

## SCECLB1 - P Keith Bush KC

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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 Keith Bush CB | Evidence from Keith Bush KC

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**SENEDD CYMRU**  
**REFORM BILLS COMMITTEE**  
**SENEDD CYMRU (ELECTORAL CANDIDATE LISTS) BILL**

**Evidence by:**

**Keith Bush KC (*Honoris Causa*)**

**Fellow in Welsh Law, Wales Governance Centre, Cardiff University**

**Introduction**

- 1. I have been invited to submit to the Committee my views on the question of whether the provisions of the above Bill would, if enacted, be within the Senedd's legislative competence. For the reasons set out below I have come to the conclusion that they would not.**

**Scheme of the Bill**

2. The Bill has to be considered in conjunction with those of the Senedd Cymru (Members and Elections) Bill currently under consideration by the Senedd. That Bill will, if it becomes law, provide for future Senedd Members to be elected as representatives of 16 constituencies. For each constituency a registered political party will be able to nominate a list of candidates (and independent candidates will also be able to be nominated) and voters will cast a vote for one of those party lists or for an independent candidate. The six seats to be filled for each constituency will then be allocated amongst the different parties (or independent candidates) using the d'Hondt formula.
3. The Senedd Cymru (Members and Elections) Bill makes no provision as to how registered political parties are to select candidates for inclusion on their lists nor as to how they are to decide the order in which candidates appear on those lists. These are crucial issues, since candidates will be called off party lists, when allocating seats to different parties using the d'Hondt formula, in the order in which they appear on the list of each party.
4. The Senedd Cymru (Electoral Candidates Lists) Bill makes additional provision, limiting the way in which parties can choose the persons who appear as candidates on their lists, and the order in which they are listed, by reference to whether or not those persons are women. The provision in question would require:
  - At least half the candidates on a party's list for an individual constituency to be women;

- A male candidate on a list to be followed immediately by a woman (so as to avoid the bunching of women candidates lower down lists);
  - Where a party nominates a list of candidates for only one constituency, the first candidate on that list to be a woman;
  - Where a party nominates lists of candidates for more than one constituency, women to be the first candidate on at least half of those lists;
5. The Bill’s Explanatory Memorandum refers to the above system as a form of “candidate gender quotas”, and is distinct from member gender quotas, eg a requirement that if the first Member elected for a constituency is a man, the next one called off using the d’Hondt formula would be the highest-placed woman on the list of the party to whom that Member was allocated. This can be described as a “zipping” model for election of Members, rather than a zipping model for drawing up lists of candidates. “Zipping “ of Members would guarantee the election of Membes at least half of which would be women whereas the zipping of candidates could not ensure more than an enhanced chance of achieving that aim.

### **Legislative competence**

6. The basic legislative competence enabling the Senedd to legislate in relation to the system for electing Members arises out of those exceptions to the restriction on modifying the Government of Wales Act 2006 itself which are found in paragraph 7(2) of Schedule 7B to that Act. The subject-matter to which the Bill relates is, however, a protected one under section 111A and the Bill cannot therefore be passed without the support of Members representing at least two-thirds of the total number of Senedd seats (i.e. would currently require at least 40 votes). The Senedd’s legislative competence is also, however, constrained by the general rules set out in section 108A of the Act.

### Reserved matters

7. The Bill is outside the Senedd’s legislative competence if (section 108A(2)(c)) it “relates” to one of the reserved matters listed in Schedule 7A. In applying that test one must have regard to the following principles:
- The question whether a provision relates to a reserved matter is determined by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances (section 108A(6));
  - There may be more than one way in which the purpose and effect of a Bill may be capable of being characterised. Which classification is the more apt depends on the purpose for which the classification is being carried out (*Re The Agricultural Sector (Wales) Bill 2014* [UKSC] 43, paragraph 65);
  - When considering whether a purpose of a Bill relates to a reserved matter, any purpose which has only a loose or consequential connection with that matter is to be ignored (*ibid* paragraph 50).

8. The Bill's Explanatory Memorandum describes the purpose of the reforms which it proposes as "to make Senedd Cymru a more effective legislature for, and on behalf of, the people of Wales" by ensuring that "the Senedd is broadly representative of the gender make-up of the population." It goes on (paragraphs 32 to 53) to make the detailed case for gender balance as a means to improve the effectiveness of legislatures. It then examines how the mechanisms contained in the Bill would foster gender balance. In doing so it identifies, as barriers to greater representation by women (paragraphs 68 to 74) various forms of bias against women in the process of candidate selection.
9. Schedule 7A (paragraph 187) of the 2006 Act lists, as a reserved matter, "Equal opportunities", which includes in its definition "the prevention, elimination or regulation of discrimination between persons on grounds of sex..."
10. As the Supreme Court made clear in *Re The Agricultural Sector (Wales) Bill 2014* [UKSC] 43 (see paragraph 7 above) the classification of the purpose of a provision that is more (or most) apt depends on the purpose for which the classification is being carried out. When the legislative competence of the then Assembly was defined by reference to subjects specifically conferred on it, the issue was whether one of the purposes of a Bill could be classified as relating to a conferred subject. Now that the model of competence has shifted to a reserved one, the issue is whether one of those purposes can be classified as relating to a reserved subject.
11. Whilst the overall purpose of this Bill may be the achievement of a greater degree of gender balance in the membership of the Senedd, it seeks to achieve this by attacking the bias in candidate selection to which the Explanatory Memorandum alludes. One of its purposes is therefore the prevention of discrimination against women in that process and falls fairly and squarely within the definition of the reserved matter of "equal opportunities". **This, in my view, means that the provisions of the Bill are outside the Senedd's legislative competence.**

#### The law on reserved matters

12. Paragraph 1 of Schedule 7B to the Government of Wales Act 2006 prohibits (subject to the exceptions in paragraph 2) a provision of an Act of the Senedd that makes modifications to the law on reserved matters. This restriction overlaps the prohibition on provisions relating to reserved matters. If my conclusion that the Bill relates to reserved matters is correct, the Schedule 7B restriction does not add anything to the effect of that conclusion. Since, however, the Presiding Officer has concluded that the provisions of the Bill would also breach that restriction I would wish to explain briefly why I respectfully disagree with that view.
13. The Presiding Officer's view is based on the effect of the Bill on section 104 of the Equality Act 2010. That section excepts from the provisions of the Act which prohibit discrimination against persons with protected characteristics those arrangements made by registered political parties in order to reduce inequality in the proportion of people having those characteristics amongst their elected representatives who are members of the UK, Scottish and Welsh parliaments and local authorities.

14. Since section 104 is a permissive provision which does no more than to relieve political parties of liability under the Equality Act 2010 for taking measures designed to ensure more equal representation by persons having all classes of protected characteristics it does not seem to me to be inconsistent with a legal duty, in the case of Senedd elections only, to select a minimum number of women candidates and to place them on that party's lists in accordance with certain criteria. Were the provisions of the Bill to be generally within the Senedd's competence and were it to be regarded as desirable to clarify the relationship between section 104 and the Bill, any minor modification to section 104 in order to do so would, in any event, fall within the exception to the Schedule 7B restriction for "ancillary" (i.e. incidental or consequential) provision contained in Schedule 7B paragraph 2.

**Keith Bush**

**March 2024**