

RESEARCH ARTICLE

# Lisvane's Legacy? Constitutional reform in the Isle of Man

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## Abstract

The Isle of Man is a largely autonomous dependent territory of the UK. In 2016, Lord Lisvane was commissioned to report on the functioning of the principal organ of governance, the Tynwald. This Lisvane Review has led to substantial constitutional reform within this small democracy, particularly in relation to the unelected second chamber of Tynwald, the Legislative Council. This reflects an ancient tension within the Manx constitution between the House of Keys, since the mid-nineteenth century a directly elected chamber, and the unelected Legislative Council. The Lisvane period saw important changes to the composition and powers of the Legislative Council, as well as gender diversity within Tynwald as a whole. Placing the Manx experience within a broader small democracy theoretical and comparative framework demonstrates not only the possibility of constitutional reform, but also provides insights into resources for constitutional development, the special challenges of managing intimacy, and the dangers of over-concentration of power in a small democracy.

**Keywords:** constitutional reform; small states; Crown dependency; Isle of Man

## Introduction

The Isle of Man is an almost entirely self-governing Crown dependency within the British Isles. The population of around 80,000 is evenly split between Manx born and non-Manx born residents.<sup>1</sup> As a largely autonomous territory, the Isle of Man has made use of its power to create its own laws to build a distinctive economy with financial services, online gaming, and registration of shipping, aircraft and spacecraft making a substantial contribution.

Discussion of the Manx constitution tends to focus on the external constitution, in particular the relationship of the Isle of Man with the UK either individually,<sup>2</sup> or as a part of the broader category of Crown Dependencies.<sup>3</sup> Reflections on the external constitution have been given a new urgency by the Brexit crisis in the UK,<sup>4</sup> and the possible intervention of Parliament in the regulation of financial

<sup>1</sup>IOMG, *2016 Isle of Man Census Report* (2017) GD 2017/004 at 8.

<sup>2</sup>PW Edge 'David, Goliath and supremacy: the Isle of Man and the sovereignty of the United Kingdom parliament' (1995) *Anglo-American Law Review* 1; CCA Pearce 'When is a colony not a colony? England and the Isle of Man' (2003) 32(4) *Common Law World Review* 368.

<sup>3</sup>P Morris 'Constitutional practices and British Crown dependencies: the gap between theory and practice' (2012) 41(1) *Common Law World Review* 1.

<sup>4</sup>A Sutton 'The impact of Brexit on the Channel Islands and other territories' (2018) 22(3) *Jersey and Guernsey Law Review* 260; S Alegre 'Brexit, human rights and self-determination – a perfect storm in the British Crown dependencies and Overseas Territories?' (2018) *European Human Rights Law Review* 311.

services in the Crown Dependencies.<sup>5</sup> The internal constitution of the Isle of Man, on the other hand, has been comparatively under-researched.<sup>6</sup>

The principal organ of Manx governance is Tynwald. Tynwald is a tricameral legislature – the House of Keys, the Legislative Council, and (when both sit together) Tynwald Court – from which are drawn the Manx executive. The directly-elected, 24-member, House of Keys is the dominant Branch of Tynwald. The 11-member Legislative Council, consisting primarily of House of Keys appointees, but including the Anglican Lord Bishop of Sodor and Man, now has a secondary role in the legislative and executive business of Tynwald.

Tynwald, in common with some other small jurisdictions' legislatures,<sup>7</sup> is not the site for extensive party politics, with the overwhelming majority of Tynwald sitting as independents – in the 2016 General Election to the House of Keys, for instance, independents won 21 of the 24 seats, with Liberal Vannin securing the other three. The norm of the independent member of Tynwald has implications for party discipline even for the small parties that do exist. Liberal Vannin, for instance, had two candidates elected in 2006, one of whom resigned to sit as an independent, while in the 2016 election, three Liberal Vannin candidates were returned, but one resigned to sit as an independent.

In 2016 Lord Lisvane, former Clerk of the House of Commons, was commissioned to report on the functioning of Tynwald. This Lisvane Review, although itself the product of constitutional controversy, has been fundamental in shaping the debate between 2016 and 2018. In this paper I show that the constitutional controversies of the Lisvane period are best understood as a modern iteration of the ancient constitutional norm of conflict between Keys and Council. Current recent reforms to Tynwald are placed within a broader body of constitutional scholarship around both particular challenges, and the structural challenges of democratic governance in such a small national jurisdiction.<sup>8</sup> Placing the Isle of Man in this broader theoretical and comparative context not only illuminates the policy decisions facing the Isle of Man, but also contributes to understanding constitutional reform in very small democracies. In particular, the Lisvane period in Manx constitutional reform provides an important corrective to Morris' study of failed constitutional reform in Alderney, which led her to question 'Are small (island) polities capable of constitutional reform?'.<sup>9</sup>

This paper is in five parts. The introduction is followed by Part 1, an overview of Manx constitutional history focusing on those fundamental issues which have shaped the Manx constitutional landscape. Part 2 is devoted to the Lisvane Review, and its immediate reception. Part 3 draws out the key constitutional debates around Lisvane, evaluating constitutional change and controversy around three key topics: (a) the appointment of members to the Council; (b) the authority of Council in relation to the Manx government; and (c) the challenges facing Tynwald in relation to gender diversity. Part 4 uses the recent Manx experience to draw broader conclusions about small jurisdiction constitutional reform, reflecting on the challenges facing small democracies as a consequence of their smallness – concentration of power, the challenges of managing intimacy, and the resources available for constitutional reform. A short concluding section completes the paper.

<sup>5</sup>See Governments of Jersey, Guernsey and the Isle of Man *Joint Statement on the Proposed Amendments to the Financial Services (Implementation of Legislation) Bill* 1 March 2019.

<sup>6</sup>But see PW Edge *Manx Public Law* (Isle of Man Law Society, 1997); J Belchem (ed) *A New History of the Isle of Man: The Modern Period 1830–1999* (Liverpool University Press, 2000); DG Kermod *Offshore Island Politics: The Constitutional and Political Development of the Isle of Man in the Twentieth Century* (Liverpool University Press, 2001); DG Kermod *Ministerial Government in the Isle of Man* (Manx Heritage Foundation, 2008).

<sup>7</sup>But not all. See further J Corbett and W Veenendaal *Democracy in Small States: Persisting against All Odds* (Oxford University Press, 2018) pp 92–118.

<sup>8</sup>For an introduction to the broader field of small state studies, see NDJ Baldwin (ed) *Legislatures of Small States: A Comparative Study* (Routledge, 2013); R Steinmetz and A Wivel (eds) *Small States in Europe: Challenges and Opportunities* (Ashgate, 2010).

<sup>9</sup>C Morris 'Attempting constitutional reform on the island microjurisdiction of Alderney' (2018) 47(2) *Common Law World Review* 105 at 128.

## 1. The evolution of Tynwald to 2016

Between 1417 and 1765 the King, later Lord, of Man was an English magnate.<sup>10</sup> The Lord was rarely present on the Isle of Man, however, and appointed a Governor, or Lieutenant-Governor, to govern the Island. The primary institutions for the Lieutenant-Governor to do so were the Council for executive government, and Tynwald as a whole for legislation.<sup>11</sup>

The Governor convened the Council. Membership was fairly fluid, but included a core of officers appointed by the Lord, including the Lord Bishop of Sodor and Man and other ecclesiastical officers.<sup>12</sup> The principal executive powers in the Island lay with the Council, and its officers acting in their particular roles. The Council, dominated by the Lieutenant-Governor, exercised almost all executive powers in the Isle of Man during this period.<sup>13</sup>

By 1609 legislative power was vested in the Tynwald, consisting of this Council and the House of Keys acting together. From 1704 the two constituent parts began to meet as separate 'branches'. Distinctively, successful passage of an Act of Tynwald required not only the assent of both Council and Keys, but also the assent of a majority of Tynwald meeting together – what Lord Lisvane identified as practical bicameralism within a tricameral legislature.<sup>14</sup> Once passed by Tynwald, a Bill required the assent of the Lord to become an Act of Tynwald.

In contrast to the Lord's Council, the Keys, although subject to the Lord, were seen as representatives of the country. The Keys founded their autonomous status on a judgment of the Manx judges, the Deemsters, that the Keys nominated candidates for a vacancy to the Governor.<sup>15</sup> As a result, 'the Keys became more and more a closed corporation and membership was largely confined to a few leading families'.<sup>16</sup> Just before the introduction of elections in the middle of the nineteenth century, they were described to the Lieutenant Governor as 'the Gentry of the Island both in talent and property'.<sup>17</sup> As might be expected with an official Council and a 'national' Keys, tension between the Keys and the Council was endemic, and could flare into open conflict. For instance, there was an ongoing dispute over the powers of the Council which involved imprisonment en masse of members of the Keys in 1715, and a purge of the Keys by the Governor in 1726.

In 1765 the British Crown purchased the majority of the regnal rights from the Lord of Man. The functions of the Lord of Man were taken over by the British Crown directly, but the internal constitution of the Island was left strikingly untouched. Tensions between Council and Keys remained, with the British Crown stepping into the place of the former English Lord.

In 1866, two important, intermeshed, constitutional reforms took place. First, a degree of autonomy was restored to the Isle of Man through an Act of Parliament which provided for increased Isle of Man Government control of financial matters.<sup>18</sup> Control of surplus revenues lay with Tynwald, subject to veto by the Lieutenant-Governor, rather than with a government deriving authority from Tynwald. Secondly, the House of Keys was transformed from a self-perpetuating oligarchy to a directly-elected chamber. Although the principle of an elected House of Keys was implemented in 1867, the initial franchise was limited to adult males able to meet a high property qualification.<sup>19</sup> The Isle of Man moved comparatively swiftly to female suffrage, however, with the House of Keys Election Act 1881.<sup>20</sup>

A previous Lieutenant-Governor of the Island, Lord Hope, had opposed the democratisation of the Keys because he feared that greater legitimacy would lead to a more assertive House of Keys, so that

<sup>10</sup>See further R Dickinson *The Lordship of Man under the Stanleys* (Chetham Society, 1998).

<sup>11</sup>PW Edge *Manx Public Law* (IOLMS, 1997) ch 6; AW Moore *A History of the Isle of Man* (Fisher Unwin, 1900) Book VI.

<sup>12</sup>W Sachaverell *An Account of the Isle of Man* (1702) Essay Three.

<sup>13</sup>J Gell *Treatise on the Constitution of the Isle of Man* (Government House, 1881).

<sup>14</sup>Lisvane *Review of the Functioning of Tynwald* (2016) GD 2016/0047 pp 15, 20 (hereafter Lisvane).

<sup>15</sup>Lib Scacc, 1659.

<sup>16</sup>RB Moore 'The roll of the Keys' (1956) IOMNHAS (P) V(2), 47.

<sup>17</sup>Drinkwater to Loch, 2 February 1863 (SRO: Loch Papers, GD 268/116).

<sup>18</sup>Isle of Man Customs and Harbours Act 1866.

<sup>19</sup>Kermode (2001), above n 6, p 23.

<sup>20</sup>On which see R Fyson *The Struggle for Manx Democracy* (Culture Vannin, 2016) pp 217–248.

they would 'claim far greater and more arbitrary power ... at issue with the British government and any Council consisting of Members nominated by the Crown'.<sup>21</sup> With the move to an elected House of Keys, conflicts between the Keys and the Council did indeed intensify, with the Manx/Imperial tension enhanced by a tension between elected and unelected members of Tynwald.

The Lieutenant-Governor remained in charge of the executive. In 1866 responsible government was not seen as suitable for a territory as small as the Isle of Man, and the Governor remained supreme head of government.<sup>22</sup> As discussed below, it was not until the latter part of the twentieth century that an executive responsible to Tynwald became a key feature of the Manx constitution.<sup>23</sup>

The twentieth century saw tremendous changes in the Manx constitution, shaped significantly by two expert reports originating as a result of Manx pressure, but drawing on external expertise.

In 1911 a Departmental Committee was appointed by the UK Home Secretary, led by Lord MacDonnell.<sup>24</sup> The Committee considered proposals from the Keys for the creation of an Executive Council, and reforming the composition of the Council so that the majority of its members would be directly elected, with a minority nominated by the Crown.<sup>25</sup> The MacDonnell Report rejected the idea of an Executive Council, but endorsed reform of the composition of the Council. The Report supported the idea of an elected element in the Council, while rejecting direct election in favour of the Keys acting as an electoral college. The Report's reasoning is interesting:

if the party system were developed in the House of Keys we think that there would be much to be said for direct election; and should a well-marked division on party lines become hereafter developed in that House, we would advise that the elections should then be by the constituencies.<sup>26</sup>

The Report supported the Lord Bishop remaining in the Council because of 'his traditional connection with the Council and Tynwald, ... the ecclesiastical interests confided to his charge, and ... his respected and authoritative personality'.<sup>27</sup> It did not, however, see a justification for retaining other ecclesiastical officers, and was concerned that the Council should be of moderate size.<sup>28</sup> As a result, the Isle of Man Constitution Act 1919<sup>29</sup> removed the Archdeacon, the Vicar General, and the Receiver General. They were replaced with two members appointed for fixed terms by the Lieutenant-Governor, and four members elected by the House of Keys. Incremental reforms replaced both ex officio and appointed members with members elected by the House of Keys, so that since 1990 the Legislative Council has consisted of the President of Tynwald, who is elected by the members of Tynwald and sits ex officio as President of the Legislative Council; the Lord Bishop of Sodor and Man, who sits ex officio; the non-voting Attorney General, who sits ex officio; and eight Members of the Legislative Council (MLCs) elected for a fixed term by the House of Keys.

MacDonnell rejected major changes to the executive, but after World War II the Manx executive was transformed – a 1946 Executive Council evolving by 1990 into the Council of Ministers, who held office at the pleasure of a Chief Minister appointed by Tynwald. Unlike in the UK, where the Prime Minister is appointed on the basis of their support in the House of Commons, in the Manx system the Chief Minister was appointed based on their support across Tynwald – including not only the directly-elected Members of the House of Keys (MHKs), but the indirectly elected MLCs, and the unelected Lord Bishop of Sodor and Man.

<sup>21</sup>Hope to Fitzroy, 16 August 1853 (MNHL: Letterbook vi, f, 578–95).

<sup>22</sup>RH Kinvig *The Isle of Man: A Social, Cultural and Political History* (Liverpool University Press, 1975) pp 156–162.

<sup>23</sup>Kermode (2001), above n 6.

<sup>24</sup>Formally, *Report of the Departmental Committee on the Constitution etc of the Isle of Man* (London: HMSO, 1911).

<sup>25</sup>Petition of the House of Keys, 27 February 1907 (MacDonnell Report, Appendix I).

<sup>26</sup>MacDonnell Report, *ibid*, p 21.

<sup>27</sup>*Ibid*, p 22.

<sup>28</sup>*Ibid*, p 22.

<sup>29</sup>Isle of Man Constitution Act 1919, ss 6, 7.

The second major report rebalanced legislative power between the Keys and the Council. The absolute veto of the Council over legislation became a central concern for the Keys, resulting in a constitutional commission led by the Chief Justice of Northern Ireland, Lord MacDermott. The 1959 MacDermott Report<sup>30</sup> led to the Isle of Man Constitution Act 1961. This Act introduced a procedure whereby a Bill could become an Act of Tynwald without the consent of the Legislative Council expressed both in its own Branch, and in Tynwald Court as a whole.<sup>31</sup> This required not only a majority or, in some cases, a special majority in the House of Keys, but also that the Council should have had repeated opportunities to pass the Bill itself. Originally, these provisions could only be triggered if the Council had failed to pass the Bill after two years, but in 1978 this was changed to one year.<sup>32</sup>

These provisions were only used once. The Licensing (Sunday Opening) Bill 1979 came before the Legislative Council after all the requirements for dispensing with their consent had been met. The Council rejected it for a final time, knowing that it would become law in any case. There was an argument put that the Council should accede to the inevitable, but it did not convince, probably because it concerned the moral issue of drinking on Sundays.<sup>33</sup> Perhaps more typical may be the approach of the Council to the Isle of Man Constitution Amendment Act 1965. The Bill, replacing an *ex officio* member of the Council with an appointee of the House of Keys, had been rejected by the Council in two previous sessions, and was reintroduced having satisfied all the requirements for dispensing with Council assent. The Attorney General captures a mood which must have been present in the Council in these circumstances: 'I heartily disagree with the matters proposed in the Bill. I am nevertheless glad in a way that the Bill has been passed so that it will not become law by default, and I beg to move that the Bill do pass'.<sup>34</sup>

A key feature of the 1961 style mechanism was that the Council would always know whether the mechanism was live. The Council could always make a judgement whether the legislation was better acquiesced to, or the mechanism to bypass the Council deployed. In 2006, however, the Constitution Act 2006 simplified the 1961 mechanism to allow the House of Keys to dispense with the consent of the Council to a Bill which had not been passed by the Council within 12 months after being sent to the Council from the Keys. This override was triggered by the passing of a motion with a special majority of 17/24.<sup>35</sup> Unlike the earlier mechanism, the Council has no opportunity to acquiesce in the legislation once the Keys has done all it needed to do in order to enable the override. As we will see, this change has had substantial constitutional implications.

## 2. The Lisvane Review

As shown above, concern over the composition and functioning of Tynwald, and in particular the composition of the Legislative Council and its relationship with the House of Keys, has been an endemic feature of the Manx constitutional landscape. The Lisvane Review had its origins in a 2015 motion which envisaged a referendum on the establishment of a directly-elected, unicameral, Tynwald,<sup>36</sup> itself emerging from 'the exasperation of, year after year after year, interminable debates on reforming [the Legislative Council] and knowing full well it is not going to go anywhere at all'.<sup>37</sup> This specificity did not survive early debates in Tynwald, and the Lisvane Review sought to examine the functioning of the branches of Tynwald, to assess their efficacy, to consider the scrutiny structure, and to make recommendations for reform if necessary. The Review makes a number of recommendations which Lord

<sup>30</sup>See Belchem, above n 6, pp 163–164.

<sup>31</sup>Isle of Man Constitution Act 1961, s 10(1).

<sup>32</sup>Constitution (Amendment) Act 1978.

<sup>33</sup>Council Proceedings, 9 January 1979, per Mr Kneale at C47.

<sup>34</sup>Council Proceedings, 29 March 1965, at 956.

<sup>35</sup>Constitution Act 2006, s 1.

<sup>36</sup>Tynwald Proceedings, 19 May 2015, 132(12), at 1726.

<sup>37</sup>Economic Policy Review Committee of Tynwald, CPRC-CM 1/14-15, 15 April 2015 at 503–505 per AR Bell, the Chief Minister.

Lisvane specifically severed from one another,<sup>38</sup> although many of them interlink so that the Report represented a coherent, and very specific, vision of a reformed Tynwald.

### (a) *The Lisvane proposals*

Lisvane recognised that one of the Manx drivers for unicameralism was ‘a dislike of the present status and mandate of Legislative Council’.<sup>39</sup> Tapping into this well-established thread of critique in the Isle of Man, outlined above, he considered whether the functions of Council required the democratic mandate of direct election. He rejected this proposal, primarily because of the possibility of competing mandates between the two chambers – in particular, directly-elected Council members would be likely to have larger constituencies than MHKs, which might make the primacy of the House of Keys problematic.<sup>40</sup> Having rejected direct election, he turned to consider in more detail the appointment of MLCs.

A significant concern with the MLCs was that they were drawn from a small political class,<sup>41</sup> and that the process could be deadlocked in the House of Keys due to an inability to command a simple majority in appointing members.<sup>42</sup> Lisvane’s solution was an independent Nominations Commission, which could accept nominations from the public, MHKs, MLCs, or candidates themselves, although no sitting MHK could be nominated. The Commission would be independent, consist of people of ‘standing and authority’, and include in its five-person membership people from a range of diverse backgrounds, at least two women, and possibly ‘a minority of off-Island members’.<sup>43</sup> The Commission would then recommend in order of merit a number of candidates and a single round of open voting by the Keys would fill the available places by order of the votes secured.<sup>44</sup> If Council was to be more involved in scrutiny, as Lisvane recommended elsewhere, a modest increase of two members might prove necessary.<sup>45</sup>

There was much less radical consideration of the two *ex officio* members, the Lord Bishop of Sodor and Man, and the non-voting Attorney General: an interesting reversal of turn of the century debates where the *ex officio* members were seen as a very significant problem in Council. A substantial discussion of the role of the Lord Bishop concluded that no serious change was needed – striking given the recurrent calls for the Lord Bishop to lose their place in Council or, as a less radical alternative, become like the *ex officio* Attorney General with a voice but no vote.<sup>46</sup>

Lisvane also considered the powers of a Council which continued to lack the mandate of direct election. He recommended that the Legislative Council should not vote on taxation or appropriation, that members should not normally be part of the executive, and that they should not vote on the appointment of the Chief Minister.<sup>47</sup> Relatedly, Lisvane also recommended a number of reforms of the executive.<sup>48</sup> Most radically, Lord Lisvane recommended the abolition of the Departmental Member system. This system allowed members of Tynwald who were not ministers to be attached to Government Departments by the relevant minister. Of the 32 eligible members of Tynwald, only five did not have a role in a Government Department. Lisvane went so far as to describe this as a ‘reputational risk’ to the Island internationally.<sup>49</sup> Lisvane anticipated that this change would free up significant

<sup>38</sup>Lisvane, above n 14, p 7.

<sup>39</sup>Ibid, p 24.

<sup>40</sup>Ibid, p 28.

<sup>41</sup>Ibid, pp 29–30.

<sup>42</sup>Ibid, pp 30–33.

<sup>43</sup>Ibid, p 31.

<sup>44</sup>Ibid, pp 31–33.

<sup>45</sup>Ibid, p 34.

<sup>46</sup>Ibid, pp 35–37.

<sup>47</sup>Ibid, pp 33–34.

<sup>48</sup>Ibid, pp 38–41.

<sup>49</sup>Ibid, p 45.

resources within Tynwald, which he proposed be used for Tynwald to ‘raise its game’<sup>50</sup> in relation to scrutiny.<sup>51</sup>

Finally, Lisvane was concerned at the homogeneity of Tynwald. Although he recognised that an average age of 57.8 for members of Tynwald was a concern,<sup>52</sup> gender was his primary focus. His proposals for appointment to Council included a direction that the new Nominations Commission work to improve diversity, but recognised that the starting point for female membership (with the Isle of Man below Iran, Bahrain and the Democratic Republic of Congo) was ‘an issue of such importance that both Tynwald and civil society need to address it with energy’.<sup>53</sup>

### *(b) Reception*

The Lisvane Review was published in April 2016, and discussion deferred until after the general elections to the House of Keys took place in September 2016. As well as containing a record number of women, discussed below, half of the new House was newly elected, the highest proportion since 1976. The Tynwald which considered the Lisvane Review in the summer of 2017 was, then, rather differently constituted from that which commissioned it. The end result of a long and complex series of votes was that some Lisvane proposals were not to be given further consideration, with the remainder sent to a Select Committee tasked to report on changes required for the implementation of those changes which had been accepted in principle; or to give further consideration as to their merits where Tynwald was still considering whether the reform was desirable.

The idea of a Nominations Commission was firmly left in abeyance. It appealed neither to supporters of radical reform, nor to members who looked for a modest refinement of a system which kept authority in the hands of the Keys. The Select Committee was, however, directed to consider whether there should be open voting in the appointment process. The place of the Lord Bishop in Council, despite Lord Lisvane recommending no change, became a centrepiece of the debates. I discuss appointment of MLCs, and the controversy over the Bishop, below in Part 3(a).

Turning to Tynwald’s relationship with the executive, a proposal that Members of the Legislative Council should be ministers only in exceptional circumstances was referred to the Select Committee for implementation; while the question of whether MLCs should be appointed as Departmental Members was referred for consideration on the principle. I discuss the role of the Legislative Council in forming the Manx Government below in Part 3(b).

Finally, the call for Tynwald to address the need to make its membership more diverse was referred for implementation by a considerable majority, despite limited discussion. There was recognition of how difficult it was to identify concrete steps towards this desired goal, although a number of members made it clear that they rejected positive discrimination, which had not been proposed by Lisvane. I discuss this at more length below in Part 3(c).

The Select Committee of Tynwald made a number of reports which formed the basis of extensive debate in Tynwald, much of which is discussed in the following section. The final report of the Select Committee<sup>54</sup> was debated in Tynwald in July 2018.<sup>55</sup> Dr Allinson, introducing the final report on behalf of the Committee, indicated that the Select Committee ‘would like to draw to a close the debate on the Lisvane Report’,<sup>56</sup> and closed the debate with an air of finality: ‘I hope that by drawing a line under the Lord Lisvane Report and going on to think about different ways of reforming that do not rely on what he said, is the way forward’.<sup>57</sup> With this final debate, Manx constitutional debate has

<sup>50</sup>Ibid, p 46.

<sup>51</sup>Ibid, pp 50–65.

<sup>52</sup>Ibid, p 65.

<sup>53</sup>Ibid, p 65.

<sup>54</sup>Final Report of the Select Committee on the Functioning of Tynwald, (2018), PP 2018/0109.

<sup>55</sup>Tynwald Proceedings, 18 July 2018, vol 135(15) at 1809–1845.

<sup>56</sup>Ibid, at 1810, 2246–2247.

<sup>57</sup>Ibid, at 1841, 3769–3771.

entered a phase best described as post-Lisvane, thereby setting the scene for an analysis of the impact of the period of the Lisvane Review, and the Review itself, on the Manx constitution.

### 3. A legacy for Lisvane? Three constitutional controversies

#### (a) *Membership of the Legislative Council*

One of the drivers for Lisvane was the difficulty that the House of Keys had in agreeing on new MLCs in 2015. As with earlier elections to the Council, candidates were appointed by secret ballot of the House of Keys. A candidate required a majority of the 24 MHKs to vote in favour of their appointment, with each MHK being able to vote for as many different candidates as there were vacancies, but not being obliged to vote for this number, or indeed for any candidate. Balloting would continue until a sufficient number of candidates had commanded a majority vote. The first attempt to fill the vacancies, in March 2015, resulted in only two appointments. After a total of nine ballots, which included multiple breaks ‘to allow private discussions to take place between candidates and the proposers and seconders’,<sup>58</sup> the Speaker concluded that ‘I think we have reached the point where there will not be a substantial change in the voting today. I therefore exercise my power to end voting today and to call for fresh nominations’.<sup>59</sup> The process may, in part, have been comparatively fruitless because only 21 voting members were present – making securing the majority of 13 for a candidate particularly difficult. Returning to the issue in June 2015, however, a further eight ballots were required to appoint to the two remaining vacancies – even with 23 members present, the requirement for a majority to appoint each candidate led to a protracted process, moving from a starting position of two candidates with 9 votes, one with 7 votes, one with 6, and one with 5. At the third ballot one candidate was elected with the required 13 votes, while a second candidate was one vote short with 12 votes, before their support ebbed, and a different candidate was finally appointed with 14 votes in the eighth ballot.<sup>60</sup>

Even before the 2015 process the Keys had begun to consider improvements, moving much of the process out of a statutory framework into Standing Orders, to allow modification without new legislation.<sup>61</sup> This change did not move eligibility to stand for the Council into the realm of Standing Orders,<sup>62</sup> however, which meant that a proposal by some MHKs to adopt the Lisvane recommendation to exclude sitting MHKs from nomination was beyond the power of the House.<sup>63</sup> Lisvane had noted the pattern of sitting MHKs moving in to the Legislative Council towards the end of their political careers, and had been concerned that such direct transfers reinforced public perceptions of the Legislative Council as ‘used largely to park superannuated MHKs’, while rejecting arguments that the experience of being an MHK was important to an MLC.<sup>64</sup> As we will see, however, the first MLC round after Lisvane appointed no sitting MHKs.

The Committee noted that Lisvane’s recommendations around appointment had not yet been considered by Tynwald,<sup>65</sup> and made comparatively minor changes to the process. They recommended that the process should be required to be completed in a single day, that the ballot should remain secret, and that nominations should not be permitted from the floor. Encouraging candidates from outside Tynwald was seen as important, and the Speaker was to be under a duty to ensure that candidates and MHKs would meet after the close of nominations.<sup>66</sup> Where there were at least three candidates and no candidate was elected, the candidate with the fewest votes would be omitted from the next round of voting. Voting would require a majority of the members present, rather than the former 13, and in the

<sup>58</sup>House of Keys Proceedings, 16 March 2015, vol 132(13), 877 K132 at 425–426; and at 567–568.

<sup>59</sup>Ibid, at 799–801. For the March process, see <http://www.tynwald.org.im/business/hansard/20002020/k150316.pdf>.

<sup>60</sup>For full proceedings, see <http://www.tynwald.org.im/business/hansard/20002020/k150622.pdf>.

<sup>61</sup>Standing Orders Committee, First Report 2016–2017, PP 2015/0132 at para 17.

<sup>62</sup>Legislative Council Elections Act 2017.

<sup>63</sup>Standing Orders Committee, Fourth Report 2016–2017, PP 2017/063 at paras 4–5.

<sup>64</sup>Lisvane, above n 14, pp 10–12, 25, 27.

<sup>65</sup>Ibid, p 4.

<sup>66</sup>Ibid, p 6.



event of ‘continued failure to decide between two remaining candidates’, the Speaker could settle the issue by drawing lots.<sup>67</sup>

The recommendations of the Committee were largely adopted by the Keys, but the provision for a default secret ballot was replaced with a default public ballot.<sup>68</sup> A theme of those who supported the amendment in debates was that MHKs exercised a public function in appointing MLCs, and must be accountable for such decisions,<sup>69</sup> as for analogous ones such as the appointment of the Chief Minister,<sup>70</sup> although the proposer also believed that openness would result in ‘far less spoiling of papers, time wasting and underhand tactics’.<sup>71</sup>

The 2018 elections of MLCs were, then, the first under the new procedure, and the first under a public ballot. Fifteen nominations were received, 9 female and 6 male. The House sat for 14 minutes, and in a single ballot elected five women to the five vacancies. I return to analysis of the gender dimension of the changes to the process, and to the MLC, below. For the moment it is worth noting that if the fundamental purpose of the reforms was to secure a decisive vote quickly, they appear to have been very effective.

Turning to the Lord Bishop, the question of whether the Lord Bishop should retain their voting rights became a live issue. In the end, the Bishop retained his vote by a close majority in the Keys (13 in favour, 11 against), and the Council (5 in favour, 3 against).<sup>72</sup>

An earlier study had stressed the distinctive voice of the Lord Bishop in Tynwald,<sup>73</sup> and a number of MHKs emphasised this.<sup>74</sup> Valuing the Bishop’s voice was common in those who supported him retaining his vote, but MHKs such as Mrs Beecroft drew a sharp distinction between the Bishop’s voice, which she valued, and his vote, which she thought was inappropriate.<sup>75</sup> Criticism of the vote of the Lord Bishop often focused on the lack of a democratic mandate,<sup>76</sup> itself linked to an argument that the continued vote was an anachronism, one of ‘the last vestiges of feudal rule’.<sup>77</sup> Other members read the antiquity of the Bishop’s vote differently, as contributing to ‘the things that make us special’.<sup>78</sup> Another contested ground was the Manxness of the Bishop – a concern related to democracy but, as the historical overview above has demonstrated, distinct. This point was made most clearly by Mrs Caine, self-identifying as a person of no faith, who did not ‘see the need for a UK-appointed Bishop to be involved in our parliament’.<sup>79</sup>

The link between the ecclesiastical and the political, identified in the earlier study, came to dominate the debate, with constitutional change seen as reducing the willingness of the Church of England to operate the very small Diocese of Sodor and Man.<sup>80</sup> Mr Malarkey warned that ‘new Members do not actually realise that if we take the vote off the Bishop we will not have a Bishop’.<sup>81</sup> Mr Corkish feared

<sup>67</sup>Ibid, p 6.

<sup>68</sup>Standing Orders of the House of Keys, 8.3(13), revised 4 April 2017.

<sup>69</sup>Eg Mrs Corlett, at 755 K134 at 784–791.

<sup>70</sup>Eg Mrs Caine at 756 K134 at 840–844.

<sup>71</sup>Miss Bettison, at 754 K134 at 767–768.

<sup>72</sup>Tynwald Proceedings, 21 February 2018, 135(17) at 835–880.

<sup>73</sup>PW Edge and CCA Pearce ‘The work of a religious representative in the a democratic legislature: a case study of the Lord Bishop of Sodor and Man in Tynwald, 1961–2001’ (2004) 9(2) *Marburg Journal of Religion*; PW Edge and CCA Pearce ‘The development of the Lord Bishop’s role in the Manx Tynwald’ (2006) 57(3) *Journal of Ecclesiastical History* 494; PW Edge and CCA Pearce ‘Official religious representation in a democratic legislature: lessons from the Manx Tynwald’ (2004) *Journal of Church and State* 1; CCA Pearce ‘The offshore establishment of religion: church and nation on the Isle of Man’ (2003) 7(2) *Ecclesiastical Law Journal* 62.

<sup>74</sup>Eg Tynwald Proceedings, above n 72, Mr Ashford at 2524–2528.

<sup>75</sup>Tynwald Proceedings, above n 72, Mrs Beecroft at 2110–2140.

<sup>76</sup>Eg Tynwald Proceedings, above n 72, Mrs Corlett at 2102–2104.

<sup>77</sup>Tynwald Proceedings, above n 72, Mr Hooper at 1348.

<sup>78</sup>Tynwald Proceedings, above n 72, Mr Cregeen at 1795–1796.

<sup>79</sup>Tynwald Proceedings, above n 72, Mrs Caine at 3319–3320.

<sup>80</sup>See more fully PW Edge ‘The constitutional implications of the survival of the Diocese of Sodor and Man’ (2019) 20(3) *Ecclesiastical Law Journal* 278.

<sup>81</sup>Tynwald Proceedings, above n 72, at 3181–3182.

that any loss of the Diocese would result in damage to ‘the standing of nationhood and the status of our Island’.<sup>82</sup> In earlier debates the seat of the Bishop, rather than the vote, had been seen as crucial to the survival of the Diocese.<sup>83</sup> By 1994, a change to the vote was sometimes seen as also raising this issue.<sup>84</sup> Although other legislators disagreed, in 2001 Mr Singer referred to ‘an authoritative source’ who had indicated that removing the vote would endanger the survival of the Diocese and lead to amalgamation with an English Diocese.<sup>85</sup>

Some legislators considered loss of the Diocese as a price worth paying for reform.<sup>86</sup> Others were sceptical that the Diocese would be lost, with Mr Hooper quoting an academic blog drawing parallels with the Dean of Jersey as indicating that losing the vote would not necessarily result in losing the ecclesiastical office.<sup>87</sup> Although the Jersey argument for a voice without a vote had some traction,<sup>88</sup> references to other jurisdictions sparked surprisingly strong hostility from other members. Mr Malarkey for instance questioned ‘Why do we want to be the same as Jersey and Guernsey? We have a history of being different’.<sup>89</sup>

The continued existence of the Diocese was central to the thinking of the Committee.<sup>90</sup> Their report emphasised what the Lord Bishop added to the Island:

the combination of the presence of the Lord Bishop on the Island and the continuing existence of the Diocese is a matter of great importance to the Island in general for social and community reasons; the Lord Bishop represents a significant part of our continuing heritage. The existence of the Diocese is ... a continuing part of the Island’s cultural heritage.<sup>91</sup>

The report identified as a key question whether the Diocese would cease to exist if the Lord Bishop were to lose his vote but remain in Tynwald, and had written to the Archbishop of York to clarify this point.

The Archbishop replied on 14 November. In his reply the vote is described as:

a matter of great importance to the Church of England. It mirrors the position of the Diocesan Bishops who sit in the House of Lords ... and ... reflects the nature of the spiritual tradition of the Isle of Man. A voice on the Legislative Council without a vote would seem to me to be a very weak position. It would be akin to the position of the Deans in the Channel Islands, who are allowed to speak but not to vote in the Parliament. You may be aware that the Channel Islands do not form a separate diocese and have no diocesan bishop; instead they are incorporated into an English Diocese.<sup>92</sup>

The Archbishop had been informed by the Lord Bishop that:

the absence of a spiritual vote in Tynwald will cause an issue for many residents of the Island, particularly where voting is required on spiritual issues ... The Bishop serves on Tynwald as a focus for all faith groups on the Island and his voting role on the Legislative Council is testimony

<sup>82</sup>Tynwald Proceedings, above n 72, at 2912–2916.

<sup>83</sup>Constitution (Legislative Council) Bill, House of Keys 4.5.82; Question to the Executive Council, Tynwald Court 14.12.82; Resolution to adopt Second Report of Select Committee on Representation of the People, House of Keys 25.1.83.

<sup>84</sup>Tynwald Proceedings, 13.7.94, Report on Reform of the Legislative Council.

<sup>85</sup>Keys Proceedings 23.1.01, Constitution Bill.

<sup>86</sup>Eg Tynwald Proceedings, above n 72, Mr Shimmins, at 1269–1271.

<sup>87</sup>Peter W Edge ‘Tynwald and the Bishop of Sodor & Man’ Law & Religion UK, 28 June 2017, <http://www.lawandreligion-nuk.com/2017/06/29/tywald-and-the-bishop-of-sodor-man/>.

<sup>88</sup>Eg Tynwald Proceedings, above n 72, Mr Ashford, at 1380–1389.

<sup>89</sup>Tynwald Proceedings, above n 72, Mr Malarkey, at 2386–2391.

<sup>90</sup>Third Report of the Select Committee on the Functioning of Tynwald, PP 2018/0018.

<sup>91</sup>Ibid, para 13.

<sup>92</sup>Ibid, at pp 17–18.

to the fact that Tynwald takes seriously the spiritual nature of the Island's identity, and its moral and ethical responsibility for the life of its people.

He concluded: 'If the Lord Bishop's vote were to be removed, in my view this would significantly undermine the case for Sodor and Man being a separate diocese'.

As a result, the Committee concluded that loss of the vote would lead to downgrading of the Diocese to a part of another Diocese based in England.<sup>93</sup> This was crucial to their conclusion that the Lord Bishop should retain his vote. From the debate which followed the Report, it is equally clear that this conclusion was important to a number of members. Mr Malarkey, for instance, confessed to having been undecided on the question of the vote, but he was not undecided on whether the Isle of Man should have a Bishop. Others remained accepting of the loss of the Diocese, with Mr Shimmins categorising it as 'a decision for the Anglican Church, not this Hon Court'.<sup>94</sup>

A number of MHKs indicated that to lose the vote, and the Lord Bishop, was irreversible, but that a decision could be made to do this at a later date.<sup>95</sup> Given the closeness of the vote, this may prove significant. The earlier study found that individual office-holders varied considerably in their contributions to the legislative process.<sup>96</sup> Bishop Eagles was installed just in time for the final debate on whether his office should carry a vote in the Legislative Council. His contributions to the debate over his vote indicated that he saw an organic link between the Manx state and the Manx church, and claimed special expertise in moral and ethical understanding – a stance unlikely to reconcile MHKs unconvinced of his being able to vote in the national legislature. His highest profile contribution since, during the passage of the Abortion Act,<sup>97</sup> seems likely to exacerbate this.

Abortion law in the Isle of Man was considerably more restrictive than that of England and Wales, even after a substantial piece of legislation in 1995,<sup>98</sup> which led to Manx women travelling to England to privately secure lawful terminations.<sup>99</sup> The Abortion Bill, intended to decriminalise abortion and make it very significantly easier to obtain on the Island, polarised public opinion sharply. As well as building on a public consultation which indicated a very strong majority for reform, however, it had secured very strong support in the House of Keys, being approved by a margin of 22 to 2.

At the First Reading in the Legislative Council,<sup>100</sup> the Lord Bishop was concerned that the Bill 'takes us into a new category and one which sits possibly outside and beyond the norms of liberal Western understanding, for all that it may be compliant with human rights'.<sup>101</sup> At the Second Reading<sup>102</sup> the Lord Bishop emphasised his special duties: 'to have a concern for everyone who lives on this Island'; and 'to care for people of faith, for people of all faiths to some degree'.<sup>103</sup> He was very involved in the debate, going so far as to call a number of expert witnesses to answer questions from himself and others. Although not categorised as such, the MHK who had led the passage of the Bill was called as a rebuttal witness by an MLC, as was an employee of the Department of Health and Social Care. The Third reading secured the support of 8 members.<sup>104</sup> The only member voting against the Bill was the Lord Bishop, who tabled a very substantial number of amendments to be considered.

<sup>93</sup>Ibid, para 16.

<sup>94</sup>Tynwald Proceedings, above n 72, at 1271–1272.

<sup>95</sup>Eg Tynwald Proceedings, above n 72, Mr Malarkey at 2396–2403.

<sup>96</sup>PW Edge and CCA Pearce 'The work of a religious representative in a democratic legislature: a case study of the Lord Bishop of Sodor and Man in Tynwald, 1961–2001' (2005) 9(2) *Marburg Journal of Religion* 17–19.

<sup>97</sup>See primarily Council Proceedings, 12 June 2018, 135(17) at 261–327; Council Proceedings, 26 June 2018, 135(18) at 331–379.

<sup>98</sup>See PW Edge 'Reforming termination of pregnancy' (1995) 3 *Web Journal of Current Legal Issues*.

<sup>99</sup>88 women travelled from the Isle of Man to England for terminations in 2016.

<sup>100</sup><http://www.tynwald.org.im/business/hansard/20002020/c180522.pdf#search=%22abortion%20first%20reading%22> (last accessed 28 August 2019).

<sup>101</sup>Ibid, at 517–519.

<sup>102</sup><http://www.tynwald.org.im/business/hansard/20002020/c180612.pdf> (last accessed 28 August 2019).

<sup>103</sup>Ibid, at 266 C135 at 202.

<sup>104</sup><http://www.tynwald.org.im/business/hansard/20002020/c180626.pdf> (last accessed 28 August 2019).

These included reducing a number of time limits under the legislation, and limiting abortion on the grounds of disability, issues which had been debated in, and rejected by the House of Keys. As well as disagreeing with statements of fact made in the Keys, the Lord Bishop was concerned at ‘moral slippage’,<sup>105</sup> and indicated he would vote against the Bill because it did not show ‘that hallmark of the liberal society that enables us to respond graciously and compassionately to all, including those who are seriously disabled’.<sup>106</sup> Challenged on his reference to moral slippage, he expanded in his final remarks that ‘there is scope for the provision for abortion to become expedient and for the underlying issues of human relationships, of poverty, of education and of deprivation to be given less emphasis than they require’.<sup>107</sup>

Unsurprisingly, his intervention was seen as controversial, for instance being described by the Campaign for Abortion Law Modernisation (CALM) as ‘cynical repeats of previous, failed, attempts to restrict the scope of the Abortion Reform Bill’.<sup>108</sup> The passage of the Abortion Act alone gives an important example of Bishop Eagles as an active member of the Legislative Council, prepared to return to issues of principles decided by substantial majority in the Keys, and prepared not only to contribute to the discussion of contentious issues of principle, but to shape that discussion by the calling of expert witnesses.

### *(b) The powers of the Council*

As discussed above, the Council and its members were formerly the preeminent organ of executive government in the Isle of Man. By the twenty-first century, the Council’s role was narrower. The Council took a role in Tynwald’s appointment of the Chief Minister, typically following a General Election of MHKs and individual members of the Council could be appointed to ministerial, or more commonly Departmental Member, roles in government.

In 2016 Tynwald met to appoint a new Chief Minister. Although the appointment would be by a majority of the voting members of Tynwald together, for the first time this would be in separate stages, with the vote of MHKs taken first, and then the vote of the Legislative Council taken ‘once the results in the Keys have been announced’,<sup>109</sup> with an expectation that the Council would vote with the majority of the Keys.<sup>110</sup> No member had a majority of the Keys’ votes, with Mr Quayle receiving a plurality of 12 votes from the 24 MHKs. Members of the Legislative Council were then called upon to vote, and Mr Quayle received all 9 votes, including that of the Lord Bishop, giving him the majority needed to be elected as Chief Minister.

As will be recalled, Lisvane had recommended that members of the Legislative Council should not vote on the appointment of the Chief Minister, and should not normally be members of the government. The Select Committee’s remit was clarified to give them the authority to consider whether MLCs should be able to vote on the appointment of the Chief Minister. The Select Committee intended to report on the issue in February 2018, but constitutional change overtook them.

In 2016 the House of Keys had passed a Bill to exclude members of the Legislative Council from the vote on the Chief Minister.<sup>111</sup> The Bill had failed to pass in the Legislative Council. In 2017 a motion was proposed to allow the Bill to proceed in any case. Mr Thomas, the proposer, raised two constitutional issues in support of the motion. First, the importance of ‘a mandate from the people voting at a General Election through to the election of a Chief Minister’.<sup>112</sup> Secondly, ‘that ... it is the will of

<sup>105</sup>Ibid, at 377 C135 at 1885.

<sup>106</sup>Ibid, at 378 C135 at 1895–1896.

<sup>107</sup>Ibid, at 379 C135 at 1946–1949.

<sup>108</sup>Quoted in <http://www.iomtoday.co.im/article.cfm?id=41123&headline=Bishop%20under%20fire%20over%20abortion%20bill%20moves&sectionIs=news&searchyear=2018> (last accessed 28 August 2019).

<sup>109</sup>The President, 10 T134 at 225–226 (<http://www.tynwald.org.im/business/hansard/20002020/t161004.pdf>).

<sup>110</sup>See the discussion by Mr Quayle, in the later debate at 310 K135 at 1230 (<http://www.tynwald.org.im/business/hansard/20002020/k171219.pdf> (accessed 28 August 2019)).

<sup>111</sup>Council of Ministers (Amendment) Bill 2016.

<sup>112</sup>Mr Thomas, 308 K135 at 1112–1113.

the elected Branch, the House of Keys, that should prevail'.<sup>113</sup> The vote was close, with precisely the special majority of 17 needed,<sup>114</sup> but resulted in both the use of the new style override for the first time, and a significant change in the body which approves the Chief Minister.

Although exactly this change had been recommended by Lord Lisvane, the proposer went to some length to distance the legislation from Lord Lisvane, pointing out that it had been passed before Lord Lisvane visited the Island, and that 'this initiative is an Isle of Man initiative initiated by a proud Manxman inside the House of Keys at the beginning of 2016'.<sup>115</sup>

The current Chief Minister, Mr Quayle, opposed the motion. He felt that the Chief Minister needed to command the support of both the House of Keys and the Legislative Council:

We are not Westminster, we are not Jersey, we are not Ireland, where obviously the House of Commons vote for the chief minister; we are a small jurisdiction. We have been going now for over a thousand years, and I believe having the support of both areas will help a Chief Minister, whoever they are, going forward.

Mr Boot pointed out that the change in appointment of the Chief Minister would result in fewer individuals voting on the appointment of the Chief Minister, which he categorised as 'concentrating the power into fewer hands – it does not seem very democratic to me'. Mr Malarkey robustly rejected this categorisation because of the democratic legitimacy of the Keys – 'it is 24 votes who have the mandate of the people behind them'. I return to this tension between democratic mandate and concentration of power below.

It is difficult to see this change as anything other than a prioritisation of the democratically elected Keys over the Council. This conclusion is reinforced by the way in which it was secured against the will of the Council. Removing the link between the Chief Minister and the Legislative Council may, however, be seen as bringing Tynwald closer into line with other small, bicameral, democracies. In his study of bicameralism in the Caribbean, O'Brien accounts for the survival of bicameralism in part because the constitutions ensure that the second chamber is dominated by the Government.<sup>116</sup> Formerly, with the Council having a distinctive role in the appointment of the Chief Minister, Tynwald was closer to a position of the second chamber having at least some authority over the Government. With the severing of this link, Tynwald has moved towards a less hierarchical relationship, with Government and Council operating in more distinctly separate spheres.

### (c) Gender

The Isle of Man is proud of having the first national legislature in the anglophone world to include women in its electorate, in 1881. At the time Lisvane carried out his review, however, only 2 of the 35 members of Tynwald were women, putting female representation in Tynwald at 5.7%, equivalent to 178<sup>th</sup> place in the Inter-Parliamentary Union's league table.<sup>117</sup> During evidence, Lisvane had asked a number of witnesses why this might be the case, and had found the answers 'not reassuring' – stressing a 'nasty, toxic, environment', where Tynwald 'was seen as a male club'.<sup>118</sup>

A particular issue in the Manx context is the lack of a strong party system. Mechanisms used elsewhere in the British Isles to encourage more equal representation of women by putting pressure on

<sup>113</sup>Ibid, at 1116–1120.

<sup>114</sup>Mr Malarkey noted the absence of a number of MHKs, who he categorised as supporters of the motion.

<sup>115</sup>Tynwald Proceedings, above n 72, at 1113-4; discussed further in Part 4(a) below.

<sup>116</sup>D O'Brien 'Bicameralism in small states: the experience of the Commonwealth Caribbean' (2018) *Journal of Imperial and Commonwealth History* 1.

<sup>117</sup>Lisvane, above n 14, p 18.

<sup>118</sup>Ibid, p 64.

political parties have no real traction in a system so dominated by independent candidates.<sup>119</sup> As noted earlier, Lisvane had recommended a Nominations Commission required to take diversity into account in selecting candidates, but even had this recommendation been accepted, it would not have addressed the gender balance in the (dominant) House of Keys. One Lisvane witness, Ms Hannan, a former MHK who had sat for 20 years, advocated the reservation of one third of seats for women.<sup>120</sup> Lord Lisvane did not adopt this recommendation, instead describing the problem as ‘not something easily corrected by executive action’.<sup>121</sup> He did, however, recommend that ‘both Tynwald and civil society need to address it with energy’, in the first instance at the upcoming General Election to the House of Keys.<sup>122</sup> Compared with the crispness of other recommendations by Lord Lisvane, the report limits itself to identifying a problem. There is some evidence, however, that simply highlighting the problem may have had an impact on the myriad individual decisions which, in a small jurisdiction based primarily on independent members, can impact on gender representation.

In the last pre-Lisvane General Election to the House of Keys, 10.9% of all candidates were women; while 8.33% of those elected were women – a 42-vote swing in one constituency would have raised this to 12.5% of the House. Under-representation of women in the Keys seemed to flow primarily from under-representation in candidates coming forward, rather than a low success rate at elections.<sup>123</sup> In the General Election after the Lisvane Review had been published, the picture was rather different. 50 candidates were male, and 13 female – female candidates rising to 20.63%. A historic five women were elected to the Keys – at 20.83%, very closely reflecting the gender division of candidates. This was achieved despite three of the two member constituencies not having any female candidates. Simply identifying this as a public policy agenda, and placing the Manx position in an unflattering global context may itself have encouraged more women to consider running for election to the House of Keys. Determining the reasons for the increased percentage of female candidates will require further qualitative field-work with candidates.

Turning to the Legislative Council, in the 2015 appointments, discussed above, six candidates were nominated in advance of the initial debate. All six candidates were men, and included three sitting MHKs, and one sitting MLC. Further male candidates emerged during the process, which resulted in the appointment of four men to the Legislative Council.

By the 2018 appointments the President of Tynwald had been put under a duty by Tynwald to encourage a wide range of candidates to the Legislative Council. Five appointments were open. Of the 15 candidates nominated, 9 were female – a jump from 0% of nominees to 60%. This was the first MLC election with open polls.<sup>124</sup> From the 15 candidates, the House of Keys elected five women, and no men, none of whom had sat as MHKs. The extent of the change is patent.

This has resulted in a Legislative Council today consisting of three male ex officio members (the President of Tynwald, the Lord Bishop and the non-voting Attorney General), three male appointed members, and five female appointed members. Excluding the non-voting Attorney General, and the normally non-voting President of Tynwald, this gives a female majority in the Legislative Council, at 55.5%.

<sup>119</sup>See S Childs ‘In the absence of electoral sex quotas: regulating political parties for women’s representation’ (2013) 49 Representation 401. This applies to some, but not all, of the mechanisms outlined in <https://tinyurl.com/yx9fuxxf> (accessed 5 September 2019).

<sup>120</sup>Lisvane, p 65. A more radical model, based on the proposed electoral system for Nunavut, would have had one male and one female MHK for each of the 12 constituencies. See <http://www.revparl.ca/english/issue.asp?art=1135&param=164>. For a wide ranging review of quota systems, see D Dahlerup ‘Electoral gender quotas: between equality of opportunity and equality of result’ (2007) 43 Representation 73.

<sup>121</sup>Lisvane, p 65.

<sup>122</sup>Lisvane, p 65.

<sup>123</sup>This election was the, however, also the last to be run with any single member constituencies. See I McAllister and DT Studlar ‘Electoral systems and women’s representation: a long-term perspective’ (2002) 39 Representation 3.

<sup>124</sup>Keys Proceedings, 12 March 2018, 134(14) at 699–703.

Tynwald in 2018, then, was a rather different place from the Tynwald upon which Lord Lisvane reported. The 5.7% female representation in Tynwald he identified has become 31.25% in just two years. In terms of the global league table that Lord Lisvane alluded to, mapping this against the date from 1 June 2018 would place Tynwald between Tunisia (at 43<sup>rd</sup> best, on 31.3%), and Cameroon (at 44<sup>th</sup> best, on 31.1%); and very close to the UK's 32%.

An obvious first response to this improvement is respect for the speed of change,<sup>125</sup> particularly striking in a system where party affiliation is comparatively unimportant, so that incumbency is used as 'an easy indication of quality and experience'.<sup>126</sup> Apart from the fact that even this exhilarating change leaves some way to go before a roughly equal number of men and women sit in Tynwald, and it is too early to say whether it will be sustained, there remains one cause for concern. As argued above, a broad trend in Manx constitutional history is the gradual increase in the powers of the House of Keys until, today, it is clearly the dominant part of Tynwald. This direction of travel has only been increased by the recent constitutional developments discussed above. Tynwald as composed today, however, does not have 30% female representation in the dominant Keys, and the Legislative Council. In the Keys, only 20% of the members are female. The 30% figure for Tynwald overall owes much to the number of female members of the Legislative Council – as noted above, a majority of the voting members, and more than 60% of those appointed members able to point to even an indirect mandate.

The division between a predominately male House of Keys, and a predominantly female Legislative Council (at least in voting terms), could add an important new element to the traditional clashes between Keys and Council, which until well into the twentieth century were composed entirely of men. There may be some evidence this has already begun. In May 2018 the Chief Minister called a meeting with the five women newly elected to the Legislative Council, following complaints he had received from some MHKs regarding the political assertiveness of the MLCs, to 'discuss the differences between the branches of parliament and government and, in particular, the role of the Legislative Council, which is primarily one of scrutiny'.<sup>127</sup> The President of Tynwald was later reported to have had a meeting with the Chief Minister to discuss the matter, and the separation between executive and parliamentary business, with the President strongly supporting the right of every member of Tynwald to political expression.<sup>128</sup> The causal explanation of this controversy may be the newness of four of the five MLCs, and not their gender, analogous to the impact of the unprecedentedly large number of new SNP MPs in Westminster in 2015.<sup>129</sup> Nonetheless, a controversy centring on the role of five female legislators, and none of their male peers, invokes the famous argument of MacKinnon that 'the state is male in the feminist sense: It sees and treats women the way men see and treat women'.<sup>130</sup>

#### 4. Lessons from the Lisvane period

As this study shows, the Isle of Man faces a number of challenges distinctively associated with smallness.

<sup>125</sup>Compare this with the Legislative Council in Hong Kong, which moved from 4% in 1980 to 11% in 1991 to 16% in 2012; see further W Tam 'Women representing women? Evidence from Hong Kong's semi-democratic legislature' (2017) 53 Representation 201.

<sup>126</sup>R McGregor et al 'Why so few women and minorities in local politics? Incumbency and affinity voting in low information elections' (2017) 53 Representation 135 at 136.

<sup>127</sup>Reported by Manx Radio at <https://www.manxradio.com/news/isle-of-man-news/chief-minister-summons-new-mlcs/> (last accessed 28 August 2019).

<sup>128</sup>Reported at <http://www.iomtoday.co.im/article.cfm?id=41488&headline=Rodan%20and%20Quayle%20draw%20a%20line%20under%20%27don%27t%20rock%20the%20boat%27%20meeting&sectionIs=NEWS&searchyear=2018> (last accessed 28 August 2019).

<sup>129</sup>See L Thomson 'Understanding third parties at Westminster: the SNP in the 2015 parliament' (2018) 38(4) Politics 443 at 447–450.

<sup>130</sup>C MacKinnon *Towards a Feminist Theory of the State* (Harvard University Press, 1989) p 161.

*(a) Resources for constitutional development*

A key tension revealed by this study is that between external input and Manx legitimacy. This took two forms in the Lisvane process.

First, there was a clear conflict within Tynwald as to the value of comparative constitutional materials. Automatic adoption of foreign solutions developed to address foreign problems is, thankfully, no longer a part of the Manx political scene. Tynwald has come a long way since Samuel Norris – an MHK famous in his time for his support for increased Manx autonomy – argued that ‘we should know, and the public should know, where we are varying, if we do vary, from the English law, and the reason for which the variation is made’.<sup>131</sup> Rejection of this approach is not the same as rejecting insights to be gained from critical consideration of the approaches and experiences of other democracies when making decisions for the Isle of Man. Deemster Doyle, speaking extrajudicially in the United States, has put it perhaps most strongly:

Laws should be developed and problems solved by reaching out for knowledge and solutions that may be provided by approaches from jurisdictions beyond our local frontiers. ... A blinkered, insular and local approach encourages ignorance and encourages conflict. We ignore developments in other jurisdictions at our peril.<sup>132</sup>

Secondly, there is the contribution of Lord Lisvane himself. A steady theme in the debates was that as an outsider Lord Lisvane had not understood the Manx constitution.<sup>133</sup> Small jurisdictions will inevitably lack specialist capacity in some areas, and outsourcing particular tasks to foreign specialists is common. In the Manx context, for instance, around 11,000 journeys a year are taken by Manx residents referred to English hospitals for treatment under a contract with the Manx government.<sup>134</sup> Aspects of the Manx legal system similarly entwine with the English system for similar reasons – all Manx prisoners receiving a life sentence are transferred to English prisons,<sup>135</sup> while the Manx judicial system has made increasing use of English lawyers since the early twentieth century.<sup>136</sup> There is not the same emphasis on a uniquely Manx way to treat cancer, or even deal with life term prisoners, as there is on a uniquely Manx way to govern the Isle of Man.

We find the same tension between the expertise of an external specialist in governance and the need for national legitimacy and authenticity elsewhere. In a failed 2016–17 attempt at constitutional reform in Alderney, for instance, the States of Alderney commissioned a review by the Constitution Unit at UCL.<sup>137</sup> In discussion of the first part of the review, which led to the termination of the process, members of the States questioned whether ‘a London consultant’ was really necessary,<sup>138</sup> whether an alternative specialist ‘well-known to the States and States’ Members here over a number of years’ might be a better choice,<sup>139</sup> and whether on-Island consultants ‘could actually help us enormously in some of the areas that we quite often seek – I will not say overseas assistance but – assistance from elsewhere’.<sup>140</sup> How is this tension to be resolved?

One possible strategy is for external expertise to be drawn upon in a directed way, so that the external expert is clearly offering specialist knowledge rather than wide-ranging political and constitutional

<sup>131</sup>Bankers Book Evidence Bill 1935 (22 January, Keys Debates 52, 51).

<sup>132</sup>DC Doyle ‘Manx law: a contribution from the Isle of Man’ (2007) 33(4) Commonwealth Law Bulletin 671 at 679.

<sup>133</sup>Eg Tynwald Proceedings, above n 72, Mr Baker, at 1824, 2918–2920.

<sup>134</sup><https://www.gov.im/categories/health-and-wellbeing/patient-transfers/> (last accessed 28 August 2019).

<sup>135</sup><https://www.gov.im/about-the-government/departments/home-affairs/isle-of-man-prison-and-probation-service/addressing-offending-behaviour/probation-and-custody/> (last accessed 28 August 2019).

<sup>136</sup>See PW Edge ‘Lawyers empires: the anglicisation of the Manx bar and judiciary’ (1995) 19(4) International Journal of the Legal Profession 29.

<sup>137</sup>For a detailed discussion, see Morris, above n 9.

<sup>138</sup>*Hansard Report, States of Alderney Meeting* 19 October 2016, Neil Harvey at 18.

<sup>139</sup>*Ibid*, Neil Harvey at 19.

<sup>140</sup>*Ibid*, Graham McKinley at 21.



judgement. Interestingly, the motion which led to the Lisvane Review was originally more directed, with an emphasis on unicameralism.<sup>141</sup> In the light of the authenticity issues later raised around the Review, a focus on exploring the merits and implementation challenges of unicameralism may have resulted in a Review which, while it may have been rejected, could not so easily be interpreted as a manifesto developed by an outsider. Rather, a clearer remit for Lord Lisvane may not have ‘disturbed their sense of ownership and control over the Island’s constitutional development which had to be reasserted’.<sup>142</sup>

While constitutional review by an outside expert faces challenges of legitimacy, capacity challenges faced by small jurisdictions may contribute to the power of such reviews. One way of looking at the impact of a constitutional review such as that carried out by Lord Lisvane is very linear. A report is generated, recommendations are adopted (or not), and the constitutional debates move on. The sheer messiness of the Manx constitutional reforms since 2016 show the limitations of this perspective. As the Select Committee noted in its final report: ‘During the course of our deliberations and publication of the three previous reports we have witnessed a series of meaningful and radical changes to the way our Parliament is structured and its decision making process’.<sup>143</sup> As the discussion above shows, Tynwald did not necessarily wait on formal discussion of Lord Lisvane’s recommendations in order to implement them.

If the legacy of Lisvane began before the Review had been debated, it may last surprisingly long. 2018 may fairly be seen as the end of the period of constitutional reflection immediately associated with the specifics of Lisvane. Such a wide ranging review, and the evidence generated by the process, will have a much longer term impact. The paucity of constitutional materials within even a wealthy small democracy such as that of the Isle of Man will mean the legacy of such a constitutional review is considerably longer than in a larger state. The Lisvane Review may have a legacy similar to that of its century old predecessor, the MacDonnell Report, still being discussed today.

### *(b) Managing intimacy as a constitutional aim in a small democracy*

The demise of the secret ballot for MLC appointments is prima facie a reinforcement of the paramount importance of a democratic mandate to Manx political legitimacy. It may also be read, however, as a turn away from a particular solution to a small democracy problem, that of managing intimacy.

Managing intimacy has been identified as a particular issue in small states, where actors recognise that they will interact over a long period of different time in different relationships, and so must get along.<sup>144</sup> Writing in relation to ministries of education in small states,<sup>145</sup> Bray notes that ‘In contrast to medium-sized and large states, everybody seems to know everybody else, and does so in a wide range of different contexts’.<sup>146</sup> This may make it difficult to apply neutral bureaucratic rules, and to limit interactions to formal settings.<sup>147</sup> The only MHK to speak at length on the benefits of the secret ballot for appointments to the Legislative Council, Mr Malarkey, tapped into exactly this theme when advising his newly appointed colleagues:

I think the new Members have to experience a round or two in here to find out just how difficult it is at times to pick who you are putting into a job on the same pay scale as you, basically, for the next five years ... One of them might be your next door neighbour; one might be your brother-in-law ... with

<sup>141</sup>Tynwald Proceedings, 19 May 2015, 132(12), at 1726.

<sup>142</sup>Morris, above n 9, at 128.

<sup>143</sup>Third Report, above n 90, para 31.

<sup>144</sup>See D Lowenthal ‘Social features’ in C Clarke and T Payne (eds) *Politics, Security and Development in Small States* (London: Allen and Unwin, 1987).

<sup>145</sup>M Bray et al *Making Small Practical: The Organisation and Management of Ministries of Education in Small States* (Commonwealth Secretariat, 1991).

<sup>146</sup>Ibid, p 20.

<sup>147</sup>Ibid, pp 20–21.

a public vote you are not going to have much conversation out of your brother-in-law or your next door neighbour for the next five years because he has found out you have not voted for him and you have voted for the best person you considered for the job ... I think that sometimes you can get stuck in a situation. Remember we are a small Island; we all know each other, and once you start bringing people in ...<sup>148</sup>

In the past being able to lie about one's support for a candidate in a secret ballot was used to maintain a good working relationship between an MHK and new MLC,<sup>149</sup> as well as maintain good relationships in the community more broadly. A Nominations Commission may have been an alternative mechanism for managing intimacy. The move to the open ballot without a Nominations Commission, on the other hand, reduced the mechanisms by which these intimacies could be managed, which Mr Malarkey hinted could be particularly difficult with newcomers to the Manx political scene.

One response to the challenge of managing intimacy may simply be to privatise the problem, by identifying it as part of normal political life which those who stand for political office need to face up to.<sup>150</sup> In supporting the move to an open ballot, Ms Bettison saw no reason why openness in the appointments process would impact on the relationships of MHKs and MLCs, who she felt 'will be more than able to conduct themselves in a professional manner'.<sup>151</sup>

As Corbett and Veenendaal have argued in their review of 39 small democracies around the world, this intimacy is a significant difference between small and large democracies: 'The sheer size of electorates in larger states means that political officeholders simply do not have the time and resources to communicate directly with all their constituents. By contrast, small states are able to overcome these limitations, albeit with varying effects'.<sup>152</sup> An alternative approach, therefore, would be to recognise that the challenges of managing intimacy are different in a small democracy, and that constitutional reform can fairly recognise this – that managing intimacy can be a structural, as well as a personal, challenge.

### (c) *An over-concentrated democracy?*

A fundamental tension revealed by this study of recent constitutional change in the Isle of Man is that between seeking democratic legitimacy for all those exercising governance power, and the concentration of power in a small number of hands. Sutton has argued that 'in small societies it is relatively easy for a determined, unscrupulous, individual ... to dominate all or most aspects of the country's life'.<sup>153</sup> With the demise of the plenipotentiary Lieutenant-Governor, the Isle of Man has moved some way from this, but it is clear that constitutional developments have increased the power of the 24 directly elected members of the House of the Keys.

A comparison with other small democracies suggests that over-concentration may be a genuine problem for Manx democracy. In 2012 Johnston and McLean analysed the population per elected representative in the only or lower houses of all independent and semi-independent territories with a population between 50,000 and 150,000.<sup>154</sup> Of the 22 considered, both the Channel Island jurisdictions analysed were amongst the most generous. Guernsey (1328) and Jersey (1920) were in the most generous five, along with Bermuda (1783), Greenland (1829) and the Marshall Islands (1645). The Isle of Man (3521) was at 13<sup>th</sup> place of the 22, bracketed by American Samoa (3083), the Cayman Islands (3083), the Federated States of Micronesia (3664), and Tonga (3692). The difference between the other Crown Dependencies and the Isle of Man is striking.

<sup>148</sup>Mr Malarkey, Keys Proceedings 758 K134 at 954–980.

<sup>149</sup>Mr Thomas, Keys Proceedings 750 K134 at 1075–1079.

<sup>150</sup>Mr Baker, Keys Proceedings 758 K134 at 1098–1100.

<sup>151</sup>Ms Bettison, Keys Proceedings 758 K134 at 777–778.

<sup>152</sup>Corbett and Veenendaal, above n 7, p 174.

<sup>153</sup>P Sutton 'Political aspect' in Clarke and Payne, above n 144.

<sup>154</sup>R Johnston and I McLean *Electoral Systems for the States of Jersey: Some Briefing Notes* (2012) p 4.

One possible reform would be to increase the size of the House of Keys. If the Keys was to be returned to its pre-twelfth century size of 32 members,<sup>155</sup> the Manx ratio on Johnson and McLean's figures would move to 2640, 8<sup>th</sup> most generous of the 22 small democracies, bracketed by Dominica and the Seychelles. The ratio of representation would remain notably less generous than that of the closest comparators to the Isle of Man – the fellow Crown Dependencies of Jersey and Guernsey.

A significant concern over any expansion of the House of Keys to bring the representation ratio down would be cost, both in terms of salary and infrastructure. This could be met by increasing resourcing of Tynwald – a politically sensitive argument, particularly as the Isle of Man continues to deal with the impact of the 2008 economic downturn. Reconfiguring the MHK role as part-time, remunerated pro rata, could, as was discussed during the Lisvane debate, reduce diversity in the Tynwald. More significant resources could be freed up by the abolition of the Legislative Council, and the move to a unicameral chamber of the kind already found in Jersey and Guernsey.

An alternative approach to expanding the Keys would be to reverse the direction of travel, and increase the power within the Manx constitution exercised by those outside the Keys. As the Isle of Man has gained autonomy, and the internal tensions between the national and the Imperial parts of the constitution have reduced, democratic legitimacy through election has increasingly become the only form of legitimacy. An alternative route might draw upon arguments which explore the legitimacy of non-elected power in a democracy, for instance through an emphasis on producers of empirical data-based assessments informing citizens,<sup>156</sup> or on functional representation;<sup>157</sup> or give referenda or other forms of more direct democracy a role in the Manx constitutional scene;<sup>158</sup> or seek to supplement deliberative democracy by other fora.<sup>159</sup> This would require a radical diversification of the ways that Tynwald, as revealed in the Lisvane debates, conceptualises democratic legitimacy.

### Concluding thoughts

The Lisvane period demonstrates that constitutional reform in a small democracy is possible. Although the reforms adopted were not as radical as those proposed by Lord Lisvane, taken together they constitute the most significant constitutional changes in the Isle of Man since at least the 1980s. Consideration of this period of constitutional change demonstrates three significant challenges facing small democracies considering constitutional reform: how to draw upon external resources to inform decision making in a way which retains legitimacy; how to account for the special problem of managing intimacy in a small democracy; and how to combine an emphasis on direct electoral mandate for political authority with a small number of directly-elected members without concentrating political power in a small group.

More narrowly, I have argued that the Lisvane period can be understood as a twenty-first century iteration of the ancient conflict between the House of the Keys and the Legislative Council. The recent constitutional developments have moved the balance further in favour of the democratically elected House of Keys. The relationship between the branches of Tynwald has not been settled during the Lisvane period. The interest in unicameralism within Tynwald – which led to the commissioning of Lord Lisvane – remains, and may lead to discussion of radical reform of Tynwald in the future. Less dramatically, we are likely to see ongoing discussion of the role of members of the Legislative Council, and the composition of the Council, perhaps most pointedly in relation to the vote of the Lord Bishop.

<sup>155</sup>On the early Keys, see W Cubbon and BRS Megaw 'The Western Isles and the growth of the Manx parliament: the origin of the twenty-four Keys' (1942) 5(66) *Journal of the Manx Museum* 67.

<sup>156</sup>F Vibert *The Rise of the Unelected: Democracy and the New Separation of Powers* (Cambridge University Press, 2007).

<sup>157</sup>C Wolff *Functional Representation and Democracy in the EU: The European Commission and Social NGOs* (Rowman & Littlefield, 2013).

<sup>158</sup>As has recently occurred in Guernsey: see <https://www.gov.gg/referendum> (last accessed 28 August 2019).

<sup>159</sup>See M Reuchamps and J Suiter (eds) *Constitutional Deliberative Democracy in Europe* (ECPR Press, 2016).

Although Lord Lisvane's concerns over the gender balance in Tynwald, and the pattern of MHKs moving into the Council, did not result in any formal change, the results of the post-Lisvane elections and appointments have led to dramatic change in the membership of Tynwald. The combination of a predominantly male democratically elected chamber, and a majority female unelected chamber, adds a new dimension to the ancient tension between Keys and Council. Additionally, the new intake of MLCs, in sharp contrast to previous rounds, are beginning their national political careers in the Council. In the longer term, we may see a reversal of the previous career path, with an MLC standing for election to the dominant House of Keys. As noted above, the success rate for female candidates to the Keys is very similar to that for male candidates. It is possible, therefore, that the increased representation of women in the Council may lead to increased representation in the Keys.

Turning to the relationship between Tynwald and the executive, as noted the change in the process of the appointment of Chief Minister has concentrated political power with the 24 MHKs. This is a very recent change to a comparatively new form of executive government, and a Chief Minister has yet to be appointed solely by the Keys. The relationship between the Isle of Man Government and the House of Keys is likely to throw up fresh controversies.