



Y Gwir Anrhydeddus Elin Jones AS

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David Rees MS

Chair of the Reform Bill Committee

Huw Irranca-Davies MS

Chair of the Legislation, Justice and Constitution Committee

11 March 2024

Dear David and Huw,

Senedd Cymru (Electoral Candidates Lists) Bill: Statement on legislative competence

In accordance with section 110(3) of the Government of Wales Act 2006 (the 2006 Act) and Standing Order 26.4, I have laid a statement setting out my view on whether or not the provisions of the Senedd Cymru (Electoral Candidate Lists) Bill would be within the Senedd's legislative competence.

It is my view that the provisions of the Bill would not be within the legislative competence of the Senedd. My statement sets out my reasons for reaching that view.

As Members will be aware, while I am required to make a statement setting out my views, the content of my statement does not affect whether or not a Bill may be introduced or complete its passage through the Senedd.

To help inform your Stage 1 scrutiny of the Bill, I enclose a summary of the issues I considered in reaching my view. If you would like further information and advice, the officials supporting the Committee will be pleased to assist.

I am copying this letter to the First Minister, the Minister for Social Justice in her capacity as Member in charge of the Bill, and all Members of the Senedd.

Yours sincerely,

The Rt. Hon. Elin Jones MS

Llywydd

Senedd Cymru (Electoral Candidate Lists) Bill: summary of legislative competence considerations

In coming to the view that the Senedd Cymru (Electoral Candidate Lists) Bill¹ would not be within the legislative competence of the Senedd, I have considered the tests of legislative competence set out in section 108A of the Government of Wales Act 2006. The merits of the policy behind the Bill did not form part of my decision-making process.

My view is based on the legal tests and the legal advice I have received on those tests. Ultimately, of course, the question of whether any Senedd Bill is within the legislative competence of the Senedd can only be definitively answered by the Supreme Court.

The reserved matter of equal opportunities

As regards my view that the Bill relates to the reserved matter of equal opportunities, I have applied the “relates to” test as set out in section 108A(2)(c) of the 2006 Act and as applied by the Supreme Court in a number of devolution cases.

I considered the purpose and effect of the Bill. While I accept the Bill has the devolved purpose of making the Senedd a more effective legislature, in my view the Bill also has the reserved purpose of equal opportunities.

“Equal opportunities” is a reserved matter in Schedule 7A to the 2006 Act and includes the prevention, elimination or regulation of discrimination between persons on grounds of sex.

From reading the Bill and the Explanatory Memorandum, I concluded that the Bill:

- (a) seeks to address disadvantages and barriers that women face during the candidate selection process;
- (b) will require political parties to treat a man (who would otherwise be more likely to be selected for a place on the list that must be allocated to a woman) less favourably than a woman, because of the man’s sex.

Having considered the purpose and effect of the Bill, I concluded that the Bill has more than a “loose or consequential”² connection with the prevention, elimination or regulation of discrimination between persons on the grounds of sex. In other words, in my view, the Bill relates to the reserved matter of equal opportunities and would not be within the legislative competence of the Senedd.

¹ Section 1 of the Bill is the core of the Bill. Therefore, the focus of my competence analysis was section 1. However, because all other sections of the Bill rely directly on section 1, once I came to the view that section 1 was not within legislative competence, it inevitably followed that the whole Bill was not within legislative competence.

² The “loose or consequential” test as applied by the Supreme Court in numerous devolution cases, including: [Martin v. Most \[2010\] UKSC 10](#); [Imperial Tobacco Limited \(Appellant\) v. The Lord Advocate \(Respondent\) \(Scotland\) \[2012\] UKSC 61](#); [AGRICULTURAL SECTOR \(WALES\) BILL - Reference by the Attorney General for England and Wales \[2014\] UKSC 43](#).

I have considered the exceptions to the equal opportunities reservation in Schedule 7A to the 2006 Act, and concluded that none of them is relevant in this case.

Modifying the law on reserved matters, namely the Equality Act 2010

As regards my view that the Bill modifies the law on reserved matters, I have considered the test set out in section 108A(2)(d) of the 2006 Act and the relevant case law of the Supreme Court.

Schedule 7B to the 2006 Act places a number of restrictions on the legislative competence of the Senedd. This includes paragraph 1 of Schedule 7B, which places a restriction on modifying the law on reserved matters.

In my view, the Bill modifies section 104 of the Equality Act 2010, which forms part of the law on reserved matters.

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.

In reaching this conclusion, I have considered the Supreme Court's explanation of the meaning of "modify".³ I have also considered the "ancillary" carve-out in paragraph 2 of Schedule 7B, which I do not consider to be relevant in this case.

In my view, the Bill modifies the law on reserved matters and would not be within the legislative competence of the Senedd.

If passed by the Senedd, then, as it the case for all Bills, the Bill will enter into a four week period of intimation. During this period, the Counsel General and the Attorney General may refer the question of whether the Bill, or any provision of the Bill, would be within the Senedd's legislative competence to the Supreme Court for decision, in accordance with section 112 of the 2006 Act. Similarly, the Secretary of State for Wales may intervene by making an order prohibiting the Clerk of the Senedd from submitting

³ **THE UK WITHDRAWAL FROM THE EUROPEAN UNION (LEGAL CONTINUITY) (SCOTLAND) BILL - A Reference by the Attorney General and the Advocate General for Scotland (Scotland) [2018] UKSC 64, paragraph 51.**

the Bill for Royal Assent if he or she has reasonable grounds to believe that certain conditions apply (set out in section 114 of the 2006 Act).