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 Thomas Glyn Watkin CB | Evidence from Thomas Glyn Watkin KC

SENEDD CYMRU

REFORM BILL COMMITTEE

INQUIRY INTO THE SENEDD CYMRU (ELECTORAL CANDIDATES LIST) BILL

Legislative Competence

Written Evidence from Professor Thomas Glyn Watkin KC (*hc*)

1. I am grateful to the Committee for the invitation to make a written submission in relation to this inquiry. Unless otherwise stated, the opinions expressed in this paper are entirely my own and do not represent the views of any body or institution with which I am or have been associated.
2. I have no personal or professional interest in the matter under inquiry.

The Bill

3. The long title of the bill states that it is a bill "to make provision about the proportion and placement of women on lists of candidates to be Members of the Senedd; and for connected purposes". The Member in Charge of the Bill, Jane Hutt MS, has, as required by statute, stated on introducing the bill that in her view the provisions of the bill are within the legislative competence of the Senedd. The Llywydd, as also required by statute, has stated her decision that the bill is not within the Senedd's legislative competence. She has also given reasons for her decision. She believes that the Bill relates to a reserved matter, equal opportunities, and that it also modifies the law on reserved matters, namely section 104 of the Equality Act 2010.

The Legislative Competence of the Senedd

4. Senedd Cymru's powers to make legislation are limited by its legislative competence as set out in section 108A of the Government of Wales Act 2006 as amended. Among the limitations set out in that section is that in relation to the legislation's subject-matter. Section 108A(2) provides that:

> "A provision is outside that competence so far as… it relates to reserved matters",

and

> "so far as … it breaches any of the restrictions in Part 1 of Schedule 7B… ".

5. The issue of equal opportunities raised by the Llywydd concerns the former of those limitations; the issue of modifying the law on reserved matters concerns the latter.

Reserved Matters

6. The matters which are reserved to the UK Parliament and therefore outside the legislative competence of the Senedd are listed in Parts 1 and 2 of Schedule 7A to the 2006 Act as amended. Part 1 lists broad areas of the law which are generally outside of competence. Part 2 lists matters which, while falling within areas of the law which are generally devolved, are nevertheless outside of competence. These latter are termed 'specific reservations'.
7. On receipt of the Committee's invitation to submit written evidence, I studied the bill prior to reading the reasons for the Llywydd's decision. In so doing, I identified two specific reservations which could potentially pose problems of competence for the bill's provisions. These were **N1 Equal Opportunities** – the matter identified by the Llywydd – and **L13 Gender Recognition**. I shall postpone consideration of the latter until I have considered the issues raised by the Llywydd.

Questions of competence

8. Section 108A also sets out the test which is to be used to determine whether provisions relate to a reserved matter. 108A(6) provides that:

> 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.

9. This is sometimes referred to as 'the purpose and effect test', although it is clear from the wording that it is the purpose which is central to the determination, the effect being one thing, amongst others, to which regard must be had.

N1 Equal Opportunities

10. The meaning of 'equal opportunities' as a reserved matter is given in the *Interpretation* provision within paragraph 187 of Schedule 7A, Part 2. The relevant portion reads:

> "Equal opportunities" means the prevention, elimination or regulation of discrimination between persons on grounds of sex…

but the paragraph contains *Exceptions*, so that it does not place outside of competence

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

11. The bill's provisions will, therefore, be outside of competence if their purpose, having regard (among other things) to their effect in all the circumstances, relate to the prevention, elimination or regulation of discrimination between persons on grounds of sex, or the encouragement of equal opportunities by prohibition or regulation.

The Purpose of the Bill and its Provisions

12. The Explanatory Memorandum which accompanies the Bill states that the Bill is part of a package of reforms "for the purpose of making the Senedd a more effective legislature that is better able to serve the people of Wales" (¶ 10). That this is the Bill's purpose was also emphasized by the Member in Charge during her oral evidence session with the Committee. The EM draws attention to evidence which indicates that "More gender-balanced representation is shown to strengthen the legitimacy of legislatures" (¶ 43). It is clearly arguable that the bill's purpose is to achieve a gender balance within the Senedd which reflects that within the Welsh population, rather than preventing, eliminating or regulating discrimination. The word *discrimination* here has a negative sense – of unfair discrimination – otherwise it would not be sought to prevent or eliminate it. As the word *regulating* follows *preventing* and *eliminating*, it too refers to discrimination in that negative sense. That is not the bill's purpose.

13. Looked at from that perspective, the bill does not appear to have as its purpose the encouragement of equal opportunities, albeit such encouragement – provided it is not by prohibition or regulation – is not outside of competence. Various passages in the EM recognize that greater gender balance in the legislature may result in women taking a greater interest in politics (¶ 43), with women in positions of political leadership serving as role models encouraging involvement by example (¶¶ 44–48).

14. Such encouragement is therefore foreseen by the EM as a likely and desirable consequence of the bill's provisions. Even, therefore, if such consequences are not among the purposes of the bill, the question arises as to whether they are an effect of the bill, or one of the 'other things' to which regard must be had in all the circumstances when determining whether or not it relates to the reserved matter of equal opportunities.

Purposes, effects, outcomes and consequences

15. The provisions of this bill raise difficult questions about the exact meaning of the terms used in section 108A(6). While the meaning of *purpose* may be generally clear, the same cannot be said for *effect* or the *other things* referred to in the test. All are likely to be consequences of the bill being passed, but they must be more than mere

consequences. Consideration of whether the provisions of this bill are within competence may require resolution of some of these interpretative difficulties.

16. In preparing this written evidence, I have found it necessary to attempt an analysis of the use of these terms to clarify my thinking. Others may disagree with the analysis I have used, but I have found analysis necessary.

17. I take the purposes of a provision to be the outcomes which it intends to bring about and wishes to be brought about.

18. I would distinguish these from a provision's effect, which I would characterize as the outcomes which a provision brings about even though not the main outcome intended or desired to be brought about by the enactment. I am giving *effect* the narrow meaning of something done, effected, by the provision.

19. Purposes and effects are therefore both outcomes which are brought about by the provision being enacted. They are distinguishable from other consequences which may follow from the legislation but which are not specifically brought about by it.

20. This leaves the question of what are the 'other things' which must be considered.

21. Not all consequences are foreseeable. It is a recognized, if unfortunate, fact that legislative proposals sometimes have unforeseen consequences, albeit that rigorous policy development should reduce these to a minimum by seeking to eliminate them.

22. Among consequences which are foreseeable, some will not be desirable and may therefore be eliminated or mitigated by express provision in a bill. Their elimination or mitigation will then form part of the bill's purpose. They are sufficiently closely connected to the bill to be controlled by it. If they are allowed therefore to occur, their occurrence can be viewed as a matter of choice by the legislator, and they can rightly be regarded as things to which regard should be had when considering questions of competence even though they are neither purposes nor effects of the provisions.

23. Other foreseeable consequences, however, may not be capable of elimination or mitigation by the bill's provisions. That the circumstances brought about by the bill's enactment may lead to those consequences is not something that can be controlled by the bill's provisions. Such consequences I regard as being too loosely connected with the bill to be controlled by it, and such consequences should not therefore be things to which regard should be had when considering questions of competence. They are not fairly and realistically connected with the bill's provisions.

Do the provisions relate to Equal Opportunities?

24. As the Llywydd observes in her statement regarding the bill's not being within competence, "Ultimately… the question of whether any Senedd Bill is within the legislative competence of the Senedd can only be definitively answered by the Supreme Court". In this particular case, the distinctions are so fine that it would be a brave soul who would confidently predict the outcome of such a determination.

25. My own view, for what it may be worth, is that the purpose of the bill is not to prevent, eliminate or regulate discrimination between persons on grounds of sex but rather to produce a Senedd membership which better reflects in terms of gender balance the population of Wales. While it is foreseen and desired that a consequence of the bill may be to encourage equal opportunities for women in the field of political activity, this is not a purpose of the bill. However, the bill's provisions will bring about greater equality in the number of men and women on candidates' lists, and this in turn may

encourage greater equality of opportunity in the field of politics. The question therefore is whether this encouragement is either an effect of the bill or one of the other things to which regard may be had in competence determinations.

26. I am persuaded that is neither. It is not an effect of the bill, in the narrow sense in which I am using the term, because it is not brought about by the bill's provisions, but may follow from the circumstances produced by the bill's enactment.

27. It is therefore a consequence of the bill, but the question yet remains whether it is too loose a consequence to take the bill outside of competence. In my view it is. My reason for saying so is this. Given that such encouragement of greater equality of opportunity is likely to be a consequence of the bill's enactment, is it so fairly and realistically related to the bill's provisions that, were it not a desirable consequence, the bill's provisions could be amended so as to exclude its occurrence? If the answer is 'Yes', I would regard the consequence as a thing to be considered when determining whether the provisions relate to a reserved matter. If however the answer is 'No', then the consequence in my view is not closely enough linked to the bill to be a thing to be taken into consideration. In this case, the bill could hardly be amended to prevent such encouragement occurring, and therefore its occurrence is to my mind a loose, consequential connection.

28. Given that the encouragement of equal opportunities which may be occasioned but not brought about by the bill's enactment has only a loose and consequential connection with the bill's provisions, the fact that the gender balance of the Senedd which may occasion that encouragement is brought about by prohibition and regulation is of no relevance, as the bill's provisions do not themselves bring about that outcome.

Modification of the Equality Act 2010, section 104

29. The bill requires registered political parties to construct their candidates lists in accordance with its provisions so as to produce lists which are gender balanced. The Llywydd has decided that this amounts to a modification of a law on a reserved matter. In her reasons, she states:

> Section 104 of the 2010 Act makes special provision for political parties by permitting them (voluntarily) to adopt discriminatory selection arrangements in order to address under-representation in their candidate selection processes. Therefore, section 104 **permits** political parties to address under-representation, but does not **require** them to do so.
>
> The Bill, however, requires political parties to address under-representation: it requires at least half of candidates on lists submitted by political parties to be women, and it requires that the first or only candidate on at least half of those lists be a woman. In the context of Senedd elections, in my view, the Bill effectively turns the voluntary power to address under-representation in section 104 into a duty to address under-representation.
>
> I have concluded that such a change amounts to a modification of section 104. Even though the Bill does not amend the text of section 104, the Bill is in conflict with section 104, which is a modification of the law on reserved matters.

30. The Llywydd states that in reaching this conclusion she has considered the Supreme Court's explanation of the meaning of "modify" in the case concerning the UK Withdrawal from the EU (Legal Continuity) (Scotland) Bill. In paragraph 51 of the judgment of the court in that case, it is stated:

> 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.

31. Section 104 of the Equality Act makes special provision for registered political parties, enabling them to regulate the selection of their candidates so as to reduce, among other things, gender inequality in their representation in an elected body even by having, in the case of the protected characteristic of sex, single sex shortlists. The selection arrangements to which the section applies are those "which the party makes". The Llywydd considers that the provisions of the Senedd bill modify this law in that they require candidates to be selected in accordance with its provisions.

32. The provisions clearly do not expressly amend or repeal any part of section 104. The question therefore is whether the provisions implicitly amend, disapply or repeal in part the section's application to the protected characteristic of sex. The Supreme Court's judgment states that this will be the case if the provisions alter the rule in section 104, or are in conflict with its unqualified continuation in force so that the original enactment has to be understood as having been in substance amended, superseded, disapplied or repealed.

33. The purpose of section 104 is, in my view, to exempt registered political parties from the provisions of that part of the Equality Act 2010 when making selection arrangements with a view to reducing inequalities. In that it exempts parties, in the case of the protected characteristic of sex, from having to adopt proportionate means to do so and permits single-sex short-lists, it permits parties to go much further than what is required by the provisions of the Senedd bill. The Senedd bill does not disapply section 104 nor conflict with its continuation in force, but it may be argued that it supersedes it in part by not allowing parties complete freedom over whether they wish to adopt selection arrangements which reduce gender inequality.

34. In my view, the Senedd bill's provisions supplement rather than supersede the provisions of section 104. I reach that conclusion on the basis that the purpose of section 104 is to reduce inequalities and not to protect the freedom of political parties as to whether they wish to reduce inequalities or not. Political parties will remain free to go further than is required by the Senedd bill to reduce gender inequality if they so wish, and therefore the Senedd bill's provisions do not supersede the provisions of section 104 but rather supplement them.

35. I believe that my interpretation of the relationship between the Senedd bill and section 104 is supported by and is consonant with the content and purpose of the fourth exception to reserved matter **N1 Equal opportunities** which provides that:

> provision falling within this exception does not include any modification of the Equality Act 2010, or of any subordinate legislation made under that Act, but does include—
>
> (a) provision that supplements or is otherwise additional to provision made by that Act;
>
> (b) in particular, provision imposing a requirement to take action which that Act does not prohibit;.

36. In that the provision contemplated by the exception must not include modification of the Act but may include what paragraph (a) and, in particular, paragraph (b) permit, it follows that what is permitted by paragraphs (a) and (b) are not considered to be modifications. The provisions of the Senedd bill fit the descriptions given in those paragraphs.

Gender Recognition

37. Unlike **N1 Equal opportunities**, **L13 Gender Recognition** does not contain an interpretation provision setting out the meaning of the reserved matter. In considering the meaning of *Agriculture* in the original Schedule 7 to the Government of Wales Act 2006, the Supreme Court stated that the term should bear the meaning which it has as an "object of legislative activity", not a dictionary definition of the term. In the case of *agriculture*, this meaning was wider than dictionary definitions. In the case of *gender recognition*, it is in my view likely to be narrower, and not so broad as to encompass all requirements for persons to state their sex or gender. In my view, therefore, the provision contained in the new section 7D(2), which section 1 of the bill proposes to insert into GoWA 2006, does not relate to the reserved matter **L13 Gender recognition**.

38. However, the bill requires provision to be made in a section 13 Order with regard to the declaration which persons nominated to be candidates will be required to make as to whether they are or are not a woman. The Explanatory Memorandum states such provision

> is necessary to ensure the effective implementation and enforcement of the candidate list requirements (¶89)

and later states that

> Much of the detail relating to how the enforcement process will work in practice will be set out in an Order made by the Welsh Ministers under section 13 of GoWA… The powers in the legislation also include powers for the Welsh Ministers to make specific provision in an Order under section 13 in respect of the right to inspect candidates' gender statements (¶114).

39. A section 13 Order cannot make provisions which would not be within legislative competence if included in an Act of the Senedd (GoWA 2006,s.13(1)). It is not difficult therefore to foresee potential difficulties arising here. Issues may arise which will involve gender recognition in the sense in which it is used as an 'object of legislative activity'. Questions may arise, for instance, if a nominee believes that someone preferred to them in constructing a list does not fit their description of themselves in their gender statement. The Data Protection Impact Assessment recognizes that the

order of candidates on a party list may on occasion make it possible to ascertain what they have stated with regard to their being a woman or not (EM, ¶230), and the Justice System Impact Identification Assessment notes the likely increase in "the potential circumstances which might give rise to grounds for applying to the courts" (EM, ¶237). Such questions, particularly if raised at a late stage, could be seriously disruptive of the electoral process.

40. It is clear that the anticipated detail which it has been left to the Welsh Ministers to provide in a section 13 Order can affect the rights of persons to stand as candidates in Senedd elections. The Equality Impact Assessment notes this (EM, ¶ 215). Even though lawful, it is questionable whether it is appropriate for detail of this nature to be left to be provided in subordinate legislation. Arguably it should be provided on the face of the bill so as to allow full scrutiny of what is proposed by the elected representatives of those affected, with opportunity for amendment. In this instance, the choice of subordinate legislation also increases the risk of seriously disruptive challenges.

Power to make consequential, transitional etc., provision

41. Section 3(2)(a) of the Bill enables the Welsh Ministers to make regulations which may

> "amend, repeal, revoke or modify this Act or any other enactment (whenever passed or made)".

42. This is an astonishingly broad 'Henry VIII power'. Its breadth is only tempered by the statutory interpretative requirement to read provisions, where possible, as narrowly as is required for them to be within competence. The power cannot therefore be exercised so as to take the provisions of the bill, once enacted, outside of competence.

43. The frequent granting of Henry VIII powers to government ministers in UK Parliamentary legislation has been the subject of severe criticism in recent years, most notably in the House of Lords where the late Lord Judge of Draycote, the former Lord Chief Justice of England and Wales, was a notable critic. It would be a shame if Senedd Cymru chose to follow Westminster's bad example in this regard.

Conclusions

44. After much reconsideration with regard to what I have written, I am on balance of the belief that the provisions of the bill as introduced are within the legislative competence of the Senedd. The arguments for and against this are however very finely balanced and it would be foolhardy to be completely confident about my conclusions. If the Bill is passed, as the Llywydd notes, it will be open to the Counsel General or the UK Attorney General to refer the matter to the Supreme Court to consider whether the bill or any of its provisions are outside of competence. If that does not occur, so that the bill progresses to Royal Assent, it will remain possible for individuals to challenge the validity of the legislation as a devolution issue in proceedings under the provisions of Schedule 9 to GoWA 2006. It is not difficult to imagine scenarios in which potential candidates or nominees disgruntled by the operation of the legislation would choose to wage such a challenge. It is not beyond imagining that the actions of parties opposed to Welsh devolution might lead to such challenges. The disruption to a Senedd General Election which such challenges might occasion cannot fail to be a cause of concern. The case for avoiding such possibilities is in my view strong, and

it is to be hoped that a definitive ruling on the validity of the bill's provisions will be obtained prior to its enactment and implementation.

Thomas Glyn Watkin[*]

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[*] Professor Thomas Glyn Watkin was First Welsh Legislative Counsel to the Welsh Assembly Government (2007–10), Professor of Law and Head of Bangor Law School (2004–2007) and Professor of Law at Cardiff Law School (2001–2004), having previously been successively Lecturer, Senior Lecturer and Reader in Law at Cardiff (1975–2001) and Legal Assistant to the Governing Body of the Church in Wales (1981–1998). He is a King's Counsel (*honoris causa*), a Fellow of the Learned Society of Wales, and an ordinary academic bencher of the Middle Temple. Since his retirement he has been an honorary professor at both Bangor and Cardiff Law Schools. His *Legislating for Wales*, written with Daniel Greenberg, was published by the University of Wales Press in 2018.