



ESRC Research programme on Devolution and Constitutional Change

How Distinctive is Holyrood? An Analysis of Legislation in the first Scottish Parliament

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Executive Summary

1. Scottish legislation in the first four-year term of the Parliament shows a big increase in output. Measures have been passed that would not have been in the absence of devolution.
2. There is clearly an autonomous sphere, in which Scotland can go its own way without reference to the rest of the UK.
3. In other areas, there is joint or parallel policy making, with Scottish legislation meeting the same goals as Westminster legislation by different means.
4. Finally there is a sphere in which Scottish legislation is essentially the same as that in England and Wales.
5. Sewel motions, which can be used to allow Westminster to legislate in fields devolved to the Scottish Parliament, have not been used to impose policy uniformity on Scotland.
6. There is evidence that devolution has shifted influence both vertically, between the UK and Scottish levels, and horizontally, within a Scottish legislative system that is more open than its Westminster counterpart.
7. It is often Westminster that diverges from old policy lines while Scotland chooses not to. This reflects the continued social democratic tradition in Scotland and the more consultative policy style, which makes radical policy change more difficult in the short term.
8. Some divergence reflects the impact of coalition government. However, there remains strong forces for convergent Westminster and Scottish legislation, including common internal security issues, the impact of UK-wide pressure groups, and the Home Civil Service.

Policy, devolution and legislation

This paper examines the primary legislative output of the Scottish Parliament during its first term (1999-2003), comparing it with that of Westminster and asking whether devolution has permitted Scotland to go its own way. Scotland has always had its own legal system, and a corpus of Scotland-specific legislation, albeit passed by the central parliament at Westminster. Some observers emphasize the degree of autonomy this gave Scotland. Others, including myself, emphasized the degree of unity in the wider UK political system.

Scotland was distinct more in how it did things than in what it did. There was a Scottish level of politics before 1999 but it was limited in scope. Certain Scottish insider groups had carved out a niche in the unitary British state and were able to use the lack of parliamentary scrutiny of Scottish legislation to insulate themselves from Scottish opinion. Governments lacking a majority in Scotland were free to experiment in policy.

Devolution can make a difference across two dimensions. First, Scotland is more autonomous from London government. Second, Scottish interests that could not penetrate the old system of administrative devolution may be better represented, so shifting influence within Scotland. Traditional forms of Scottish distinctiveness on form (the 'how') will remain, but there may be more divergence on substance (the 'what'). On the other hand, there are constraints on policy divergence in practice.

Analysing Legislative Output

The quantity of Scottish legislation has increased greatly since devolution. Between 1979 and 1999 there was an average of six Scottish Acts per parliamentary session. In the first term of the Scottish Parliament, there was average of sixteen.

The typology of legislation we present ranges from bills with no counterpart in the other jurisdiction to those that are more or less identical. In between are bills that deal with the same issue but use different policy instruments and those that deal with the same issue with the same policy instruments. This gives us the categories in Box 1.

Box 1: Categories of Legislation in Scotland

1. Holyrood legislation with no Westminster counterpart
2. Westminster Acts with no Holyrood counterpart, with a sub-category for Sewel motions, by which Holyrood agrees to Westminster legislating on a devolved matter.
3. Legislation that deals with the same issue but with a different policy, including significant differences in detail.
4. Legislation that deals with the same issue and with the same policy, but with scope for differences in application.
5. Legislation that is essentially the same but passed separately

Assigning legislation to individual categories is a matter of judgement, and the boundaries between categories 3 and 4 are especially blurred. Acts tend to deal with a bundle of issues in the same policy sector. However, the bundles in the two jurisdictions are not necessarily identical so the analysis below sometimes refers to parts of Acts.

White Papers have also been consulted in order to clarify the purpose and meaning of legislation.

Holyrood legislation with no Westminster counterpart

Thirty eight Acts of the Scottish Parliament were passed in this category in its first term:

- Five deal with public finance: the four annual Budget Acts, plus the *Public Finance and Accountability Act 2000*.
- Two acts (plus part of another) ensure Scotland's compliance with the European Convention for the Protection of Human Rights.
- The *Standards in Scotland's Schools etc Act 2000* and the *School Education (Amendment) Act 2002* show Scotland committed to comprehensive education and against opting out of local authority control.
- The *Education (Graduate Endowments and Student Support) Act 2001* abolishes up-front tuition fees and provides some student grant support in a clear break with English policy.
- The *Land Reform Act* introduces provisions that have no counterpart elsewhere in the United Kingdom, and nothing as extensive would have found its way onto the Westminster timetable. The *Abolition of Feudal Tenure (Scotland) Act 2000* and the *Title Conditions (Scotland) Act 2003* were consensual matters long pending. The *National Parks (Scotland) Act 2000* remedies a post-war omission when landowner opposition prevented the introduction of National Parks in Scotland. The *Abolition of Poindings and Warrant Sales Act 2001* ends a distinctive Scottish practice, widely seen as archaic. The *Protection of Wild Mammals Act 2002* bans hunting with dogs in Scotland. This group of Acts highlights the shift in power *within* Scotland brought about by devolution and the additional legislative time now available for distinctive Scottish issues.
- The *Criminal Justice (Scotland) Act 2003* has no UK counterpart but elements follow or prefigure English practices. The ban on physical punishment of children under three, which would have meant a significant policy divergence, was removed after parliamentary and media opposition.
- There are also several Acts on housekeeping matters and tidying up that would never have found their way onto the busy Westminster timetable.

Westminster Acts with no Holyrood Counterpart

One hundred and forty four Westminster Acts passed from 1999-2003 have no Holyrood counterpart. Most deal with reserved matters and do not concern us. The *Health Act 1999* applies to Great Britain and covers devolved matters but originated before devolution. The *Terrorism Act 2000* is UK wide since terrorism is a reserved matter. The *Anti Terrorism, Crime and Security Act 2001*, which includes devolved matters, was also adopted on a UK wide basis, with a Sewel motion. Eight Acts are for Northern Ireland, one is for Wales and thirty five for England or England and Wales, of which six Acts have some limited Scottish application. Six of the England and Wales Acts focus on

criminal justice, reflecting the high place of these questions on the Labour government's agenda at Westminster.

There is no evidence here that Westminster is using its residual power to legislate in devolved matters at will, or seeking to override the Scottish Parliament. However, twenty eight of the Acts on reserved matters and some of the others include Sewel motions, which deserve separate analysis.

Box 2: The Sewel Convention

The 'Sewel Convention' is just that: a convention. It is not enshrined in the Scotland Act, but nonetheless sets out the UK Government's policy on legislating on devolved matters in the UK Parliament. It is named after the then Government Minister, Lord Sewel, who set out the terms of the policy in the House of Lords on 21 July 1998:

"The devolution of legislative competence to the Scottish Parliament does not affect the ability of Westminster to legislate for Scotland even in relation to devolved matters. Indeed we envisage instances where it would be more convenient for legislation on devolved matters to be passed by the UK Parliament. However we would expect a convention that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament."

UK Legislation with Sewel Motions

There were 41 Sewel motions from 1999-2003, rather more than anticipated. Referring to these figures, critics have charged that Holyrood is surrendering its responsibilities to Westminster. Analysis, however, reveals a more complex explanation.

- Some Sewel motions stem from convenience; in other words, if Scotland is going to pursue the same policy as Westminster it need not waste its own legislative time. An obvious example is The *Anti-Terrorism, Crime and Security Bill, 2001*, an emergency measure that a Holyrood Bill would largely have duplicated. This did not mean surrendering all policy discretion, however, since Scotland opted out on three significant issues: international corruption provisions; policies on racial hatred; and police powers to remove disguises. Legislating on banning tobacco advertising was introduced with a Sewel motion for technical reasons and because of EU considerations, although there was a bill waiting in the Scottish Parliament when the UK one got into temporary difficulty because of the 2001 election.
- A second reason for the use of Sewel motions is to ensure uniformity, and to avoid loopholes where the distinction between devolved and reserved matters is not clear. Such unclear distinctions could allow challenges to the constitutionality of Scottish legislation, or loopholes for criminals. The International Criminal Court is an example. Whilst both Westminster and Holyrood produced bills with similar wording, there was a Sewel motion because the competence of the

Scottish Parliament to legislate was open to interpretation (while powers of arrest are devolved, those on extradition are reserved).

- Another reason may be political cowardice; in other words the Scottish Executive may wish to avoid a public or parliamentary debate. This might be one reason for letting Westminster pass the *Sexual Offences Amendment Act* after the controversy over Section 28/2A. On the other hand, there was a technical reason in that the original bill was introduced before devolution but defeated in the Lords. The UK government proposed to use the Parliament Act to ensure its passage at Westminster but this could not be done if the Scottish (or any) provisions were modified.
- Some Sewel motions are introduced not so much to surrender the prerogatives of the Scottish Parliament as to safeguard them, by making the point that the matter in question could be dealt with by subsequent Scottish laws. For example, a motion accompanied plans contained in the *NHS Reform and Health Care Professions Act* because, whilst the existing health care regulatory bodies are reserved, the Scottish Executive *could* introduce a new regulatory body under devolved control.
- Finally, Sewel motions are used for a variety of administrative reasons, particularly concerning UK regulatory bodies or cross-border matters and to give powers to Scottish Ministers in administering UK provisions.

There are some real objections to Sewel motions, as they give Westminster control of the entire process of passing Sewel bills, conceivably allowing it to change the original understanding of the policy issue within Scotland. They may also give powers to Scottish ministers which are not subject to full scrutiny in the Scottish Parliament. There is, however, no evidence that Westminster is using Sewel motions to impose policies on Scotland.

Legislation that deals with the same issue but with a different policy

There are eight pairs of Acts that address the same issue but show significant differences in policy:

- The first two pairs provide something to replace Section 28/2A, (banning the 'promotion' of homosexuality by local authorities), in the *Ethical Standards in Public Life etc. Scotland Act 2000 part VI / Local Government Act 2000 section 104*, and the *Standards in Scotland's Schools etc. Act 2000 section 56 / Learning and Skills Act 2000 section 148*. The Scottish legislation gives no explicit guidance on sex education. The Westminster legislation does. Differences are subtle but show Holyrood as being rather more permissive and liberal.
- Another politically salient issue was the Scottish decision to provide free personal care for the elderly through the *Community Care and Health (Scotland) Act 2002*, which is compared with the Westminster *Health and Social Care Act 2001 Part 4* (with Sewel motions). This is a clear policy divergence, but there are also similarities, once we get down to the detailed provision of who pays for what.

- Local government organisation produces two minor examples - the *Scottish Local Government (Elections) Act 2002* and the *Local Government Act 2000 part IV*. Both deal with local elections, notably their timing, with some differences in scope.
- Scotland's water boards remained public after the sale of water companies in England and Wales. Parts of the *Water Industry (Scotland) Bill 2002* and the *Water Industry Act 1999* suggest convergence around a 'new public management' model of service delivery. Scottish Water is to be given greater commercial freedom, while the 1999 Act restricts the abilities of commercial water companies in England and Wales to cut off the supply for non-payment.
- Two civil law matters reflect traditional differences. The *Leasehold Casualties (Scotland) Act 2001* and the *Commonhold and Leasehold Reform Act 2002* refer to the same broad issue, but are necessarily different in approach because the rules of leasehold in Scotland and England were already different. The *Marriage (Scotland) Act 2002*, amends the 1977 *Marriage (Scotland) Act* to permit civil marriages to be solemnised in places approved by local authorities or Ministers. The English White Paper *Civil Registration: Vital Change* of January 2002 signals the government's intention to introduce similar legislation (although in England and Wales there are fewer restrictions on civil and more on religious ceremonies).

Some differences are at the borderline between policy and application. Take the pair *Transport (Scotland) Act 2001 / Transport Act 2000 parts II and III*. In the pre-devolution White Papers overall policy was the same, but with differences reflecting distinct conditions. In England the key problem was growing car use and the environmental consequences. In Scotland, the key issues were Scotland's unique geography, population spread and peripheral position. The Scottish White Paper takes the integration of transport with other policy areas further. Both subsequent Acts introduced integrated transport strategies. The scope of the Westminster Act is wider, including the reserved matters of air traffic and railways. Otherwise, large sections of the text are the same, with only minor institutional differences, with less statutory obligations on local authorities in Scotland. More substantive is a shift between the Scottish White Paper and the Act which led to the disappearance of provision for workplace parking levies and trunk road tolls, although these remain in the Westminster Act. This shift followed ferocious lobbying of Scottish ministers by the CBI and other business interests. It shows how a policy which started off in the pre-devolution system became amenable to change in the new Scottish dispensation.

Legislation that deals with the same issue and with the same policy, but with scope for differences in application

The remaining legislation often shows differences in the organisational form of policy, of the sort that existed before devolution. There is also some scope for ministers to implement policy differently on both sides of the border.

Freedom of information was a salient question in both parliaments and the Scottish Liberal Democrats have made much of the more liberal provision secured by Jim Wallace in the Scottish Act. The basis for both the *Freedom of Information (Scotland) 2002 Act* and the *Freedom of Information Act 2000* was the 1997 White Paper *Your Right to Know*, although the Scottish Executive also published its own consultation document *An Open Scotland* in 1999. The wording of the Acts is slightly different, but the explanatory notes for each Act suggest that they are basically the same. Both cover a general right of access to information held by public authorities, exemptions, the creation of information commissioners and enforcement. Both are more restrictive than Labour suggested in opposition, and were further amended during passage. The Scottish Act is still somewhat less restrictive than the UK one. In the Westminster Act, a series of clauses exempts items whose disclosure would prejudice various matters; in the Scottish Act this becomes 'seriously prejudice'. In the UK Act the Minister has the last word on release of information while in the Scottish Act, after considerable debate, this is so only in matters of 'of exceptional sensitivity'.

A large set of examples concerns the regulation of public services according to New Labour philosophy, but tailored to the situation in England and Scotland. Policies on access and accountability in the public services have the same aim, but Scotland's circumstances allow its policy to appear more coherent. Scottish legislation does not favour opting out of schools or internal markets in public services and tends to give more scope to local government.

There is also somewhat less emphasis on firm targets in Scotland, for example on fuel poverty (*Warm Homes and Energy Conservation Act 2000* and the Scottish 'Central Heating Programme and Warm Deal' policy). Homelessness is addressed in both jurisdictions but in slightly different ways. School examinations show some convergence on a common model, but with differences, as does the regulation of care standards. There are detailed but important differences on ethical standards in public bodies, responding to the 1997 Nolan Report.

Increased public rights of access to the countryside, promised by Labour before the 1997 election, were realised in the *Land Reform (Scotland) Bill Part 1* and the *Countryside and Rights of Way Act 2000*. The Westminster Act has a greater focus on traffic issues, wildlife enforcement and Areas of Outstanding Natural Beauty. Its provisions on protecting Sites of Special Scientific Interest also apply to Scotland.

Finally, the example of commissioners for young people demonstrates a policy convergence fostered by exchange among the devolved assemblies, since this was initiated by the National Assembly for Wales.

Legislation that is essentially the same but passed separately

Security matters show much policy similarity, given the common security area and the desire to avoid legal loopholes, despite the devolution of most of the criminal law. A number of Acts are essentially reproduced at Westminster and Holyrood.

- The *Regulation of Investigatory Powers (Scotland) Act 2000* and the *Regulation of Investigatory Powers Act 2000 part II* (with two Sewel motions) are identical in large part.
- The *International Criminal Court (Scotland) Act 2001* and the *International Criminal Court Act 2001* (with a Sewel motion) both give effect to the Statute of the International Criminal Court.

A minor matter but potentially sensitive issue is dealt with in the *Census (Amendment) (Scotland) Act 2000* and the *Census (Amendment) Act 2000*. Both provide for questions on religion, although Scottish ministers had not planned to do so until the Equal Opportunities Commission asked them to.

The *Fur Farming (Prohibition) (Scotland) Act 2002* closes a possible loophole in Scotland opened by the *Fur Farming (Prohibition) Act 2000* banning fur farming in England, to ensure that firms do not just relocate to Scotland. The wording is virtually identical in each Act.

Conclusion

After four years of devolution, some patterns emerge. There is a Scottish sphere of legislation on matters not affecting the rest of the United Kingdom, considerably larger than before. On the other hand, there is a lot of legislation that is similar and shows signs of common origins and principles.

There is a consistency between Labour-led administrations on both sides of the border but there are differences of style and emphasis. It is often Westminster that diverges from old policy lines while Scotland chooses not to. This reflects the continued social democratic tradition in Scotland and the more consultative policy style, which makes radical policy change more difficult in the short term.

The Scottish Parliament takes more care over gender-neutral language and makes more reference to consultation procedures. Scottish legislation tends to give more scope to local authorities. Holyrood also tends to require committee scrutiny and parliamentary approval for statutory instruments.

Joined-up government is more prominent in Scotland than in Westminster, with White Papers and legislation drawing links between the immediate focus and other policy sectors. Social inclusion has been 'mainstreamed' to a greater extent in Holyrood legislation. These differences, albeit matters of degree, go beyond those visible before devolution.

Coalition government accounts for some differences. The Freedom of Information legislation is a bit more liberal. There was less emphasis on hard-line law and order policies with a Liberal Democrat at the Justice Department although, following clashes

on the issue during the 2003 election campaign, Labour took the Justice portfolio into its own hands.

Common policies may turn out differently as a result of differing pressures in the two jurisdictions. Other divergences represent adaptations to Scotland's legal system and could have been expected before devolution.

The analysis confirms the strong social and contextual pressures to uniformity. The common security area leads to uniformity in law enforcement and regulation, while permitting important differences in criminal procedure and rights. Interest group demands make it difficult to sustain very different levels of social provision on either side of the border. The role of the civil service as a unifying force is seen in the tendency to imitative legislation.

There is also strong evidence of the entanglement of reserved and devolved matters, in spite of the apparently clean division of competences. Given the shared political outlook of both levels, responsibility for legislation is usually seen more as a practical matter than one of principle.

Devolution represents an evolutionary process, with the Scottish Parliament staking out new fields for policy innovation. There is evidence of change on both dimensions identified earlier. Scotland does have the ability to go its own way within its devolved sphere, and diverge from law south of the border. There is also some evidence of shift within Scotland, with issues like land reform gaining more prominence. Interest group activity has increased in Scotland and this can be credited with changes in legislation from White Papers to Acts. Some of these measures originated before devolution but were moulded in the Scottish Parliament. The supply of common initiatives will be less in the second Parliament and we may see more divergence again. Where there is a will to make distinct policy, Scotland is able to do so, but the traces of the previous system of unitary government are still visible.

The real test will come with a change of government at either level. This will challenge the understandings and conventions that have built up in the first parliamentary term and may force the Scottish Parliament to delineate more clearly its own legislative sphere.

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