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# Independents in Tasmania's Legislative Council: Analysing strategies to achieve influence\*

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**Abstract** Independent Members (IMLCs) have long dominated the Tasmanian Legislative Council (Council). They are expected to play a review and scrutiny rather than a policy-making role. However, this article presents research that finds that such Members are indeed able to achieve policy influence despite their lack of supportive party colleagues or a party structure. Current and former IMLCs, one Labor MLC, and one Member of the lower House of Assembly, were interviewed for this research. They were asked about the IMLC role as they see it, the strategies used, if in fact they are used, to gain policy influence, IMLC work and influence on committees, and the obstacles, including political obstacles, to IMLCs achieving influence. Our paper addresses the lack of studies of the legislative behaviour of Councillors, and establishes that, despite the review and scrutiny focus of their role, and the attribution of the policy-making role to the lower house, IMLCs do seek influence and use various means of achieving it.

'Tasmania has been well served by an upper house dominated by independents – they are there to knock the rough edges off government'.<sup>1</sup>

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<sup>1</sup> Tony Mulder IMLC 2011-17, See G. Burgess, and E. Gramenz, 'Fresh Calls to Curb the Powers of Tasmania's Upper House', *ABC News* 20 June 2017.

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## INTRODUCTION

Westminster upper houses are not known for their power to determine policy, indeed the literature typically suggests that to pursue such power would be to be seen to usurp the policy-making role of lower houses. However the (elected) Australian Senate initiates, reviews, and amends legislation and is thus extremely influential.<sup>2</sup> The parliamentary decline thesis, which sees Westminster Parliaments as dominated by the executive, is less persuasive in such circumstances, as it is, we suggest, in the case of Tasmania.<sup>3</sup> Some question the legitimacy of Westminster upper houses like Tasmania's having any policy-making power or influence, beyond their roles in reviewing legislation and scrutinising the executive.<sup>4</sup> There are clearly varying circumstances that impact in differing ways upon influence.<sup>5</sup> Our focus is not upon context, process,<sup>6</sup> or upper-lower house dynamics, but upon the influence that Tasmania's IMLCs have, or believe that they have, in their review, scrutiny and policy roles, in amending and proposing bills, and in operating in committee environments.

Whatever the context or make up of a Westminster upper house,<sup>7</sup> there are two features that matter in terms of influence, namely whether the house has democratic legitimacy, as an elected body, and whether the government dominates its numbers. Westminster upper houses that are appointed, for example, the House of Lords and Canadian Senate, are arguably less legitimate and potentially less likely than elected upper houses to exercise a policy role. Some of their powers may be limited and some

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<sup>2</sup> M. Russell, and M. Benton, '(Re)assessing Parliamentary Policy Impact: The Case of the Australian Senate'. *Australian Journal of Political Science* 45(2) 2010, pp.159-174.

<sup>3</sup> B. Stone, 'Bicameralism and Democracy: The Transformation of Australian State Upper Houses'. *Australian Journal of Political Science* 37(2) 2002, pp. 267-281; A. Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. London: Yale University Press, 1999.

<sup>4</sup> M. Stokes, 'The Future Role and Function of the Legislative Council', in A. Fletcher (ed.), *Operation of the Legislative Council: Discussion Brief*. Tasmania, Parliament of Tasmania, 1997, pp. 39-54.

<sup>5</sup> M. Russell and P. Cowley, 'The Policy Power of the Westminster Parliament: The Parliamentary State and the Empirical Evidence'. *Governance* 29(1) 2016, pp. 121-137; M. Flinders and A. Kelso, 'Mind the Gap: Political Analysis, Public Expectations and the Parliamentary Decline Thesis'. *British Journal of Politics and International Relations* 13(2) 2011, pp. 249-268.

<sup>6</sup> G. Tsebelis, *Veto Players: How Political Institutions Work*. New Jersey: Princeton University Press, 2002.

<sup>7</sup> J. Money and G. Tsebelis, 'Cicero's Puzzle: Upper House Power in Comparative Perspective'. *International Political Science Review* 13(1) 1992, pp. 25-43.

of their roles subject to review.<sup>8</sup> On the other hand, being elected, Australia's Senate is democratically legitimate, and because it is elected by proportional representation, government rarely dominates. It also has a range of powers that enable Senators to play an active role and to influence policy.<sup>9</sup>

In Tasmania, the Council is democratically legitimate for being elected by a preferential system, even though elections are out of synch with general elections, funding is limited, campaigns are subdued, and party policies are not usually canvassed.<sup>10</sup> These circumstances do, however, routinely see Independents returned. Indeed they have dominated the Council continuously, unlike in any other upper house in the world,<sup>11</sup> which predisposes them to being influential in ways that we will examine here. The Council can also send the lower house to an election without facing one itself,<sup>12</sup> and is thus extremely powerful. Tasmania's case is worthy of investigation, therefore, because it has such a Legislative Council; because it is, unusually, dominated by Independents; and because the legislative behaviour of the Independent Members of the Legislative Council (IMLCs) and their pursuit of influence is little known and worthy of investigation.

Our research is qualitative, and interview informed. We employ a variety of research techniques and materials: literature review, parliamentary statistics, various legislative examples, interviews, and we included a case study for analysis. Ours is a positivist study that makes no judgements of IMLCs' actions, although self-evidently some of these actions will be politically or ideologically based, and/or motivated by self-interest or the needs of constituents. We are agnostic as to whether influence is a legitimate activity for an IMLC in an upper house—this is beyond the scope of our inquiry. We sought qualitative evidence of influence by speaking with those who responded to our requests for interviews; that is, five IMLCs, one Labor MLC, formerly the Leader of the

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<sup>8</sup> Lijphart, *Patterns of Democracy*.

<sup>9</sup> S. Bach, 'Mandates, Consensus, Compromise, and the Senate'. *Papers on Parliament* No. 48. Canberra: Parliament of Australia, 2008.

<sup>10</sup> In 2019, the 15 Members of the Council include four ALP MLCs, two Liberal MLCs and nine IMLCs.

<sup>11</sup> L. Weeks, 'Parliaments Without Parties'. *Australasian Parliamentary Review* 30(1) 2015, pp. 61-71.

<sup>12</sup> N. Fewkes, 'Tasmania's Legislative Council elections: Is Reform Needed?'. *Australasian Parliamentary Review* 26(2) 2011, pp. 87-98.

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Government in the Legislative Council, and one Member of Parliament (to gain the perspective of the Tasmanian Greens).<sup>13</sup>

Attempts were also made to represent the political spectrum, hence the inclusion of Green and Labor Members; however, no Liberal Member agreed to participate, so claims made by our interviewees about Liberal Members are not included in this article. The Tasmanian Forest Agreement (TFA) study is included in our analysis by way of offering a concrete illustration of the actions and influence of IMLCs; and because this was the most complex and politicised bill that the Council has dealt with in recent times.<sup>14</sup> It was the subject of a select committee and was heavily amended. There were claims of politicisation during this process. IMLC Paul Harriss, who opposed the TFA process, subsequently resigned, ran for the Liberals in the House of Assembly election, and, as a newly elected minister, abolished the TFA altogether.

Our work contributes a novel ‘independents and policy influence’ perspective to the literature on Westminster upper houses, parliamentary procedure, and policy development. The transferability of its findings may be limited, given its reliance upon the experiences of IMLCs in a small, regional parliamentary jurisdiction. However it adds in general to the body of knowledge about the roles of independents in Westminster upper houses, with its focus on parliamentary procedure in the areas of policy initiation (Private Members Bills), legislative review, and scrutiny of the executive. It identifies strategies of influence by IMLCs that could be more fully investigated by future broader research on MLCs, including those who are party members. We offer qualitative insight into the role of IMLCs that highlights the need for further research into the dynamics of the Tasmanian Parliament more broadly, given the historical dominance of independents in the Legislative Council.

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<sup>13</sup> Seven Members of the Tasmanian Parliament were interviewed: Hon. Rob Valentine - Independent MLC first elected 2011; Hon. Ivan Dean - Independent MLC first elected 2003 ; Hon. Sue Smith - Independent MLC first 1997-2013 and President of the Legislative Council 2008-2013; Hon. Ruth Forrest - Independent MLC first elected 2005; Hon. Jim Wilkinson - Independent MLC first elected 1995 and President of the Legislative Council 2013-2019; Hon. Craig Farrell - Labor MLC first elected 2011, Leader of the Government in the Legislative Council 2012-2014 and President of the Legislative Council 2019-present; Ms Cassy O'Connor - Greens MHA first elected 2008, Leader of the Tasmanian Greens and Cabinet Minister 2011-2014

<sup>14</sup> Farrell Interview.

## THE LEGISLATIVE COUNCIL: REVIEW, SCRUTINY AND INFLUENCE

The Legislative Council (Council) was established in 1825, predating the House of Assembly (Assembly); with equal powers to the Assembly once that was established in 1856.<sup>15</sup> Each May, a number of councillors from single member electorates are elected by a preferential system for staggered six-year terms.<sup>16</sup> This ‘out of cycle’ procedure with its emphasis on name recognition and local issues has favoured independents.<sup>17</sup> The Council recently supported a motion (10:3) acknowledging that its ability to block Assembly budgets could be replaced with a suspensory veto, which could lapse after a month.<sup>18</sup> However, it is currently constitutionally entitled, not to initiate money bills, but to reject them, with requests that they be amended and returned, without itself facing an election.<sup>19</sup>

The Council is therefore one of Australia’s most powerful. Until recently, it was better known for its conservatism, and indeed for some MLCs’ alignment with the Liberal Party, than for any more radical, Labor or Green leanings.<sup>20</sup> From its beginnings as an upper house, it was intended to check the democratic spirit of the masses, to guard against hasty and inconsiderate legislation, and to proceed as a conservative body, cautiously and deliberately.<sup>21</sup> Despite the Council’s conservative history, Kevin Bonham has identified a more recent ‘left-biased’ voting pattern in the Council, with IMLCs now leading reform debates on mandatory sentencing, transgender laws and

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<sup>15</sup> G. Griffith and S. Srinivasan, *State Upper Houses in Australia*. Sydney: NSW Parliamentary Research Service, 2001, p. 19.

<sup>16</sup> C. Sharman, ‘Limiting Party Representation: Evidence from a Small Parliamentary Chamber’. *Legislative Studies Quarterly* 38(3) 2013, pp. 327-348.

<sup>17</sup> D. Hamer, *Can Responsible Government Survive in Australia?* Canberra: Department of the Senate, 2004. Accessed at: [https://www.aph.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/hamer](https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/hamer)

<sup>18</sup> P. Chapman, ‘Brave Move Must Trigger Reform’, *The Mercury*, 2 February 2018.

<sup>19</sup> It should be noted that changes to Tasmania’s Constitution require only a simple parliamentary majority to do this. The Legislative Council has blocked supply only once, in 1948. Griffith and Srinivasan, *State Upper Houses in Australia*; T. Morling, *Report of the Board of Inquiry into the Size and Constitution of the Tasmanian Parliament*, Hobart, Tasmania, Department of Premier and Cabinet, 1994.

<sup>20</sup> Griffith and Srinivasan, *State Upper Houses in Australia*.

<sup>21</sup> Fewkes, Tasmania's Legislative Council elections; T. Newman, *Tasmania’s Constitution and Bicameral Parliament*, Tasmanian Parliamentary Library, Parliamentary Research Service, Issue Brief 91/8 1991: 4-19. See also Tasmanian Parliamentary Library, ‘Tasmanian Parliament’. Accessed at: <http://www.parliament.tas.gov.au/tpl/Backg/Parliament.htm>

police powers.<sup>22</sup> If the Council had this composition during the Labor-Green Government (2010-14), it would likely have passed bills on marriage equality, voluntary assisted dying, and land returns to the Aboriginal community, and passed the TFA bill 'in very short order'.<sup>23</sup>

However, the independent character of the Council does reduce the executive dominance that is characteristic of Westminster systems elsewhere. This is reflected in the observations by IMLCs about their roles. IMLC Valentine observed that the Council 'is not there to be a rubber stamp, it's there to examine and to pull apart, line by line, the [Government's] legislation and to make sure that there aren't any unintended consequences, that there is consistency'.<sup>24</sup> Of all our interviewees, only Valentine qualified the seeking of influence by IMLCs as seeking influence within the bounds of the agenda that is put before the Council by the government of the day. The other interviewees were all comfortable with influence seeking more generally; however, with most agreeing that, even though they represent single member electorates, any influence seeking must benefit the entire State.

Separate reports by Beaumont, Ogilvie, Morling and Nixon<sup>25</sup> confirm the review and scrutiny role of the Council.<sup>26</sup> The *review function* entails taking a 'second look' at government bills to: technically improve them; protect citizen liberties; and ensure that affected interests and opinions are accounted for.<sup>27</sup> We consider this role in terms of IMLCs' review and amendment of government bills, and in their initiation of Private

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<sup>22</sup> K. Bonham, 'Legislative Council Voting Patterns 2014-18', *Polling analysis blogspot*, 2018. Accessed at: <http://kevinbonham.blogspot.com/2018/03/legislative-council-voting-patterns.html>. See also G. Barns, 'Don't let Legislative Council become a Rubber Stamp', *The Mercury* 29 April 2019.

<sup>23</sup> O'Connor Interview.

<sup>24</sup> Valentine Interview.

<sup>25</sup> B. Beaumont, *Report of the Royal Commission into the Constitution Act, 1934, Tasmania*, Hobart, Parliamentary Library, 1982; G. A. Ogilvie, *Report of the Advisory Committee on the Proposed Reduction in the Number of Members Elected to Both Houses of the Tasmanian Parliament to the Premier the Honourable Robin Trevor Gray*, Hobart, Tasmania, Government Printer, 1984; Morling, *Inquiry into the Size and Constitution of the Tasmanian Parliament*; P. Nixon, *Tasmania into the 21st Century: Commonwealth State Inquiry into the Tasmanian Economy*, Hobart, Government Printer, 1997.

<sup>26</sup> See also Stone, 'Bicameralism and Democracy'.

<sup>27</sup> B. Stone, 'Changing Roles, Changing Rules: Procedural Development and Difference in Australian State Upper Houses'. *Australian Journal of Political Science* 40(1) 2005, pp. 33-50.

Members Bills, which have tended to be about refining processes.<sup>28</sup> The *scrutiny role* 'includes a range of parliamentary activities: scrutiny of administrative institutions and processes; investigation of particular administrative decisions; review of the administration of particular policies; and examination of public expenditure'.<sup>29</sup> We consider the roles played by IMLCs on committees, and their specific work in reviewing and revising the TFA. We asked our interviewees about IMLCs' *review and scrutiny* roles, the strategies they use to gain policy influence, their work and influence on committees, and the obstacles to their achieving influence. What follows here is a compilation, distillation and analysis of their responses.

## AMENDMENTS AND PRIVATE MEMBER'S BILLS

There have been contrasting perceptions over time that the Council is both a rubber stamp,<sup>30</sup> and obstructionist for blocking government's agenda.<sup>31</sup> What is less emphasised is the role that IMLCs themselves believe they play in terms of review, scrutiny and policy initiation and influence. Our interviewees suggest that the review and scrutiny role involves fine-tuning bills in order to ensure that they do what they intend; that they do not have unintended consequences; that they are 'tidied' up in terms of any flaws; and that they are the best they can be, at times 'tweaked' or re-thought in order to achieve better outcomes. Government bills may be amended for these or other reasons; however, IMLCs also introduce private Members' bills (PMBs) to influence procedures and policy.<sup>32</sup>

### *Amending Bills*

The Council has the constitutionally backed potential to form a blocking majority and the government therefore needs to secure its support to pass bills.<sup>33</sup> IMLCs may negotiate amendments in return for concessions if they enjoy a constructive

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<sup>28</sup> With at least one notable exception - IMLCs Ivan Dean's Tobacco-Free Generation bill.

<sup>29</sup> Stone, 'Changing Roles, Changing Rules'.

<sup>30</sup> Chapman, 'Brave Move Must Trigger Reform'.

<sup>31</sup> Smith Interview; Beaumont, *Report into the Constitution Act*.

<sup>32</sup> N. Dixon, 'The Role of Private Members' Bills'. *Australasian Parliamentary Review* 19(1) 2004, pp. 88-115.

<sup>33</sup> Farrell Interview.

relationship with government,<sup>34</sup> however, horse-trading for support is frowned upon.<sup>35</sup> The Leader of the Government in the Council (LGLC) will look for common ground, recognising ‘that sometimes getting seventy-five per cent of something is better than getting nothing’.<sup>36</sup> Given the lack of a supportive party political environment, personal relationships are important. This includes the need for an open door policy to all MLCs by the LGLC.<sup>37</sup> Government does not like its agenda being held up by the Council, and it may drop a bill if there are too many amendments proposed.<sup>38</sup>

The Council has been relatively active in amending bills. David Hamer has claimed that in the past it amended 40 to 50 percent of bills, many heavily, and that Conferences of Managers from the two houses were used to resolve the resulting differences.<sup>39</sup> Statistics for the period 1947 to 1995 show that at such Conferences the government made 33 (27%) of concessions, the Council made 21 (17%), with 52 (42%) joint concessions, and that there were 16 (13%) failures to gain any resolution.<sup>40</sup> However, the Conferences of Managers were removed from Standing Orders in 1996. Table 1 demonstrates that from May 2014 to June 2018, of the bills passed by the Council, only about one quarter were amended.

Amendments may also be proposed on the floor of the Council, and be adopted by government. Amendments from the floor are more likely to succeed where the case is well put, and the Member is well respected by colleagues.<sup>41</sup> IMLCs are ‘lone voices’.<sup>42</sup> They may not have caucused their bills. They do not vote in a block, so it is harder work than it is for party political members to gain support. They cannot pass work onto other colleagues.<sup>43</sup> The form of an amendment is important, but IMLCs do not have the resources of parties to draft amendments. Drafting assistance is at the discretion of government, following a written request from the LGLC. Past governments have been

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<sup>34</sup> Smith Interview.

<sup>35</sup> Smith Interview.

<sup>36</sup> Smith Interview.

<sup>37</sup> Farrell Interview.

<sup>38</sup> Valentine Interview.

<sup>39</sup> Hamer, *Can Responsible Government Survive in Australia?*.

<sup>40</sup> Griffith and Srinivasan, *State Upper Houses in Australia*.

<sup>41</sup> Smith Interview.

<sup>42</sup> Forrest Interview.

<sup>43</sup> Dean Interview.

known to not allow this support, only to argue subsequently that the amended bill will not be supported because it is poorly drafted.<sup>44</sup>

**Table 1. Breakdown of results of *all* bills, government and non-government, introduced into Council from 2014-2018**

	6 May 2014 to 30 June 2014	1 July 2014 to 30 June 2015	1 July 2015 to 30 June 2016	1 July 2016 to 30 June 2017	1 July 2017 to 28 January 2018	1 May 2018 to 30 June 2018
Introduced	10	46	57	72	26	8
Lapsed	-	-	-	0	5	0
Negated at Second Reading	-	1	1	0	3	0
Passed	5	45	50	58	30	5
Without Amendment	5	35	36	42	21	3
With Amendment	-	10	14	16	9	2
Number of Amendments	-	139	124	98	63	3

Source: Tasmanian Legislative Council' *Annual Report 2017-2018*. Hobart, Legislative Council of Tasmania, 2018, p. 18.

Strategies to influence policy through amendments can be seen in the passage of the Workplaces (Protection From Protesters) Bill 2014, which aimed to prevent protests that obstruct business operations.<sup>45</sup> In the Council committee stage, *Committee of the Whole*,<sup>46</sup> both Government and IMLCs proposed scores of amendments.<sup>47</sup> The LGLC in turn offered significant amendments, saying that the issues raised by IMLCs had caused the Government to adopt that course of action.<sup>48</sup> IMLCs proposed further substantive

<sup>44</sup> Forrest Interview; The Hon L Giddings MP, Tasmania, *Hansard*, House of Assembly, 18 November 2010, p. 68.

<sup>45</sup> B. Gogarty, 'Bob Brown Wins His Case, but High Court Leaves the Door Open to Laws Targeting Protesters'. *The Conversation* 18 October 2017. Accessed at: <https://theconversation.com/bob-brown-wins-his-case-but-high-court-leaves-the-door-open-to-laws-targeting-protesters-85742>

<sup>46</sup> This is 'the legislative stage that follows debate of the principles at the second reading', as explained in Stone, 'Changing Roles, Changing Rules'.

<sup>47</sup> Tasmania, *Hansard*, Legislative Council, 5 November 2014, p. 3-89.

<sup>48</sup> The Hon V Goodwin, Tasmania, *Hansard*, Legislative Council, 5 November 2014, p. 21.

amendments, including the narrowing of the bill's scope.<sup>49</sup> The Government supported these and the bill was ultimately accepted by the Council's *Committee of the Whole*.

### *Private Member's Bills*

In the Council, 59 percent of sitting time in 2017-18 was spent on government business, 13 percent on government briefings, and 29 percent on non-government business.<sup>50</sup> Part of non-government business is the initiation of IMLC PMBs, six of which have been introduced to the Council since 2010.

- Electoral Amendment (Legislative Council Ballot Papers) 2010
- Constitution Amendment (Legislative Council Proceedings) 2011
- Public Health Amendment (Tobacco-Free Generation) 2014
- Electoral Amendment (Legislative Council Ballot Papers) 2015
- Fire Service Amendment (Fire Infringement Notices) 2015
- Legislative Council Electoral Boundaries Amendment 2017

Few such bills become law. Government support is key to their success.<sup>51</sup> For example, IMLC Mike Gaffney's Amendment (Fire Infringement Notices) Bill 2015 was developed with the Government and became law. However, some bills are introduced in the knowledge that they will never become law.<sup>52</sup> Instead, they put the Government 'on notice'<sup>53</sup> by profile raising and agenda setting.<sup>54</sup> IMLC Ivan Dean's Tobacco Free Generation Bil, has, for example, promoted tobacco control, even though his bill has thus far failed to achieve support.<sup>55</sup> Generally, 'governments just want to be the ones

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<sup>49</sup> Tasmania, *Hansard*, Legislative Council, 5 November 2014, p. 26.

<sup>50</sup> Legislative Council, *Annual Report 2017-2018*.

<sup>51</sup> Valentine Interview; Dixon, 'The Role of Private Members' Bills'.

<sup>52</sup> O'Connor Interview; Forrest Interview.

<sup>53</sup> Wilkinson Interview.

<sup>54</sup> A. Brazier and R. Fox, 'Enhancing the Backbench MP's Role as a Legislator: The Case for Urgent Reform of Private Members Bills'. *Parliamentary Affairs* 63(1) 2010, pp. 201-211.

<sup>55</sup> O'Connor Interview; Forrest Interview.

who write the legislation and control it'.<sup>56</sup> But they are happy for an IMLC bill to test the waters, and may return to tobacco control in future.<sup>57</sup>

In this way, a version of IMLC Jim Wilkinson's PMB became law. He introduced the Financial Management and Audit (Quarterly Reporting) Amendment Bill 2011 to increase scrutiny of the executive by requiring Treasury to release quarterly financial reports.<sup>58</sup> It passed the Council but was blocked by the Government.<sup>59</sup> The next year, the Government introduced its own Financial Management and Audit Amendment Bill 2012, which was largely consistent with the Wilkinson bill, but was presented as the Government's initiative.<sup>60</sup> Wilkinson suggested that his bill had strong support and had made a case for the change.<sup>61</sup> Even though it was rejected, it subsequently had a direct influence upon government action.

## COMMITTEES AND POLICY INFLUENCE

Committees are significant features of Westminster Parliaments,<sup>62</sup> known for their scrutiny of government and influence over policy.<sup>63</sup> These roles are notable within Tasmania's Legislative Council.<sup>64</sup> Stone observes that the Council has a rigorous approach to the policy review of legislation by committee, with 'a mini-inquiry' conducted into 'every substantial or controversial piece of legislation'.<sup>65</sup> Such inquiries include government briefings and hearing from those supporting and opposing bills, which leaves the Council well informed and affords smoother passage for bills. Stone's

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<sup>56</sup> O'Connor Interview; Brazier and Fox, 'Enhancing the Backbench MP's Role as a Legislator'.

<sup>57</sup> Dean Interview.

<sup>58</sup> Wilkinson Interview.

<sup>59</sup> Tasmania, *Hansard*, Legislative Council, 21 June 2012, p. 52.

<sup>60</sup> Wilkinson Interview; The Hon P Gutwein MP, Tasmania, *Hansard*, House of Assembly, 24 May 2012, p. 74-76.

<sup>61</sup> The Hon Wilkinson MLC, Tasmania, *Hansard*, Legislative Council, 21 June 2012, p. 60.

<sup>62</sup> J. Halligan and R. Reid, 'Conflict and Consensus in Committees of the Australian Parliament'. *Parliamentary Affairs* 69(2) 2016, pp. 230-248.

<sup>63</sup> Stone, 'Changing Roles, Changing Rules'.

<sup>64</sup> D. Monk, 'Committee Inquiries in the Australian Parliament and Their Influence on Government: Government Acceptance of Recommendations as a Measure of Parliamentary Performance'. *The Journal of Legislative Studies* 18(2) 2012, pp. 137-160.

<sup>65</sup> Stone, 'Changing Roles, Changing Rules'.

comparative review of upper houses does show, however, that the Council's committee system is compromised by its relative lack of adequate administrative support.<sup>66</sup>

The Council also participates in formal committees, in Stone's view potentially compromising its independence, lessening its influence and undermining bicameralism.<sup>67</sup> MLCs sit upon Joint Standing Committees (covering Integrity, Public Accounts, Public Works and Subordinate Legislation), Sessional Committees (examining government bills and administration), *ad hoc* Select Committees, Estimates Committees, Government Business Committees and Joint Committees. In contrast to Stone's concerns, the IMLCs we interviewed identified instances of their policy influence in the Joint Public Accounts and Subordinate Legislation Committees, and in the Council's Select and Sessional Committees, including significant influence over the contentious Tasmanian Forest Agreement Bill.

### *Public Accounts (Joint) Committee influence?*

The Public Accounts Committee (PAC) is established by statute, with equal numbers from each house, and can look at any issue pertaining to State finances (*Public Accounts Committee Act 1970*). It exercises influence by scrutinising the executive<sup>68</sup>, and is considered by some to be 'probably the most powerful committee within the parliament in the world'.<sup>69</sup> In Tasmania, it can provide a check on a 'government heading in the wrong direction'.<sup>70</sup> The recent influence of the Committee can be seen in its review of the financial position of government-owned energy agencies following the 2015-16 energy crisis and the Treasurer's refusal to release relevant Treasury advice<sup>71</sup>. Despite this conflict, it is likely that a government will adopt the PAC's recommendations for transparency and improved responses to future crises.<sup>72</sup>

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<sup>66</sup> Stone, 'Changing Roles, Changing Rules'.

<sup>67</sup> Stone, 'Changing Roles, Changing Rules'.

<sup>68</sup> J. O'Dea, 'The Role of Public Accounts Committees'. *Australasian Parliamentary Review* 27(1) 2012, pp. 191-195.

<sup>69</sup> Dean Interview.

<sup>70</sup> Smith Interview.

<sup>71</sup> Public Accounts Committee (PAC), *Report on the Financial Position and Performance of Government-Owned Entities*, Hobart, Tasmania, Parliament of Tasmania, 2017.

<sup>72</sup> Dean Interview.

### *Subordinate Legislation (Joint) Committee influence?*

Many Acts delegate to a Minister or agency the ability to make rules, regulations, and by-laws.<sup>73</sup> These do not require prior parliamentary approval, but are subject to retrospective review through the Subordinate Legislation Committee (SLC).<sup>74</sup> If the Committee finds a lack of compliance with the relevant Act, it can refer rules, regulation and/or by-laws to the Council or Assembly to be disallowed.<sup>75</sup> IMLCs sit on the SLC, exerting influence by scrutinising government action, but also in disallowing rules, regulations, and by-laws found to be non-compliant.<sup>76</sup> Furthermore, the Council may need to put the disallowance motion, if the government fails to do so.<sup>77</sup>

Disallowance motions are rare; however, the SLC can be influential in more subtle ways.<sup>78</sup> For example, in 2013, it initiated an inquiry into the operation of a regulation providing for mandatory alcohol interlocks to be installed in the cars of repeat drink drivers (SLC, 2013). The SLC gave notice in the Council of its intention to disallow this regulation, should the responsible agency not satisfactorily amend it.<sup>79</sup> The SLC withdrew its notice of motion to dismiss the regulation once the changes had been made.<sup>80</sup> Attempts by IMLC Ruth Forrest to enhance the disallowance power to allow it to operate prospectively passed the Council but failed in the Assembly, possibly because they were seen to allow the Council to set policy. The Government's grounds were poor drafting, although Forrest had been denied drafting assistance.<sup>81</sup>

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<sup>73</sup> G. Appleby and J. Howe, 'Scrutinising Parliament's Scrutiny of Delegated Legislative Power'. *Oxford University Commonwealth Law Journal* 15(1) 2015, pp. 3-40.

<sup>74</sup> R. Laing, *Oggers' Australian Senate Practice: As Revised by Harry Evans* (14th ed.), Canberra, Department of the Senate, 2016.

<sup>75</sup> Office of Parliamentary Counsel, *Manual for the Preparation of Statutory Rules*, Hobart, Tasmania Department of Premier and Cabinet, 2010.

<sup>76</sup> R. Snell, H. Townley, and D. Vance, 'The Tasmanian Subordinate Legislation Committee—Lifting the Scrutiny Veil by Degrees'. *Deakin Law Review* 4(2) 1999, pp. 1-37.

<sup>77</sup> Forrest Interview.

<sup>78</sup> Snell, Townley and Vance, 'The Tasmanian Subordinate Legislation Committee'.

<sup>79</sup> Subordinate Legislation Committee, *Mandatory Alcohol Interlock: Final Report*, Hobart, Tasmania, Parliament of Tasmania, 2013.

<sup>80</sup> Subordinate Legislation Committee, *Mandatory Alcohol Interlock: Final Report*.

<sup>81</sup> Forrest Interview; The Hon L Giddings MP, Tasmania, *Hansard*, House of Assembly, 18 November 2010, p. 68.

### *Legislative Council Sessional and Select Committee influence?*

Whilst Council sessional and select committees are broadly similar, the former are established to deal with bills and government administrative matters referred to the Council, whilst the latter can be created on the Council's own initiative.<sup>82</sup> The scrutiny that Estimates Committees provide in the Senate is crucial in holding the executive accountable for its budgets.<sup>83</sup> During the 2013 Tasmanian Estimates hearings, for example, IMLC Ivan Dean raised questions over high levels of overtime payments to prison staff.<sup>84</sup> The Minister then agreed to an inquiry that recommended significant changes, many of which were subsequently implemented.<sup>85</sup> Estimates Committees offer a useful process for an IMLC to gather information, identify problems and influence policy change, as well as to scrutinise government.

Influence is not apparent where government rejects recommendations, and fails to commit to others,<sup>86</sup> as it did with the recommendations of the IMLC initiated 2016 Inquiry into Built Heritage Tourism in Tasmania.<sup>87</sup> However, the literature suggests,<sup>88</sup> and our interviewees felt, that such reports may still influence policy at a later stage, as IMLCs' ideas re-emerge as government suggestions.<sup>89</sup>

[The report] will be sent to the government [and generally there is silence. But 18 months down the track you might see an amendment, a piece of legislation come in and you think 'hahaha', here is the end result. They have picked it up as their idea.<sup>90</sup>

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<sup>82</sup> Smith Interview.

<sup>83</sup> J. Hogg, 'Throwing Light into Dark Corners: Senate Estimates and Executive Accountability'. *Papers on Parliament* No. 54. Canberra: Parliament of Australia, 2010.

<sup>84</sup> Government Administration Committee B, *Final Report on the Overtime Costs of the Tasmanian Prison Service*, Hobart, Parliament of Tasmania, 2013.

<sup>85</sup> Dean Interview; Government Administration Committee B, *Overtime Costs of the Tasmanian Prison Service*.

<sup>86</sup> P. Lobban, 'Who Cares Wins: Parliamentary Committees and the Executive'. *Australasian Parliamentary Review* 27(1) 2012, pp. 178-190.

<sup>87</sup> Valentine Interview; M. Groom, *Response to the Final Report on the Inquiry into Built Heritage Tourism in Tasmania*, Hobart, Tasmanian Government, 2017.

<sup>88</sup> Monk, 'Committee Inquiries in the Australian Parliament'.

<sup>89</sup> Forrest Interview.

<sup>90</sup> Smith Interview.

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IMLC Sue Smith observed that the Council committee system is respected by governments for its fairness and independence from partisan politics, which increases the chance that its recommendations will be adopted. IMLCs also have influence for working more easily with government than if they were partisan players,<sup>91</sup> as they capture evidence and public opinion to better inform decision-making.<sup>92</sup> All interviewees agreed that committees are an influential processes, as was illustrated by their various descriptions of the role of IMLCs in resolving an outcome for the highly complex Tasmanian Forests Agreement bill. This bill had sought to break a deadlock between conservationists and forestry interests over the logging of contested areas with arguably high conservation value. Given the difficulties of achieving accord between these conflicting interests, the Labor-Green Government was keen for the bill to proceed quickly through the Legislative Council. However, by leveraging the committee process, and their roles within this process, IMLCs ensured that this did not occur.

### *Tasmanian Forests Agreement - Select Committee influence?*

The Tasmanian Forests Agreement (TFA) was a contentious, complex government bill,<sup>93</sup> which was intended to end the forest wars by protecting high conservation value forests whilst ensuring industry viability into the future.<sup>94</sup> A Labor-Green Government initiated a bill, and its resolution was negotiated through a Council select committee process. This process provided a clear example of how IMLCs influence procedures and policy by leveraging the crucial committee process. At the time, the Council was seen by critics to be operating conservatively, in concert with the Liberal opposition, by resisting the TFA forest 'peace process',<sup>95</sup> the length and depth of its extensive review process, and the number of revisions it proposed to the bill.

But others, including IMLCs, argued that neither the delicate negotiations between conservation and forestry interests (the TFA signatories), nor the bill's passage through

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<sup>91</sup> Smith Interview.

<sup>92</sup> Dean Interview.

<sup>93</sup> Details are archived at - <http://www.parliament.tas.gov.au/ctee/Council/Forests.htm>

<sup>94</sup> Farrell Interview.

<sup>95</sup> O'Connor Interview.

the Assembly, had allowed for sufficient consultation.<sup>96</sup> The Council therefore established a select committee to review the bill.<sup>97</sup> As IMLC Rob Valentine observed, ‘They say they consult. Sometimes the Legislative Council says, “well yeah, you haven't consulted far enough”’.<sup>98</sup> This process was to ‘inform us (the Council) and to ensure that we had all the evidence and information that we needed’,<sup>99</sup> in order to propose what were in the end substantive amendments to the bill.<sup>100</sup>

The Council established a select committee of the entire Council. It held hearings, working over Christmas, in order to produce a report for circulation, whilst being heavily lobbied, and at times threatened, over a quite ‘horrendous’ period.<sup>101</sup> For the Greens, who supported the Labor minority Government and its forest peace process, this was a dishonest, delaying, ‘wrecking process’.<sup>102</sup> However, the Council’s consultation and evidence gathering process, and its public airing of views, did deliver legitimacy that was previously lacking.<sup>103</sup> They enabled IMLCs to feel justified, in terms of the evidence they acquired, in heavily amending what had otherwise been a ‘skeleton’ bill.<sup>104</sup> LGLC Craig Farrell engaged constantly with the Council, offering government amendments to alleviate its concerns, even when the Government did not agree with them:<sup>105</sup> ‘(M)ore often than not [Farrell] would say, “Well, I will talk to the minister”’.<sup>106</sup>

IMLC Ruth Forrest offered the most significant amendments, which had the greatest impact on the Government’s version of the bill, including several pages of new clauses to create a framework to govern compensation schemes.<sup>107</sup> These were supported by

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<sup>96</sup> J. Schirmer, M. Dare and S. Ercan, ‘Deliberative Democracy and the Tasmanian Forest Peace Process’. *Australian Journal of Political Science* 51(2) 2016, pp. 288-207.

<sup>97</sup> Valentine Interview; Tasmania, *Hansard*, Legislative Council, 13 December 2012, p. 56.

<sup>98</sup> Valentine Interview.

<sup>99</sup> Dean Interview.

<sup>100</sup> Valentine Interview.

<sup>101</sup> Dean Interview.

<sup>102</sup> O’Connor Interview.

<sup>103</sup> Schirmer, Dare and Ercan, ‘Deliberative Democracy and the Tasmanian Forest Peace Process’.

<sup>104</sup> Wilkinson Interview.

<sup>105</sup> Farrell Interview.

<sup>106</sup> Smith Interview.

<sup>107</sup> Tasmania, *Hansard*, Legislative Council, 26 March 2013, p. 1-65.

the Government, which saw them as strengthening the bill,<sup>108</sup> and by a majority of MLCs. However the Council's proposals very nearly did upset the delicate conservation-forestry balance, with the Government ultimately supporting the bill despite what Greens Leader Cassy O'Connor saw as some 'horrible amendments':

If we didn't pass it amended... the whole four years (of the TFA negotiation process) would have been a waste of time... So we had to pass a flawed piece of legislation rather than send it back upstairs (to the Legislative Council) where we were almost certain it would die.<sup>109</sup>

IMLC Jim Wilkinson proposed amendments to improve the durability of the bill, despite his personal opposition to the TFA process.<sup>110</sup> He recognised that the bill was likely to pass and wanted it to be the best it could be<sup>111</sup>, as befits the Council's role of legislative review.<sup>112</sup>

Overall, the Council used the committee process to significantly flesh out the bill, making 58 successful amendments and adding over two hundred pages to what became the most heavily amended bill in the Council's history.<sup>113</sup> This included the addition of two new Clauses, a new Part and seven new Schedules, showing clear evidence of legislative and policy influence.<sup>114</sup> In this case, the influence afforded by the committee and review process involved not just IMLCs, although they were prominent, and not just those supportive of the bill. It is for other research to determine whether or not this influence was politically motivated.<sup>115</sup> The forest peace process was certainly novel, negotiated by conservationists and the forestry industry, and legislated for by a government bill that was heavily amended in the Council.

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<sup>108</sup> The Hon C Farrell MLC, Tasmania, *Hansard*, Legislative Council, 16 April 2013, p. 9.

<sup>109</sup> O'Connor Interview.

<sup>110</sup> The Hon J Wilkinson MLC, Tasmania, *Hansard*, Legislative Council, 16 April 2013, p. 8.

<sup>111</sup> Wilkinson Interview.

<sup>112</sup> D. Chalmers, 'Looking Forward: Some Thoughts on the Operation of the Legislative Council in the Next Century', in A. Fletcher (ed.), *Operation of the Legislative Council: Discussion Brief*. Hobart, Parliament of Tasmania, 1997, pp. 5-15.

<sup>113</sup> Legislative Council, *Annual Report 2012-2013*, Hobart, Legislative Council of Tasmania, 2013.

<sup>114</sup> Legislative Council, *Annual Report 2012-2013*.

<sup>115</sup> See Schirmer, Dare and Ercan, 'Deliberative Democracy and the Tasmanian Forest Peace Process'.

## DISCUSSION AND CONCLUSIONS

Literature describing the power of Tasmania's Legislative Council tends to focus on its staggered elections and its capacity to block budgets without having to face the electorate. There has been some recognition of, and focus upon, the independent nature of the Council, the implications for its accountability, and parties' sporadic attempts to pick up seats. However, nothing previously has been written about the means by which independent Members of the Legislative Council influence, in their view, policy and pursue their own agendas.<sup>116</sup> It is clear from this research that such Members do use the Council's powers to influence policy, but also to primarily ensure that legislation, supported or otherwise, is of the highest standards.

For reasons of scope, we have limited our investigation into the influence of IMLCs. We have not undertaken analysis of the political or ideological considerations behind IMLCs' actions, for example, and instead considered the potential of those actions to influence policy and legislation. We have not been concerned with how politics is prosecuted in a Westminster house of review, therefore, but with opportunities for, and instances of, influence being pursued in the uniquely independent Legislative Council. Not surprisingly, these opportunities and instances arise in the course of the Council's normal review and scrutiny work, although some IMLCs strategies are more successful than others, as we have seen. And some take longer to be realised than others.

Obviously, independents may front for parties that are seeking influence and control of the Council, its Members and processes. Party aligned independents could then review government business, and initiate inquiries, in terms of party interests rather than electorate or state interests. They may alienate, marginalise or attempt to shut down any sign of true independence by an IMLC, such as by Ruth Forrest for example, who is active in speaking her mind, in particular in critiquing state finances and accountability processes.<sup>117</sup> Conversely, Craig Farrell, previously LGLC and now

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<sup>116</sup> Despite the lack of previous qualitative research, historical description and information may be gleaned from the annual 'Tasmanian Political Chronicle' of the *Australian Journal of Politics and History*; W. A. Townsley, *The Government of Tasmania*. St Lucia: University of Queensland Press, 1976, pp. 81-84; and A. Scott and S. Young, *The Tasmanian Legislative Council as a House of Review: An Analysis of the Process of Review of Legislation by the Legislative Council from July 1989 to December 1993*, A Research Project commissioned by the Board of Inquiry into the Size and Constitution of the Tasmanian Parliament, Hobart, December 1994.

<sup>117</sup> O'Connor Interview.

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President of the Council, considers his independence to be critical, and unhindered by his membership of the Labor party.<sup>118</sup>

Our findings are that, despite its long held reputation as conservative and obstructionist, the data suggests that the Council plays a healthy but not obstructive role in amending legislation. It does not tend to amend bills extensively, although clearly the TGA bill was an exception. Private Members Bills appear to play a marginal but at times important role, less by their direct adoption and more by influencing government legislative initiatives at a later stage. IMLCs have a blocking majority in the Council, so it is crucial that government cultivates good, reciprocal working relations with them. In turn, where this is the case, an IMLC may secure a policy win just by having a conversation with a Minister;<sup>119</sup> however, to do so, our interviewees stressed, the win had to be one for the State, not for personal gain.

We found that IMLCs use the committee process as intended, namely to scrutinise the executive, but that they can leverage this process aggressively against the wishes of government by seeking enhanced public deliberation and evidence gathering. While government may resist this, it invariably recognises the power of these committees, and respects, and very often implements, their recommendations. We found that it may also choose to ignore them, only to subsequently offer its own versions of these recommendations as its own initiatives. In all of their review and scrutiny work, IMLCs are sole operators, not supported by party colleagues or resources, and can be denied access to drafting services, so they are on their own and must build relations to gain support. However, most of our interviewees saw benefit in a lack of party alignment for affording a broad range of working relationships. We observed that government does not respond well to attempts by the Council to increase its powers. Whilst IMLC Jim Wilkinson's bill led to more regular reporting of financial data, IMLC Ruth Forrest's bill to scrutinise regulations before they were enacted failed.

There is much research still to be undertaken on the Council. The electorate work and priorities of MLCs are undocumented, as is the extent to which they follow through on campaign promises. The dynamics between IMLCs and other MLCs have not been explored. Our focus was on the opportunities for policy influence of IMLCs who dominate the Council. We asked IMLCs about their role, the strategies they use to gain

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<sup>118</sup> Farrell Interview.

<sup>119</sup> Smith Interview.

policy influence, their work and influence on committees, and the obstacles to achieving influence. Virtually all of our interviewees see their role not only as reviewing and scrutinising government, but also as exerting initiative and influencing policy.