

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 Yr Athro Emyr Lewis | Evidence from Professor Emyr Lewis

Senedd Cymru (Electoral Candidate Lists) Bill

Note for the Reform Bill Committee

Emyr Lewis

I would like to thank the Committee for its kind invitation to comment on this Bill.

This note sets out in brief my views about whether the Bill is within the Senedd's legislative competence, and raises the more practical issue of the potential consequences if that question is not resolved before the Bill receives Royal Assent.

A more detailed supplementary note about legislative competence accompanies this note.

1. The Bill will be outside the Senedd's legislative competence if
 - a. it relates to “the prevention, elimination or regulation of discrimination between persons on grounds of sex” taking account of the statutory exceptions;
 - b. it modifies section 104 of the Equality Act 2010; or
 - c. it contravenes Article 3 of Protocol 1 (A1P3) (the right to free elections) of the Convention Rights, when taken together with Article 14 (prohibition of discrimination).

2. In respect of 1.a:
 - a. Applying the test in Section 108A(6) of GOWA 2006, the Bill's system of regulating candidature for the Senedd clearly has an effect on the prevention, elimination or regulation of discrimination between persons on grounds of sex.
 - b. Whether that link on its own is sufficient to mean that the Bill ‘relates to’ equal opportunities, rather than having merely a ‘loose or consequential connection’ to equal opportunities is a matter of judgment for the courts (ultimately the Supreme Court).

3. In respect of 1.b:
 - a. Section 104 exempts political parties from liability for unlawful discrimination in certain circumstances. That exemption will remain if the Bill becomes law. The Bill has the effect, however, of removing the objective assessment of those circumstances in individual cases, and can be said therefore to modify section 104.
 - b. It may be that the Bill could be amended to overcome this difficulty, but that is likely to be at the expense of certain features of the Bill.
 - c. If 1.a is resolved in favour of the Bill, then the modification might be saved as an ancillary modification.

4. In respect of 1.c
 - a. Whether the Bill contravenes A1P3 depends on whether the ‘asymmetric’ provisions in the Bill are considered to have objective and reasonable justification.

 - b. That is a matter of judgement for the Courts (ultimately the ECtHR).

5. The lack of consensus between the Llywydd and the Minister can be seen as being based on different assessments of the likely judgments of the courts as to where to draw the line on questions of connection (1.a) and justification (1.c).

6. That impasse cannot be resolved simply by agreement between the Llywydd and the Minister. The only ways of doing so before the Bill becomes law are through either (a) the Senedd acquiring the power to pass the Bill through an Order in Council made under s 109(1) GOWA 2006 or through an Act of the UK Parliament or (b) the Supreme Court deciding the matter either way following a reference under s 111B GOWA 2006.

7. If it were clearly the case that the Minister was correct in her view, then there would be no need to extend the Senedd’s law-making powers nor to refer the Bill to the Supreme Court before it became law.

8. That is not clearly the case, however, and passing the Bill as it stands without resolving the impasse would create a substantial risk. The danger is that someone might challenge the provisions in the courts after the Bill has become an Act of the Senedd (for example by a political party wishing to put forward an all-male shortlist applying for judicial review of a decision by the national nominations compliance officer to reject that list). Such a challenge would most likely cause serious disruption to the next

Senedd election, regardless of whether it succeeded. If the challenge succeeded, that would mean that the Bill (or challenged provision) is ‘not law’. The knock-on effect of such a finding would risk jeopardising the integrity of the election itself and could be very damaging to the Senedd and to democracy in Wales.

Department of Law and Criminology Aberystwyth University. April 8th 2024

Senedd Cymru (Electoral Candidate Lists) Bill

Supplementary Note on Legislative Competence

1. The Bill

- a. The Bill seeks to insert four new sections into the Government of Wales Act 2006 (‘GOWA 2006’), namely section 7A to 7D.
- b. These new sections would mean that in respect of electoral lists for Senedd elections:
 - (a) at least 50% of candidates on all lists of two or more candidates must be women (7A(2))
 - (b) where there is an odd number of candidates on a list the majority must be women (7A(3))
 - (c) any candidate on a list (apart from the last candidate on the list) who is not a woman must be followed immediately by a woman (7A(4))
 - (d) registered political parties who submit two or more lists must ensure that the first or only candidate on at least half of those lists must be a woman (7B(2))
 - (e) where a party submits an odd number of lists, the first or only candidate on the majority of those lists must be a woman (7B(3))
- c. The arrangements are asymmetric, that is to say that they allow, and in some cases (7A(3) and 7B(3)) require, parties to put forward lists made up of more than 50% women, but not men. It is convenient to refer to these features as permitted asymmetry and required asymmetry.

2. Legislative Competence - The views of the Llywydd and the Minister

- a. The Llywydd considers the Bill to be outside the legislative competence of the Senedd because it

- (a) relates to the reserved matters of equal opportunities, and
- (b) modifies the law on reserved matters, namely the Equality Act 2010 (specifically s104)

whereas the Minister considers it to be within competence.

- b. The Llywydd has explained her reasons in the annex to her letter of 11th March to the then chairs of the Reform Bill and Legislation, Justice and Constitution Committees.¹

3. Is the Bill outside the legislative competence of the Senedd?

This boils down to whether the Bill (or any provision in it)

- a. relates to a reserved matter, ie Equal Opportunities as defined in para 187 of Schedule 7A of GOWA 2006 which reserves Equal Opportunities? (s.108A(c) and Schedule 7A GOWA 2006) ('schedule 7A competence')
- b. would, if it became law make modifications of, or confer power by subordinate legislation to make modifications of, the law on reserved matters, ie s 104 of the Equality Act 2010? (s.108A(d) and Schedule 1 Paragraph 1 GOWA 2006) ('schedule 7B competence')
- c. is incompatible with the Convention rights (s.108A(e) GOWA 2006)), in particular Article 3 of Protocol 1 (A1P3) (the right to free elections) of the Convention Rights, when taken together with Article 14 (prohibition of discrimination) ('ECHR Competence').

4. Schedule 7A Competence - The law on 'relates to'

- a. GOWA 2006 s 108A (6) states:

The question whether a provision of an Act of the Senedd 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.

This is called the purpose and effect test.

- b. In respect of the equivalent provisions in the Scotland Act 1998 and in s 108 of GOWA 2006 (which dealt with the pre-2011 referendum Act-making powers of the National Assembly (as

¹ <https://business.senedd.wales/documents/s146028/Paper%203%20-%20Letter%20from%20the%20Llywydd%20regarding%20the%20Senedd%20Cymru%20Electoral%20Candidate%20Lists%20Bill%20-%202011%20M.pdf>

was)) the Supreme Court has held that the phrase ‘relates to’ indicates ‘more than a loose or consequential connection’.²

- c. The most recent discussion of the purpose and effect test by the Supreme Court was in the so-called Indyref 2 case.³ In that case, in relation to purpose, at para 73 of the judgment the court quoted with approval what the Supreme Court had said in para 50 of its judgment in the Agricultural Sector (Wales) Bill⁴ case

As the section requires the purpose of the provision to be examined it is necessary to look not merely at what can be discerned from an objective consideration of the effect of its terms. The clearest indication of its purpose may be found in a report that gave rise to the legislation, or in the report of an Assembly committee; or its purpose may be clear from its context

and

‘the purpose and effect of legislation may, in this context, be ‘derived from a consideration of both the purpose of those introducing it and the objective effect of its terms’.

- d. In relation to effect, the Supreme Court in Indyref 2 said:

regard is to be had to the provision’s “effect in all the circumstances”: a phrase whose scope extends beyond purely legal effects. That is reflected in the court’s attention to the practical consequences of the provisions in question...Furthermore, the court has previously made it clear that a provision does not have to modify the law applicable to a reserved matter in order to relate to that matter⁵

- e. So, drawing the threads together,

- (a) Purpose can be clear from the context of the Bill (nobody would dispute for instance that this Bill relates to Senedd elections) or can be found in certain extraneous material which indicates its purpose. This clearly extends for example to an explanatory memorandum by the Government.

² See for example *Martin v Most* [2010] UKSC 10; 2010 SC (UKSC) 40, para 49

³ REFERENCE by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998 [2022] UKSC 31 (‘Indyref 2’)

⁴ *In re Agricultural Sector (Wales) Bill* [2014] UKSC 43; [2014] 1 WLR 2622 (‘Agriculture Wales’)

⁵ *Indyref 2* para 74

- (b) Effect in all the circumstances involves an “objective consideration of the effect” of the terms of the Bill. It includes both legal and practical effects. The phrase ‘(among other things)’ means that the regard can be had to things other than the effect of the provision in question.

- f. A provision can relate to more than one matter, The fact that it relates to matter A does not mean that it cannot also relate to matter B.⁶

5. The ‘Structured Analysis’

The Supreme Court has adopted⁷ a ‘structured analysis’ for determining whether a provision relates to a reserved matter. This analysis, adapted to the Government of Wales Act, 2006, proceeds as follows:

- a. What is the scope of the subject-matter of the relevant matter reserved by Schedule 7A?
- b. By reference to the purpose of the provision under challenge, having regard (among other things) to its effect in all the circumstances, does that provision relate to the reserved matter?

6. What is the scope of the subject-matter of the relevant matter reserved by Schedule 7A?

- a. Schedule 7A para 187 GOWA 2006 reserves “equal opportunities”.
- b. It defines that phrase as follows (subject to certain exceptions):

Equal opportunities” means the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions, but not including language.

- c. For the purpose of this exercise, the scope of the reservation is ‘the prevention, elimination or regulation of discrimination between persons on grounds of sex’, subject to any exception which cuts down that scope.
- d. Note on the one hand that this reservation is confined to *the prevention, elimination or regulation of discrimination*. It does not extend to the securing or promotion of equality by

⁶ Agriculture Wales para 65

⁷ Indyref 2 para 75

other means. On the other hand, the definition is broader than the ambit of discrimination under Equality Act 2010 because (a) it is not confined to unlawful (direct or indirect) discrimination and (b) it is not confined to discrimination on the grounds of the protected characteristics set out in that Act (indeed, apart from ‘language’, it seems open-ended, given the breadth of ‘personal attributes’).

- e. Note also that discrimination is not defined. It is clearly intended however to include treating women and men differently.
- f. There are four categories of exceptions. If any of those exceptions apply, then the provision will be outside the scope of the reservation. Three clearly do not apply (since they involve ‘devolved Welsh authorities’, and the Senedd is not such an authority). The remaining exception is:

The encouragement (other than by prohibition or regulation) of equal opportunities, and in particular of the observance of the equal opportunity requirements.

It does not seem that this this exception applies here. The Bill creates rules for electoral lists for Senedd elections and it creates obligations with which those putting lists together must comply. Furthermore, it creates the post of national nominations compliance officer for the purpose of ensuring compliance with the obligations. Regardless of whether the Bill relates to the encouragement of equal opportunities (i.e. ‘the prevention, elimination or regulation of discrimination between persons on grounds of sex’) it proceeds by way of regulation, so the exception will not apply.

7. The Purpose of the Bill

- a. The express purpose of the Bill and its various provisions can be gleaned from the explanatory memorandum.
- b. The reasoning in the explanatory memorandum can be condensed as follows:
 - (a) The Senedd does not currently mirror the make-up of the Welsh population in terms of gender. (Para 10). Women are under-represented (Para 76).
 - (b) To achieve the policy aim of a more effective Senedd, the Senedd must be more representative of the gender make-up of the population (Para 3, para 67)

- (c) “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” (Para 75)
 - (d) Para 104 refers to “the aim of improving the representation of women in the Senedd”
 - (e) Para 216 refers to the EIA’s finding that the Bill has “a legitimate aim, which is to achieve a broadly representative Senedd in terms of the gender make-up of the Welsh population”
 - (f) Para 100 justifies the use of the asymmetric model by reference to “the aim of electing more women to the Senedd”.
- c. If this is a fair precis, the purpose of the Bill can, on the basis of the explanatory memorandum, be said to be ‘To improve the efficiency of the Senedd by making the Senedd more representative of the gender make-up of the population of Wales through provisions designed to increase the number of women elected to the Senedd.’
 - d. The Llywydd in the annex to her letter to the then chairs of the Reform Bill and Legislation, Justice and Constitution Committees notes that the Bill ‘seeks to address disadvantages and barriers that women face during the candidate selection process’. This is her basis for considering the Bill to relate to equal opportunities.
 - e. The Explanatory Memorandum contains detailed reference to evidence of such disadvantages and barriers as part of the justification for the provisions in the Bill (see paras 68-72), Addressing these is not, however, given as an express purpose of the Bill and other factors causing women to be under-represented are mentioned.⁸
 - f. The purpose as articulated by the Government emphasises the positive benefits of electing more women to the Senedd, rather than preventing or eliminating discrimination against women. From the Government’s perspective, while the latter may be a welcome by-product of the Bill, it is not its purpose. The difference between the Llywydd and the Minister can perhaps be framed in those terms.
 - g. A by-product, however, is part of the effect of the Bill.

8. What is the Effect of the Bill?

⁸ This is perhaps not surprising, since saying otherwise would risk acknowledging that the para 187 exception is in fact engaged.

- a. Regardless of the declared intent of the Government about the purpose of the Bill, that purpose is to be considered not only by reference to what the Government says, but having regard to the effect in ‘all the circumstances’⁹.
- b. The Bill will have many effects if it becomes law, not least that a greater percentage of women will stand for election to the Senedd.
- c. The Bill will also have an effect on “prevention, elimination or regulation of discrimination between persons on grounds of sex”. The Bill envisages a system of regulated candidature for the Senedd which
 - (a) makes it far more difficult (if not impossible) for political parties to treat men candidates preferentially to women candidates (ie the “by-product” effect) and
 - (b) makes it possible for political parties to treat women candidates preferentially to men candidates.
- d. It is difficult to see how it could be argued that the Bill has no effect on the prevention, elimination or regulation of discrimination between persons on grounds of sex.
- e. Whether the Bill (or any provision in it) is within schedule 7A Competence will therefore depend on the extent to which this effect is sufficient to mean that it “relates to” equal opportunities, rather than having merely a ‘loose or consequential connection’ to equal opportunities. That is a matter of judgment, ultimately for the Supreme Court.

9. Schedule 7B Competence - The law on modification of reserved matters

- a. Para 1 of Schedule 7B to GOWA 2006 states:

A provision of an Act of the Senedd cannot make modifications of, or confer power by subordinate legislation to make modifications of, the law on reserved matters.

and defines reserved matters to include:

any enactment the subject-matter of which is a reserved matter and which is comprised in an Act of Parliament or subordinate legislation under an Act of Parliament,

- b. The Supreme Court considered the meaning of ‘modify’ in the Scottish Continuity Bill case¹⁰. It stated:

⁹ and having regard to the ‘other things’ parenthetically referred to in s 108A(6) GOWA 2006,

¹⁰ In re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill [2018] UKSC 64; [2019] AC 1022

Without attempting an exhaustive definition, a protected enactment will be modified by a later enactment, even in the absence of express amendment or repeal, if it is implicitly amended, disapplied or repealed in whole or in part. That will be the position 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.

- c. This means that modification need not be express. It can happen where a rule in the protected enactment is altered or the later enactment conflicts with the protected enactment to such an extent that the protected enactment has *been in substance amended, superseded, disapplied or repealed*.
- d. Paragraph 2 of Schedule B saves a modification which

(a) is ancillary to a provision made (whether by the Act in question or another enactment) which does not relate to reserved matters, and

(b) has no greater effect on reserved matters than is necessary to give effect to the purpose of that provision.

10. Does the Bill modify the law on reserved matters, i.e. section 104 of the Equality Act 2010?

- a. Section 104 is in Part 7 of the Equality Act 2010. That part deals with associations. It prohibits unlawful discrimination by associations against members, applicants for membership and associates on the grounds of protected characteristics including sex.
- b. Section 104 creates special rules in favour of associations which are registered political parties. It exempts them from being in breach of the anti-discrimination provisions if they act in accordance with ‘selection arrangements’, defined in s104(3) as:

arrangements—

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

c. Section 104(4) explains

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.

- d. Section 104(6) excludes shortlisting only candidates who have a particular protected characteristic, but Section 104(7) provides that this does not apply to sex. So all-women or all-male shortlists (for example) will not involve a breach of the Part 7 anti-discrimination provisions, at least until the end of 2030.¹¹
- e. The annex to the Llywydd's letter of 11th March considers that the Bill modifies section 104 because it 'turns the voluntary power to address under-representation in section 104 into a duty to address under-representation.'
- f. It can be argued *contra* that the Bill does not modify section 104 for that reason. Rather than being seen as granting a power to political parties, section 104 can be characterised as one that grants them an exemption from liability. The effect of section 104 in the context of Wales is that political parties will not be held to have committed unlawful discrimination ('a person does not contravene this Part') only by making different provision for women than for men, provided that it is done for the purpose of reducing inequality in the party's representation in the Senedd, and that it is a proportionate means of achieving that purpose. The Bill is not necessarily incompatible with that. Acting in accordance with the Bill would only result in a conflict with section 104 if (a) it were done for another purpose or (b) it were not a proportionate means of reducing inequality.
- g. The Bill however has the effect of removing the objective assessment of purpose and proportionality in individual cases. This would not be a problem if it could be guaranteed that compliance with the Bill's provisions would in all cases necessarily satisfy the purpose and proportionality criteria in section 104(3). That would be difficult, however, in particular bearing in mind the asymmetric nature of the provisions. It does therefore in my view modify section 104 since it qualifies that section's continuation in force in relation to Senedd elections

¹¹ Section 105. This sunset date can be extended by regulations. Note also that the Section 104(6) exclusion only applies to shortlists. It does not appear to apply to the electoral lists themselves.

by (effectively) deeming the Bill’s provisions to satisfy the section 104(3) test for ‘electoral arrangements’.

- h. It may be that this problem could be resolved wholly or partly by amending the Bill. (For instance, parties could be placed under a duty, when complying with the Bill, to do so for the purpose of reducing inequality in the party's representation in the Senedd, and act proportionately. This could deal with situations of permitted asymmetry, but not required asymmetry).¹²
- i. If, however, the question of Schedule 7A Compatibility is resolved in favour of the Bill, then it may be that the modification will be saved by paragraph 2 of Schedule 7B on the basis that it is ancillary to a provision in the Bill (or more than one) and has no greater effect on reserved matters than is necessary to give effect to the purpose of that provision. The modification seems to be ancillary in the sense that it resolves what would otherwise be a conflict between section 104 and the Bill and since it is limited to resolving that conflict, it can be said to have no greater effect on reserved matters than is necessary to give effect to the purpose of the Bill.

11. ECHR Competence – A3P1 and A14

- a. A3P1 sets out the right to free elections. It reads:

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.

- b. It is presumed for the purpose of this note that the Senedd would count as a legislature for the purpose of A3P1.¹³
- c. The ECtHR has established that the Article covers both a right to vote and the right to stand for election. The rights are not absolute, and states are given a wide margin of appreciation as to the conditions they apply to the right, especially so in respect of the right to stand for election.¹⁴ As the ECtHR put it in *Zevnik v Slovenia* (application no 54893/18)

¹² This needs much more thought than I have been able to give it.

¹³ That seems more than likely in the light of ECtHR decisions but is not a foregone conclusion. See para 2 of *Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights* (Council of Europe) (Updated 31 August 2022) (“Guide”)

¹⁴ See Guide paras 12-14 and 47

Contracting States must be given a wide margin of appreciation in this sphere, seeing that there are numerous ways of organising and running electoral systems and a wealth of differences, inter alia, in historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mould into its own democratic vision.

In that case the Court found that a minimum 35% quota of women candidates was compatible with A3P1.

- d. A14 prohibits discrimination on any grounds, including sex, in the enjoyment of the rights protected by the Convention. It reads:

The enjoyment of the rights and freedoms set forth in [the] 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.

- e. So discrimination on the grounds of sex is prohibited. It may however be permitted if there is objective and reasonable justification for it.
- f. In the case of *Sejdić and Finci v. Bosnia-Herzegovina* (Application numbers 27996/06 and 34836/06) ECtHR held that a law which prohibited people from standing for election unless they were affiliated to a ‘constituent people’ of Slovenia discriminated on the ground race lacked an objective and reasonable justification and therefore found in favour of the applicants who were members of the Roma and Jewish communities, which were not ‘constituent peoples’.
- g. The Bill discriminates on the ground of sex in respect of A3P1, because of the permitted asymmetry and required asymmetry of its provisions. Art 14 was not considered in *Zevnik* But it appears to be consistent with the judgment in that case to assume that, had it done so, the Court would have found the asymmetry in that case (a 35% quota) to have an objective and reasonable justification. The asymmetry in the Bill is more extensive, so would require its own objective and reasonable justification.