The Scottish Parliament and the "Westminster Model": A Decade of Law-Making at the Scottish Parliament (1999-2009)

McGrath, Peter
The Scottish Parliament. Edinburgh EH99 15P
peter.mcGrath@scottish.parliament.uk

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Gaur egungo Eskoziako Parlamentua, Erresuma Batuko Westminsterreko Parlamentuaren semea da. Erresuma Batuko Parlamentuak legez sortu zuen. Parlamentua sortu zen funtziorako eta bere jatorrizko kultura politikoaren artean tirabirak sortu ohi dira. Eta horrela jarraitzen dute deboluzio edo deszentralizazio prozesuan. Lan honek zera aztertzen du: Eskoziako Parlamentuaren ekintzabidea kultura politiko berri baten eragile ote den edo Westminsterreko ereduaren errepikapen eta jarraipena erakusten duen, hasieran batean uste zena baino estuagoa alegia.

Giltza-Hitzak: Eskoziako Parlamentua. Westminster eredua. Kultura politikoa. Aginteen deboluzioa.

El actual Parlamento de Escocia es un hijo de Westminster, el Parlamento del Reino Unido que lo creó mediante una ley. Se han producido tensiones entre la función prevista para el Parlamento y la cultura política donde se ha formado. Y estas continuan en el dinámico proceso de descentralización. En este texto se analiza si el Parlamento escocés ciertamente incorpora una "nueva política" o si por el contrario sigue el modelo de "Westminster" de gobierno parlamentario, de una manera mas estrecha de lo que en un principio estaba previsto.

Palabras Clave: Parlamento de Escocia. Modelo Westminster. Cultura política. Devolución de poderes.

L'actuel Parlement d'Écosse est un enfant de Westminster, le Parlement du Royaume-Uni, qui l'a créé grâce à une loi. Des tensions ont éclaté en raison des divergences dues à la fonction prévue pour le Parlement et la culture politique où il s'est formé. Et ces dernières se poursuivent dans le processus dynamique de décentralisation. Dans ce texte, on analyse si le Parlement écossais incorpore certainement une « nouvelle politique » ou si, au contraire, il suit le modèle de gouvernement parlementaire de «Westminster», d'une façon plus étroite de ce qui était initialement prévu.

Mots-Clés : Parlement d'Écosse. Modèle Westminster. Culture politique. Restitution de pouvoirs.

1. INTRODUCTION: THE ARCHITECTURE OF THE SCOTTISH PARLIAMENT AND THE "NEW POLITICS"

The architects of the new Scottish Parliament wanted to create a legislature that would embody a "new politics", a vague term carrying positive undertones. Perhaps because of this, it seems to have something of an enduring popularity amongst politicians in the English-speaking world[1].

"Architects" may be taken to refer to the designers of both the institution and the building. In many respects, they had similar aims. It was Winston Churchill who declared that "we shape our buildings and then they shape us"[2]. He was referring at the time to the House of Commons Chamber. The striking and controversial structure housing the Scottish Parliament, sited in the Holyrood district on the edge of Edinburgh's Old Town, appears to be almost everything that the Palace of Westminster is not.

The main chambers of both Parliaments stand out in particular as an exercise in contrasts. Where the Commons Chamber at Westminster is a rectangle, the Debating Chamber at Holyrood is a semi-circle, in the continental style. At Westminster, government and opposition sit on opposite sides facing each other, the front benches of each separated by a distance equivalent to the length of two swords. At Holyrood, every politician faces in the same direction, towards the Presiding Officer's chair. At Westminster the benches and walls are of darkly varnished wood panelling, reminiscent, it is sometimes said, of a gentleman's club. There are few windows and they look onto nothing other than adjacent parts of the Palace complex, making the Commons a literally inward-looking institution. At Holyrood, by contrast, natural light dominates, with extensive views outwards to the green hilly landscape just beyond the Parliamentary campus.

Here we have a concrete representation of what the "new politics" was meant to embody in post-devolution Scotland; it was to be everything that the old Westminster politics was not. Westminster politics was adversarial; Scottish politics was to be consensual, more "European". Westminster was dark, Gothic, clubby, conservative, traditional; Holyrood was to be modern, open, transparent, outward-looking. And so on.

This narrative of the Scottish Parliament as a place practising a new and better sort of politics goes back some time, at least as far as the 1980s, when Mrs Thatcher's strongly anti-devolutionist Conservative administration was in power. In its final report, in 1995, when the Conservatives still ruled, the Scottish Constitutional Convention, a civic body set up to maintain the momentum for home rule during those years, and (as it was to turn out) one of the Parliament's main institutional architects, predicted that

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1. At their first joint press conference on 12 May 2010, the two leaders of the new UK coalition Government both described that their agreement to govern together as a sign of a "new politics".

2. Hansard, Commons. 28 October 1943

> The coming of a Scottish Parliament will usher in a way of politics that is radically different from the rituals of Westminster: more participative, more creative, less needlessly confrontational[3].

This theme was carried forward in the work of the Consultative Steering Group on the Scottish Parliament, a body of respected individuals from politics and civic life set up by the new Labour Government in 1997 to propose rules for the new Parliament, and another of the main shapers of the new Parliament. The CSG proposed that the Parliament run itself (and by implication distinguish itself from Westminster) according to four guiding principles[4]:

- *Power-sharing*: power should be shared between the people, the legislators and the Scottish Executive;
- *Accountability* the Executive should be accountable to the Parliament and the Parliament and Executive accountable to the people of Scotland;
- *Accessibility*: the Parliament to be accessible, open and responsive, and develop procedures allowing a participative approach in developing, considering and scrutinising policy and legislation;
- *Equal opportunities*; the Parliament in its operation and appointments should promote equal opportunities for all.

The notion of Holyrood being a different sort of Parliament continues to be an important element in the Parliament's own self-perception. For instance, in his speech[5] welcoming Queen Elizabeth to Holyrood on the Parliament's tenth anniversary last year, the Presiding Officer of the Parliament invoked it as a "modern" Parliament that had "established itself as one of the most open and innovative in Europe".

Perception and reality are not of course always the same. And there can be a danger of reading too much into symbols. The House of Commons Chamber itself dates from just 1950; a brilliant imitation of Victorian neo-Gothic, it is a pastiche of a pastiche[6]. The story about the swords' lengths may be apocryphal. And, *pace* Churchill, confrontation and partisanship are surely as possible when your political adversaries are facing in the same direction as when they sit opposite you. In this regard, it is significant that, in his speech, the Presiding Officer did not make the claim that the Parliament had established itself as one of the least confrontational in Europe.

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3. Scottish Constitutional Convention. *Scotland's Parliament, Scotland's Right.* (1995).

4. Consultative Steering Group on the Scottish Parliament. *Shaping Scotland's Parliament* (1998), page 3.

5. Available at: http://www.scottish.parliament.uk/nmCentre/news/news-09/pa09-po-speech.htm [Accessed June 2010].

6. The Churchill quote is from a speech made in the aftermath of the Commons' destruction by a German bomb, arguing that the replacement chamber should be a facsimile of the old. This duly came to pass.

This paper aims to examine whether the perception of the Scottish Parliament as a place practising a new politics matches the reality, based on consideration of its first ten years of considering laws. (There are of course other things that the Parliament does that may provide insight into whether the Constitutional Convention's prediction has come true, but restricting the discussion to this one aspect is intended to keep the discussion more focussed). There will be a short discussion of how laws for Scotland were considered pre-devolution to give an insight into the "old politics" that the new Parliament was supposed to supersede. The institutional architecture of the Scottish Parliament will then be considered; both the superstructure; the parameters set by Westminster under the Scotland Act, and, as it were, the interior design; the Parliament's own internal rules and procedures. There will be a short analysis of how the Parliament has in fact gone about considering legislation, followed by some concluding reflections on whether the Parliament has now become a place that examines laws proposed for Scotland in a distinctive and better way.

2. LAW-MAKING FOR SCOTLAND BEFORE DEVOLUTION

The independence and distinctiveness of the Scottish legal system was largely preserved under the 1707 Treaty of Union. Accordingly, Scotland was in the unusual position of being a legal jurisdiction without its own legislature.

The UK Parliament made new laws for Scotland in two ways. One was to add clauses to mainly English Bills so as to make them apply to Scots law in an appropriate way (a practice that came to be irreverently known to Scots lawyers as "putting a kilt on it"). The other was to introduce Bills applying solely to Scotland. Such Bills were relatively rare (especially viewed from the perspective of post-devolution Scotland)[7], and also tended to be of an omnibus character, covering a variety of unrelated matters[8]. Both these approaches led to concerns that the modernisation of Scots law was taking place in a fragmentary, unsystematic manner[9] and that major reforms were being indefinitely sidelined[10].

To this might be added more general concerns about the way legislation was being considered (for instance the absence of rules enabling Committees to take public evidence on Bills[11], requiring stakeholders to seek access and influence through informal or private channels), plus the simple fact that what public legislative processes there were took place hundreds of miles from Scotland. Another more fundamental issue was as to the democratic legitimacy of the

7. Between 1979 and 1999, an average of six such Bills were introduced.

8. Most such Bills went by the name of the Law Reform (Miscellaneous Provisions) (Scotland) Bill.

9. Eg DM Walker, The Scottish Legal System (7th edition).

10. An example was reform of heritable property laws; by 1997 Scotland was the last jurisdiction in Europe, outside of the Channel Isles, to have retained a feudal system of land tenure.

11. Any such concerns, it should be added, would apply as much to England-only legislation, since the procedural rules were the same.

process, given the lack of Government MPs elected in Scotland, particularly from the 1987 election onwards. Such concerns may have helped contribute to a growing consensus north of the border that there was a "democratic deficit" in the governance of Scotland, and a lack of genuine openness and meaningful participation in the formulation of policy, both of which might be addressed through the establishment of a Scottish Parliament.

3. THE ESTABLISHMENT OF THE SCOTTISH PARLIAMENT; THE SCOTLAND ACT AND THE "WESTMINSTER MODEL"

In 1997, a UK Labour Government was elected, pledging to establish a Scottish Parliament. Following a successful Scottish referendum, a Bill was introduced into the UK Parliament and passed in 1998 as the Scotland Act. The Scottish Parliament came into being the following year.

Parliaments in the Commonwealth (including state or provincial Parliaments in federal or mainly federal countries such as Australia and Canada) tend to exhibit many of the characteristics of the UK Parliament. They belong to the "Westminster family". Features of this Westminster model include:

- the sovereignty of Parliament (ie the supremacy of Parliament; rules made by Parliament trump other laws, including earlier statutes that they contradict)[12];
- absolute privilege in Parliamentary proceedings; proceedings in Parliament are not justiciable in any court of law (other than the Parliament itself sitting as a court);
- Two-party politics with strong party discipline, and the institutionalisation of an adversarial approach to political discourse (for instance by way of weekly Prime Minister's Question Time)[13];
- the notion of the Parliament as a place where the Government decides most of the business to be considered and consequently as primarily the place where that business gets done. On legislation, it is the Government rather than the Parliament that holds the initiative: Parliament's role is primarily reactive; scrutinising the legislation that the Government has laid before it;
- two Chambers, one having primacy, with the most important role of the other being as a revising body for legislative proposals. (This feature is of course also common in non-Commonwealth assemblies).

12. Most Commonwealth democracies now have written constitutions, which has of course led to limitations being imposed on their Parliaments' sovereign powers. Even state or provincial Commonwealth Parliament are usually at least partly sovereign, however, in that they have exclusive legislative jurisdiction over matters within their competence.

13. In fact, it is not at all uncommon for Government Bills at Westminster to be agreed to with Opposition support, but this is not how the business of politics is generally presented to the UK public.

Most (though not all)[14] of these features are absent from the Scottish Parliament, by virtue mainly of the Scotland Act itself. The terms of the Act make clear that the Scottish Parliament is not sovereign[15]. This does not mean merely that there are some matters on which it has no power to legislate (in respect of which the Act has provided a referral procedure enabling Ministers in the UK Government to obtain a Supreme Court ruling on whether the Parliament has exceeded its powers). It also means that the courts may competently be asked to rule on decisions of the Parliament, and to grant judicial review[16].

3.1. Legislative consent motions: Westminster legislating for Scotland

More fundamentally yet, the UK Parliament retains the power to make law for Scotland even over matters devolved to the Scottish Parliament. This power has been exercised quite frequently[17], though thus far never without the prior consent of the Scottish Parliament, by way of what the Scottish Parliament's standing orders call legislative consent motions (LCMs).

An LCM involves the Parliament (following consideration by the relevant Parliamentary committee) deciding whether to consent to Westminster legislating on a matter devolved to the Scottish Parliament[18]. The question of what would happen if the Scottish Parliament decided to withhold its consent remains hypothetical. Clearly, there would be political repercussions. However, the legal power of Westminster to legislate would be unaffected. In short, an LCM is an

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14. For example, the Scottish Parliament has imported from Westminster a weekly half-hourly question time slot for the First Minister, which is usually no less adversarial in character. The extent to which party discipline plays a part in Scottish Parliamentary business may become evident in the discussion on legislation-related statistics later in the paper.

15. Of course, the mere fact that the Parliament is created by Act of Parliament in itself underlines that the Parliament is not sovereign. It is, however, important to acknowledge the view that sovereignty in Scots law rests with the Scottish people rather than with (to use AV Dicey's celebrated formulation), the Queen-in-Parliament, as at Westminster. It is debatable whether those espousing this point of view are seeking to make a legal and constitutional point or (no less validly) a political and rhetorical one. However, there has been some qualified judicial support for the viewpoint that Scottish and English concepts of sovereignty differ and, in particular, that Parliamentary sovereignty is a concept of English rather than Scots law. (McCormick v Lord Advocate 1953 SC). The issue is interesting, but for the purposes of this paper it is sufficient to note that the Scotland Act 1998 is determinative as to the status of the *current* Scottish Parliament.

16. Whalley v Watson (2000 SC 340). The jurisprudence on the extent to which the courts can judicially review decisions of the Scottish Parliament is still very undeveloped, there having been very few reported cases and none in which a decision has in fact been successfully reviewed.

17. A notable example was the law giving same-sex couples the right to enter into civil partnerships, despite family law being devolved to the Scottish Parliament. The majority of cases are far less significant, often relating to points of detail in UK-wide legislation or to minor cross-border issues. A fairly recent example was of UK legislation for civil defence in relation to reservoirs straddling the Scottish/English border. No such reservoirs currently exist.

18. A possible weakness of this procedure is that consent is sought only at the point of the legislative proposal entering the UK Parliament and not after it has been passed, leaving open the possibility of the Bill having been radically amended, but this has not so far emerged as a bone of contention.

instrument of inter-Parliamentary etiquette, not a device to "lend" sovereign power from Holyrood to Westminster.

It is sometimes overlooked that an LCM is also required where a UK Bill seeks to *extend* either the devolved powers of the Scottish Parliament or the administrative functions of the Scottish Government. This is not especially uncommon, although usually the power or function being extended is of a relatively technical nature, for instance in relation to the environmental management of a river basin whose catchment straddles the Scotland/England border[19]. There is of course a separate, ongoing and wide-ranging political debate as to whether the competence of the Scottish Parliament should be more comprehensively extended[20].

Thirty-nine LCMs were lodged in the first four-year session of the Scottish Parliament; 38 in the second, and thus far in this session (with around ten months to go), 25. In other words, the flow of LCMs has been fairly constant over the first decade of the Parliament's existence. The advent of a Scottish Nationalist administration following the 2007 Scottish general election appears to have had no significant effect on their frequency.

3.2. The electoral system

Another area of divergence is in relation to the relative strengths of political parties in Holyrood. The Scottish Parliament has multi-party politics rather than a two-party system. To state that this is because Scotland has multi-party politics appears truistic. In fact, it is the proportional element of the two-part system for elections to the Parliament set out in the Scotland Act that has helped prevent one-party dominance, as, under the first-past-the-post part, the Labour Party would have had an absolute majority in all three Scottish elections held so far.

Either way, it is all but certain that no one party will hold an absolute majority in the Scottish Parliament in the foreseeable future[21]. This would appear to help set the conditions for a participative and less confrontational model of political discourse predicted by the Constitutional Convention, including of course in the consideration of legislation.

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19. Legislative consent motion for the UK Marine and Coastal Access Bill (2009).

20. The Scottish Parliament voted to establish a Commission on Scottish Devolution in 2007. The UK Government supported the establishment of the Commission. The Commission reported in 2008, making a number of proposals for reform of aspects of the Scotland Act, some of which would extend the Scottish Parliament's tax-raising and law-making powers. The new UK Government has indicated that it is interested in taking some of the Commission's proposals forward.

21. In the first and second Parliamentary sessions (1999-2007), the Labour and Liberal Democrat parties governed as a majority coalition. In the third session, the Scottish National Party governs as a minority with 47 seats out of 129, relying on its use of Executive powers or on ad hoc support from other parties in order to pursue its agenda.

3.3. The absence of a second chamber and Scottish Parliament Committees

The Scottish Parliament's Standing Orders provide for two main types of Committee; those set up to consider particular policy areas (eg Justice; Economy, Energy and Tourism) and those exercising particular cross-cutting or house-keeping roles (eg Parliamentary Standards and Procedures; Equal Opportunities). Committees are appointed having regard to overall proportionality in the Chamber meaning that no party enjoys a majority on any committee.

The Scotland Act did not provide for a second chamber in the Scottish Parliament. The Consultative Steering Group on the Scottish Parliament noted that this had "led many to focus on the important role that Committees may play as the "revising chamber" in scrutinising draft legislation"[22]. The CSG went further however, arguing for a paradigm shift in the role of committees and indeed of the public in considering legislation

> (...) there is a need to extend the process to form a recognised policy development stage … A formal, well-structured, well-understood process would not only deliver a scrutiny stage pre-introduction but would also allow individuals and groups to influence the policy-making process at a much earlier stage than at present. By making the system more participative, it is intended that better legislation should result[23].

Allied to this was another key CSG recommendation, subsequently incorporated into the Parliament's Standing Orders; that Committees should have the joint function both of scrutinising Government performance and of considering legislation within their area of responsibility. This is to be contrasted with Westminster, where there are separate committees to exercise those roles, the latter type usually existing only for as long as the life of a particular Bill. The view taken was that that this would better ensure the building up of subject matter expertise, and the shift to a policy-shaping legislative culture envisaged by the CSG. In the first session of the Parliament, this aspiration was rather hampered by fairly frequent changes to Committee membership. In sessions two and three, committee membership has been slightly more stable.

There will be further consideration as to whether committees have fulfilled the role envisaged by the CSG later in the paper.

3.4. Consideration of legislation; the three stages of Parliamentary consideration

The Scotland Act also laid down some ground rules for the consideration of legislation in the new Parliament. First, there must be provision for "general debate" and the opportunity to vote on the "general principles" of any Bill.

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22. Consultative Steering Group on the Scottish Parliament. *Shaping Scotland's Parliament* (1998), page 64.

23. *Ibid*.

Secondly, there must be an opportunity to consider and vote on the details of a Bill. Thirdly, there must be "a final stage at which a Bill can be passed or rejected". Here we see the genesis of the three stage procedure for the consideration of Bills, set out in the Parliament's Standing Orders:

Stage 1: The Bill is assigned to a Committee for consideration of its general principles. The Committee takes evidence on the Bill and then produces a report to the Parliament. In the light of that report, the whole Parliament then debates whether the general principles be agreed to. If so, the Bill proceeds to Stage 2.

Stage 2: the Bill returns to Committee. There is the opportunity at this point for what tends to be described as "detailed" or "line-by-line" scrutiny of the Bill, which is perhaps misleading since the main focus is on considering textual amendments to the Bill. There is no opportunity to reject the Bill outright at Stage 2 and "wrecking" amendments are inadmissible.

Stage 3: The Bill (together with any amendments to it made at Stage 2) returns to the chamber for consideration in plenary session. There is a final opportunity for textual amendments, followed by the Parliament debating whether to pass the Bill in its final form.

At Stage 3, the Bill either passes or falls. Because there is no second chamber, there is no "ping pong" as in many Commonwealth jurisdictions, with competing versions of the Bill being volleyed from one chamber to the other until there is complete textual harmony. Instead, the version of the Bill agreed to at Stage 3 simply supersedes that agreed to at Stage 2. There is, however, provision for the final debate on whether to pass the Bill to be suspended to another day, to enable further amendments to be lodged. This was intended to deal with situations where drafting or policy infelicities have occurred because of unexpected decisions on amendments at Stage 3. Of the 139 Bills that Parliament has so far passed, this power has been invoked only once. It is perhaps no surprise that this was in the case of a non-Government Bill[24] (a Committee Bill –see below– on the registration of members' interests), when members were not "whipped" but instead left free to vote with their consciences.

3.5. Amendments

Any member may lodge textual amendments to a Bill at either Stage 2 or Stage 3 of the legislative process. All amendments are debated at Stage 2, whilst at Stage 3, the Presiding Officer has the discretion not to select amendments, in order, for instance to weed out those debated at Stage 2 that received little support. Backbench members receive some assistance from Parliamentary staff in preparing their amendments. Ministers of course receive specialist civil service assistance in the drafting of amendments.

24. Now the Interests of Members of the Scottish Parliament Act 2006.

All amendments are publicly notified on the Parliament's website the day after being lodged and lists of the amendments to be considered on a particular day are also published online.

The deadline for lodging amendments has been pushed back, by increments, since the Parliament was established, in large part in response to recurring concerns from members as to the volume of amendments being lodged, Government amendments in particular. Deadlines are now reasonably generous by the standards of many Commonwealth legislatures[25], although from time to time concerns are still expressed about the difficulties of carrying out proper scrutiny when a large number of amendments have been lodged.

3.6. Pre-introduction provision for legislation

The Consultative Steering Group also emphasised the importance of Bills being introduced only after a proper opportunity had been afforded to individuals or bodies likely to be affected by the legislation to contribute to the policy-making process. The CSG envisaged committees having an important role at pre-introduction; for example it expected that a committee would want to take evidence from the relevant Government Minister on the consultation process on whether and how policy was being developed.

However, in practice, Committees have tended to purposefully avoid being involved in the formation of policy at the pre-introductory stage, seeing that as a matter for the Government and the affected stakeholders. As a matter of fact, the vast majority of Government Bills, of successive administrations, have been the subject of consultation (sometimes involving draft Bills) prior to their introduction into the Parliament. This may be one of the reasons why Committees have generally been content not to involve themselves in the pre-introductory process.

Standing Orders do however provide that each public Bill be accompanied by a policy memorandum, setting out (amongst other things) the consultation undertaken on the Bill, alternative proposals considered and why they were rejected, and an assessment of the Bill's likely impact on matters such as equality issues, island communities or human rights.

3.7. Financial scrutiny of legislation

Bills must also be accompanied by a financial memorandum setting out the best estimates of the cost implications of the Bill on the Government, local

25. Three sitting days at Stage 2, four at Stage 3. Given the pattern of sitting days, this effectively means that the weekend will always come between an amendment being lodged and an amendment being considered. Successive administrations have also given a commitment to lodge their own amendments five working days before the day of consideration whenever possible.

authorities and other persons, and of the margins of uncertainty of such estimates. Scrutiny of financial memorandums falls primarily on the Parliament's Finance Committee, which reports its findings to the Committee assigned to lead scrutiny on the Bill at Stage 1. The role of the Finance committee in so doing is to assess whether the memorandum is accurate and helpful, rather than whether the Bill is worth the money, which is more properly for the lead Committee.

The Parliament also makes provision in its Standing Orders for a discrete procedure for "financial resolutions" for legislation. This provision is somewhat complex but in essence, it gives whoever is in Government a power of veto over legislation deemed by the Presiding Officer either to incur "significant expenditure" on the Scottish Government or to confer a power to incur charges that may be "significant". The Government holds this veto power because, under Standing Orders, it is only the Government that has the power to lay the motion for approval of the financial resolution, and a Bill cannot proceed past Stage 1 unless the motion is agreed to.

The financial resolution procedure appears in the Parliament's Standing Orders having left little in the way of a paper trail (for instance in the report of the CSG) explaining why it was considered useful or necessary. It is evident, however, that it is essentially an inheritance from Westminster, where "money resolutions" and "ways-and-means resolutions" fulfil essentially identical functions (one for spending; the other for charging). The underlying justification for the veto power (at least for legislation incurring significant expenditure) is that the Government has a fundamental duty of care towards the nation's finances, which may over-ride even the democratic will of the Parliament. That said, successive Presiding Officers have tended to take what might be considered a fairly cautious approach towards financial resolutions, generally deeming them necessary where expenditure is upwards of around £500.000 or more[26].

Only one Bill has fallen because of the financial resolution procedure and that was in fact a Government Bill[27]. Concerns as to the budgetary implications of the Bill were raised during the Stage 1 debate, and the minority administration went on to lose the vote on the resolution, despite the general principles of the Bill having just been agreed to. This is very much the exception to a general rule of financial resolutions being agreed to without debate. It will be interesting to see whether this continues in future years or whether (as the UK and Scotland enter an era of more straitened financial circumstances) greater opportunity will be taken to debate resolutions on the basis that while the policy of the Bill may be unexceptionable, the financial cost exceeds the policy benefit delivered.

26. To provide context, the overall Scottish budget in recent years has been around the £25-30 billion mark. Successive Speakers of the House of Commons at Westminster have taken a broadly similar approach in relation to money resolutions.

27. Creative Scotland Bill (2008).

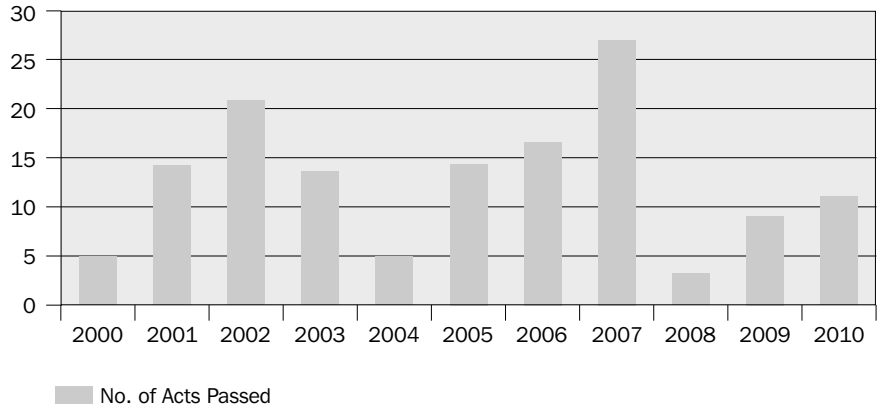
3.8. Members Bills and Committee Bills

The Consultative Steering Group proposed, and accordingly Standing Orders provide, that both Committees and individual members may initiate legislation. This was seen as flowing from the guiding principle identified by the CSG that there be a sharing of power between Government and Parliament. The view was that this should include sharing the power of initiative in proposing legislation. The rules could also be seen as flowing from a wish to do things better than at Westminster[28].

Some provision has been made to ensure that non-Government Bills are fit for purpose at the point of introduction. In particular, Standing Orders effectively require both Committees and individual Members to consult on their legislative proposals, and to demonstrate whether and how they have developed their policy as a result. In addition, in 2000, the Parliament established a Non-Executive Bills Unit, believed to be the first body of its kind in the Commonwealth. NEBU's role is to provide assistance to individual members and Committees in consulting and refining policies on their proposed Bills, and in taking the Bill through all three stages of the legislative process. NEBU also instructs the drafting of Bills that it supports, and has an annual budget to spend on securing professional drafting assistance.

4. GENERAL OBSERVATIONS ON THE PARLIAMENT'S CONSIDERATION OF LEGISLATION

At the time of writing, 139 Bills have been passed in the Scottish Parliament[29]. The following table shows the number of Bills to have reached the statute book in each Parliamentary year (which runs from May to end April):



28. Members' Bills are permitted under rules at Westminster, but are rarely successful. Usually, it is only the first handful of MPs selected under a lottery system each year who have any realistic chance of success, owing mainly to the lack of Chamber time allocated for debate. Committees at Westminster have no power to introduce legislation.

29. This includes ten private Bills, ie, Bills seeking for particular persons powers or benefits in conflict with the general law, to which a slightly different Parliamentary procedure, including a quasi-judicial element, applies.

Some general trends might be picked out:

- *Number of Bills.* There have been an average of around 14 Bills a year, compared with around 6 Scottish Bills per year at Westminster in the two decades before devolution. Predictions that devolution would provide more opportunity to update the Scottish statute book have clearly been proven true;
- *Parliamentary cycles:* there is a lag phase between a general election taking place and laws being enacted. Election years (1999, 2003, 2007) are quiet years for legislation. This is no surprise and no different from Westminster;
- *Minority rule:* the advent of minority government in 2007 appears to have had an effect on the volume of legislation: fewer Bills are being passed. This is mainly because fewer Government Bills are being introduced rather than because more Government Bills are being defeated. An obvious conclusion to be drawn is that minority rule has made for a more cautious approach to legislation. However, this may also be a reaction to a growing perception in session two of the Parliament that too many new laws were being made, and at too fast a pace. Many of the most pressing law reform issues pending at the time of devolution may also have been dealt with by now[30].

The raw statistics explain nothing of course about the type of legislation being passed. Many of the largest and (arguably) most significant Bills agreed to by the Parliament were passed in the first four years, particularly a suite of major Bills making radical changes to Scottish land and property law.

Another significant trend of both the first and second sessions of Parliament was the extent to which legislative proposals in the Scottish Parliament were along similar lines to those being pursued at roughly the same time at Westminster. This might be considered unsurprising given that the main party in the governing coalition at Holyrood for the first eight years was the party in charge at Westminster. To say that this amounted to the Parliament updating the practice of "putting a kilt" on English law would, however, be entirely inaccurate, not least because many of the Scottish Acts differed in significant respects from the parallel English Act, often as a direct result of Scottish Parliamentary scrutiny. In some cases, Scottish laws have led where English laws have only subsequently followed (most notably the law banning smoking in public places), while in others the Scottish Parliament has adopted policy solutions explicitly rejected south of the border[31].

30. The CSG anticipated that there might be 10-12 Bills per year to begin with, but that this number would probably reduce. However, the Scottish Law Commission, which makes recommendations to the Government on improving Scots law has expressed concerns about the low implementation rate of its recommendations in recent years, suggesting that there is still some work to be done in updating the statute book.

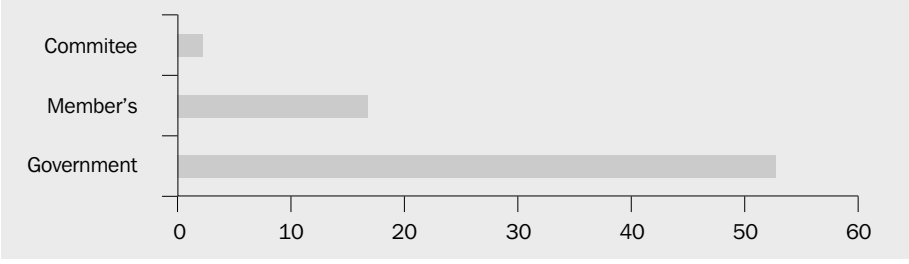
31. Amongst the most significant of these were laws to provide free personal care to the elderly in need of such care and to abolish tuition fees for students at Scottish universities.

The trend of there being some complementarity between Bills introduced at Holyrood and at Westminster has not entirely abated since the Scottish National Party took office[32]. Nor, as already noted, has there been a significant diminution in the number of legislative consent motions agreed to by the Parliament. Cross-border co-operation on non-contentious legislative issues has been, and continues to be, the rule rather than the exception so far during the lifetime of the Scottish Parliament. The Parliament also awaits its first case of the UK Government referring a Bill agreed to by the Parliament to the UK Supreme Court on the grounds of its being *ultra vires*[33].

4.1. More specific trends: types of Bills

In order to consider whether Holyrood has evolved into the power-sharing Parliament envisaged by its architects, it may be helpful to subject the statistics on Bills to closer consideration.

The spread of Government and non-Government Bills and Acts may provide interesting evidence. The following table shows how many public Bills of each of the three types – Government, Member's, and Committee were introduced in the first (1999-2003) Parliamentary session:



The numerical dominance of Government Bills is evident. To be fair, this accords with the CSG's prediction that after devolution most legislation would still originate from the Government, despite provision for Member's and Committee Bills[34].

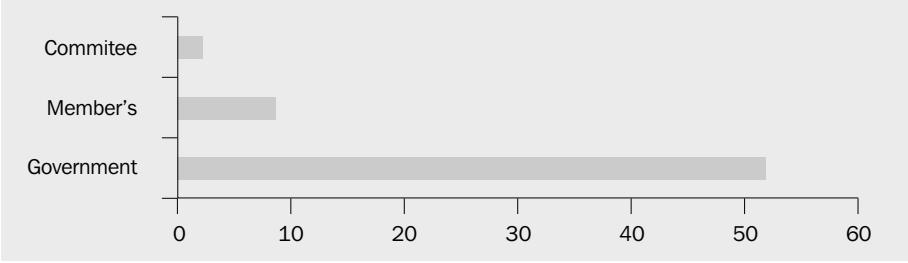
The next chart shows how many of these Bills actually went on to be enacted. The issue to note in this table is the difference between the number of non-

32. Eg Marine (Scotland) Bill (Scottish Parliament) and Marine and Coastal Acess Bill (UK Parliament).

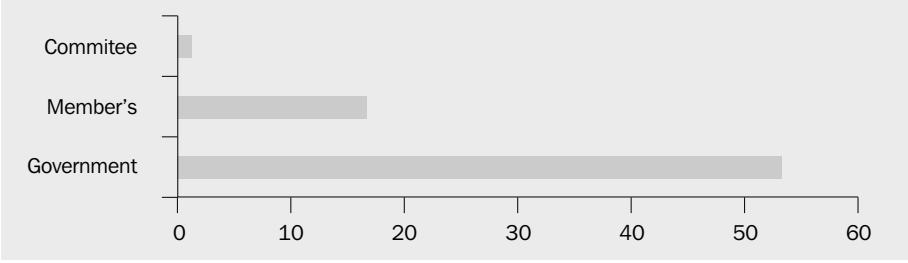
33. Just two Bills (both Members' Bills) have been introduced to the Parliament accompanied by a statement on competence from the Presiding Officer (as required by Standing Orders) that he did not consider them to be within the competence of the Parliament. Neither came close to being passed.

34. Consultative Steering Group on the Scottish Parliament. *Shaping Scotland's Parliament* (2008), page 65.

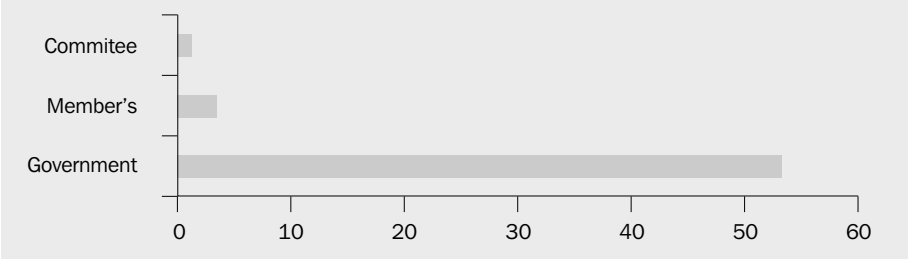
Government Bills introduced and the number passed. Note the shrinkage in Members' Bills:



The next two tables perform the same task for the second Parliamentary session (2003-07). First, the number of Bills introduced. The pattern is much the same as for session 1:

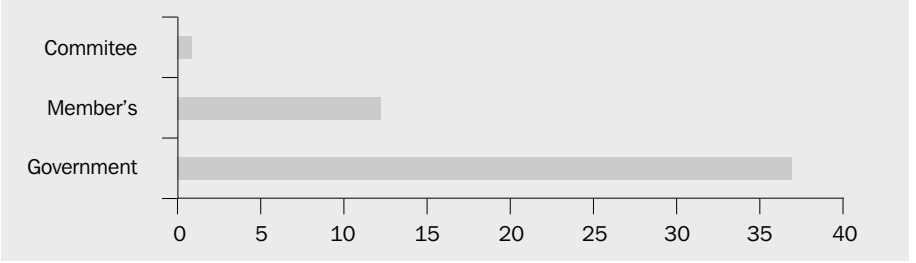


Now, Bills passed:



So members' Bills fared even more badly in session 2. Just three out of 17 were passed, whereas all 54 Government Bills were successful.

For completeness, here is the number of Bills introduced thus far in session 3[35]:



Since this session still has around ten months more to run, it might not be helpful to provide full statistics on Bills passed so far, other than to note that 23 Government Bill introduced has been successful (with two falling), whilst three Members' Bills have been passed.

As far as content and subject matter is concerned, successful members Bills have tended to be quite short and focussed, dealing with matters such as making Saint Andrew's Day a bank holiday, tackling dog fouling, or addressing homophobic hate crime. What committee Bills there have been have tended to focus on reforming or codifying particular practices and procedures of the Parliament, for instance, establishing the office of Parliamentary Standards Commissioner[36].

4.2. Types of Bill: analysis

At first glance, all this appears to disclose a rather traditional model of politics, rather than that envisaged by the Parliament's architects. In particular, the authors of the CSG report might be disappointed and surprised to note that just six Committee Bills have been successful in the past seven years. Particularly in Session 2, however, this might be partially explained by the sheer volume of legislation introduced by the Government over that session, eating into committees' time to pursue matters of their own choosing – although this only serves to underline that Committees are perhaps more subject to the priorities of the current Government than might have been hoped for.

Members' Bills are more of a grey area. It was perhaps always to be expected that the Member's Bill procedure would have a high failure rate, as there was always the potential for the system to be used to make political points rather

35. At this point in the Parliamentary calendar, there will be no more Member's Bills and almost certainly no more Committee Bills. There may be a handful more Government Bills.

36. A notable exception to this general trend was the Parliament first Committee Bill (emanating from the then Justice and Home Affairs Committee), which sought to extend the protection available to people being harassed by their former partners.

than to promote policies with a realistic prospect of success. It was this that led the Parliament, in the second session, to tighten the rules on the introduction of Member's Bills so as to require members to demonstrate far greater cross-party support than had previously been required. The Non-Executive Bills Unit was also formally given the power to prioritise its support for Member's Bills, based on agreed criteria, including the likelihood of the proposal gaining enough cross-party support to succeed.

More importantly, concealed amongst "failed" Members' Bills are legislative proposals that helped provoked subsequent Government action on the same matter. Notable examples of these are Member's Bills to require all public bodies to adopt official Gaelic language policies and to ban smoking in all public places. The policy aims behind these and other Bills were almost entirely realised in subsequent Government legislation.

This underlines a key point in any analysis of the Parliament's legislative record thus far (which will be returned to in the discussion on amendments below: it is clear that the power of legislative initiative has not been shared equally between the Parliament and the Government. Given the breadth and depth of legal and policy-making support available to Government by way of the civil service, this arguably should not have come as a surprise, despite the aspirational tone of the Consultative Steering Group's report. On the other hand, committees and individual members of the Scottish Parliament have had a consistent record of success in securing influence over the direction of policy set out in legislative proposals. Legislative procedures have been used as a bargaining device, so as to persuade the Government to refine or redirect its approach, and also to cajole it into using its own drafting and policy-making resources to introduce or to make the necessary changes to the legislation.

Holyrood has thus not really turned out to be a "legislating Parliament". But it has used procedural leverage to exercise influence over the ultimate form that legislation takes. Whether this means that it has turned out to be more of a scrutinising Parliament than a policy-making one is not clear but this debate is perhaps more one of semantics than substance.

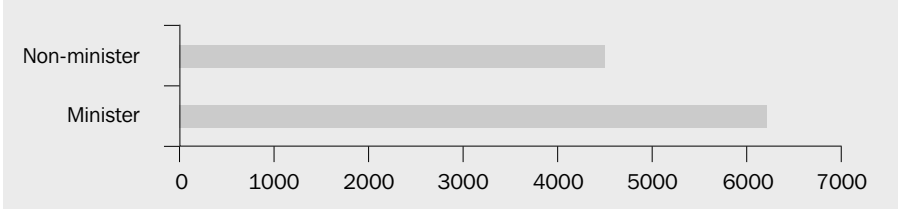
4.3. More specific trends: amendments

The passing or rejecting of Bills is not of course the whole story. The Parliament can exert influence over legislation by the way of the amending process. Again, statistics can be used to help illustrate the point, but again (as will be discussed below) they may not tell quite the whole story.

The following statistics are from session two of the Parliament (2003-2007). They show the total number of amendments to Bills lodged at Stage 2[37] over

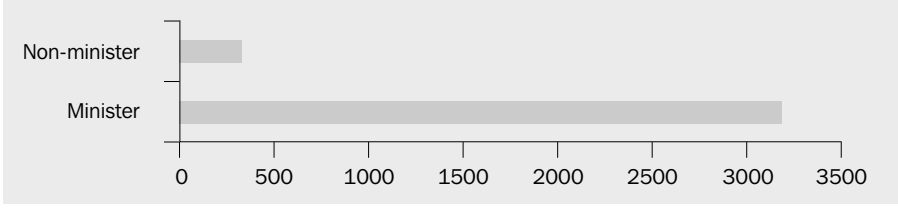
37. Ie the stage intended for detailed consideration in committee, and the main amending stage.

those four years, divided into Government amendments (amendments lodged by ministers) and amendments lodged by anyone else – whether Government back-benchers or opposition members).



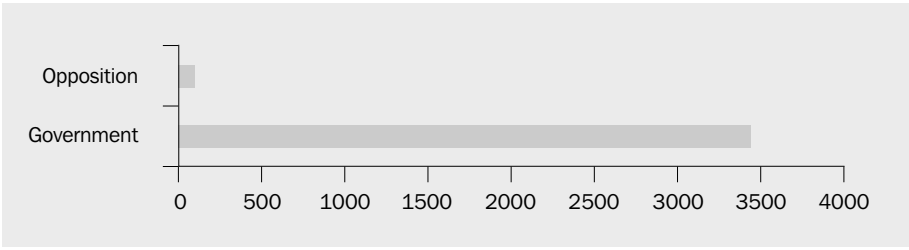
So Government amendments outnumbered non-Government amendments, but not overwhelmingly. This is no great surprise, following on from statistics showing that the vast majority of Bills were Government Bills. It is to be expected that Government Ministers would have more cause to lodge amendments to their own Bills, in large part to make technical refinements identified by Government civil servants and drafters after the Bill was introduced.

The next table shows the number of *successful* amendments lodged (ie amendments that were agreed to). In a Parliament following the "typical" Westminster pattern of adversarial two-party politics, the column showing non-Ministerial amendments would be expected to shrink markedly, whilst Government amendments would hold up. One sign of a "new politics", however, might be a much higher success rate for non-Ministerial amendments, and also perhaps rather fewer Ministerial amendments being supported. Here are the figures[38]:



For completeness, the next table makes a further distinction between the same amendments; between successful amendments lodged either by Government Ministers *or by backbench members of the two governing parties* and successful amendments lodged by members of opposition parties.

38. These figures, and those in the next graph cover only the Parliamentary years 2005-2007 because full statistics on the success rate of amendments for session 2 only began to be collated mid-way through that session. However, it is highly unlikely that figures for the first two years of the session would disclose a different trend.

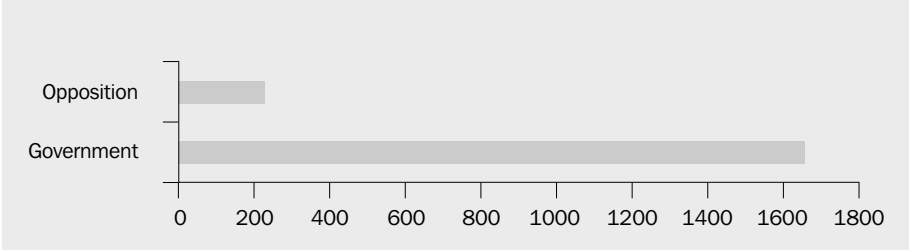


(The fact that a significant proportion of amendments lodged by Government backbenchers have been lodged with the awareness, support and, at times, assistance of Government ministers and civil servants may help in explaining these figures).

So, as with the Bill statistics, these figures appear to show a rather traditional model of legislative practice, with Ministers and non-Ministers lodging roughly equal numbers of amendments, but Ministers (and their backbench supporters) being vastly more successful in having them agreed to.

The figures require to be interpreted with care, however. The first point to be made is an obvious one, though it was perhaps somewhat overlooked by commentators at the time of the Parliament's formation, as well as in the reports of both the Constitutional Convention and the CSG. Whilst a highly proportional electoral system might well have guaranteed multi-party politics, it did not preclude two or more of those parties forming a relatively stable coalition so as to govern with a secure majority for the duration of a Parliamentary session. This was the story in sessions 1 and 2, and helps explain how the Government was largely able to "get its business through", in the Westminster fashion and to repel most opposition amendments.

Figures from session 3 of the Parliament, in which only one party has governed, and as a minority, help bear this out. As with the last table, this shows the number of successful amendments at Stage 2 coming, on the one hand, from Government ministers or Government backbenchers and, on the other, opposition members. Note the marked difference in the proportion of opposition amendments agreed to compared to the last table:



Clearly, successful Government amendments are still statistically dominant though. Again, the number of technical amendments lodged by the Government to its own Bills helps explain this[39].

4.4. Stage 1 scrutiny

More importantly and fundamentally, a large proportion of amendments lodged by the Government would have been in response to concerns raised by the Committee scrutinising the Bill at Stage 1 of the process. This underlines one of the main trends of the last ten years; the emergence of Stage 1 of the legislative process as the main period at which Committees exercise influence over policy.

As already noted, Stage 1 is the point at which the committee tasked with the Bill inquires into the Bill's general principles, and reports to the whole Parliament on whether they should be approved. The term "general principles" is not defined in Standing Orders, but in its report, the CSG proposed that the role of the committee at Stage 1

> (...) would be to provide a report to the Parliament as to whether or not the Bill should be approved in principle. It would not at this stage be a detailed consideration on a line by line basis of the Bill's content. At this stage, the Committee would also be able to … recommend whether further evidence should be taken to inform the next stage of consideration of the Bill[40].

Very early on in the life of the Parliament, this sort of pattern was followed. For instance, the report of the Committee considering the Abolition of Feudal Tenure (Scotland) Bill, a 112-page proposal for nothing less than the complete overhaul and replacement of Scotland's 800 year-old system of property tenure, ran to just 36 paragraphs.

This quite quickly ceased to be the norm, though. Reports have become much longer[41]. Unsurprisingly, given this trend, reports have also tended to delve far more into the detail of the Bill and to make more, and more detailed, recommendations, amounting in some respects to a "shopping list" of amendments that the Committee proposes should be incorporated into the Bill at amending stages.

The language of such recommendations tends to be in terms of inviting the Government to note the Committee's concern and, accordingly, lodge amend-

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39. The number of technical Government amendments made to Government Bills has been a recurring concern over the Parliament's first ten years.

40. Consultative Steering Group on the Scottish Parliament. *Shaping Scotland's Parliament* (2008), page 66.

41. To pick a later Bill more or less at random, the Stage 1 report on a two-page 2008 Bill to establish that former industrial workers who had developed non-symptomatic pleural plaques had the right to claim damages, ran to 153 paragraphs.

ments to the Bill, rather than of indicating that the Committee is minded to lodge amendments itself at Stage 2. Again, committees may have adopted this approach on the pragmatic grounds that the Government is logistically better placed than the Parliament to draft amendments to correct or improve the Bill with the necessary care and expertise. In other words, politicians at Holyrood have not radically departed from the "old" Westminster notion that the Parliament's role is to point out flaws in Bills and the Government's role is to correct them.

By contrast, the CSG's expectation that evidence heard at Stage 1 about gaps in the pre-introduction consultative process might lead to more evidence being taken at amending stages has not generally come to pass. Under Standing Orders, it is possible for committees to take evidence at Stage 2 of Bills, but in practice this is rare, and usually saved for occasions when especially controversial Government amendments are being proposed.

In short, the legislative process has become "front-loaded", with the main debates not just as to the general principles of a Bill, but also important points of detail taking place during stage 1. This must be in large part because of the extent to which individuals and organisations outside of Parliament have become involved in the process at Stage 1.

4.5. Evidence-taking on Bills

It has become standard for any committee considering a public Bill at Stage 1 to take evidence on it from a cross-section of stakeholders at meetings, and by issuing calls for written evidence, to the point where it would be almost literally unthinkable not to do so[42]. It is therefore worth reiterating that before devolution this would have been the exception and not the norm. (The UK Parliament has, in fact, since followed the Scottish Parliament's lead, reforming its procedures in 2006 to enable standing committees –renamed public Bill committees– to take evidence on Bills before deciding whether and how to amend them).

The Parliament has also sought to ensure that calls for evidence are well publicised, for instance through targeted emailing or by notifying local media, community groups, or trade magazines, an approach that has been largely successful[43].

All evidence-taking on Bills is also in public[44]. There is of course nothing to prevent individual Parliamentarians from receiving informal briefings on legisla-

42. The exception are the handful of so-called emergency Bills thus far agreed to by Parliament, which are dealt with through an expedited procedure because of their perceived urgency.

43. To take a recent example, the calls for evidence on what became the Climate Change (Scotland) Act 2009 secured 489 individual responses.

44. Standing orders do permit private evidence-taking where the Committee decides that this is "appropriate". This was intended to enable evidence-taking on matters of a particularly sensitive nature from persons who might otherwise be unwilling to address the Committee. This provision has almost never been used.

tion from stakeholders or constituents but all stage 1 reports are based on evidence provided in public.

Efforts have also been made to secure evidence and information on Bills by other means, including

- site visits to parts of Scotland likely to be particularly affected by the Bill (often tied in with formal committee meetings in that area);
- "round table" evidence-taking sessions, where a number of witnesses offering various perspectives join the committee at the table, and are encouraged to engage directly with each other, rather than simply answer politicians' questions;
- "open microphone" sessions at meetings, where members of the public are invited to make statements from the floor.

Putting questions to witnesses at meetings, and considering their written submissions, does however remain the main method of gathering evidence on Bills.

It is very evident that stakeholders invited to comment upon a Bill at Stage 1 have not felt constrained to restrict their comments to the "general principles" of the Bill, whatever those may. Instead, they have generally taken the opportunity to avail themselves of concerns as to details, albeit, from their perspective, important details. In so doing, they have perhaps recognised that the best opportunity to influence the direction of a legislative proposal is always at the earliest possible point in the process. This has emerged as one of the main factors causing the drift mentioned earlier towards a far more detailed analysis of the Bill at Stage 1 than the CSG had intended or envisaged.

4.6. The influence of evidence-taking on policy development

To sum up, by any objective assessment, the Parliament has, in its consideration of legislation, largely met the CSG's aspiration that it be open and accessible. Likewise, it has largely met the aspiration that it enable a participative approach to the scrutiny of policy, although the challenge of finding new and better ways to enthuse and interest the public, particularly those sectors of society less likely to engage with the Parliament, is ongoing.

Whether a participative approach has been enabled in the *development* of policy, as the CSG also intended, turns on the question, raised earlier, as to where the boundary actually lies between policy development and policy scrutiny. After more than a decade, instances of the Government failing to get its own legislation through Parliament are extremely rare. But there are also a number of cases of legislation proceeding to enactment only because of the Government's acceptance of radical reforms demanded by the committee at Stage 1, these being based in turn on serious concerns raised by stakeholders as to the direction of the

proposed policy[45]. There are also innumerable examples of the Government at Stage 2 giving ground by way of an amedment in response to witnesses' concerned amplified in a committee's Stage 1 report. All of this would suggest that the CSG's aspirations on policy development have been at least partly met.

5. GENERAL CONCLUSIONS

What conclusions can be drawn from the foregoing discussion? Firstly, predictions that the creation of a Scottish Parliament would mean more time for the consideration of legislation and more time to update the Scottish statute book have been proven entirely true. There has been a high turnover of legislation, although this has slowed in the third session.

Secondly, the UK Parliament's reserve power to pass legislation on matters devolved to Scotland has been exercised perhaps more frequently than might have been anticipated but largely on administrative matters with cross-border implications, with no major controversies arising. Legislative consent motions have accordingly come to be accepted as a relatively quotidian aspect of the Scottish Parliament's working life.

Thirdly, the Parliament benefited generally from a relatively benign economic climate in the first years of devolution. There is the potential for the Parliament's scrutiny of the financial implications of legislation to develop as we enter lean years for the public sector and choices about public spending become more difficult.

How different from Westminster has Holyrood turned out to be in the way that it considers legislation? Were the aspirations of some of the Parliament's institutional architects realised? Do we have a new politics at Holyrood?

In terms of the Government's overall legislative programme, the Parliament has established itself as a place where the Government's business "gets done", in the Westminster fashion. In part, this is a product of eight years of relatively stable coalition Government. In part, this is because many Government Bills have cross-party support. Minority government has, however, probably led to fewer and less controversial Bills.

The Government has clearly retained the power of legislative initiative. In particular, the power of committees to initiative legislation has so far been little used. In that respect, there has perhaps not been the sharing of power between the Government and the Parliament that was envisaged.

On the other hand, Parliamentarians have become relatively adept at making use of the legislative levers at their disposal to secure concessions from the

45. Examples include the Bills that became the Crofting (Scotland) Act 2007, the Prostitution (Public Places) (Scotland) Act 2007, and the Scottish Commission for Human Rights Act 2006.

Government. Statistics showing a clear imbalance between the success rate of Government and opposition amendments are interesting but partially misleading in that they conceal the number of Government amendments based on committee recommendations. Again, this underlines a pragmatic acceptance by Parliament that it is the Government that is usually best placed to write (and re-rewrite) the law.

Overall, there is therefore no clear answer to the question as to whether, in its handling of legislation, Holyrood is a "scrutinising" or a "policy making" Parliament, although it is more perhaps more of the former than the latter.

As to the role of Parliamentary committees, they have perhaps confounded expectations in generally eschewing involvement with legislation prior to its introduction. Instead, Stage 1 of the legislative process has emerged as the key period for seeking to influence the direction of legislation.

The Parliament's rules and practices for the consideration of Bills at Stage 1 of the legislative process have enabled Bills to be considered in an environment of openness and transparency, and in a manner that enables genuine public participation. There has been a paradigm shift since pre-devolutionary days, bringing the legislative process far closer to the people it affects.

It is recognised within the Parliament that ensuing the same level of openness and participation at amending stages is more of a challenge, given the speed at which events can move and the innately technical nature of the process. The main challenge, however, lies with the promoter of the legislation (be they a Government Minister, a committee, or an individual member) to ensure that the legislation is at a fit state of preparedness when it enters Parliament so as to reduce the need for too many potentially confusing technical corrections.

This paper began by noting the intention of the Holyrood chamber's architects' to create a space that would be a concrete expression of the sort of politics the Parliament would practice. With the benefit of hindsight, the most appropriate design might have been a peculiar hybrid of Westminster box and European hemicycle.