**Isle of Man Green Party Submission**

**to the Constitutional and Legal Affairs and Justice**

**Standing Committee of Tynwald**

## 1. Introduction

1.1. By an invitation from the Constitutional and Legal Affairs and Justice Standing Committee of Tynwald dated 19 September 2023, the Isle of Man Green Party was invited to give its views on the current constitutional arrangements of the Isle of Man.

## 2. The Isle of Man Constitution

2.1. The Isle of Man constitution is not found in a single document.

2.2. The former First Deemster William Cain, indicated that the constitution of the Isle of Man can be found in the totality of a myriad of works and documents, including "*in legal decisions, particularly of the Privy Council, in Acts of Parliament and of Tynwald and in the reports of various Committees and Commissions and in constitutional practice*." [1]

2.3. As a neighbour of the United Kingdom the constitution of the Isle of Man has developed to reflect a similar construction. The position of the United Kingdom's constitution was expressed by the leading constitutional judgment of the United Kingdom's Supreme Court in *R (Miller) v The Prime Minister & Cherry v Advocate General for Scotland*[2]:

> "*Although the United Kingdom does not have a single document entitled 'The Constitution', it nevertheless possesses a Constitution, established over the course of our history by common law, statutes, conventions and practice. Since it has not been codified, it has developed pragmatically, and remains sufficiently flexible to be capable of further development*"[3]

2.4. A country that this system can be immediately compared against is that of the United States of America. In relation to judicial review of legislation, Alexis de Tocqueville[4] provided an insight into the fundamental differences engendering from the two systems (written constitution vis a vis unwritten constitution). On the matter of judicial review as a limb of the separation of powers in the constitution of the United States of America, he wrote:

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[1] Isle of the Man Studies, XVII, 2021, pp15-22. The Manx Constitution: a constitutional anomaly? William Cain CBE, QC, TH, RBV. Isle of Man Natural History and Antiquarian Society, 2021.

[2] *R (Miller) v The Prime Minister & Cherry v Advocate General for Scotland* [2019] UKSC 41

[3] *R (Miller)* [2019] UKSC 41, at [39]

[4] Alexis de Tocqueville, (born July 29, 1805, Paris, France—died April 16, 1859, Cannes), political scientist, historian, and politician.

*"Within its restricted limits, the power granted to American courts to pronounce on the constitutionality of laws remains still one of the most powerful barriers ever erected against the tyranny of political assemblies."*[5]

2.5. However, of the system in the United Kingdom he had this to say:

*"It would be even more unreasonable to grant English judges the right to resist the will of the legislature since Parliament, which makes the laws, also shapes the constitution and consequently cannot, under any circumstance, call a law unconstitutional when it stems from the three authorities: King, Lords, and Commons."*[6]

2.6. The United Kingdom system with the sovereign Parliament is therefore differentiated from the context of a written constitution, and the United Kingdom's Courts subservient to the final say of the Westminster Parliament. This was set out in the England & Wales High Court judgment of English Court of Queen's Bench in Ex p. Canon Selwyn:

"*There is no judicial body in the country by which the validity of an act of parliament could be questioned. An act of the legislature is superior in authority to any court of law … and no court could pronounce a judgment as to the validity of an act of parliament*.'"[7]

2.7. The position of legislative supremacy is echoed in the Isle of Man, with a particular nuance.

## 3. <u>The Supremacy of the United Kingdom Parliament</u>

3.1. On 6 April 1406, when John Stanley was granted the Isle of Man by Henry IV, John Stanley and his predecessors in title became vassals to the English Crown, holding the island for a superior lord.[8] Therefore, as a conquered territory, the English Crown could intervene in the affairs of the Isle of Man, and replace the existing law and constitution, if necessary by an Act of Parliament or through the Privy Council.[9]

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[5] Alexis de Tocqueville. *Democracy in America* (1835). Chapter 6, Judicial Power in the United States of America.
[6] Ibid. Chapter 6.
[7] *Ex p. Canon Selwyn (1872)* 36 JP 54, per Cockburn CJ and Blackburn J.
[8] Isle of Man Studies, XVII, 2021, pp15-22, at 16. *The Manx Constitution: a constitutional anomaly?* William Cain CBE, QC, TH, RBV. Isle of Man Natural History and Antiquarian Society, 2021. See: *"Firstly the Island had become a possession of the English Crown, although not part of England itself and remains so to the present day."*
[9] *Campbell v Hall* (1774) 1 Cowper 204, per Lord Mansfield at 208: "*The 4th, that the law and legislative government of every dominion, equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives."*

3.2. Accordingly, the courts of the Isle of Man have accepted for over 400 years[10] that an Act of the Westminster Parliament can extend to the Isle of Man if it is expressly mentioned, or by sufficient implication, as set out by the Isle of Man Staff of Government Division appellate court in *Attorney General v Harris and Mylrea*[11]:

> "*The Isle of Man was bound only by those Acts of the English Parliament which were expressly or by sufficient implication applicable to it. Although it was not necessary for the Act of Parliament to mention the Island by name, the intention that it was to apply in the Island had to be clear and explicit. The Militia Act 1882 did not expressly state that it applied to the Island and it was not possible to imply, from the words of the statute itself, that it was intended to do so*."
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> …
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> "*In Isle of Man Case (1), which appears to be one of the earliest cases on the subject, it was declared (1522-1921 MLR at 3) that no general Act of Parliament extends to the Isle of Man, "without special and express provision for it." As a matter of fact, however, there is no record that prior to 1522, Parliament ever passed an Act extending, or purporting to extend to the Isle of Man, and it has been doubted whether the few Acts which were passed purporting to extend to this Island between that date and the revestment of the Island in the Crown of England in 1765 had, as a matter of law, any force here. Many eminent judges and writers of authority referred to by His Honour the Clerk of the Rolls in the court below have stated the law in the same words as were used in the Isle of Man case and, as a rule, few if any*."

3.3. If the legislatures of Westminster and Tynwald can both legislate for the Isle of Man, there is a cause for conflicting statute laws. However, that conflict was addressed by the Isle of Man Staff of Government Division appellate court judgment in *In the Matter of C.B. Radio Distributors* [12], observing that that there would be no conflict as the later Act (whether of Tynwald or of Westminster) would always take precedence on the understanding that the United Kingdom Monarch and Lord of Man prescribes Royal Assent to both Acts of the respective legislatures.

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[10] See *Isle of Man Case (Derby Succession)* (1598) MLR 2 (PC) "*the Statute of Uses, Henry VIII and the Statute of Wills were not binding on the said Isle nor on the inheritance of it, nor was any other Stuate made in England without special and express provision for it. And it is in the same position as Ireland, where the people are ruled by the laws and Acts of Parliament of their [own] country and not by any law of [England], unless I is an Act of Parliament which enacts laws expressly for the people or Ireland and Wales*."

[11] (1894) MLR 248 (SGD)

[12] *In the Matter of C.B. Radio Distributors Ltd* 1981-83 MLR 381, at 396-397: *"We can however see no difficulty at all so long as the Lord of Man remains the same person as the United Kingdom Sovereign. Since her consent is required before Acts of either legislature become law, it must follow that the later Act (whether Tynwald or Parliament) must prevail."*

3.4. Ultimately, however, it is the Westminster Parliament that has the authority to have the final say by issuing a statute superseding to any conflicting statute passed by the Tynwald legislature. An illustration of the supremacy of the Westminster Parliament can be seen in the case of Radio Caroline and the extension to the Isle of Man of the Marine etc. Broadcasting (Offences) Act 1967 when Tynwald refused to enact the law (although in that case, it was an extension of the United Kingdom legislation by Order in Council and not by the Act extending to the Isle of Man by specific reference or necessary implication).[13]

3.5. As to an attempt by Tywand to supersede and replace an Act of the Westminster Parliament applying in the Isle of Man, this would similarly be almost certainly likely to fail as the United Kingdom Government advises the United Kingdom's Monarch whether to grant Royal Assent to an Act of Tynwald before it can become law. An illustration of the Royal Assent being denied can be found in as was the case in the refusal to grant Royal Assent in 1961 to Isle of Man legislation conferring powers to licence broadcasting in the Isle of Man.[14]

3.6. An explanation of the relevance of Royal Assent and the engendering supervision of the legislation of the Isle of Man by the United Kingdom government can be found the European Court of Justice judgment in *DHSS v Barr and Montrose*[15]:

> "*The United Kingdom Home Secretary, who is the member of the United Kingdom Government with primary responsibility for relations with the Island, may therefore advise he Sovereign to withhold the Royal Assent if the measure in question is unacceptable to the United Kingdom Government. Although it appears that the Royal Assent has only rarely been withheld, the result in practice is that the Home Office must approve all bills which come from the Island*."

3.7. As to how the supremacy of the United Kingdom Parliament is practised today, it is limited by convention to leave the Isle of Man's internal constitutional institutions to manage the Isle of Man's affairs, subject to the United Kingdom having ultimate responsibility for the Isle of Man's good governance. As to what may fall within good governance, definition was afforded in the 'Kilbrandon Report'[16]:

> "*So long as the UK Government remains responsible for the international relations of the Islands and for their good government it must have powers in the last resort to intervene in any Island matter in the exercise of those responsibilities. Not possible to define areas in which UK might in practice be justified in using its paramount powers we have done so under 5 hearings: defence, matters of common*

[13] *A New History of the Isle of Man: Volume IV*, page 161-162.
[14] p.430 *Report on the Relationship between the United Kingdom and the Channel Islands and the Isle of Man*. (1973)
[15] 1990 - 92 MLR 243 (ECJ)
[16] Report of the Royal Commission on the Constitution, 1969-1973.

*concern to British People throughout the world, the interests of the Islands, international responsibilities and the domestic interests of the United Kingdom*."[17]

## 4. Constitutional Pillars

4.1. In view of the foregoing, we distil the core constitutional pillars of the Isle of Man to the following:

4.1.1. The sovereignty of the Act of Tynwald, subject to the intervention of the United Kingdom's Royal Prerogative (which is subject to the justiciability of the courts of England & Wales[18]) or an Act of the Westminster Parliament (if expressly naming the Isle of Man, or extending by sufficient implication[19]), to be exercised subject to the convention that the United Kingdom will only intervene to ensure the good governance of the Isle of Man[20] and that the Westminster Parliament will not legislate for the Isle of Man's domestic purview without the consent of the Isle of Man Government[21]. The conventions would not be justiciable in the courts of England & Wales[22], giving the Westminster Parliament the discretion to revoke the convention at its will[23].

4.1.2. The common law principle of the Rule of Law. The principle of the Rule of Law was concisely summarised by the English jurist Sir Edward Coke[24] as *"The King is subject not to men, but to God and the law."*[25] The Isle of Man High Court of Justice has recognised the constitutional principle of the Rule of Law[26]. The constitutional principle of the Rule of Law is enshrined in the Council of Ministers Act 1990, placing an obligation upon the Council of Ministers thereunder to uphold and support the Rule of Law[27].

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[17] Report of the Royal Commission on the Constitution, 1969-1973, Page 465 (The Kilbrandon Report).
[18] *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9
[19] See [3.2] above.
[20] See [3.7] above.
[21] *Re. Tucker* 1987-89 MLR 220, at 228-229: "*There has been for many years a convention that whilst Parliament legislates for the Island in matters relating to defence and foreign affairs and until recently customs and excise, it leaves to Tynwald control over all domestic matters … Whilst I can envisage an interesting argument relating to ultra vires by an astute Manx constitutional lawyer in, say, 1780, it is now far too late – at any rate in this court – to deny the right of Parliament to legislate in accordance with accepted convention.*"
[22] *(Miller and another) v Secretary of State for Exiting the European Union (Birnie and others intervening)* [2017] UKSC 5, [136]-[137]. See also *Madzimbamuto Appellant v Desmond William Lardner-Burke and Frederick Phillip George Respondents* [1969] 1 A.C. 645, 722-723.
[23] Report of the Royal Commission on the Constitution, 1969-1973, paragraph 446 (The Kilbrandon Report).
[24] English Barrister, Judge, and Politician (1552-1634).
[25] *Prohibitions Del Roy* (1572-1616) 12 Co Rep 63; 77 E.R. 1342: *"with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said that Bracton saith, quod rex non debet esse sub homine, sed sub Deo et lege."*
[26] See Deemster David Doyle's judgment in *HM Attorney General v Graley* (Unreported) (22 September 2006) CP 2005/146.
[27] "*6A Duty of Council of Ministers to uphold and support rule of law*
*(1) The constitutional principle of the rule of law continues to exist.*

4.1.3. The Separation of Powers separates the functions of the legislating, the administering, and the interpretation and adjudication of the law in the Isle of Man[28]. The Separation of Powers has been recognised by the Isle of Man's High Court of Justice as a foundational constitutional principle[29] and the United Kingdom's Supreme Court[30].

## 5. The Green Party's Views on the Current Constitutional Arrangements of the Isle of Man

5.1. The Isle of Man Green Party is of the view that we should curate our constitutional arrangement to afford a political and governance system that is dynamic, diverse, inclusive, responsive, participatory, deliberative, transparent, and accountable.

The Separation of Powers

5.2. The Isle of Man Green Party has a material concern that the current constitutional arrangement in the Isle of Man does not properly deliver the core constitutional principle of the Separation of Powers, in respect of the relationship between the Isle of Man Government and Tynwald. This matter was highlighted in Lord Lisvane's *Review of the Functioning of Tynwald*[31], wherein Lord Lisvane provided a concluding observation that the *"lack of evident separation of roles between Parliament and the Executive means that the Isle of Man may be seen to fall short of the highest standards of parliamentary governance*. *This has wider reputational risks*."[32]

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*(2) The Council of Ministers has a constitutional role in upholding and supporting the constitutional principle of the rule of law*."

[28] See for example the United Kingdom House of Lords judgment in *In R v Home Secretary, ex p Fire Brigades Union* [1995] 2 AC 513, at 567: "*It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts each have their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks fit. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws and see that they are obeyed*."

[29] See for example acting Deemster Iain Goldrein's judgment in *De Yoxall v Moore* (unreported) (04 August 2015) ORD 2009/0017, at [60]: "*60. I remind myself that Tynwald enacts statutory provisions, and such provisions are cast in their own language, refined over centuries. The language of enactment is the will of Tynwald speaking in particular to the Courts. A disciplined mastery of that language on the part of the legislature and the judiciary is central to the separation of powers and the independence of the judiciary. This is a principle of the utmost gravity and importance and it is the constitutional bedrock on which the jurisdiction of the Isle of Man is so firmly and solidly founded*."

[30] *R (Miller*) [2019] UKSC 41, at [40]: "*40. The legal principles of the constitution are not confined to statutory rules, but include constitutional principles developed by the common law. … Many more examples could be given. Such principles are not confined to the protection of individual rights, but include principles concerning the conduct of public bodies and the relationships between them. For example, they include the principle that justice must be administered in public ( Scott v Scott [1913] AC 417 ), and the principle of the separation of powers between the executive, Parliament and the courts: Ex p Fire Brigades Union [1995] 2 AC 513 , 567–568*."

[31] *Review of the Functioning of Tynwald,* June 2016, GD No. 2016/0047. Lord Lisvane, KBD, DL. ("***Lisvane***")

[32] *Lisvane*, [31], page 45.

5.3. Lord Lisvane made the following recommendations in respect of curtailing the influence that membership of government departments had over the body of the Tynwald legislature as a whole:

5.3.1. "*I therefore recommend that the present extensive system of Departmental Members should end. Ministers should be capable of running their Departments with significantly less political support, and they should empower and support officers to a much greater extent. There should be no more than one Departmental Member per Department, and an appointment should be made only where it is clear that substantial responsibilities will be assumed in recognition of the salary enhancement*."[33]

5.3.2. "*As is the case at present, only exceptionally should MLCs be Ministers. To avoid any inhibition on their scrutiny role, they should not be Departmental Members*."[34]

5.4. The Isle of Man Green Party is concerned that the indicated recommendations of Lord Lisvane have not been given legal effect at the cost to the proper implementation of the constitutional principle of the Separation of Powers. This is a matter of the good governance of the Isle of Man.

5.5. The fundamental importance of the accountability of the Isle of Man Government to Tynwald under the Separation of Powers, and the avoidance of any fettering thereof, was clearly stated by the United Kingdom Supreme Court in its second *Miller* judgment (in respect to the analogous relationship of the United Kingdom Government and the Westminster Parliament)[35]:

> "*46. The same question arises in relation to a second constitutional principle, that of Parliamentary accountability, described by Lord Carnwath JSC in his judgment in R (Miller) v Secretary of State for Exiting the European Union [2018] AC 61 , para 249 as no less fundamental to our constitution than Parliamentary sovereignty. As Lord Bingham of Cornhill said in the case of Bobb v Manning [2006] UKPC 22 at [13]: "the conduct of government by a Prime Minister and Cabinet collectively responsible and accountable to Parliament lies at the heart of Westminster democracy." Ministers are accountable to Parliament through such mechanisms as their duty to answer Parliamentary questions and to appear before Parliamentary committees, and through Parliamentary scrutiny of the delegated legislation which ministers make. By these means, the policies of the executive are subjected to consideration by the representatives of the electorate, the executive is required to report, explain and defend its actions, and citizens are protected from the arbitrary exercise of executive power*."

[33] *Lisvane* [32], page 45.
[34] *Lisvane* [31], page 34.
[35] *R (Miller) v The Prime Minister & Cherry v Advocate General for Scotland* [2019] UKSC 41, at [46].

5.6. It is noteworthy that the Westminster Parliament has sought to give effect to the proper Separation of Powers (in respect of the executive vis a vis the legislature) with two Acts of that legislature:

5.6.1. The Ministerial and Other Salaries Act 1975 sets out the maximum number of paid ministerial posts. The maximum number is 109. There are currently 650 MP seats in the House of Commons.

5.6.2. The House of Commons Disqualification Act 1975 provides that not more than 95 holders of Ministerial offices may sit and vote in the House of Commons at any one time. There is no equivalent legal restraint on the number of Ministers in the Lords.

5.7. As has been observed above in respect of the conclusions and observations of Lord Lisvane, committees of the Westminster Parliament have identified and opined upon the political edifice of the United Kingdom Government vis a vis the House of Commons. The legal limitation upon the ability of the executive to absorb political members has been declared to be justified to give effect to good governance and the proper independence of the legislature, a fundamental precept of the constitutional principle of the separation of powers.

> "*127. Having too many ministers is bad not just for the quality of government, but also for the independence of the legislature. Currently 141 Members, approximately 22% of the House of Commons, hold some position in Government. This is deeply corrosive to the House of Commons primary role of acting as a check on the Executive. One simple step the Government could take immediately to limit this size of the payroll vote would be to limit the number of Parliamentary Private Secretaries to one per Secretary of State. If this was done it would result in 26 fewer Members being on the payroll vote*."[36]

5.8. In comparison to (at that time) the 22% of the Members of the House of Commons that were political members of the United Kingdom Government in 2011 (which was seen as an inappropriate curtailment of the independence of the legislature), we understand that 71%[37] of the popularly elected Members of the House of Keys, and 88%[38] of the Members of the Legislative Council elected by the House of Keys, are political members or Ministers of the Isle of Man Government.

5.9. It is noted that in its second *Miller*[39] judgment, the United Kingdom Supreme Court observed that where a power arose from statute (see for example the power to appoint department members[40]) and it was liable to affect the operation of a constitutional

[36] *Smaller Government: What do Ministers do?* House of Commons Public Select Committee. 7th Report of Session 2010-11. At page 43.
[37] https://www.tynwald.org.im/members-officers/members
[38] Ibid.
[39] *R (Miller) v The Prime Minister & Cherry v Advocate General for Scotland* [2019] UKSC 41.
[40] Section 2, Government Departments Act 1987.

principle (e.g. the proper Separation of Powers), unless the terms of the relevant statute indicate a contrary intention, the courts have a role to ensure the lawful exercise of the relevant power in order that its exercise does not impede or frustrate the relevant constitutional principle[41]:

> *"49. In answering that question, it is of some assistance to consider how the courts have dealt with situations where the exercise of a power conferred *607 by statute, rather than one arising under the prerogative, was liable to affect the operation of a constitutional principle. The approach which they have adopted has concentrated on the effect of the exercise of the power upon the operation of the relevant constitutional principle. Unless the terms of the statute indicate a contrary intention, the courts have set a limit to the lawful exercise of the power by holding that the extent to which the measure impedes or frustrates the operation of the relevant principle must have a reasonable justification. That approach can be seen, for example, in R (UNISON) v Lord Chancellor (Equality and Human Rights Commission intervening) (Nos 1 and 2) [2017] 3 WLR 409 , paras 80–82 and 88–89, where earlier authorities were discussed."*

5.10. In view of the foregoing, the Green Party would call for a legal limit to the political members of the Isle of Man Government similar to that already reflected in the United Kingdom law[42]. This exclusion would include an outright exclusion of a member of the Legislative Council in taking a Departmental or Ministerial role, and a limit of seven members MHKs taking a Departmental or Ministerial role. This does not mean that non-Governmental members of the House of Keys could not support the Government, but such support would be achieved through the objective of scrutinising and regulating the work of the Ministers, and not through patronage.

5.11. In order to better address the balance of MHKs who can hold the political members of the Isle of Man Government accountable in the House of Keys, we call for the role of Speaker of the House of Keys (who is an impartial member of that chamber) to be removed from a sitting MHK by vesting the role either in the President of Tynwald or holding a by-election for a replacement MHK once a speaker is elected by the Keys.

<u>Further Policies to better enhance the functioning of the Isle of Man Constitution</u>

5.12. To better reflect the diversity and pluralism in our society, the Green Party advocates for the transformation of our voting system from a first past the post system to a proportional voting system. The Isle of Man has historically had a form of proportional voting in the single transferable vote system and that precedent should be returned to.

5.13. To improve the engagement of the electorate with the institution of Tynwald, the Green Party calls for legislation to entitle a petition with 1,000 resident signatories to be

[41] *Miller* [2019] UKSC 41, at [49].
[42] See [5.6] above.

discussed by Tynwald. This policy reflects an extant policy benefitting the citizens in the United Kingdom.

5.14. The Green Party considers that the introduction of a single legal entity structure of Government could also improve accountability in the delivery of government functions and tackling silos across the body of current Government Departments. This could also better focus the debate around improving the relationship and distinction between policy delivery and regulation.

5.15. The Green Party considers that the introduction of a Future Generations Act modelled on the current Act for Wales[43], building the needs of future generations into every government decision. This can better factor into longer term thinking (and associated consequences) into government decision making.

5.16. Whilst balancing the need for accountability to the electorate and also the need for continuity and stability in electing members of the House of Keys, the Green Party calls for the introduction of legislation to enshrine a recall mechanism whereby a by-election would be called if 30% of the constituents on the electoral roll sign a petition for the recall of a MHK, to face a by-election (should they decide to contest the same). The 30% figure was calculated on the basis that the turnout rate in the 2021 Isle of Man general election of registered voters was 50.68%. In the UK's 2019 general election, the turnout rate was 67.3%.

5.17. To improve citizen engagement, the Green Party calls for the use of citizen assemblies (in the style of jury candidature) who form, as it were, a microcosm of the community to hear evidence, engage with, and make policy proposals, which are then considered by Tynwald, on the intractable problems of our time and the future society (e.g. affordable housing, rates reform, the role and function of local government).

**Isle of Man Green Party**

**03 October 2023**

[43] Well-being of Future Generations (Wales) Act 2015.