

SCECLB5 – P 5050Amrywiol

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 5050Amrywiol | Evidence from Diverse5050 (Saesneg yn unig)

4. Your opinion

To assist with our inquiry, the Committee would welcome your views on any or all of the following points:

Some helpful things to be aware of before you start answering the consultation questions:

- You do not need to answer every question, only those on which you wish to share information or have a view.
- If you provide any information that you feel is not suitable for public disclosure, please indicate which parts should not be published and give your reasons for this.

General principles

1. What are your views on the general principles of the Bill and the need for legislation to deliver the Welsh Government's stated policy objective (*to make the Senedd a more effective legislature by ensuring it is broadly representative of the gender make-up of the population*)?

(we would be grateful if you could keep your answer to around 500 words)

We are fully supportive of the general principles and stated policy objective of the Bill, which is to make the Senedd a more effective legislature for, and on behalf of, the people of Wales by aiming to ensure that the Senedd is broadly representative of the gender make-up of the Welsh population. Without robust measures to encourage the election of a Senedd that better reflects the Welsh population, the potential of reform proposals to deliver a more effective legislature for the people of Wales will be deeply compromised. The provision for legislative gender quotas set out in the Bill comprises the single most effective measure towards achieving this and are therefore central to delivering the overall policy objective of Senedd reform.

The role of the Bill within Senedd reform

The Bill is a central element of a package of Senedd Reform proposals which would jointly achieve the shared policy objective of making the Senedd a more effective legislature. Most of the proposals would be delivered through the Senedd Cymru (Members and Elections) Bill, which is currently at Stage 3 of the legislative process. This includes the expansion of the Senedd from 60 to 96 members, which would increase the Senedd's capacity to properly scrutinise legislation and policy and can ultimately translate into better frontline public services and better value for money for the people in Wales.

As we have highlighted in several previous submissions, the potential benefits of Senedd expansion will only be fully realised if the expansion goes hand in hand with well-designed measures to encourage the election of a Senedd that better reflects the population of Wales, including with regard to gender. In a submission to the Committee on Senedd Electoral Reform in 2020, ERS Cymru argued that the diversity of a future Senedd must go “hand in hand” with electoral reform and capacity increase.¹ WEN Wales, in response to the same consultation, argued that “women’s participation and the success of women as candidates in elections are vital indicators of the health of a representative democracy.”²

This point has been recognised throughout the findings of the Expert Panel on Electoral Reform, the Committee on Senedd Electoral Reform, and the Special Purpose Committee. It is further supported by a wealth of evidence on the positive impact of women’s representation on the legitimacy and effectiveness of legislatures. A full review of this evidence would be outside the scope of this submission, but details can be found in the reports of the aforementioned bodies and submissions, as well as in the Explanatory Memorandum accompanying the Bill.

Why legislative quotas are needed to deliver the stated policy objective

The evidence is equally clear on the point that achieving a legislature that better reflects the gender make-up of the population is best achieved through legislative gender quotas. Gender quotas have been found to be the “single most effective tool for ‘fast tracking’ women’s representation in elected bodies for government” and are used by over 130 countries worldwide.³ The majority of these countries use legislative as opposed to voluntary quotas, either in the form of legislative candidate quotas or less commonly through reserved seats.⁴ The evidence also suggests that legislative gender quotas benefit women from marginalised communities, while voluntary gender quotas at party level do not have the same impact.⁵

¹ ERS Cymru (2020), Electing a more diverse Senedd. Consultation Response, <https://business.senedd.wales/documents/s102091/DIV%2001%20Electoral%20Reform%20Society%20Cymru.pdf>

² WEN Wales (2020), Electing a more diverse Senedd. Consultation Response, <https://business.senedd.wales/documents/s102095/DIV%2005%20Womens%20Equality%20Network%20Wales.pdf>

³ International IDEA. Gender Quotas Database, retrieved 27 Mar 2024. <https://www.idea.int/data-tools/data/gender-quotas>; Drude Dahlerup et al. (2013), Atlas of Electoral Gender Quotas, International Institute for Democracy and Electoral Assistance [IDEA], IPU and Stockholm University.

⁴ International IDEA. 2020. Gender Quotas Database, retrieved 27 Mar 2024. <https://www.idea.int/data-tools/data/gender-quotas>;

⁵ Hughes, M. (2011). Intersectionality, quotas, and minority women’s political representation worldwide. *American Political Science Review*, 105(3):604-20.

Data from the 2021 Senedd election shows that women's underrepresentation was more pronounced at the candidacy stage than after the election.⁶ Women made up only 31% of candidates but managed to secure 42% of seats. This means that, once given the chance to stand, women were, on average, more successful than men at winning elections. This suggests the key bottleneck for women's underrepresentation in Wales is parties' candidate selection rather than voter bias. Legislative candidate quotas are the only tool that would be both effective and specific in addressing this major barrier to the election of a Senedd that reflects the gender make-up of the Welsh population. The implementation of legislative gender quotas will become even more important given that the provisions in the Senedd Cymru (Members and Elections) Bill to introduce a closed proportional list voting system would increase the influence of political parties (vis-à-vis the electorate) over the gender and diversity make-up of the Senedd.⁷

While voluntary quotas have been used by some individual parties in Wales, they have failed to deliver consistent, long-term results. Since devolution, women have been underrepresented in all but one Senedd election and remain so to this day. This is unsurprising. Unless ambitious voluntary quotas are used by all political parties, their effectiveness is dependent on the electoral success of specific parties. More generally, the use of voluntary quotas is, by definition, always at the discretion of parties, which is why they can never offer a long-term guarantee for women's representation. As better representation of the gender make-up of Wales' population has been found to be a central pillar of the Senedd's future legitimacy and effectiveness, it cannot be left at the discretion of individual parties. Legislative quotas are necessary.

Enforcement and compliance

As part of the nominations process, candidates would be required to make a statement about whether they are a woman or not a woman. This statement will be used as the basis for enforcing the rules. Constituency Returning Officers (CROs) will take these statements at 'face value', meaning that they would not undertake any investigation into whether the information provided by a candidate is correct. CROs would be responsible for verifying that a minimum of 50% of candidates on each list have made a statement that they are

⁶ Senedd Research (2021), How diverse is the Sixth Senedd? <https://research.senedd.wales/research-articles/election-2021-how-diverse-is-the-sixth-senedd>

⁷ WEN Wales (2023), Response to the Consultation on the Senedd Cymru (Members and Elections) Bill, <https://wenwales.org.uk/wp-content/uploads/2023/11/WEN-Consultation-response-on-the-Senedd-Cymru-Members-and-Elections-Bill.pdf>.

women, and that the vertical rule is met. If a list does not comply, the CRO will be able to invalidate the nomination papers.

For the national quotas, the Bill gives the Welsh Government the power to appoint a National Nominations Compliance Officer (NNCO). This role would oversee compliance with the horizontal rule. If a political party's lists do not comply with the rule, they will be given the opportunity to re-order one or more list to make them compliant. If they do not, then one or more lists would be chosen by the NNCO and re-ordered by the relevant CRO.

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

(we would be grateful if you could keep your answer to around 500 words)

The proposed system of enforcement and potential sanctions for non-compliance, including the practice of taking gender statements at 'face value', is appropriate and in accordance with international practice.

At the level of individual party lists, we would expect the rejection of non-compliant lists by the Constituency Returning Officer to be a highly effective enforcement mechanism as parties would not be able to stand candidates in a particular constituency unless they submit a compliant list. A potential alternative sanction to list rejection would be the use of financial sanctions, as done e.g. in Ireland.⁸ Lack of relevant state funding for political parties in Wales means financial sanctions would not be feasible. In addition, financial sanctions would allow parties to proceed to an election with non-compliant lists if they are willing and able to make the financial sacrifice. This is not a possibility with list rejection, making it arguably a more effective enforcement mechanism.

At the horizontal level, the appointment of a National Nominations Compliance Officer to ensure compliance via the proposed process appears appropriate. As parties become more familiar with the new system, consideration could be given as to whether the process can be streamlined.

The Bill's implementation

⁸ National Women's Council (2021), Candidate Gender Quota for Local Elections Briefing paper, https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_housing_local_government_and_heritage/submissions/2021/2021-07-28_submission-national-women-s-council-hlgh-369a-2021_en.pdf.

The Regulatory Impact Assessment is set out in Part 2 of the **Explanatory Memorandum** (<https://senedd.wales/media/xp4dqjto/pri-ld16394-em-e.pdf>). This includes the Welsh Government's assessments of the financial and other impacts of the Bill and its implementation.

3. Are there any potential barriers to the implementation of the Bill's provisions? If so, what are they, and are they adequately taken into account in the Bill and the accompanying Explanatory Memorandum and Regulatory Impact Assessment?

(we would be grateful if you could keep your answer to around 500 words)

The Explanatory Memorandum comprehensively addresses a range of potential impacts relating to the implementation of the Bill's provisions. But there are several aspects relating to the costs and benefits of the Bill that require further consideration.

The Regulatory Impact Assessment (RIA) sets out the costs and benefits for two different options – *business as usual* or *implementation of the Bill*. The RIA recognises that there are a range on non-monetary benefits as well potential financial savings associated with the implementation of the Bill. As detailed under Question 1, this is because better gender representation would make the Senedd a more effective legislature, which in turn can be expected to achieve better value for money. The RIA recognises that these benefits and savings could be incurred as potential opportunity costs in the "business as usual" scenario.

However, we would add there is a risk that the "business as usual" scenario (not implementing the Bill) could incur costs above and beyond the stated opportunity costs. This is due to a risk that Senedd expansion *without* parallel implementation of the Bill could easily lead to a Senedd that is *less* representative of the population of Wales than is currently the case, both in terms of gender and potentially with regard to other protected characteristics. There is a further risk that any potential regression would likely be entrenched for years to come.

The risk is explicitly recognised elsewhere in the Explanatory Memorandum, which states:

31.As men typically outnumber women as candidates at Senedd elections, there is a risk that without the introduction of quotas the planned significant expansion of the Senedd, increasing the number of MSs from 60 to 96, will lead to a greater gender imbalance than at present.

We would stretch that men currently *significantly* outnumber women as candidates at *all* levels of Welsh elections. Without the introduction of quotas, and the accompanying work

of parties to attract more women as candidates, we would expect an imbalance in the pipeline of potential candidates for the 2026 Senedd election. This imbalance could easily result in men securing an even greater share of seats than in previous Senedd elections. In addition, gender quotas have been found to have a positive impact on diversity by encouraging the election of women from marginalised communities, and could provide an impetus for parties to consider wider diversity in candidate selection.⁹

A failure to introduce gender quotas in parallel with Senedd expansion could therefore easily result in a regression in terms of gender diversity and could also have potential negative impacts on wider diversity. In either case, the “business as usual” scenario would result in a Senedd that is less representative of the Welsh population. As set out in the response to Question 1, research and scrutiny work on Senedd reform found that being less representative of the population would make the Senedd a *less* effective legislature along various dimensions. This means the “business as usual” scenario could incur non-monetary and financial costs beyond the opportunity costs acknowledged in the RIA.

Due to the impact of an amplified *incumbency overhang*, this net loss of diversity – and, in turn, legitimacy and effectiveness – could be entrenched far beyond the election at which the Senedd is first expanded. Incumbency overhang is an effect described by Laura McAllister, which creates a bias towards the existing demographic composition of a legislature.¹⁰ If the existing underrepresentation of women and other marginalised groups is increased as the Senedd expands, the incumbency overhang that is already working against these demographics would be amplified. This means a failure to implement gender quotas in parallel with Senedd expansion could set us on the path of a downward spiral in terms of diversity of representation. Any opportunity costs and potential additional costs of a less representative Senedd could become entrenched for years to come. Future measures needed to address the set-back in diversity of representation would incur costs on top of these, and they could be higher due to the magnitude of the challenges having increased in the meantime.

⁹ Hughes, M. (2011). Intersectionality, quotas, and minority women’s political representation worldwide. *American Political Science Review*, 105(3):604-20; Krook, M. L., & Nugent, M. K. (2016). Intersectional institutions: Representing women and ethnic minorities in the British Labour Party. *Party Politics*, 22(5), 620-630.

¹⁰ WEN Wales (2023), Response to the Consultation on the Senedd Cymru (Members and Elections) Bill, <https://wenwales.org.uk/wp-content/uploads/2023/11/WEN-Consultation-response-on-the-Senedd-Cymru-Members-and-Elections-Bill.pdf>.

4. Are any unintended consequences likely to arise from the Bill?

(we would be grateful if you could keep your answer to around 500 words)

Impact on trans and non-binary candidates

At face value, the provisions in the Bill would offer the opportunity for trans and non-binary people to stand for Senedd elections as who they are, which is to be welcomed. However, we are concerned that, in the present climate, there is an increased risk for people with certain gender identities to have their election challenged in various ways, including through an election petition. As the Bill and relevant subordinate legislation progresses through the Senedd, we urge that every effort is made to protect the privacy and safety of trans and non-binary people as part of the electoral process.

Impact on wider diversity

While there is evidence that gender quotas alone have some positive impact on the representation of women who face intersecting discrimination, the effect of incumbency overhang and wider societal factors and barriers could lead to a situation whereby the Bill could in practice benefit women who occupy relatively privileged social positions more than those who face intersecting discrimination. To prevent this potential unintended consequence, it is imperative that wider measures to advance diversity and inclusion in elected office are implemented in parallel to the progression of the Bill. Further details on this are discussed in response to Question 9.

5. What are your views on the Welsh Government's assessment of the financial and other impacts of the Bill?

(we would be grateful if you could keep your answer to around 500 words)

The accompanying documents provide assessments of the financial and other impacts of the Bill. Our focus has been on the equality and justice impact assessments, which are detailed and comprehensive. The findings were generally in line with our own understanding of the potential impacts of the Bill on different groups of women, which are overwhelmingly positive and have the potential to generate additional benefits for people with other protected characteristics.

We would emphasise that, while the Bill alone may have some positive impact on people with other protected characteristics, it is imperative that these are leveraged through other diversity and inclusion measures that need to be rolled out at pace to take effect prior to

Senedd expansion. This is particularly important to ensure that the Bill will encourage the election of women who experience intersecting discrimination, as they often face additional barriers to elected office and are especially underrepresented.¹¹ For instance, women under 40 make up only 6.1% of the world's MPs.¹² In countries without any quota legislation, the odds of being elected for women from racial, ethnic or religious minorities are 1 in 14 compared to men from a majority (non-minority) background, 1 in 3 compared to women from a majority (non-minority) background, and 1 in 2 compared to men from minority backgrounds (relative to their share in the overall population).¹³

As discussed under Question 4, we echo the concern that, in the present climate, the provision in the Bill could lead to negative impacts on people with certain gender identities, including on trans women, and these risks need to be managed very carefully.

Subordinate legislation

The powers to make subordinate legislation are set out in Part 1: Chapter 5 of the **Explanatory Memorandum** (<https://senedd.wales/media/xp4dqjto/pri-ld16394-em-e.pdf>).

The Welsh Government has also set out its **statement of policy intent for subordinate legislation**

(<https://business.senedd.wales/documents/s146049/Statement%20of%20Policy%20Intent%20PDF,%20313KB.pdf>).

6. 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?

(we would be grateful if you could keep your answer to around 500 words)

Other considerations

¹¹ WEN Wales (2022), Diversity Quotas Briefing,

https://wenwales.org.uk/wp-content/uploads/2022/02/DiversityQuotas.WenWales.Final_.pdf

¹² IPU (2020), Young women's political participation and leadership, <https://www.ipu.org/content/objective-6-2020>.

¹³ Hughes, M. (2011). Intersectionality, quotas and minority women's political representation worldwide. *American Political Science Review* 105(3), 604-620.

'Legislative Competence' is the term used to describe the scope of the Senedd's power to legislate. The 'Reserved Powers Model' established by the **Wales Act 2017** (<https://www.legislation.gov.uk/ukpga/2017/4/contents>) allows the Senedd to legislate on matters that are not reserved to the UK Parliament. A provision in a Senedd Bill is unable to modify the law on **reserved matters** (<https://www.legislation.gov.uk/ukpga/2006/32/schedule/7B/paragraph/1>).

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

(we would be grateful if you could keep your answer to around 500 words)

In 2022, WEN Wales and ERS Cymru instructed Christian J Howells, a public and constitutional law specialist at 30 Park Place Chambers, to provide a legal opinion on whether the Senedd has legislative competence to pass legislation in relation to quotas for gender and other protected characteristics.

The legal opinion was submitted to the Special Purpose Committee on Senedd Reform and a copy has been attached. Further information will be supplemented in due course.

8. Do you have any views on matters related to the quality of the legislation, or to the constitutional or other implications of the Bill?

(we would be grateful if you could keep your answer to around 500 words)

9. Are there any other issues that you would like to raise about the Bill, the accompanying Explanatory Memorandum and Regulatory Impact Assessment, or any related matters?

(we would be grateful if you could keep your answer to around 500 words)

The impact of party selection procedures

It has been suggested that the Bill could potentially result in an underrepresentation of men because it allows women to take up more than 50% of places on each candidate list and more than 50% of top places in lists overall. We anticipate that the risks of this occurring are slim, because the number of candidates of each gender that are being elected will partly be driven by who is being placed in winnable seats. Subject to the horizontal placement criteria, placement into winnable seats will remain at the discretion of individual parties. Evidence from Wales and other nations suggests that parties tend to

place more men in winnable seats and there is no reason to expect that this practice will fully cease with the implementation of the Bill.

The Explanatory Memorandum recognises that, in theory “a party could fulfil the requirements of the minimum threshold and placement criteria and still see up to 8 more candidates who are not women elected than those who are women.” While an impact of this magnitude is only expected in very specific circumstances, the Explanatory Memorandum acknowledges that “political parties have a key role to play through the candidate selection process and the formulation of constituency party lists in ensuring that women candidates are placed in winnable seats and in winnable constituencies if the legislation is to fully meet its purpose.”

This suggests that, rather than there being a chance of tipping the balance *too far*, there remains a risk that the provisions in the Bill would *not go far enough* to secure 50% representation for women. We recommend that this aspect should be closely monitored as part of the post-implementation review. If the vertical and horizontal placement criteria in the Bill are found to be insufficient to facilitate the election of a Senedd that reflects the gender make-up of the Welsh population, consideration should be given to the introduction of an additional placement criterion that requires that women are placed in at least 50% of winnable seats. Such a criterion could make references to established metrics of winnable seats, such as seats requiring less than a 5% swing to win.¹⁴

Support for women candidates

As the existing literature on Senedd reform recognises, women face a range of barriers to elected office and these are amplified for women who experience intersecting discrimination. While the provisions in this Bill would specifically and effectively address one major barrier – candidate selection processes – they would have no direct impact on other barriers, such as the disproportionate exposure to harassment and abuse, the lack of support with caring responsibilities, and other elements of political and wider culture that compound additional challenges in women’s candidacy and their work as elected members. If these barriers are not addressed, there is a significant risk that parties may struggle to attract women candidates, that women will be less likely to seek re-election, and that they will face barriers in seeking senior positions. It is therefore imperative that measures to address other barriers are implemented at pace, alongside the progression of the Bill.

¹⁴ English, P. (2022), High rejection, low selection: How ‘punitive parties’ shape ethnic minority representation, *Party Politics* 28(2), 294–305, <https://journals.sagepub.com/doi/full/10.1177/1354068820973851>.

We would envisage that an appropriate suite of measures should encompass a financial assistance scheme for candidates with caring responsibilities, opportunities for job-sharing, a review of standards and grievance procedures, measures to tackle harassment and abuse and ensure candidate safety, and targeted mentoring and training opportunities. Special consideration should be given to ensure these measures effectively support women from a diverse range of backgrounds and are tailored to address the impact of intersecting discrimination.

Wider diversity measures

Achieving the overall policy objective of Senedd reform depends on the extent to which reform proposals will succeed in making the Senedd representative of the Welsh population *in all its diversity*. This will only be possible if the gender provisions in the Bill go hand in hand with initiatives to encourage the election of candidates with different protected characteristics and from different marginalised communities.

The Diverse5050 Campaign has called for the implementation of quotas relating to other protected characteristics as well as gender quotas. International evidence suggests that gender quotas and quotas for other protected characteristics can be effectively combined into *intersectionally embedded quotas* to encourage the election of a Senedd that fully reflects the diversity of the Welsh population.¹⁵ The Committee on Senedd Reform and the Special Purpose Committee recognised the potential benefits of quotas for protected characteristics other than gender to encourage the election of a more diverse Senedd. Both Committees recommended that further work should be undertaken to assess the feasibility of such quotas. To date, this work has not been commenced, nor does the Bill include provisions to ensure it would be progressed following the passing of the Bill.

As well as assessing the feasibility of quotas for other protected characteristics, we would urge the Welsh Government to swiftly develop robust guidance on political parties' diversity and inclusion strategies, the implementation of the provisions to promote diversity in the Elections and Elected Bodies (Wales) Bill, and measures for the collection and publication of anonymised candidate diversity data.¹⁶ All measures should align with the commitments and frameworks set out in the Anti-Racist Wales Action Plan, the LGBTQ+ Action Plan, the Violence Against Women, Domestic Abuse and Sexual Violence (VAWDASV) Strategy, and the Social Model of Disability.

¹⁵ WEN Wales (2022), Diversity Quotas Briefing,

https://wenwales.org.uk/wp-content/uploads/2022/02/DiversityQuotas.WenWales.Final_.pdf.

¹⁶ WEN Wales (2023), Elections and Elected Bodies (Wales) Bill Consultation Response, <https://wenwales.org.uk/wp-content/uploads/2023/11/WEN-consultation-response-on-the-Elections-and-Elected-Bodies-Wales-Bill.pdf>.

About Diverse5050

The award-winning Diverse5050 campaign is a coalition campaign in partnership between the Women's Equality Network (WEN) Wales, the Ethnic Minorities and Youth Support Team (EYST) Wales, the Electoral Reform Society Cymru and Race Council Cymru. Its aim is to ensure that Wales elects politicians at a local, Westminster and Senedd level that are gender balanced, with meaningful representation from people with protected characteristics and marginalised communities.

About our partners

Women's Equality Network (WEN) Wales: Our vision is of a Wales free from gender discrimination where all have equal authority and opportunity to shape society and their own lives. We work with our vibrant coalition of organisational and individual members to transform society. Our work sits under three pillars. We will Connect, Campaign and Champion women so our vision is realised.

Ethnic Minorities & Youth Support Team (EYST) provides services and support for individuals across Wales who identify as ethnic minorities and/or have lived experience as an asylum seeker or refugee. We provide a range of services including education, employment, health, family support and community safety, challenge and counter negative stereotypes about ethnic diversity, and aim to increase awareness and understanding about the diverse communities who live in Wales.

The *Electoral Reform Society (ERS) Cymru* operates on a simple premise – that politics can be better than it is. We are campaigning for a better democracy in Wales, and across the UK.

Race Council Cymru (RCC) is the overarching umbrella body established by ethnic minority grassroots communities in Wales to bring key organisations together to combat racial prejudice, race discrimination, harassment, victimisation, abuse and violence.

ADVICE ON LEGISLATIVE DIVERSITY QUOTAS FOR SENEDD ELECTIONS

1. I am instructed to advise WEN Wales and ERS Cymru on whether the Senedd can pass legislation in relation to quotas for gender and other protected characteristics, within the meaning of the Equality Act 2010. They in turn have been asked by the Senedd Special Purpose Committee on Electoral Reform to identify any legislative options that may be available.
2. I am of the view that the introduction of mandatory selection arrangements, to include gender quotas, would arguably be within legislative competence because:
 - a. It is arguable that the purpose of such legislation would not relate to a reserved matter (equality of opportunity) but would relate to Senedd elections and so would not be caught by section 108A(2)(c) of the Government of Wales Act 2006 ('GoWA'); and
 - b. It is arguable that such legislation would fall within the exception to section N1 of Schedule 7A and so would not be caught by s108A(2)(c) GoWA.
3. Alternatively, it would be open to the Senedd to pass legislation imposing a duty on political parties to have due regard to the desirability of gender balanced candidate lists - mandating consideration of utilising section 104 of the Equality Act 2010.

Purpose of legislation would relate to Senedd elections not equality of opportunity

4. Legislative selection arrangements would probably be introduced by way of amendment to section 7 and/or 9 GoWA, '*candidates at general elections*' and '*allocation of seats to electoral region members*'. Those provisions are not protected by virtue of §7(2)(a)(v) of schedule 7B.

5. Senedd legislation will be outside competence where “*it relates to reserved matters*” in schedule 7A; section 108A(2)(c) GoWA.

6. Section 108A(6) provides the test to be applied in determining whether legislation relates to reserved matters. It provides:

“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.”

7. The Supreme Court has on two occasions clarified that the purpose of the legislation is to be ascertained in the usual way. If the purpose relates to a matter within devolved competence, then the fact that the legislation also touches upon reserved matters does not render the legislation outwith legislative competence:

a. *Martin v Most* [2010] UKSC 10, (2010) SC (UKSC) 40 was a case where an increase in the summary sentencing powers of Scottish criminal courts to 12 months impliedly amended the Road Traffic Offenders Act 1988 which stated that the maximum summary sentence for offences under the Act was 6 months. The Act was a reserved matter. The Court held by a majority at §§ 31 and 59 - 60 that as the purpose of the new legislation was to re-allocate the caseload and reduce pressure on the higher courts, it was “*directed*” as Scots law and did not relate to a reserved matter. Most of what was enacted by the Westminster Parliament (that it was an offence and the maximum penalty was 12 months) was left untouched;

b. *Re Agriculture Sector (Wales) Bill* [2014] UKSC 43, [2014] 1 WLR 2622 was a case where the Welsh Assembly passed legislation setting minimum terms and conditions of employment in the agricultural sector. Agriculture was then a conferred power, but employment and industry were not. The Court accepted at §58 that the bill “*might in principle be characterised as relating to “employment” and “industrial relations”*”.

Nevertheless, it held at §§ 65 – 68 that so long as the bill related to a devolved matter (the scheme of devolution was then a conferred powers model rather than a reserved powers model) it was within competence – GoWA at that time did not require that the legislation should only be categorised as relating a devolved subject.

8. The purpose of legislation can be ascertained by looking at the reports and papers that brought it about. I have considered the documents: (i) *A Parliament that Works for Wales* (November 2017) written by an expert panel on Assembly Electoral Reform; and (ii) *Senedd Reform: The next steps* (September 2020) written by the Senedd Committee on Senedd Electoral Reform. Recommendation 10 of document (i) was “*in order to safeguard the achievements of the Assembly and political parties in Wales in relation to gender-balanced representation, we recommend that a gender quota is integrated within the electoral system put in place for 2021.*” At §12.19 it stated that it would be anomalous if the Senedd did not have competence to determine its own electoral arrangements, including gender quotas. At §12.22 it states “*the intention of our proposals for gender quotas is to ensure that the Assembly is as representative as possible of the people of Wales*”. Read as a whole, the proposals in document (i) were not formulated to create equality of opportunity, but rather to ensure the Senedd was as representative as possible of the people of Wales.
9. Depending on the reasons for the legislative proposal going forward, if it can be said that the purpose of the legislation is to ensure the Senedd is representative of the electorate, then it can be argued that the purpose of the legislation relates to Senedd elections and although it may also touch upon equality of opportunity, that is insufficient to render it outside competence. The only reservations relating to Senedd elections are set out at §§ 21 - 27 of section B1 of Schedule 7A and are not relevant here.

10. Quotas in respect of protected characteristics other than gender need to be carefully thought through bearing in mind that the Senedd's competence is restricted by compatibility with the European Convention on Human Rights (s108A(2)(e)) and drawing distinctions along other lines requires careful justification for the purposes of the principle of non-discrimination contained in article 14 of the Convention.

11. Section 104 of the Equality Act 2010 ('EA') allows a political party to introduce selection arrangements which are designed for the purpose of reducing inequality in a party's representation and are proportionate arrangements. The introduction of mandatory gender quotas in candidate lists for each party in Wales would not be inconsistent with section 104 EA but would make additional provision - make such arrangements mandatory rather than permissible. I do not consider that there would be any modification of section 104 EA by the proposed amendment of sections 7 and 9 GoWA (and so I disagree with the suggestion to the contrary made at §278 of the report of the Senedd Committee on Electoral Reform). The Senedd legislation would not alter the rule laid down in section 104 EA or be in conflict with its unqualified continuation in force as before, so that section 104 EA has to be understood as having been in substance amended, superseded, disapplied or repealed; see *Re Withdrawal from the EU (Scotland) Bill* [2018] UKSC 64, [2019] AC 1022 at §51.

12. In any event, even if there were such modification, the Equality Act 2010 is not protected legislation in §5 of Schedule 7B and so can be modified by the Senedd, subject to the operation of section 108A(2)(c) and schedule 7A. §2 of Schedule 7B allows the modification of an enactment the subject matter of which is a reserved matter if such modification is ancillary to legislation which does not relate to a reserved matter. Thus, if the effect of an amendment to sections 7 and 9 GoWA was an implied amendment of section 104 EA, that would be permissible.

13. However, if such legislation is passed, there is a real risk that the Attorney General would refer the legislation to the Supreme Court pursuant to section 112 GoWA. That process will take 8 – 12 months to resolve.

Even if purpose related to equality of opportunity, the proposed mandatory selection arrangement would fall within an exception to the reservation

14. Schedule 7A sets out the reserved matters but also sets out the exceptions to those reserved matters. If the legislation falls within the exception, it is not caught by s108A(2)(d).
15. Section N1 of schedule 7A materially states:

“Section N1 Equal opportunities

187 *Equal opportunities.*

Exceptions

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

...

The 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;*
- (c) provision that reproduces or applies an enactment contained in that Act, with or without modification, without affecting the enactment as it applies for the purposes of that Act.” [emphasis added]*

16. If reliance is being placed on the exception because it is accepted, or the Supreme Court holds, that mandatory selection arrangements would relate to a reserved matter, then any legislation could not modify the Equality Act 2010,

as the exception expressly says so and §1 of schedule 7B would bite. But the Senedd **can** pass a provision which supplements or is otherwise additional provision and which imposes a requirement to take action which the Equality Act 2010 does not prohibit.

17. The first point is that, for the reasons given at §10, a legislative quota would not modify the Equality Act 2010 – it would be additional provision and would fall within the exception. Section 104 EA allows selection arrangements by political parties and the Senedd legislation would only require action already permitted by the Equality Act 2010. Such mandatory selection arrangements would be an encouragement of equal opportunity. I have debated whether a mandatory requirement would amount to regulation, which is not permitted by the exception, but in light of the fact that it later says such provision does include a requirement that is not prohibited, then I have come to the conclusion that it is arguable that mandatory selection arrangements would fall within the exception of encouragement.

The lesser option of a due regard duty

18. If it was accepted, or the Supreme Court held, that a mandatory selection requirement did not fall within the exception of encouragement (because it was regulation) or because it did amount to a modification of the Equality Act 2010, then there is the lesser option of introducing a duty on all political parties who submit a list of candidates to have due regard to the desirability of gender balanced lists. This would simply be encouraging parties to take advantage of section 104 EA and it would be open to the parties to decline, so long as they consider it.

Conclusion

19. Accordingly, I am of the view that it is within the legislative competence of the Senedd to introduce legislation which requires political parties at Senedd elections to submit candidate lists which are comprised of at least 50% female candidates. Alternatively, it is within the legislative competence of the Senedd to impose a duty on political parties to have due regard to the desirability of implementing selection arrangements in accordance with section 104 of the Equality Act 2010.

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