Welsh Parliament
Legislation, Justice and Constitution Committee

Report on the Senedd Cymru (Electoral Candidate Lists) Bill

June 2024

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About the Committee

The Committee was established on 26 May 2021. Its remit can be found at **www.senedd.wales/SeneddLJC**

Current Committee membership:

Committee Chair: Mike Hedges MS
Welsh Labour

Alun Davies MS
Welsh Labour

Samuel Kurtz MS
Welsh Conservatives

Adam Price MS *
Plaid Cymru

* Adam Price MS did not participate in the Committee during the scrutiny of the Bill

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The following Member was the Chair of the Committee during the evidence session on the Bill:

Sarah Murphy MS
Welsh Labour

The following Member attended as a substitute during the scrutiny of the Bill:

Luke Fletcher MS
Plaid Cymru

Contents

1. Introduction

On 11 March 2024, Jane Hutt MS, Minister for Social Justice and Chief Whip (the Minister) introduced the Senedd Cymru (Electoral Candidate Lists) Bill (the Bill),[1] and accompanying Explanatory Memorandum (the EM).[2]

1. The Senedd's Business Committee referred the Bill to the Reform Bill Committee on 27 February 2024, and set a deadline of 7 June 2024 for reporting on its general principles.[3]

2. On 11 March 2024, the Minister, as the Member in charge, issued a Statement of Policy Intent for Subordinate Legislation to be made under the Bill.[4]

3. Following the appointment of Vaughan Gething MS as First Minister,[5] Jane Hutt MS became Trefnydd and Chief Whip (the Trefnydd), and retained responsibility for the Bill as the Member in charge.[6] For ease of use, all subsequent references in the report to statements made by Jane Hutt MS will be attributed to her current role as the Trefnydd, even when statements were made in her capacity as the Minister.

Background

4. In Plenary on 27 June 2023, the former First Minister, the Rt Hon Mark Drakeford MS, when discussing the introduction of the Bill, stated that:

> *"The Special Purpose Committee on Senedd Reform considered how its proposals could support and encourage the election of a legislature that aims to deliver a more representative and thereby a more effective legislature for and on behalf of the*

[1] Senedd Cymru (Electoral Candidate Lists) Bill, as introduced
[2] Welsh Government, Senedd Cymru (Electoral Candidate Lists) Bill, Explanatory Memorandum incorporating the Regulatory Impact Assessment and Explanatory Notes, March 2024
[3] Business Committee, Timetable for consideration: Senedd Cymru (Electoral Candidate Lists) Bill, March 2024
[4] Letter from the Minister to David Rees MS, Chair of the Reform Bill Committee, 11 March 2024, enclosing the Senedd Cymru (Electoral Candidate Lists) Bill: Statement of Policy Intent for Subordinate Legislation
[5] See Plenary, 20 March 2024
[6] Letter from the First Minister to the Llywydd, 5 April 2024

> *people of Wales. Therefore, in a further measure to reform the Senedd, we will bring forward a Bill to introduce gender quotas for candidates elected to this Welsh Parliament."*[7]

5. He later said:

> *"On Senedd reform, it was the subject of detailed discussions between the Government and Plaid Cymru, and the advice we had was that in order to ensure that the main Bill can be there and operating successfully for the 2026 election, we should find a way of dealing with any vulnerabilities to challenge that there may be on the gender quotas aspect. We are confident that we have the legal scope here in Wales to legislate in this area, and we will bring forward a Bill confident of the basis on which we do so. But it is an area in which other views may be possible, and where a challenge might be mounted. In order to make sure that the main reforms are not vulnerable to challenge, we've severed the two aspects."*[8]

6. A written statement by the Trefnydd was published on 11 March 2024.[9]

7. In the EM, the Trefnydd states:

> *"The Senedd Cymru (Electoral Candidate Lists) Bill ("the Bill") will implement the recommendations relating to gender quotas made in the report of the Special Purpose Committee on Senedd Reform, published in May 2022.*
>
> *The Bill will introduce integrated statutory gender quotas to the system used to elect Members of the Senedd (MSs). The Bill makes provisions which apply where a registered political party chooses to submit a list or lists of candidates for election to the Senedd. The Bill makes requirements about candidate list or lists submitted by those parties and the quota rules such lists must comply with.*
>
> *The purpose of these reforms is to make Senedd Cymru ('the Senedd') a more effective legislature for, and on behalf of, the*

[7] Plenary, 27 June 2023, RoP [119]
[8] Plenary, 27 June 2023, RoP [141]. The "main Bill" referenced by the former First Minister refers to the Senedd Cymru (Members and Elections) Bill - please see the webpage for details.
[9] Welsh Government, Written Statement: Senedd Cymru (Electoral Candidate Lists) Bill, 11 March 2024

people of Wales. To achieve this, the Bill aims to ensure the Senedd is broadly representative of the gender make-up of the population."[10]

8. The Trefnydd also states in the EM that:

"The Bill is particularly focused on increasing the number of women MSs, given the fluctuating representation levels in the Senedd since 1999 and as women and girls constitute over 50% of the population of Wales and are an underrepresented majority. (...)

Under the proportional electoral list system that will be introduced by the SCME Bill, it is considered that two key factors will shape the number of women being elected to the Senedd: the number of women presented as candidates by political parties and the positions in which women are placed on party lists.

Reflecting this, there will be two key features: a minimum threshold of women candidates and placement criteria which safeguard specific list positions for women.

Where a registered political party chooses to submit a list or lists of candidates for election to the Senedd, those lists will be required to comply with the quota rules. Where a party has more than one candidate on their list, at least half of the candidates must be women. The Bill also introduces requirements relating to the placement of candidates on party lists. A candidate on a list who is a not a woman must be immediately followed on the list by a candidate who is a woman unless they are last on the list (vertical placement criteria). If a party submits lists in more than one constituency a woman must be in first (or only where it is a list of one) position on at least half of a party's lists across Wales (horizontal placement criteria)."[11]

[10] EM, paragraphs 1 to 3
[11] EM, paragraphs 76 and 82 to 84

The Committee's remit

9. The remit of the Legislation, Justice and Constitution Committee is to carry out the functions of the responsible committee set out in Standing Orders 21 and 26C. The Committee may also consider any matter relating to legislation, devolution, the constitution, justice, and external affairs, within or relating to the competence of the Senedd or the Welsh Ministers, including the quality of legislation.

10. In our scrutiny of Bills introduced into the Senedd, our approach is to consider:

- matters relating to the legislative competence of the Senedd;
- the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;
- whether an appropriate legislative procedure has been chosen, in relation to the granting of powers to the Welsh Ministers to make subordinate legislation; and
- any other matter we consider relevant to the quality of legislation.

11. We took evidence from the Trefnydd on 29 April 2024.[12]

Recommendation 1. The Trefnydd should respond to the conclusions and recommendations we make in this report at least two working days before the Stage 1 general principles debate takes place.

[12] Legislation, Justice and Constitution (LJC) Committee, 29 April 2024, RoP [3 to 192]

2. Legislative competence

Background

12. We considered the Bill under the reserved powers model of legislative competence, as set out in section 108A of the ***Government of Wales Act 2006*** (the 2006 Act).

13. Under this model, a provision in a Senedd Bill will be within the Senedd's legislative competence unless any of the paragraphs in section 108A(2)(a) to (e) of the 2006 Act apply. Determining this requires the application of nine tests (see Annex 1), three of which are particularly relevant to our consideration. These are shown in the box below:

Test 1: No provision of the Bill must relate to a reserved matter

- A list of reserved matters is set out in Schedule 7A to the 2006 Act.
- Under section 108A(6) of the 2006 Act, the question of whether a provision of a Bill "relates" to a reserved matter is to be determined "by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances."

Test 2: No provision of the Bill must modify (or give the power to modify) the law on reserved matters

- The law on reserved matters is defined in paragraph 1 of Schedule 7B to the 2006 Act. It covers any provisions of an Act of the UK Parliament, or secondary legislation made under such an Act, about a reserved matter. It also includes any common law rule on a reserved matter.
- A Senedd Act can modify the law on reserved matters if the modification is ancillary to a provision not relating to reserved matters, so long as the modification "has no greater effect on reserved matters than is necessary to give effect to the purpose of that provision" (i.e. the provision to which the modification is ancillary).

Test 7: Each provision of the Bill must be compatible with the Convention rights set out in the Human Rights Act 1998

- Several of the rights protected by the European Convention on Human Rights are of particular relevance to the Bill, including Article 3 of Protocol 1

(free and fair elections), Article 14 (protection against discrimination) in conjunction with Article 3 of Protocol 1, and Article 8 (respect for private and family life).

14. The Supreme Court has applied a number of principles in interpreting Test 1. These are:

- the purpose of the provision is the most important factor in the test[13] (although effect and "other things" also need to be looked at);
- to discover the purpose of a provision, an objective consideration of the Bill's terms is not enough. In other words, purpose has a subjective element: what the Bill is intended to achieve is of key importance, not merely what the Bill does on its face;[14]
- a provision will "relate to" a reserved matter if the purpose of the provision has more than a "loose or consequential connection" with the reserved matter;[15]
- if a provision has more than one purpose, and one of those purposes has more than a "loose or consequential connection" with a reserved matter, then that is enough to take the provision outside competence;[16]
- a provision with an objective connected to a reserved matter will be within competence if its purpose is not "truly distinct" from the "overall purpose" of the Bill.[17]

15. As regards Test 2, "ancillary" is defined in section 108A(7) of the 2006 Act. A provision of a Senedd Act is "ancillary" if it provides for the enforcement of another provision or is "otherwise appropriate for making that provision effective", or is "otherwise incidental to, or consequential on, that provision."

16. Section 110(2) of the 2006 Act provides that the Member in charge of a Bill must, on or before the introduction of a Bill, state that, in their view, the Bill's provisions would be within the Senedd's legislative competence. This is supplemented by Standing Order 26.6[18] which provides that, on introduction, a

[13] Martin v Her Majesty's Advocate [2010] UKSC 10, paragraph 161 (per Lord Kerr).
[14] Imperial Tobacco v Lord Advocate [2012] UKSC 61, paragraph 16; Agricultural Sector (Wales) Bill Reference by the Attorney General for England and Wales [2014] UKSC, paragraph 50.
[15] Martin v Her Majesty's Advocate [2010] UKSC 10, paragraph 49; Imperial Tobacco Ltd v Lord Advocate [2012] UKSC 61, paragraph 16.
[16] Imperial Tobacco Ltd v Lord Advocate [2012] UKSC 61, paragraph 43
[17] Christian Institute and others v Lord Advocate [2016] UKSC 51
[18] Standing Orders of the Welsh Parliament, January 2024

Bill must be accompanied by an EM which must state that in the view of the Member in charge, the provisions of the Bill would be within the legislative competence of the Senedd. Unless such a statement is included in the EM, the Bill may not be introduced.

17. Section 110(3) of the 2006 Act provides that the Presiding Officer must, on or before the introduction of a Bill, state their decision on whether or not, in their view, the provisions of the Bill would be within the Senedd's legislative competence. This is supplemented by Standing Order 26.4, which provides that on introduction, a Bill must be accompanied by a statement from the Presiding Officer that must:

- indicate whether or not the provisions of the Bill would be, in their opinion, within the Senedd's legislative competence; and
- indicate any provisions which, in their opinion, would not be within the Senedd's legislative competence, and the reasons for that opinion.

Evidence on legislative competence

Evidence from the Llywydd

18. In her statement on legislative competence, the Llywydd, the Rt Hon Elin Jones MS, stated:

> *"In my view, the provisions of the Senedd Cymru (Electoral Candidate Lists) Bill, introduced on 11 March 2024, would not be within the legislative competence of the Senedd because the Bill:*
>
> *a. relates to the reserved matters of equal opportunities, and*
>
> *b. modifies the law on reserved matters, namely the Equality Act 2010."*[19]

19. In a letter to us and the Reform Bill Committee dated 11 March 2024, the Llywydd enclosed a summary of the issues she considered in reaching her view on legislative competence. She also confirmed that while she was required to make a statement setting out her views, the content of her statement "does not affect whether or not a Bill may be introduced or complete its passage through the Senedd". The Llywydd's letter is attached at Annex 2.

[19] Presiding Officer's Statement on Legislative Competence, 11 March 2024

Evidence from legal professionals

20. The Reform Bill Committee received written evidence from the following legal professionals about the Bill:

- Elisabeth Jones
- Keith Bush
- Thomas Glyn Watkin
- Emyr Lewis

21. In her written evidence, Elisabeth Jones states that she considers the Bill to be outside the legislative competence of the Senedd on the basis that it relates to the reserved matter of equal opportunities and modifies section 104 of the *Equality Act 2010*.[20]

22. Keith Bush states in his written evidence that he considers the provisions of the Bill to be outside the legislative competence of the Senedd on the basis that they relate to the reserved matter of equal opportunities.[21]

23. In his written evidence, Thomas Glyn Watkin states:

> *"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."*[22]

24. Emyr Lewis did not come to a definitive conclusion on whether he considered the provisions of the Bill to be within or outside the legislative competence of the Senedd.[23]

Evidence from the Welsh Government

25. The Trefnydd states in the EM that she is satisfied that the Bill would be within the legislative competence of the Senedd.[24]

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[20] Written evidence, Reform Bill Committee, SCECLB35 – P Elisabeth Jones
[21] Written evidence, Reform Bill Committee, SCECLB1 – P Keith Bush KC
[22] Written evidence, Reform Bill Committee, SCECLB42 – P Thomas Glyn Watkin KC
[23] Written evidence, Reform Bill Committee, SCECLB6 – P Professor Emyr Lewis
[24] EM, Member's Declaration, page 1

26. The Trefnydd re-stated this position when we questioned her on the issue of legislative competence. She told us:

> *"Yes, I am satisfied. Based on all of the information available to me, I'm of the view that the Bill is within the legislative competence of the Senedd. (…) The Bill's purpose is a more effective Senedd, and (…) it's very important to say the Bill's been through the usual processes and checks within the Welsh Government…"*[25]

27. We asked the Trefnydd about the basis on which she had reached her view. She stated:

> *"…This is about the purpose of a more effective Senedd (…) I don't consider that there's another purpose of equal opportunities, but, of course, in terms of equal opportunities, the effects of a provision may be relevant, but they're not themselves its purpose. I think it's quite useful, actually, to look at this issue about the equal opportunities purpose, because, if you look at the tests laid down in the Government of Wales Act 2006, it says 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.'*
>
> *The Bill's purpose is a more effective Senedd, which is sought to be achieved through greater gender balance amongst its Members."*[26]

28. An official accompanying the Trefnydd stated:

> *"I'd agree with everything the Trefnydd said. The test is whether it relates to the reserved matter, and, as you've identified, the equal opportunities matter. But then how we look at purpose, it's 108A(6), and it's the effect of the provision amongst other things—having regard to the effect of the provision, amongst other things. So, as the Trefnydd said, the effect is relevant in determining purpose, but it is not the most relevant thing. The*

[25] LJC Committee, 29 April 2024, RoP [11]
[26] LJC Committee, 29 April 2024, RoP [14 to 16]

> *most relevant thing is the purpose, and I think we talked in the Senedd Reform Bill Committee previously about how the courts have looked at this, and that what's one of the very important things is the subjective purpose of those introducing the Bill, and the subjective purpose of those introducing the Bill is about a more effective Senedd, along with the package of reforms that the other Bill looks at as well.*
>
> *And so, the position is, as the Trefnydd has said, that we don't consider there is a secondary purpose. There is a single purpose for this Bill of a more effective Senedd, and therefore any impact on equal opportunities is no more than incidental, and therefore doesn't amount to 'relating to'."*[27]

29. In questioning about whether the Bill modifies the law on reserved matters, the Trefnydd said:

> *"Well, I don't consider that the Bill breaches the restriction on modifying the law on reserved matters. (…) I don't consider that the Bill breaches section 104 of the Equality Act 2010. And I think that's important, just to recognise that this is very much part of a package of all the reforms in terms of Senedd reform, including, of course, our Senedd Cymru (Members and Elections) Bill (…)*
>
> *Now, clearly, any effects on equal opportunities in terms of that purpose, general purpose, are incidental. They're the means to the end of a more effective Senedd, not an end in itself. (…) we do believe that the Bill would operate separately from but alongside section 104 of the Equality Act, and generally does not prevent that section from continuing in force without conflict."*[28]

30. We highlighted that there is no consensus on whether the Bill is within the legislative competence of the Senedd.[29] The Trefnydd commented:

> *"I would disagree about there being no consensus on competence. Clearly, we've just discussed that in terms of the earlier questions on the Bill (…) But I think what I'm going to say*

[27] LJC Committee, 29 April 2024, RoP [24 to 25]
[28] LJC Committee, 29 April 2024, RoP [18 to 19]
[29] LJC Committee, 29 April 2024, RoP [96]

> *is there are a range of views, some of which are very supportive of the Government's position, and you'll see that, as I've already mentioned, particularly the eminent Professor Thomas Glyn Watkin KC, but also other legal—*
>
> *(…)*
>
> *—advice, …"*[30]

31. The Trefnydd added:

> *"…the evidence that had come from Professor Thomas Glyn Watkin KC, his overall conclusion is that, although finely balanced, the Bill is within the Senedd's legislative competence. I think it's important to recognise where we've got this external as well as internal, and all of the legal guidance that has been given. But, please, can colleagues look at the whole of the explanatory memorandum? (…) it gives a clear case. It is what it says: an explanatory memorandum as to why we feel this Bill is within competence. And it's been explained that of course it doesn't appear in the long title, because the Bill is about how we would deliver on that legal case."*[31]

32. We noted that, in evidence to the Reform Bill Committee, an official accompanying the Trefnydd advised that, in light of the Trefnydd's view that the Bill is within the Senedd's legislative competence, there was no need to engage with the UK Government on that matter.[32] However, we also noted a media report[33] that the Secretary of State for Wales, David TC Davies MP (the Secretary of State), had written to the Welsh Government about the Bill. The media report quotes the Secretary of State as saying in his letter:

> *"…I am writing so soon as I have serious concerns with the Welsh Government's decision to introduce the Senedd Cymru (Electoral Candidate Lists) Bill, despite the Llywydd concluding, on the basis of legal advice, that it does not fall within the Senedd's legislative competence (…)*

[30] LJC Committee, 29 April 2024, RoP [97 and 99]
[31] LJC Committee, 29 April 2024, RoP [114]
[32] Reform Bill Committee, 13 March 2024, RoP [65]
[33] Nation Cymru, Vaughan Gething faces constitutional battle over Senedd gender balance Bill, 22 March 2024

> *I note that notwithstanding this, the Welsh Government maintains that the Bill's provisions are within the Senedd's competence. I have not seen any analysis from the Welsh Government explaining its position."*[34]

33. We therefore asked the Trefnydd what discussions the Welsh Government has had with the UK Government in relation to the Bill, before and after it was introduced, and the outcome of those discussions.[35] In response, the Trefnydd offered to provide an exchange of correspondence between the First Minister and the Secretary of State, which noted the prospect of meetings between officials taking place after Senedd Committees have completed their Stage 1 scrutiny.[36] We subsequently received this correspondence on 3 May 2024.[37]

34. An official accompanying the Trefnydd added:

> *"...just to confirm, in the preparation of the impact assessment, specifically the justice impact assessment and the data protection impact assessment, we engaged with the Ministry of Justice and the Information Commissioner's Office, to ensure that they were content with the impacts, as we saw them. But, as the Trefnydd has said, we didn't engage with the UK Government on matters of competence, prior to introduction."*[38]

35. The long title of the Bill states that it is:

> *"An Act of Senedd Cymru to make provision about the proportion and placement of women on lists of candidates to be Members of the Senedd; and for connected purposes."*[39]

36. We asked the Trefnydd why reference to creating a more effective Senedd does not appear in the long title of the Bill. She stated:

> *"I mean, obviously, the long title of the Bill and the Bill itself is there to tell you how you will deliver on your purpose. All Bills do that, don't they?"*[40]

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[34] Nation Cymru, Vaughan Gething faces constitutional battle over Senedd gender balance Bill, 22 March 2024
[35] LJC Committee, 29 April 2024 [42]
[36] LJC Committee, 29 April 2024, RoP [43 and 45]
[37] Letter from the Trefnydd and Chief Whip, 3 May 2024
[38] LJC Committee, 29 April 2024, RoP [49]
[39] Senedd Cymru (Electoral Candidate Lists) Bill, as introduced
[40] LJC Committee, 29 April 2024, RoP [104]

37. An official accompanying the Trefnydd stated:

> *"... the long title, the purpose and the way in which we use long titles in our drafting in Wales (...) we use those to set out expressly what the Bill does; we don't use them generally to express the purpose of the Bill. And if I could refer to the long title of the other Bill in this package of reforms, the Senedd Cymru (Members and Elections) Bill, the Government's view on that is that that's about a more effective Senedd as well. That's the purpose of that Bill, but it doesn't say it in that long title either.*
>
> *(...)*
>
> *But what it does is it says precisely what each part of the Bill does, so we don't expressly say in there what the purpose is. So, that's why the long title doesn't express the purpose of a more effective Senedd, because we're just saying what it does."*[41]

38. Another official accompanying the Trefnydd added:

> *"...it isn't in the long title, but if you were to look at the explanatory notes, which would, of course, sit alongside the Act if passed, then that does, in paragraph 2, quite clearly state that*
>
> *'The Bill is intended to make the membership of Senedd Cymru...broadly reflective of the gender make-up...This in turn is intended to make the Senedd a more effective legislature for, and on behalf of'—"*[42]

The risk of legal challenge

39. In his written evidence, Emyr Lewis discusses the lack of consensus between the Llywydd and the Trefnydd in relation to whether the Bill is within the Senedd's legislative competence, noting that:

> *"...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*

[41] LJC Committee, 29 April 2024, RoP [105 to 107]
[42] LJC Committee, 29 April 2024, RoP [111 to 112]

> *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."*[43]

40. In his written evidence, Thomas Glyn Watkin also comments on the risk of legal challenge, noting that:

> *"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."*[44]

41. We therefore asked the Trefnydd what assessment the Welsh Government has made of the risk of the Bill being referred to the Supreme Court. The Trefnydd responded by stating:

> *"Actually, this is not the time when a referral to the Supreme Court needs to be considered."*[45]

[43] Written evidence, Reform Bill Committee, SCECLB6 – P Professor Emyr Lewis
[44] Written evidence, Reform Bill Committee, SCECLB42 - P Thomas Glyn Watkin KC
[45] LJC Committee, 29 April 2024, RoP [54]

42. She added:

> *"When it can be considered is when a Bill has passed and then final provisions are known. And, as you know, only the Attorney General and Counsel General can refer a Bill to the Supreme Court, and we don't want to speculate about their view. But it would be at the relevant time."*[46]

43. We pursued this issue by asking the Trefnydd why the Bill's provisions had been split from the Senedd Cymru (Members and Elections) Bill, if the Welsh Government has not considered the risk of the Bill being referred to the Supreme Court.

44. In response, the Trefnydd said "this was the judgment, in terms of our Government legislative advice, that we should have two separate Bills".[47]

45. The Trefnydd added that the advice:

> *"...was based on the fact that we needed to make sure that the main Senedd reform Bill was able to progress at pace, as it has..."*[48]

46. An official accompanying the Trefnydd, noting the former First Minister's statement in June 2023, added:

> *"There was a recognition, given the nature of this Bill, or rather the provisions within this Bill, that there would be those that may seek to challenge it. It was in response, actually, to one of the special purpose committee recommendations, obviously, to not put the main reforms and the delivery timetable for that ahead of the 2026 Senedd elections in any way at undue risk. So, it was in relation to that."*[49]

47. We also asked what assessment the Welsh Government has made of the risk of individual legal challenges and their potential disruption to Senedd elections, should the Bill not be referred to the Supreme Court prior to receiving Royal Assent. In response, the Trefnydd stated:

> *"We recognise that there could be challenge, and that that could be, of course, as you say, individual legal challenge. But*

[46] LJC Committee, 29 April 2024, RoP [56]
[47] LJC Committee, 29 April 2024, RoP [60]
[48] LJC Committee, 29 April 2024, RoP [62]
[49] LJC Committee, 29 April 2024, RoP [63]

> *that's where I think I've mentioned the fact that our primary and secondary legislation must be robust and also subject to consultation, but I think also that we do need to look at implications for implementing this legislation, and that's why we've got such a close engagement (…) with all of the stakeholders, particularly those involved in managing and running elections, to identify and test out and also to see whether such challenges could be made."*[50]

48. An official accompanying the Trefnydd added:

> *"…all primary legislation passed by the Senedd, all secondary legislation made by Welsh Ministers, may be subject to challenge—that's the nature of it. And, obviously, if challenge does come, that can have implications for the implementation timetable. We acknowledge that (…) that's the case for all legislation and it's the same here."*[51]

49. The Trefnydd indicated that she did not think a challenge to the Bill, if it was brought forward ahead of the 2026 Senedd election, could call into question the whole Senedd election that takes place in 2026.[52]

50. An official accompanying the Trefnydd added:

> *"I think (…) if that scenario arose, then advice would be given to the Trefnydd about what steps could be taken in order to mitigate those risks of disrupting the election."*[53]

51. The official accompanying the Trefnydd also noted that:

> *"…the commencement of this is by Order, so that, should there be challenges, there are steps that can be taken; it's not automatic commencement. So, there are steps that could be taken to protect the election if that situation arose."*[54]

52. The Trefnydd added:

> *"But I think it is important to say, you know, we've looked at this in detail in terms of the possible impacts. (…) As with all*

[50] LJC Committee, 29 April 2024, RoP [70]
[51] LJC Committee, 29 April 2024, RoP [71]
[52] LJC Committee, 29 April 2024, RoP [73]
[53] LJC Committee, 29 April 2024, RoP [74]
[54] LJC Committee, 29 April 2024, RoP [76]

> *legislation (…) there can always be examples where there could be individual legal challenges, (…).”*[55]

53. The Trefnydd also told us that now was not the time to speculate about whether the Secretary of State could use his power under section 114 of the 2006 Act[56] to prohibit the Llywydd from submitting a Bill for Royal Assent.[57]

54. When we asked whether the Welsh Government had looked at clarifying the boundary of legislative competence by seeking an Order in Council under section 109 of the 2006 Act,[58] the Trefnydd reiterated her view that the Bill was within the Senedd's legislative competence.[59]

Human rights

55. The Trefnydd confirmed that the Welsh Government has undertaken a full assessment of the Bill's impact on human rights and that it is satisfied that the Bill is compatible with the European Convention on Human Rights (the Convention).[60]

56. When asked what steps the Welsh Government has taken within the Bill to limit the interference of the Bill on human rights, the Trefnydd stated:

> *“In terms of the equality and human rights impact assessment, you will have seen that we have looked at particular convention rights, specifically article 8, the right to privacy; article 3 of protocol 1, the right to stand for election; and, in conjunction with those articles, article 14, the non-discrimination and the enjoyment of convention rights. So, the impacts and potential mitigations to address them, of course we'll consider as we progress through subordinate legislation, as that's developed. But I think the key point really is that the rules in the Bill are clear, the consequences will be foreseeable and proportionate to the legitimate aim of a more representative Senedd, and we also believe that the proposals for the subordinate legislation are objectively justified. But, of course, we always need to be mindful of the need to ensure that there is compatibility with convention rights.”*[61]

[55] LJC Committee, 29 April 2024, RoP [78]
[56] Section 114 – Power to intervene in certain cases, Government of Wales Act 2006
[57] LJC Committee, 29 April 2024, RoP [67 to 68]
[58] Section 109 – Legislative competence: supplementary, Government of Wales Act 2006
[59] LJC Committee, 29 April 2024, RoP [80]
[60] LJC Committee, 29 April 2024, RoP [88]
[61] LJC Committee, 29 April 2024, RoP [90]

57. On a specific point, we asked the Trefnydd whether she had any concerns about the Bill's compliance with Article 3 of Protocol 1 of the Convention (the right to free elections), whether read with Article 14 (the prohibition of discrimination), or not. In response, the Trefnydd said:

> *"Well, I certainly acknowledge that we needed to look at and consider both article 3 and article 14. (…) in terms of article 3, that's really important to put on the record, that the point about that is the right to stand. And I think it's important to say (…) that nothing in the Bill prevents a person from standing (…) I think that's crucial. The impact assessment recognises this. And I think, if you look at this, for example, in terms of article 14, the rules may result in people who would have stood not being selected, or it may affect the likelihood of their being elected. As I've said, the conclusion of our assessment is that any interference with this right or any of the rights can be objectively justified.*
>
> *And I think that's, as you say, bringing the interaction of those two articles together, because the impact on people's rights and parties' rights to stand is not restricted beyond that which is necessary to safeguard a proportion of the more favourable list positions for women, with a view to achieving that legitimate aim of a more effective Senedd by having a more representative gender make-up of the Welsh population."*[62]

Our view

58. We would like to make two important points relating to our consideration of whether the Bill is within the Senedd's legislative competence.

59. First, the question of whether a Bill is within the legislative competence of the Senedd can only be definitively answered by the Supreme Court. It is therefore not a matter that we should take a view on. This is the position we adopt when scrutinising all Bills laid before the Senedd. For that reason, our report does not seek to address this issue directly.

60. Secondly, the merits or otherwise of a Welsh Government policy is a different and separate matter from whether the Senedd has the legislative competence to translate that policy into law.

[62] LJC Committee, 29, April 2024, RoP [92]

61. We note the Llywydd's statement that, in her view, the provisions of the Bill would not be within the legislative competence of the Senedd. We also note that the Trefnydd, as the Member in charge of the Bill, has consistently expressed the view that the Bill is within the Senedd's legislative competence, both to the Reform Bill Committee and to us.

62. In the time between the Trefnydd's first evidence session with the Reform Bill Committee and her evidence to us, the Reform Bill Committee received evidence from four legal professionals. In very broad terms, two of those legal professionals consider that the Bill is outside the Senedd's legislative competence, one considers that it is within competence, and a further does not come to a definitive view. As a consequence, we believe the nature of these two evidence sessions in relation to the arguments around legislative competence were dissimilar, potentially because the Trefnydd's responses were being informed by a different evidence base. The evidence provided by legal professionals to the Reform Bill Committee demonstrates again that a difference of opinion exists about whether the Senedd has the power to make this new law. We draw the Senedd's attention to this evidence.

63. As such, in light of the evidence and in particular the difference of opinion between the Llywydd and the Trefnydd, we disagree with the Trefnydd's suggestion that there is a consensus on whether the Bill's provisions are within the Senedd's legislative competence.

64. This Bill is constitutionally significant and, should it be passed, the timetabling for its implementation, including the subordinate legislation to be made under powers delegated to the Welsh Ministers, has implications for the next Senedd general election in 2026.

65. We note that a number of legal professionals have highlighted the risk of legal challenge and possible disruption to the 2026 Senedd general election.

66. In particular, we note Thomas Glyn Watkin's comments that, while he believes the Bill to be within the Senedd's legislative competence, the arguments are very finely balanced and that legal challenges could arise, and that as a result, "The disruption to a Senedd General Election which such challenges might occasion cannot fail to be a cause of concern".

67. We also note the views of Emyr Lewis regarding the possible disruption to the 2026 Senedd general election and in particular that a successful legal challenge to the legislation "would risk jeopardising the integrity of the election itself and could be very damaging to the Senedd and to democracy in Wales."

68. As a result, while not coming to a view on the issue of legislative competence, we considered that it would be appropriate to ask the Trefnydd about the risks and implications of any legal challenge on grounds of legislative competence, given the potential for disruption to the 2026 Senedd general election.

69. We are unclear from the Trefnydd's evidence about the extent to which the Welsh Government has considered the implications of a legal challenge to the Bill on grounds of legislative competence and, as a consequence, the impact this could have on the integrity and perceived legitimacy of the 2026 Senedd general election.

70. Section 112 of the 2006 Act[63] gives the Counsel General (Welsh Government) and the Attorney General (UK Government) the power to refer the question of whether a Senedd Bill would be within the Senedd's legislative competence to the Supreme Court. The Counsel General exercises this function independently of government.[64]

71. Based on the letter we received from the Trefnydd on 3 May enclosing correspondence between the First Minister and Secretary of State, we also note that prior to the calling of the UK general election, Welsh Government officials were likely to meet Wales Office officials after we and the Reform Bill Committee have completed our Stage 1 scrutiny. The purpose of the meeting was to consider matters arising from the Bill including the issue of whether the Bill is within the Senedd's legislative competence.

72. It would appear that the Welsh Government has not considered the option of seeking an Order in Council under section 109 of the 2006 Act and, by inference, has not raised this issue with the UK Government. Pursuit of such an Order, which we acknowledge would need to follow the appropriate Senedd and UK Parliamentary processes, provides a mechanism to modify the legislative competence of the Senedd by amending Schedules 7A and 7B to the 2006 Act and would be one way of seeking to resolve any dispute around legislative competence.

Conclusion 1. We regret that the Senedd will be asked to vote on whether or not it agrees to the general principles of the Bill at Stage 1 of the Senedd's legislative process when there is a significant degree of uncertainty about whether the Bill is within the legislative competence of the Senedd.

[63] Section 112 – Scrutiny of Bills by Supreme Court, Government of Wales Act 2006
[64] Reform Bill Committee, 1 May 2024, RoP [189]

Recommendation 2. The Welsh Government must undertake and publish, prior to Stage 4 (Final Stage) of the Senedd's legislative process, a full risk assessment of the potential for disruption to the 2026 Senedd general election as a consequence of the potential for legal challenges to the Bill.

Recommendation 3. The risk assessment required by recommendation 2 should include the steps the Welsh Government will take to mitigate the likelihood of legal challenges to the Bill to ensure that:

i. the legislation is in force in good time for the 2026 Senedd general election to take place;

ii. the integrity of the election process and the ensuing results in the 2026 Senedd general election are not placed in jeopardy.

Recommendation 4. In the event that, following the UK general election on 4 July 2024, the Welsh Government holds discussions at the earliest available opportunity with the UK Government about whether the Bill is within the Senedd's legislative competence, the Trefnydd must issue a statement notifying the Senedd of the outcome of the discussions.

Recommendation 5. The Welsh Government should work with the UK Government following the 2024 UK general election to deliver an Order in Council under section 109 of the *Government of Wales Act 2006* to ensure and put beyond doubt that the Senedd has the power to make the Bill as currently drafted.

Recommendation 6. The Welsh Government should issue a statement notifying the Senedd of any discussions that take place with the UK Government following the 2024 UK general election about such a section 109 Order in Council under the *Government of Wales Act 2006*.

Conclusion 2. We regret that the Senedd may be invited to vote on a Bill at Stage 4 of the Senedd's legislative process when there is a significant degree of uncertainty about whether the Bill is within the legislative competence of the Senedd.

Recommendation 7. A motion that the Bill be passed at Stage 4 (Final Stage) of the Senedd's legislative process should not be debated unless the Welsh Government has issued a statement setting out whether the Welsh and UK Governments have reached agreement on whether they believe the Bill is within, or will be brought within, the Senedd's legislative competence (including by

means of amendments to the *Government of Wales Act 2006*).If agreement has not been reached, the reasons for that disagreement must be clearly stated.

73. Recommendations 2 to 7 are intended to contribute collectively to an overall aim of ensuring that the risk of disruption to the 2026 Senedd general election is minimised.

Recommendation 8. The Welsh Government must take full and appropriate action to minimise the risk of disruption to the 2026 Senedd general election caused by potential legal challenges to the Bill, including (if necessary) by means of the Counsel General referring the Bill to the Supreme Court using his powers under section 112 of the *Government of Wales Act 2006*.

74. The purpose of the Bill has featured in our discussions on legislative competence.

75. We note in particular the Explanatory Notes to the Bill, referred to in our evidence session, which state:

> *"The Bill is intended to make the membership of Senedd Cymru ('the Senedd') broadly reflective of the gender make-up of the population. This in turn is intended to make the Senedd a more effective legislature for, and on behalf of, the people of Wales."*[65]

76. In our view, this paragraph could be regarded as being inconsistent with the Trefnydd's suggestion that the Bill only has one purpose.

77. There is another matter we feel obliged to highlight and that relates to the evidence we have heard about long titles to a Bill and the purpose of the Bill. Public Bills introduced to the Senedd must comply with the Presiding Officer's Determination on Proper Form (the Determination).[66] Paragraph 11 of the Determination states: "A Bill must include a long title beginning 'An Act of Senedd Cymru to …' describing the purposes of the Bill." (Emphasis added.)

78. As far as we are aware, this has been a requirement of the Determination in all iterations since the Senedd acquired primary legislative making powers in 2011. The concept that a Bill's long title would seek to explain its purpose is therefore

[65] Welsh Government, Senedd Cymru (Electoral Candidate Lists) Bill, Explanatory Memorandum incorporating the Regulatory Impact Assessment and Explanatory Notes, March 2024, Annex 1 Explanatory Notes, paragraph 2

[66] Presiding Officer's Determination on Proper Form Public Bills for Acts of the Senedd, October 2022

well-established.[67] Linked to this is the commonly used phrase "and for connected purposes" which regularly appears in the long titles to Bills introduced to the Senedd by the Welsh Government. As such, we find it difficult to reconcile long-standing government practice with the evidence provided by the Trefnydd and her officials on the Bill that long titles are not generally used to express the purpose of a Bill.

79. We draw the evidence of the Trefnydd and her officials on the Bill's purpose to the attention of the Senedd.

80. We note the evidence provided by the Trefnydd about the human rights implications of the Bill and draw it to the attention of the Senedd.

81. We also note that the only way the Supreme Court can determine whether a Senedd Bill is within the legislative competence of the Senedd is for the Bill to be referred to the Supreme Court under section 112 of the 2006 Act after the Bill has been passed by the Senedd.

82. This is different to the position in Scotland, where any question arising by virtue of the *Scotland Act 1998* about reserved matters can also be referred to the Supreme Court. This is how a proposed Scottish Parliament Bill (i.e. a draft Bill) on Scottish independence was referred to the Supreme Court in 2022 for the Supreme Court to decide whether the proposed Bill would be within the legislative competence of the Scottish Parliament.[68] This option should also be available to the Senedd.

Recommendation 9. The Welsh Government should work with the UK Government following the 2024 UK general election to expand the list of "devolution issues" in Schedule 9 to the *Government of Wales Act 2006* that can be referred to the Supreme Court, so that proposed Senedd Bills can be referred to the Supreme Court at an early stage.

[67] See also Erskine May, (a treatise on parliamentary procedure and constitutional conventions based on practice in the UK Parliament) It states that "The long title sets out in general terms the purposes of the bill, and should cover everything in the bill. The phrase 'and for connected purposes', with which it commonly ends, makes it possible to omit an express reference in the long title to minor matters related to the main substance of the bill. Conversely, the long title should not refer to significant purposes which are not covered by the provisions of the printed bill..."

[68] REFERENCE by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998, 23 November 2022

3. General observations

Preparation of the Bill

83. When asked why, given the constitutional importance of the legislation, a draft Bill had not been published for consultation, the Trefnydd stated:

> *"You will recall, of course, the special purpose committee report, 'Reforming our Senedd: A stronger voice for the people of Wales', and that was published back in May 2022, and that made recommendations for policy instructions for legislation to be developed and to be introduced, and importantly as well, in terms of the timescale, that those reforms should be in place by the 2026 Senedd election, and indeed the Senedd voted in favour of endorsing that report. Then that was part, as you know, of the programme for government commitment and co-operation agreement."*[69]

84. The Trefnydd also told us:

> *"... in terms of draft Bills, I think about 20 per cent of our Bills start as draft Bills, but I think the fact so much work had been done, policy instructions and timing, meant that we did not feel it was necessary to produce a draft Bill."*[70]

Time available for scrutiny of the Bill

85. The Bill was scheduled to be introduced in December 2023, but a media report noted the postponement of the Bill's introduction.[71]

86. A Senedd Member sought further information about the postponement of the Bill's introduction through written questions.[72]

[69] LJC Committee, 29 April 2024, RoP [9]
[70] LJC Committee, 29 April 2024, RoP [9]
[71] BBC News, Welsh government: Senedd gender quota plan postponed, 30 November 2023
[72] Written Question (WQ90006) 30 November 2023, Andrew R.T. Davies MS to Counsel General, Senedd Cymru; Written Question (WQ90157) 11 December 2023, Andrew R.T. Davies MS to the Deputy Minister for Social Partnership, Senedd Cymru

87. On 13 December 2023, the Counsel General confirmed that introduction of the Bill would be postponed, to enable "further work" to be carried out on the Bill.[73]

88. On 15 March 2024, following the Business Committee's agreement of the timetable for consideration of the general principles of the Bill, the Llywydd wrote to the Reform Bill Committee, noting that the timetable "includes a period of nine sitting weeks for Stage 1 scrutiny, which is a departure from the usual twelve sitting weeks".[74]

89. In her letter, the Llywydd encloses correspondence from the then Minister for Rural Affairs and North Wales, and Trefnydd (the former Trefnydd) to the Business Committee dated 7 March 2024, in which the former Trefnydd outlines her reasons for proposing an expedited timetable. In her letter, the former Trefnydd states:

> *"The timetable proposed by the Welsh Government is fundamental to maintaining a pathway to implementing the measures in time for the 2026 Senedd election. We are working to ensure the measures are in place ahead of that election as this is part of the package of Senedd reform along with the Senedd Cymru (Members and Elections) Bill. A delay of even a month to the passage of the Bill would have implications for that implementation work."*[75]

90. In her letter to the Reform Bill Committee, the Llywydd confirms that the expedited timetable was agreed by the Business Committee by majority decision, and that she and one other Member did not agree to it.[76]

91. The Llywydd further notes:

> *"I am writing to place on record my reservations, as Llywydd, about the expedited scrutiny timetable for this Bill. I have stated that, in my view, the provisions of this Bill are not within the legislative competence of the Senedd; the Member in charge of the Bill has stated that, in her view, the*

[73] Plenary, 13 December 2023, RoP [111]. 3
[74] Letter from the Llywydd to the Chair of the Reform Bill Committee, 15 March 2024
[75] Letter from the Llywydd to the Chair of the Reform Bill Committee, 15 March 2024
[76] Letter from the Llywydd to the Chair of the Reform Bill Committee, 15 March 2024

provisions are within competence. This is the first time that a Bill has been introduced where there are differing views as to its competence.

Scrutiny of the general principles of a Bill at Stage 1 enables committees to interrogate a range of issues, including legislative competence. It is regrettable that your Committee will have less time than is typically the case to consider this novel and complex issue."[77]

Our view

92. A draft Bill is a Bill that is formally published for pre-legislative scrutiny prior to its introduction. We highlighted the importance of draft Bills when governments propose to change constitutional law in our report on the Senedd Cymru (Members and Elections) Bill.[78]

93. We note the Trefnydd's statement that "about 20 per cent of our Bills start as draft Bills". We are unclear if the Trefnydd's comments were intended to capture draft Bills as we view them. If so, we are not convinced that the figure is as high as the Trefnydd suggests in the Sixth Senedd.[79]

94. In our report on the Senedd Cymru (Members and Elections) Bill, we said:

"We note the Counsel General's views regarding the tight timescales for ensuring that the Bill, if enacted, receives Royal Assent in time for all necessary preparations for the 2026 Senedd general election to be implemented and completed. While we acknowledge this point, we also believe that it is vital to get this legislation right because there is danger that if the Bill and its implications are not fully considered and explored, unintended consequences could arise as a result."[80]

95. Our comments about the importance of getting the legislation right apply equally to this Bill.

[77] Letter from the Llywydd to the Chair of the Reform Bill Committee, 15 March 2024
[78] LJC Committee, Report on the Senedd Cymru (Members and Elections) Wales Bill, January 2024, paragraphs 44 to 47
[79] The Senedd Cymru (Electoral Candidate Lists) Bill was the 13th Bill introduced to the Senedd. Based on our assessment we believe 2 of those Bills to have been published in draft for consultation.
[80] LJC Committee, Report on the Senedd Cymru (Members and Elections) Wales Bill, January 2024, paragraph 47

96. In that vein, we are concerned at the reduced amount of time made available to Committees to scrutinise the Bill, not least because of its constitutional importance and the lack of consensus about whether the Senedd has the legislative competence to make this law. In expressing that concern, we recognise that the Llywydd and another member of the Business Committee did not agree with its decision to allocate only nine sitting weeks for the scrutiny of the Bill.

97. We believe a more standard period of at least twelve sitting weeks should have been allocated for the scrutiny of the Bill and consider that the letter from the former Trefnydd to the Business Committee does not provide enough justification for seeking an expedited timetable. Furthermore, we do not believe it is either appropriate or reasonable that a decision of the Welsh Government to delay the Bill's introduction, for whatever reason, should reduce the time available for scrutiny by Senedd Committees. That is unwelcome and should not be repeated.

98. The Business Committee and Welsh Government may argue that a curtailed period for Stage 1 scrutiny was necessary in order to ensure the implementation of electoral reforms in advance of the 2026 Senedd general election. However, we believe that the Welsh Government should have better planned the arrangements for the Bill's introduction to provide the Senedd with an appropriate amount of time to scrutinise such an important constitutional Bill.

Conclusion 3. Given the significance of the Bill for the constitution of Wales, space should have been found within the overall timetable to prepare and seek views on a draft Bill.

Conclusion 4. Given the constitutional importance of the Bill, and the fact that the Llywydd has expressed a view that the Bill introduced to the Senedd is outside its legislative competence, the relevant Committees should have been given at least twelve sitting weeks for Stage 1 scrutiny. On this latter point, we therefore agree with the concerns of the Llywydd about the timetable for the Bill's scrutiny.

99. We discuss specific sections of the Bill in the next Chapter, including as part of our consideration of sections 1 and 3, the balance between what is included on the face of the Bill and what is left to subordinate legislation.

4. Specific observations on sections in the Bill and the powers to make subordinate legislation

100. The Bill comprises five sections:

- Section 1 – Proportion and placement of women on lists of candidates to be Members of the Senedd;
- Section 2 – Review of operation and effect of this Act;
- Section 3 – Power to make consequential, transitional etc. provision;
- Section 4 – Coming into force;
- Section 5 – Short title.

101. There are five delegated powers in the Bill for the Welsh Ministers to make subordinate legislation:

- three of which broaden the existing power in section 13 of the 2006 Act and are therefore subject to the affirmative procedure (as currently set out in that Act);
- one of which is subject to the negative procedure, or if primary legislation is being amended, the affirmative procedure;
- one of which is a no procedure commencement power.[81]

Section 1 – Proportion and placement of women on lists of candidates to be Members of the Senedd

Background

102. Section 13 of the 2006 Act[82] provides a broad power for the Welsh Ministers to make provision about Senedd elections. This includes the conduct of elections, the questioning of an election of a Member and the consequences of irregularities, and the return of a Member otherwise than at an election. According to the Explanatory Notes to the EM, "This power has previously been

[81] Welsh Government, Senedd Cymru (Electoral Candidate Lists) Bill, Explanatory Memorandum incorporating the Regulatory Impact Assessment and Explanatory Notes, March 2024, Chapter 5 – Power to make subordinate legislation

[82] Section 13 - Power of the Welsh Ministers to make provision about elections etc. Government of Wales Act 2006

exercised to make the National Assembly for Wales (Representation of the People) Order 2007[83] (often referred to as "the Conduct Order")."[84] In this report, references in our commentary to the conduct Order and the consolidated conduct Order are a reference to an Order under section 13 of the 2006 Act. These terms are used interchangeably, depending on the context and the need for readability.

103. Section 1 of the Bill inserts the following new sections 7A to 7D into the 2006 Act.

104. Section 7A makes it a requirement that where a political party submits a list of (at least two) candidates at a Senedd election, at least half of the candidates must be women (the minimum threshold) and a candidate on a list who is not a woman must, unless they are the last candidate on the list, be followed by a woman (the vertical placement criteria).

105. Section 7B requires that where a political party submits a list for more than one Senedd constituency, a woman must be the first candidate on the list in at least half of the lists (the horizontal placement criteria).

106. Section 7C provides for the creation of a national nominations compliance officer (NNCO) and for the enforcement of section 7B by means of an Order under section 13 of the 2006 Act. In particular, section 7C enables the Welsh Ministers by means of an Order under section 13:

- to designate an NNCO;
- to set out the functions of the NNCO related to ensuring compliance with Section 7B, including determining which lists are to be subject to action;
- to confer functions on a Constituency Returning Officer[85] (CRO) in relation to ensuring compliance with section 7B, including by requiring or enabling a CRO to making changes to candidate lists, including by

[83] S.I. 2007/236 The National Assembly for Wales (Representation of the People) Order 2007
[84] Welsh Government, Senedd Cymru (Electoral Candidate Lists) Bill, Explanatory Memorandum incorporating the Regulatory Impact Assessment and Explanatory Notes, March 2024, Annex 1 – Explanatory Notes, paragraph 6.
[85] The definition of a constituency returning officer will be contained in a new section 7 (Candidates at general elections) of the *Government of Wales Act 2006* to be inserted by the Senedd Cymru (Members and Elections) Bill, once enacted. See section 8 of the Senedd Cymru (Members and Elections) Bill, as passed."

holding that a candidate who is not a woman and who is the only candidate on a list no longer stands nominated.

107. Section 7D provides the Welsh Ministers powers (again, via an Order under section 13 of the 2006 Act) to:

- provide for what happens when a candidate is removed from a list (for example where the candidate has died or withdrawn), and whether the list can still comply with sections 7A and 7B;
- make provision requiring a person, as part of the nomination process, to state whether they are a woman or not a woman; and
- make provision for the inspection of statements made by candidates about whether they are, or are not, a woman.

108. The Statement of Policy Intent for Subordinate Legislation provides some additional information relevant to the making of the Order under section 13 of the 2006 Act including the following:

- as regards the person designated as the NNCO, the intention is that this person will be designated from the pool of Local Authority Returning Officers who will not be serving as CROs in Senedd elections;
- the role of an NNCO will be similar to that of a CRO, in that the NNCO will be checking an aspect of whether nominations, on their face, comply with the rules;
- the Order will also make provision for changes to the electoral timetable to allow for adequate time to complete the necessary compliance checks;
- requirements about candidate statements. It is stated that:

  "The section 13 order must include a requirement for candidates standing for a registered political party to state either that they are a woman or not a woman (section 7D(2)). This information is required for CROs and the NNCO to consider whether party lists are compliant with the vertical and horizontal rules. It is intended that this gender statement will form part of the suite of nomination papers which candidates are required to submit in order to stand for election, and that it will be signed and dated by the candidate. Where a candidate fails to provide a statement, their nomination will be invalid.

Upon a party nomination paper being submitted, the CRO (as is currently the case) would consider whether the party's nomination and those of the candidates on the party's list are validly made. This will include whether the candidates have stated whether they are a woman or not and whether the list of candidates (that are otherwise validly nominated) complies with the vertical rules. The intention is that the order will add an additional ground for the CRO holding a party nomination paper invalid, namely that the party list does not comply with the vertical rules. It is anticipated that there will be an opportunity for parties to have their lists informally checked by CROs for compliance during the nominations period.

The order may set out arrangements in respect of inspection of candidate statements (section 7D(1)(b)). It is intended that any rights to inspect such gender statements would, like the current arrangements for inspecting nomination papers and home address forms, be limited to specified persons and to a specified time period.";

- issues relating to matters of compliance. It is stated:

  "It is intended that checks for compliance with the horizontal rule will take place after both the deadline for the close of nominations and the CRO completing their checks. (…) CROs will also have a role in checking compliance with the horizontal rule (section 7C(3)(b)). They will be required to provide the NNCO with information about the gender of candidates in the first or only position on a list i.e. whether that candidate is a woman or not. They may also need to provide information on which lists (if any) contain only one candidate. This information will be used by the NNCO to determine whether a registered political party is compliant with the horizontal rule (including whether a party is subject to it at all (…) and if it is not compliant, to inform the action to be taken.

  (…) The order may set out details of the communications to take place between the CRO and the NNCO.

  The order will also make provision for what is to happen in the event of a party's lists not being compliant with the horizontal rule (section 7C(3) and (4)). The policy intention is that the order

of candidates on one or more of the party's lists would be rearranged to make the party compliant. This rearrangement will involve the person at the top of a list who is not a woman, being swapped with the woman in the second position on that list and potentially also the person in third position swapping with the person in fourth position and so on down the list, as necessary for the list to comply with the vertical rules.

The policy intention is that parties will have an opportunity to decide which list or lists of those they submitted are to change, failing which the NNCO would make that selection at random (which may be required to be done through the drawing of lots). Ordinarily, the action taken to address non-compliance will not involve any party or candidate ceasing to be nominated, rather just changing the order in which candidates appear on a list. The exception to this would be if the party has lists of one. It may be necessary for a candidate (who is not a woman) on a list of one to cease to stand nominated in order to make the party's lists compliant overall, but the policy intention is that this would only be required as a last resort (i.e. the policy intention is that the order will provide that the NNCO, in selecting which lists are to be changed, must first exhaust lists of multiple candidates which have a candidate who is not a woman in first position, before selecting any lists of one)";

- the conduct Order will also set out the functions of CROs in dealing with issues of non-compliance and the details of information to be given by CROs to the NNCO and vice versa and to parties;

- the intention is for the conduct Order to address the situation when a woman candidate dies during the nominations process, where this affects compliance with the rules and the removal of a candidate from a list.[86]

Delegated powers and the balance between what is on the face of the Bill and what is left to subordinate legislation

109. When asked whether she considers that the Bill strikes the right balance between providing sufficient detail on its face against providing delegated powers to the Welsh Ministers, the Trefnydd stated:

[86] Welsh Government, Statement of Policy Intent for Subordinate Legislation, March 2024

> *"Well, of course, the approach we've taken in the Bill is really very much in keeping with existing ways in which we separate primary and secondary legislation, particularly governing Senedd elections, which, mainly, are between the Government of Wales Act and the conduct Order. So, we recognise that there are going to be further changes required to the conduct Order to give effect to this Bill, but it is in keeping with existing separation between those primary and secondary legislation arrangements for Senedd elections."*[87]

110. In his written evidence, Thomas Glyn Watkin states:

> *"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."*[88]

111. In her written evidence, Elisabeth Jones also states:

> *"Given the importance, in terms of civil and political rights, of the Gender Quota provisions, I would have thought it appropriate for more information to have been contained on the face of the Bill, rather than left to be made in Orders under section 13 of GOWA.*
>
> *In particular, I am thinking of the functions of a Constituency Returning Officer (CRO) and of the National Nominations Compliance Officer (NNCO), related to ensuring compliance with new section 7B of GOWA. Of particular concern to parties represented in the Senedd (and prospective candidates) must be:*

[87] LJC Committee, 29 April 2024, RoP [120]
[88] Written evidence, Reform Bill Committee, SCECLB42 - P Thomas Glyn Watkin KC

a. the powers and duties that the NNCO will have to deal with party lists that are not in compliance with the horizontal placement criteria;

b. the consequences of removal of a candidate from a list of candidates, for breach of the Gender Quota provisions; and

c. provisions about inspection of gender statements.

In my view, this type of provision does not properly fall within the category of detailed technical and administrative provision that is appropriately left to subordinate legislation. The power of a majority governing party or coalition to legislate in a way that affects the electoral chances of their opponents goes to the heart of democracy and should be subject to significant safeguards."[89]

112. We raised with the Trefnydd the concerns expressed about the balance between providing sufficient detail on the face of the Bill against providing delegated powers to the Welsh Ministers. An official accompanying the Trefnydd commented that:

"Both this Bill and the other Bill work within the existing balance of primary and secondary legislation for Senedd elections. So, currently, with the Government of Wales Act, before the first Bill even amends that, there's very little detail about Senedd elections—it just says that you may have candidates. All of the detail of how you get from being selected, right through to election, is all in the conduct Order. The conduct Order is an unusually large piece of secondary legislation, and so it's that balance. And because this Bill fits into that system—. And, as has already been said, the NNCO is a new office that is dependent on the CRO, and the CRO is already in the conduct Order. Those were the practical barriers. If you were to put more detail in the primary legislation, you would have primary legislation referring to secondary legislation, and that's a practical barrier. That's the reason for it. So, whilst we accept that Thomas Glyn Watkin has made that point about balance, those were our reasons for it."[90]

[89] Written evidence, Reform Bill Committee, SCECLB35 - P Elisabeth Jones
[90] LJC Committee, 29 April 2024, RoP [151]

Definitions of a woman and not a woman

113. As indicated above, sections 7A, 7B and 7C of the 2006 Act would provide for the placement on lists of candidates who are a woman or not a woman. New section 7D would make provision for an Order under section 13 of the 2006 Act to require a candidate standing for a political party to make a statement on whether they are a woman or not a woman.

114. We asked the Trefnydd what consideration the Welsh Government gave to including an express definition of 'a woman' and 'not a woman' on the face of the Bill, and whether a lack of definition makes the legislation less precise or increases the risk of legal challenges to the election process. In response, the Trefnydd said:

> *"We considered several options in developing a Bill, and not including a definition is our preferred option, because the Bill is not about defining a woman. The Bill's not about gender recognition, and, indeed, it's not uncommon for legislation to use the term 'woman' without a definition. So, I don't think that it could lead to particular or increased risk of challenge, because even if the Bill contained a definition of 'woman' or 'not a woman', the precise meaning of it would still be, ultimately, for the courts to determine."*[91]

115. As for any unintended consequences arising from not including a definition of 'a woman' and 'not a woman' on the face of the Bill, the Trefnydd said:

> *"That's where it's important that we have, in section 2, a review mechanism. Because, obviously, in terms of review, unintended consequences are then—. Once you implement a Bill or any legislation, you have to learn from it and then the option for a review under section 2 can be considered. But, obviously, we'd hope to get through the first election when the quotas would apply and then you could consider that."*[92]

116. When we asked if there is a possibility that definitions could be included in subordinate legislation made under the Bill (i.e in an Order under section 13 of the 2006 Act), an official accompanying the Trefnydd said:

[91] LJC Committee, 29 April 2024, RoP [122]
[92] LJC Committee, 29 April 2024, RoP [124]

> *"No. The Bill doesn't provide a power for any meaning or definition in that respect to be provided in the conduct Order or other secondary legislation."*[93]

Enforcement of section 7B of the 2006 Act

117. When we asked how new section 7B in the 2006 Act will be enforced, the Trefnydd said:

> *"All the functions of the constituency returning officers and, indeed, the new national nominations compliance officer will be provided for in an Order under section 13 of the Government of Wales Act, (…) but also, the statement of policy intent, which you will have all received with the Bill, sets out the details of the provisions we intend to make in the Order."*[94]

118. We subsequently asked why the Welsh Government was proposing to include so much detail in an Order under section 13 of the 2006 Act, rather than placing it on the face of the Bill. In response, the Trefnydd said:

> *"I think this goes back to the earlier points that we need to have flexibility, we need to understand the detail. It is a new process. It's a new process for our returning officers. We will have our new national nominations compliance officer. It's good that there's plenty of detail laid out in the statement of policy intent for subordinate legislation, as we published when we published the Bill, and it is the right balance. It's the right balance between what's on the face of the Bill and, indeed, what will come through subordinate legislation on the Order."*[95]

119. As for any barriers to putting more detail on the face of the Bill, an official accompanying the Trefnydd noted that:

> *"The only barrier, I think, we were mindful of was the current balance of primary and secondary legislation, GOWA and then the conduct Order. Obviously, the national nominations compliance officer is a new role, but it will interact, very much so, with constituency returning officers; their functions need to be cognisant of the functions of constituency returning officers. All of that is currently set out in the conduct Order, and*

[93] LJC Committee, 29 April 2024, RoP [126]
[94] LJC Committee, 29 April 2024, RoP [137]
[95] LJC Committee, 29 April 2024, RoP [139]

> *therefore we felt it was appropriate that any functions were in relation to the NNCO, and that whole process of compliance checking for the horizontal rules in section 70, were set out there."*[96]

Candidate statements in accordance with section 7D of the 2006 Act

120. As well as new section 7D of the 2006 Act making provision for an Order under section 13 of the 2006 Act to require a candidate standing for a political party to make a statement (as part of the nominations process) declaring whether they are a woman or not a woman, it also may make provision about the inspection of such candidate statements.

121. In his written evidence to the Reform Bill Committee, Thomas Glyn Watkin states:

> *"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).*
>
> *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*

[96] LJC Committee, 29 April 2024, RoP [142]

> *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.*
>
> *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."*[97]

122. When asked how requiring candidates to make statements declaring whether they are a woman or not a woman will work in practice, the Trefnydd said:

> *"What we will be asking for in the conduct Order will be for mandatory statements. We will be setting out the terms of the statement in the conduct Order. We are, at the moment, talking with colleagues and stakeholders about the format of the statement, but there is no issue, as far as we're concerned, in terms of the statements about defining a woman or not defining a woman. It's not the case that it becomes an issue in other circumstances when we're using this definition. But I would want to say that it's important that we do look, in terms of the candidate statement and the conduct Order, at issues about privacy and tighter rules around access to home*

[97] Written evidence, Reform Bill Committee, SCECLB42 - P Thomas Glyn Watkin KC

> *addresses, et cetera, which I'm sure this committee will be concerned about. It's not strictly a legal issue, it's a policy issue, but I think this is important in terms of the candidate gender statements."*[98]

123. An official accompanying the Trefnydd added:

> *"...just to reiterate that the way it's been set out in the statement of policy intent is to fit into the way the existing nominations process works. So, with all the information that candidates are already required to bring forward, it will be in the same vein as that. And as the Minister has said, there are some policy considerations to be given to precise details, but a lot of that is set out in the statement of policy intent."*[99]

124. We raised the issue of what sanctions there would be for candidates who make false statements. The Trefnydd replied:

> *"There is not going to be any criminal offence for making a false or incorrect statement. I think it's really important that political parties have been giving evidence to the Senedd reform committee about what they feel about this Bill, because it's going to be very much up to political parties to make sure and take care that their nominations comply with the rules. Obviously, this is something that they undertake anyway, in terms of checks in terms of due diligence. So, it is candidates and political parties that should be prepared to take responsibility for accuracy of statements, and they will, of course, have a clear interest in statements being accurate, because they would be concerned about reputational damage and challenge. But ultimately, there is a route to challenge, which is through an election petition, and this Bill doesn't change anything about the process or grounds for bringing an election petition to challenge an election."*[100]

125. The Trefnydd added:

> *"Could I perhaps just say also that a returning officer could reject a nomination if the candidate's particulars are not as*

[98] LJC Committee, 29 April 2024, RoP [129]
[99] LJC Committee, 29 April 2024, RoP [130]
[100] LJC Committee, 29 April 2024, RoP [132]

> *required by law? But that applies at the moment in terms of elections."*[101]

Timing of an Order under section 13 of the 2006 Act

126. On 1 December 2023, the Counsel General wrote to the Reform Bill Committee indicating that the Welsh Government will consult on a draft bilingual and consolidated conduct Order (under section 13 of the 2006 Act), reflecting "our ambition to consolidate the statute book for Wales where we can, to deliver an accessible, bilingual legislative framework." The letter also indicates that the consultation on a draft Order, which will happen in parallel with a review of Senedd boundaries, will start in the autumn of 2024, with an Order being made in the summer of 2025.[102]

127. We understand that the conduct Order will be a significant and lengthy piece of subordinate legislation. We therefore asked the Trefnydd whether the Welsh Government has considered what impact a referral of the Bill to the Supreme Court would have on its plans to consult on the conduct Order.

128. The Trefnydd responded by stating:

> *"We are going to consult on the conduct Order, which will be an amendment to the conduct Order for the Members and elections Senedd reform Bill anyway. There'll be a full consultation. This has been discussed extensively with all of the organisations involved with electoral arrangements..."*[103]

129. An official accompanying the Trefnydd added:

> *"...just to echo what the Trefnydd has said, the main conduct Order is remaking the existing conduct Order and also taking account of changes that will be brought into effect, if passed, to the Senedd Cymru (Members and Elections) Bill, but also the Elections and Elected Bodies (Wales) Bill. The intention is that, to implement the electoral candidate lists Bill, a second Order would be made to amend the first, and insert any provision into the main conduct Order. So, it would be dealt with separately from the main one, but the consultation timescales and timetable for that are not dissimilar in terms of consultation, and then, obviously, making through, mindful of the Gould*

[101] LJC Committee, 29 April 2024, RoP [134]
[102] Letter from the Counsel General to the Reform Bill Committee, 1 December 2023
[103] LJC Committee, 29 April 2024, RoP [153]

> *convention and all legislation needing to be in place six months prior to the Senedd election."*[104]

130. We asked the Trefnydd to confirm whether the Welsh Government is therefore in the process of developing a conduct Order under section 13 of the 2006 Act for the 2026 elections that will not, in the first instance, include reference to the requirements of the Bill. The Trefnydd stated:

> *"There's one that's going to be consulted upon for the Members and elections Bill, and this would be an amendment to that conduct Order. So, it'll be very much following through the consultation. Also, on this balance between primary and secondary legislation, this is very much reflected in the Assembly and elected Members Bill anyway that the conduct Order does deal with much of the detail about implementation, as this will for this Bill."*[105]

Accessibility

131. In light of the Trefnydd and her official's comments in paragraphs 128 to 130, we asked the Trefnydd to explain how amending the conduct Order which would be newly consolidated was compatible with the Counsel General's aims for a consolidated and accessible conduct Order.

132. An official accompanying the Trefnydd responded, stating:

> *"So, it is to be consolidated and remade as a new single Order—that is the plan that's in place. But... that initial Order, the draft Order, will be consulted on in the autumn and is intended to be made certainly in line with the Gould convention. That, in the first instance, won't include implementation of this legislation. It's to be commenced by Order. Obviously, there will be, subject to the timings around that—. The intention is to implement this for 2026. If we are able to do that, then it will be implemented through a second Order that will amend the first. So, in terms of accessibility, it will ultimately be in a single conduct Order, but*

[104] LJC Committee, 29 April 2024, RoP [154]. The Gould convention (or principle) provides that electoral legislation should not be applied to any election held within six months of the new provision coming into force (for further discussion see the Electoral Commission, Scottish elections 2007 The independent review of the Scottish Parliamentary and local government elections 3 May 2007, October 2007, page 112)
[105] LJC Committee, 29 April 2024, RoP [159]

it will be given effect by way of an amending Order to the main conduct Order."[106]

Our view

133. We do not consider that the Bill achieves an appropriate balance between what is included on its face and, in the specific case of this Bill, the detail that is to be included in the conduct Order under section 13 of the 2006 Act. In reaching this view, we wish to make some observations.

134. We note the argument presented that a practical barrier exists to including more detail on the face of the Bill because primary legislation would then refer to secondary legislation. However, we believe that it should be possible to ensure that the Bill works in tandem with the conduct Order given that the latter is to be the subject of a full review and consolidation. So while we recognise that the Bill reflects the current balance between primary and secondary legislation, that would not in our view prevent important detail being placed on the face of the Bill. As such, we do not believe the barrier suggested arises.

135. In addition, as well as setting out important matters of principle and substantive policy, primary legislation should provide an indication to a reasonable extent of the detail that may or must be included in subordinate legislation. As such, the face of the Bill should provide the Senedd as the legislature with a clear indication of the nature and scope of the powers it is being asked to delegate to the Welsh Ministers. More prescription on the face of the Bill as to what may or must be included in a conduct Order under section 13 of the 2006 Act is more appropriate than giving the Welsh Ministers what amounts to a blank cheque.

136. We also note that, during the evidence sessions, the Trefnydd said that the statement of policy intent "sets out the details of the provisions we intend to make in the Order". The detail included in the Statement of Policy Intent for Subordinate Legislation is helpful to understand how some aspects of the legislation are intended to work, although it cannot be expected to provide the full picture.

137. However, as we indicate, consideration needs to be given as to whether that detail should be more appropriately included on the face of the Bill. As a matter of principle, including material in a statement of policy intent document should not be regarded as a substitute for putting detail on the face of the Bill or a valid

[106] LJC Committee, 29 April 2024, RoP [183]

justification for not doing so. If the detail is known, consideration should be given to including it on the face of the Bill in the first instance.

138. The Statement of Policy Intent for Subordinate Legislation is not binding on this, or a future Welsh Government. As our Committee has often said in its reports on Bills, how delegated powers could be used in the future by a Welsh Minister is a different matter from how the Welsh Government says it intends to use them during a Bill's passage through the Senedd.

Conclusion 5. The Bill does not achieve an appropriate balance between the information included on the face of the Bill and that which is left to be included in subordinate legislation (and in particular an Order under section 13 of the *Government of Wales Act 2006*).

Conclusion 6. Ensuring more information is placed on the face of the Bill would be beneficial for a range of reasons, including:

i. providing more certainty to stakeholders (including voters) at the earliest possible stage about the operation of the electoral process for the 2026 Senedd general election;

ii. ensuring that the views of the Senedd help shape how the election process should operate by allowing for Welsh Government proposals to be the subject of challenge and amendment if necessary;

iii. reducing the size and complexity of the Order to be made under section 13 of the *Government of Wales Act 2006*.

139. In light of conclusions 5 and 6, we believe the Bill needs to be strengthened by adding more detail to its face.

Recommendation 10. The Trefnydd should table an amendment to the Bill setting out the functions of a national nominations compliance officer as a consequence of new section 7C of the *Government of Wales Act 2006* (as inserted by section 1 of the Bill).

Recommendation 11. The Trefnydd should table an amendment to the Bill setting out the functions of a constituency returning officer in relation to new section 7C of the *Government of Wales Act 2006* (as inserted by section 1 of the Bill).

Recommendation 12. The Trefnydd should table an amendment to the Bill to provide more information related to candidate statements and how will they operate.

Recommendation 13. The Trefnydd should table an amendment to the Bill to set out more information about how the provisions of the Bill will be enforced, including but not limited to section 7B of the *Government of Wales Act 2006* (as inserted by section 1 of the Bill).

Recommendation 14. In considering our recommendations 10 to 13, the Trefnydd should take account of the Statement of Policy Intent for Subordinate Legislation and consider what detail from the information it includes about how the provisions in the Bill will operate, would be more appropriate to include on the face of the Bill.

140. Subject to any amendments that may be tabled to the Bill as consequence of recommendations 10 to 14, we are also concerned about the potential risk of legal challenge to an Order under section 13 of the 2006 Act that will be required to implement provisions in the Bill. For example, by virtue of new section 7C(4)(b) of the 2006 Act, changes could be made to a candidate list, which might mean that a candidate loses out (either by having to move down the list, or be removed from the list).

Recommendation 15. The risk assessment we refer to in recommendations 2 and 3 should include an assessment of the risk of challenge to an Order to be made under section 13 of the *Government of Wales Act 2006* in order to implement provisions of the Bill should it be enacted.

141. In general, we believe that key terms in primary legislation should be defined where doing so would be helpful, or indeed essential, to understand fully the intent of the legislation, particularly where an understanding of those terms is important in the context of enforcing the Bill's provisions. As such, definitions are important for the purposes of providing clarity and certainty for those that are directly affected by that legislation and for all relevant stakeholders.

142. We note the views of the Trefnydd regarding the absence of definitions of the terms 'a woman' or 'not a woman' in the Bill.

143. However, given that these terms are fundamental to the understanding and operation of the Bill, we do not believe that the Trefnydd has explained adequately why definitions of 'a woman' and 'not a woman' have not been included in the Bill.

Recommendation 16. The Trefnydd should provide more detailed information about why definitions of 'a woman' and 'not a woman' have not been included in the Bill.

144. We also refer to the matter of defining 'a woman' and 'not a woman' in our consideration of section 3 of the Bill.

145. We also note that, in her evidence, the Trefnydd has indicated that the Welsh Government will first be making an Order under section 13 of the 2006 Act as a consequence of the Senedd Cymru (Members and Elections) Bill, if and when it has received Royal Assent and the Elections and Elected Bodies (Wales) Bill, if it is passed and receives Royal Assent. We are aware that this Order will have been long in the making, given that a consolidated bilingual Order is a stated priority within the Welsh Government's Welsh law accessibility programme for 2021 to 2026.[107] The Trefnydd has also confirmed that, soon after and subject to the Bill receiving Royal Assent, the very recently-made consolidated Order will be subsequently amended via a further Order to be made under section 13 of the 2006 Act.

146. The Counsel General's letter of 1 December 2023 to the Reform Bill Committee made reference to one conduct Order only, but provided some helpful information about its timetable for consultation and making, in order to implement the Senedd Cymru (Members and Elections) Bill. The Counsel General also spoke about the opportunity to produce a consolidated bilingual conduct Order, which is to be welcomed.

147. It would however be unfortunate, even if possibly understandable, if a consolidated conduct Order was amended almost immediately after it had been made (should that be the case) as a consequence of this Bill.

148. It will be important to ensure that candidates have free access to, and the opportunity to take account of, full and consolidated information about the requirements for the conduct of the Senedd general election in 2026.

Recommendation 17. The Trefnydd and Counsel General should provide details of the timetable for consultation and making of an Order under section 13 of the *Government of Wales Act 2006* required to implement the Senedd Cymru (Electoral Candidate Lists) Bill.

Recommendation 18. The Counsel General should explain what steps he will take to ensure that a consolidated, accessible version of Orders made under section 13 of the *Government of Wales Act 2006* governing the conduct of the 2026 Senedd general election is available to candidates.

[107] Welsh Government, The future of Welsh law: A programme for 2021 to 2026, first published 21 September 2021. (See also revised programme, published 19 January 2024.)

149. We believe it is important that the Senedd and stakeholders have an opportunity to scrutinise draft Orders to be made under section 13 of the 2006 Act.

Recommendation 19. The Trefnydd must publish for consultation all Orders in draft format which are to be made under section 13 of the *Government of Wales Act 2006* in readiness for the 2026 Senedd general election.

Section 2 – Review of operation and effect of this Act

150. Section 2 provides for a review of the Act[108] after the 2026 election.

151. It makes provision requiring the Presiding Officer of the first Senedd elected after the day on which section 1 of the Act comes into force to table a motion (as soon as practicable following the first meeting of that Senedd, but in any case, within six months of that meeting) proposing that the the Senedd establishes a committee for the purposes of carrying out a review of the operation and effect of sections 7A to 7D of the 2006 Act (as inserted by section 1 of the Act), and any related provision made under section 13 of the 2006 Act or under the Act.

Our view

152. In our report on the Senedd Cymru (Members and Elections) Bill,[109] we considered the constitutional propriety of the Welsh Government asking the Sixth Senedd to pass legislation which would impose a duty on the Seventh Senedd and its Presiding Officer, namely to table a motion to establish a Committee (in respect of section 7 and section 19 of that Bill).

153. We consider that the issues that we draw attention to in that report in relation to section 7 (paragraphs 89 to 109) and section 19 (paragraphs 136 to 157) of the Senedd Cymru (Members and Elections) Bill remain valid.

Conclusion 7. It is not constitutionally appropriate to include section 2 in the Bill because if passed, it would impose a duty on either the Seventh or a future Senedd, in so doing breaching the principle that an Act of a Parliament should not constrain the freedom of action of a future Parliament.

Recommendation 20. In light of conclusion 7, the Trefnydd should consider whether section 2 is appropriate for inclusion in the Bill.

[108] That is, the Act that would result from the Bill if it were passed by the Senedd and received Royal Assent. .
[109] LJC Committee, Report on the Senedd Cymru (Members and Elections) Wales Bill, January 2024

Section 3 – Power to make consequential, transitional etc. provision

154. The Statement of Policy Intent for Subordinate Legislation states that section 3:

> *"Provides the Welsh ministers with a regulation power to make consequential, incidental, supplementary, transitional, transitory or saving provision if the Welsh Ministers consider it appropriate for the purposes of, in consequence of, or for giving full effect to any provision of the Act (i.e. the Bill once enacted). The regulations may amend, repeal, revoke or modify enactments."*[110]

155. In his evidence to the Reform Bill Committee, Thomas Glyn Watkin described this as an "astonishingly broad 'Henry VIII power'."[111]

156. We asked the Trefnydd why it was necessary to include such broad delegated powers in the Bill. An official accompanying the Trefnydd replied:

> *"...those are not unusual powers. Many Bills from this legislature involve those kinds of powers, and, although they do enable us to use secondary legislation to amend primary or secondary legislation, they are nonetheless still curtailed, because they still have to be in consequence of the provisions of the Bill. They aren't just to do anything; it still has to be within the scope of doing something that gives full effect to the provisions of this Bill or is incidental to that and so on. So, although they do appear very broad in what they can do, their scope is nonetheless limited. And they are necessary to ensure that—. Obviously, we hope, always, to do everything we need to to the statute book to make legislation work, but, if we were to miss something or if something becomes apparent when the Bill becomes operational, we have that power, without further primary legislation, to amend what we need to, again, within that limited scope of for giving full effect to the Bill."*[112]

[110] Welsh Government, Statement of Policy Intent for Subordinate Legislation, March 2024
[111] Written evidence, Reform Bill Committee, SCECLB42 - P Thomas Glyn Watkin KC
[112] LJC Committee, 29 April 2024, RoP [188]

Our view

157. We note section 3 of the Bill includes a regulation-making power for the Welsh Ministers, enabling them to make consequential, incidental, supplementary, transitional, transitory or saving provision if they consider it appropriate:

- for the purposes of the Act, or
- in consequence of the Act, or
- for giving full effect to any provision of the Act.

158. We further note that regulations made under section 3 may amend, repeal, revoke or modify "this Act or any other enactment (whenever passed or made)". We note that this is therefore a substantial Henry VIII power and, should the Welsh Ministers exercise the delegated power in this way, the regulations would be subject to the draft affirmative scrutiny procedure in the Senedd.

159. We acknowledge that it is not uncommon for a government to seek Henry VIII powers in a Bill which would enable it, and future governments, to amend primary legislation.

160. Henry VIII powers can vary. For example, some will enable only the repeal and modification etc of the Act in which the particular Henry VIII power is delegated.

161. Through this Henry VIII power, the Trefnydd is seeking the ability for any current or future Welsh Minister to repeal or modify etc the Bill (if and when enacted), and any other Senedd Act or Act of the UK Parliament (subject to legislative competence) including those which may not yet have been passed.

162. We therefore agree with the view expressed by Thomas Glyn Watkin that this is an "astonishingly broad" Henry VIII power.

163. We note in particular that the Bill provides for regulations to make supplementary provisions in order to give full effect to the Bill.

164. We note that an official accompanying the Trefnydd said that the Bill does not provide a power for any meaning or definition regarding 'a woman' or 'not a woman' to be provided in a conduct Order or other subordinate legislation.

165. We recognise that this is not the current government's intention. Nevertheless, we are uncertain as to whether a barrier to providing such

definitions in subordinate legislation exists and equally whether it is one of legislative competence or the breadth of the enabling powers. That is because an argument could be made that the Bill and/or section 13 of the 2006 Act as amended by the Bill, would be broad enough to enable definitions of 'a woman' or 'not a woman' to be included in the conduct Order.

Recommendation 21. The Trefnydd should state whether, in her view, the enabling powers in the Bill and/or the powers in section 13 of the *Government of Wales Act 2006* as amended by the Bill, could be used to define 'a woman' or 'not a woman'.

Recommendation 22. The Trefnydd should state whether, in her view, defining 'a woman' or 'not a woman' would be within the legislative competence of the Senedd.

Annex 1: Legislative competence tests

Under the reserved powers model of legislative competence, a provision in a Senedd Bill will be within the Senedd's legislative competence unless any of the paragraphs in section 108A(2)(a) to (e) of the *Government of Wales Act 2006* (the 2006 Act) apply. A series of tests must be considered when assessing whether or not a provision is within the Senedd's legislative competence. These are summarised below.

Test	Notes
Test 1: No provision of the Bill must relate to a reserved matter	A list of reserved matters is set out in Schedule 7A to the 2006.Act. Under section 108A(6) of the 2006 Act, the question whether a provision of a Bill "relates" to a reserved matter is to be determined "by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances".
Test 2: No provision of the Bill must modify (or give the power to modify) the law on reserved matters	The law on reserved matters is defined in paragraph 1 of Schedule 7B to the 2006 Act. It covers any provisions of an Act of the UK Parliament, or subordinate legislation made under such an Act, about a reserved matter. It also includes any common law rule on a reserved matter. A Senedd Act can modify the law on reserved matters if the modification is ancillary to a provision not relating to reserved matters, so long as the modification "has no greater effect on reserved matters than is necessary to give effect to the purpose of that provision" (i.e. the provision to which the modification is ancillary).
Test 3: No provision of the Bill must modify (or give the power to modify) the private law	The "private law" is defined widely as meaning contract law, agency law, the law of bailment, tort law, the law of unjust enrichment and restitution, property law, trusts law and succession law. The restriction does not apply to a modification that is solely for a devolved purpose.
Test 4: No provision of the Bill must modify (or give the power to modify) the list of specific offences and elements of criminal	A provision of a Bill cannot modify any of a list of serious offences, nor confer power to do so by subordinate legislation. These offences include

Test	Notes
offences in Paragraph 4 of Schedule 7B	treason, homicide, the most serious violent offences, sexual offences and perjury. There are also other elements of the criminal law that are outside competence, including modification of the law on criminal responsibility and capacity, or the 'mental' elements of offences such as the meaning of "intention", "recklessness" or "dishonesty". Inchoate and secondary criminal liability is also beyond the reach of the Senedd. The Senedd also has no competence to make law about sentencing (or other court orders and disposals) in respect of defendants in criminal proceedings, nor can it make law about the effect and operation of sentences.
Test 5: No provision of the Bill must extend beyond the England and Wales Jurisdiction	A Senedd Act provision cannot form part of a legal system other than the unified jurisdiction of England and Wales.
Test 6: No provision of the Bill must apply otherwise than in relation to Wales or confirm, impose, modify or remove functions exercisable otherwise than in relation to Wales (or give the power to do so) unless it meets the criteria in section 108A(3)	A Senedd Act provision will be outside competence if it applies otherwise than in relation to Wales; or confers, imposes, modifies or removes functions exercisable otherwise than in relation to Wales; unless it falls within the exception in section 108A(3) of the 2006 Act (which provides that a Senedd Act provision may apply otherwise that in relation to Wales, or confer, impose, modify or remove functions otherwise than in relation to Wales if it is ancillary to a provision of any Senedd Act or Measure or to a devolved provision in an Act of Parliament, or the provision has no greater effect otherwise than in relation to Wales, or in relation to functions exercisable otherwise than in relation to Wales, than is necessary to give effect to the purpose of that provision). This test concerns whether a Senedd Bill has practical application or effect other than in relation to Wales; for example whether it creates powers, rights, duties or criminal offences that are not sufficiently linked to Wales. It does not mean that legislation made by the Senedd can affect only people in Wales.
Test 7: Each provision of the Bill must be compatible with the	Several Convention rights are of particular relevance to the Bill, including Article 3 of Protocol 1 (free and fair elections), Article 14 (protection

Test	Notes
Convention rights set out in the Human Rights Act 1998	against discrimination) in conjunction with Article 3 of Protocol 1, and Article 8 (respect for private and family life).
Test 8: No provision of the Bill must affect Minister of the Crown functions, or those of government departments or other "reserved authorities" in a range of ways without the consent of "the appropriate Minister"	Paragraphs 8 to 11 of Schedule 7B to the 2006 Act set out restrictions on the competence of the Senedd to affect functions of Ministers, government departments and other reserved authorities.
Test 9: No provision of the Bill must modify or confer power to modify, a protected enactment	The protected enactments are set out in paragraphs 5 to 7 of Schedule 7B to the 2006 Act (and include the 2006 Act itself).

Annex 2: Letter from the Llywydd

Y Gwir Anrhydeddus Elin Jones AS
Llywydd, Senedd Cymru

Right Honourable Elin Jones MS
Llywydd, Welsh Parliament

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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.

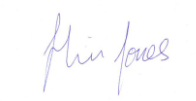
It is my view that the provisions of the Bill would not be within the legislative competence of the Senedd. My statement sets out my reasons for reaching that view.

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) Bill[1] 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.

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[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).