

Senedd Cymru | Welsh Parliament

Y Pwyllgor Biliau Diwygio | Reform Bill Committee

Bil Senedd Cymru (Rhestrau Ymgeiswyr Etholiadol) | Senedd Cymru (Electoral Candidate Lists) Bill

Ymateb gan Elisabeth Jones | Evidence from Elisabeth Jones

Senedd Cymru (Electoral Candidate Lists) Bill – Consultation Response

1. My name is Elisabeth Velina Jones. I wish to thank the Committee for this opportunity to submit evidence to it.
2. I am over 18 years old. I am submitting this response in a personal capacity, but on the basis of professional expertise. I set out my relevant experience and qualifications at the end of this submission, along with information on potential conflicts of interest.
3. This submission does not deal with all the Committee's consultation questions. I have included the questions to which I am responding in headings in the document.

Do you have any views on matters relating to the legislative competence of the Senedd including compatibility with the European Convention on Human Rights?

4. Yes. With great regret, I have reached the view that the whole Bill would be outside the legislative competence of Senedd Cymru. This is my personal view; of course, only the Supreme Court of the United Kingdom can definitively decide that issue.
5. To be precise, I consider that parts of section 1 of the Bill are outside the competence of the Senedd: namely, the provisions that insert new sections 7A and 7B into the Government of Wales Act 2006 (GOWA). For ease of reading, in this response, I will call these proposed new sections of GOWA "the Gender Quota provisions".
6. All the other provisions of the Bill are consequential on the Gender Quota provisions. They have no independent effect. Therefore, if the Gender Quota provisions are outside the legislative competence of the Senedd, the whole Bill is outside that competence.
7. The reasons why I, regrettably, consider that the Gender Quota provisions are outside the legislative competence of the Senedd are:
 - (a) I consider that they modify section 104 of the Equalities Act 2010, contrary to section 108A(2)(d) of, and paragraph 1 of Schedule 7B to, GOWA, which prohibit an Act of the Senedd from modifying the law on reserved matters; and
 - (b) On balance, I consider that they relate to the reserved matter of Equal Opportunities (para. 187 of Schedule 7A to GOWA), contrary to section 108A(2)(c) of GOWA.
8. I should also say that I do not consider that section 154 of GOWA can be applied so as to bring the Gender Quota provisions within competence. Section 154, as the Committee

knows, provides that Senedd Bills must be read as narrowly as is required for them to be within competence, if such a reading is possible. However, I do not think that the issue in this case is the breadth or narrowness of the Gender Quota provisions and, therefore, section 154 does not apply, in my view.

9. I will now explain the reasons for my views on competence.

Do the Gender Quota provisions make modifications of the law on reserved matters contrary to section 108A(2)(d) of GOWA and paragraph 1 of Schedule 7B to GOWA?

10. As the Committee is well aware, “*the law on reserved matters*” is defined (in paragraph 1(2) of Schedule 7B) as including “*any enactment the subject-matter of which is a reserved matter and which is comprised in an Act of Parliament [...]*”.

Is any “*law on reserved matters*” in play here?

11. Yes. The “*law on reserved matters*” in question here is section 104 of the Equality Act 2010. It forms part of the “*law on reserved matters*” because “*Equal Opportunities*” is a reserved matter under Head N, Section N1, paragraph 187 of Schedule 7A to GOWA. The Interpretation paragraph of Section N1 defines “*Equal Opportunities*” as follows (as far as relevant and emphasis added):

“*“Equal opportunities” means the prevention, elimination or regulation of discrimination between persons on grounds of sex [...]*”.

12. Section 104 of the Eq Act deals with the selection of candidates, by registered political parties, for election to certain bodies, including the Senedd (under its former name of the National Assembly for Wales). It provides that registered political parties can lawfully select candidates in way that positively discriminates in favour of people who share a “*protected characteristic*”, as defined in section 4 of the Eq Act, including sex, provided that:

- (a) those people are under-represented amongst the party’s elected members in the body concerned, and
- (b) the selection arrangements are proportionate to the purpose of reducing the inequality.

13. And, in relation to sex inequality, section 104 goes as far as allowing single-gender shortlists (section 104(6) and (7)), whereas it does not allow the equivalent selection arrangement for any of the other protected characteristics, such as race.

14. So, the subject-matter of section 104 of the Eq Act is to permit registered political parties to positively discriminate in order to reduce inequality. In my view, this falls within “*regulation of discrimination*”. The section also seeks to prevent or eliminate future discrimination against the under-represented group. In other words, the subject-matter of section 104 of the Eq Act is part of Equal Opportunities, as defined in Section N1 of Schedule 7A to GOWA, which is a reserved matter.

Do the Gender Quota provisions make modifications of section 104 of the Eq Act?

15. The Supreme Court clarified the meaning of “modification” in its judgment in *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill*¹.

16. Section 158(1) of GOWA defines “*modifications*” as including amendments, repeals and revocations. The Court found, however, that modifications do not have to be **express** (textual) amendments, repeals or revocations. It explained that there will also be a modification “*if the later enactment alters a rule laid down in the protected enactment, or is otherwise in conflict with its unqualified continuation in force as before, so that the protected enactment has to be understood as having been **in substance** amended, superseded, disapplied or repealed by the later one*².”

17. As has been seen, section 104 Eq Act **allows** political parties, voluntarily, to discriminate positively on grounds of sex in their selection arrangements, in order to address under-representation of one or other gender amongst the party’s elected Members. Political parties will not be breaking the law if they so discriminate. Nor will they be breaking the law if they choose not to positively discriminate.

18. By contrast, the Gender Quota provisions **require** political parties to discriminate in favour of women (and only women) in their selection arrangements. If political parties do not abide by these requirements, they **will be** breaking the law.

19. Therefore, it is my view that, to paraphrase the Supreme Court’s words, the Gender Quota provisions “*in substance amend or supersede*” section 104 of the Eq Act, and thus “*make modifications*” of it; and thus are, sadly, outside the Senedd’s competence.

20. In its judgment on the *UK Withdrawal from the European Union [etc] (Scotland) Bill*, the Supreme Court illustrated its reasoning by setting out what the modification made by that Bill would look like, if it had been an express textual amendment, rather than an implicit one. I have copied this approach, below, to show the implicit effect I consider that the Gender Quota provisions would have on section 104 of the Eq Act (implied amendments in bold):

“104 Selection of candidates

(1) This section applies to an association which is a registered political party.

(2) A person does not contravene this Part only by acting in accordance with selection arrangements.

(3) Selection arrangements are arrangements—

(a) which the party makes for regulating the selection of its candidates in a relevant election,

¹ [2018] UKSC 64, paras. 51-52, referring to the Scotland Act 1998 provision that is equivalent to paragraph 1 of Schedule 7B to GOWA).

² Loc. cit., emphasis added.

(b) the purpose of which is to reduce inequality in the party's representation in the body concerned, and

(c) which, subject to subsection (7), are a proportionate means of achieving that purpose.

(4) The reference in subsection (3)(b) to inequality in a party's representation in a body is a reference to inequality between—

(a) the number of the party's candidates elected to be members of the body who share a protected characteristic, and

(b) the number of the party's candidates so elected who do not share that characteristic.

(5) For the purposes of subsection (4), persons share the protected characteristic of disability if they are disabled persons (and section 6(3)(b) is accordingly to be ignored).

(6) Selection arrangements do not include short-listing only such persons as have a particular protected characteristic.

(7) But subsection (6) does not apply to the protected characteristic of sex; and subsection (3)(c) does not apply to short-listing in reliance on this subsection.

(8) The following elections are relevant elections—

(a) Parliamentary Elections;

F1(b)

(c) elections to the Scottish Parliament;

*(d) elections to the National Assembly for Wales³, **except in so far as concerns the protected characteristic of sex; [...]**”.*

21. In other words, for section 104 Eq Act and the Gender Quota provisions both to be in force at the same time, Senedd Cymru would have to be carved out of section 104, as far as sex discrimination was concerned - but would continue to be within the ambit of that section as regards other forms of discrimination.

22. As a supplemental point, I think it is significant that section 104 creates an **exception** from the general thrust of the Eq Act: i.e. an exception from the general rule that discrimination on the grounds is unlawful.

23. Moreover, section 104(7) provides for a further exception, specific to sex discrimination, by allowing single-sex shortlists where proportionate to address under-representation, whereas shortlists that listed only people of a certain race, for example, would not be lawful (by virtue of section 104(6)).

³ This reference to the National Assembly for Wales must of course be read as a reference to Senedd Cymru, the Welsh Parliament, by virtue of section 150A of GOWA.

24. It is a general rule of statutory interpretation that exceptions should be construed narrowly. In my view, the courts are likely to apply that rule with particular force to a statute of the importance, in terms of civil and human rights, of the Eq Act.

25. Finally, I should say that I do not consider that any of the exceptions in Part 2 of Schedule 7B to GOWA apply here so as to remove the barrier to competence.

26. My view that the Gender Quota provisions, and therefore the whole Bill, are outside competence because they modify the law on a reserved matter stands alone, independent of the results of applying other tests of legislative competence.

Do the Gender Quota provisions also “relate to” the reservation of Equal Opportunities in Section N1 of Schedule 7A to the Government of Wales Act 2006 (GOWA)?

27. As the Committee is fully aware, section 108A(2)(c) of GOWA states that a provision of an Act of the Senedd is not law so far as it “relates to reserved matters”. Subsection (6) goes on to provide that the question whether a provision “relates to” a reserved matter is to be determined “by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances”.

The approach of the Supreme Court

28. Again, I realise that the Committee is very familiar with the Supreme Court’s approach but I set out the relevant principles here for convenience.

29. The Supreme Court clearly regards the “purpose” of the provision as the key element of the test in section 108A(6) GOWA. The effect of the provision, and other relevant matters are tools for ascertaining that purpose⁴.

30. The Court has said that, to ascertain the purpose of a provision:

- “it is necessary to look not merely at what can be discerned from an objective consideration of the effect of its terms⁵.”
- “[t]he clearest indication of [a provision’s] purpose may be found in a report that gave rise to the legislation, or in the report of a Senedd committee; or its purpose may be clear from its context⁶”.
- part of the overall context that the Court will bear in mind is the purpose of reserved matters in general, which Lord Hope, the former Deputy President of the Supreme Court described as the “common theme” of “matters in which the United Kingdom as a whole has an interest ... includ[ing] matters which are affected by its treaty obligations ...”⁷.

⁴ *The Christian Institute and others v The Lord Advocate* [2016] UKSC 51, para. 30, (though the Supreme Court does not use the expression “tools”).

⁵ *Agricultural Sector (Wales) Bill – Reference by the Attorney General for England and Wales*, [2014] UKSC 43, para. 50.

⁶ *Martin v Most* [2010], UKSC 10, para 75; *Imperial Tobacco Ltd v the Lord Advocate* [2012] UKSC 61, para. 16; see also *Agricultural Sector (Wales) Bill*, para. 50.

⁷ *Imperial Tobacco*, para. 29. I have to admit that I find this aspect of the Supreme Court case-law quite difficult to apply, if only because the three devolution settlements are not identical in terms of the matters that are reserved. Some of these differences can of course be explained by constitutional and historical factors, such as the fact that Scotland and Northern Ireland have separate legal systems; but I do not think this applies across the board. Moreover, the UK’s treaty obligations cover matters that are not reserved, such as many aspects of environmental protection; and the devolution settlements contain other provisions allowing the UK Government to intervene to ensure that the UK’s treaty obligations are not breached by a devolved parliamentary Bill (see s. 114 GOWA).

31. Once the Supreme Court has ascertained the purpose of the provision being challenged, it will look at the nature of the relationship between that purpose and the reserved matter.

32. The Court has said that the provision will not “relate to” that matter, and will not be outside competence⁸:

- if the provision has merely a “*loose or consequential connection*”⁹ with a reserved matter;
- if the purpose of the provision was “*a means to an end [...] not [...] a purpose and end in itself*”¹⁰;
- if the “*specific objective*” of the provision was “*not truly distinct*” from a wider “*overall purpose*” of the Bill or part of the Bill, but instead could be regarded as “*consequential upon*” that wider purpose – provided, of course, that that wider purpose was not, itself, reserved¹¹.

33. This last scenario does not mean that the Senedd has competence to enact a provision which has two “*distinct*” purposes, one of which is reserved and one of which is not. As the Committee is keenly aware, section 108A(2)(c) GOWA outlaws a provision if it “*relates to*” a reserved matter. This means that the provision will be outside competence **even if it also relates to a non-reserved matter**¹².

Applying the Supreme Court’s approach, do the Gender Quota provisions “*relate to*” the reserved matter of Equal Opportunities?

Welsh Government’s statement as to the Bill’s purpose

34. To ascertain the purpose of a provision in a Bill introduced by the Welsh Government, the appropriate starting point is normally the Welsh Government’s own description of that purpose. This approach is in accordance with the Supreme Court principles set out above: it goes beyond an objective consideration of the effect of the provision’s terms, and it takes into account the context of the Bill and material leading up to the legislation.

35. The Welsh Government’s Explanatory Memorandum for the Bill¹³ contains a number of statements that address the “*purpose*” or “*intention*” of the Bill.

36. On page 3, it states, under the heading “*Description of the Bill*”:

*“The purpose of [the] reforms [contained in the Bill] is to make Senedd Cymru a more effective legislature for, and on behalf of, the people of Wales. To achieve this, the Bill aims to ensure the Senedd is broadly representative of the gender make-up of the population”*¹⁴.

⁸ Under the test in s. 108A(2)(c).

⁹ *Martin v Most*, para. 49 and repeated in *Imperial Tobacco*, para. 16, and in later devolution cases.

¹⁰ *Imperial Tobacco*, para. 43.

¹¹ *Christian Institute*, para. 64.

¹² *Imperial Tobacco*, para. 43.

¹³ Welsh Government, *Senedd Cymru (Electoral Candidate Lists) Bill, Explanatory Memorandum*, March 2024; <https://senedd.wales/media/xp4dqjto/pri-ld16394-em-e.pdf>

¹⁴ *Ibid.*, paragraph 3.

37. And on page 22, there is a heading “*The intention: an overview of the Bill*”. Under that heading, the Welsh Government says,

“75. The intention of the Bill is to make the Senedd a more effective legislature, which it aims to achieve by strengthening the Senedd’s ability to represent the people of Wales. To achieve this, the Bill will introduce requirements in relation to candidate lists designed to maximise the chances of securing a Senedd which is broadly reflective of the gender make-up of Wales.”

38. The words “*to achieve this*”, used in both places, suggest that the Welsh Government see the “*aim*”¹⁵ of ensuring that the Senedd broadly represents the gender make-up of Wales as either:

- (a) a *means to an end*, rather than as an aim in itself; or
- (b) a more specific objective than the overall purpose of making the Senedd a more effective legislature, better able to serve the people of Wales, but not *truly distinct* from that overall objective.

39. Applying the Supreme Court case-law, these indications of purpose **point towards the Gender Quota provisions being within competence** as regards the test in section 108A(2)(c)¹⁶.

40. The Explanatory Memorandum also contains a section headed “*Purpose and Intended Effect of the legislation*”. In paragraph 10, the Welsh Government expresses the purpose of the Bill slightly differently, stating that the Bill is,

“a further Bill within [a] package of reforms¹⁷ “for the purpose of making the Senedd a more effective legislature that is better able to serve the people of Wales. Acknowledging that the Senedd does not currently mirror the make-up of the Welsh population in terms of gender, the Bill aims to ensure the Senedd broadly reflects the population it is seeking to represent and serve, in particular with regard to the representation of women”¹⁸.

41. The overall objective is consistently stated here to be making the Senedd a more effective legislature. However, in this case, the link between that purpose and the aim of broadly reflecting the Welsh population in terms of gender is expressed slightly less clearly, and tends to suggest that the Bill has two aims (whether or not they are “*truly distinct*” from each other). So, in my view, it **very slightly weakens the indications in favour of competence** under the “relates to” test.

42. I note that, in the Welsh Government’s evidence to the Committee in March, it was not accepted that the Bill had a second purpose, in addition to that of making the Senedd more effective.

¹⁵ Loc. cit.

¹⁶ As previously mentioned, my views on competence under this test and under s. 108A(2)(d) are separate and each stand alone.

¹⁷ The “package of reforms” described includes the Senedd Cymru (Members and Elections) Bill currently before the Senedd.

¹⁸ Welsh Government, *Senedd Cymru (Electoral Candidate Lists) Bill, Explanatory Memorandum*, March 2024, paragraph 10.

43. I want to emphasise, very strongly, that I do not question the sincerity of the Welsh Government's statements, or intentions, in any way. Moreover, the genuineness of those intentions is strongly evidenced by the very considerable and weighty research on which they rely to show the relationship between the effectiveness of a legislature, as measured in a range of ways, and the presence or absence of a critical mass of female members in that body¹⁹. But it seems to me that the indications contained in the Explanatory Memorandum as to the purpose of the Gender Quota provisions are somewhat **ambiguous**, looked at in terms of the principles laid down by the Supreme Court. Therefore, it is important to look at other sources of such indications.

Evidence as to purpose in reports giving rise to the Bill

44. Applying the Supreme Court's approach, those sources include reports giving rise to the Bill. The key reports are:

- *A Parliament that works for Wales: The report of the Expert Panel on Assembly Electoral Reform*, November 2017²⁰;
- Report of the Committee on Senedd Electoral Reform (CSER), *Senedd reform: the next steps*, September 2020²¹;
- Report of the Special Purpose Committee on Senedd Reform, set up to consider the conclusions of the CSER, *Reforming Our Senedd: A stronger voice for the People of Wales*, May 2022²².

45. All these reports conclude that a Senedd whose composition is more representative of the electorate of Wales is desirable. They all also conclude that a Senedd whose composition is more diverse is desirable.

46. All the reports also convey the view that both greater reflection of the population, and greater diversity, will make the Senedd more effective. However, they all also contain material which can be read as conveying the view that under-representation of different sectors of the population, including specifically women, is something that it is desirable to address, in itself. As a citizen, I would fully endorse that view. Unfortunately, however, the question in hand is not whether I think that the Bill pursues a laudable aim; it is whether I consider that it relates to the reserved matter of Equal Opportunities.

47. Having looked at the series of reports leading to the Bill's introduction, I do not think that they provide clear evidence as to whether the purpose of the Gender Quota provisions is to be "*merely a means to [the] end*" of greater Senedd effectiveness, or whether they have a "*truly distinct*" objective, namely the prevention, elimination or regulation of discrimination between persons on grounds of sex – part of the reserved matter of Equal Opportunities.

¹⁹ See the Explanatory Memorandum.

²⁰ <https://senedd.wales/media/eqbesxl2/a-parliament-that-works-for-wales.pdf>.

²¹ <https://senedd.wales/laid%20documents/cr-ld13452/cr-ld13452%20-e.pdf>.

²² <https://senedd.wales/media/5mta1oyk/cr-ld15130-e.pdf>.

48. So far, then, **the indications of competence or lack of competence under the “relates to” test appear ambiguous** to me. I now turn to the context of the provisions, and then to the effect of the provisions.

Evidence of purpose from context

49. As set out above, the Supreme Court has said that the purpose of a provision may be clear from its context. In many cases, such as the *Christian Institute* case cited above²³, that context was essentially provided by the Bill or Act in which the provision appeared (although the Supreme Court also looked at other sources to determine purpose).

50. The present case is unusual. The Bill is very short, and all the provisions other than the Gender Quota provisions are dependent on those provisions. The Bill does not include other provisions aimed at increasing Senedd effectiveness. So, if the Bill is regarded as the relevant context for determining the purpose of the Gender Quota provisions, then context would **point towards the purpose of the provisions relating to the reserved matter of Equal Opportunities, as defined in Schedule 7A.**

51. However, it can be argued, as the Welsh Government appears to be doing in its Explanatory Memorandum (and also in its evidence to the Committee to date), that the legislative context is the whole “*package of reforms*”²⁴ to make the Senedd more effective, better able to serve the people of Wales, through being broadly more reflective of those people, particularly of the 51% who are women.

52. This package of reforms includes, in particular, the Senedd Cymru (Members and Elections) Bill. If enacted in its present form, that Bill will change the process by which candidates will be elected to the Senedd to a fully proportionate-representation system in which registered political parties will be required to put forward lists of candidates for each constituency they contest. The Senedd (Electoral Candidate Lists) Bill is, of course, intended to govern the way in which candidates are selected for those lists, and the order in which they are listed, as far as gender is concerned.

53. If this wider package of reforms is accepted as the context for the Gender Quota provisions, then there is certainly an argument that the provisions are merely a “*means to an end*”, the end being greater Senedd effectiveness; or that they do not have a purpose that is “*truly distinct*” from that objective of greater Senedd effectiveness. Once again, then, **the answer to the question of whether the provisions “relate to” a reserved matter or not appears ambiguous.**

54. The final tools for ascertaining purpose, as set out in section 108(6) of GOWA, are “*the effect of the provisions in all the circumstances*”, and “*other things*” – i.e. any other relevant factors.

Effect as a tool for ascertaining purpose

²³ [2016] UKSC 51.

²⁴ Explanatory Memorandum, para. 10.

55. Whatever else is ambiguous, the effect of the Gender Quota provisions is clear. Their combined effect is to ensure that, overall, women make up at least 50% of the candidates put forward for Senedd election by registered political parties. The provisions also seek to have the effect of giving women candidates a strong chance of being elected, by virtue of the rules on listing, known as the “*vertical placement criteria*”²⁵.

56. Therefore, overall, the Gender Quota provisions have the effect of regulating discrimination between persons on the grounds of sex. And they have the intended effect of preventing or eliminating discrimination between persons on the grounds of sex, in the context of selection of candidates for the Senedd. So their effect is squarely on the terrain of the reserved matter of Equal Opportunities, as defined in paragraph 187 of Schedule 7A to GOWA.

57. Moreover, the Welsh Government’s Explanatory Memorandum contains a section headed “*The rationale for increasing female representation in the Senedd*”²⁶. It is divided by two sub-headings. The first sub-heading reads “*Women are underrepresented in the Senedd*”. The second is headed “*Improved gender diversity within legislatures lead to improved representation*”.

58. The section on under-representation explains that current male incumbency is a barrier to future election of women. It also sets out statistics showing that men made up a far higher proportion of Senedd candidates at the last election, and explains that if this is repeated in future, then clearly men will have a statistically greater chance of being elected.

59. Thus, part of the stated “*rationale*” for the Gender Quota provisions is to prevent, or reduce, the chance of continued under-representation of women in the future. As a citizen, I applaud that aim. But as a (retired) lawyer, I cannot help noting that seeking to combat under-representation appears to be the same thing as seeking to prevent, eliminate or regulate (by reducing) discrimination – in this case, on the grounds of sex. And the reserved matter of Equal Opportunities in Schedule 7A to GOWA is defined in exactly those terms.

Other things (section 108A(7))

60. Section 108A(7) instructs us to have regard to “other things”, as well as effect in all the circumstances, in order to determine whether the purpose of a provision relates to a reserved matter.

61. The only additional relevant factor to be taken into account in this case appears to me to be the fact that elections to the Senedd are, generally, not a reserved matter, with some detailed exceptions set out in Section B1 of Schedule 7A. Just as importantly, if not more

²⁵ Explanatory Memorandum, para. 84. The provisions do not guarantee that at least 50% of Senedd Members elected will be female; that will be affected by the relative strength of each party in each constituency they contest and by the operation of the D’Hondt formula, as well as possibly by the exceptions for independent candidates and for any parties that contest only one constituency.

²⁶ Explanatory Memorandum, p. 9.

importantly, paragraph 7(2) of Schedule 7B to GOWA allows the Senedd to modify almost all of the provisions about Senedd elections within GOWA itself. The report of the Expert Panel pointed out that “*it would be anomalous if [...] reservations [such as the Equal Opportunities reservation] meant that the Assembly did not have competence to determine its own electoral arrangements, including gender quotas*”²⁷. The Welsh Government has raised the same point in oral evidence to the Committee.

62. I also note that the reservation relating to Political Parties, in paragraph 6 of Schedule 7A to GOWA, does not reserve their arrangements for selecting candidates to the Senedd.

63. Personally, I agree with the Expert Panel that it is anomalous for the Senedd to have such wide competence over its own electoral arrangements but not to have competence to introduce gender quotas into candidate selection. However, the UK Parliament could have avoided that anomaly when passing the Wales Act 2017, which amended GOWA so as to create the structure of the present Welsh devolution settlement. Applying the normal rules of statutory interpretation, I regretfully consider that the UK Parliament must be assumed to have been aware of the relationship between reserved matters, such as Equal Opportunities, and the Senedd’s competence over its own electoral arrangements.

64. This argument is strengthened by the fact that paragraph 187 of Schedule 7A does in fact contain four exceptions from the Equal Opportunities reservation, none of which are relevant to the provisions of the Bill. So the UK Parliament did consider that there were situations in which it was appropriate for the Senedd to legislate on Equal Opportunities, as defined; but selection of candidates for election to the Senedd was not one of those situations.

65. I also recognise the argument that the effect of the Equal Opportunities reservation on the Senedd’s competence over its own elections is not an anomaly, but an example of Lord Hope’s analysis that the “*common theme*” of reserved matters is that they are matters in which the UK as a whole has an interest²⁸ - including an interest in retaining control over the rules governing equality and diversity in the selection of candidates by registered political parties.

Drawing the threads together on the “relates to” test

66. In my view, no clear answer as to whether the Gender Quota provisions “*relate to*” the reserved matter of Equal Opportunities emerged from a consideration of the Welsh Government’s statements as to purpose, reports giving rise to the Bill and context.

67. However, having now had regard to the effect of the Gender Quota provisions, I find it extremely difficult to understand how their purpose can be said to have only a “*loose and consequential connection*” with a reserved matter, specifically Equal Opportunities in this case. Therefore, if that was the only test used by the Supreme Court, my view that the

²⁷ *A Parliament that works for Wales: The report of the Expert Panel on Assembly Electoral Reform*, November 2017, para. 12.19.

²⁸ See footnote 7.

provisions were outside the Senedd's competence as "*relat[ing] to*" a reserved matter would be very clear.

68. However, as discussed above, the Supreme Court has also used other formulations when discussing whether a provision of a Bill "relates to" a reserved matter: the "*means to an end*" test, and the "*no truly distinct purpose*" test²⁹.

69. On balance, however, I consider – very reluctantly - that the purpose of the Gender Quota provisions is the purpose of preventing, eliminating or regulating sex discrimination in Senedd candidate selection, and that this is a "*distinct*" purpose from the overall purpose of making the Senedd more effective, although that purpose is undoubtedly genuine and there is undoubtedly a connection between the two purposes.

70. Therefore, I have regretfully concluded that the Gender Quota provisions "relate to" the reserved matter of Equal Opportunities as well as to the non-reserved matters of Senedd effectiveness and the Senedd electoral system; and, thus, that those provisions, and the whole Bill, is outside competence on this ground as well as on the ground of modifying the law on a reserved matter.

71. I have reached that conclusion partly because of the very fact that Bill stands alone, apart from the rest of the package of reforms. It seems to me that this points to the Gender Quota provisions having a distinct, although genuinely connected, purpose from the rest of the measures intended to make the Senedd more effective.

72. The situation is very different from the *Christian Institute* case, where purpose of the challenged provisions was found **not** to be "*truly distinct*" from the overall objective of protecting children. The challenged provisions were changes, to the law of data protection, which facilitated the sharing of information without consent, in order to better protect children. The provisions were contained in one Part of an Act of 18 Parts. Even in Part 4, where they appeared, they were one cog (albeit an important one) in a legislative machine entirely and solely designed to improve the protection and well-being of children. If the Gender Quota provisions can be separated from the rest of the package of reforms, can they truly be said to be an integral part of the machinery of those reforms, with no distinct purpose of their own?

73. Finally on this issue, I should reiterate that there are four exceptions to the Equal Opportunities reservation, which I have not analysed as it is clear, in my view, that none of them apply to the Gender Quota provisions.

74. Likewise, a consideration of the Senedd's generally wide competence over its own electoral arrangements has not changed my reluctant conclusion.

Compatibility with the Convention rights (section 108A(2)(e))

²⁹ In my view, both these formulations mean essentially the same thing.

75. As the Committee will be aware, the most relevant Convention rights are Article 3 of Protocol 1 (Elections) and Article 8 on private life, in each case taken alone or with Article 14 (anti-discrimination).

76. Text of Article 3 of Protocol 1, with or without Article 14

Article 3 Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Article 14 Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status

77. Here, the key question in terms of compatibility is whether the Gender Quota provisions are incompatible with those articles, alone or taken together, because they allow all-women candidate lists but ban all-men ones? Are they incompatible with the Article 3, Protocol 1 requirement for elections which ensure the free expression of the opinion of the people in the choice of the legislature? This is a very valid question. However, I **do not consider that the provisions are incompatible.**

78. Section 2 of the Human Rights Act 1998 (HRA) provides that, in interpreting the Convention rights, a UK court must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights (ECtHR).

79. The ECtHR has, as far as I know, decided only one case on gender quotas in elections: *Zevnik v Slovenia*³⁰. The judgment emphasised the wide margin of appreciation that Contracting States to the Convention have in relation to election systems, within the overall principles of democracy, the rule of law and free and fair elections. In other words, the Court will be slow to find that a national election system breaches the Convention.

80. Significantly, the judgment also held that the equality of men and women is a legitimate aim that can justify particular electoral and selection arrangements, for the purposes of the Convention. The Court said:

The Court reiterates that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe ... and that its institutions consider the lack of gender balance in politics to be a threat to the legitimacy of democracy and a violation of the right of gender equality ... Consequently, the Court considers that the interference in question pursued the legitimate aim of strengthening the legitimacy of democracy by ensuring a more balanced participation of women and men in political decision-making³¹.

³⁰ *Zevnik and Others v. Slovenia*, no. 54893/18, 12/11/2019

³¹ *Zevnik*, para. 34

81. Moreover, the ECtHR takes account of the pronouncements of the Council of Europe, its parent body. The Council of Europe has called for “*ambitious targets*” in electoral gender quotas³². The Council’s Advisory Body on Constitutional Matters, the Venice Commission, has also adopted a Code of Good Conduct in Electoral Matters, which provides, inter alia:

Equality and parity of the sexes

*Legal rules requiring a minimum percentage of persons of each gender among candidates should not be considered as contrary to the principle of equal suffrage if they have a constitutional basis*³³.

The Council of Europe Parliamentary Assembly has passed the following relevant resolution:

“4. ... Changing the electoral system to one more favourable to women’s representation in politics, in particular by adopting gender quotas, can lead to more gender-balanced, and thus more legitimate, political and public decision making.

...

6. The Assembly considers that the lack of equal representation of women and men in political and public decision making is a threat to the legitimacy of democracies and a violation of the basic human right of gender equality, and thus recommends that member states rectify this situation as a priority by:

...

6.3. reforming their electoral system to one more favourable to women’s representation in parliament:

6.3.1. in countries with a proportional representation list system, consider introducing a legal quota which provides not only for a high proportion of female candidates (ideally at least 40%), but also for a strict rank-order rule ..., and effective sanctions (preferably not financial, but rather the non-acceptance of candidacies/candidate lists) for non-compliance...;”³⁴.

82. In light of these factors, it would seem highly unlikely that a court of England and Wales, or the ECtHR itself, would hold that the Gender Quota provisions constituted a breach of Article 3 of Protocol 1 to the Convention, with or without Article 14.

83. Text of Article 8 (see also Article 14, above)

Right to respect for private and family life

³² Resolution 2111 (2016) on assessing the impact of measures to improve women’s political representation, adopted by the Parliamentary Assembly of the Council of Europe on 21 April 2016.

³³ European Commission for Democracy Through Law (“the Venice Commission”), 51st and 52nd sessions (5-6 July and 18-19 October 2002) (CDL-AD (2002) 23 rev.). For States with no written constitution, such as the UK, a “constitutional basis” equates to a legal basis.

³⁴ Resolution 1706 (2010) on increasing women’s representation in politics through the electoral system.

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

84. Here, the main relevant provision in the Bill would be new section 7D(2) of GOWA, to be inserted by section 1 of the Bill, whereby subordinate legislation would require a statement of gender from list candidates. This could be held to be an interference with a person's Article 8 rights, taken alone or with Article 14. However, Article 8 rights are subject to limitations that are lawful, necessary (i.e. proportionate) in a democratic society, and serve a legitimate aim.

85. The requirement for a gender statement would serve the legitimate aim of advancing equality between men and women, as in the *Zevnik* case; the general legitimate aim of protecting democracy by ensuring that candidates are lawfully selected and elected; and finally the need to protect the rights and freedoms of others (particularly other candidates), which is expressly set out in Article 8(2).

86. Therefore, I consider that new section 7D(2) would not be incompatible with the Convention. This is subject to the caveat that the subordinate legislation must strike a proportionate balance between the legitimate aims and the right of an individual to respect for her/his/their private life, e.g. in terms of rights to inspect the statements.

What are your views on the balance between the information contained on the face of the Bill and what is left to subordinate legislation? Are the powers for Welsh Ministers to make subordinate legislation appropriate?

87. Given the importance, in terms of civil and political rights, of the Gender Quota provisions, I would have thought it appropriate for more information to have been contained on the face of the Bill, rather than left to be made in Orders under section 13 of GOWA.

88. In particular, I am thinking of the functions of a Constituency Returning Officer (CRO) and of the National Nominations Compliance Officer (NNCO), related to ensuring compliance with new section 7B of GOWA. Of particular concern to parties represented in the Senedd (and prospective candidates) must be:

- (a) the powers and duties that the NNCO will have to deal with party lists that are not in compliance with the horizontal placement criteria;
- (b) the consequences of removal of a candidate from a list of candidates, for breach of the Gender Quota provisions; and
- (c) provisions about inspection of gender statements.

89. In my view, this type of provision does not properly fall within the category of detailed technical and administrative provision that is appropriately left to subordinate legislation. The power of a majority governing party or coalition to legislate in a way that affects the

electoral chances of their opponents goes to the heart of democracy and should be subject to significant safeguards.

90. I do, however, consider that, if fuller provision on the above matters were included on the face of the Bill, there would need to be a power to amend it by subordinate legislation, in case experience revealed problems. In that case, I would think it appropriate for the subordinate legislation to be subject to a procedure which built in additional safeguards, on top of the normal affirmative resolution procedure mandatory for all Orders under section 13 GOWA. The additional safeguards could, for instance, in principle³⁵, include a requirement for a special majority of Senedd Members to pass it, in order to protect minority parties; additional time for scrutiny; and/or the potential for amendment.

What are your views on the system of enforcement and potential sanctions for non-compliance proposed in the Bill?

91. As the Explanatory Memorandum states, much of the detail on enforcement is left to Welsh Government subordinate legislation.

92. However, it is clear that the key sanction for non-compliance with the Gender Quota provisions is forced amendment, or rejection, of candidate lists. On the basis of international experience, and in line with the recommendations of the Senedd's Special Purpose Committee on Senedd Reform, this appears an effective enforcement mechanism. I also consider that it is an appropriate mechanism, provided that strong safeguards are in place to ensure the political impartiality of the officials concerned, and to deal appropriately with the electoral consequences, should any problem with the process come to light.

93. I am, however, somewhat concerned by the fact that an election petition under the Representation of the People Act 1983 appears to be the key mechanism to challenge election results that parties, or individuals, believe breach the Gender Quota provisions. The costs for such petitions are not insignificant - £677 in total per petition³⁶, disregarding any legal fees. No doubt political parties can fund this easily, but democracy demands that individual citizens should also have real access to justice to ensure that electoral law is respected. Vexatious petitions should of course be discouraged, but there may be more democratic way to do so than financial requirements.

94. By contrast, electoral fraud can simply be reported to the police, free of charge.

95. There is also a very tight timescale for lodging a petition – 21 days from the election. This is understandable in the context, but creates another barrier for individuals, as opposed to political parties, who are no doubt well versed in the relevant procedures.

96. Public awareness of the ability to file an election petition, and of the process and costs involved is, I would think, very low. It seems desirable for information about it to be

³⁵ The above does not take account of any changes to the Senedd's Standing Orders that would be needed, nor of the process for agreeing such changes.

³⁶ <https://www.gov.uk/challenge-election-result/how-to-challenge>.

routinely made available by the Electoral Commission in the run-up to elections, if that is not already done.

Relevant experience and qualifications

2012 - 2019: Chief Legal Adviser to Senedd Cymru, the Welsh Parliament (or the National Assembly for Wales as it was then)

2007- 2012: Deputy Director, Welsh Government Legal Service with responsibility for the Constitution Team

2001 – 2007: Head of Constitution Team, Welsh Government Legal Service

2000-2001: Welsh Government Legal Service, lawyer in Constitution team.

Prior to 2000, I spent five years at the European Court and Commission of Human Rights in Strasbourg. In my earlier career, in private practice in London and Bristol, and in the voluntary sector, I specialised in Employment Law, including sex discrimination.

1982: BA (First Class Honours), Modern and Mediaeval Languages, University of Oxford

1983: Post-Graduate Certificate in Law (College of Law, London)

1984: Legal Practice Certificate (College of Law, London)

1986: Qualified as a Solicitor

1994: LLM (Distinction), Public International Law, University of Bristol.

I retired from the Senedd in 2019 and am now a non-practising Solicitor.

Conflict of interest

Arguably, every man or woman who lives in Wales has a potential conflict of interest in relation to this Bill. I am a woman.

I am a member of the Women's Equality Network Wales (WEN Wales), which is campaigning in support of the Bill. I have not played a role in the campaign, and I do not hold any role within the organisation.

I am a member of an Advisory Group, advising the Welsh Government on Strengthening and Advancing Human Rights and Equality in Wales. I sit on it in an independent capacity, rather than as the representative of some other organisation. I do not receive any pay or expenses for this role.

Elisabeth Velina Jones

12th April 2024