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The *Scotland Bill*: Some Operational Aspects of Scottish Devolution

The *Scotland Bill* [Bill 104 of 1997-98] is due to be debated on second reading on 12-13 January and this paper is one of a series of 5 Research Papers on the Bill. Research Paper 98/1 describes the development of the Government's devolution policy and provides a detailed overview of the Bill. Other Papers deal with other aspects of the devolution scheme, such as local government, the tax-varying power and the 'West Lothian Question.'

This Paper examines a number of specific issues in the Scheme, including the Scottish Ministers, the Parliament's legislative process, disputes resolution procedure, arrangements for standing orders on the operation of the Parliament, MSP's remuneration, and a list of 'order-making' provisions in the Bill.

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Summary

This Paper is one of a series of Research Papers prepared for the second reading debate of the *Scotland Bill* on 12-13 January. General briefing on the development of the Government's devolution policy, and an overview and analysis of the proposed devolution scheme in the Bill is contained in Research Paper 98/1. This present Paper explores in more detail some particular aspects of the scheme which have been the subject of debate over the years.

The position of the Scottish Ministers, including their formal means of appointment and removal, is examined, as is the general role of various office-holders, such as the Parliament's Presiding Officer and the Secretary of State, in this and related contexts, such as their relationships with the Sovereign. More general representational relationship issues, especially those subsumed in the concept of the 'West Lothian Question', are considered in Research Paper 98/3.

Aspects of the Scottish Parliament's legislative role, especially the crucial matters of its legislative competence and the related disputes resolution procedure, are examined in this Paper. A list of order-making powers (and their Parliamentary procedure) and related provisions is also set out.

The Government's policy towards the proposed devolution scheme is for the operational detail to be fleshed out as much as possible by the Parliament itself. Nevertheless, the Scottish Office is developing various detailed studies, and this Paper examines the preparation of initial standing orders, and provides a list of provisions in the Bill which require or permit standing orders on particular issues.

The issue of the remuneration of MSPs and Scottish ministers is also examined here.

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I. The Scottish Ministers

The appointment of the Scottish Executive is of interest in that it demonstrates the differences not only between the proposed schemes of Scottish and Welsh[1] devolution, but between the Scottish and UK arrangements, at least in terms of explicit statutory provision and between the current and 1970s Scottish devolution proposals.

The *Scotland Act 1978* provided for a Scottish Executive comprising a First Secretary and other Secretaries. All the Secretaries, including the First Secretary, were to be appointed by the Secretary of State, though if the Assembly nominated one of its members for the office of First Secretary, the Secretary of State was required to appoint that person, and the Secretary of State was also required to act on the advice of the First Secretary in the appointment of the other Secretaries. Bradley & Christie's commentary on this provision (*section 20*) contained the following observation:[2]

> Although Scottish Secretaries hold office at Her Majesty's pleasure (subs. (5) and will be exercising powers which ultimately derive from the Crown (see s. 21), Scottish Secretaries will be appointed not by the sovereign, but by the Secretary of State. Neither here nor elsewhere in the Act is direct contact permitted between the sovereign and the Executive or Assembly, on the argument that this would be inappropriate in a devolved system of government.

As all Secretaries, including the First Secretary, under the *1978 Act*, were to hold office at Her Majesty's pleasure (*s20(4)*), there were no provisions for their removal other than in the case of their ceasing to be a member of the Assembly. This meant that, had the scheme come into operation, much of this area would have had to develop through practice, possibly, but not necessarily, on the UK model of confidence motions, and the primary practical role that the First Secretary would have had in the determination of the composition of the rest of the Executive. As the Sovereign would presumably have acted through the Secretary of State, this would have further reinforced the role not only of that UK minister, but of the Westminster Parliament (generally, the House of Commons) to which such ministers would be responsible in the exercise of those statutory functions.

The appointment and removal of UK ministers (including the Prime Minister) is virtually entirely extra-statutory, being within the realm of the prerogative, exercised through constitutional convention and practice. By contrast the Scottish Executive, under the current Bill, will be a creature of statute, and the *Scotland Bill* expressly provides for almost all stages of the appointment and removal process, following the scheme set out in the white paper:[3]

> **9.6** The First Minister will head the Scottish Executive and will be appointed by The Queen on the advice of the Presiding Officer after the Scottish Parliament has nominated a candidate, who will

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1 See the *Government of Wales Bill*, which provides that the First Secretary is to be elected by the Assembly (*clause 52*), and the other Secretaries are to be elected by the relevant subject committees (*clause 57(5)-(6))*.

2 A Bradley & D Christie, *The Scotland Act 1978*, note to s20(3).

3 Cm 3658, para 9.6

> normally be the leader of the party able to command the majority support of the Scottish Parliament. The First Minister will (with the approval of The Queen) appoint other Ministers; and will determine portfolios.

Therefore, unlike the 1970s scheme, there is to be a direct channel of communication between the devolved bodies and the Sovereign. In the 31 July debate on the white paper, Mr Dewar explained the effect of this change from the *Scotland Act 1978*:[4]

> My third point is that the Secretary of State for Scotland will not have what is sometimes called the governor- general role, which was at the heart of the 1978 Act and was put upon the shoulders of the Secretary of State. The Scottish Parliament and Scottish Executive will have their own direct relationships with the Crown, rather than using the Secretary of State as an intermediary. Legislation passed by the Scottish Parliament will not need to go to the Secretary of State for consideration and approval before it is passed to the Queen for Royal Assent. It is important that we do not have such overriding decisions. It would have sullied the atmosphere and made for great difficulties. I am glad `about that particular extension.

The Parliament is required to nominate one of its members for First Minister[5] when one of a number of events occurs (ie following a general election or if there is a vacancy in the office of First Secretary through resignation or otherwise): *cl 43(1)-(2)*. The Parliament's Presiding Officer is required to recommend that nominee to Her Majesty (*cl 43(4)*). However, presumably to preserve the constitutional proprieties, there is no express restriction on the Sovereign's power of appointment under *cl 42(1)*. In addition, the combination of the provisions of *clause 42(1)* and *clause 42(3)* appears *to* retain the Sovereign's theoretical 'personal' prerogative of dismissal, either directly or by the appointment of a new First Minister.

Other ministers are to be appointed by the First Minister, with the approval of Her Majesty (*cl 44(1)*), after gaining the agreement of the Parliament (*cl 44(2)*).[6] However (in addition to situations where they cease to be MSPs) ministers hold office at Her Majesty's pleasure and can be removed by the First Minister.[7] Similar provisions are to apply in respect of junior ministers (*cl 46*).

While, unlike the 1970s scheme, much of this important area is to be set out expressly in statute (including the explicit power of the Parliament to remove the whole Executive by a vote of no confidence[8]: *cls 42(2), 44(3)(c)* and *46(3)(c)*), there will still be areas to be 'filled in' by convention and practice. In particular, given the direct link between devolved officers

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4 HC Deb vol 299 c462, 31.7.97

5 The SNP suggest that he or she could be called the 'Chancellor of Scotland': *A future for our past*, SNP constitutional Affairs Committee discussion document, Jan 1998, p4

6 There appears to be no statutory limitation on the number of ministers which may be appointed.

7 The latter scenario apparently does not require the agreement of the Parliament, although it can force ministers' resignations by a vote of no confidence.

8 It is assumed that 'collective responsibility' will operate, and that a no-confidence vote of the type envisaged in these provisions will relate to the whole executive and not in relation to individual ministers. Other procedures may evolve in the Parliament (perhaps similar to the Westminster 'reduction of salary' motion) whereby it can censure or seek the removal of particular ministers.

(especially the First Minister[9] and the Presiding Officer) and the Sovereign, will the relationship between the Sovereign and her Scottish ministers be exercised in essentially the same ways as that with her UK ministers, especially in the choice of First Minister and the dismissal of ministers, or in the practice of weekly audiences? Will the UK Government, and the Secretary of State and the Prime Minister in particular, retain (or seek to retain) an advisory role in these matters? Will most or all members of the Scottish Executive expect to be made Privy Councillors?

The proposed devolution scheme, as set out in the white paper and the Bill, contemplates a number of posts which can act as liaison between Edinburgh and London:

- **First Minister**: This will be, in effect, 'Scotland's Prime Minister,' whose appointment and removal has already been described (see *clauses 42-43*). The First Minister, as head of the Scottish Executive, and Keeper of the Scottish Seal (*cl 42(7)*), has a direct relationship with the Sovereign in, for example, the appointment of ministers, junior ministers, law officers, sheriffs and judges of the Court of Session other than the Lord President and the Lord Justice Clerk (in the appointment of which the First Minister has a role directly with the Prime Minister: (*cl 89*). Notwithstanding the desire for the devolution scheme to be constitutionally innovative, the white paper stated that "the relationship between the Scottish Executive and the Scottish Parliament will be similar to the relationship between the UK Government and the UK Parliament."[10] The First Minister and the Executive will remain in office so long as it retains the confidence of the Parliament, and they will be 'accountable' to the Parliament for their actions and policies.
- **Secretary of State**: This post will remain and its roles were described in the white paper, para 4.12. As already noted, the Government do not envisage the post to be one of a 'governor general' (as was the case, to some degree, in the 1978 Act, and was also inherent in the form of devolution in Northern Ireland under the *Government of Ireland Act 1920* with the Post of Governor). As the Bill envisages a direct relationship between the devolved administration and the Sovereign this presumably means that the Secretary of State is not intended to be the Sovereign's representative in Scotland, in that sense. Conventions may develop as to the exercise of the role of Secretary of State both in relation to the rest of the UK Executive and to the Westminster Parliament (and in relation to European institutions), although some direct minister-to-minister relationships (including First Minister-to-Prime Minister) will no doubt develop. The Secretary of State will have a scrutiny role in relation to legislation. For example the Scretary of State can intervene by order to prevent a Bill receiving royal assent under certain circumstances (*cl* 33) and can direct the Scottish Executive to introduce a Bill into the Parliament to rectify perceived incompatibilities with international obligations (*cl 54(3)*)
- **Presiding Officer**[11]: In addition to a number of election and 'Speaker' functions,[12] the Presiding Officer has at least two substantive and significant functions, in relation to

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9 who, for example, is given the power, subject to the agreement of the Parliament, to recommend the appointment and removal of the Scottish Law Officers: *cl 45(1)*

10 Cm 3658, para 2.6

11 The recent SNP discussion document suggested the title 'President' or 'Preses', *op.cit, p*4

scrutiny of the vires of Bills (*clause 31*) and in relation to the appointment of the First Minister or acting First Minister (*clauses 42-43*). In these roles the Presiding Officer will presumably have the benefit of the advice of the Clerk and the other staff (including lawyers?) of the Parliament. The appointment or removal of a Prime Minister may require the Presiding Officer, from time to time, to provide substantive advice to the Sovereign, and may even be seen to be the appropriate (or even sole) source of such advice to Her Majesty. Given the potential effect of the proposed form of electoral system for the party composition of the new Parliament, identification of a person who can, as First Minister, command the confidence of a majority in the Parliament so as to be able to carry out the government of Scotland within the devolved sphere, may not always be as straightforward as it generally is in the Westminster context. It also remains to be seen whether, if the Presiding Officer role develops into one of active involvement in the new Scottish political scene, it may be seen by some as a potential model for an enhanced role for the Speaker of the House of Commons at the UK level, in, say, advising in the exercise of the Sovereign's various prerogatives, or even in exercising some of these prerogatives herself.

- **Prime Minister**: The Prime Minister has few direct functions within the proposed devolution scheme (other than in relation to the appointment the most senior judiciary), but, as head of the UK Government which retains ultimate authority, through the Westminster Parliament, over Scotland, will clearly be a central figure in the devolution scene. It appears that it is envisaged that neither the Prime Minister nor the other UK ministers will be the constitutional source of advice in relation to the Sovereign's dealings with her Scottish ministers or the Presiding Officer of the Parliament, although situations could well arise in extreme cases (especially where the executives in Edinburgh and London are of different political complexions) where UK ministers may wish, in theory, to intervene in the devolved sphere in ways other than through their formal statutory or other powers or through the promotion of new legislation at Westminster.[13] In the absence of any 'non-party' Governor-type figure in the current scheme, these situations could lead, for example, to the Sovereign receiving conflicting advice from her two sets of Ministers or Parliaments.

Northern Ireland is perhaps not an appropriate precedent for executive issues, given its history in the last 70 years. During the Stormont era, there was no Secretary of State, but there was a Governor[14] who exercised the Sovereign's powers in relation to the summoning, proroguing and dissolving of the Parliament, and the granting and withholding of royal assent

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[12] The Presiding Officer "will ensure the efficient conduct and administration of Scottish parliamentary business and chair sessions of that Parliament"(white paper, *op cit*, para 9.5) and will preside at meetings of the Scottish Parliamentary Corporate Body (Bill, schedule 2, para 6(3)

[13] As occurred in 1972 in Northern Ireland, or, in a different context, in the mid-1980s in relation to the GLC and the metropolitan county councils.

[14] The office of Governor replaced the office of Lord Lieutenant under the *Government of Ireland Act 1920* in December 1922, by virtue of the *Irish Free State (Consequential Provisions) Act 1922*, s1 and sch1.

to its legislation.[15] Hadfield describes how the Northern Ireland government operated in practice:[16]

> This, then, is the skeleton of the form of the Executive that was devised for Northern Ireland under the Government of Ireland Act. In practice it was "fleshed out" by clearly following the Westminster style of responsible Cabinet Government; the Governor became a constitutional figurehead taking the requisite action on the advice of the Prime Minister (about which office the 1920 Act was silent; in practice he was the leader of the majority party at Stormont) or the relevant member of the Cabinet. The members of the Cabinet, in turn, were chosen and dismissed by the Prime Minister and were collectively and individually responsible to the Northern Ireland Parliament.
>
> The doctrine of collective responsibility to the Northern Ireland Parliament clearly had less constitutional bite than its Westminster counterpart. First, the fact that the Unionist party was constantly the majority party in Northern Ireland denied Northern Ireland the type of alternating party government enjoyed, or at least experienced, at Westminster for the United Kingdom as a whole. The significance of this fact was heightened by the way in which the Northern Ireland Cabinet was formed – the members of it were chosen exclusively from the majority party. It was, thus, a Westminster-style of government - Cabinet Government formed only from the majority party-without the presence of the one factor which made the Westminster system of government so different, namely, the alteration of parties in power. Secondly, the Northern Ireland Parliament was not dominated by "politics" in the British sense of "left versus right wing" politics. Thirdly, the Northern Ireland Government (generally, but by no means invariably) followed the Westminster Government's policies, whether that Government was Labour or Conservative. All this meant not only that scrutiny of the Northern Ireland Government by the Northern Ireland Parliament as a whole lacked vigour; it also entailed the more specific but crucial consequence that the opposition, constantly denied the responsibilities of governing or of partaking in the processes of government, was largely not inclined or encouraged to undertake the role of a responsible opposition. The particular fact that the statutory bones of the 1920 Act were covered with the flesh of Westminster's constitutional practices was to build into the operation of the 1920 Act the seeds of destruction - although, as ever, hindsight endows a picture with greater clarity than contemporaneous vision.

Calvert remarked in 1968 that the brevity of the history and the paucity of documentation made it impossible for him to derive any general principles on the practice of appointment and removal of Northern Ireland Prime Ministers.[17]

II The Scottish Parliament's legislative process

While the July 1997 white paper set out the legislative competence of the Scottish Parliament in some detail, it said very little about the actual legislative process itself, as a key aspect of the Government's stated policy was to leave as much as possible of the Parliament's procedure for decision by the Parliament itself. There would be minimum statutory requirements as to the stages of bills (*para 9.8*), and the Government expected that committees would be established which could, for example, initiate legislation (*para 9.10*). The Bill follows this framework in *clause 34*:

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[15] The only example of an attempt to withhold assent arose in 1922 over a Bill to abolish PR for local government, an episode which suggests what sort of political and practical difficulties could arise in a conflict between Edinburgh and London. See V. Bogdanor *Devolution*, 1979: pp49-55, and Hadfield, *infra*, pp49-51

[16] B Hadfield, *The constitution of Northern Ireland*, 1989, pp62-3

[17] H Calvert, C*onstitutional law in Northern Ireland*, 1968, p353

> **34**- (1) Standing orders shall include provision-
>
> (a) for general debate on a Bill with an opportunity for members to vote on its general principles,
> (b) for the consideration of, and an opportunity for members to vote on, the details of a Bill, and
> (c) for a final stage at which a Bill can be passed or rejected
>
> (2) Standing orders may, in relation to different types of Bill, modify provisions made in pursuance of subsection (1).
>
> (3) Standing orders shall provide for an opportunity for the reconsideration of a Bill after its passing if (and only if)-
>
> a) the Judicial Committee decide that the Bill or any provision of it would not be within the legislative competence of the Parliament, or
> (b) an order is made in relation to the Bill under section 33
>
> (4) Standing orders shall, in particular, ensure that any Bill amended on reconsideration is subject to a final stage at which it can be approved or rejected.
>
> (5) References in subsection (3), section 27(2) and 36(1)(a) to the passing of a Bill shall, in the case of a Bill which has been amended on reconsideration, be read as references to the approval of the Bill.

Clause 34(1), requiring at least a three-stage process (akin to the Westminster stages of second reading, committee and third reading), is identical to s26 of the *Scotland Act 1978*. In creating detailed legislative procedures and practices, standing orders may well seek to adopt the policy of the Convention and others (including ministers) that the Scottish Parliament should not (as apparently was intended, to a large extent, for the 1970s Assembly) simply follow the Westminster model, but grasp the opportunity for innovation and experimentation afforded by the creation of a totally new legislative body within the UK system. Institutional differences, such as the consequences of the proposed electoral system, and the adoption of modern technological and other methods, may themselves create pressures for divergence from the Westminster model. The likelihood that committees would form a crucial element in the functioning of the new Parliament would no doubt feed into its legislative procedures. It remains to be seen whether these structural foundations will produce the more consensual, inclusive and less adversarial legislative process in a Parliament where it is envisaged that the basic Westminster model of Parliament-Executive relationships will remain to some degree.[18]

It should also be borne in mind that detailed procedures and practices for the Scottish Parliament will be considered within Westminster and Whitehall (and beyond) at a time when the House of Commons itself is undergoing a period of what the Government describes as 'modernisation,'[19] not least in the area of the legislative process, and there may well be a degree of cross-fertilisation between Westminster and Edinburgh (and, to some extent, the Welsh Assembly).

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[18] These issues are considered further in chapter IV of this Paper

[19] On which see generally Research Paper 97/107, *Parliamentary reform: the Commons 'modernisation' programme*, 28.10.97

Crick and Millar's draft standing orders contained some more detail on legislative procedures[20]:

Order 19 - Government and Standing Committee Bills

> 1. Government Bills shall on presentation be printed and published by Parliament. Bills will be debated in two stages by Parliament as a whole. The Steering Committee shall propose to the Parliament a timetable for each Government Bill.. After a First Stage debate they shall be referred by the Steering Committee to the appropriate Standing Committee.[32]
>
> 2. Government Bills reported from a Standing Committee shall thereafter be placed on the agenda for Second Stage by the Steering Committee.
>
> 3. After the Second Stage is moved a motion may be made to refer the Bill back to Committee for amendment before the motion for the Second Stage is put.
>
> 4. Government and Standing Committee Bills so proceeded with, and which have been adopted at second stage, shall be presented by the President for Royal Assent.[33]
>
> [32] Two stages are recommended, not the three readings of Westminster Bills. The Report Stage of the latter, between Committee and Third Reading, in which amendments can be moved from the floor, is notoriously prolix and time-wasting. Therefore to proceed directly from amendments in Committee to acceptance or rejection in a "second" or final stage debate. However, to protect the right of Parliament as a whole, without squandering its time on detailed amendments, a motion could be made to refer back to committee. So there would be three options in a Scottish Parliament: to pass, to reject, to refer back to committee (if necessary more than once), but not to amend on the floor.
>
> [33] Bills from Standing Committees should be a regular feature of a more democratic and less Government-dominated parliamentary ethos. We follow the Convention in deliberately seeking to change the Westminster balance of power. But also a strike a new balance so that Government legislation must be given a timetable on the floor of Parliament (that is, cannot be held up in committee indefinitely); also that Bills can be promoted by committees, yet with greater difficulty, requiring a two-thirds vote in the committee (see So 16.6 above) to demonstrate positive cross-bench support; and negatively so that hopeless Bills are not moved simply to crowd and encumber time available for Government Bills. In a new and presumably multi-party national Parliament it could be that on some measures a clear distinction between Government legislation and committee legislation may not arise. The Government might propose main clauses or broad outlines and leave the detailed implementation to a committee, or vice-versa.

Order 20 - Private Members' Bills

> 1. In addition to the right of a Standing Committee to introduce legislative measures, Members shall have the right to introduce Private Members' Bills in Parliament, with the support of five other Members.
>
> 2. Private Members Bills shall be printed and published by Parliament, and shall if agreed at First Stage be referred by the Steering Committee to the appropriate Standing Committee.
>
> 3. The Steering Committee shall allocate two sitting days before Christmas, two sitting days before Easter and two sitting days before Whitsun for proceedings on the Floor on Private Members Bills.[34]

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[20] B Crick & D Millar, *To make the Parliament of Scotland a model for democracy*, Nov 1995, orders 19 and 20, pp22-3.

> 4. The Steering Committee shall early in each Session shall hold a ballot to decide in which order Private Members' Bills shall proceed. A Member may give his place on the ballot another Member's Bill which has been printed and published.
>
> 5. Private Members' Bills awaiting first stage, and those reported from Standing Committees, shall be set down by the Steering Committee on the agenda for first and second stages, respectively, on a day allocated under para. 3 above for their consideration.
>
> 6. The Steering Committee shall, pursuant to Order 14.4, ensure that adequate time is allotted by Standing Committees to proceedings on Private Members Bills.
>
> 7. After the Second Stage is moved a motion may be made to refer the Bill back to the Committee for amendment before the motion for the Second Stage is put.
>
> 8. Private Members' Bills so proceeded with, and which have passed Second Stage, shall be presented by the President for the Royal Assent.
>
> [34] Private Members' Bills are an important right and must be protected by a specific timetabling provision in Standing Orders. But equally the Government, Parliament as a whole and the public need protection against abuse of this procedure for filibustering or for feckless publicity. So, again, not too little but not too much. If the procedure proved too popular members might, as in the House of Commons, might ballot for position on the timetable, but all Bills would be "printed" (as perhaps print-outs available from a computerised index publicly available).

III. Devolution disputes resolution

A. Introduction

This issue is crucial in the relationship between the London and Edinburgh political systems under devolution, as the mechanisms which, in shorthand, can be described as 'disputes resolution procedures', will be at the heart of the practical operation (especially when difficulties arise) of the scheme.

Colin Boyd (now Solicitor General for Scotland) has set out a number of general principles which he believes should be followed:[21]

- *"First, the Scottish Parliament should be allowed, within the scope of the legislation, to get on with the job without interference from outside"*. He noted that conflict could arise if British institutions were seen to be interfering in what are thought by the Scottish Parliament and Government to be matters exclusively within their own competence. This would be a factor not only of the political make-up of the two legislatures but also of the personalities involved. He proposed that "the right to intervene or challenge the decisions of the Scottish institutions should be confined to those occasions on which it is alleged that they are acting outwith their powers or that they are compromising an international obligation of the United Kingdom."

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[21] C Boyd, "Parliament and courts: powers and disputes resolution", in T StJ Bates, *Devolution to Scotland: the legal aspects*, 1997, pp24-25, emphasis added. For comment on this topic as it was set out in the white paper, see the memorandum of the Law Society of Scotland, Sept 1997.

- *"Secondly, the Act which establishes the Scottish Parliament should be as clear and precise as possible in defining devolved matters and setting out the rights and the obligations of the institutions involved."* He suggested that the *Government of Ireland Act 1920* approach of listing non-devolved rather than devolved powers "would be clearer and easier for ordinary people, let alone lawyers, to understand. It is less likely to lead to disputes and litigation. The Scottish Parliament would not have to point to a particular provision to justify the legislation. Psychologically it would help to establish it as a responsible body."

- *"Thirdly, where disputes arise and cannot be resolved by negotiation they should be resolved by a judicial body and not by politicians."* He thought that this was of particular importance where issues arise during litigation or if the rights of individual citizens were involved, and he set out the risks of involving politicians in such judicial or quasi-judicial arbitration "risks the charge that the process is tainted by attempts to gain political advantage or that objectivity has been clouded by proximity to the dispute. Accordingly the determination must be made by a court of law."

- *Fourthly, the judicial body exercising the responsibility for resolving the dispute should be one in which the parties to the dispute have confidence, whether they be the legislatures, governments or private individuals."* He believed it was important that the wider public in Scotland and the rest of the UK accept the body as fair and impartial, by choosing not only the right body, but also ensuring that its composition is seen to be fair and not 'packed'. The latter point could be settled by conventions, ensuring that Scottish judges were well represented on the bench.

- *"Finally, a system for resolving disputes should, as far as possible, be quick and efficient."*

The convenor of the Law Society of Scotland's devolution committee, Seith Ireland, was recently quoted as agreeing that the work of lawyers and judges would increase after the Parliament began: [22]

> Judges would also have new responsibilities to apply the European Convention on Human Rights, soon to be incorporated into Scots law, and lawyers could be kept busy as disputes arise over the Convention's interpretation and interpretation of the Scotland Act.
> "The Scottish parliament and those dealing with it are going to need good advice on devolution and what is intra and ultra vires," adds Ireland.
>
> The extra duties of judges might strengthen the case for a Judicial Appointments Commission to appoint judges and sheriffs in a way more transparent than at present.
>
> The commission might have a role in monitoring judges' performance, and could also take responsibility for developing the training of judges.

B. Legislative competence[23]

The scope and extent of the Scottish Parliament's legislative competence is defined in a number of the Bill's provisions. The Parliament has power to enact primary legislation ('*Acts of the Scottish Parliament*'), subject to the provisions of *clause 28*: ***clause 27(1***). An Act, any provision of which is outwith the Parliament's legislative competence (ie *ultra vires*), is not

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[22] "More freedom for the law in a devolved Scotland", *Scotsman*, 22.12.97

[23] This section deals with primary legislation. In addition there are provisions which define the competence of Scottish ministers to make subordinate legislation (eg. they cannot make any which is incompatible with Community rights or law: *cl 53(2)*)

valid law: ***clause 28(1)***. A provision is *ultra vires* if any of the following apply (***clause 28(2)***):

(a) it would form part of the law of a country or territory other than Scotland
(b) its effect would be to modify any provision of this Act
(c) it relates to reserved matters
(d) it is incompatible with any of the Convention rights or with Community law, or
(e) it would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland

Thus the question of *vires* is not restricted simply to the boundary between devolved and reserved matters, although that will presumably be the most obvious ground if and when the devolution scheme comes into operation. These five grounds are amplified by the other provisions of *clause 28*, including the rule of construction that any provision of an Act is to be read, so far as possible, so as to be within the Parliament's legislative competence, and to have effect accordingly: ***clause 28(9)***.

The white paper summarised the various procedures which could apply if there was a dispute over the Parliament's legislative competence:[24]

Reaching agreement

4.15 The Scottish Executive and the UK Government may from time to time take different views of the Scottish Parliament's legislative powers. There will therefore be procedures for identifying and resolving any such difficulties. The Government believe that, given an open and constructive relationship between the UK Government and the Scottish Executive, problems will usually be resolved quickly and amicably.

4.16 In drafting legislation for consideration by the Scottish Parliament, the Scottish Executive will take legal advice to ensure that the provisions brought forward are within the Scottish Parliament's powers. In any cases of uncertainty, there will be consultation with the Scottish Executive Law Officers and as necessary more widely. It will be for the Presiding Officer of the Scottish Parliament to satisfy himself or herself that legislation, whether brought forward by the Executive or by others, is intra vires before giving approval to introduction. These pre-legislative checks will ensure that any potential difficulties are identified at the earliest possible point. During the Parliamentary passage of legislation, it will fall to the Presiding Officer to certify that all amendments selected for debate are within the remit of the Scottish Parliament. UK Government Departments will be able to discuss any concerns which they might have with the Scottish Executive at that stage.

4.17 Prior to a Scottish Bill being passed forward from the Presiding Officer to receive Royal Assent, there will be a short delay period to ensure that the UK Government is content as to vires. In the event of a dispute between the Scottish Executive and the UK Government about vires remaining unresolved, there will be provision for it to be referred to the Judicial Committee of the Privy Council. For this purpose the Judicial Committee will consist of the Lords of Appeal in Ordinary. At least five Law Lords will sit in any case. The size and composition of the Committee will be decided by the Senior Law Lord (or, in his absence, the next senior Law Lord who is available) who will also decide where the Committee is to sit in any particular case. As appropriate, this might be in Edinburgh. The Judicial Committee will also be able to hear any subsequent disputes about devolution issues in relation to secondary legislation and Acts of the Scottish Parliament after Royal Assent.

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[24] *Scotland's Parliament*, Cm 3658, July 1997, pp14-15

These procedures can be examined at a number of stages, as set out in the Bill (supplemented by the description in the white paper, above, and explanations in the Scottish Office guide to the Bill).

C. Pre-legislative *vires* scrutiny[25]

- The Scottish Minister in charge of a Bill must, on or before its introduction, state in writing (to be appropriately published) that he or she is of the view that, if it became an Act with its identical provisions, it would be within the Parliament's competence (*intra vires*): ***clause 30***. In practice, as the white paper suggests, this will mean that the Minister will seek appropriate legal advice, from the Scottish Law Officers and others, as necessary.

- The Presiding Officer must ensure that no Bill is introduced if it, or any provision of it, is outwith the Parliament's legislative competence (*ultra vires*): ***clause 31(1)***. Presumably the Presiding Officer will have access to legal advice independent of the Executive, (perhaps in-house, akin to Speaker's Counsel at Westminster). The Parliament will be able to overrule any such decision that a Bill is *ultra vires*, so that the Bill can be proceeded with: ***clause 31(2)***.

D. Parliamentary proceedings

The white paper stated: "During the Parliamentary passage of legislation, it will fall to the Presiding Officer to certify that all amendments selected for debate are within the remit of the Scottish Parliament. UK Government Departments will be able to discuss any concerns which they might have with the Scottish Executive at that stage" (*para 4.16*). None of this is set out in the Bill itself, being presumably more appropriate for standing orders and the like, or through informal relationships between appropriate bodies at Scottish and UK level. If the Judicial Committee has decided that a Bill, or any provision in it, is *ultra vires*, or if the Secretary of State has made a *clause 33* order (see below), standing orders have to provide for a legislative stage where the Parliament can reconsider, amend and approve it, as appropriate: ***clause 34(4)-(5)***.

E. Pre-Assent scrutiny

- Within four weeks of the initial or subsequent passing of a Bill, the *Advocate General* (the UK Government's Scottish law officer), *Lord Advocate* (the Scottish Parliament's senior law officer) or the *Attorney General* (the senior 'English' law officer) may refer the

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[25] The *Scotland Act 1978* did not contain any such provisions.

question of the *vires* of a Bill, or any provision of it, to the *Judicial Committee of the Privy Council*: ***clause 32***.[26]

- Within four weeks of the initial or subsequent passing of a Bill, the Secretary of State can make an order prohibiting the Presiding Officer from submitting it for Royal Assent if he or she has reasonable grounds to believe that it contains provisions which

  (a) are incompatible with any international obligations, or

  (b) which, though *intra vires* in terms of *clause 28(4) or (5)*, would have an adverse effect on the operation of an enactment if it applies to reserved matters: ***clause 33***.[27]

An order under this provision ceases to remain in force once the relevant Bill has been reconsidered, amended and approved by the Parliament: ***clause 33(5)***. A *Scotsman* article recently analysed the potential impact of this clause:[28]

> CLAUSE 33 does not have the romantic symbolism of Labour's long gone bete noire, Clause 4, but it is the one aspect of the Scotland Bill which immediately raised a few eyebrows. A first reading of the clause itself raises the suspicion that it opens the door for a Scottish secretary to overrule the Scottish parliament on "reasonable" grounds. But yesterday ministers and officials insisted it would only apply in a small number of cases on extremely technical points relating to reserved matters. And even then the decision to prevent the bill going through would have to be done on "reasonable grounds" with the ultimate option being a judicial review if no agreement can be reached. "It is emphatically not a veto, the secretary of state does not have a veto on devolved matters," said a Government source. The clause deals with bills containing provisions which enable the secretary of state of the appropriate UK department to take action to stop them if he believed they would be incompatible with any international obligations or which would have an "adverse effect" on the operations of an enactment as it applies to reserved matters.
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> This was seen by some as a potential "timebomb", leaving the way open for a future Scottish secretary to block a bill. If for, example, the Scottish secretary represented a different party from the one forming the majority, surely this would enable him or her to use the power to block legislation? Not so, say Scottish Office sources, who insist that no secretary of state of any department has any veto over devolved matters and that this clause actually reinforces Scots private law. In drafting the bill, officials had to make it absolutely clear how a Scottish parliament would go about making legislation. It is in Clause 27 (7), which sets out that procedure, that the bill states the supremacy of the UK parliament, in effect the statement that sovereignty rests with Westminster. Clause 28 then states that any act of the Scottish parliament is not law if any provision is "outside the legislative competence" of the Scottish parliament. Clause 33 has to be taken in context with those other clauses. It deals with the power of intervention and is clearly defined. The secretary of state can intervene to stop a bill only in certain limited cases where provisions trespass on reserved matters of where the UK's international obligations would not otherwise be met. It also applies to measures of Scots private law which relate to reserved subjects, such as company law. On international matters, the power applies to treaty obligations outside the European Union and does not affect judgments of the European Court of Human Rights. European matters are dealt with separately. After devolution, the UK parliament will remain the signatory to international treaties such as those agreed by the United Nations. If the Scottish parliament introduced legislation on something that broke the UK's obligations in the treaty, the secretary of state would have the power to stop the legislation. Officials say this power is designed simply to ensure that the UK government meets

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[26] Unless, after a Bill's initial passing, that law officer has notified the Presiding Officer that he or she does not intend to make a reference: ***clause 32(3)***.

[27] Unless, after a Bill's initial passing, the Secretary of State has notified the Presiding Officer that he or she does not intend to make a reference: ***clause 33(4)***.

[28] "Scotland Bill's clause for concern", *Scotsman*, 20.12.97

its international treaty obligations. This also includes things like changes of names of organisations. The power is said to be needed because the Scotland Bill permits the Scottish parliament to trespass into reserved areas in some cases. In other matters the parliament is not permitted to trespass on reserved areas and if it did the matter would have to be dealt with by the courts and ultimately the Judicial Committee of the Privy Council as the bill outlines. Officials say that this "limited power" of intervention protects the "legitimate interests of the UK government in legislation dealing with reserved matters which depend on Scots private law for their operation in Scotland". It does not apply to measures of general criminal law. "[The clause] provides a solution to the problem of maintaining the coherence of Scots private law despite the fact that many aspects of it relate to reserved matters," said an official. These matters are said to be extremely technical and would be resolved early. In these areas, the appropriate UK Government department would be consulted early on in the process. Consultation is usually widespread anyway and Clause 33 gives the department the chance to raise its concern and ultimately stop the bill going through. "In 99.9 per cent of cases the situation would be resolved early on. In fact, I would revise that and say in 100 per cent of cases. This is not a veto and it does not affect devolved matters," said a Government source. If, for example, Scottish Enterprise changed its name it would have a consequent effect on Inland Revenue legislation and the UK legislation would have to be altered. If the Scottish parliament had not considered this, then Clause 33 would give the appropriate UK department the right to intervene. In relation to international obligations, the reasonable grounds needed to block the legislation are that the treaty the UK had signed to would be breached. In relation to Scots private law matters, there must reasonable grounds for considering that a private law or incidental measure would have an adverse effect on the operation of an existing law dealing with the same subject.

But officials insist that the secretary of state "does not have the power of override". These powers only concern provisions of devolved legislation in the "narrow case" where they would be incompatible with international obligations. Senior sources in the Scottish Office deny that this clause opens the way for its remit to be widened in the future. "It is very specific, it is very narrow and it is very technical," said an official. But that will not stop some opposition politicians from trying to exploit the issue. The Scottish National Party leader Alex Salmond was one, although his criticism was firmly tongue in cheek, and the Tories also mention it. The other area of scrutiny is those matters which are reserved at Westminster.

Some of the decisions seem to betray no rhyme or reason and in most areas the potential for conflict is slight. The Scottish Secretary, Donald Dewar, said yesterday that he accepted things might change. During the bill's passage through the House, that is what is likely to happen. Some might argue that some reserved matters should be devolved. The biggest area for potential conflict lies in social security where the UK government retains responsibility while the Scottish parliament has the power over social services.

F. Post-legislative proceedings on 'devolution issues'

A 'devolution issue' is defined in *paragraph 1* of ***schedule 6***, as a question:

(a) whether an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament is within the legislative competence of the Parliament

(b) whether subordinate legislation which a member of the Scottish Executive has purported to make or is proposing to make, or any provision of such legislation, would be within the legislative competence of the Parliament if it were included in an Act of the Scottish Parliament

(c) whether a matter in relation to which a member of the Scottish Executive has purported to exercise or proposes to exercise a function (other than a function to make subordinate legislation) is a reserved matter

(d) whether a purported or proposed exercise of a function (other than a function to make subordinate legislation) by a member of the Scottish Executive is, or would be, incompatible with any of the Convention rights or with Community law

(e) whether a failure to act by a member of the Scottish Executive is incompatible with any of the Convention rights or with Community law,

> *(f)* whether a matter in relation to which a Minister of the Crown has purported to exercise or proposes to exercise a function is a devolved matter.

A devolution issue is not to be taken to arise if such a contention by a party appears to the relevant court or tribunal to be frivolous or vexatious: ***para 2***. Proceedings on a devolution issue can be instituted in the courts of Scotland, England & Wales or Northern Ireland by the relevant law officer(s), and the Lord Advocate can defend any proceedings in these courts by another law officer. This is without prejudice to any other power to institute or defend proceedings exercisable by any person.

Schedule 6 also sets out the various paths where appeals or references on devolution issues can be made to higher courts, up to the Judicial Committee itself. If a devolution issue arises during proceedings in the House of Lords, it must be referred to the Judicial Committee, "unless the House considers it more appropriate, having regard to all the circumstances, that it should determine the issue": ***para 32***. References may also be made directly to the Judicial Committee

(a) by a court or tribunal if a relevant law officer, who is a party to the proceedings, so requires (*para 33*), or
(b) by a law officer even if the devolution issue is not the subject of legal proceedings (*para 34*).

In the latter case, where the reference relates to the proposed exercise of a function by a Scottish Minister, the law officer must notify that Minister, and the Minister cannot then exercise the function until the reference has been decided or otherwise disposed of. The Advocate General can institute proceedings relating to any possible failure of a Minister to comply with this suspension, without prejudice to the power of any other person otherwise to institute proceedings (*para 35*).

Where a court or tribunal decides that an Act, or a provision in it, is *ultra vires or* that a Scottish Minister did not have the power to make, confirm or approve subordinate legislation under challenge, it may make an order to remove or limit any retrospective effect of that decision or to suspend its effect for a period and subject to conditions in order for the defect to be corrected: ***clause 93(1).*** The court or tribunal must take into account the extent to which third parties would be adversely affected by its decision (***cl 93(3)***), and when considering whether to make an order, must ensure that the Lord Advocate is so informed unless he or she is a party or otherwise been given intimation under *schedule 6* (***cl 93(4)***). The Lord Advocate may then become a party to the proceedings in relation to any such order (***cl 93(5)***).

G. Judicial Committee of the Privy Council

Boyd had examined the options for an appropriate judicial forum,[29] especially a new 'constitutional court'[30], the House of Lords and the Judicial Committee of the Privy Council.

As to the suggestion of a specially constituted constitutional court, he recalled the argument during the passage of the *Scotland Act* in 1978, and thought that such a court may be considered if and when there is wider constitutional reform in the UK, but it would be unlikely to commend itself to Parliament at present, especially as there was, he believed, no widespread clamour for it publicly or in legal circles: "It is not suggested that there is not a court which could deal with constitutional issues and it seems unnecessary to invent one to deal only with devolution issues. These in themselves would not warrant the appointment of a full-time court. Moreover, the constitution of the court might itself give rise to considerable debate, diverting attention from the real issue of establishing a Scottish Parliament" (p31).

As to the other two options, it could be argued, he stated, that there was little practical difference between them, especially in composition. The House of Lords was perhaps the closest to a supreme court in the UK, as the final court of appeal (except for Scottish criminal cases), with generally at least two Scottish judges available. However he noted the disadvantages of the House of Lords, such as the great resistance, historically, to its having any role in Scottish appeals (the acceptance of such he described as "grudging rather than welcomed"), and the perception, especially by the public, that the House was part of the UK Parliament and could sometimes be judge in its own cause.

Boyd suggested that the Judicial Committee was "the natural place for devolution questions to be decided," (as had been proposed in the 1970s legislation, and in the 1920 and 1973 Irish legislation, and because of its Commonwealth role), and flexibility of composition. Note, however, that though dissenting opinions have been permitted since 1966, they are rare, and convention dictates that any judge who agrees with the result of the majority but by a different route may not prepare a dissenting judgement.[31] It has been suggested that these practices could inhibit the development of a new jurisprudence in such a novel, but constitutionally important area.

For the purposes of this legislation, ***clause 94(2)*** provides that the members of the Judicial Committee must hold or have held:

(a) the office of a Lord of Appeal in Ordinary, or

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[29] *op cit*, pp30-32

[30] The argument for a new 'constitutional court' was made by Jackson in another essay in the same collection: G Jackson, "Devolution and the Scottish legal institutions", in StJ Bates, *op cit*, p60.

[31] D Owen, *The Judicial Committee of the Privy Council*, Oct 1997, p7 (a background note prepared by the Registrar)

(b) 'high judicial office'

The latter is defined in s25 of the *Appellate Jurisdiction Act 1876*, as the Lord Chancellor and the judges in the 'superior courts' (ie, in England, the High Court and Court of Appeal; in Northern Ireland, the High Court and Court of Appeal, and, in Scotland, the Court of Session), but not other members *per se* of the Judicial Committee.[32]

The white paper had originally proposed that only Lords of Appeal in Ordinary could sit, and that the quorum be 5.[33] The extended membership would allow, for example, certain judges of the Court of Session. The Bill does not refer to any particular quorum, because existing legislation provides for a quorum of 3, though in practice normally 5 judges would sit.[34] The white paper also said that the size and composition of the Committee would be decided by the senior Law Lord (or, if absent, the next available senior Law Lord), who will also decide where it would sit in any particular case. This could be in Edinburgh as appropriate (*para 4.17*).

IV. Procedure and practice[35]

A. Generally

The operational aspects of the Scottish Parliament will be crucial to its future viability and effectiveness. This ranges from broad areas such as the location and structure of the Parliament itself[36] (including the shape of the main chamber) through the provision of resources for MSPs by way of staff, facilities, and other assistance (either provided individual or centrally)[37] to the philosophy behind, and detailed content of the Parliament's procedures and practices (as set out in its standing orders and elsewhere). While much of this will be decided or developed once the Parliament comes into being and begins to operate, many of the basic decisions (at least on its initial operation) will have to be determined during the passage of the Bill. Thus, matters such as the extent of statutory prescription (in the primary and any secondary legislation), and the scope for the Parliament to be enabled to decide its own procedures and practices, will be debated during the Parliamentary passage of the legislation, both in Parliament and in any working/advisory groups preparing detailed schemes for the operation of the new Parliament. While the scope for the Parliament to create new forms of operation may formally be wide, the extent to which novel, experimental

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32 The exclusion is provided by the non-application in *cl94(2)(b*) of s5 of the *Appellate Jurisdiction Act 1887*.

33 *op cit*, para 4.17

34 Scottish Office guide to the Bill, Dec 1997, annex A, p4

35 This section was co-written with Rob Clements, Director of Parliamentary and Reference Services

36 Unless the view is taken that modern technology makes a central building unnecessary, as suggested in "Take the high-tech road," *Computing*, 16.10.97

37 Iain MacWhirter, when discussing the issue of the cost of a new parliament (especially as to its location), emphasised that "facilities aren't luxuries. They are the essential infrastructure of democracy. It is all very well keeping politicians in their place, and not bankrolling monuments to their vanity. But good government doesn't come cheap.": "Let's build a parliament," *Scotsman*, 17**.7.97**

or radical practices and philosophies are embedded in, for example, the enabling legislation, initial standing orders and designs for the physical structure of the Parliament, may well determine how much practical freedom the new Parliament will have to develop its own distinct ways of working, at least in its early years.

A constant theme of pro-devolutionists in recent years has been that any new Scottish Parliament should not simply adopt the 'Westminster model' of Parliamentary procedure and practice. By this was meant not only detailed procedures and practices, such as rules of debate, order of business or method of voting, but more fundamental issues such as the nature of the Parliament's relationship with its Members, the Executive and with the 'world outside' (such as the public and the media). The present Westminster Parliament is a product of centuries of constitutional and political development in England and the UK, and such a long period, characterised, in general, by evolutionary democratic development almost inevitably produces a Parliamentary ethos which gives great weight to custom and tradition. The current modernisation programme of the new Labour government is the latest example of such evolutionary change for the House of Commons.[38]

In particular, the fundamental bi-polar 'Government-Opposition' nature of the Westminster tradition has been the subject of much criticism, both in relation to Westminster itself and to any new Parliamentary institutions created within the UK. This 'adversarial' aspect (often described, not entirely accurately, as 'party political'[39]) is seen by some to be the main weakness of the Westminster model, and this has led to calls for symbolic (such as the shape of the Parliamentary chamber) and practical means to be devised to reduce scope for confrontation and promote the opportunity for consensus and agreement. This approach has been expressed even by ministers. Henry McLeish, on a visit to Bavaria in October, said:[40]

> My meetings today have reinforced my strong belief that a Scottish Parliament will serve Scotland's needs far better if it replaces the confrontational politics of Westminster with a new approach based on consensus and co-operation.

Practical ways of achieving a 'less confrontational' Parliament may include extensive use of committee-based practices[41] and significant day-to-day involvement of, and interaction with external bodies and individuals,[42] in, say, its legislative and scrutiny processes. However it may be that the new Parliament will retain many recognisably 'Westminster' features, not least because the current devolution scheme, as expressed in the white paper and the Bill, retains the fundamental bi-polar nature of the Westminster model, with all members of the

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38 See further Research Paper 97/107, *Parliamentary reform: the Commons 'modernisation' programme*, 28.10.97, and, more generally, Research Paper 97/64, *Aspects of parliamentary reform*, 21.5.97

39 See, for example, "Let's smash mould of petty party bickering", *Scotsman*, 12.9.97

40 "Co-operation not confrontation is winning formula for Scottish Parliament – Henry McLeish," Scottish Office PN 1476/97, 6.10.97

41 The departmental select committee system in the House of Commons is often cited in this respect.

42 Alan Cochrane in the 12 September 1997 *Scotsman* article already cited encapsulates this attitude: "This involvement of the public must be at the root of all the parliament does. Its watchword must be: tell the people."

Scottish Executive, including the First Minister and junior ministers,[43] being MSPs (*clauses 42-46*). While the Parliament may adopt standing orders which do not formally give the Executive much of the initiative in its operation generally (especially if matters such as its order of business is dealt with by, say, a 'business steering committee', and Members other than Ministers are given scope to introduce and pilot legislation through the Parliament), the devolution legislation and the like may, expressly or otherwise, assume some continuation of the 'Westminster' Government-Opposition style[44] One crucial factor in this whole area may be any changes which may result from adoption of a more proportional electoral system, which may lead to greater party fragmentation and the election of 'independents', requiring formal or informal coalitions at Executive and Parliamentary level.

A great deal of work, within and outwith the Scottish Constitutional Convention, has been undertaken in recent years to flesh out the Opposition parties' devolution or independence proposals. This has provided a perhaps unique opportunity for a radical rethink about how a parliament can operate other than simply being based on the model of the Westminster Parliament.[45] In its 1995 report the Convention claimed that "the creation of a new parliament is a rare and exciting moment, one which affords unique opportunity for change and renewal .... It therefore expects that the parliament will provide through its practices and procedures a form of government in whose accountability, accessibility, openness and responsiveness the people of Scotland will have pride. Accordingly, the working arrangements for Scotland's parliament set out here describe a legislature that is very different from the Westminster model." The Parliament would be more accessible to its citizens, "and this proximity will be reinforced by the introduction of an information technology strategy designed expressly to encourage understanding of the Parliament's workings and participation in its decision-making by all organisations and individuals." It will "ensure the greatest possible involvement of the people of Scotland, both as Members of the Scottish Parliament and as contributors to its work. It will vary the location of its meetings, work to standard business hours and provide appropriate facilities for Members, for the media and the public." Arrangements would be made "to make sure that the Parliament remains responsive to the wishes and values of the people of Scotland."

Crick & Millar, in their standing orders for the Parliament, set out their philosophy:[46]

> Scotland's Parliament will only work as its supporters want it to work, for and with the Scottish people, if from the word go it is bold enough to break from the Westminster mould and to invent and adapt procedures and working practices better suited to and arising from Scotland's more democratic civic traditions. It should draw on experience outwith more than within the United Kingdom. Procedures are not irrelevant to democracy, they are part of its essence. Perhaps they are only means to an end, but the end cannot be reached without the right means. And until now there has been little thought about this.

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43 Though not necessarily the two law officers: *clause 26*

44 For example, *clause 70(5)* requires standing orders to ensure that only a member of the Scottish Executive may move a motion for a tax-varying resolution, and *schedule 3 para 4(2)* requires standing orders to ensure that regard be had to the balance of parties in the Parliament when appointing members of any committees and sub-committees.

45 The issue of composition and the electoral system is not considered here

46 B Crick & D Millar, *To make the Parliament of Scotland a model of democracy*, Nov 1995, pp2-3

The tradition-bound procedures of the Westminster Parliament and its excessively confrontational nature are sufficient enough reasons for Scotland's Parliament to make a clean break with Westminster's procedures. Scotland's Parliament need not suffer from excessive executive control and party domination in what is likely to remain, quite apart from the consequences of a new electoral system, a multi-party system. Too many of the Westminster procedures, formal and informal, seek to perpetuate the English myth of the two-party system, whatever the reality on the ground. The proceedings of the Scottish Constitutional Convention itself have shown that a more consensual approach to decision-making is possible in Scotland, and it has argued that such an approach should and could continue. Party differences will still be strong but procedures should not force party divisions on every issue. Some issues inevitably cut across party lines. and there is no harm in that. Every vote need not be a vote of confidence. Procedures are needed that can work in such a spirit and in such circumstances.

However, not all Westminster procedures need be discarded and doubtless much that is familiar will often be followed or adapted out of habit. We argue for a deliberate and conscious break, otherwise nothing may change; but we know that breaks are never complete in peaceable and constitutional circumstances; so not too much, but not too little either. And we look for rules of procedure to strike a balance between the need to carry on responsible government in a coherent and reasonably consistent way and the rights of the electorate not merely as expressed through their elected MSPs, but by some new devices (new to the United Kingdom at least) to allow the public to express their opinions directly. But such a balance will look very radical to conventional Westminster eyes. And so it will be.

To prevent everything that is not written into the Enabling Act being done in the Westminster way, we suggest the Standing Orders that will follow. We seek to avoid excessive detail. Again, not too much but not too little. The Parliament, once it has begun work and gained experience, will have its own ideas, will amend and add to its Standing Orders. It will need many other ordinary rules of procedure which it can change by simple majority, unlike these Standing Orders which we would propose, in the spirit of the Convention's search for a more consensual form rather than party contestation all the time, *as basic rules needing a two-thirds majority of Members to change*. So when we say 'Standing Orders' we mean just that, whereas when we say "rules of procedure" we mean rules that can be changed by a simple majority vote.

We have performed this strange, gratuitous labour out of a real fear that unless some basic framework, in workable detail which has been publicly debated, is either annexed to the to the Enabling Act or ready to be put before the first sitting of the new Parliament, file Parliament would almost certainly, as we have already suggested, in tile excitement and urgency of the first Session to get on with real issues, adopt or fall into existing known practices. The chance for fundamental reform would be gone, perhaps for ever. Busy new parliaments are likely to continue much as they begin. What happened in the British Isles in 1920 makes a cautionary tale: both the *Dail Eireann* in Dublin and the Stormont Parliament in Belfast carried on with Westminster practices to an astonishing degree. This was no considered tribute to Westminster, certainly not in the Irish case, but lack of forethought or short-sightedness amid the desperate pressures of the times. The big men had other things on their minds. But that is where the little fellows can come in. Scotland still has a little precious time to think, debate and prepare.

The July 1997 white paper made it clear that the Government wished as far as possible to leave detailed decisions on how the Parliament would work to the Parliament itself. It nonetheless expected that “the Scottish Parliament will adopt modern methods of working;

that it will be accessible, open and responsive to the needs of the public; that participation by organisations and individuals in decision making will be encouraged; and that views and advice from specialists will be sought as appropriate."[47] The government's aim was that the Parliament, "once in being, should have the necessary room to evolve in its own way, rather than be forced along a rigid predetermined path"[48]. It was acknowledged, however, that preparatory planning and design work would need to be undertaken to enable the Parliament to be set up and running on schedule, although no substantial expenditure would be incurred before the principle of the legislation was approved by Parliament.

Less than a month after the white paper was published, the devolution minister Henry McLeish, announced that the government would establish an advisory group on telematics[49] and the Scottish Parliament. This was to help the Parliament become 'the most advanced on-line government in the world':

> The Scottish Parliament will be, wherever it is located, a modern Parliament for a modern Scotland. I hope it will reflect Scotland's position at the heart of the development of a new information society. I want the Scottish Parliament to operate efficiently and effectively and to do so it will need to make the best use of the advanced technology that is now available to us. I also want the Scottish Parliament to be accessible: people from all across Scotland should be able to find out what it is doing and make their views known. Here the use of telematics will be vital., I want to ensure that whether you live in Wester Ross or Wester Hailes you will be able to see at an instant what your Parliament is up to[50].

Although membership of the group has not yet been announced, it has been reported that it will include representatives from major IT suppliers and telecom providers. Among the technologies that the group will discuss may be videoconferencing, interactive TV and electronic voting as well as more familiar ones like a web site[51].

A month before publication of the Bill, the Secretary of State announced the establishment of an all-party Consultative Steering Group that would take forward consideration of how the Parliament would operate. While this group would draw up standing orders for the Parliament, it would be for the Parliament's Members to decide whether to accept them.

> 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

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47 *Scotland's Parliament*, Cm 3658, July 1997, para 9.9

48 ibid para 12.2

49 Telematics is the term used to describe the convergence of information technology with modern telecommunications and digital technology.

50 Scottish Office Press Notice 1089/97 18.8.97

51 *Computer Weekly*, 21.8.97 p4; John Wheatley Centre *A Parliament for the millennium – a report by the Advisory Committee on Telematics for the Scottish Parliament* June 1997. For other imaginative proposals see, for example, "Scotland plans tele-democracy," *Guardian*, 18.8.97 and "Take the high-tech road," *Computing*, 16.10.97

> 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. 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.
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> 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.
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> Among the key issues to be considered are: How should the Parliament conduct its day to day business? How will the Parliament turn ideas and policies into laws? What use should the Parliament make of pre-legislative committees? How can modern technology best be used to make the Parliament open, accessible and efficient? 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.
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> Because of time constraints, some decisions on the design of the Parliament building will be taken before final decisions on the operation of the Parliament have been made. I will be aiming to ensure that the building design is as flexible as possible to accommodate future demands of the Parliament. I also aim to ensure that, as far as practically possible, the work on the Standing Orders meshes with the work on the building and the shape of the Scottish Executive.
>
> A number of technical working level groups, some chaired by The Scottish Office, might be formed to do the detailed work of preparing the draft Standing Orders and look at a range of operational issues. These would include relevant members with specific expertise. As well as a working group to look at general procedural matters, there will be a need for groups on financial issues, and on how technology will be used by the Parliament. There will be some interaction between the Group's work and that of the Commission on Local Government and the Scottish Parliament.
>
> The Consultative Steering Group would be charged with reporting to me by the end of 1998. Draft Standing Orders would then be prepared on the basis of the report, which I would present to the Parliament. I propose that the Group should meet for the first time shortly after the Scotland Bill has received its second reading. The Group should comprise one representative from each of the main political parties, together with one representative each from the Scottish Constitutional Convention and the Convention of Scottish Local Authorities. As regards other members, I propose that the main Group should comprise no more than 10-12 members in total. At this stage I have written to the main political parties, SCC and COSLA for their views on who might serve on the main group[52].

The government believes that this approach will permit the development of draft standing orders which "are likely to command widespread acceptance"[53]. In commenting on the establishment of the group, Henry McLeish said "We want to move away from the yah, boo at Westminster because it is a bit like a football match. A lot of it is just the actors playing out drama. My preference is for something that doesn't have the politicians facing each other, two swords apart". It has been reported that other parliaments in Europe – for example

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[52] Scottish Office Press Notice 1751/97 14.11.97

[53] HL Deb vol 583 c 82WA, 19.11.97

Catalonia – will be looked at as possible examples and also that among the options that will be considered will be that of allowing committees to meet in towns other than Edinburgh[54].

At the time of writing the major parties had agreed their members of the group[55] – Alex Salmond for the SNP, Jim Wallace for the Liberal Democrats, Paul Cullen for the Conservatives – and COSLA and the Scottish Constitutional Convention had also agreed representatives. Other members had not been finalised but should be announced shortly and the first meeting of the group is scheduled for 19 January 1998. Details of the membership of the technical level working groups – which will report to the main group but not necessarily share any of its members – are likely to be finalised subsequently. The telematics group announced in August will act as one of these technical level groups.

The white paper set out how the operational procedures and practices of the Parliament will be established:[56]

> ***How the Scottish Parliament will work***
>
> **9.1** The Government intend the minimum of legislation to establish the Scottish Parliament; and wherever possible to leave the Scottish Parliament to decide for itself what its procedures should be. This Chapter sets out the basic constitutional arrangements which the Government will put in place, within which the Scottish Parliament will operate according to its own procedures …..
>
> **9.8** The Scottish Parliament will be responsible for drawing up and adopting Standing Orders. The Government intend that these Standing Orders be designed to ensure openness, responsiveness and accountability. There will be minimum requirements covering stages of Bills, Crown interests, preservation of order, Members' pecuniary interests, reporting of proceedings, public access and committees.
>
> **9.9** The Government wish so far as possible to leave detailed decisions on how the Scottish Parliament will work to that Parliament itself. The Government expect that the Scottish Parliament will adopt modern methods of working; that it will be accessible, open and responsive to the needs of the public; that participation by organisations and individuals in decision making will be encouraged; and that views and advice from specialists will be sought as appropriate.
>
> **9.10** The Government also expect committees to play an important part in carrying out Parliamentary business and the Scottish Parliament will have power to establish such committees as it considers appropriate. It is envisaged that these committees might for example initiate legislation, scrutinise and amend the Scottish Executive's proposals as well as having wide-ranging investigative functions. Such a role for the Scottish Parliament committees will mean that the proposals of the Scottish Executive will be appropriately scrutinised. The committees might meet from time to time at appropriate locations throughout Scotland so that people can see how their country is run.
>
> **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.

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54 *Scotsman* 15.11.97

55 Substitute members will be allowed when necessary.

56 Cm 3658, p30

B. Standing Orders: statutory provision as to content

Clause 21 states that the proceedings of the Parliament are to be regulated by **standing orders**, and *schedule 3* and a number of specific clauses set out how a number of issues are to be dealt with, and whether they must or may be contained in the Parliament's standing orders:

Mandatory provisions

Clause 8(5):	determination of date of constituency vacancy
Clause 9(7):	determination of date of regional vacancy
Clause 18(4):	exercise of Presiding Officer's functions by another MSP due to vacancy etc. (subject to this, PO can authorise any deputy to act: *cl 18(5)*)
Clause 21:[57]	proceedings of the Parliament to be regulated by standing orders.
Clause 22(1):	register of Members' interests
Clause 22(2):	declaration of interests by Members before participation in proceedings
Clause 22(4):	prohibition of paid advocacy
Clause 31(1): [58]	*vires* scrutiny of bills by Presiding Officer before their introduction (subject to the Parliament overruling any decision of the Presiding Officer that a bill is *ultra vires*: *cl 31(2)*)
Clause 31(3):	Presiding Officer is person who submits Bills for Royal Assent
Clause 31(4):	Presiding Officer not to submit Bill for Royal Assent if there is a *cl 32* reference by a Law Officer or a Secretary of State's order under *cl 33*
Clause 31(5):	Presiding Order not to submit a Bill for Royal Assent unamended if Judicial Committee has decided it is *ultra vires*
Clause 34(1): [2]	legislative process for Bills, including stages which allow debate on the general principles of bills, detailed consideration of bills and a final opportunity of passing or rejecting bills.
Clause 34(3):	reconsideration of Bills where the Judicial Committee has decided that it was, in whole or in part, *ultra vires*, or if *cl 33* order has been made
Clause 34(4):	final stage where Bill amended on reconsideration can be approved or rejected
Clause 66(3):	consideration by the Parliament of *cl 66(1)(e)* financial reports and accounts
Clause 70(5):	only a member of Scottish Executive to move motion for a tax-varying resolution
Sch 3 para1(1):	preservation of order in proceedings of the Parliament (including provision for preventing conduct which would constitute a criminal offence or contempt of court).
Sch 3 para 2(1):	proceedings of the Parliament to be in public, except in circumstances prescribed in standing orders. There may be provision for conditions imposed on the public attending meetings, including the exclusion of those who do not comply with these conditions.
Sch 3 para 3:	reporting and publishing of proceedings of the Parliament
Sch 3 para 4(2):	membership of committees and sub-committees to have regard to the balance of parties in the Parliament.
S*ch 3 para 5*:	Crown interests: ensuring that bills which require such Crown consents shall not pass unless the consents have been signified to the Parliament

Discretionary provisions

Clause 18(6):	participation (inc voting) of Presiding Officer and deputies in Parliament's proceedings
Clause 22(3):	exclusion etc.of Members with registrable interest in relevant proceedings of the Parliament
Clause 22(5):	exclusion from proceedings of Parliament of Members in breach of *cl 22(1)-(4)* interests rules

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[57] This is the general provision as to the role and function of standing orders.

[58] The Scottish Parliament's legislative role is considered more fully in chapters 2 and 3 of this Paper

Clause 23(5):	exercise of *cl 23(1)* power to call for witnesses and documents by committees or sub-committees
Clause 25(1):	person other than Presiding Officer authorised to require and administer oath to witnesses
Clause 25(4):	payment of allowances and expenses to witnesses and those producing documents
Clause 26(1):	participation of Scottish Law Officers in proceedings of the Parliament, if not Members
Clause 31(2):	power for the Parliament to overrule any *cl 31(1) ultra vires* decision of Presiding Officer, and for such a Bill to proceed
Clause 34(2):[59]	different types of legislative process for different types of Bills
Sch 3 para 1(2):	provision for preservation of order may include exclusion of Members from proceedings
Sch 3 para 2(2):	provision for conditions imposed on the public attending meetings, including the exclusion of those who do not comply with these conditions.
Sch 3 para 4(1):	committees which may be provided for by standing orders may appoint sub-committees.
Sch 3 para 4(3):	exclusion of Members who are not members of a committee or sub-committee from that body's proceedings.

The *Government of Wales Bill*[60] contained detailed provisions on the creation of the Assembly's standing orders by statutory commissioners, and on their form and content, which reflected, *inter alia*, the particular form of devolution scheme to be applied there (in terms of division of powers, including legislative power, between Wales and Westminster/Whitehall). The standing orders had to give effect to certain principles and criteria, including:

- Preservation of order (*clause 68*)
- Openness (*clause 69*)
- Accountability (*clause 70*)
- Integrity (*clause 71*))

In addition to these requirements, the Bill directs the Assembly to act in certain ways or do or establish a number of other things for its operation, including:

- Equality of English and Welsh languages (*clause 46*)
- Equality of opportunity for all people (*clause 47*)
- Election of presiding officers (*clause 51*)
- Election of Assembly First Secretary (*clause 52*)
- Establishment of committees (*clause 53*)
- Subordinate legislation procedures (*clauses 63-7*)
- Provision of documents relevant to Assembly business to Secretary of State (*clause 75(3)*)

In addition to specific functions and powers transferred to it, the Assembly will be empowered to do certain things, including:

- Consider any matter affecting Wales (*clause 34*)
- Support of culture (*clause 33*)
- Appointment of staff (*clause 35*)
- Holding of inquiries (*clause 36*)

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[59] The Scottish Parliament's legislative role is considered more fully in chapters 2 and 3 of this Paper

[60] See Research Paper 97/132, chapter IV

◊ Participation in legal proceedings (*clause 37*)
◊ Supplementary powers (*clause 39*)
◊ Agency arrangements (*clause 40*)

V. Members' remuneration

The white paper said:[61]

> 9.3 The Government will invite the independent Senior Salaries Review Body to set the salaries of MSPs in the first instance. Thereafter the Government will expect movements to be linked to changes in the salaries received by MPs. It will be for the Scottish Parliament to determine the allowances to be paid to MSPs.

The Bill deals with this matter in *clauses 76-78*. There is no reference to the setting of initial salaries by the SSRB, because it is a non-statutory body, and it will be done administratively by the Secretary of State based on the SSRB's advice.[62] The Parliament is to make provision, by Act, or by a resolution to the SPCB, for the salaries and allowances of MSPs and members of the Scottish Executive. The latter term includes the law officers (*cl 41(1)(c)*) and, for this purpose, junior ministers (*cl 76 (5)*).

There is no express reference to different remuneration levels for, for example, ministers, the Presiding Officer and the two deputies (elected under *cl 18*); other members of the Scottish Parliamentary Corporate Body (created under *cl 20*), any chairs of committees and the like. However *clause 78(5)* states that "different provision may be made under section 76 or 77 for different cases," and this provision presumably will be used to provide larger remuneration for some of these categories above the basic level of an 'ordinary' MSP. This provision could also be used to provide differential salaries and/or allowances among MSPs perhaps on geographical or population grounds. The SSRB is at present considering (including consultation with the various Parliamentary parties) the possibility of differential allowances at Westminster by way of an 'Exceptional Needs Allowance' for Members for constituencies with particularly high levels of need which generate extremely heavy constituency case work.[63]

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[61] Cm 3658, p29

[62] Scottish Office guide to the Bill, Dec 1997, p8. Press reports following publication of the Bill suggested that MSPs' salaries may not be significantly less than those of MPs, currently £43,860. See, eg, "Nice pay and shorter hours give MSPs chance of the good life," *Scotsman*, 19.12.97

[63] This was one of the 'development recommendations' agreed by the House when it accepted the SSRB's July 1996 report (Cm 3330, esp paras 102-3). See HC Deb vol 281 cc488-543, 10.7.96 and Research Papers 97/101, 29.8.97 and 96/79, 9.7.96.

The Parliament is required to limit the remuneration of those MSPs with 'dual (or more) mandates', eg. as MP, peer or MEP (*cl 77*).[64] The level of the reduction is not set in the Bill. Under existing legislation, MEPs who are also MPs receive only 1/3 of an MP's ordinary salary (rather than the full amount) in addition to their Westminster salary.[65]

Crick & Millar had drafted a standing order on remuneration:[66]

> **Order 12 - Members' Salaries and Allowances**
>
> 1. Members shall be paid a salary linked to that of an appropriate grade of Scottish civil servant. The relevant grade shall be determined by Parliament on the recommendation of the Steering Committee.[18]
>
> 2. The President and Deputy Presidents and the convenors of Standing Committees shall in addition to their salaries, receive allowances commensurate with their responsibilities in Parliament. Such allowances shall be determined by Parliament on recommendation of the Steering Committee.
>
> 3. Members shall be entitled to receive allowances for secretarial expenses, for the employment of a Parliamentary assistant and for justified travel within (lie European Union on parliamentary business.. Such allowances shall be determined by Parliament on the recommendations of the Steering Committee.
>
> 4. Members shall be entitled to claim the expenses for travel to and from its place of sitting of Parliament and their Parliamentary constituency and on the authorised business of committees.
>
> 5. Members shall be entitled to an allowance for travel within their constituency both within and outside the Session. Such allowances shall be determined by Parliament on the recommendation of the Steering Committee.
>
> [18] On salaries notice that we make no recommendation for a higher scale of salary for Ministers. The Parliament might decide that in a democratic country equal salaries for all Members would be reasonable. It could be a great public example and a salutary shock. The burdens of office are usually sought for voluntarily, and good candidates for office need no financial incentive beyond a decent salary and necessary expenses, support staff and services.

The SSRB applied the following analysis in its most recent review of MPs' pay:[67]

> **General principles** 28. We have applied the following general principles to the determination of pay levels:
>
> (i) pay should not be so low as to deter suitable candidates or so high as to make pay the primary attraction of the job;
> (ii) pay should reflect levels of responsibility rather than workload;
> (iii) whereas those with outside interests should not be deterred from entering Parliament, those who choose to make Parliament a full-time career should be adequately rewarded to reflect their responsibilities;

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64 The white paper had stated that 'dual mandates' would not be prohibited, as these matters would be for the individual political parties to determine: *op cit*, para 9.2

65 s1, *European Parliament (Pay and Pensions) Act 1979*

66 B Crick & D Millar, *To make the Parliament of Scotland a model of democracy*, Nov 1995, pp17-18 (Order 12)

67 *Review of Parliamentary pay and allowances*, 38th report, Cm 3330-I, July 1996, pp9-11

(iv) pay should not be augmented in an attempt to compensate MPs for job insecurity, which is not unique to MPs,
(v) The basic Parliamentary salary should continue to be the same for all MPs**,**
(vi) there should be no pay progression linked to length of service.
(vii) a clear distinction must be made between salary and reimbursement of expenses.

Parliamentary salaries 29. We have examined various approaches to setting pay levels. In evidence a number of factors have been specifically mentioned as being relevant to an appropriate judgement:

- workload,
- incentives to recruitment and retention;
- comparisons with earnings of constituents;
- comparisons with earnings of functionaries and officials with who MPs customarily deal;
- comparisons with those with similar responsibilities.

30. There is no doubt that the work load of conscientious MPs is heavy, but heavy workloads can be found in many walks of life and at in many different levels of salary. It is difficult also to look at Parliamentary salaries in terms of' straightforward recruitment and retention as understood in other fields. Pay cannot be set by reference to a recognisable "market rate". There is no evidence of a shortage of persons willing to seek selection as candidates for Parliamentary seats; nor is there any way in which the quality of MPs can readily be assessed.

31. But concerns have been expressed in evidence about the difficulty of attracting into Parliament high quality candidates with Ministerial potential, particularly from a successful business background. Some have also stressed that recent curbs on outside interests have adversely affected the financial situation of many MPs**.** Like the Nolan Committee, we recognise that outside experience may well be of value to the House; but those who choose to make Parliament a full-time occupation should be adequately rewarded to reflect their responsibilities. MPs' pay should not be set to "compensate" for any perceived loss of outside income.

32. We were told that comparisons with earnings of constituents or of those with whom the MP deals should be taken into account as a factor in determining pay levels. We disagree. We believe that, of all the factors mentioned, the relative responsibilities of an MP should carry most weight.

33. The majority of those who gave evidence took the view that comparators for MPs' pay should be in the public sector/professional arena: head teachers, police superintendents, doctors, civil servants. We share this view. Hay carried out a detailed comparability exercise which reviewed the MP's job description and matched it to the Hay remuneration database. Their results are set out in full in Volume 2, section I of this report. As noted in the Hay study, salaries for those public sector comparators most frequently quoted fall in a range between £38,000 and the mid-£50,000s.

34. Hay found that the MP's job had not changed substantially since 1983, although they noted an increase in the proportion of constituency work relative to other Parliamentary activities. They drew attention to the fact that a range of differing levels of work and responsibility exists among MPs, and adopted a responsibility level in the middle of the range for purposes of comparison. We saw no reason to change the system whereby basic Parliamentary pay is the same for all MPs; we therefore support Hay's approach. For constitutional and practical reasons we have discounted the possibility of performance-related pay for MPs, whatever its utility may be elsewhere. Their study led Hay to the view that a Parliamentary salary within the range of £43,000 to £47,000 would be appropriate.

35. We also commissioned an update of the international comparisons of Parliamentarians' pay carried out in 1983. There are always caveats attached to such exercises, since Parliamentarians' responsibilities are not the same in different legislatures. But a salary in the lower £40,000s would place the United Kingdom MPs around the international average in terms of purchasing power parity (see Volume 2, section 3b, l para 13).

36. It has been noted both in the 1983 TSRB report and in the subsequent announcement by the Leader of the House that "the level of pay is a matter of judgement". However the result is arrived at, it should be generally perceived as reasonable and fair. The 1983 TSRB report took account of most of the factors which have emerged in evidence to this review - international comparability, heavy Parliamentary workloads, increased lobbying and constituency expectations, and the need to attract able candidates - in setting its recommended pay level of £ 19,000. Parliament did not reject this sum as inappropriate but, as an act of voluntary pay restraint, voted for a Parliamentary salary of £ 15,308 in 1983, with further staged increases leading to a salary of £18,500 in 1987. Had the TSRB recommendation of £19,000 per annum been accepted in 1983 and subsequently uprated by the percentage factors which were actually applied each year, it would have produced a Parliamentary salary of some £42.300 today, as compared with the current £34,085.

37. We have concluded in the light of all the evidence, and in particular of the factors set out above, that it is now appropriate to adjust the Parliamentary salary to £43,000.

Recommendation 1: that the salary for Members of Parliament be set at £43,000.

VI Order making provisions

What follows is a list of provisions (including those in other enactments) on the face of the Bill which grant an order-making power of some kind (and other powers/duties) either to the Secretary of State (or other UK Minister) or to the Parliament or Scottish Ministers.[68] There may be other such powers inherent in the provisions of the Bill, but not appearing on its face, such as those which may be contained in other enactments referred to in the Bill.

Powers of Her Majesty, UK and Scottish Ministers to make subordinate legislation are set out in *clauses 100-103*. Provisions which confer such power, but do not specify who can exercise it, are called '*open powers'*, and are to be exercised by Order in Council or by a UK Minister by order. The power of Scottish Ministers to make subordinate legislation is contained in *clauses 49-54*. Scottish ministers have no power to make subordinate legislation incompatible with Community rights or laws: *clause 53(2)*. Restrictions by the Secretary of State on the exercise of statutory powers by Scottish ministers are provided by *clause 54* in relation to compatibility with international obligations.

[68] The list is descriptive of the relevant powers, and Members should consult the relevant provisions of the Bill for full details of the scope and application of the powers/duties.

Power is provided in *clause 100(5)* for subordinate legislation made under a number of provisions in the Bill to *modify* any enactment[69], instrument or other document. 'Modify' includes amend or repeal (*cl 111(1)*). A provision which expressly[70] permits primary legislation to be amended by secondary legislation is commonly called a 'Henry VIII Clause' and is clearly a power of potential constitutional and practical significance. Normally these are *ad hoc* powers in legislation, but were, in a sense, institutionalised in one context in the form of 'deregulation orders' made under the *Deregulation and Contracting Out Act 1994*. Special Parliamentary procedures were created for their scrutiny which recognised the particular nature of such powers.[71] 'Henry VIII' clauses are noted in the following list by '***H8***'.

In some cases there is an option of affirmative or negative procedure: *clause 101 (6)-(8)*. Orders in Council (in practice by a Secretary of State) are noted by '***OinC***'. Where identified, the person exercising the power is noted eg Secretary of State (**'SofS**')

affirmative: both Houses of UK Parliament

clause 2(1): day of first ordinary general election: **SofS**
clause 2(3)-(4): 'minimum period' for dissolution prior to ordinary general election: **SofS**
clause 11(1):[72] provision about elections: **SofS**
clause 97: provision re transfer of functions to Scottish ministers: ***'H8'***
clause 98(1): treatment of 'Scottish taxpayers' for social security purposes: ***'H8'***: **SofS**
clause 111(2): determination of boundary waters: **OinC**

affirmative: House of Commons

clause 64(3): increase of loans limit under *s63* (set at £500m: *cl 64(2)*): **SofS**
clause 75(1):[73] modification of enactments re Parliament's tax-varying power: ***'H8'***: **Treasury**
clause 75(2):[74] provision re operation of *cl 69(2)* (income tax for Scottish taxpayers): ***'H8'***: **Treasury**

affirmative: Scottish Parliament

*clause 14(1)(d):*specification of disqualifying offices for membership of Scottish Parliament: **OinC**
clause 14(2): specification of disqualifying offices for specified constituencies or regions: **OinC**

affirmative: both Houses of UK Parliament and Scottish Parliament

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[69] including the Bill itself except sch5 (reserved matters), and an Act of the Scottish Parliament, various forms of Northern Ireland legislation, a Royal Warrant and an enactment comprised in subordinate legislation, including those made under an Act of the Scottish Parliament (*cl 111(1)*)

[70] There are a number of other provisions (eg *clauses 95, 97* and *100(3)*), which allow orders to contain, eg, 'transitional', 'supplementary' and similar provisions.

[71] See generally Research Papers 94/16, 28.1.97, and 94/116, 22.11.94

[72] This is not, strictly speaking a *'Henry VIII clause'*, as it does not permit the actual amendment of primary legislation, but does allow it to be applied with modifications or exceptions.

[73] Unless if only of form specified in *cl 75(3)*, where annulment procedure applies. Subordinate legislation under this clause may include provisions having **retrospective effect** (*cl 75(4)*).

[74] Unless if only of form specified in *cl 75(3)*, where annulment procedure applies. Subordinate legislation under this clause may include provisions having **retrospective effect** (*cl 75(4)*).

clause 29(2):[75] modifications of schedule 5 (reserved matters): may be of ***'H8'*** form (*cl 29(2)-(3)*): **relevant minister** or **OinC**
clause 99: regulation of Tweed and Esk fisheries: ***'H8'***: **OinC**

annulment: either House of UK Parliament

clause 33(1): prohibiting Presiding Officer from submitting certain Bills for royal assent: **SofS**
clause 54(1):[76] prevention of actions by Scottish ministers believed to be incompatible with international obligations: **SofS**
clause 54(2): requirement for action by Scottish ministers to comply with international obligations: **SofS**
clause 54(4): revocation of certain 'Scottish' subordinate legislation: **SofS**[77]
clause 56(1): transfer of property etc. to Scottish ministers[78]
clause 56(3): transfer of liabilities etc. to Scottish ministers[79]
clause 58(1): transfer of property etc. to Lord Advocate[80]
clause 58(3): transfer of liabilities etc. to Lord Advocate[81]
clause 60(1): transfer of property etc. re a *s59* functions transfer to Scottish ministers[82]
clause 60(3): transfer of liabilities etc. re a *s59* functions transfer to Scottish ministers[83]
clause 83(5): specification of 'cross-border public body'
clause 92:[84] provision to remedy *ultra vires* acts: ***'H8'***
clause 94(3):[85] powers etc of Judicial Committee of Privy Council: ***'H8'*****: OinC**
clause 95:[86] provision in consequence of Acts of Scottish Parliament: ***'H8'***
clause 96: provision in pre-commencement enactments in consequence of this Act: ***'H8'***
clause 98(2): Scottish income tax rate for social security purposes: ***'H8'***: **SofS**
clause 103(8): determination of compensation disputes re transfer of property
sch2 para 2: provision re property of SPCB

annulment: House of Commons

clause 61(5): designation of receipts of Scottish Consolidated Fund (after consultation with Scottish ministers): **Treasury**
clause 75(3):[87] PAYE provisions: **Treasury**

annulment: Scottish Parliament

clause 17(5): specification of sum as caution in judicial proceedings in Court of Session re disqualification: **ScMins**

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[75] Subordinate legislation under this clause may include provisions having **retrospective effect**.
[76] No Parliamentary procedure if order simply revokes existing cl 54(1) order: *cl 101 (9)*
[77] Subordinate legislation under this clause may include provisions having **retrospective effect**.
[78] See also *cl103*
[79] See also *cl103*
[80] See also *cl103*
[81] See also *cl103*
[82] See also *cl103*
[83] See also *cl103*
[84] Subordinate legislation under this clause may include provisions having **retrospective effect**
[85] Subsections (a) and (b) only; OinC of subsection (c) form requires no Parliamentary procedure, and cannot be of ***'H8'*** form
[86] Subordinate legislation under this clause may include provisions having **retrospective effect**
[87] Subordinate legislation under this clause may include provisions having **retrospective effect**

clause 36(3): provision of form and manner of preparation and publication of Letters Patent signifying royal assent, and of 'election' proclamations under *cls 2-3*: **OinC**
sch 2 para 7: SPCB to be treated as a 'Crown body' for statutory purposes: ***'H8'***: **OinC**

annulment: either House of Parliament or Scottish Parliament

clause 59(1): transfer of functions to Scottish ministers: ***'H8'***
clause 84: provision re cross-border public bodies: ***'H8'***
clause 85: provision re transfer of property of cross-border public bodies

no Parliamentary procedure

clause 54: revocation of existing *cl 54(1)* order: *cl 101(9)*: **SofS**
clause 11(5): designation of regional returning officers: **SofS**
clause 94(3)(c): procedure of Judicial Committee of Privy Council: **OinC**
clause 114(1): commencement of provisions: **SofS**

actions of Presiding Officer

clause 2(5): proposal for date of ordinary general election one month on either side of first Thursday in May
clause 3(1): proposal for date of extraordinary general election
clause 8(2): fixing of date for poll to fill constituency vacancy
clause 25: administering the oath to witnesses
clause 42(4): designation of person to exercise functions of First Minister when office vacant etc.
clause 43(4): recommendation to Her Majesty of person nominated by Scottish Parliament as First Minister

legislation by Scottish Parliament

clause 62(1)(c):rules re payments out of Scottish Consolidated Fund
clause 66: rules re financial control, accounts and audit
clause 86(1): investigation of maladministration complaints

resolutions by Scottish Parliament

clause 15(4): disregard of disqualification on specified grounds
clauses 69-70: percentage rate of income tax

legislation or resolution by Scottish Parliament

clause 76(1): payment of salaries to MSPs and Scottish Ministers
clause 76(2): payment of allowances to MSPs and Scottish Ministers
clause 76(3): payment of pensions etc. to MSPs and Scottish Ministers

actions etc. of Scottish Parliamentary Corporate Body

clause 19(2): appointment of Clerk of the Parliament
sch 2 para 3: appointment of Assistant Clerks and other staff, and determination of their (including the Clerk's) terms and conditions

sch 2 para 4: general powers of SPCB, including borrowing
sch 2 para 5: delegation of functions to Presiding Officer or Clerk
sch 2 para 6: determination of own procedure, including appointment of other member to preside in place of Presiding Officer

actions of First Minister

clause 36(4)-(5): specification of Wafer Scottish Seals
clause 44(1): appointment of Ministers, with Her Majesty's approval
clause 44(3)(b): removal of Ministers
clause 45(1): recommendation to Her Majesty on appointment or removal of Scottish Law Officers
clause 46(1): appointment of junior Ministers, with Her Majesty's approval
clause 46(3)(b): removal of junior Ministers
clause 89(2): nomination of Lord President or Lord Justice Clerk to PM
clause 89(3): recommendation to Her Majesty on appointment or removal of Court of Session judges (other than LP or LJC) and sheriffs
clause 89(4): recommendation to Her Majesty on appointment or removal of Court of Session judges (only after resolution of the Parliament with majority of 2/3 of all MSPs: *cl 89(5)*)

royal proclamation

clause 2(5): ordinary general election: dissolution of Parliament, date of poll, meeting of new Parliament
clause 3(2): extraordinary general election: dissolution of Parliament, date of poll, meeting of new Parliament

other actions by Her Majesty

clause 42(1): appointment of First Minister
clause 44(1): approval of First Minister's ministerial appointments
clause 46(1): approval of First Minister's junior ministerial appointments
clause 89(4): removal of Court of Session judge

other actions by UK ministers

clause 47(6): determination of payments by Scottish ministers re pensions etc: **MinCivServ**
clause 61(2): amount of payments to Scottish Consolidated Fund: **SofS**
clause 61(6): payments by Scottish ministers to SofS: **Treasury**
clause 63(3): repayment of loans by Scottish ministers: **Treasury**
clause 67(4): repayment of existing debt (including interest) by Scottish ministers: **Treasury**
clause 82(3): determination of UK minister to act in place of Advocate General: **PM**
clause 89(1): recommendation of Lord President or Lord Justice Clerk to HM (if nominated by First Minister: *cl 89(2)*) : **PM**
clause 90(1): requirement of provision of information by Scottish Ministers: **Treasury**