments will also submit schemes to the Welsh Language Board just as if the legislation places them under an obligation to do so. These schemes will have regard to the same guidelines as those which apply to all other public bodies. (Hickinbottom 2014, 14)

The bench asserted that "the Board took the Government at its word" (*ibid.*, 15). Thus, while persons acting on behalf of the Crown were under an obligation to prepare schemes as a result of the UK Government's commitment, other public bodies were obliged to do so under the statutory provisions (*ibid.*). The result of all this is that the bench concluded that NS&I was in a position to take a robust view on the appropriateness of the WLB's statutory guidelines itself and, whether it do so or not, NS&I voluntarily bound itself to seeking the Board's approval (the power regarding approval is now held by the Welsh Language Commissioner) prior to making any changes to its Scheme.

Some light can be cast upon the extent to which the WLB indeed "took the Government at its word" by reference to some evidence not presented during the judicial review, as far as the research team can ascertain. Very shortly after the 1993 Act was passed the WLB took legal advice on the interpretation of the 1993 Act with specific regard to "the significance of Ministerial statements made during the passage of the Welsh Language Bill" (Welsh Policy Paper 45 1994, 5). Here, legal opinion is given on the weight that might

be given to such statements in the light of the case of *Pepper v Hart*.<sup>12</sup> Counsel stated that a court may take such statements into consideration,

if genuine uncertainties were to arise as to its interpretation. Otherwise, statements made on behalf of the Government during the passage of the Bill as to the manner in which it was envisaged that the legislation would be implemented are likely to be seen as no more than expressions of intention not having any legal force. (Ibid.)

One may conclude from this that far from simply taking the UK government at its word, the Board understood this as nothing more than an expression of intent “not having any legal force” but in the event of genuine uncertainty arising then it could well be a material consideration.

## Conclusions

The case of translating y Cofnod exposed an underlying issue of some constitutional interest, namely the nature and extent of sovereignty in the Welsh context. The apparent confusion over the Crown in this context is rather puzzling, given that it is clear in UK law and is understood by UK constitutional conventions that the Crown cannot be bound unless such a bind was expressly stated in the Act (Office of the Parliamentary Counsel 2013, 1) and where the Crown is bound by legislation – for example, the National Health Service and Community Care Act 1990 (s.60) and the Environmental Protection Act 1990 (s.159) (Leyland 2012, 99) – it is expressly so. While it is bound by health and safety legislation the Crown enjoys the privilege of Crown immunity<sup>13</sup> from the enforcement powers of the Health and Safety Executive.<sup>14</sup> Failure on the part of the Crown to “comply with standards ... will open it to proceedings for a declaration of non-compliance, rather than criminal prosecution” (Sunkin 2003, 1) and in those particular cases in which Crown immunity does not apply it has been expressly removed (UK Parliament, December 20, 2005). In some ways the Commission’s situation with regard to the Welsh language regulatory regime captures the key features of that confusion.

The Commission, as a body with Crown status (National Assembly for Wales Commission (Crown Status) (No. 2) Order 2007), adopted a Welsh Language Scheme in 2007 in which it was noted that “no changes will be made to this Scheme without the approval of the Welsh Language Board” (National Assembly for Wales 2007, para. 6.10). In other words, the Commission made the same voluntary bind as NS&I when it announced a change of practice with regard to translating y Cofnod in 2009. The policy change appears to have been agreed at a meeting of the Commission on 7 July 2009, although, and rather intriguingly, the official minutes describe the matters discussed as budgetary issues rather than policy issues.<sup>15</sup> Inevitably, the WLB intervened, stating that this was a breach of the Scheme, as was noted in the media at the time.<sup>16</sup> The NAfW was advised by Counsel that the WLB had, in fact, no jurisdiction in this matter and that the Commission, as a Crown body, was not subject to the regulatory powers of the WLB. In other words, the issue at hand bears a strong similarity to the case put by NS&I. In resisting being subject to the Welsh Language Measure and in bringing forward legislation (National Assembly for Wales [Official Languages] Act 2012) subsequent to which the Commission adopted its Official Languages Scheme, the Commission deliberately set itself apart. It was argued in the Explanatory Memorandum to the 2012 Act that this was “needed” so as to end

“uncertainties relating to the legal position of the Welsh Language Scheme and to the relationship between the NAfW, the Commission, the WLB and Welsh Ministers” (National Assembly for Wales 2012a, 5) and to place the Welsh language duties of the Assembly and the Commission “on a sound statutory footing” and that “In line with fundamental constitutional principles, neither the Assembly nor the Commission is subject to [the] new arrangements” (ibid., 6). It was explained by the Commission in the associated Scheme that these “fundamental constitutional principles” are due to “the particular constitutional situation in Wales and the fundamental constitutional principle that Welsh Ministers ought to be accountable to the Assembly rather than the other way around”<sup>17</sup> (National Assembly for Wales 2012b, para. 16). In the Explanatory Memorandum it is further explained that bringing forward the Act and the Scheme

will make it clear that accountability for the Commission’s bilingual services will be directly to the National Assembly (and therefore to the public) rather than to the Welsh Language Commissioner and Welsh Ministers as in the case of public bodies on whom standards are imposed under the Welsh Language (Wales) Measure 2011. (National Assembly for Wales 2012a, 22, para. 12.5)

There is no fundamental constitutional principle, however, that elevates the Commission above Welsh Ministers; both enjoy Crown status and are therefore absolutely equivalent in that sense. Ministers are as accountable to the NAfW, as is the Commission, yet the former are included within the scope of the Measure. Equally, the Commission could have been included in the Measure. If there was a fundamental constitutional principle causing that to be frustrated, which applied to the Commission as a Crown body and not to ministers as a person acting on behalf of the Crown, then it is not clear what that principle was, or is. In fact, the argument given by the Commission in the Scheme on the specific constitutional point fails to differentiate between the NAfW, which is the sovereign legislature, and the Commission, which is not. Rather, the Commission is a distinct body with Crown status. As things now stand, the public may bring a complaint about the Commission’s Scheme to the Public Service’s Ombudsman Wales (PSOW), yet the PSOW has no powers of enforcement, merely recommendation. In other words, Welsh citizens have no immediate statutorily binding or legal remedy with regard to the Commission breaching its Scheme. This seems to run counter to the original wishes of the Welsh Government and the NAfW to tighten the regulatory regime and also to bring “the Crown” within the reach of the Welsh Language Commissioner, whether Welsh Ministers, Ministers of the Crown and Crown bodies generally. More broadly, the situation as it stands seems rather anomalous. Indeed, even as a body with Crown status, the Commission would appear to be *sui generis*, set in its own unique Welsh language regulatory regime.

## Notes

1. Professor Diarmait Mac Giolla Chríost, together with Dr Simon Brooks, then also of the Language, Policy and Planning Research Unit, the School of Welsh, Cardiff University, submitted evidence as an expert witness to the Communities, Equality and Local Government Committee in relation to the National Assembly for Wales (Official Languages) Bill 2012 on 15 March 2012. The transcript of the oral evidence is available at <http://www.senedd.assemblywales.org/mgIssueHistoryHome.aspx?IId=1306>.

The written evidence (NAfW reference OLB 4) is available at <http://www.senedd.assemblywales.org/mgIssueHistoryHome.aspx?IID=2413>.

2. The policy change appears to have been agreed at a meeting of the Assembly Commission on 7 July 2009, although the official minutes describe the matters discussed as budgetary issues rather than policy issues. See <http://www.assemblywales.org/abthome/abt-nafw/abt-commission/abt-commission-agendas.htm?act=dis&id=145898&ds=9/2009>. The policy change appears to have become public knowledge by early August 2009. See, for example, [http://news.bbc.co.uk/welsh/hi/newsid\\_8180000/newsid\\_8187800/8187875.stm](http://news.bbc.co.uk/welsh/hi/newsid_8180000/newsid_8187800/8187875.stm)
3. See, for example, [http://news.bbc.co.uk/welsh/hi/newsid\\_8180000/newsid\\_8189600/8189676.stm](http://news.bbc.co.uk/welsh/hi/newsid_8180000/newsid_8189600/8189676.stm)
4. See, for example, [http://assemblywales.org/abthome/about\\_us-commission\\_assembly\\_administration/about\\_us-commission\\_publications/abt-commission-agendas.htm?act=dis&id=146683&ds=9/2009](http://assemblywales.org/abthome/about_us-commission_assembly_administration/about_us-commission_publications/abt-commission-agendas.htm?act=dis&id=146683&ds=9/2009).
5. The words of First Minister of Wales Carwyn Jones were widely reported in the UK media. See, for example, <http://www.theguardian.com/politics/2012/nov/12/welsh-national-assembly-bill-law>.
6. See, for example, <http://www.legislation.gov.uk/changes/affecting/anaw/2012/1>.
7. There were, in fact, two such orders, passed by the Privy Council on 4 April and 2 May respectively. The Welsh language is dealt with in the second. It would appear, however, that neither was deemed to be of much interest, according to some (O'Connor 2009, 6), as they are not referred to in the Council's "snapshot of 2007" in which the body of "substantive transacted business" is noted.
8. Judicial Review 19 February 2014, *The Queen on the Application of Welsh Language Commissioner v National Savings and Investments and Welsh Ministers (Interested Party 1) and Secretary of State for Wales (Interested Party 2)* JR-Div Crt, The Cardiff Civil Justice Centre, before The Honourable Mr Justice Hickinbottom and His Honour Judge M. Jarman QC, Courtroom 16.
9. Note that this chronology pertains to the Welsh Language (Wales) Measure 2011. There is, of course, an immediate connection between the Measure and the National Assembly for Wales (Legislative Competence) (Welsh Language) Order 2009 (LCO) and there is some overlap of policy cycle between the two. The policy cycle for the Order ran from June 2008 up until the Proposed Order was laid on 2 February 2009. The legislative cycle of the Order was completed on 10 February 2010 when the Order was Made by Her Majesty in Council.
10. In fact, the 1993 Act uses the terms "Persons acting on behalf of the Crown" and "any person acting as the servant or agent of the Crown" in the section entitled "The Crown" (Welsh Language Act 1993, § 21).
11. Such a decision may be quashed only if it is, to paraphrase Varahus (2009, 110), outrageous in its defiance of logic or absurd. See also the concept of *Wednesbury reasonableness* – Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, 229, CCSU v Minister for the Civil Service [1985] AC 374, 410.
12. *Pepper v. Hart* [1992] 3 WLR 0132, [1993] 1 All ER 42, HL (E).
13. "[O]n the basis that legislation is made by the Sovereign in Parliament for the regulation of Her subjects and not Herself". See <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/540/54014.htm#note242>.
14. See <http://www.hse.gov.uk/enforce/enforcementguide/> (previously <http://www.hse.gov.uk/enforce/enforcementguide/investigations/approving-enforcement.htm>) and [http://www.pcs.org.uk/en/resources/health\\_and\\_safety/health\\_and\\_safety\\_legal\\_summaries/crown\\_immunity\\_and\\_health\\_and\\_safety.cfm](http://www.pcs.org.uk/en/resources/health_and_safety/health_and_safety_legal_summaries/crown_immunity_and_health_and_safety.cfm).
15. See <http://www.assemblywales.org/abthome/abt-nafw/abt-commission/abt-commission-agendas.htm?act=dis&id=145898&ds=9/2009>. The policy change appears to have become public knowledge by early August 2009. For example, [http://news.bbc.co.uk/welsh/hi/newsid\\_8180000/newsid\\_8187800/8187875.stm](http://news.bbc.co.uk/welsh/hi/newsid_8180000/newsid_8187800/8187875.stm).
16. See [http://news.bbc.co.uk/welsh/hi/newsid\\_8190000/newsid\\_8197700/8197751.stm](http://news.bbc.co.uk/welsh/hi/newsid_8190000/newsid_8197700/8197751.stm).
17. Authors' translation.

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