The Constitution Unit

Realising the Vision: a Parliament with a Purpose An audit of the first year of the Scottish Parliament

Barry K. Winetrobe

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Executive Summary

- Contrary to the conventional view that the Scottish Parliament was created by a clear, consistent policy process, its founding blueprint betrays a confused, contradictory variety of approaches to the Parliament's role in devolved governance. The influence of UK politicians and officials ensured that the Parliament, as established, was firmly within the 'Westminster model' family, especially in its relationship with the Executive.
- In the Parliament's first year, it sought to reconcile these various visions and the reality of its inherited statutory rules. It has had to review and adapt many procedures and practices in the light of experience, while seeking to retain the basic operational structure of its initial Standing Orders.
- The centrality of political party involvement and competition within the Parliament has ensured a more adversarial, less consensual parliament than was suggested by some of the more idealistic rhetoric of the 'new politics'. The success of the Parliament has been in synthesising these two pressures to produce a lively and very productive assembly, embracing genuine debate and disagreement within an ethos of collegiality unknown at Westminster.
- The committees exemplified this trend, even though they faced greater workload and resource pressures, particularly due to the volume of Executive legislation, than was anticipated. These constraints prevented them from exploiting as much of the innovative and participative working practices, or being as involved in the first budgetary process, as they would have wished.
- The Chamber has become more central than originally foreseen, rather overshadowing the committees, at least in terms of media and public attention. The creation of a First Minister's Question Time in January 2000 was a stark acknowledgement of this trend.
- The Parliamentary Bureau has proved to be less an open, transparent and inclusive business committee model, and more a formalisation of Westminster-style 'usual channels' practice. The weighting voting system in the Bureau has consolidated the power of business managers and the Executive at the expense of MSPs as a whole.
- While the Parliament continues to face up to the problems caused by its initial blueprint and the conflicting expectations of its operation, it
  - has successfully established itself as a permanent feature in Scottish governance,
  - is outgrowing these limitations and restraints,
  - can now develop genuinely innovative practices, and
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generally understood and accepted as a 'parliament', or something entirely unique and tailored to the specific devolution scheme.[2] This complicates any audit of the Parliament's performance.

This was compounded by the extent to which any such visions were not consistently carried through in the detailed proposals for the Parliament's operation, and then in its actual rules and procedures. Further, how the Parliament itself dealt with its own establishment, within the inevitable legal and practical limitations of that process, is also relevant to an assessment of its early performance. This involved the Parliament testing the very blueprint with which it was presented, making changes where it deemed it necessary, and thereby altering that very benchmark against which its performance is being measured.

Such reshaping can arise for a number of different reasons relevant to this Study. Early changes of procedure and practice could be regarded as a manifestation of the flexibility and robustness of the founding vision, in that it encompassed and enabled necessary refinement. On the other hand, if such changes arose from defects or gaps in that initial blueprint, and if they were 'solved' by convenient quick fixes based on Westminster practice, they could be regarded as retreats from its basic philosophy.

Process is fundamental to a parliament's operation. A parliament exists to facilitate various key governance activities, such as debate, scrutiny, law-making and the ventilation of citizens' grievances. It was neatly put in a useful submission to the CSG:[3]

> Standing Orders sound boring, dusty and irrelevant to the democratic agenda; this could not be further from the truth. Standing Orders are at the very heart of any democracy. The operational aspects of the Scottish Parliament will be crucial to its future effectiveness.

The provenance of the rules under which the Scottish Parliament operated in its first year is important for this Study. The Parliament's basic structure and rules were not devised by the Parliament itself, but by the UK Government, through the *Scotland Act 1998* and its related delegated legislation. The initial set of Standing Orders is the most obvious and important example of the latter. It was not the package of proposals of the SCC or of the CSG which the Parliament had to operate. It had to abide by the statutory scheme created by UK legislation,

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[2] Just as the National Assembly for Wales, the Northern Ireland Assembly and the Greater London Assembly are unique constructions, each designed for its own 'devolution' scheme.

[3] M Mitchell, *Standing Orders for the Scottish Parliament*, Charter 88, 1998, p4. An influential

which may or may not have fully translated that vision into operational parliamentary practice.

The Parliament has, within its legal competence, power to create its own rules and practices. It can do so by changing Standing Orders or by enacting relevant legislation; by creating rules, guidance or practices fleshing out these Standing Orders, or by dealing administratively with matters not covered by the initial rules. It will be argued that the Parliament accepted the initial procedural framework, in the sense that its first year operated it, and all reviews and amendment of its prac

it can be measured. It does have, however, a key role in shaping and facilitating these policy outcomes, and is a central player in the achievement of 'better governance'. The sole focus of this Study is the Scottish Parliament, not Scottish devolution itself. While the Parliament is a key component of Scottish devolution, and its most visible innovation, it is not the whole devolution story by any means, though some aspects of its performance will depend on the success or otherwise of the Scottish devolution scheme established by the *Scotland Act 1998*.[6]

The Scottish Parliament has been deliberately termed a 'parliament', implying that it has some defining characteristics in common with other parliaments, rather than simply being one of the generality of democratically elected representative assemblies and legislatures. This is not the place to review the literature on the definitions of these types of institutions.[7] What is relevant here is the extent to which the Parliament can be assessed in isolation, based purely on 'domestic' indicators, and to what extent it should be measured against some more generic measure of parliamentary performance.

Every parliament is a product of the constitutional structure and political culture of the 'state' it inhabits. It will have its own regime of powers and duties, which may provide different emphases as to the range of its functions. Imposing the standards and values of existing parliamentary practice - whether from Westminster, the Commonwealth, Europe or elsewhere - may well detract from the very innovativeness intended to be at the heart of the new Parliament. On that basis, the Parliament should be assessed primarily on its own terms, on the basis of what was intended for it in its creation.

On the other hand, it is generally accepted that democratic representative legislative assemblies, especially those which are termed 'parliaments', have some essential characteristics and functions in common. In particular, there are six prime functions of a parliament which are usually enumerated, and which are adopted by the audit template underpinning this Study:

- Representing the people
- Making the law
- Providing, sustaining and scrutinising the executive
- Controlling the budget
- Providing an avenue for the redress of grievances
- Managing itself effectively to carry out the above five functions

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[6] For wider studies of devolution, see R Hazell (ed.), *The state and the nations: the first year of devolution in the United Kingdom*, Imprint Academic, 2000, and N Burrows, *Devolution*, Sweet & Maxwell, 2000

[7] For a recent contribution, see John Uhr, *Deliberative democracy in Australia: the changing place of Parliament*, Cambridge UP, 1998. See also, for example, the 1998 'Latimer House Guidelines for the Commonwealth' on governance and parliamentary supremacy:
http://www.comparlas.co.uk/guidelines/index.htm

Applying such criteria enables an assessment to be made of the Parliament's performance against both the specific internal indicators of the CSG report, and a more general standard of parliamentary performance. This Study has been undertaken on the basis that a twin-track evaluation of this sort is required for the Scottish Parliament. Its approach has to take full and fair account of its unique personality an

further details of any particular aspect of procedure and practice should consult the Parliament's own sources or other relevant material cited in this Study. For brevity, references and citations to primary material are kept to a minimum.

Caution must be exercised in relation to the statistics used in this Study. The Parliament has produced a mass of data and general information in a number of ways, such as committee briefing papers, annual reports, and in routine official records. All this material is available on its public website: http://www.scottish.parliament.uk. However, a close examination of that material discloses some inconsistencies and errors. While, to some extent, this is understandable in a brand-new institution, where uniformity of practice cannot be easily guaranteed, it does make the detailed study of many aspects of parliamentary practice difficult. This is especially the case in discrete and complex areas of business, such as subordinate legislation scrutiny, or the extent and categorisation of plenary and committee business.

Where such problems have either been identified or suspected, the relevant data have been recalculated directly from the primary sources, in so far as that is possible from the available material as published, or as kindly provided by parliamentary staff. This may well mean that some of the data presented in this Study will be different from that published in official parliamentary sources or in academic work. In many cases, there is no 'true' answer, because of procedural or technical variations inherent in some of the initial procedures and rules of the Parliament, or in differential interpretation during that first year. This is compounded in the many areas where either the formal rules or the actual practice has changed during the first year, thereby changing the basis of any relevant data collection.

Grateful thanks are due to all the parliamentary staff, MSPs and their staff who, in the true spirit of the CSG vision, generously and helpfully responded to requests for information or assistance during the production of this Study. Colleagues at various institutions, including the Constitution Unit itself, also provided invaluable support and advice. Without the editorial and inspirational support provided by the Unit's Director, Robert Hazell, this Study would not have been possible. The initial work of Richard Cornes and his colleagues on this Study greatly assisted the final product, as did discussions with the authors of the parallel Northern Ireland study.[9] Nevertheless, it must be emphasised that none of them is in any way responsible for any of the views or conclusions expressed in this Study, or for any of its errors or omissions.

[9] Robin Wilson and Rick Wilford, *A Democratic Design? The political style of the Northern Ireland Assembly*, Constitution Unit, May 2001.

2. Planning the Parliament

2.1. Devising a parliament

".. as it is always in the power of the majority, by their numbers, to stop any improper measures proposed on the part of their opponents, the only weapons by which the minority can defend themselves against similar attempts by those in power are the forms and rules of proceedings.."

Conventional wisdom has it that the process of the last 15 last years did more than produce the vision and blueprint of the 'new politics', but was itself a guiding example of the 'new politics' in action. It followed, so the theory goes, that if this process was so inclusive, participative and consensual, then its product must itself be a satisfactory blueprint based on these very principles. Thus, this Study requires some overview of the development of the process itself, especially the extent to which it was consistent in theory and practice.

2.2. The Scottish Constitutional Convention

The most useful starting-point for the process which led to the present devolution scheme is

should be put in place to make sure that the parliament remains responsive to the wishes and values of the Scottish people."

The SCC saw these aspirations being put into force in two ways. Enshrined in the devolution legislation would be matters of "fundamental importance" without which "the parliament could not begin to function." These would include the methods of appointing a Speaker and deputies for the parliament, a chief Minister and a Cabinet, the length of the parliamentary term and the question of dual mandates. The Parliament's operating rules would be encompassed in Standing Orders. The SCC had been working with others on the detail of these rules, and it "would encourage wider debate and discussion." The report set out some basic principles:

> Like all modern legislatures, the Scottish parliament will operate according to an agreed set of Standing Orders… While it will ultimately be for the parliament itself to decide its Standing Orders, the Convention is committed to delivering a parliament of a new type and therefore expects methods of operation which ensure openness, responsiveness, accessibility and accountability. Accordingly, the Convention believes that these conditions will require the adoption of Standing Orders which, for example:
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> - oblige MSPs to devote themselves to the business of the parliament and to the interests of the electorate;
> - enable electors directly to petition the parliament;
> - provide for the parliament to operate through a system of powerful committees which are able to initiate legislation as well as to scrutinise and amend government proposals, and which have wide-ranging investigative functions;
> - require the legislators to consult widely both before and during the legislative process;
> - specify working hours and a working year designed to make it as easy as possible to stand for the Parliament and to influence it;
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- to observe and report on all aspects of the parliament's activities; and
- encourage and promote constructive, rather than confrontational, debate and discussion.

2.3. The Crick-Millar proposals

Among all the more generalised work of this period on the proposed parliament, two expert students of parliamentary practice, Bernard Crick and David Millar, undertook the most influential and detailed research being undertaken at the time on operational aspects of the proposed parliament as a functioning institution.[13] This work was designed to fit the emerging themes of the SCC's proposals, and to produce effe

2.4. The Consultative Steering Group

As a Labour victory in the imminent UK general election became increasingly likely, devolution planning moved more into the more co

> **9.11** In summary, the Government will provide a framework for the Scottish Parliament, but it will be left open to that Parliament itself to develop procedures which best meet its purposes.

These principles were reflected in the legislation that proceeded through Parliament during 1998. However the general expectation that the Parliament itself would devise its own procedures - presumably during the extended period between election and full operation that was initially factored into the devolution timetable - was abandoned before the end of 1997. The influential 1996 Constitution Unit report, Scotland's parliament: fundamentals for a new Scotland Act, had proposed a process which called for the preparation of a draft set of standing orders by an all-party group, and drawn up by the core specialist staff already identified for secondment to the Parliament following its establishment. This would forestall any risk that standing orders would simply be imposed by the UK Government. Consensus could be achieved relatively smoothly by accepting the main thrust of existing detailed drafts, especially the Crick-Millar proposals. It was envisaged by the Unit's report, as by the SCC, that any initial standing orders would be adopted by the Parliament itself immediately after its establishment.

In November 1997, the Scottish Secretary, Donald Dewar, announced the establishment of the Consultative Steering Group (CSG):

> Decisions about how a Scottish Parliament operates should be for that Parliament to make. It would be unreasonable, however, to expect MSPs to begin drawing up Standing Orders - the detailed operating rules of the Parliament - from scratch, immediately after the first elections. For that reason it is far more sensible, in my view, for the procedural arrangements and working approaches for the Scottish Parliament, including draft Standing Orders, to be developed over the next 12 -18 months, and made available to the Parliament as a starting point for their deliberations.
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> Clearly, these arrangements are more likely to meet the Parliament's requirements if all political parties and other interested bodies are involved from the start. I intend therefore to establish a Consultative Steering Group to oversee this task. The task facing this group should not be underestimated. Developing a new politics for a new millennium

> is a significant challenge in anyone's book. The group starts with a blank piece of paper and hopefully a lot of ideas. A lot of interesting matters have to be addressed and let me make it clear that there are no blueprints sitting in Ministerial desk drawers. This group is drafting the rules from scratch… The aim throughout would be to develop consensus proposals, which the Parliament would of course be free to take, leave or amend as it saw fit.

Crucially, this group would be, in essence, a Scottish Office body. In Wales, where there had been little in the way of detailed advance planning for the operation of the proposed Assembly, and certainly nothing akin to the SCC process, the equivalent work was undertaken initially by an advisory group. This was followed by an independent statutory commission established under the *Government of Wales Act 1998*, which reported to the Secretary of State for Wales. In Scotland there was no such statutory independent input. The CSG was chaired by the Scottish Office devolution minister, Henry McLeish, and its Secretariat was provided by that department.[17]

2.5. The CSG Key Principles

Some earlier work on devolution had adopted the technique of devising a set of principles which would then inform more detailed proposals. While the SCC did not promulgate an over-arching set of principles as such, its final report referred frequently to certain defining principles, including openness, responsiveness, accessibility and accountability. In relation to particular issues, the report also referred to principles such as consensus and equal representation of men and women. This 'principles' approach was also politically topical in the work of the Committee on Standards in Public Life (the Nolan Committee) and its 'seven principles of public life'.

The July 1997 white paper did not refer to principles as such, but did consider the structure and operation of the parliament by reference to a number of criteria. These ranged from the SCC agenda of openness, responsiveness and accountability, to more practical parameters such as the importance of committees and the unicameral basis of the Parliament. However one of the first working papers presented to the CSG by its Secretariat did refer to a number

[17] It was assisted by an Expert Panel on procedures and standing orders, chaired by the Head of the Scottish Office's Constitution Group. The translation of the CSG report into the final set of Standing Orders was undertaken within government, assisted by the Expert Panel, and by staff of the new parliament as they were being appointed at this time (some by secondment from the Scottish Office or the UK Parliament).

of key principles, said to be set out in the SCC report and reiterated in the White Paper. These were:

- the Parliament should normally sit for a fixed term of 4 years
- it should be a single chamber legislature
- it should be accountable, accessible, open and responsive
- it should provide for adequate scrutiny of legislation
- committees should play an important role.[18]

At its first meeting in January 1998, the Group agreed that its Secretariat would "draw up a revised list of key principles against which the Group might consider issues relating to the operation of the Scottish parliament". Such a list was prepared and presented to the Group in March, and were agreed in their entirety, with only a couple of textual amendments. This became the set of key principles which were published in the final report nine months later.

Thus virtually all the detailed work of the Group through 1998 was informed by what it saw as a consistent view of its fundamental vision. The report explained the role of these principles:

> Our aim has been to try to capture, in the nuts and bolts of Parliamentary procedure, some of the high aspirations for a better, more responsive and more truly democratic system of government that have informed the movement for constitutional change in Scotland; and in submitting these proposals for debate, our hope is that the principles on which they have been based will continue to influence the life of Scotland's Parliament, not only in the letter of its Standing Orders, but in the spirit of its work.

and,

> 3. These key principles were an invaluable benchmark against which to test our emerging conclusions. They also served as a basis for the consultation exercise and have been broadly welcomed and accepted by the wide range of bodies and individuals who have responded to us. We invite the Scottish Parliament to endorse them, to stand as a symbol of what the Scottish people may reasonably expect from their elected representatives.

[18] working paper CSG(98)(2), January 1998, para 1. Unfortunately the devolution website hosted by the Scottish Office, http://www.scottish-devolution.org.uk

4. These key principles and our recommendations are also designed to achieve the Parliament envisaged by the Scottish Constitutional Convention, in the Government's White Paper "Scotland's Parliament" and provided for in the Scotland Act 1998 (referred to throughout as the Scotland Act). They aim to provide an open, accessible and, above all, participative Parliament, which will take a proactive approach to engaging with the Scottish people - in particular those groups traditionally excluded from the democratic process. To achieve this the Scottish Parliament must avoid adopting procedures which are obscure or archaic. It should adopt procedures and practices that people will understand, that will engage their interest, and that will encourage them to obtain information and exchange views. We have detected a great deal of cynicism about and disillusionment with the democratic process; it will require an effort both from the Parliament itself and from the people with whom it interacts to achieve the participative democracy many seek. We firmly believe that the Scottish Parliament should set itself the highest standards. Our key principles are intended to achieve a Parliament whose elected Members the Scottish people will trust and respect, and a Parliament with which they will want to engage.

The four key principles, and how the Group related them into particular practical proposals, were summarised in Section 1 of the report:

1: **Sharing the Power** – "The Scottish Parliament should embody and reflect the sharing of power between the people of Scotland, the legislators and the Scottish Executive."

- *Relevant aspects*: the programming of Parliamentary business; the role of the Presiding Officer; the role of committees; the role of civic society, and public petitions.

2: **Accountability** – "The Scottish Executive should be accountable to the Scottish Parliament and the Parliament and Executive should be accountable to the people of Scotland."

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- *Relevant aspects*: committees, working pattern, and language

The Group urged that the Parliament regularly review its performance against the principles, and summed up as follows:

> 53. This section of our report sets out the way in which we believe the Scottish Parliament should operate and the implications of this for Scotland as a whole. We see the Parliament as the central institution of a new political and community culture, and recognise that a more open democracy requires innovative institutions and attitudes in Scottish society, if our goal of a participative approach to the development, consideration and scrutiny of policy and legislation is to be achieved. While these aspirations cannot all be directly reflected in the Standing Orders, we feel strongly that the Standing Orders should be drafted with these expectations and implications in mind, and should encourage the Parliament to operate as we propose.

2.6. Establishing itself

"Busy new parliaments are likely to continue much as they begin."[19]

By leaving many aspects of the Parliament's operational machinery to be decided by the Parliament itself, subject to some initial transitional provision, the UK Government was ensuring that the new body would need to spend a significant amount of time in its early days fleshing out its own internal arrangements. This task would involve

- Making provision where none was already in place (such as the regulation of cross-party groups, guidance on relationships between MSPs, or procedures in standards cases)
- Revising some rather skeletal provisions it was bequeathed (such as Members' allowances)
- Replacing key transitional provisions (such as Members' interests)
- Reviewing and improving existing procedures, based on experience.

This was a continuous process before, during and after the Parliament's establishment. Transitional provisions, in delegated legislation under the *Scotland Act*, were being made all this time by the UK Government. The set of Standing Orders itself only emerged in final form a month before the Parliament's election and first meeting. Arrangements had to be made for the Parliament's first meetings, from the oath-taking process to the election of the Presiding Officers. A similar exercise was required for the formal opening ceremony a few weeks later, on 1 July.

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[19] Crick-Millar, *op cit*, p4.

Where such arrangements depended on external factors, they had necessarily to be tentative and flexible. Apart from the political make-up of the Parliament and Executive, these assumptions had to take into account the roles and personalities of those who would likely become the Parliament's key players – Presiding Officers, Scottish Parliamentary Corporate Body members, Bureau members, party business managers / whips, ministers, committee conveners and so on – and what they, and MSPs generally, would want and expect of the Parliament and its staff. Would the Parliament even accept and operate the transitional provisions as expected, or seek to establish a very different scheme in so far as it had the legal competence to do so?

At the same time, detailed arrangements had to be made for the actual running of all aspects of the Parliament, including the procedures whereby the Parliament would conduct its formal business, in plenary or committee proceedings. Staff were being recruited and trained. Much of the relevant infrastructure, especially the underpinning IT (including very visible examples such as the electronic voting equipment), was novel and relatively untested. Planning had to be undertaken at the same time for

- establishing and running what was then assumed to be a short-term operation in the interim accommodation pending the move to Holyrood,
- preparing for the move to the permanent facility at Holyrood with the minimum of disruption, and
- devising and creating the permanent operation at Holyrood.

Time was very short, because the UK Government had drastically reduced the transitional phase between first meeting and full operation from around eight months to about eight weeks. Prior to the Parliament's meeting, everything was, formally and in practice, a UK Government responsibility, generally in the hands of the Scottish Office. This only changed during the transitional phase before 1 July, with a progressive handover to the Parliament's authorities. Even after that, the Parliament, as a new and relatively small organisation, continued to use many government support services, and a proportion of its staff remained (and some remain) secondees from the Executive. The Parliament was in a novel institutional position before 1 July 1999, something akin to an 'arm's length' Scottish Office body being prepared for full autonomy. This meant that implementation work could well reflect the UK Government's view of the Parliament's proper role and function. For some Scottish Office officials concerned, the position must have seemed a little like a period prior to an expected change of administration.

Steps were taken by senior Parliamentary managers to instil in the new staff some sense of what working in, and for, a parliament was like, and how it may differ from what they had experienced in their previous jobs. These may have been in the Scottish Office, other central departments or public bodies, local government, academe or in the private sector, where

Westminster was likely to have been the only direct experience they would have had of a parliament, if they had had any such experience at all.

All these various factors in the practical creation of the Parliament, as more than just a political vision or aspiration, may suggest that it was remarkable how well the Parliament actually did operate in its first year. That many of the predicted and assumed political and other outcomes did materialise in early 1999 greatly assisted the process in the initial phase. The challenge then moved from getting the Parliament started to keeping it going.

3. Representing the people

3.1. The first general election

The 6 May 1999 election took place under a novel voting system, designed to produce some degree of proportionality in the composition of the Parliament. Of the 129 MSPs,

- 73 were elected on a traditional 'first-past-the-post' basis from the 72 existing Westminster constituencies, with Orkney and Shetland split into 2 seats, and
- 56 were elected from 8 regions based on the former European Parliament constituencies, with 7 MSPs from each region chosen from party lists.

Table 3.1: May 1999 election results: Seats by Party[20]

	Constituency	**Regional**	**Total**
Labour	53	3	56
SNP	7	28	35
Liberal Democrat	12	5	17
Conservative	0	18	18
Green	0	1	1
D Canavan	1	0	1
Scottish Socialist	0	1	1
	73	**56**	**129**

deputy posts, 2 were Liberal Democrats (including the party's business manager, Iain Smith, becoming Deputy Minister for Parliament).[21]

3.2. Representing the people

The first key parliamentary function, representing the people, refers not just to the Parliament's activities, but also to the characteristics of its membership. An important aim of the mixed member voting system[22] was intended to produce a membership in the Parliament that would better reflect the Scottish electorate, both in terms of their political preferences and their demographic characteristics, than was the case under a simple plurality system.

The first election produced an outcome where the four main Scottish parties took all but three of the 129 seats. The other seats were won by the Scottish Socialists and the Scottish Greens (each by way of a regional list), and by an individual winning a constituency seat.[23] The two small parties' breakthrough was seen as some vindication of the new voting system, but earlier hopes of a more diverse composition, comprising newly formed parties representing geographical, cultural or other interests, were not realised.

In demographic terms, there were two visible outcomes of the voting system. A positive result was the proportion of women elected (48, 37%), but the main negative result was the absence of any members from the ethnic minorities, whereas strict proportionality with the general population would have produced at least one such MSP. The party breakdown of

Table 3.3: Women MSPs elected, May 1999

	All MSPs	Women MSPs			as %age of party group	as %age of all women MSPs
		All	Constituency	Region		
Labour	56	28	26 (93%)	2 (7%)	50.0	58.3
SNP	35	15	2 (13%)	13 (87%)	42.9	31.3
Conservative	18	3	0	3	16.7	6.3
Lib Dem	17	2	2	0	11.8	4.2
Green	1	0	0	0	0	-
SSP	1	0	0	0	0	-
MSP, Falkirk West	1	0	0	0	0	-
	129	**48**	**30**	**18**		

The Parliament's operational structure and practice does not explicitly require representational balance. For example, there are no 'demographic' requirements for the membership of sub-parliamentary structures, such as committees, the Bureau or SPCB, where more traditional notions of party balance predominate. One potential exception is the requirement in *Rule 6.3* that, in proposing committee memberships, the Bureau has regard to any relevant qualifications and experience of those who have indicated an interest in serving on a particular committee. The more radical suggestions of non-MSPs participating directly in the work of the Parliament - such as by co-option of members of the public on to committees - have not come to pass. This suggests that notions of sharing of power may have given way, at least thus far, to more traditional ideas of representation.

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In its functional sense, representation is integral to the activities of the Parliament. The SCC's final report stated that "the purpose of electing a Scottish parliament is to give a representative say to the people of Scotland over the way in which their affairs are run. That is in itself a fundamental democratic principle." This was echoed in the first paragraph of the July 1997 white paper: "The Government are determined that the people of Scotland should have a greater say over their own affairs." In so far as it relates to the discussion of matters of public interest and concern, and seeking to influence decision-makers, either directly or through elected representatives, this aspect is considered in this Study in the context of redress of grievances.

Functional representation involves, in the sense of direct public engagement, a synthesis of the two CSG principles of sharing the power, and access and participation. The people are part-owners of governmental and political power, but they also appear to have access rights as if they were somehow outside the power centre. The CSG principles say little explicitly in terms of representation of the people by elected members, and the assumption therefore seems to be that they encompass some sort of productive synthesis between representative democracy and participative democracy. In this model, representation of the people's interests by elected members is one, but not the sole, means of political engagement by the people in Scottish devolved governance, with the people themselves (directly or through other groupings) having a right to engage directly as principals in the business of government, through the Parliament and otherwise.

3.3. Representational practice and problems

Table 3.4 Seats by constituency/region, May 1999 election

Region	Constituency Seats	Regional List Seats	Total Seats
Central Scotland	10	7	17
Glasgow	10	7	17
Highlands & Islands	8	7	15
Lothians	9	7	16
Mid Scotland & Fife	9	7	16
North East Scotland	9	7	16
South of Scotland	9	7	16
West of Scotland	9	7	16
TOTAL	**73**	**56**	**129**

Table 3.5 Seats by party, May 1999 election

Region	Constituency Seats					Regional List Seats					Total Seats				
	L	SNP	C	LD	Oth	L	SNP	C	LD	Oth	L	SNP	C	LD	Oth

The novel voting system used for elections to the Scottish Parliament has had a significant, but largely unanticipated, impact on the first year of the Parliament's operation. This resulted from the conjunction of three aspects:

- MSPs were elected to the Parliament in two distinct ways, in single-member areas ('constituencies') under 'first-past-the post', and in multi-member areas ('regions') by way of a party list,
- these areas overlapped, in that each single member-constituency was wholly within a multi-member region, and that each region consisted of an aggregation of single-member constituencies
- with the exception of Orkney and Shetland, the single-member constituencies were exactly the same as those for election to the House of Commons.

This 'mixed member' form of voting system was designed primarily to produce greater proportionality and fairness in terms of the relationship between votes gained and seats won. Relatively little consideration was given by proponents of this system to its consequences once the Parliament was elected, and how MSPs elected to represent the same locality but by different electoral routes would interact with each other. Westminster experience has demonstrated the potential tensions and scope for dispute between Members if clear rules and conventions against 'poaching' are not operative. This would apply even more in the Scottish Parliament because of the existence of two novel representational relationships created - those between 'constituency' and 'regional' MSPs, and those between MSPs and Westminster MPs for Scottish seats.

The representational impact of a mixed member system had been considered by the Independent Commission on the Voting System for the House of Commons, established by the new Labour Government, and chaired by Lord Jenkins of Hillhead.[26] The only other contemporary and substantive consideration was during the Commons Scottish Affairs Committee's surprisingly little-noticed inquiry into multi-layer democracy. The committee had examined the then junior Scottish Office minister, Henry McLeish, on the more complex representational environment, implicit in his Government's devolution legislation, an exchange which covered much of the relevant ground of this issue.[27]

The matter was not directly addressed in any great detail before the Parliament began operation. No guidance was provided for the Parliament or for the Scottish people, either in the devolution legislation or in the Parliament's standing orders, on the respective roles of constituency and regional MSPs. The only substantive advice given publicly by the UK

[26] Cm 4090, Oct 1998, paras 114-7, 135

[27] *The operation of multi-layer democracy*, HC 460, 2nd report of 1997-98, evidence of 1.7.98. See also the evidence of practice in countries with similar electoral systems

Government in advance of the May 1999 election was the following extract from *In Prospect*, the Scottish Office's briefing pack to prospective candidates in February 1999:[28]

> *2.3.6* Interest has been expressed in pa

electoral areas. The matter was compounded politically by the disparity in the balance between constituency and regional MSPs of the different parliamentary parties (table 3.5). The Labour Party was overwhelmingly, and the Liberal Democrats predominantly, comprised of constituency members, whereas the Conservative Party at that time was entirely composed of regional members, and the SNP, the main opposition party, predominantly so.

The effect of the deep divisions which exploded so publicly in that debate were not fully anticipated by those responsible for the arrangement of the Parliament's business. There was, for example, no preliminary debate in the Chamber, or, as would have been more in keeping with CSG principles, by a committee inquiry. In either forum, these difficulties could have surfaced and been addressed, and any apparently relevant overseas comparisons, such as New Zealand and Germany, could have been examined. The scheme which was presented to the Parliament resulted from the labours of an ad hoc group of MSPs from the four main parties (those represented on the Parliamentary Bureau), including some who were themselves members of the Bureau or of the SPCB. Presenting the scheme to the Parliament, on behalf of the Bureau, the SNP's business manager, Mike Russell, noted that the group "has met on innumerable occasions to examine in very great detail the items contained in the motion." Crucially, this group was unable to resolve all differences between the parties, and Russell himself openly expressed his dissent on the key aspects in dispute.

The Parliament was being required, within weeks of its establishment, to come to a final decision on this sensitive matter, whether by consensus or otherwise, in the open arena of a plenary debate. While there were attempts to couch the arguments in the language of the 'new politics' – terms like 'equality' and 'equal opportunities' abounded during the debate - it was difficult to read them as not being based primarily on current partisan interest. Under these circumstances, it was not surprising that the episode became one of the main reasons for the well-publicised media (and, through them, public) antipathy to the Parliament in the initial period.

The difficulty went to the heart of the new system of representation, and the roles of the two types of MSP. Were they both representatives of their respective territorial localities, with the regions being a form of 'super-constituency'? Or were regional members supposed to adopt a more strategic rather than territorial approach, leaving 'constituency' representation and casework to the constituency MSPs? Labour's constituency MSPs who spoke in the debate were in no doubt. They claimed sole or primary interest in representing 'their' constituency, to the exclusion of regional MSPs (especially of those from other parties) covering the same territorial area.[29] Karen Whitefield was typical of this approach:

[29] One argument which was used was that many regional MSPs had been unsuccessful candidates for constituency seats, and thereby had been explicitly rejected by the constituents they purported to

“The people of Airdrie and Shotts gave me a clear mandate to represent them, and them alone. It is my constituency office that they will visit and my surgeries that they will attend. I alone am accountable to the people of Airdrie and Shotts. I do not believe that there is, nor do I want there to be, two classes of MSP. However, it is essential that the additional work load that I and other constituency MSPs will have is recognised… The people of Airdrie and Shotts gave me their mandate. I am honoured to be their representative, I will work tirelessly on their behalf for the next four years and they will hold me to account. I do not want taxpayers' money to be sp

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A: Relationships Between Members

1. Any constituent can approach any MSP within his or her constituency or region.
2. If a constituent seeks to approach a particular MSP, the constituent must be directed to that MSP by other MSPs or their staff.
3. All MSPs have a right to hold surgeries within the area for which they were returned.
4. Any constituent from outside a region who approaches an MSP with a constituency issue should be directed initially to a relevant MSP.
5. Any list MSP who raises a constituency issue should notify the relevant constituency MSP at the outset unless the consent of the constituent is withheld.
6. Any MSP who is approached by a constituent with an issue related to a reserved matter (e.g. social security) should consult with the appropriate Westminster MP.

While other aspects of the Code related more directly to the use of offices and other facilities, it was perhaps symptomatic of the inherent political difficulties involved that more general representational guidance had to be inserted explicitly in the Code. The terms of these provisions reflected local problems which had already arisen around Scotland. They attempted a balance between the desire of Labour MSPs to assert some local primacy for constituency MSPs, while incorporating some of the representational conventions that had arisen at Westminster (albeit under a different electoral system) and which were generally understood and accepted.

Continued media coverage of alleged local disputes between MSPs, and between MSPs and

- whether Scottish Executive Ministers should respond directly to matters raised in correspondence by Scottish MPs on devolved issues
- whether UK Ministers should respond directly to matters raised by MSPs on reserved issues affecting Scotland

This was an ambitious remit, seeking to tackle both the MSP-MSP and MSP-MP relationships, especially as the Westminster authorities were not formally represented as such on the group.[32] There was, for example, no necessary connection in principle between the two relationships, given the very different natures of the two parliaments. In the event, the group reported to the Presiding Officer within the desired timescale solely on the domestic intra-MSP aspect. At the time of writing, there appears to have been no further formal steps towards addressing the inter-parliamentary aspect.

While the fruits of the Group's deliberations and report to the Presiding Officer were not themselves published (being distributed to the parliamentary parties for their consideration), they were widely trailed in the Scottish media. In particular, much publicity was given to a set of 4 guiding principles said to form the basis of the proposed detailed guidance. The media swiftly dubbed them the 'Reid Principles', after the Deputy Presiding Officer chairing the Group, and, as reported in the media, they can be summarised as follows:[33]

- Each Scottish constituent and each territorial part of Scotland is represented by 8 MSPs, ie one constituency and seven regional MSPs
- All MSPs are equal, whether representing a region or a constituency, in relation to their parliamentary and representational roles
- No 'poaching', that is constituency and regional members should not deal with matters outwith their constituency or region, as appropriate
- The interests of constituents and localities should be paramount in determining how MSPs carry out their representational roles.

These guidelines related primarily to the two relationships between constituency and regional MSPs, and between constituents and all their local MSPs. They implicitly recognised that both types of Member had a territorial jurisdiction (unlike New Zealand's single national list), and therefore both could legitimately claim to have a 'constituency'. They also addressed only indirectly what had emerged as the most obvious problem on the ground, the alleged differential activity by regional MSPs' *within* their region, based on electoral rather

[32] The one MP, Archy Kirkwood, was involved in a personal capacity, though he had much experience of matters of Commons administration and parliamentary party management.

[33] See A McCabe & J McCormick, "Rethinking representation: some evidence from the first year", in G Hassan & C Warhurst (eds), *The new Scottish politics: the first year of the Scottish parliament and beyond*, 2000, p41.

than representational considerations. It was presumably hoped that a general statement of equality, allied to the twin principles of 'no poaching' and the primacy of local wishes in any particular case, would deal with most situations. This would avoid resort to formal rules, which could be seen as recognising that there were two 'classes' of MSP. Much of the detailed advice sought also "to offer guidance to the Parliament for each 'player' in the triangular relationship involving parliamentarians, constituents and agencies/organisations."[34] This was seen as particularly important in view of the very limited published guidance which existed hitherto.[35]

The Parliament itself did not formally consider these representational issues, or the Group's work directly, whether by a structured committee inquiry (other than in the Standards Committee, as considered below), or any plenary debate. It appeared that progress was being made 'behind the scenes' by MSPs and parliamentary officials, in and around the Bureau, the SPCB and the party groups themselves.[36] At Westminster, this would have been described as negotiation through the usual channels. Party differences on the detail of the 'Reid Principles' and the related guidance, as tracked in media reports, can be assumed from the fact that the matter did not reach the Parliament for formal endorsement until just before the 2000 summer recess, as well as from the nature and text of the guidance as finally agreed.[37]

The Standards Committee briefly considered the matter in late June, because the guidance was proposed to be included in the existing Members' Code of Conduct.[38] The Convener introduced the item in interesting terms:

> "The third item on our agenda is consideration of a paper on the so-called Reid principles, which have been referred to us for approval by the parliamentary

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[34] McCabe & McCormick, p41.

[35]

Bureau. Members will be aware that discussion of these matters has been taking place between the various party groups. I am advised that there has been general agreement between all groups. If the committee endorses the paper, the Bureau is keen that the paper should be put before the Parliament before the recess, with a view to its incorporation in the code of conduct as an annexe."

One member complained that the relevant papers had only appeared the previous day,

indicate that local tensions have eased. No cases based on the guidance reached the Standards Committee until 2001, though the Presiding Officer openly expressed his disquiet, during the 23 May 2001 plenary meeting, at the volume of informal complaints by MSPs about other MSPs he has had to deal with. He described this as "quite the most tedious and distasteful part of my many duties," and appealed to members "to read the code of conduct carefully to see how they are supposed to describe themselves and how they are supposed to deal with each other so that we diminish these internal complaints. It is time that we took steps to do that…"

Cowley and Lochore have noted, from a study of local constituency activity, some significant differences in the scale of various types of constituency activity:

- constituency MSPs spent noticeably more of their time on constituency work when compared to regional MSPs
- constituency MSPs were both more likely to hold surgeries at all and also more likely to hold more.
- more of the correspondence ('letters + email') received by constituency MSPs came from their constituency compared to the proportion received by regional MSPs originating in their region.

They concluded that "there does appear to be a difference – slight, but still noticeable – between the attitudes and behaviour of the two types of MSPs. They may be equal, but they do not appear to be identical. The fact that differences are detectable so early on in the life of the new system may suggest that, as the system grows in its influence on Scotland's political order and culture, the differences between MSPs may develop."[39] McCabe and McCormick noted from a mid-1999 survey of MSPs that there is "a degree of confusion around the appropriate roles of constituency and li Twi8nd

4. Arranging the Parliament's business

4.1. Arrangement of Parliamentary business

"A Steering Committee (or Business Committee if preferred) to determine timetable is an essential innovation … Its absence is a key to the Government's excessive control of the House in Westminster."[40]

How, and by whom, the Parliament's business is arranged is one of the most important issues to be considered in this Study. This, and the related issue of how, and by whom, the Parliament is run as an institution, between them cover the two fundamental topics of the organisation of the formal proceedings of the Parliament, and of its wider institutional administration as an autonomous entity.

Little was said by the SCC on this matter, at least in its main report. The Crick-Millar proposals, however, did regard it as of key importance, and their model is worthy of some consideration in comparison with the Parliament's actual model, both as it was established and as it has developed. Crick-Millar proposed the establishment of a Steering Committee to organise and arrange the Parliament's business. It would consist of the Presiding Officers; one member elected by democratic ballot by each party (defined as a group of 6 or more MSPs, in a parliament of 145); one Member from each of Orkney and Shetland; one Member elected by independent Members, and two Members nominated by the First Minister. It was intended that such a composition would make any single-party majority unlikely, and would, by its diversity, ensure that a majority for any particular proposal would require support of a wide range of opinion in the Parliament, and therefore be more representative of the views of the Scottish people.

This Committee would propose to the Parliament the timetable for and agenda of its business. It could also appoint sub-committees to make recommendations to the full Committee on:

- financial and organisational decisions on matters concerning Members, Parliament and its bodies,
- the number of officers and other servants of Parliament and their terms and conditions of work,
- the draft estimates of expenditure and the accounts of Parliament.

To ensure a measure of accountability, the decisions of the Committee would be printed and made public, and any Member could put down questions for written answer, addressed to the Presiding Officer, on its work.

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The key aspects of this model, for present purposes, were

- a broad composition, all of whom could vote, where each main party would be represented by an MSP elected by it, not nominated by its leadership, and would only have a single vote rather than a weighted vote in proportion to their party size
- some institutional and administrative responsibilities
- some, though unspecified, degree of public accountability.

When the CSG came to consider the organisation of business management – significantly, within the context of its first principle of 'sharing the power' - there was early consensus that the process should be more open, inclusive and transparent than in the House of Commons. Westminster practice was, in the words of one CSG working paper, "perceived as allowing the Government too great a control over the business of the House". It would be based on something like a continental business committee model, with a small membership, and the Presiding Officer in the chair to provide "reassurance to ordinary members that their interests would not be overlooked". Each party's representative would be nominated by its leader, and there would be a representative of smaller parties and independents.

The basic principles of business management would reflect a balance between the conflicting demands for time, from the Executive, ordinary members and so on, and ensure that there was sufficient time for proper debate and for scrutiny of the Executive. These arrangements had to:

- recognise the need for the Executive to govern, including enacting primary and subordinate legislation and obtaining approval of its expenditure proposals;
- provide Parliament with the time and opportunity to scrutinise the work of the Executive;
- allow for the debate of issues of both national and local interest;
- enable individual Members to raise matters of concern and introduce proposals for legislation;
- allow sufficient time for Committees to carry out their work.

There are some basic differences between this model and that of Crick-Millar, not all of which was due to factors within CSG's influence. The devolution legislation gave the administrative functions remit to a totally separate body, the SPCB, thus ensuring that there would not be a single parliamentary steering committee covering both its institutional and business arrangements. The proposed composition of the Business Committee reflected a tight, cohesive, 'party leadership'-driven model. This can be contrasted with one based more fully on the principle of dispersal of power, through a broad and diverse membership, and by the election of party representatives. The priorities of elite-driven functional efficiency appear to have won over broader notions of power-sharing and inclusiveness.

This scheme was broadly adopted in the Parliament's Standing Orders, except that it was decided that the business committee was to be called the Parliamentary Bureau. Not only did

this provide a suitably continental flavour,

even become members of committees. However, other than 'constituency matters' and the like, they have generally restricted their more visible contributions to subjects which are relatively non-partisan or which reflect their representative position.[43]

As occupants of the chair, the presiding officers have a crucial role in the development of parliamentary procedure and practice, not least through their duty, under Standing Orders, to "determine any question as to the interpretation or application of these Rules and give a ruling on any such question."[44] The two deputies can participate in Bureau meetings, and often do so, though they cannot vote. One deputy, George Reid, convenes the Conveners Liaison Group, and, probably because of his previous CSG membership, appears to have a watching brief over matters relating to the Parliament's culture and ethos.

Thus, it can be concluded that the Presiding Officers are central to the Parliament's achievement of the CSG vision, in terms of the arrangement of its business, as well as in terms of its formal proceedings and practices, and its wider institutional organisation and operation. Much, inevitably, will depend on the personalities of the three incumbents, and their relationship with the other leading players, such as the party leaders and business managers, and the Clerk / Chief Executive and other senior permanent staff.

4.3. The Parliamentary Bureau

One of the key bodies in the Parliament is its business committee, the Parliamentary Bureau. It has two main functions - proposing the Parliament's business, and proposing the constitution and membership of committees – which are central to the Parliament's operation. Its composition, as provided for by Standing Orders, is a major determinant of its role and influence within the Parliament. That composition reflects the CSG model of a group representing the party leaderships, rather than the more inclusive, 'backbench' model proposed by Crick-Millar.

The Bureau is convened and chaired by the Presiding Officer. Each party with 5 or more MSPs is entitled to a representative on the Bureau, and any group, made up of parties with fewer than 5 MSPs and of MSPs not representing any political party, is also entitled to a representative. Thus, there is no fixed membership of the Bureau, as its composition depends

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[43] For example, Patricia Ferguson is a member of the Standards Committee, and, on 8 March 2000, initiated a Members' Business debate on International Women's Day.

[44] They have, for example, consistently sought to apply the Westminster principle that significant ministerial policy announcements should, where possible, be made first to the Parliament. This was dramatically demonstrated on 18 January 2001 (strictly speaking, outwith the timeframe of this Study), when a deputy presiding officer decreed that a ministerial statement on quango reform was to be 'taken as read', because of extensive advance press briefing. The minister was not permitted to make his statement, and the Parliament moved on to questions on the 'statement'.

on the political balance of the Parliament. Since the establishment of the Parliament, the Bureau has had 4 party representatives (Labour, SNP, Conservative and Liberal Democrat), and no group representatives, as the other parties together can only muster 3 members.

While each of the main parties is represented by a single member, that member wields a vote in the Bureau measured by the size of his or her party in the Parliament. Unless a Bureau representative chooses to divide up that vote in some way, this means that each of the 4 business managers carries a 'block vote', a form of voting that has long been criticised in British politics.[45] In practice, the philosophy behind the Bureau model is that business arrangements should, as far as possible, be made on a consensual basis, without resort to formal votes. Standing Orders require Bureau meetings to be held in private, and state that votes are used "in the event of any disagreement". In such a model, agreement is therefore assumed to be reached on the basis of debate and discussion, and this makes the composition of Bureau meetings of particular significance.

The Presiding Officer's role is potentially much greater than that of a passive chair of Bureau meetings.[46]

Donald Gorrie (Lib Dem), a member of the Procedures Committee, submitted a paper to that Committee in June 2000, setting out proposals which sought to ensure that the Parliament "should gain more control of its own business". The first problem he identified was that "complete control of Parliament's business lies in the hands of the Business Bureau". He noted that "it is quite possible that the bureau, which represents the four main parties, will become a sort of collective that tends to work in its own way and that does not necessarily represent the views of the Parliament as a whole." He proposed that there should be an "Executive Business Manager's Question Time", akin to the House of Commons' weekly Business Questions period to the Leader of the House. Although the Bureau's response to Gorrie's proposals came in December 2000, strictly speaking outside the period of this Study, it is of interest in the context of the above discussion:

can also serve to reinforce the Executive, given its ability to have its way in the Bureau through the availability or use of its voting majority.

4.4. The normal pattern of business management

The usual process for the promulgation of business is broadly as follows:

- The Bureau presents to the Parliament a forward 'business programme' for a specified period, including the agenda for meetings of the full Parliament, and timetables for consideration by the Parliament or any committee of any legislation. A business motion can only be moved by a Bureau member; generally, as the CSG expected, an Executive's representative. It can, under certain conditions, be debated and even amended, and is generally decided immediately, rather than at Decision Time.

- Primarily on the basis of the business programme, the Clerk publishes a 'daily business list'. The Parliament can, on a Bureau motion, make alterations in the daily business list. The business programme, daily business list and any alterations, are published in the *Business Bulletin*. The Presiding Officer can make late changes to cope with emergency business.

Generally in the first year, a business programme has covered two-week periods. The

kicking. There will also be some relationship between the degree of Executive control of business management, and the employment by non-Executive forces of tactics such as late lodging of motions or amendments. In all this, it is difficult for those immediately involved not to see business management primarily as an internal process, with insufficient weight being given to the interest of the wider Scottish public, as sharers of powers and active parliamentary participants, in knowing what the Parliament's business is.

4.5. The ownership of parliamentary time

A related business management issue, which goes to the heart of the executive-parliamentary relationship, is the actual allocation of time in meetings of the Parliament between different categories of business.

Time during each parliamentary year is provided in Standing Orders for 'special cases of Parliamentary business' (*rule 5.6.1*):

- *committee business* (12 half sitting days)
- *business chosen by non-Executive parties* (16 – originally 15 - half sitting days)
- *Members' business* (30 minutes – 45 minutes, from November 2000 - at the end of each plenary meeting).

"Sufficient time" must be provided for

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availability of time for types of business which can be initiated by 'ordinary Members'. Taken in conjunction with an Executive majority in the Bureau, such an arrangement could put an Executive in virtually the same dominant position as the UK Government enjoys in the House of Commons, a situation contrary to the spirit and the letter of the CSG report.

On the other hand, was it intended that all non-specified time remained at the Parliament's disposal, to be shared out by the Bureau as it saw fit, taking into account factors such as those which the CSG noted? Such an approach could mean that any periods specified in Standing Orders should be regarded simply as minimum requirements. These, and other categories of proposed business, can compete in the Bureau with any Executive claims for time. As Crick-Millar puts it, "time must ... always be found for Government business, but not always to the convenience of the Government."

This would require the Executive to determine its true priorities, and to make a compelling case for parliamentary time for its legislation, general debates and other business. It would also remove any suspicion that it was managing the Parliament's business in its own interests, such as by staging debates on matters of its own choosing which may be regarded by the other parties or by the wider public as not necessarily being the most relevant or topical. Where there is a very limited amount of plenary time, any perception that the Executive was staging debates primarily as 'time-fillers' would be very damaging to the ethos and status of the Parliament.

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The symbolic impact of the latter interpretation is crucial to the achievement of the spirit of the CSG/SCC vision. A position where the Parliament itself, not the Executive, is the true e-1.5574 TD0.0000rwas273 time, nt.

> to advance its programme. That is why we have an Executive, and the remainder of the time should be available to the Executive for that purpose."

The Bureau implicitly accepted this interpretation in the Parliament's early days, as can be seen from guidance issued to Members on 14 June 1999:

> 16. Most business taken in Executive time will originate in the Executive. However CSG envisaged the possibility that the Bureau might note the strength of feeling among Members on a particular issue, and the desire to debate it, based on the motions lodged and the support they carry. In such cases, CSG envisaged that the Executive might agree to allow a debate on such issues. The terms and origin of the motion to be debated would be a matter for negotiation in the Bureau; but it should be recognised that such debates would take place in Executive time.

On the other hand, the SNP business manager, Mike Russell, has argued that no such presumption can be made in the absence of any explicit statement in standing orders. In his view, all unallocated time belongs to the Parliament, for business as arranged under usual Bureau procedures.

This divergence of view was most clearly seen in the allocation of time for the three Members not represented on the Bureau. *Rule 5.6* did not provide them with any guaranteed time, and the two major non-Executive parties had shared out the allotted 15 periods between them (10 to the SNP and 5 to the Conservatives). The three aggrieved MSPs asked the Procedures Committee in September 1999 to ensure the provision of a period each, raising the total allocation to 18. The Executive objected to what it saw as the diminution of available time for its business, and initially proposed that any provision for these Members be accommodated within the existing overall allocation. Ultimately a compromise was reached, by increasing the allocation from 15 to 16. This was calculated on the basis that appropriate time be allocated to the single member parties (currently the Greens and SSP), with the Presiding Officer ensuring that independent members (currently, only Dennis Canavan) have "the opportunity to put forward the issues that are important to them."

Some analysis of how plenary time was allocated in the first Parliamentary year is provided in chapter 9 of this Study. Over the succeeding years, it will be interesting to see how urTnlris Stu37 0 0

improvement on Westminster. This encompassed a number of inter-related criteria, including the following:

'family friendly': There should be normal working hours, as far as possible, with no Westminster-style late-night sittings. The sitting hours should take proper account of factors such as Scottish school holidays, the domestic needs of Members and staff, and the accessibility of the Parliament and its proceedings to the public.

balance between Chamber and committee work

The normal pattern of plenary sitting is 1½ days per week, with an afternoon session on Wednesdays (at an average of 3 hours 19 minutes) and a full day on Thursdays (at an average of 5 hours 53 minutes). One formal change in the standard pattern of weekly sittings, which was implemented as part of the major reform of Standing Orders at the end of 1999, was the extension of Wednesday plenary sittings from a 17:30 close to a 19:00 close, if necessary. The Procedures Committee apparently did not wish to go further at that stage, and so options such as extended Thursday plenary sittings, the use of Wednesday mornings for plenary sittings, or of allowing plenary and committee meetings to take place at the same time, were not pursued.

The latest the Parliament sat in plenary session was 18:59 on Wednesday 29 March 2000. No sitting began earlier than the set times of 09:30 or 14:30, nor did a sitting run continuously through the day without a midday break.[49] Generally the Parliament managed to maintain its normal plenary cycle, other than in the initial period before the first summer recess, when there were two meetings on a Tuesday, one on a Friday, and two Wednesday morning sittings.

[49] The shortest lunch break was during an early meeting of the Parliament, on 17 June 1999, when the morning session, devoted to a full debate on the future of the Holyrood Parliamentary Building Project, ended on 13:20 and the afternoon session began at 14:30.

5. Committees: the Parliament's powerhouse

5.1. Introduction

The committees of the Parliament were intended to be integral to its style of operation. Though the legislation did not require committees to be established, their existence was assumed throughout the SCC, legislative and CSG processes from 1989 onwards. Committees enable a parliament to take on a greater workload than could be managed effectively in plenary session. In the unicameral Scottish Parliament, the committee system was seen to be particularly relevant because there would be no other means for internal review and alternative consideration of policies or legislation.[50] Committees also provide a convenient and efficient channel for the meaningful participation of outside interests in parliamentary work, something which was central to the Scottish Parliament's ethos.

The CSG proposed a system of all-purpose subject committees, combining the role of the Westminster standing and select committees, with wide-ranging remits covering consideration and scrutiny of policy and legislation. This was substantially implemented in the initial Standing Orders, as can be seen from the provisions of *Rule 6.2* on the functions of all committees:

> 1. A committee shall examine such matters within its remit (referred to as "competent matters") as it may determine appropriate or as may be referred to it by the Parliament or another committee and sha

(d) consider the need for the reform of the law which relates to or affects any competent matter;
(e) initiate Bills on any competent matter; and
(f) consider the financial proposals and financial administration of the Scottish

- *Education*: school and pre-school education, the arts, culture and sport and such other matters as fall within the responsibility of the Minister for Children and Education, Culture and Sport;
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Orders did not state whether committee membership was restricted to ‘backbenchers’ or to

Describing particular areas of public policy as being regarded traditionally or stereotypically as 'female' or 'male' issues is be fraught with difficulty. Also, there is no official hierarchy of committees, or even of categories of committee, within the Parliament. Nevertheless, it may be suggested tentatively that female committee participation and leadership seems to have been concentrated more in subject areas which have been typically characterised as 'women's issues'. This may have been due to the choices of the MSPs concerned and the decisions of the party business managers,[53] or to a combination of these and other factors.

[53] Initially, the 4 business managers, who represented their parties on the Bureau, were male, though the SNP (Tricia Marwick) and Liberal Democrat (Margaret Smith) deputy business managers, and one of the two Labour deputy business managers (Margaret Curran), were female. When Margaret Smith was elected as convener of the Health and Community Care Committee, she was replaced as Liberal Democrat deputy business manager by Keith Raffan.

Table 5.1: Committees, as established June/July 1999

Committee	Mandatory or Subject	Members	Convener by party	Convener by gender	Lab	SNP	C	LD	Other	Male/ Female
Audit	M	11	SNP	M	5	3	2	1		8-3
Education, Culture and Sport	S	11	L	F	5	3	1	2		6-5

The appointment of deputy conveners was delayed until the last sitting day of 1999, and the actual members were elected by their committees on their return after the Christmas / New Year recess. The party and gender distributions were in the same proportions as for convenerships:

Table 5.2: Committee deputy convenerships

Committee	**Deputy Convener by party (Jan 00-)**	**Deputy Convener by gender (Jan 00-)**
Audit	C	M
Education, Culture and Sport	L	F
Enterprise and Lifelong Learning	C	F
Equal Opportunities	SNP	F
European	L	F
Finance	L	M (F from 01.02.00)
Health and Community Care	L	M
Justice and Home Affairs	L	M
Local Government	L	F
Procedures	L	F
Public Petitions	L	F
Rural Affairs	SNP	M
Social Inclusion, Housing and Voluntary Sector	SNP	F
Standards	SNP	F
Subordinate Legislation	LD	M
Transport and the Environment	LD	F
TOTALS	**8L, 4SNP, 2C, 2LD**	**6M, 10M (5M, 11F from 01.02.00)**

5.4. Activity

The work of committees during the first year is summarised in table 5.3. This shows that the level of formal meetings was generally much greater than the fortnightly cycle originally envisaged. The Justice & Home Affairs Committee met no less than 31 times, mainly due to its heavy legislative load.

It also demonstrates the significant variation in the balance of business between committees, such as the scrutiny of legislation and EU documents, the consideration of petitions and the conduct of inquiries. The first two types of business are those allocated to committees from elsewhere in the Parliament, and the level of such business can affect the extent to which a committee can set its own agenda, especially in the areas of pursuing scrutiny inquiries. In some cases, such allocated business will inevitably dominate the agenda, as can be seen in the cases of the European, Finance, Subordinate Legislation and Public Petitions Committees.

Table 5.3: Committee activity: 1999-2000 parliamentary year

	Meetings	Visits	Inquiries	Bills	Sub Leg, EU docs	Petitions	Reports	Divisions
							4	2
							6	31
							1	0

with the people' in their work [and] to engage in new forms of participation",[55] and some committees did discuss, in open session during the first year, how such funding could be used. The 'Business in the Chamber' event organised by the Enterprise and Lifelong Learning Committee in February 2000, a form of 'mock parliament' for business representatives, was a rare example of a novel committee exercise. Committees do conduct electronic consultations, and the European Committee produces a regular on-line newsletter, *Europe Matters*.

Much of the committees' information-gathering in the first year was through formal evidence-taking, both written and oral. It can be seen from table 5.4 that, though just over a quarter of all witnesses were from the Executive, and a further 12% from public bodies, the majority were described in the Parliament's statistics simply as 'other witnesses'. While a large proportion of this category were no doubt what may be described as 'the usual suspects' – prominent pressure groups, academic experts and so on[56] – many will have been individuals and groups which would have not accustomed to have been consulted by government or parliament prior to devolution.

There were no serious problems for the Parliament in its first year over the exercise of its information-gathering powers, and evidence was gathered through invitation rather than by recourse to its statutory powers. However, tensions grew between the committees and the Executive in the autumn of 2000 over their investigation of the Scottish Qualifications Authority's handling of the 2000 school exams diet. Westminster experience had demonstrated that such battles of wills over ministerial accountability generally were unproductive affairs, with Parliament generally unwilling or unable to assert its theoretical powers fully to obtain all the evidence it demanded. The Executive reacted to the SQA problem in a rather traditional way, if

That the Parliament notes that the Executive is committed to a policy of openness, accessibility and accountability in all its dealings with the Parliament and its Committees; further notes both the Parliament's right and duty to hold the Executive to account including the power to invoke section 23 of the Scotland Act and the public interest in maintaining the confidentiality of exchanges between officials and Ministers concerning policy advice; observes that other Parliaments with strong freedom of information regimes do not disclose the terms of such exchanges and calls, to that end, for the Executive and the Parliament to observe the following principles:

(i) consistent with its policy of openness, the Executive should always seek to make as much information as possible publicly available as a matter of course and should respond positively to requests for information from the Parliament and its Committees;
(ii) officials are accountable to Ministers and Ministers in turn are accountable to the Parliament and it follows that, while officials can provide Committees with factual information, Committees should look to Ministers to account for the policy decisions they have taken;
(iii) where, exceptionally, Committees find it necessary to scrutinise exchanges between officials and Ministers on policy issues, arrangements should be made to

Table 5.4: Committee witnesses: 1999-2000 parliamentary year

	SE ministers	SE officials

“We are all minded to support the principles behind Andrew Wilson's motion that committees should move around the country… I do not think that, at this stage, we should tie ourselves down to specifying how that should work. The committees themselves need to consider their programmes, the issues that they intend to address and how best they can obtain the views of the people who are affected by those issues. It should then be for the committees to rnt16y6uIosals about holding meetings around the country. … We must consider those practicalities, but the principle is certainly accepted.”

Table 5.5 Committee meetings: 1999-2000 parliamentary year

	Meetings	Within the Parliament	Elsewhere in Edinburgh	Outside Edinburgh
Audit	16	16	0	0
Education, Culture & Sport	27	24	3	0
Enterprise and Lifelong Learning	21	17	3	1 (Inverness)
Equal Opportunities	20	20	0	0
European	18	17	0	1 (Glasgow)
Finance	21	20	1	0
Health & Community Care	28	28	0	0
Justice & Home Affairs	31	28	2	1 (Stirling)
Local Government	27	24	1	2 (Glasgow, Stirling)
Procedures	15	15	0	0
Public Petitions	14	13	0	1 (Galashiels)
Rural Affairs	23	21	2	0
Social Inclusion, Housing and Voluntary Sector	29	24	3	2 (Glasgow, Stirling)
Standards	24	23	1	0
Subordinate Legislation	29	29	0	0
Transport & the Environment	20	16	4	0
TOTAL	**363**	**335** ***(92.3%)***	**20** ***(5.5%)***	**8** ***(2.2%)***

No committees are permanently located outside Edinburgh. Only 8 meetings in the first year, 2.2% of the total, were held outside Edinburgh, and 20 meetings were held in Edinburgh but outside the parliamentary complex. Of the 16 committees, 10 (6 mandatory, 4 subject) had no meetings outwith Edinburgh. It is clear that, at least in the first year, that this was due in part to resource constraints and time pressures.

- *Audit*: examination of Scottish Ambulance Service - visits to Glasgow, Dundee and Galashiels (Feb 2000)
- *Justice & Home Affairs*: Annual report of HM Chief Inspector of Prisons – visits to HMP Low Moss, Bishopbriggs and HMRI Longriggend, Lanarkshire (Sept 1999)
- *Local Government*: McIntosh Report on local government and the Scottish Parliament – visits to 15 local councils (Nov 1999-Feb 2000)
- *Rural Affairs*: Changing employment patterns in rural Scotland - 4 public meetings in Newton St Boswells, Lewis, Newton Stewart and Laurencekirk (Apr-May 2000)

Of equal importance for the purposes of the CSG vision is whether committee meetings were held wholly or partly in public. This is considered in chapter 12, as part of the general issue of openness.

5.7. Conclusion

The committee system is one of multi-purpose committees, dealing with all relevant matters within their respective remits, including primary and subordinate legislative scrutiny. This was a bold model, in stark contrast with the Westminster tradition. The main advantage of this arrangement is intended to be the greater opportunity for committee members to gain the necessary expertise in the policy areas within their committee's remit, and develop close working relationships with the relevant government bodies and interest groups.

The main potential disadvantages are that

- a mix of legislative scrutiny and investigations and inquiries would mean that committees' work patterns could be set too much by the legislative timetable (generally at the behest of the Executive) rather than at their own initiative, and
- the potential for a consensual and inclusive culture among members could be diluted by partisan, political pressures when scrutinising government legislation.

Therefore, it is more appropriate and useful to think of a committee as having a common ethos and seamless approach across all its work, rather than seeing it as operating sometimes in 'select committee' or sometimes in 'standing committee' mode, in a Westminster sense. In general, in the Parliament's first year, the advantages outweighed the disadvantages. An effective degree of collegiality and cohesiveness had begun to develop, as can be seen by the relatively low frequency of formal divisions in committee, albeit within an overall context of a Parliament with a flourishing ethos of part

Perhaps the most visible aspect of committee activity in the first year was how busy they were. At the outset, it was envisaged that committees would generally meet once a fortnight. This would have implied around 150-200 meetings a year, whereas in the first year there were 363 meetings, taking well over 600 hours of parliamentary time. This workload has been a key feature of the Parliament's early operation.

The inherent tension between plenary and comm

> Parliament and the Executive will contribute to a productive working relationship between the two organisations.

The presumption appeared to be that, though committees formally report to the Parliament or to another committee, their reports are in practice directed at the Executive, and that it was for the Executive to respond to them:

> Advance embargoed copies of Committee Reports will be provided to the Executive. Neither the Parliament (ie Members, Parliamentary officials and staff of Members) nor the Executive (ie Ministers and officials) will place such Reports in the public domain in advance of their publication…The Executive will determine the form of its responses to Committee Reports according to the nature and content of the Reports. The Executive will normally provide a response within 2 months of publication of the Report. Where a response will take longer than 2 months to prepare, the Executive will write to the Committee Convener or Clerk explaining the reasons and indicating the likely timetable.

The committees' relationships with 'civic Scotland' can also cause difficulty. Committees will wish to create and maintain close contacts with key players in the areas of public policy within their respective remits. Yet they must not become 'captured' by these outside interests. As one commentator noted: "…. the specialist committees are likely to attract MSPs representing producer rather than consumer interests."[60] Another went further:[61]

> "… the development of 'clientistic' relations with some subject committees and their main pressure groups associated with that policy area cannot be ruled out. This fact raises the potential for committees to go native and become supporters of particular interest groups. Arguably, this scenario may already have occurred with the Local Government Committee: a committee comprised of former councillors and local authority employees … Acting as a lobbyist for COSLA was not exactly what the Consultative Steering Group had in mind for the Local Government Committee."

In the context of that particular committee, its convener has written:[62]

> "As Convener I have made clear that the Committee would not be seen as a limb of the Scottish Executive – it would be responsible and accountable to Parliament,

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[60] M Dyer, "Representation in a devolved Scotland" (1999) 36 *Representation* 18, 22

[61] P Lynch, "The committee system of the Scottish Parliament", in G Hassan and C Warhurst (eds), *The new Scottish politics: the first year of the Scottish Parliament and beyond*, 2000, pp72-3

[62] Trish Godman, "The Local Government Committee", *SCOLAG Journal*, Nov 2000, p12

and local authorities need not be apprehensive of our examinations of the relationships of councils, Parliament and the communities they seek to serve. Our objective is to assist with the improvement of local government throughout Scotland. One year on, I believe that my colleagues and I have demonstrated that independence from the Executive and have gained the respect of most councillors

6. Shared business: legislation

6.1. Making laws

Law-making is a touchstone of a parliament. It

buying parliamentary legislative time. However, such objections appear not to have been aired thus far in the Parliament.

Within public primary legislation, the three main categories[64] are

- Executive Bills
- Members' Bills
- Committee Bills

power comes responsibilities. We shall pass laws, not because we are here and must look busy, and not because someone grabs a microphone, or a megaphone, and says that something—anything—must be done. We shall act for and in the

knock-on effect on the non-legislative functions of committees, or the amount of time devoted in the Chamber to matters other than Executive legislation. These pressures, and trends towards more Westminster rhythms, may also have the unfortunate consequence of creating an assumption of the government legislative programme as the main determinant of parliamentary business.

The legislative timetables set for some Executive Bills produced complaints from some committees. For example, the Rural Affairs Committee was unhappy at the time available for Stage 1 consideration of the *National Parks (Scotland) Bill*. It was designated as lead committee on 30 March, and a Bureau motion, approved by the Parliament on 27 April, required Stage 1 to be completed (that is, including the plenary debate) by 24 May. It issued its report on 22 May, which included the following comment:

> 6. The draft proposals for National Parks were first considered by the Rural Affairs Committee in February 2000 although it was the Transport and the Environment Committee which had taken a more active role in the pre-legislative stage. Since being given the lead role, the Rural Affairs Committee has had to rely upon both evidence and advice from the Transport and the Environment Committee for which it is grateful. The other committees involved were asked to report by 9 May in view of the timescale set for stage 1, but this was not possible. The report by the Subordinate Legislation Committee was finished the day before, and the Transport and the Environment Committee report was agreed on the same day as the Rural Affairs Committee had to agree the final terms of this report. Accordingly, there has been limited opportunity for the lead committee to take into account the views of the Transport and the Environment Committee, as required by standing orders. The Transport and the Environment Committee's report is being published separately and the Parliament may wish to consider their additional evidence, which is not duplicated in this report.
>
> 7. The Committee wishes to express dissatisfaction with the extremely tight timescale set for the consideration of stage 1 of the bill. This report contains a number of questions to be answered by the Executive, which may have an impact on the timetable for completion of the Bill.

As the Executive does not have formal control of the Parliament's time, its programme has to take account of its potential impact, not only on the Chamber, but also on the committees. It has to balance ministers' desires for legislation, with the Parliament's ability to deal with it. This could imply programmes which, to some extent, include Bills across a broad range of public policy areas, and not overly concentrated on particular areas.

Parliamentarians, the media and wider civic Scotland will have to accept the implications of the intended operation of the Parliament's legislative procedures. Too great an emphasis on the quantity and 'newsworthiness' of legislation, and on speed of enactment, can only encourage undesirable practices. Some have already appeared, such as ministers sometimes being unwilling to accept substantive amendments to its proposals, or opposition parties routinely criticising Executive legislative programmes as "unimaginative" or "lacking in ambition". The nature and scope of any particular legislative programme may be due as much to the present limitations of the Parliament's legislative competence, as to the policies of any particular Executive.

The initial period of the Parliament may turn out not to be representative of its law-making activity in the future, for a number of reasons:

- Early programmes may contain a number of 'law reform' measures from pre-devolution days. Such measures may be significant, and indeed controversial, but not always contentious in a partisan sense, or conventionally newsworthy.
- 'Pre-legislative scrutiny' and detailed, widespread consultation may mean that some measures (such as FoI) expected by some to appear early in a session, may not in fact be introduced or enacted quite so quickly. Pre-legislative scrutiny and consultation which may have taken place prior to devolution, may not be regarded by the Executive or the Parliament as wholly sufficient.
- Some structural devolution legislation, giving effect to matters covered by the *Scotland Act* or proposed by the CSG and related reports, would be required. The major example thus far is the *Public Finance and Accountability (Scotland) Act 2000.*
- All concerned are inevitably learning how the legislative process works in practice, and can be expected to build up expertise over time. This also applies to ministers and their officials, who may have been more familiar with those at Westminster.

6.3. Executive legislation in the first year

Table 6.1: Executive Bills introduced in the first parliamentary year

Title	Introduced	Stage 1			Stage 2	Stage 3 & passed	Royal Assent
		Lead Cttee	Other Cttees	Plenary	Cttee	Plenary	
Mental Health (Public Safety and Appeals) (Scotland)	31.08.99	-	-	02.09.99	*CWP*; Finance (fr)	08.09.99	13.09.99
Public Finance and Accountability (Scotland)	07.09.99	Audit	Finance (inc fr); SL (dps)	30.09.99	Finance; Audit; SL (dps)	01.12.99	17.01.00
Abolition of Feudal Tenure etc. (Scotland)	06.10.99	JHA	SL (dps); Finance (fr)	15.12.99	JHA; SL (dps)	03.05.00	(09.06.00)

Ten Bills were introduced by the Executive in the first Parliamentary year, and table 6.1 tracks their progress. This section records, in order of introduction, some of the highlights of that programme, noting relevant aspects about their provenance and progress in the Parliament during that period.

[SP Bill 1]: It was ironic that the first legislation before the brand-new Parliament, was emergency legislation. As such, it had to be dealt with in ways expected to be atypical of the normal pattern of legislative scrutiny. In addition, it raised ECHR issues, and therefore the Presiding Officer's certification of legislative competence involved considerable discussion between Executive and parliamentary officials. Neither side would have wished the Bill to be accompanied by a statement that, in the Presiding Officer's view, all or part of the Executive's, and the Parliament's, first piece of legislation was not within legislative competence. Such a negative judgment could not, by itself, block progress of the Bill, but would be, at the very least, an embarrassment to the Executive and an invitation to future challenge on *vires* grounds.[68]

A Sheriff Court case, during the Parliament's summer recess, had exposed a "loophole" in mental heath legislation, leading to the release from the state hospital of a patient convicted of a serious offence. Discussions within the Executive, and between them and the main political parties, took place speedily, partly in response to critical media reaction concerned that other patients could have to be released on a similar basis. Initial statements from ministers hinted that legislation was an option, but no commitments were made. By 28 August ministers had announced early legislation:

> Scottish Ministers this morning confirmed their intention to put a Mental Health Bill before the Scottish Parliament using emergency legislation procedures when the Parliament resumes next week. When the Bureau meets this afternoon, the Minister for Parliament will propose a timetable which would get the Bill through Parliament within 10 days of introduction. The timetable we are setting out will ensure that the Bill is in place before any further relevant appeals are determined. It meets the commitment we gave at the time of the Ruddle judgement. We are determined to ensure that, when the courts come to consider similar cases, they can take full account of public safety. We want to ensure that our proposals command Parliamentary support and are effective in the courts. I am therefore contacting the Presiding Officer and the main Opposition Parties to brief them on our proposals. We shall also be making sure that our proposals are consistent with

[68] In the event, there was such a legal challenge, which was not upheld: *A v Scottish Ministers*, 2001 SC 1, 2000 SLT 873 (Court of Session, June 2000). At the time of writing, this is being appealed to the Judicial Committee of the Privy Council.

> the European Convention of Human Rights. We intend to conclude those discussions in time to allow us to publish the Bill by Wednesday 1 September.

Although *Rule 9.21* envisaged the passage of an emergency bill in one sitting, the Parliament agreed on 1 and 2 September, its first days after the recess, to take the Bill over two days. The first day (2 September) would be for Stage 1 (the debate lasted 90 minutes), and the second (8 September) for all remaining stages (the debate on these Stages lasted over 3 hours).[69] No committee involvement on Stages 1 and 2 was required for emergency bills, though the

the Executive's intended review of emergency and other legislative procedures." The *Census (Amendment) (Scotland) Bill*, which was enacted very speedily in early 2000, did not however use the formal Emergency Bills procedure, but proceeded by way of suspension of certain Standing Orders.

[SP Bill 4]: This programme bill is a good example of a 'law reform' measure, being on a matter of purely domestic Scottish interest; long and highly technical in form and content, and which may not have easily found legislative time at Westminster. Opening the Stage 1 plenary debate on 15 December 1999, the Justice Minister said that "this is the kind of detailed law reform that would have been delayed for years waiting for a legislative slot at Westminster, but is ideally suited for consideration by this Parliament."

Two major UK Acts on feudal reform had been passed in the 1970s, and the Scottish Law Commission produced a discussion paper in 1991 and a report and draft bill in February 1999. Reform was supported by the main Scottish parties (though the Conservatives favoured updating the present system of land tenure), and it featured in the Executive's partnership agreement. The Executive announced, in June 1999, its intention to produce a bill based primarily on the 1999 draft bill, and that Bill was introduced on 6 October 1999. It was designed to be part of a package of wider land reform, a factor that some MSPs noted complicated the operation of the Parliament's legislative scrutiny, based as it is on examination of individual bills.

The bill was examined at Stage 1 by the Justice and Home Affairs Committee (JHAC), as lead committee, over 4 meetings in November-December 1999, and by the Parliament on 15 December. The JHAC carried out Stage 2 scrutiny over 3 meetings in March 2000. The Bill was examined at Stage 3 and passed by the Parliament on 3 May, and was enacted on 9 June.

The JHAC's Stage 1 Report is a good example of this form of legislative scrutiny. It surveyed the background to the bill, and highlighted any relevant issues and particular areas of concern for the Parliament. The Committee had had a heavy workload in the Parliament's initial period, as much of the early legislation fell within its ras much M12 r areas oee s the earl

deal with many matters of social and ethical concern. The Parliament's legislative procedures may be at their best when dealing with a bill of this nature, as they enabled the major issues and controversies to be aired, and for what was described at its final stage by the minister as a "substantially improved" bill to proceed to enactment.

[SP Bill 8]: This was not originally part of the Executive's programme, but arose because of pressure from within the Parliament and its committees. Disquiet had been expressed, through questions and motions, about the Executive's decision not to include a question on religion in the 2001 Census. Ministers had claimed that inclusion of such a question would require an Act of the Parliament.[71]

The Equal Opportunities Committee (EOC) took the lead in this matter when, at its 14 December 1999 meeting, a couple of its members said that they approached the Executive, but without much success. The convener promised to write to ministers on the EOC's behalf. The draft *Census Order 2000*

week before the relevant debate. The convener had already lodged a motion on behalf of the Committee, and on 9 February, she lodged a revised motion calling for the introduction of Executive amending legislation to permit a religion question in the 2001 Census. The day before the plenary debate on 16 February, the Committee discussed suggestions that the Executive would concede on the religion question, rather than risk defeat in the debate. The convener reported that she had received informal assurances to that effect, although she refused, when questioned by other members, to go into explicit detail. There appeared to be a split, partly on party lines, in the EOC on how to proceed, especially as it was not clear whether the apparent Executive concession covered all of its desires on matters beyond a religion question.

Though the convener had said that she still intended to press her motion, it was announced, at the start of the plenary debate, that it had been withdrawn. During the debate, she explained that the majority of the EOC believed that they had achieved as much as they reasonably could expect, but that she understood the views of the SNP members who had moved their own motion on the outstanding matters of concern. As the Justice Minister had formally announced the Executive's change of heart during his opening speech, any real tension or risk of a defeat for the Executive had evaporated.

The fruits of this successful campaigning emerged swiftly in the form of the Executive's *Census (Amendment) (Scotland) Bill*, introduced on 29 February. Because of the Executive's claim of time pressures in advance of the following year's Census, the Parliament agreed to expedite the Bill's progress. Unlike the previous year's mental health bill, this was achieved not by way of the emergency bill procedure, but by the suspension of various standing orders. The Parliament cooperated with the Executive's desire for speedy enactment, as evidenced by the brevity of the various legislative stages, and the absence of any substantive amendments. Stage 1 was taken in plenary session on 9 March, the remaining stages in plenary on 15 March, and royal assent was given on 10 April.

Both the parliamentary events which gave rise to the legislation, and the process of its enactment, make this Bill a noteworthy instance of the Parliament's first legislative year. Various potential difficulties were overcome, such as the substantive and procedural complexities surrounding the draft Order and the need for primary legislation in implementing the Executive's policy change. Those pushing for the inclusion of a religion question maintained impressive solidarity, although party differences did emerge in the EOC as to how to react to the Executive's overtures in advance of the 16 February debate. Perhaps the most appropriate endnote to this bill's passage is the comment by Johann Lamont (Lab) at the EOC's 15 February meeting:

> "I would be happier if, in general terms, we stopped perceiving every change in policy as a defeat. We should recognise that we have the opportunity for a

meeting of minds and that people can change their views after they have talked to others. We do not have to have the old combative model where, if someone is

day, trailing the minister's committee appearance. The Minister for Communities, Wendy Alexander, announced the use of the ethical standards bill on 29 October, during a speech at Glasgow University.

The draft bill was published on 18 November, and the Local Government Committee (LGC)

The Bill's parliamentary passage can, therefore, be regarded as a success in a number of respects. The Executive got their legislation, including possibly the most controversial provision of the Parliament's first year. If amendment can be regarded as improvement, the Bill which received royal assent in late July was a better one than was introduced at the beginning of March. But, to what extent did the Parliament take account of, and reflect the views of, the Scottish people on the Section 2A issue? Such issues are notoriously difficult for representative assemblies, as the actual balance of public opinion is hard to gauge.[74] If the anti-repeal campaign reflected the true opinion of the Scottish people, then did the Parliament act properly in legislating contrary to that wish? Were the additional statutory provisions arising out of the repeal a positive contribution to the body of Scottish legislation, or were they a political fudge to allow ministers their main policy? Only time will tell.

6.4. Members' legislation

The concept of legislation being initiated by 'back-bench' Members is well-known at Westminster, where several different procedures exist, including the private Member's ballot. The CSG report had suggested two forms of initiative by what it called (somewhat surprisingly) 'private Members' bills':

- directly to the full Parliament, if a proposal received a sufficient level of support (perhaps 10% of all MSPs), or
- via submission to the relevant subject committee, where, if supported, it could follow the procedure for committee bills.

It also proposed that each MSP should be limited to the introduction of 2 bills in any session (normally 4 years). If this allocation was fully used, there could be around 250 such bills each session. The Parliament's rules gave general effect to these proposals. However, Members wishing to pursue the Member's Bill route face two practical hurdles:

- *parliamentary time* – No ring-fenced time is expressly provided for consideration of Members' Bills, and the short 'Members' business' period at the end of each plenary sitting is used for what may be thought of, in Westminster terms, as 'adjournment debates'. Members' Bills have to conform to the same legislative procedure as any other bill, and, like Executive Bills, they have to await the allocation of parliamentary time by the Bureau. This absence of guaranteed time can be beneficial, so long as the Bureau allocates reasonable time for a bill's progress, as it limits the opportunity for obstruction and delay by its opponents. As at Westminster, Members seeking to

[74] Though a privately funded 'referendum' would be potentially suspect, the successful 'referendum' on water privatisation in the 1980s by Strathclyde Regional Council gave such 'informal' exercises some credence within Scotland.

promote legislation have to balance the substance and potential controversiality of a Bill, with the likelihood of its successful passage through the legislative process.

- *legislative drafting* – The legislative, procedural and other requirements as to the form and content of Bills, and the current practice that Scottish drafting style generally conforms to traditional UK practice, mean that drafting is a specialised art. No specific assistance existed initially within the Parliament, as 'parliamentary counsel', as governmental not parliamentary officials, were fully occupied on Executive business. Backbench MSPs were required to draft their own legislation or seek external assistance,[75] and the Parliament's initial guidance could only suggest that "clerks may be able to assist in the drafting of Members' Bills in certain cases". The Parliament took steps to remedy this situation in 2000 with the establishment of a Non-Executive Bills Unit.

[75] This latter aspect can cause potential ethical and legal difficulties, as Mike Watson (Lab) found when accepting some outside assistance in connection with his proposed *Protection of Wild Mammals Bill* (on which see *Whaley v Lord Watson of Invergowrie* 2000 SLT 475)

Table 6.2: Members' Bills introduced in the first parliamentary year

Title	Lodged	Threshold reached

until November 2000 (*Sea Fisheries (Shellfish) (Amendment) (Scotland) Act 2000*). Two of the Bills introduced became as visible as any of the Executive's Bills, perhaps more so – Mike Watson's *Protection of Wild Mammals (Scotland) Bill* and Tommy Sheridan's *Abolition of Poindings and Warrant Sales Bill.*

Anti-hunting measures have been promoted regularly at Westminster, and the new Parliament opened another legislative front. Mike Watson (Lab) announced on 20 July 1999 that he planned to take advantage of that opportunity. His proposal for a Bill was lodged on 1 September, and reached the required level of support the following day. However the Bill itself was not formally introduced until 1 March 2000, much of the intervening time being devoted to a legal challenge to its proposed introduction. The Rural Affairs Committee (RAC) was quickly designated as the lead committee, and the JHAC as secondary committee, the latter's involvement intended to be only in relation to the Bill's provisions for creating criminal offences. The RAC had a preliminary discussion on 21 March, when they agreed to c 0.00ra-21s Tc0.574 TDlC 0ACchu0.5adueted to a le35e ammaItntrodc21r14.40sc936 Billthe21.2Tc001J-555(t

Sheridan had, on 19 August 1999, lodged a proposal for a Member's Bill to amend the

Leasehold Casualties (Scotland) Bill, an MSP may have already lodged a proposal independently, in largely the same terms. In

- allowing the Executive, as the elected Government, to take forward its policies;
- ensuring proper participative consultation by the Executive through giving Committees a supervisory role;
- freeing up valuable Committee time, allowing Committees to focus on proposals which have already been the subject of participative involvement of interested bodies.

Though Standing Orders did not adopt this recommended model, much that has been written and said to date about the Parliament's legislative process appears to assume that this is how the Parliament actually operates. This not only leads to confusion by those wishing to participate in the legislative process, on Executive Bills in particular, but also to misconceived criticism of the Parliament's legislative work thus far.

There is virtually nothing in Standing Orders about the legislative process prior to the introduction of a Bill, and so no standard template exists for pre-legislative scrutiny.[79] The Parliament is not required to have any involvement at this stage, and all the Executive is only required to show, in the Policy Memorandum accompanying the introduction of its bill, what consultation, if any, it had undertaken and a summary of its outcome. There is even some

Another potential source of confusion was the interaction, if any, between Executive consultation, and those conducted by the Parliament on substantially the same issue. There is little guidance as to how such exercises could or should relate to each other. This can cause difficulty for those wishing to participate actively in them. Whereas experienced interest groups may be able to take advantage of this situation, perhaps by playing one institution off against the other, others may find it an expensive and wasteful duplication of effort. The CSG model saw consultation on Executive proposals as largely an Executive function, with parliamentary committees' role being primarily the scrutiny of the efficacy of that exercise. However it did accept that a committee could take its own evidence "if it felt that the Executive's consultation process had been insufficient." It is not clear how, under this model, the Parliament could come to an informed view about the adequacy of any Executive consultation, if it did not conduct some form of independent scrutiny. It could find itself limited to acting as a 'court of appeal' for those who felt aggrieved or dissatisfied by the consultation process or its outcome.

For the Parliament's committees,[81] the absence of a standard procedure enables them to decide for themselves whether and when to enter the policy development process. This need not necessarily bear a close relation to the Executive's internal timetable. For example, a committee may

- conduct a policy debate itself, on a topic where the Executive was not actively considering legislation,
- involve itself in an area where the Executive, or other body, was actively engaged in policy formation, but had not yet 'gone public',
- await the 'public' stage of policy development, where the Executive is seeking input from interested parties on the formation of its policy, or
- await the formal introduction of legislative proposals.

These tactical decisions, influenced by practical considerations such as timescale and political interest, may result in very different forms of committee involvement in 'legislative consultation' or 'pre-legislative scrutiny'. Joining in at the early stages may be resented by ministers and officials as 'muscling in' on what is properly their terrain, and could cause problems of confidentiality and secrecy ('legislative sub judice'). On the other hand, waiting for a policy to emerge from within government could be taken as the Parliament accepting that it is just another consultee, albeit a particularly important one. Waiting for the introduction of a Bill means, strictly speaking, no parliamentary pre-legislative scrutiny, and a return to the unsatisfactory situation which the CSG was seeking to remedy.

[81] This discussion concentrates on the committees, because of their role in the formal legislative process at Stage 1 and Stage 2. The Parliament itself can, and will, participate in the policy development

Examination of two bills in the Parliament's first year may provide some evidence as to how the committees have gone about their legislative, or, more properly, pre-legislative business:

(i) Ethical Standards in Public Life (Scotland) Bill: The bill was published in draft by the Executive in November 1999, and the consultation period ended on 14 January 2000. According to the Bill's policy memorandum, over 6,500 copies of the consultation paper were issued, as well as being made available on the Executive's website. This exercise elicited 2,200 responses, and the Bill was introduced on 1 March.

The Local Government Committee (LGC) had begun to prepare to scrutinise the proposals, even before the draft bill was issued, with a preliminary discussion at its 27 October meeting, followed by further discussions on 24 November. It held three witness sessions (8 and 14 December, and 18 January), the last including the appearance of the relevant deputy minister. The LGC considered a draft report on its scrutiny, in public session, at its meeting on 24 January and issued it on 8 February. This broadly welcomed the proposals, while making a number of suggestions for improvements in the Bill itself. The Committee regarded its pre-legislative scrutiny as "extensive", and on that basis explained, in its later Stage 1 report, how it concentrated its Stage 1 scrutiny on particular aspects of the Bill which its earlier exercise had identified. The Stage 1 report also commented in some detail on the adequacy and outcome of the Executive's consultation exercise:

> 12. Overall, the Committee notes that some significant changes were made to the Bill as a result of consultation although there were a greater number of proposed changes which the Executive decided not to consider. It is recognised that after consultation there will inevitably be some points of view which are not taken on board. Where the Committee feels that the Executive has not taken sufficient account of the views expressed in consultation, this is mentioned in relation to the specific area of the Bill.

(ii) National Parks (Scotland) Bill: In its Stage 1 report, the Rural Affairs Committee (RAC) described the extensive consultation there had been on the topic in the year prior to devolution, and on that basis it decided that "a general call for further public evidence was unnecessary and our examination was concentrated upon key areas of concern." The Executive published a draft bill on 21 January 2000, on which consultation ended on 3 March 2000. According to the policy memorandum, 2,500 copies of the consultation paper were issued as well being made available on the Executive's website. This exercise elicited 343 responses, and the Bill was introduced on 27 March.

The RAC had a preliminary meeting on 15 February to discuss how to conduct its pre-legislative scrutiny, and took evidence from witnesses on 29 February and 8 March. The

latter included the Transport Minister, who reported on the Executive's consultation exercise. The Transport and Environment Committee took ev

Table 6.3: Committee consideration of subordinate legislation: 1999-2000 parliamentary year

Committee	SSIs considered (a)	SSIs, affirmative-negative	SIs considered	Subordinate

learning curve, familiarising themselves with the relevant procedures. Many members were not embarrassed to admit their inexperience, and even expressed concern that scrutiny, especially when not the lead committee for a particular instrument, could be ineffective. In the European Committee's meeting on 14 September 1999, when members were tackling the subject for the first time, Bruce Crawford (SNP) remarked that "the easy way out" would be to "just approve the SSIs", but he was worried whether something in one of them "might prove to be horrendous. I do not want to be Pontius Pilate."

Concern was also expressed about the workload imposed on committees in scrutinising subordinate legislation. As with bills and petitions, this work was not at an individual committee's own initiative, and so could distort its desired work programme. Subordinate legislation scrutiny was not spread evenly among the committees. Almost 58% of all committee reports concerned subordinate legislation, and even discounting the SLC's own reports, that proportion is 47%. In the first year, ignoring the SLC itself, three quarters of all instances of committee scrutiny of statutory instruments were undertaken by just four subject committees (Health & Community Care, Local Government, Rural Affairs and Transport & the Environment). While the number of instruments considered is, inevitably, a rather crude measure of actual workload, it is not unexpected that such subject committees would bear the brunt of subordinate legislation scrutiny.

A related aspect of committee work in this legislative area is the function of the SLC of examining any provisions in Bills which grant powers to others to make subordinate legislation. This delegated powers scrutiny role is derived from Westminster, where the House of Lords pioneered this technique in the 1990s. During the first year the committee reported to the Parliament upon 4 Bills on this basis: *Public Finance and Accountability*; *Budget*; *Adults with Incapacity*, and *Abolition of Feudal Tenure*. It also examined other Bills on this basis

committees and by individual MSPs were intended to have a real impact on the Scottish statute book. Perhaps they arose more from a desire to provide some diversity in the initiation of legislation, and to make clear its intention that the Parliament should not be exclusively a processor of government legislation. In this sense, Committee Bills may have been seen as an extension of the 'private Members' bills' concept adopted for the Parliament. The priority accorded to Executive legislation both in terms of procedures and in allocation of parliamentary time and resources is clear in the first year of the Parliament, though there have been some developments in favour of committees and MSPs, such as the creation of the Non-Executive Bills Unit.

The involvement of the public was seen to be of particular importance at the pre-legislative stage, which the CSG wished to amount to more than traditional consultation. Yet, early experience has suggested that civic engagement on legislative policy has been displayed as much with the Executive directly, as with the Parliament's pre-legislative scrutiny processes. The Parliament has published guidance on its legislative process, and there is a certain amount of information through its website and publications on the progress of Bills and other legislation. However, decisions it has taken as to the form and content of legislation, and the perhaps inevitable complexity of the actual procedures themselves (such as the admissibility and consideration of amendments), may have produced a legislative process in some ways almost as remote and alienating as that at Westminster.

The position is more positive in terms of the Parliament's own scrutiny of Executive legislation, where the legislative procedures proposed by the CSG do produce enhanced opportunities for meaningful involvement. The unicameral nature of the Parliament also imposes a premium on coherent and well-drafted legislation, which can give MSPs some real influence on the passage of Executive legislation. The committee structure enables MSPs to become more involved and informed in legislative scrutiny, because they will have already been involved in any pre-legislative processes leading up to the introduction of a bill, and, in partnership with the full Parliament, in Stage 1 scrutiny of its general principles.

The involvement ofc008 Tw[(imppe of)6.2(the)5-6.5(m)-1.6en as

> 7.27 The detailed arrangements which the Scottish Parliament makes to control and scrutinise the spending of the Scottish Executive will be a matter for the Scottish Parliament and its committees, but the Scotland Bill will lay a general obligation on the Scottish Parliament to establish effective scrutiny and audit arrangements. Suitable machinery will have to be agreed before the Scottish Parliament becomes fully operational to ensure that the actions of the Scottish Executive can be called to account as soon as it assumes its responsibilities. In common with other central government expenditure the grant to the Scottish Parliament will fall to be audited by the UK Comptroller and Auditor General.

In fleshing out these aims within the context of the evolving devolution legislation, a Financial Issues Advisory Group (FIAG) was set up by the Scottish Secretary.[86] Its main conclusions were published as annex 1 of the CSG Report, and were accepteded by the CSG:

> The objective of FIAG endorsed by CSG was to ensure that the Scottish Parliament's finances are managed in a way that is open, accessible and accountable to the people of Scotland. FIAG has considered a wide range of public finance issues. Its report is also wide ranging and covers the main aspects of public finance. The report contains recommendations on the following issues:

- terminology;
- budgetary procedures;
- accounting arrangements;
- public accountability;
- audit arrangements.

CSG proposed that two key committees, Finance and Audit, be established to deal with financial matters. This committee structure, with both being designated as mandatory committees, was incorporated into Standing Orders, along with a general financial scrutiny role for subject committees within their subject areas, as was also recommended by the CSG. One of the generic functions of all committees is to “consider the financial proposals and financial administration of the Scottish Administration (including variation of taxes, estimates, budgets, audit and performance) which relate to or affect any competent matter”.

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[86] Its full remit was "to assist The Scottish Office in developing for consideration by the Consultative Steering Group (CSG), proposals for the rules, procedures, standing orders and legislation which the Scottish Parliament might be invited to adopt for handling financial issues, taking account of the deliberations of the CSG and contributing to the draft report which the CSG is to submit to the Secretary of State by the end of 1998 to inform the preparation of draft standing orders."

substantive proposals, and even of the legislative process itself, was clearly in the hands of the Executive.

7.3. The budget process

The first year of the Parliament meant that there would be an inevitable period of transition, not only to set up the procedures in legislation, Standing Orders and in other agreements and conventions, but in dealing with the first Scottish Budget. This was recognised by the Finance Committee in its report in December 1999:

> As a result of the timing of the Scottish Parliament elections, the envisaged three stage process has of necessity been curtailed this year. The Committee therefore agreed that it was not feasible to attempt to engage the subject committees in consideration of individual departmental expenditure plans this year. Instead, the Committee decided to use this transitional year as an opportunity to consider the format of the data made available at this stage of the process, the manner of its presentation and its content. … The Committee welcomes the approach that the Minister has taken in these discussion

These main agreements are contained in the Finance Committee's *written agreement between the Parliament and the Scottish Ministers on the budgeting process*, SP Paper 155. This contained three agreements on

- the budgeting process itself,
- the format of the budget documents
- in-year changes to expenditure allocations

In addition, the Committee concluded separate agreements with the SPCB on the Parliament's budget, and with the Scottish Commission for Public Audit on Audit Scotland's budget, and the Audit Committee published an agreement with Scottish Ministers on the form of accounts and powers of direction (SP Papers 156-8).

As to the budget process itself, FIAG approach was designed to ensure that it "will be less

with other committees of the Parliament. This will comment on the Scottish Ministers' proposals and may include an alternative set of proposals. The total spend proposed by the Finance Committee will not exceed the total proposed by the Scottish Ministers. A plenary debate will follow in which Committees and individual members may seek to table amendments to the Executive's expenditure proposals, within the total proposed.

The Scottish Ministers will produce a Budget Bill by 20 January each year or the first day thereafter on which the Parliament sits.

This process seeks to provide a parliamentary and public input into the budgetary process, including what may seem the rather radical notion that the Finance Committee can even produce what amounts to its 'alternative budget'. This is balanced by the truncated legislative procedure provided in Standing Orders for Budget Bills themselves. Stage 1 is taken in plenary, and not preceded by committee scrutiny; the usual rules on intervals between Stages do not apply; Stage 3 must begin no earlier than 20 days after introduction, but must be completed within 30 days of introduction, and amendments to a Bill can only be moved by a Scottish Minister.

7.4. Initial evaluation and prospects

The Parliament, and its Finance Committee in particular, had to spend as much, if not more, time during its first year in setting up the relevant financial procedures as in operating them. When compared with the Executive bureaucracy, this put the Parliament at somewhat of a disadvantage in fulfilling the CSG/FIAG aspirations of providing a novel and effective system of genuine parliamentary engagement in the financial function. Ministers constantly paid tribute to the co-operative spirit of the Parliament, its committees, and its members and staff in facilitating the passage of the necessary legislation, the PF&A Act, and the first Budget Act in 2000. However, parliamentarians were well aware of the structural shortcomings in these exercises, from their perspective. Some acknowledged improvements were made to the legislation during the Parliament's scrutiny processes, and much useful experience and familiarisation will have been gained during the first year. However the initiative in financial business remained firmly with the Executive during that first year.

The Finance Committee has been reviewing the procedures and practices relating to financial business, and has sought to involve the public in this exercise. It made a number of proposals for improvements, based on its experience of the first year's abbreviated process. Some of the proposed reforms that may result from these reviews, and from other evaluations of the Parliament's financial business, may be able to be implemented through Standing Orders or even administratively. However some may require legislation by the Parliament, and it will be a test of the Executive's commitment to the spirit of FIAG and CSG as to how constructively it approaches any demands for changes to the PF&A Act.

Another possible indicator of the Executiv

Executive (such as tuition fees and personal care for the elderly), often due to the risk of

If ownership of the budgetary function is to be shared, rather than resting solely with the Executive, then the whole process must provide scope for genuine involvement both by the Parliament and, equally importantly, by the wider public. The FIAG system sought to maximise the degree of sharing of power at the earlier stages, when Executive plans should be at their most tentative and subject to external influence. Stages 1 and 2 operate as a form of pre-legislative scrutiny exercise, enabling outline proposals to be tested, and even for alternative priorities and proposals to be floated. The third and final Stage is seen as the point at which the Executive gains ownership of the process, and the Parliament's role becomes more one of legitimation and approval, much as at Westminster.

This model can succeed if the first two Stages are seen to be legitimate and effective, from the point of view of all concerned. If not, there is a risk that demands will grow for greater parliamentary and public involvement at the third Stage, such as by making the legislative procedure for Budget Bills to become more like that of any other Executive Bill, with more committee involvement, and with the ability of all MSPs to propose amendments. Such a trend could, in practice, set the FIAG scheme on a path towards a more closed, Westminster form of financial scrutiny.

Greater familiarity with financial procedure will also give all the committees, and especially Finance and Audit, more scope to initiate inquiries into, and scrutiny of, other financial issues and policies. This type of activity may project the Parliament's financial scrutiny functions more to the forefront of parliamentary politics, especially if the Parliament tackled core issues such as the extent and use of revenue-raising and tax-varying powers. The budgetary process may, therefore, not become the sole or main forum for parliamentary debate on such fundamental issues as spending priorities or fiscal autonomy. The development of such parliamentary strategies will have an impact on the scope for effective and genuine public participation in the financial debate.

The present financial arrangements under the devolution legislation are significantly unbalanced in that the Executive, and therefore, by extension, the Parliament, have a far

Parliament in its first year, and do not assist the development of a stable and continuing Parlent

It rejected any requirement for a minimum level of support for the Parliament to be obliged to act: “the action taken by the Parliament on a particular petition should be dependent on a

lobbying tool, or as a means of privileged access to decision-makers. This is a difficult balance, and, thus far, the Parliament has seen the process primarily as a participative process, a means of connecting citizens with those in authority who influence their lives. In this model, the PPC's role is largely that of a facilitator, or as the published guidance describes it, "a gateway for public involvement in the parliamentary process." The Committee's convener has written about this aspect of its role:[87]

> "[The] committee exists to ensure that people have the right to directly petition the parliament and its committees, and, more importantly, to ensure that when they do so their petitions are treated respectfully and seriously….[It] has no agenda of its own other than to assure access to the parliament for petitioners and action by the parliament in response to those petitions. The issues to be dealt with are entirely a matter for the petitioners themselves."

This last point is crucial to the petitions system as a means of giving effect to the CSG vision. Other than by way of private legislation (an option not likely to be used frequently, certainly not by the public at large), a petition is the only substantive way that citizens can *require* the Parliament to consider and react to their views. Other forms of 'external' initiative, as in the Crick-Millar model, or by direct public involvement as members of committees, have not been adopted so far. Virtually all other processes are entirely at the formal initiative of the Parliament, its committees and bodies, or its individual MSPs.

The Committee has seen it as essential to its facilitating role that any procedural requirements, such as those relating to form, content and transmission of petitions, are kept to a minimum and are interpreted flexibly. The aim is to encourage, rather than impede, the interaction between petitioner and the Parliament. Thus, for example, there are virtually no restrictions on who can petition; no minimum number of signatories, and no single template for the format of a petition.

There are also relatively few restrictions as to the subject matter of a petition. A narrow interpretation of a petition's content would severely limit the process's potential. A petition is inadmissible if "it requests the Parliament to do anything which, in the opinion of the Committee, the Parliament clearly has no power to do." This has been interpreted broadly, distinguishing between the Parliament's legislative competence and its ability to consider virtually any subject, whether a reserved matter or not. The published guidance states that "a petition can make a request for the Parliament to take a view on a matter of public interest or concern, or amend existing legislation or introduce new legislation", and it provides a summary of the Parliament's legislative competence in terms of 'devolved' and 'reserved'

matters.[88] However, it does go on to exclude petitions which, for example, relate directly to particular legal proceedings, or which request unlawful action.

The PPC has to maintain a good relationship with those bodies, within and outwith the Parliament, to which it may refer petitions. If it acted merely as a 'post office', recipients would rapidly become disenchanted with the process. In the early days, some committees, already more overburdened than initially expected, were irritated at having more items in effect dropped in their lap over which they had little control.[89] On the other hand, the committees did not wish substantive petitions within their remit to be diverted elsewhere. As one study noted, "such contradictory expectations are characteristic of a new and developing procedural etiquette and have diminished as the PPC itself has become more assured about its own role in processing and monitoring public petitions."[90] Procedures have evolved between committees to smooth this process, including committees being copied into relevant petitions on receipt by the PPC and giving an indication whether they might wish for a referral.

strategy. In this way, petitioning may develop as a recognised, even standard, campaigning tactic.

Classifying petitioners by type may be rather subjective, but the available evidence suggests that about half of all petitions come from individuals (including 'serial petitioners'), with about 40% from groups of various types, and the remainder from local councils, businesses, political parties and politicians. It is difficult to break down the petitioning groups and associations with any accuracy. Some single-issue groups, for example, may have been formed expressly for the purpose of generating and submitting a petition. A recent study concluded that "in the main it has been organisations who would normally be labelled 'outsider' who have used public petitioning procedures to have their voice heard. … Overall, petitioning has proved a popular vehicle for a diverse range of local, Scottish, UK and national groups to raise their own issues of concern."[91]

The PPC has been determined to keep petitioners involved after they have submitted petitions. In addition to calling witnesses from the bodies responsible for the policy area which is the subject of a petition, it may invite the petitioner to participate in its proceedings. This happened 45 times in the first year, and the practice has evolved of having three petitioners appearing before it at each meeting. The Committee will seek to keep the petitioner informed of the progress of the petition, as well as its outcome in parliamentary terms.

Patterns of referral in the first year or so show that almost 70% go to other committees as the sole or primary point of referral (the vast majority being for their consideration rather than simply for information); around 10% each to the devolved Scottish government and to local authorities and other public bodies, with only 3% going to UK ministers. The Transport and Environment Committee is the most popular recipient committee, with more than a fifth of all committee referrals, followed by the Rural Affairs Committee and the Health and Community Care Committee.[92]

Analysing 'outcomes' is more problematic. Comparing the Parliament's own information, as recorded on its website, with the published research shows that for about 10% of petitions, no further action was taken by the PPC, other than by noting contents or by responding to the petitioner with readily-available information. On two occasions (on GM crops and on a proposed Borders Rail Link), petitions led to a debate in the Parliament. Petitions led directly, on nine occasions, to committee action such as an inquiry or as part of legislative scrutiny.

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[91] Cavanagh, McGarvey and Shephard, p75

[92] See table 5.3, above. Figures derived from table on petitions considered, *Scottish Parliament Statistics 1999-2000*, Dec 2000, p39 (and from the pages on each individual committee), and from Cavanagh, McGarvey and Shephard, *op cit*, tables 3 and 4

Examples of this are the reports by the Health and Community Care Committee in response to petition over processes relating to the future of Stracathro Hospital in Tayside and to the siting of a new and controversial unit at Stobhill Hospital, Glasgow. Some petitions have fed

to Westminster.[94] It may be that this positive ministerial view may be due to a feeling that the Scottish petitions model is just the sort of discrete and visible 'off the shelf' procedure, which can be conveniently copied elsewhere as a public symbol of modernisation and reform.

This may sound a timely warning for the Scottish process. For the petitioning technique to make a genuine contribution to the achievement of the CSG vision, it has to be, and be seen to be, a means of enabling the public and the Parliament to make a difference in Scottish public policy. Robin Cook chose to describe the Newton Report's support for the technique in terms

9. The Parliament in plenary: representing the people together

9.1. The role of the plenary meeting

The previous chapters have examined the ways in which the Parliament operates primarily or substantially through its committees. The intention of the framers of the Parliament was not to so concentrate its formal proceedings in either plenary or committee sessions that one forum would overshadow the other. The focus on committee activity was not meant to be at the expense of plenary meetings. While covetous eyes are often cast across the Atlantic at the strength and prestige of Congressional committees, none wished to replicate the perceived diminished role of the two Congressional chambers. The balance between plenary and committee was not to be a 'zero sum' relationship, but rather a complementary, and mutually fruitful one, where the activity of the Parliament as a whole would be more than the sum of its constituent parts.

This is not an easy balance to achieve, and, to a large extent, it is not something that can be assured simply by way of provision of the appropriate institutional framework. Though the

offices. Some parliamentary business, such as oral questions, takes place entirely in plenary, whereas other forms of business derive from prior activity in committees. The legislative process, in particular, is designed as a seamless process involving both plenary and committee proceedings.

9.2. Making collective decisions

i. Appointments et.

The Parliament is required or empowered by a range of legislative[96] and Standing Orders provisions, to be involved in the appointment or removal of people to many particular offices, not all of which are internal parliamentary posts. The extent of parliamentary involvement varied, depending on the type of office or post concerned. For example, it nominates an MSP to be appointed as First Minister, but the actual appointment of First Minister is made by the Sovereign following a recommendation by the Presiding Officer of that nominee. However it directly elects its Presiding Officer and two deputies. Again, its powers of removal may be different from those of appointment. It (or the SPCB) may also have power to set terms and conditions, including pay and allowances for some offices.

Some of these appointments powers were of necessity exercised in the Parliament's initial meetings:

Presiding Officer & 2 Deputy Presiding Officers:	12 May 1999
First Minister:	13 May 1999
Other Scottish Ministers:	19 May 1999
Junior Scottish Ministers:	19 May 1999
Scottish Law Officers:	18 May 1999
Scottish Parliamentary Corporate Body (SPCB):	19 May 1999
Parliamentary committees:[97]	17June 1999
Auditor General:	15 Sept 1999
Parliamentary Bureau:[98]	---

Over the first Parliamentary year, there was no further use of any power of appointment or removal in relation to the 3 presiding officers, the SPCB or to any ministerial posts, other than

[96] These powers will likely grow over time as the Scottish and UK Parliaments legislate in particular areas. In the first year, for example, the *Public Finance and Accountability (Scotland) Act 2000* provided for the appointment by the Parliament of 4 of its MSPs to be members of the Scottish Commission for Public Audit. The method of appointment to the SCPA, by the SPCB following the agreement of the Parliament, was added to Standing Orders in June 2001.

[97] The initial membership was completed by two further appointments on 2 July.

[98] The Bureau is required to be 'established' by the Parliament (*rule 5.1.1*), but this seems not to have been by way of any proceedings at a meeting of the Parliament in 1999.

the two Law Officers. This last exercise was due to the appointment of the Lord Advocate as a senior judge, and the Parliament agreed on 17 February 2000 (not without some adverse comment on the nature and timing of this elevation, especially in view of the forthcoming trial in the Netherlands of the two Libyans accused of the Lockerbie bombing) that he be replaced by the Solicitor General, Colin Boyd, and that Neil Davidson be the new Solicitor General.

There were no other changes in the ministerial team until the First Minister's death in October 2000 led to the nomination of Henry McLeish on 26 October (contested also by the SNP and Conservative leaders and by Dennis Canavan), and of the consequential changes to the composition of his ministerial team on 1 November. This major, and unexpected, reshuffle highlighted the limitations of the Parliament's involvement in the makeup of the

This was compounded by the transitional nature of this period. The Parliament and the Executive did not inherit their full powers until

- *Executive's Legislative Programme** – (i) statement by First Minister, and questions and debate, no question for decision 16 June 99; (ii) statement by First Minister and debate, no question for decision 14 September 2000
- '*Programme for government*'* – Executive policy programme '*Making it work together*' debated and agreed on division 9 September 1999
- *Concordats** – Memorandum of Understanding and initial concordats debated and agreed, subject to two agreed drafting amendments, on division 7 October 1999
- *British Irish Council** – policy and Executive participatio

Justice:	5	(3 cabinet, 2 junior)
Rural Affairs:	2	(1 cabinet, 1 junior)
Transport & the Environment:	1	(1 cabinet)
		(30 cabinet, 16 junior)

Other points to note are:

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then carried, in all cases bar one (an SNP motion on the Act of Settlement, a reserved matter, on 16 December 1999) by division. Inter-party rivalry among the Opposition is demonstrated by the frequent challenges to each other's mo

from seeking to deflect some categories of information requests towards other bodies (especially the Parliament's own services), to seeking the extension of the period for answer during recesses. In response, the Procedures Committee has scrutinised the Executive's

be said to enable ministers to avoid public scrutiny through the questioning or debate that follows an oral statement in plenary.

The usual justification, one which Executive ministers have made, is that this use of PQs is a convenient and less burdensome way of making Parliament and the public aware of information they judge relevant, and which otherwise would be released through time-consuming plenary statements or simply by extra-parliamentary announcement. Generally, the Procedures Committee has accepted the practice as not objectionable in principle, especially given the limited amount of plenary time available for oral statements. It has argued that its use needs to be more transparent, so that such questions can be distinguished from 'genuine' questions initiated by MSPs.

There is a dedicated question period in plenary each week, generally on a Thursday afternoon. Initially there was a period of 30 minutes for randomly-selected questions to all ministers ('Question Time'), followed by a period of 'Open Question Time' lasting 15 minutes, where up to 3 questions were selected by the Presiding Officer. This was changed in the December 1999 revision of the rules, following requests for a dedicated period of questioning of the First Minister. Question Time was extended to 40 minutes, and Open Question Time became First Minister's Question Time and was extended to 20 minutes. 1,806 oral questions were lodged in the first parliamentary year.

Questions can be lodged for oral answer the same day, if they meet the same urgency criteria as urgent ministerial statements. However no such questions were accepted during the first parliamentary year, the first being taken on 26 May 2000, on a proposed strike affecting ferry services.

A total of 6,619 written questions were lodged during the first parliamentary year, a monthly average of 552.[107] The heaviest single month was March 2000, with 1050, and the lightest June 1999, with 331.[108] As may be expected, the main Opposition parties asked the bulk of these questions – SNP Members asked 3803 (57%) and Conservatives asked 1173 (18%).

ii. Ministerial statements

There were 44 ministerial statements during the first Parliamentary year. As with the categorisation of Executive debates in the previous section, these statements can be divided by the minister making them:[109]

107

First Minister:		4	
Children & Education:		5	
Communities:		4	(3 cabinet, 1 junior)
Enterprise and Lifelong Learning:	3		
Finance:		5	
Health & Community Care:		6	
Justice:		5	(4 cabinet, 1 junior)
Rural Affairs:		3	(1 cabinet, 2 junior)
Transport & the Environment:		9	
		44	(40 cabinet, 4 junior)

Parliamentary rules appeared to regard ministerial statements as fulfilling two distinct purposes.[110] Ministers could notify the Presiding Officer of their intention to make a statement, and the Bureau would then provide time for it in a business programme. If a statement is "of an urgent nature", and the Presiding Officer is of the opinion that it is "sufficiently urgent", a statement can be made on the same day as it is requested. These two mechanisms (there is a separate procedure for 'emergency questions') appeared therefore to envisage, respectively

- planned or programmed statements, presumably for policy announcements, especially those deemed sufficiently important as not to be made by way of an 'inspired question'. Unlike Westminster, slots were often provided in business programmes, which generally dealt with two weeks' future business, for such statements, even though the proposed subject was always not revealed at that time.
- unplanned, reactive statements, presumably to deal with current crises or policy developments.

The parliamentary treatment of a statement of either form, such as whether and how they should be debated, as provided by Standing Orders, caused some initial confusion. Early practice was for a statement to be followed immediately by a period of questioning of the Minister concerned. In some cases, this was followed by a debate on the statement, either immediately or at a future date. Bureau guidance on this was during the first summer recess, which was endorsed by the Procedures Committee during its review of Standing Orders in late 1999, and these procedures appear to have operated smoothly thereafter. Five

[110] The presiding officers have consistently enforced the principle that major Executive policy announcements should be made first in the Parliament, as far as possible.

statements in the first year were followed by a debate, all on subjects which could be regarded as falling into the category of planned announcements.

iii. Examining legislation

The Parliament's legislative process has already been considered in chapter 6, in the context of the role of committees, and will not be repeated here. The plenary role is primarily

- to decide on whether to approve the general principles of a Bill, following a report from one or more committees
- to make any final amendments to a Bill after it has had detailed 'line-by-line' scrutiny in committee
- to decide whether or not to pass a Bill, so that it can receive royal assent.

Depending on the particular procedure adopted for a Bill, more (or even all) proceedings on a Bill may also be taken in plenary (sometimes in the guise of a Committee of the Whole Parliament) rather than in committee. An example of this is a Bill taken under the emergency bill procedure, of which the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 was the only instance during the first two years.[111] Any reconsideration of a Bill which has been passed but then challenged by the Secretary of State or a Law Officer under the Scotland Act provisions is also taken in plenary rather than in committee. This has not yet been necessary.

The impact that plenary proceedings can have on the passage of a bill, and the interaction between plenary and committee stages, can be seen from the case of the Abolition of Poindings and Warrant Sales Bill, discussed in chapter 6 in the context of Members' Bills. In the early days, this was the only substantive example of a potentially serious clash between the views of the Parliament in committee and of the Parliament in plenary, as can arise at Stage 1. The Stage 1 decision is important for the rest of the legislative process, as any proposed amendments at later stages which are deemed to be contrary to a Bill's 'general principles', as agreed, are inadmissible. These are described in the official guidance as 'wrecking amendments'. Stage 3 plenary proceedings could also provide the opportunity for 'legislative bargaining' by promoters of bills,

the First Minister in the Parliament on 9 June 1999; by the UK and Scottish governments in the Memorandum of Understanding, and by the House of Commons Procedure Committee.[112] There were 7 'Sewel Motions', covering 9 Bills, in the first year, and a further 5 before the summer recess in July 2000:

Table 8.2: Sewel motions, to July 2000

Motion	Bill	Minister	Debated

iv. Committee and members' business

The Parliament's rules guarantee periods of plenary time for committee-initiated business. This amounts to 12 half sitting days in each parliamentary year, or approximately 33 hours. It would appear that this minimum target was not achieved in the 1999-2000 year. The Parliament's official statistics only record 9 hours 43 minutes of plenary business based on committee motions (although they do not itemise this business), and none on committee bills (there not being any in the first year). Of the 9 motions introduced on behalf of committees, 6 were in relation to Standards (4) and Procedures (2) Committee reports on internal parliamentary matters, such as the establishment of the Code of Conduct or amendments to Standing Orders. The other three were:[113]

- 16.03.00 Health & Community Care: Health Boards and NHS Trusts
- 26.04.00 Rural Affairs: Impact of Water Boundaries Order
- 11.05.00 Transport & the Environment: Telecommunications Inquiry

The first year, therefore, is not a good guide as to how committees -22.9(- Tc0.na617.8403J--3.4(.2(4)-0(Commit

There were 62 such debates, consuming 33 hours 11 minutes, in a first year which had 73 meetings. All 11 meetings without such a slot were near the beginning of the year, and all meetings after 23 September 1999 had a member's business debate. These slots do not appear

The Executive has tended to dominate plenary business. Other than the Parliament's first two meetings, when no Executive existed, there were only 5 meetings which contained no business initiated by, or on behalf of, the Executive. The proportion of committee-initiated business in the first year may not have been typical, and the advent of committee bills in later years will raise that proportion. Almost exactly 10% of plenary time was spent on Bills, virtually all of which were Executive Bills (over 30 hours out of a total of just under 33 hours). Half the time spent on substantive policy debates was on Executive motions, and virtually 10% of the total plenary time was taken up by ministerial statements.

The ability of the Executive to set so much of the Parliament's plenary agenda can undermine the achievement of the CSG principles, especially in the extent to which the Parliament can hold ministers to account effectively, and can scrutinise their policies and actions. Despite much of the early media reporting, the Parliament also spends relatively little, perhaps too little, of its time in domestic 'navel-gazing'. A regular working pattern of 1½ days a week in plenary session may well be too little, though the Parliament has thus far resisted virtually all attempts to expand this time significantly. This pattern is designed to maintain a balance between plenary, committee, party and 'constituency' activity, but it may also limit the Parliament's overall ability to do its job. Extra time could be made available if the Parliament sat for more weeks in the year, as an alternative to longer sessions over more days each week. Such options may well have to be considered in the coming years.

10. Managing itself

10.1. Introduction

The extent to which the Scottish Parliament has legal and functional autonomy is central to the way in which it operates both as a 'parliament' and as a functioning institution. The devolution legislation provided the Parliament with a number of ways in which it c3 6(w)2h3is

> privilege" in relation to the Scottish or its members in the sense understood at Westminster….

This guidance cannot and must not be regarded as a comprehensive statement on this complex area of law, which is expected to develop over time. The senior staff of the Parliament will be happy to provide furt

> way of legal action, a Committee of this Parliament that its own view of its own rules is inappropriate or even wrong. That, in my opinion, is far beyond what the legislation contemplated the extent of intervention by the Court of Session would be in the activities of the Scottish Parliament.

However, on appeal, a different view was clearly taken, best expressed by the Lord President, Lord Rodger of Earlsferry, in a passage whose importance entitles it to be reproduced extensively here:

> The Lord Ordinary gives insufficient weight to the fundamental character of the Parliament as a body which - however important its role - has been created by statute and derives its powers from statute. As such, it is a body which, like any other statutory body, must work within the scope of those powers. If it does not do so, then in an appropriate case the court may be asked to intervene and will require to do so, in a manner permitted by the legislation. In principle, therefore, the Parliament like any other body set up by law is subject to the law and to the courts which exist to uphold that law….
>
> Some of the arguments of counsel for the first respondent appeared to suggest that it was somehow inconsistent with the very idea of a parliament that it should be subject in this way to the law of the land and to the jurisdiction of the courts which uphold the law. I do not share that view. On the contrary, if anything, it is the Westminster Parliament which is unusual in being respected as sovereign by the courts. And, now, of course, certain inroads have been made into even that sovereignty by the European Communities Act 1972. By contrast, in many democracies throughout the Commonwealth, for example, even where the parliaments have been modelled in some respects on Westminster, they owe their existence and powers to statute and are in various ways subject to the law and to the courts which act to uphold the law. The Scottish Parliament has simply joined that wider family of parliaments. Indeed I find it almost paradoxical that counsel for a member of a body which exists to create laws and to impose them on others should contend that a legally enforceable framework is somehow less than appropriate for that body itself….
>
> [C]ounsel for the first respondent submitted, however, that this court should exercise "a self-denying ordinance in relation to interfering with the proceedings" of the Scottish Parliament. Lord Woolf used that expression to describe the attitude which the courts have long adopted towards the Parliament of the United Kingdom because the relationship between the courts and Parliament is, in the words of Sedley L.J., "a mutuality of respect between two constitutional sovereignties". The basis for that particular stance, including Article 9 of the Bill of

> Rights 1689, is lacking in the case of the Scottish Parliament. While all United Kingdom courts which may have occasion to deal with proceedings involving the Scottish Parliament can, of course, be expected to accord all due respect to the Parliament as to any other litigant, they must equally be aware that they are not dealing with a parliament which is sovereign: on the contrary, it is subject to the laws and hence to the courts. For that reason, I see no basis upon which this court can properly adopt a "self-denying ordinance" which would consist in exercising some kind of discretion to refuse to enforce the law against the Parliament or its members. To do so would be to fail to uphold the rights of other parties under the law. The correct attitude in such cases must be to apply the law in an even-handed way…"

The Lord President could not be clearer. It is the UK Parliament, not the Scottish Parliament, which is the exception to the general level of legal protection afforded to parliaments. As the case was not taken further, there matters rested in terms of Scottish public law. The UK Parliament could overturn the effect of this interpretation by legislation, but it is less certain that the Scottish Parliament is legislatively competent to do so itself.

10.3. The SPCB and its staff

At the apex of the Parliament's administrative and institutional structure is the Scottish Parliamentary Corporate Body (SPCB), composed of the Presiding Officer and 4 MSPs elected by the Parliament.[116] It is a body created directly by the *Scotland Act*, to fulfil various legal functions for the Parliament, such as the provision of its staff, property and resources. It sets the Parliament's budget, which comes out of, and has a prior call on, the Scottish Consolidated Fund.[117]

were formally published, but from June 2001, the minutes and most papers of SPCB meetings have been published on the Parliament's website. It moved 6 motions in plenary sessions during the year, all agreed to by the Parliament, and produced five reports to the Parliament

There was a transitional period at the establishment of the Parliament, when all staff were formally employed by, or seconded from, the Scottish Office / Scottish Executive. During this period, the SPCB prepared and offered contracts to existing staff, and began employing new staff in its own right. As at 1 July 1999, of the 319 such staff employed "96 were career civil servants from the Scottish Executive; eight were seconded from Westminster; and 215 had been recruited directly from a variety of sources such as local government, central government departments, other public sector bodies and the private sector." By November 2000, "out of a total of 371 staff in post: 316 are employed by the SPCB direct; 53 are seconded from the Scottish Executive and two are seconded from Westminster."[120]

The SPCB ran 55 recruitment programmes and filled 105 posts up to the end of May 2000. It recruited its staff directly as from 1 April 2000 "under the principles of fair and open competition", and 61 new posts were advertised in external competition between then and the end of November 2000.[121]

This is considered here by way of case-studies of two central aspects of that second phase - procedures and standards – through the work of the two relevant committees.

Initial reform: Perhaps the important domestic task the Parliament had to undertake in its first year or so, was to examine the adequacy and efficacy of the rules, procedures and practices it had been presented with at its inception. This was carried out primarily by the Procedures Committee, a mandatory committee with a remit "to consider and report on the practice and procedures of the Parliament in relation to its business."

The Parliament's initial constitution was created, through the primary legislation, delegated legislation made under it, and the development of detailed rules and procedures. There was a four-track approach in the 1997-99 period:

- basic provisions about operational aspects of the Parliament, including some mandatory and discretionary issues to be covered in Standing Orders, in the *Scotland Bill* going through Parliament in 1998;
- detailed preparatory work in and around the CSG process (1997-1998)
- preparation of initial set of Standing Orders and other provisions in delegated legislation made under the *Scotland Act* (1998-1999);
- practical preparation for the establishment of the Parliament and its initial necessary business, such as oath-taking and elections of the presiding officers (1998-1999)

Standing Orders were promulgated in UK delegated legislation in April 1999, just a month before the Parliament was due to assemble. This also provided that these Standing Orders would "cease to have effect on the day on which the first standing orders made by the Parliament come into force". Thus any action by the Parliament to bring in its own Standing Orders would automatically override the whole of the initial set. The Procedures Committee was required to propose to the Parliament the draft of a new set of Standing Orders. These could be the same set as the initial set, with or without modifications, but any modifications had to be consistent with the provisions of the *Scotland Act*.

The Committee described in its December 1999 report how it approached this task. The Parliament should have its own Standing Orders "without undue delay", and, because of the absence of much operational experience, "it would be inappropriate to embark on wholesale changes which could in hindsight prove to have been ill founded." Significantly, the

build upon and develop the innovatory procedures and practices of the Parliament which, as members will be aware, are being observed with keen interest in other parliaments and assemblies in the UK and around the world.

regularly review its policy and performance against these key principles. We suggest that such reviews should be undertaken at least once during each Parliamentary session; with the end of each Parliament providing a further opportunity to take stock."

The Committee agreed to take this forward at its last meeting of 1999, and this was given further impetus by the appearance before it by a group of interested observers of devolution and the Parliament who had produced a paper, urging constant adherence to the spirit and practice of the CSG principles and agenda. As a first stage of this enquiry into "whether the key CSG principles as endorsed by the Parliament … are being implemented in the Parliament, to what extent and with what success", the committee undertook a review of existing research. At the time of writing, stage 2, involving wide-ranging evidence-taking and consultation, both within and outwith the Parliament, is in progress.

10.5. Maintaining the Parliament's standards

The Parliament was created at a time when parliamentary standards was a major issue in British politics. 'Sleaze' was one of the key political buzz-words of the 1990s, and it was clear that the new Parliament would not only have to be modern and efficient, but would also have to demonstrate the highest standards of probity. In addition, there had been similar problems in Scottish local government, and there was some concern that a devolved parliament could, in this respect at least, become a local council writ large.

The CSG report said that its principles were intended to achieve a Parliament "whose elected Members the Scottish people will trust and respect," and a CSG working group produced a detailed report on a Code which sought to give effect to that aspiration. The Standards Committee was charged by Standing Orders with producing a Code of Conduct, a task initially seen as an important if a relatively technical and low profile task. It was also expected to begin work, following the first summer break, on other standards issues, such as a register of members' interests.

However the Committee's workload, and with it, its parliamentary and public profile, rocketed due to the emergence of a number of unexpected issues. The regulation of cross-party groups, for example, is considered in chapter 11. The biggest issue was the 'Lobbygate' affair which blew up in September 1999, when the *Observer* newspaper published a story about the alleged actions of a lobbying company with connections to senior Scottish Labour figures. This was a complex story, involving many leading politicians, including ministers in the new Executive, and the then Scottish Secretary's son, who was employed by the lobby firm.

In many respects, this was an issue which should properly have been directed primarily at the Scottish Executive, and, in so far as some of the allegations related to pre-devolution

events and ministers, at the UK Government. The Parliament could have legitimately said that it was largely not a matter for it, and, in any case, as a very new body, it had yet to work out its complaints and investigatory procedures. These procedures had to be robust, in view of the Parliament's exposure to legal challenge. However, the media outcry focused squarely on the Parliament and what it intended to do about this 'scandal', and there were reports that the First Minister had agreed to, or even 'ordered', a parliamentary inquiry. The Parliament was, in effect, caught in the crossfire, and was ill-equipped to resist becoming embroiled.

There also appeared to be a feeling that, after a series of negative presentational episodes in its first few months, here was an opportunity for the Parliament to assert itself by taking a robust stand on such a sensitive issue. Legal questions as to its jurisdiction to examine what was largely events involving ministers, including pre-devolution UK ministers, were overcome to its own satisfaction, by way of the Standards Committee restricting its investigation into whether there was any "evidence of breaches of any code that covers the conduct of MSPs."[125] An adviser was appointed to support the Committee in this inquiry.

The Lobbygate inquiry dominated the Standards Committee's work in October, when it met in formal session on five occasions. Much of its proceedings, especially when there were high-profile witnesses before it (such as the son of the Scottish Secretary on 8 October, and

scope for innovative development, it did make a number of changes to the set of key principles which CSG had provided as the template for the Code, especially in the areas of accountability and representation. The 9 key principles which CSG said should form the basis of such a Code, included the following relevant aspects:

- *Public duty*: "Members have... a duty to act in the interests of the Scottish Parliament as a whole and the public it serves"
- *Duty to constituents*: "Members have a duty to be accessible to their constituents. Members should consider carefully the views and wishes of their constituents; and, where appropriate, help ensure that constituents are able to pursue their concerns."
- *Selflessness:* "Members should take decisions solely in terms of the public interest…"
- *Integrity:* "Members should not place themselves under any financial or other obligation to any individual or organisation that might influence them in the performance of their duties."
- *Honesty:* "Members have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest."
- *Openness*: "Members should be as open as possible about all the decisions and actions they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands…"
- *Responsibility for decisions*: "Members remain responsible for any decision they take. In carrying out public business Members should consider issues on their merits taking account of the views of others."
- *Accountability*: "Members are accountable for their decisions and actions to the Scottish people and should submit themselves to whatever scrutiny is appropriate to their office."
- *Leadership*: "Members should promote and support these principles by leadership and example, to maintain and strengthen the public's trust and confidence in the integrity of Members in conducting public business."

The Parliament stated clearly its own view of itself in the very first paragraph of its Code of Conduct:

> The Scottish Parliament commits itself to being an open, accessible, participative Parliament in which the public and other organisations in civic society are partners. It exists to serve the people of Scotland and is accountable to them.

Although again much of the Code, as adopted, reflects overriding concern with issues of ethics and probity, its set of 7 key principles have a dual purpose. They "set the tone for the

relationship between members and those they represent and between the Parliament and the people of Scotland," and contain some wording on representational aspects which are subtly distinct from CSG's draft:

- *Public duty*: "Members' primary duty is to act in the interests of the Scottish

The committee conveners first met as a group just before the end of the Parliament's first summer recess under the aegis of the Presiding Officer. It convened in private, presumably for much the same reason that the Bureau meets in private, to facilitate free and substantive cross-party discussion.

The Group very rapidly decided that it should be formally constituted in Standing Orders, so that it could have an independent status in its dealings with the Parliament's governing bodies, such as the Bureau and the SPCB, and have a defined remit in terms of functions and responsibilities.[131] Because of the way Standing Orders are constructed, this formalisation would require substantial rewriting of the existing rules. Given its unique nature and composition, it would presumably exist as a *sui generis* body like the Bureau, rather than be a parliamentary committee.

The Procedures Committee were approached, and very briefly considered the matter at its 5 October 1999 meeting, though a hint of future difficulties appeared in the contribution of Mike Russell, then the SNP's business manager and Bureau member:

> "One of my concerns, which I know has been expressed by several members of the bureau, is that there is already the Scottish Parliamentary Corporate Body and the Parliamentary Bureau. There are difficulties with that in terms of roles and responsibilities—they are being worked out. If we have a third standing group, the committee of conveners, does that add to our difficulties or does it diminish them? I would like that question to be addressed, because clarity in parliamentary business and in the Parliament's operation is what we need."

By the time the Committee discussed the matter again, in two meetings in February 2000, the Group had set out its thinking in more detail, and consultations had been undertaken with interested parties, such as the Bureau. Differences had indeed emerged between the Bureau and the Group, especially over the Group's desire to take over some of the Bureau's functions relating to committees. The Bureau seemed reluctant, ostensibly on business management grounds, to cede some of these functions, preferring generally to see the Group retaining an essentially advisory rather than executive role. The Procedures Committee took the view that it was not its function to resolve such differences.

There matters rested, at least publicly, until the autumn of 2000. Behind the scenes, this time was apparently devoted to the Group, the Bureau and the SPCB thrashing out an agreed approach that could be presented to the Committee as a basis for amendment of Standing

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[131] The Group may have had in mind the model of the House of Commons' Liaison Committee, and related bodies such as the Chairmen's Panel and the Committee of Selection. The group appeared originally to be known as the 'Conveners' Group', but the word 'Liaison' was added almost immediately.

Orders. The option still remained of adhering to the status quo, with the Group functioning on an informal basis, perhaps with some develo

Parliament's agenda. Just before the end of the first summer recess, the Presiding Officer had set out publicly, in a written answer, the Parliament's approach:

> Clerks are currently preparing draft proposals for the establishment of a scheme to register all party parliamentary groups, to be considered by the Standards Committee. Once such a scheme is in place, the SPCB will be invited to consider what facilities might be made available to registered groups….

The Standards Committee examined the practice of all-party groups at the House of Commons, to see whether it provided a suitable and appropriate template for the Scottish Parliament. However there were wider issues of principle for the Committee to address, some of which were being aired actively in the related lobbying debate. In essence, these could be summarised as whether or not the existence of all-party groups enhanced or impeded the Parliament's agenda, especially in terms of openness, inclusiveness and participation.

The Committee's approach envisaged a mechan

- “The group must be Parliamentary in character, and its purpose must be of genuine public interest” (*rule 1*)
-

There has been some debate in the Committee about whether some proposed purposes may be regarded as too local or specific to conform with the spirit of *rule 1*. Perhaps the most interesting aspect, from the broader perspective of the ethos of the Parliament, is the potential conflict between the requirement for 'all-party' inclusiveness and the 'campaigning' nature of some issues. Inclusiveness does not mean 'non-controversial', and can encompass the creation of groups with diametrically opposing purposes relating to the same area of public policy; indeed it can emphasise that not all issues divide neatly and cleanly on party lines.

However, greater difficulty arises when support

- Time for Reflection will be held in the Chamber in a meeting of the Parliament normally as the first item of business each week;
- Time for Reflection will be held in public and will be addressed both to Members and to the Scottish people;
- Time for Reflection will last for a maximum of four minutes;
- Time for Reflection will follow a pattern based on the balance of beliefs in Scotland; invitations to address the Parliament in leading Time for Reflection will be issued by the Presiding Officer on advice from the Parliamentary Bureau;
- Time for Reflection will be recorded in the Official Report.

The first Time for Reflection took place on 27 October 1999, and contributors have included representatives of the Christian denominations (including Cardinal Winning and the Moderator of the General Assembly of the Church of Scotland), of the Muslim, Jewish and Hindu communities, of humanists, and of interdenominational organisations.

The creation of this particular proceeding is relevant to this Study. The initial impetus within the Parliament came from a desire for an element of religious prayer in the Parliament's formal proceedings, somewhat akin (consciously or otherwise) to 'prayers' at Westminster. The ethos of the 'new politics' provided a convenient and legitimate way of defusing the potential for acrimony and division, by broadening the initial proposal into something regarded as (compared to Westminster) more inclusive and transparent. This can be seen, not just in the process by which general consensus was reached, but also in three crucial provisions of 'Time for Reflection' - it has a multi-faith aspect, it was directed not just at MSPs but at "the Scottish people", and it would be recorded in the Official Report. The apparent success of the Time for Reflection period can be attributed to the availability and application of the Parliament's underlying vision.

11.4. First Minister's Questions

Perhaps one of the most interesting and revealing procedural changes which occurred early in the Parliament's operation was the adoption of a dedicated Question Time for the First Minister, as part of the reforms to Standing Orders at the end of 1999. A constant theme of the founding spirits of the new Parliament was that it should not imitate Westminster's defects, which were seen to derive, to a large extent, from its confrontational style.

The worst example of that style is often said to be Prime Minister's Question Time. A leading CSG member, Professor Alice Brown, has written that a First Minister's Question Time "had not been recommended by the CSG on the grounds that it might encourage some of the more

negative aspects associated with Prime Minister's Question Time at Westminster."[135] The CSG Report emphasised that "the time provided in Plenary for parliamentary questions should not be used for political points scoring". It proposed that, rather than dedicated question periods for particular ministers or topics, all PQs would be addressed to the Scottish Executive, and "it would be for the First Minister to allocate questions to particular Ministers for reply". This latter proposal "would ensure that questions on topical issues could be pursued."

The initial Standing Orders generally followed the CSG's preferred model for the Parliament's oral question period ('Question Time' and 'Open Question Time'). The First Minister answered questions just like any other Minister during both segments of the regular Thursday afternoon question period. The level of involvement of the First Minister can be gleaned from three Question Times in 1999: 17 June (the first such period), 23 September, and 16 December (the last period under the initial arrangements):

Question Time:
18 Questions, of which 12 answered by Cabinet Ministers and 6 by Junior Ministers. None was answered by the First Minister

Open Question Time:
3 Questions, of which 2 were answered by the First Minister and 1 by another Cabinet Minister. The first question was asked by the SNP leader, who had 3 supplementaries, followed by 2 supplementaries by other Members. The second question was asked by the Conservative leader, who had 2 supplementaries, followed by a supplementary by another Member. The third question elicited 2 supplementaries, 1 by the original questioner.

[135] A Brown, "How the Parliament works", in G Hassan & C Warhurst, *The new Scottish politics: the first year of the Scottish Parliament and beyond,* 2000, p52.

Question Time:

18 Questions, 3 of which were answered by the First Minister, 5 by other Cabinet Ministers and 10 by Junior Ministers. All three dealt with by the First Minister appear to be taken in the place of the Transport & Environment Minister, who was in Ireland on official business, although two later transport questions were taken by a Junior Minister

Open Question Time:

3 Questions, of which 1 was answered by the First Minister, 1 by another Cabinet Minister, and 1 by a Junior Minister. The first question was asked by the Conservative leader, who had 2 supplementaries, followed by a supplementary by another Member. The second question was asked by an SNP frontbencher, who had 2 supplementaries, followed by a supplementary by another Member. The third question, by a Liberal Democrat MSP elicited 5 supplementaries, 2 by the original questioner.

not always the case. The consensus of opinion within the Parliament and from observers in the media was that this attempt to provide a mechanism that would exploit the best of PMQs without its defects, was not working successfully.

The Conservative leader, David McLetchie, wrote to the First Minister, in a letter released to the press, as early as 28 May 1999 to ask for a First Minister's Question Time. His arguments

First Minister will normally answer personally such questions as are selected for FMQT, but that exceptionally another member of the Executive may do so in his absence."

These proposals were welcomed during the Parliament's debate on the Committee's report on 9 December 1999, especially by the Executive itself. The Committee's convener, Murray Tosh (Con), explained that it was intended to provide a key element of accountability desired by MSPs and the First Minister weekly, and he hoped that it would "add to the Parliament's standing among the Scottish people."

The change in the profile of the First Minister's involvement at the Parliament's regular Thursday afternoon question period can be seen from three such periods, those of 13 January 2000 (the first session under the new arrangements), 11 May 2000 (the end of the first Parliamentary year), and 7 September 2000 (the first after the Parliament's second summer recess).

Question Time:
15 questions, of which 11 were answered by Cabinet Ministers and 4 by Junior Ministers. None was answered by the First Minister.

First Minister's Question Time:
4 questions, all of which were answered by the First Minister. The first question was asked by the SNP leader, who had 3 supplementaries. The second question was asked by the Conservative leader, who had 2 supplementaries, followed by 2 supplementaries by other Members. The other two questions elicited 6 supplementaries, 3 by the original questioners.[136]

Question Time:
15 questions, of which 9 were answered by Cabinet Ministers, and 6 by Junior Ministers. None was answered by the Deputy First Minister, either in his capacity as Minister for Justice, or as Acting First Minister (in the absence through illness of the First Minister).

[136] The Presiding Officer had intended that there be a fifth question, but the Member, when called, chose to ask a supplementary to the previous question.

First Minister's Question Time:
5 questions, all of which were answered by the 'Acting First Minister'. The first question was asked by the SNP leader, who had 3 supplementaries, followed by a supplementary by another MSP. The second question was asked by the Conservative leader, who had 3 supplementaries. The other 3 questions elicited 9 supplementaries, 3 by the original questioners.

Question Time:
11 questions, of which 7 were answered by Cabinet Ministers and 4 by Junior Ministers. None was answered by the First Minister.

First Minister's Question Time:
5 questions, all of which were answered by the First Minister. The first question was asked by the SNP leader, who had 3 supplementaries. The second question was asked by the Conservative leader, who had 2 supplementaries. The other 3 questions elicited 7 supplementaries, 3 by the original questioners.

The distinction between the two question periods was now clear, with the first period becoming 'Ministers' Question Time', without the participation of the First Minister. The second period was exclusively intended for questions to the First Minister (or by another Minister, in the First Minister's absence).

These changes were not merely cosmetic adjustments to the existing system. The decision to adopt so explicit a name for the question period signalled an acknowledgement that something akin to Commons' PMQs was what was generally wanted. This appeared to extend even to the habit of the two Opposition leaders generally asking an 'open question', such as the First Minister's meetings with the Cabinet, Prime Minister or Scottish Secretary. Though the Committee stated that it was determined to keep the whole issue under review, it seems certain that, while the details of FMQT may be fine-tuned, it will not be abolished in the near future.

In itself, as a form of parliamentary proceeding, it cannot be doubted that it is operating well. Participants, and, significantly, the media, seem to be more comfortable with the FMQT format than the previous 'Open Question Time'. It is a lively and relatively spontaneous

period in the parliamentary week, unlike some of the more structured and managed proceedings of debate and statement. As at Westminster, it performs the valuable democratic function of allowing parliamentarians and public alike to compare the performance of the head of government and the aspirants to that office.

On the other hand, FMQT exhibits many features regarded as defects in the Westminster context, and which are especially relevant in the terms of the stated ethos of the Parliament. It confirms the 'confrontational' aspect of parliamentary activity at the expense of the 'consensual', by highlighting the inevitable party political competition inherent in the 'government-opposition' divide. This cuts across the 'government-parliament' relationship that is more appropriate to effective parliamentary scrutiny and accountability activity. It consumes a disproportionate amount of media and public attention, by distorting the perception not only of the overall pattern of work in the Chamber, but, more significantly, of the balance between Chamber and Committee work towards the former.

In addition, by institutionalising this exemplar of Westminster parliamentary practice so early in the Parliament's life, the Parliament may be unconsciously signalling that it is unwilling or unable to find truly innovative solutions to significant procedural difficulties. The CSG package of parliamentary scrutiny and accountability was itself a rather conventional and familiar collection of techniques, such as questions, debates, statements and so on. For the Parliament to react to difficulties with one of the more original aspects of even this timid blueprint, not by seeking a novel or radical solution, but by appearing to import an even more familiar and conventional Westminster practice is worrying. Even at Westminster, efforts are being made, albeit unsuccessfully thus far, to find different and potentially more effective ways of holding the head of government accountable, such as regular appearances before a select committee. A committee-based mechanism, whether of this sort or otherwise, could well have some relevance for the ethos of the Scottish Parliament, and could symbolise a desire to explore more innovative techniques of scrutiny of the executive, and for holding it to account.

Only time will tell whether adoption of a First Minister's Question Time will be seen as a sell-out of the founding principles and a return to the familiar practices of Westminster, or as a sensible reform of the original procedures to provide a mechanism of holding the head of government to account publicly essential to the true model and spirit of the Parliament.

12. Realising the vision: openness and accessibility

12.1. Openness, accessibility and participation

At the heart of the CSG vision was the notion that the principles should "aim to provide an open, accessible and, above all, participative Parliament, which will take a proactive approach to engaging with the Scottish people – in particular those groups traditionally excluded from the democratic process." Participation was to be the benchmark of the particular form of parliament that was desired. Like equal opportunities, it had to be embedded in the procedures and practices of the Parliament, not merely regarded as an optional, symbolic 'add-on'.[137]

The notion of participation has been considered in context in other parts of this Study, especially in relation to committees (chapter 5), legislative consultation (chapter 6) and petitions (chapter 8). The extent to which the Parliament's rules themselves gave effect to the notion of participation is arguable. There is a dedicated chapter in Standing Orders entitled 'openness and accessibility', which deals with a variety of matters from proceedings to be open to the public, provision for non-members to address the Parliament and petitioning procedures.

On the other hand, there was no provision for direct membership by non-MSPs on committees, a radical innovation that was regularly proposed during pre-devolution days. Other than the petitioning process, non-MSPs cannot formally initiate any substantive parliamentary action, or participate in any of its proceedings, save by invitation or compulsion. At the heart of the Parliament's procedural structure remains some notion of 'them' and 'us', 'insiders' and 'outsiders'. While there may be valid legal and statutory reasons for such distinctions, they do demonstrate the difficult tension between the competing notions of representative and participative democracy underpinning the Parliament's design.

This chapter concentrates on aspects of openness and accessibility which underpin the aim of wide participation in the Parliament, especially that of the availability and flows of information about the Parliament, its structure and its activities.

[137] The principle of equal opportunities has a key role in ensuring accessibility and inclusiveness. One example, which has both symbolic and practical importance, is the use of gender-neutral language in all parliamentary publications.

12.2. Accessibility

The rules give effect to the principle of parliamentary proceedings being in public, balanced by provisions for the maintenance of order and the holding of meetings in private. The Presiding Officer issued conditions for public access to plenary meetings in May 1999:[138]

> Members of the public admitted to the public gallery during any meeting of the Parliament must:

- Discussion of draft committee reports.
- Taking oral evidence and considering written evidence of a particularly sensitive nature
- Discussion of a future work programme.

The *Scotsman* newspaper, presumably willing to test the young Parliament, took action in the Court of Session challenging the Standards Committee's plans to hold some aspects of its Lobbygate enquiry in private session. Th

policy debate. The Executive is formally taking steps towards this through its proposed freedom of information legislation. The Parliament can fulfil its part of the inclusiveness bargain by making all its rules, practices and activities as open and transparent as possible. If Westminster is, at least in its legislative guise, the "Queen-in-Parliament", then the devolved Scottish institution should be regarded as, in an operational if not a strictly legal sense, the "People-in-Parliament".

The CSG Report's draft information strategy neatly encapsulates this approach in its opening

example, genuine two-way information flows, both within the various parts of the Parliament (a complex multi-layered institution), and between them and the wider world of civic society. It may, for example, require calm consideration of the necessary balance of information transmission means, appropriate to the diversity of Scotland. The all-electronic strategy of the National Assembly for Wales may be admirably radical, but does it actually deliver greater accessibility than other apparently less innovative approaches?

The Parliament was due to debate and endorse the CSG draft information strategy, alongside, but independently of, the main CSG report in its debate on 9 June 1999.[143] However, the motion which was debated made no explicit mention of the strategy. It may be that it was decided that, procedurally, the motion endorsing the main report automatically included the draft information strategy, as it was included as an annex to that report. It would be damaging to the Parliament if the absence of explicit endorsement meant any dilution of its commitment to an inclusive information strategy.

Having considered, albeit briefly, some of the basic, and extremely complex issues involved, it is possible to examine the reality of the first year of the Parliament's operation.

12.4. Explaining how the Parliament actually works

A basic accessibility requirement is that all those involved in the Parliament, whether intimately or otherwise, have the greatest possible opportunity of knowing how the Parliament operates. A parliament is inevitably a complex organisation, because of the multiple nature of its participants and its activities. As other parts of this Study seek to demonstrate, a parliament is more than just a forum for the transaction of business in formal plenary or committee proceedings.

Many of these more informal activities tend to be less visible, and therefore less accessible, than formal proceedings. Activities by MSPs as individuals (such as their representational functions) or as collectivities (party groups, cross-party groups and so on) may be more a matter for personal, party or other responsibility than properly a matter for the Parliamentary authorities as such. Nevertheless the Parliament itself can have some input, albeit with a lighter touch, even in some of these areas, such as the regulation of cross-party groups; registration of interests of the various categories of people involved in and around the Parliament, and in rules for the availability of Parliamentary facilities and resources. Through these means, it can ensure that appropriate levels of openness and transparency also apply to these types of informal parliamentary activity.

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[143] The amended business programme for that day, as agreed the previous day, stated: "… a debate on the Consultative Steering Group report and draft Information Strategy"

The Parliament has not produced, or collaborated in, the production of a comprehensive 'rule-book', whether or not similar to *Erskine May* at Westminster and its equivalents in other parliaments. This may be a conscious decision by the Parliament, perhaps wishing to avoid the potential pitfalls of precedent-setting and inflexibility that such an approach can bring, especially to a new-born institution. However, it does mean that the Parliament has to seek other, preferably better, ways of making its rules and procedures available and transparent.

There are different levels of information of this sort, not all of which is within the custody of the Parliament itself, such as:

- *UK legislation*: The *Scotland Act 1998*, and the mass of delegated legislation made under it, can almost be regarded as the 'written constitution' of Scottish devolution. The Parliament does not make that material, and any other directly relevant UK legislation, publicly available, even by way of website links.

- *Scottish legislation*: As at Westminster, the text of legislation in all its forms (including any 'accompanying documents') from introduction up to, but not including, enactment is

produced on private bills, and updated versions of the early guidance have been or are being produced, to take account of developments in procedure and practice.

- *Other procedural and practical guidance*: In addition, ad hoc guidance has been produced for specific audiences, sometimes by way of the Public Information Service's *FactFile* series. Other than the general guides to the Parliament which were produced at its establishment in the spring of 1999, these *Factfile* guides are:
  - *You and your MSPs* (FF 4, May 1999, rev ed. March 2001): a guide to representational practices under an AMS electoral system
  - *Guidance on the submissions of public petitions* (FF 5, October 2000)
  - *Information for witnesses appearing before committees* (FF 6, October 2000)
  - *Amendments to Executive Bills: guidance for external organisations and individuals* (FF 7, October 2000)

- *'Guidance from the Chair':* While no system akin to that of Speaker's rulings has evolved as such, any ad hoc procedural guidance which is issued by the Presiding Officers does not appear to be collected or published.. Again, this may be because of a conscious desire to avoid the potential rigidities of a body of precedent. However, such jurisprudence inevitably exists, and practical utility, as well as principles of openness and transparency, suggest that some formal arrangement should be created. If not, a class of 'secret parliamentary knowledge' will evolve, known only to the select band of senior staff.

- *Other Parliamentary information*: The Parliament has a system of regular press releases (available to the wider public through its website) about its current and future activities, and on other matters of public interest. This is an advance on the current practice at Westminster. The website contains virtually all published parliamentary material.[146] This includes *WHISP*, the Parliament's regular detailed publication on its business, which is designed primarily for the general public. On the other hand, some information is designed entirely for internal consumption, and will be available only to insiders through the intranet, email or in hard-copy. This is unexceptionable, so long as such information is solely and genuinely of an internal nature, and does not concern matters about which the wider public, on openness grounds, should also be informed.

- *Business Bulletin 'announcements'*: This is a favoured method of publication, as it reaches both the internal and external audiences, though primarily designed for the former. A wide range of information is published in this way, from relatively mundane 'housekeeping' matters to promulgation of important matters of procedure and practice.

[146] However not all material, especially documents in PDF format, has been easily accessible in practice to all outside visitors to the site. It is important that all the material on the site is archived and remains accessible to all users, but this has not always been the case.

The status of such announcements from the Presiding Officer and others may not be entirely clear, as compared to statements made from the Chair during a formal meeting of

- where a detailed resolution of the Parliament, especially on 'house-keeping' matters, has been agreed and is not otherwise formally published as a separate document.[148]

Annual Reports: Although not required by the *Scotland Act* or by Standing Orders, the SPCB has produced a report on its first year, just before the recess in late December 2000. It was accompanied by a statistical volume, *Scottish Parliament Statistics*, which is akin to, but often more accessible and informative than, the *Sessional Return* of the House of Commons. Each committee is required to submit to the Parliament an annual report of its activities (including details of the number of times it met in private) "as soon as practicable after the end of each Parliamentary year." A cumulative annual report, containing brief individual reports for each committee was published for the first parliamentary year ending in May 2000 in early 2001.

Committee papers: Exploitation of the internet has meant that much of what is discussed in committee proceedings is made publicly available. As from March 2000, a significant advance in accessibility was made when committee papers were made available on the Parliament's website. Prior to this time, such papers were generally only made available to members of the press attending the relevant meeting. These papers tend to be substantially comprehensive, and even include issues papers prepared by committee staff.

Other papers relevant to Parliamentary proceedings: Many papers which are relevant to plenary and committee proceedings are prepared by other bodies, especially by the Executive. These include explanatory memoranda on legislation (including those on amendments) or the topic of a particular debate or motion. These are often not generally published, or made available on-line, being distributed or made available to the members of the Parliament or the relevant committee dealing with the particular business. Such ephemeral material may well be referred to during the proceedings or in the media. This can only produce a sense of exclusion among those without access to the material, as they will not be able to follow or understand the debate.

12.6. Information and participation

Information is an essential precondition of the achievement of the CSG vision of public accessibility and participation in the operation of the Parliament. The widest possible availability of all types of information relevant to the Parliament, its operation and its activity enhances the sense of inclusiveness and 'sharing of power', overcomes any residue of civil service notions of 'need to know' or the Westminsterish ideas of a parliament being an essentially private exercise, and enables and encourages meaningful public participation.

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[148] such as resolutions on Members allowances (8 June 1999 and 16 March 2000), or on executive

The principles being evaluated in this chapter are both objective and subjective. A certain amount can be learned from measures such as the extent of committee business taken in private; the number and types of committee witness; novel methods of civic participation; visits to the Parliament;[149] attendance of pupils in the Educational Visits Programme,[150] use of the website[151] and so on. However the principles of openness, accessibility and participation will be adhered to fully if the public is satisfied that the Parliament

- acts on the presumption of comprehensive dissemination of all information relevant to itself and its operation, in a timely and comprehensible way, and
- actively encourages interactions with, and participation by, the public, regarding these as necessary and substantive mechanisms in the parliamentary process, not as merely symbolic acts.

[149] There were almost 27,000 attendees at plenary sessions, and almost 20,000 at committee meetings. There were also over 46,000 visits to the Parliament's Visitor Centre.

[150] 2,697 from 106 schools from the inception of the Programme on 15 September 1999 until March 2000. By the end of May 2000, 131 schools had participated in the Programme.

[151] The number of hits ranged between 643, 530 in May 1999 to 1,714,143 in March 2000. The total number of website pages requested (the Parliament's preferred indicator of website usage) ranged from 107,848 in May 1999 to 397,579 in March 2000.

13. Realising the vision

13.1. The nature of the vision: interpreting the principles

In attempting to examine the extent to which the Scottish Parliament has achieved what was expected of it by its founders, this Study has analysed the operation of the Parliament by reference to the two inter-related sets of criteria:

- the CSG principles and proposals, and
-

every detail of the CSG proposals, produced just a few months previously. In some areas, such as pre-legislative scrutiny, the actual procedures differed quite significantly from them. The CSG report is a foundation of the Parliament's constitution, not the edifice itself.

Thus the Parliament was born with a variety of different expectations, aspirations and obligations. There were, and remain, those who expect that it will be an exemplar of some form of 'new politics' and of a 'different form of governance'. On the other hand, many of those directly involved in its creation and operation wished it to operate in ways fundamentally similar to existing UK constitutional norms, albeit in a far more efficient and effective way. The Parliament itself had a legal obligation to act in accordance with the statutory regime with which it had been bequeathed, whether or not it accorded with one or other, or both, of these expectations.

The Parliament overall has sought publicly to operate as if bound by the CSG principles. On the initiative of the Executive, and introduced by Henry McLeish, the former Scottish Office devolution minister and CSG chair, it debated and agreed to endorse the CSG report on 9 June 1999.[152] Resort to the CSG vision may even have helped to save some procedures, mechanisms, and even some committees, which seemed, even in the first year or two, under threat. The work of the Standards and Procedures Committees, such as the revision of Standing Orders, the creation of the various limbs of its standards regulation, and the devising of new procedures (chapters 10-11), has been directly related to the CSG principles and proposals. In accordance with CSG recommendations, the Procedures Committee is currently conducting a long-term review of the extent to which the Parliament has put the CSG principles into practice.

It is reasonable, therefore, to regard the CSG report's underlying vision, as expressed in part by its 4 key principles, as the most suitable and convenient benchmark against which to measure the extent to which the Parliament has met its various founders' aspirations. These principles themselves need to be examined, especially the extent to which they fit the list of generally accepted parliamentary functions.

The four key principles are

- Sharing the power
- Accountability
- Access and participation
- Equal opportunities

[152] That debate provided an early opportunity for MSPs to consider the new Parliament's culture and ethos, and it revealed the divergence in the interpretation of the CSG vision among the newly-elected parliamentarians. See, in particular, the speeches of

Principles expressed in these terms are ways in which the Parliament carries out its functions, rather than a description of these functions themselves. The nature of the Parliament's initial template would have been clearer to understand had the CSG been more explicit about the functions it expected the Parliament to fulfil, and had it seen its role as describing the criteria by which the Parliament should operate within that range of functions. Unfortunately a close reading of the CSG work and report demonstrates that it was more focused on the Parliament's operational style than on its functions.

There appears to have been little empirical examination, within the CSG process, of the full range of functions the proposed Parliament should undertake. The CSG seems to have implicitly assumed the existence of many such functions, perhaps because they existed in Westminster and in other parliaments it examined. It saw its main job as devising procedures and practices which would enable these assumed functions to be carried out in the 'proper spirit'. Other parliamentary functions and activities, especially those not directly related to formal proceedings, appear to have been largely or entirely overlooked. Therefore, in terms of the Parliament's practical operations, the CSG's work did not fully address the 'what' and 'why', but concentrated on the 'how'. This meantat

This was a serious gap. The House of Commons has problems in reconciling the 'party' and 'individual' roles of the MP, and the extent to which it functions both as an aggregation of individual MPs and as an aggregation of party groups. For the Scottish Parliament, this is compounded by the degree to which the Parliament operates not just on behalf of the people of Scotland, but with their active involvement, as notional 'co-owners' of devolved power. The CSG principles, especially the first (power-sharing) and third (access and participation), appear to provide mixed signals. In terms of the relationship between people and parliament, the former principle implies an 'insider' model, where the people are, just as is the Executive, part of the Parliament. On the other hand, the latter principle implies a more 'outsider' model of the people coming into the Parliament to participate in its activities.

In the CSG principles, 'sharing the power' appears to address the power invested in devolved governance itself, rather than just in the Parliament, but the Parliament is the major place where the three power-sharers come together. However, these three partners are not equal holders of power, in the sense that, while the Executive is, through its ministers, physically within the Parliament, the people are not directly a part of the Parliament itself. Their exercise of power, therefore, is carried out in two ways:

- indirectly, through their elected representatives, and
- directly, through mechanisms of access and participation.

This may explain the purpose of the third CSG principle of access and participation. It does not, however, explain why representation was not also explicitly regarded as a key principle. In so far as representation was considered at all, the CSG appeared to recognise it implicitly within its accountability principle.

Some of the radical ideas floating around in the early 1990s which would have made 'the people' partners in, or sharers of, devolved parliamentary power, did not survive after 1997. To use CSG terminology, the emphasis shifted from the people as power-sharers to the people as participants, as the more traditional representative model of representative democracy, with elected politicians as the primary players on the parliamentary stage, prevailed. Yet again the apparent consistency of the visible rhetoric may have hidden a significant shift in the core structure of devolved governance. Civic engagement was central to the CSG vision, but it may have been more convenient for government to have the primary focus of such activity directed at the Parliament, rather than at the Executive itself. It may also have been because, as suggested by one trenchant commentator, the proponents of the new, more participative politics themselves focussed on the Parliament rather than what he calls the "more important branch of government."[153]

[153] J Mitchell, "New Parliament, new politics in Scotland", (2000) 53 *Parliamentary Affairs* 605, 614

The notion of the Parliament 'managing itself', with a sufficient degree of independence and autonomy, both from the Executive and from the pressures of other external forces, was examined in chapter 10. The lesson of the first year or so is that the Parliament has gradually sought to take control of its internal affairs, both institutionally and in relation to its formal business.

13.3. Realising the vision: year one

As neither the devolution legislation nor the CSG report provided a comprehensive statement of the Parliament's functions, this Study has adopted and applied a generally accepted list of parliamentary functions. This list provides the foundation for the audit template, devised by the Constitution Unit, which is the basis of both this Study, and of the parallel Northern Ireland Study.[160] These functions are:

- Representing the people
- Making the law
- Providing, sustaining and scrutinising the executive
- Controlling the budget
- Providing an avenue for the redress of grievances
- Managing itself effectively to carry out the above five functions

It was seen in chapter 3 that the new mixed-member electoral system helped to produce a Parliament with a much better gender balance than previously in the UK. It also assisted the election of two minor parties, the Scottish Socialists and the Scottish Greens, as well as one rebel from a major party. On the debit side, the Parliament has no representation from any ethnic minority community, and, other than the three MSPs mentioned, all its members came from the 4 existing major Scottish parties. While a wide variety of parties and groups contested the May 1999 general election, any expectations that the new electoral system would encourage the return of members from a much wider range of political opinion were not realised.

The electoral system, by returning MSPs under two different methods, has created novel and largely unforeseen problems for the Parliament. These had an immediate impact in the initial weeks, during the unhappy debate on MSPs allowances on 8 June 1999, which contributed significantly to the initial media and public antipathy to the Parliament's initial performance. The Parliament sought to address these problems through the preparation and publication of

[160] *A Democratic Design? The political style of the Northern Ireland Assembly* by Robin Wilson and Rick Wilford, Constitution Unit, May 2001

guidance, aimed formally at MSPs themselves, but also intended to be assist constituents, public agencies and others who interact with MSPs. That these matters were politically sensitive can be seen in the non-transparent process adopted for their resolution, and the fact that it took almost a year from the initial steps taken during the first summer recess to the agreement of the guidance just prior to the following year's summer recess.

In the wider sense of the Parliament representing the interests of the people, it can be concluded from examination of a range of parliamentary activity - petitions (chapter 8); plenary activity such as questions and debates (chapter 9); committee activity (chapter 5), and legislation (chapter 6) and so on - that the new institution has sought to address a much larger and broader range of matters of concern to the people of Scotland than was possible prior to devolution. The Code of Conduct has been devised so as to emphasise the centrality of the representative role of the Parliament and its members, and the formulation of the regulatory regimes for activities such as lobbying and cross-party groups (chapter 10) also aim to ensure as open and inclusive a Parliament as possible.

Parliamentary government, at least in the devolved arena, has definitely been brought closer to the people, and the Parliament has taken some steps towards being regarded as an institution for all Scotland. Committee meetings were held outside Edinburgh, though not to any great extent initially. The Parliament itself made a virtue of necessity, the chamber being required by its permanent owners, the Church of Scotland, for its general assembly, by meeting in Glasgow at the beginning of its second year in May 2000. These measures, and others such as having at least one 'partner library' in each constituency, have all helped to promote the Parliament as more than just an Edinburgh or Central Belt institution.

exchanges with any parliamentary, governmental, administrative or other body, whether within or outwith the United Kingdom."

The legislative process was designed to be centra

at Westminster, parliamentary support for an administration is generally presumed, unless and until demonstrated otherwise. Political parties were assumed in the CSG report and in the legislation, primarily through the requirements for party balance in committees, guarantees of plenary time for non-Executive parties, and in the composition of the Bureau. However, there was no discussion of party organisation or operation, even in terms of party discipline and whipping.

Nevertheless, the party group immediately became a key operative mechanism in the Parliament. This gave enormous influence to the party leaderships, through the special consideration given in proceedings to party leaders and frontbenchers, and in the role of party business managers in the Bureau. Not only does this tend to divert power from the Parliament as a whole towards party elites, putting at risk the development of cross-party relationships and allegiances, it also challenges the principle of wider access and participation. There are no requirements for party meetings to be public or transparent, and Bureau proceedings are conducted in private, thereby ensuring much important decision-making in and about the Parliament is undertaken in the absence of public scrutiny or participation.

The emphasis on party also tends to consolidate the influence of an Executive with a parliamentary majority. Rules and procedures which are primarily designed to preserve and protect minority parties and groups in the Parliament – such as the 'party balance' requirement, and the guarantees of shares of parliamentary time - also have the effect of entrenching the influence of the majority. Such arrangements also encourage the non-Executive forces to maximise, in terms of party advantage, their available opportunities, such as choosing the topic of debate or putting questions to ministers. This also inevitably tends to emphasise the adversarial at the expense of the consensual.

The CSG designed the Parliament's procedures primarily in terms of scrutinising the Executive, and its policies, actions and legislative proposals. These procedures tended to dominate both plenary and committee activity in the first year, through mechanisms such as questions, debates, statements and committee inquiries (chapters 5-7 and 9). However many of these opportunities in practice arise at the initiative of the Executive itself, especially through its choice of topic of debate, or by making oral statements.

How the Parliament undertook its financial functions in the first year was examined in chapter 7. That emphasised the extent to which much effort was devoted to the necessary task of setting up many of the detailed procedures and practices, as much as to substantive financial scrutiny. For that reason, the Parliament's performance of its financial functions in the first year is unlikely to be typical of its future activity or effectiveness. Nevertheless, the Parliament was generally successful in balancing these two functions, within the inevitable limitations of a start-up year and of the technical complexity of financial procedures. In particular, the indications for future years are that the committees will become meaningfully involved in the annual budgetary process, and through them, there will be scope for equally substantive participation by wider civic Scotland.

Finance is central to the devolution scheme as a whole, and its importance has become increasingly apparent. Nevertheless, the Parliament's role is relatively limited, as the legislation and the Parliament's own rules and procedures assume that the power of financial initiative rests almost entirely with the Executive. This is particularly true of the most prominent of devolved financial matters, that of the tax-varying power. The imbalance in the overall scheme of devolved finance as between the ability to raise money and to spend it, has tended to skew the Parliament's role, as well as

function. The Bureau also indicated, in guidance issued in June 1999, that the Members' Business slot at the end of each plenary meeting should be used "to raise non-controversial, constituency-related issues." Such debates can be contrasted with the Commons' daily adjournment debate by the extent of participation by other interested members. This makes them genuine short debates rather than merely private dialogues between an MSP and a minister.

The CSG proposals also provided for a layer of direct engagement between citizens and the Parliament, through public petitions (chapter 8), and the encouragement of direct participation through committees (chapters 5 and 6). In addition, more informal means of contact have developed, through cross-party groups, (chapter 11), lobbying (chapter 10) and the like, as well as through direct contact with local MSPs, through correspondence, surgeries and other meetings.

A parliamentary ombudsman scheme was established on an interim basis by the initial legislation, which, as at Westminster, preserved a parliamentary involvement through the requirement for an 'MSP filter'. At the time of writing, this is under review by the Executive. It has proposed an overarching public sector ombudsman scheme, which would remove the necessity of the 'MSP filter'. The Scottish Parliamentary Ombudsman's first annual report, published in September 2000, showed that 47 new complaints had been received in the scheme's first nine months (from 1 July 1999 to 31 March 2000), which was "about three times the number of complaints against the Scottish Office and related bodies referred to the UK Parliamentary Ombudsman in the full year of 1998/99." Of the 53 complaints received (including 6 carried over from pre-devolution days), 32 were resolved, one by full investigation. None of these complaints was directed against the SPCB.

The public petitions system is one of the Parliament's more innovative procedures. Its performance in the first year has generally been regarded as successful, both in terms of providing a means for the ventilation of grievances and for public promotion of particular points of view. It is the one opportunity the public has of directly influencing the Parliament's agenda. As such, it can be, and is being, used as one weapon in a broader campaigning or lobbying strategy targeted at the Parliament and the Executive or other appropriate public agencies.

The constituency welfare work of elected members was not substantively dealt with by the CSG report. Nevertheless, the 3 versions of the Allowances Scheme thus far have implicitly accepted that MSPs have a representational responsibility to their locality, will hold regular surgeries, and otherwise deal with constituency casework. These Schemes have provided financial assistance for the provision of local offices and support staff. The Presiding Officer's July 2000 guidance on the relationship between MSPs, also recognised this 'constituency ombudsman' role (chapter 3). The general parliamentary and public

expectation that MSPs would undertake a constituency welfare role similar to that of Westminster MPs has been borne out in practice from the inception of the Parliament.

This Study has emphasised the importance of how the Parliament operates as a functioning institution. This is not just a matter of organisational efficiency, but of a necessary and sufficient degree of autonomy and self-regulation appropriate to a parliament (chapter 10). In this context, the nature of the executive-parliamentary relationship is crucial, especially if executive influence extends, as at Westminster, beyond the arrangement of a parliament's proceedings and into matters of its internal administration.

Various mechanisms have been provided in the legislation and in Standing Orders for the central direction of the Parliament. These range from the SPCB and the Clerk/Chief Executive, through the presiding officers, to the Parliamentary Bureau and, more informally at present, the Conveners Liaison Group. How

Parliament has been shaken (whether fairly or not) by the Holyrood Building Project saga, and perceptions of secrecy cannot assist restoration of the public's faith.

13.4. The nature of the vision: a parliament with a purpose

When compared with Westminster, the Scottish Parliament is different in two crucial respects. One is negative: as a body created by statute, its power of self-regulation and autonomy is formally limited, and the highest Scottish co

13.5. Some proposals

A fundamental revision of the role of the Parliament within the overall devolution scheme is something that is probably outwith its own competence to achieve. This would require action at UK level, in terms of the underlying devolution legislation. Subject to any such constitutional upheaval, the Parliament will not, for example, be transformed into some executive, governing body alongside the Scottish Executive, but will develop its present role as a parliament of the Westminster model family. This does not mean that it does not have the potential to develop that role in radical and innovative ways, both those which have been considered in the last 15 years, and in ways not yet seriously contemplated.

In this sense, the construction of the Parliament remains incomplete or unsatisfactory in certain respects. The following proposals are offered as possible options for consideration, and are aimed at entrenching the Parliament's autonomy, enhancing its accountability role and developing its openness and participativeness.[164]

. Though rather limiting, the Parliament's existing 'constitution' does provide opportunities for reform, which can be expressed in Standing Orders, parliamentary resolutions,

- ensures that any significant Executive rules or procedures on its interactions with the Parliament, such as those on the provision of information and documentation by its ministers and officials, will only be made following full consultation with the Parliament, and
- guarantees that any devolved legislation which would significantly affect the structure, operation or proceedings of the Parliament (including its members or its staff), will not be introduced by way of an Executive Bill, except where the Parliament agrees otherwise.

. Applying the statutory and Standing Orders obligation of 'having regard' to party balance, so as to reflect as closely as possible the party balance in the Parliament, not only protects minorities, but also entrenches the primacy of the majority. This ensures Executive dominance over key aspects of the work of the Parliament, not totally dissimilar to that in the House of Commons. There is no logical reason for an Executive majority on bodies which are su ons.

required in a mature and confident Parliament. These matters should be considered as thoroughly and openly by the Parliament as are Executive policies and legislation.

: This would include scrutiny of policy areas currently within the portfolios of a number of different ministers, including the First Minister, the Minister for Justice and the Minister for Finance and Local Government, and subject to scrutiny by various parliamentary committees or by none, such as

- the structure, staffing and operation of the Scottish Administration (including particular common strategic policies such as freedom of information; 'quangos' / agencies and public appointments; minister / civil servant relationships, and 'modernising government' programmes), and
- inter-governmental relations with the UK and the devolved administrations, and other 'external relations'.[167]

, at member and official level and otherwise, both in terms of individual 'parliaments' and like representative assemblies within the UK and beyond, and through relevant parliamentary associations

. This would complement the currently incomplete existing sources, and should be available at various levels of detail, suitable both for those who wish to participate actively in the Parliament (including MSPs themselves, and their staff) and for those who simply wish to understand more about their Parliament. There should be a more open and transparent approach to the operation of the Parliament's business, with more advance information on the substance of future business, including committee agendas, and the terms of motions forming the basis of parliamentary business. The presumption should always be clearly in favour of publication, and against any outdated and inappropriate 'need to know' notions. The Parliament's twin aim should always be to inform its civic partners and to encourage their participation.

13.6 Conclusion

The CSG report, as fed into the initial Standing Orders and other parliamentary procedures and practices, may have consolidated the sort of parliament envisaged by the UK

politics and government, but were instrumental in the creation of that very vision. Within that context, the Parliament, in its first year, adhered to these proposals, and applied them in its operation. This was best demonstrated when it chose to maintain that fundamental structure, when it reformed, and took ownership of, its Standing Orders at the end of 1999.

The CSG process itself, and the vision it generated, have together provided the necessary catalyst for the creation of a living, vibrant parliament. Even in that first year or so of life, as well as managing both to establish itself and to fulfil its various parliamentary functions, the Parliament began to develop its own style, and to change that initial template. This was inevitable once the dry, theoretical blueprint met the reality of a representative assembly, composed of elected politicians, who were armed with a democratic mandate, and who came from a variety of political traditions. This variety, it must be remembered, even extended to their support or otherwise for the very existence of the devolution scheme itself, and therefore of the place of the Parliament in Scottish governance.

The Parliament has demonstrated in its initial year that it has the potential and the political will to outgrow that rather limited initial blueprint, and to become the sort of parliament of which the Scottish people can be proud. Despite the deluge of initial media and public criticism, opinion polls appear to show consistent public support for the Parliament, and