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Of the people, by the people, for the people: Law-making in New South Wales, 1843–1855.

Kerry Fraser Mills

M.A. LLB. (University of Sydney)

A thesis submitted for the degree of Doctor of Philosophy
of the University of New England

November 2006

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Abstract

This thesis examines a central issue of Australian history, using an historiographical model developed by British scholars. Historians exploring developments in Great Britain in the first half of the nineteenth century generally agree that modern methods of government and of conducting parliamentary business emerged there during that period. Some emphasise historical forces as the explanation for change, others the impact of ideas. Insofar as Australian historians have written about such issues, they have paid little attention to methods of government and the creative uses of authority in New South Wales.

A core problem for this thesis has been to consider how closely developments in mid-nineteenth-century New South Wales followed those in Great Britain and, in the process, to consider what colonial governments and legislators actually did in the field of law-making, especially in the 13 years leading up to the commencement of responsible government in 1856. While much was adapted from British experience in terms of legislative precedent and methods of government, New South Wales was no mere replica of its parent. The willingness of early "conservative" legislators to experiment in a creative and radical manner led to a period of dense and impressive social reform in the late 1840s and early 1850s.

Between 1843 and 1855, after the establishment of a partly elected legislature but before responsible government, increasingly potent methods of introducing public opinion and public accountability into the business of law-making were being perfected in New South Wales, petitions, the press and, especially, select committees of the legislature, all playing a part. At the same time, a growing emphasis was placed on the need for expertise in government and the public service, especially by adherents of utilitarianism. This study reveals a period of tremendous legislative and, even, nation-building effort which provided a strong launching pad for responsible government. However, the introduction of that form of government was itself followed by something of a legislative dénouement, the factionalism that accompanied the triumph of the liberal democrats and overwhelmed clear utilitarian priorities militating against the passage of all but a few landmark reforms in the parliament's early years.

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From the beginning of this journey, my principal supervisor, Professor Alan Atkinson, has been a constant source of encouragement and support and has urged me on when I faltered. His critical and expert examination of the evolving text, acute observations and suggestions have been invaluable. I cannot thank him sufficiently for his guidance, patience and tact over several years.

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Contents

Abbreviations

ADB	*Australian Dictionary of Biography.* The letters *ADB* are followed by the number of the volume, e.g., *ADB*, 2.
CO 201/	Colonial Office: New South Wales, Original Correspondence, 1849-1860 (Australian Joint Copying Project) (Dixson Library, University of New England microfilm)
HRA	*Historical Records of Australia.* The letters *HRA* are followed by the number of the series and the number of the volume, e.g., *HRA*, 1, 23.
JRAHS	*Journal of the Royal Australian Historical Society*
ML	Mitchell Library, Sydney
J NSWLC	*Journal* New South Wales Legislative Council
PR NSW	*New South Wales Parliamentary Record, 1824-1856*
SMH	*Sydney Morning Herald*
SRNSW	State Records New South Wales
V&P NSWLA	*Votes and Proceedings* of the New South Wales Legislative Assembly
V&P NSWLC	*Votes and Proceedings* of the New South Wales Legislative Council (before 1856)

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Introduction

This thesis is concerned with law-making in New South Wales in the middle decades of the nineteenth century. Historians exploring developments in Great Britain in the first half of the nineteenth century now generally agree that modern methods of government and of conducting parliamentary business emerged there during this period. However, there has been much debate about the timing and causation of change. Some have emphasised the importance of historical forces, others the impact of ideas. Writing to begin with in 1958 Oliver MacDonagh, the leading protagonist in the former camp, argued that the intolerable social evils of the age set in train an irresistible demand for change and legislative action. He and his adherents made little allowance for the influence of ideology, especially of Benthamism. Others however have considered that the impact of ideas, of laissez faire, individualism, utilitarianism and paternalism, cannot be discounted. These arguments are outlined in Chapter 1.

It is the aim of this thesis to ask similar questions about nineteenth-century New South Wales. Insofar as Australian historians have written about such issues, they have followed a variety of different paths. R.W. Connell, T.H. Irving and Alastair Davidson are representatives of the radical nationalist perspective, which treats government power as oppressive, whether emanating directly from Britain or from a colonial elite. Although such writers display an interest in the uses of power, the notion of government authority as a genuinely creative aspect of colonisation does not form part of their approach. The older liberal tradition, developed, for instance, by Michael Roe and John Ward in writing about New South Wales, takes a more positive approach but pays very little attention to what governments actually did. Overall then, what is lacking at present is an interest in the creative uses of authority in New South Wales. This is what this thesis aims to supply.

The thesis nevertheless draws to some extent on such earlier work. Connell and Irving argued in *Class Structure in Australian History: Poverty and Progress* (1980) that the unity of the ruling class in eastern Australia dissolved in the 1840s and that a struggle for control of the state developed, the conflict being projected on the political stage "in terms of rival social orders: plantation capitalism versus *laissez-faire* capitalism".[1] They said that to

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1 R.W. Connell and T.H. Irving, *Class Structure in Australian History: Poverty and Progress*, Longman Cheshire, Melbourne 1980 (2nd edn. 1992), p. 94.

understand class dynamics in Australia, it was necessary to view the white settlements as occupying a specific place in a highly differentiated global structure, a place that changed in response to both the dynamics of the whole system and local events.[2] In observations that support the argument of this thesis that New South Wales was not a British clone, Connell and Irving denied that the British state was simply transplanted into Australia. They described the state in general as a set of social relations that cannot be translated in their entirety to a new location, arguing that it needed to be reconstructed to meet new conditions. In Australia, they said, this task was undertaken deliberately, using British resources and features, but from the outset, it departed from the British model in a number of ways.[3] This is largely the approach taken by this thesis.

Connell and Irving referred to the struggle for land in the Australian colonies in the mid-nineteenth century largely taking the form of a struggle for control of state organisations, arguing that the fundamental connection between business, the state and the property system was made very plain in the process. Access to state power was sought because it directly affected private fortunes.[4] They also noted that while attention tended to focus on the interior, political power lay in the towns where the period of bourgeoisie hegemony began, the 50 years from 1840 heralding the era of the "hegemony of the mercantile bourgeoisie"—a point also of importance for this thesis. They pointed to a major contraction in state activity in the labour market early in this period, and to the movement to stop further transportation as a major factor in mobilising colonial workers and crystallising urban bourgeoisie politics, the movement achieving its ends when the gold-rushes convinced the British government that bourgeoisie dominance was feasible in the colonies.[5] When examining the transfer of state power and the change in the form of the state, Connell and Irving argued that the introduction of responsible government occurred not only in the context of a reorganisation of imperial relationships but also of a change in the balance of class forces within the colonies.[6] These are issues to be explored below, but from a different theoretical perspective. Connell and Irving's discussion has particular relevance to the argument of this thesis that the rhetoric of the early 1850s regarding constitution-making was quite at odds with the reality of the work of the New South Wales legislative council as

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2 Ibid., p. 13.

3 Ibid., p. 35. See also R.W. Connell, *Ruling Class Ruling Culture: Studies of conflict, power and hegemony in Australian life*, Cambridge University Press, Cambridge 1977, p. 6.

4 Ibid., p. 40.

5 Ibid., pp. 70, 83-84.

6 Ibid., pp. 87-90.

established in the 1840s. And here too MacDonagh's view of the paramountcy of historical forces, of great social and political changes—the rise of the middle class and, less obviously, the transformation of the nature of parliamentary government—driving change, will be tested against the actuality of local circumstances.[7]

Alastair Davidson has spoken of a struggle for control of state power and institutions in somewhat similar language. In *The Invisible State: The Formation of the Australian State 1788-1901* (1991), Davidson seeks to explain the relationship of the institutions within the Australian state to one another and to determine where the final power lies "in the labyrinth of structures of authority". The answer is not obvious, Davidson says, but is invisible except in its public effect.[8] Davidson defines a state by reference to related structures, the legislature, judiciary and executive, "whose object is to ensure that all citizens perform their socially allotted duties". He argues that in the Australian state the normal, expected consent of citizens to comply with the law has been extended so that the law denies the collective, democratic sovereign right of the people to override court decisions.[9] Davidson describes the Australian state as one with a different consensus from that in Britain, a different class of state officials having the last say about state arrangements and power.[10] He agrees with Connell and Irving that modern states are all different. They are not uniform, he says, because each "has emerged from a different history where remnants from past classes and structures resisted with greater or lesser success the hegemonising reorganisations of social practices or lives within certain borders".[11]

Davidson argues that the judicial arm gained control of the state following the creation in 1823 of legal institutions, their use as "the place for public political activity" being evident in the movements for jury trial and a free press in the 1830s and 1840s.[12] He says that the habit of obsequiousness that the populace acquired in its public contacts with state

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7 See Oliver MacDonagh, *Early Victorian Government 1830-1870*, Weidenfeld and Nicolson, London 1977, pp. 3, 5-6.

8 Alastair Davidson, *The Invisible State: The Formation of the Australian State 1788-1901*, Cambridge University Press, Cambridge 1991, p. xi.

9 Ibid., pp. xvi, 1 (quotation on p. 1). See Lord Shaw of Dunfermline, *Legislature and Judiciary*, University of London Press, London 1911, pp. 27-29 on the sovereignty of parliament and, ultimately, the people under the British constitution. See also, Zelman Cohen and D.P. Derham, "The Constitutional Position of Judges", *Australian Law Journal*, vol. 29, April 26, 1956, pp. 705-713.

10 Ibid., pp. 16-17.

11 Ibid., p. 4.

12 Ibid., p. xv. See also David Neal, "Law and Authority: The Campaign For Trial by Jury" in C.L Tomlins and I.W. Duncanson (eds.), *Law and History in Australia*, La Trobe University, Melbourne 1982 (2nd printing 1984), pp. 110-111, in which Neal describes the colonial legal system as a crucial political forum in the colony's first 50 years.

institutions during this period produced "the prototypical Australian political animal", unwilling to be actively assertive against an autocratic authority. Given these early developments, Davidson argues that the movement for self-government between 1842 and 1856 was a drive by liberals and conservatives for control of institutions which were already united in a particular way,[13] For Davidson, the effect of the constitutional arrangements of 1855-56 was to shift all arguments about state power into the judicial arena, "the place of last resort in the State".[14] Davidson blames the liberal leaders of the 1850s for the failure of the people to assert themselves in deciding where they wanted the ultimate power within the state to lie. These leaders did not wish to displace the commitment to private property and British law and order which the squatters also shared, they failed to secure popular representation in the legislative council and they permitted an alliance of lawyers and squatters to draft the new constitution. But, Davidson says, even if electoral reform had been secured before the constitution was drafted, Parkes, Cowper and the "masses" would "probably not have challenged the rule of law in the name of the sovereignty of the people", as that would have entailed overthrowing the Queen, to whom they professed effusive loyalty.[15]

Davidson suggests that from 1850, citizens, whatever their differences, were unified by "their possessive individualism and a desire to protect themselves as possessive individuals". From that point of view, "they only wanted to control the institutions which had formed them, by adding to them British rights of representation, not to destroy those institutions and replace them with new ones".[16] This idea of consensus as the basis of emerging forms of government is fundamental to the approach taken below. The preparation of the colony's constitution of 1855-56 might also be compared with an equally momentous happening at the end of the nineteenth century, the preparation of the constitution of the Australian commonwealth. In both cases, political leaders, having debated the issue among themselves, found it hard to agree on a practical way forward. In the 1890s, they had the novel and, for the time, radical idea of asking each colony to stage a referendum. The question was put to the people, and was resolved, on a popular basis.[17] Given the current understandings of democracy, a referendum was not a possibility in the 1850s. However, it is striking that a

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13 Ibid., p. xiv.
14 Ibid., p. xv.
15 Ibid., pp. xvii, 166 (quotation on p. 166).
16 Ibid., pp. 88-89 (quotations on p. 89).
17 See Helen Irving (ed.), *The Centenary Companion to Australian Federation,* Cambridge University Press, Cambridge 1999, pp. 10-12, 64-67, 74-84, 168-174, 212-214, 270-277, 318-322.

matter of such significance as the colony's new constitutional arrangements was handled quite as exclusively as it was because, as this thesis shows, the legislative process had been gradually opening up and becoming more widely consultative since the mid 1840s. The autocratic way in which the constitution was drafted has tended to obscure from historians the degree to which consensual law-making had evolved to that point.

Other writers have taken a more sympathetic view of the aspirations of New South Wales colonists with social and political authority. In his pioneering study of colonial ideas, *Quest for Authority in Eastern Australia 1835-1851* (1965), Michael Roe, when tracing the dénouement of conservative power in colonial New South Wales, came down on the side of ideologically-driven change. He argued that the brute force of the penal period was replaced, not by the charisma of an individual or small group of men, or a "sheer virtuosity" of governments, but by a set of ideas in the form of moral enlightenment. This movement grew from eighteenth-century thought. It was a new faith that mingled Romantic, Protestant, and liberal attitudes, developed by the upholders of secular culture and the temperance movement, who were intent on ensuring that everyone became good, wise, prosperous and responsible. Roe said that this movement triumphed over conservatism, which rested on two pillars, namely ideas represented by the Church of England and the interests of a landed gentry.[18] The cause of conservatism was also adversely affected, in Roe's view, by the "anarchism" involved in constant attacks on the executive government, attacks in which W.C. Wentworth played a prominent part, and by a lack of unity among its proponents as to how far the campaign for self-government should extend.[19]

Roe argued that the new faith influenced the development of colonial legislative policy, especially in the field of public education. He also detected its influence in many other seemingly disparate fields—science and communications; regulation of the liquor and gaming industries, marriage, and public administration (for example, in laws to improve the calibre of the constabulary and to eliminate corruption and inefficiency in city government); establishing general cemeteries; aiding the founding and operation of benefit societies, savings banks, building societies and art unions; public bathing, and enforcing Sunday observance; and preventing cruelty to animals. Roe referred to numerous paternalist laws aimed at improving public health, and to the efforts of colonial legislators to match their

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18 Michael Roe, *Quest for Authority in Eastern Australia 1835-1851*, Melbourne University Press in association with Australian National University, Melbourne 1965, p. 6.

19 Ibid., pp. 77-79.

British counterparts in the area of law reform.[20] He also argued that moral enlightenment, by including the previously ignored or patronised working class, ensured a strong working-class influence on the Australian political and social character.[21] Roe's conclusions are especially important for this thesis because they demonstrate something of the power and complexity of educated public opinion in the period. However, in spite of the title of his book, he does not show in any detail the relationship between public opinion and law-making.

Roe returned to the same theme in 1974 when he wrote of the creed of moral enlightenment tending towards egalitarianism and hostility to privilege and pretension, especially of the clergy. Utilitarian emphasis on the greatest good for the greatest number became fused with the Romantic belief in everyman's perfectibility. He now emphasised the role of culture—in transforming society and individuals in the manner required by the new creed. Hence the importance of education and the need for government and politicians to commit to its provision as culture could thrive only among the educated. As well as referring to the importance of the print media in this context, Roe drew attention to the emergence of other means of self-improvement, such as mechanics institutes, libraries, reading rooms, museums and galleries, many of which were encouraged or subsidised by government.[22] While the ideals of self-perfection and moral rectitude had been embraced by much of the English-speaking world by the mid-nineteenth century, he argued that these ideals gained ground faster in the Australian colonies because of the relative absence of class division and traditional belief, the rapid material progress and the opportunities for individualist ambition.[23]

John Ward adopted a somewhat similar approach in various works, and most obviously in *James Macarthur: Colonial Conservative, 1798-1867* (1981). In this book, Ward criticised the Whiggish tendency to see Australian history as the triumph of liberals and radicals over entrenched and selfish conservatives.[24] He detected a clash between two kinds of conservatism in New South Wales in the first 30 to 40 years of the nineteenth century.

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20 Ibid., pp. 151-152, 158-159, 191-198. See also C.M.H. Clark, *A History of Australia*, vol. 3, *The Beginning of an Australian Civilization 1824-1851*, Melbourne University Press, Melbourne 1973, pp. 409-414 on the influence of religion and moral enlightenment, especially in the area of education, in the 1840s.

21 Ibid., p. 205.

22 Michael Roe, "1830-50", in F.K. Crowley (ed.), *A New History of Australia*, Thomas Nelson Australia Pty Ltd, Melbourne 1974, pp. 112-114.

23 Ibid., p. 116.

24 John M. Ward, *James Macarthur: Colonial Conservative, 1798-1867*, Sydney University Press, Sydney 1981, pp. ix-x.

One was imposed by British policy and was formally embodied in rule by the governor and his officials. The other, Ward said, grew out of private land ownership and private trading wealth, and it called on supposed precedents from eighteenth-century England to justify its pretensions. However, the latter also embraced traditional paternalistic assumptions about the rights and duties of the landed elite to carry the burden of political responsibility and social leadership.[25] Ward argued that the conditions that had facilitated the earlier ascendancy of the colonial conservatives passed away early in the middle decades of the nineteenth century. However, he said, although the conservatives suffered formal defeat, they survived, remaining politically formidable, socially powerful and economically strong, continuing to shape the colony's conservative tradition.[26]

Two authors who have carried forward and refined this understanding of the causes of change in New South Wales, thereby exploring a distinctively Australian way of doing things, are John Hirst and Alan Atkinson. In *The Strange Birth of Colonial Democracy: New South Wales 1848-1891* (1988), Hirst traces the development of democracy in New South Wales and the evolution of colonial liberalism, his analysis concerning in part the period covered by this thesis. For Hirst, the colony's mid-nineteenth century social order, comprised of a landed gentry on large estates, serviced by tenant farmers, supported by the local church and dispensing local justice, came closer than that of anywhere else in the empire at that time to recreating English experience. This is an important insight for this thesis, which attempts a direct comparison between events in England and in New South Wales. The landed class expected that the colony would reproduce England's system of government, Hirst says, and that they, together with a few leading Sydney merchants and lawyers, would assume political power. The colony's legislative council was composed of this conservative elite, he says. Hirst mentions a brief period of opposition, led by merchants and professionals, when the colony's new constitution was being prepared in the early 1850s. However, while this opposition movement was described as liberal and had popular support, Hirst notes that it was far from democratic. Its leaders objected to a monopoly of power being conferred on landholders and squatters but they did not wish the people to have political power. The only committed democrats, he says, were workers and small tradesmen of low social status and with little influence. He notes that the conservatives held power from the commencement of the new constitution in 1856 for a little over a year with one month's

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25 Ibid., pp. 8-9.
26 Ibid., p. 2.

break, "and never held it again". The liberals won the 1857 general election and then, Hirst says, moved to the left, shedding most of their men of substance. They made radical amendments to the conservative constitution, thereby giving power to small men who were the social inferiors of both the conservatives and those leading the liberal push, their triumph being completed with the passage of a radical land law in 1861 that broke the pastoralists' grip on the interior.[27] Hirst's study offers a good explanation for the rapid process by which the conservative constitution was upset and democracy established, and it also examines in detail the nature of the new political order.

Martin and Loveday had argued that during the second half of the nineteenth century the prevailing faction system in parliament provided New South Wales with effective government. Hirst notes that this view has been disputed and points to the inefficiencies and shortcomings of faction governments and to the general disgust among contemporaries with the faction system.[28] This thesis will demonstrate that, in the early parliamentary years, that system inhibited, at the very least, passage of all but a few reformist measures, so that law-making was much more fruitful in the 13 years before 1856 than for a number of years afterwards. Hirst also examines the growth of central power in New South Wales. He observes that after the liberals came to power local authorities became weaker. Under the liberals, the rule of officials of the central government over the people was embraced and greatly extended.[29] He argues that the explanation for this phenomenon lies in the adaptation, in the 1850s, of the system of crown land commissioners that had controlled the colony's pastoral interior for decades to the circumstances of the goldfields.[30] This observation is of considerable interest because, as I say in Chapter 1, MacDonagh placed great emphasis on the importance of field executives—full-time experts operating in the field as the crown land commissioners did—in driving legislative change in Great Britain in the 50 years from 1825. In this thesis, I ask how far MacDonagh's approach might explain centralisation in New South Wales.

In an article written in 1988 dealing with early conservative thinking in New South Wales, Alan Atkinson refers to a tendency among historians of New South Wales to split the

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27 J.B. Hirst, *The Strange Birth of Colonial Democracy: New South Wales 1848-1884*, Allen and Unwin, Sydney 1988, pp. viii-ix (quotation on p. ix).

28 Ibid., p. 191, Hirst referring in footnote 68, p. 291 to P. Loveday and A.W. Martin, *Parliament, Faction and Parties: The First Thirty Years of Responsible Government in New South Wales, 1856-1889*, Melbourne University Press, Melbourne 1966, pp. 3-5.

29 Ibid., p. 195.

30 Ibid., pp. 198, 201, 203.

nineteenth century into two parts divided either at 1851, with the discovery of gold, or at 1855-56 with the introduction of responsible government. Atkinson says that this approach clouds the importance of both the influx of free immigrants to the colony in the 1830s, as an equally significant turning point, and the long-term development of political ideas and methods of government in the colony. He asserts that his observations are borne out by an examination of conservative thinking as it evolved in the colony between the 1820s and 1854. Atkinson points to ambiguities in the use of the term "conservative". Roe and Ward had argued that colonial conservatives were reactionary in their support of the privileges of the landed gentry and Church of England, and yet certain aspects of conservative thinking were in fact radical. When examining colonial law-making in the six years or so leading up to responsible government, Atkinson refers to a supposition that the legislation of this period was the work of reactionary conservatives who dominated the legislature, forestalling the rise of liberal democracy and producing a constitution that the liberals were able to white-ant within a few short years after 1856. This interpretation of events, he says, was invented by the liberals, and is untrue. In fact, during these years the conservatives produced and obtained the passage of an impressive array of social measures, Atkinson pointing to a significant increase in legislative activity in which both government and elected members participated in the six years from 1849. This matter is also explored by this thesis. For Atkinson, the conservatives' work in this period was no less important for the formation of Australian political traditions than that of liberal legislators in their first years in office.[31]

Atkinson refers to frictions and philosophical differences between conservatives and liberals, and within these groups, over various legislative measures in this period. He points to the liberals' advocacy of laissez-faire and free trade policies, while noting the conservatives' concern that the state should give a distinct form to society and be responsible for ensuring equity in arrangements between ranks in the social hierarchy.[32] He points to a history of over two generations of government intervention in the lives of New South Wales residents by the mid-nineteenth century, arguing that this was not simply because of the presence of convicts. He observes that conservatives had long supported state involvement in areas such as allocation and management of land and other resources including labour, and in the licensing of a range of commercial activities. He says that as the origins of New South Wales were as a place for punishment and reform, its activities had become absolute and

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31 Alan Atkinson, "Time, Place and Paternalism: Early Conservative Thinking in New South Wales", *Australian Historical Studies*, vol. 23, no. 90, April 1988, pp. 1-3.

32 Ibid., pp. 3-8.

permeated with "moral ambition". The achievement of this ambition depended on the right allocation of resources. He suggests that the colony's landed gentry, by controlling land and convict labour, saw themselves as a semi-official class that shared responsibilities with the state. He argues that those of this class who had grown up with the convict system, and here he includes James Macarthur, W.C. Wentworth, G.R. Nichols and James Martin, and those bureaucrats, such as Edward Deas Thomson, who had worked within it, naturally saw the state as being immensely powerful in the ordering of society.[33] Like Ward, Atkinson says that conservative thinking in early New South Wales had two distinct facets, but he describes the two differently. For Atkinson, the first reflected European and North American ideas, many conservative reforms being "fragments of utilitarianism adapted from a British to an Australian setting". Secondly, from an early date (the 1820s) local conservative thinking had a distinct moral thrust and depended on an attachment to things peculiar to the colony. This strain was central to the attitudes of white native-born Australians, including James Macarthur, Wentworth and Nichols. Martin also came within this group. Though born abroad, he was less than two years old when his parents migrated and, Atkinson says, self-consciously associated with the attitudes of the native-born. Taking a view different from Roe's, Atkinson argues that there was something unique in the behaviour and thinking of this cohort and in the way in which these attributes coloured their political ideals and in their perceived attachment to the soil.[34]

Atkinson also disagrees with Roe's view that cultural pursuits were the province of moral enlightenment triumphing over conservatism. Atkinson points to the early association of the educated native-born "sons of the soil" with the press and with cultural activities, their interest in education, their introspection and attachment to the local landscape, their Australian patriotism and their concern, with increasing prosperity and influence, for law, order and morality. These ideas were also reflected in the thinking of the conservative James Macarthur and combined with his paternalist ideals. These men (apart from Wentworth) had little in common with "mammoth and absentee squatters".[35] Atkinson argues that a distinctly colonial brand of idealism with a somewhat romantic radical streak, which emphasised an active role for government in "creating and distributing resources, in supporting and

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33 Ibid., pp. 9-10. See also Alan Atkinson, *The Europeans in Australia: A History*, vol. 2: *Democracy*, Oxford University Press, Melbourne 2004, pp. xiii, 266, Australian governments being described as "a perpetual backstop", with strong habits of "dictatorial benevolence" always being present.

34 Ibid., pp. 10-11 (quotation on p. 10). See also Atkinson, *Europeans*, vol. 2, pp. 266-267, especially regarding the ramifications of utilitarianism.

35 Ibid., pp. 12-15 (quotation on p. 15).

controlling education, and in subsidising religious effort", inspired conservative legislative activity between 1849 and 1854.[36] This interventionist aspect of colonial conservatism has links with the practices of the English paternalists that are the subject of Kim Lawes' book (see Chapter 1). Atkinson contends that the conservatives made this radicalism Australian in the way they linked state sponsored moral enlightenment and other forms of progress with official support for individual effort, the state having a Christian duty to be "father or 'uncle'" to the people". Atkinson says that the situation was little altered with the coming of democracy.[37]

Another point with particular relevance to New South Wales should be noted here. It concerns the tendency of many writers to overlook or ignore the legislative contributions of colonial lawmakers before 1856. Shirley Fitzgerald's work in the field of public health in Sydney (1982, 1987) is characteristic of the received view. She largely discounts almost all early efforts at reform during that period. Similarly, she fails to set such reforms against a British background. Her 1982 article suggests that the reforms of the late nineteenth century were motivated by the changing requirements of the pastoralist exporting sector and by financial and mercantile considerations, and had little or nothing to do with reforms that had been taking place in Great Britain from the 1830s.[38]

The main flaw in the traditional approach to this period in New South Wales, especially in Connell and Irving and in Davidson, is the assumption that the history of the relationship of government and subject in Australia is merely one of control and resistance. Roe and Ward did not take this approach, and neither did Hirst nor Atkinson. However, none on either side has been interested in the creative power of the state to the extent of trying to apply the English debates to New South Wales. A more sympathetic treatment of the creative power of the state has been adopted by Geoffrey Serle, David Dunstan and Stuart Macintyre when writing about colonial Victoria, with Dunstan deliberately taking the British arguments on board.

Serle, in *The Golden Age: A History of the Colony of Victoria, 1851-1861* (1983),

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36 Ibid., p. 17. See also Atkinson, *Europeans*, vol. 2, pp. xiv-xv, 197-286 for a detailed consideration of the implications of literacy among European Australians between the 1820s and 1870s and of the global revolution in communications that occurred in the middle decades of the nineteenth century.

37 Ibid, p. 18.

38 See Shirley Fisher (as Fitzgerald then was), "The Pastoral Interest and Sydney's Public Health", *Historical Studies*, vol. 78, April 1982, pp. 73-75, 89 and Shirley Fitzgerald, *Rising Damp: Sydney 1870-90*, Oxford University Press, Melbourne 1987, pp. 69-100.

commented on the "invisible luggage", the beliefs that migrants carried with them to the colony.[39] He referred to a sharing by most migrants of political assumptions of liberal protestantism and of democracy, together with a veneration for traditional British institutions. He asserted that the remedial social legislation enacted in Britain in the 1840s opened up the "long road to the welfare state", saying that if laissez faire never stood a chance in Victoria this was largely because the question had been decided before that state was created.[40] Dunstan, in *Governing the Metropolis: Politics, Technology and Social Change in a Victorian City: Melbourne 1850-1891* (1984), referred to the colonists of the gold generation coming to maturity when the values of economic individualism, which played a great part in nineteenth-century liberalism, were in the ascendant. He maintained that even though the march towards state socialism dates from this period, there were still occasions when the doctrine of laissez faire was invoked.[41] It was not unusual, he said, for public statements concerning increased government activity in the mid-nineteenth century to be expressed in terms of regret or, in an Australian case, explained as a result of "the imperfect stage of development that pertains to a very young country". Dunstan argued that mid-nineteenth century Britons (including Australian colonists) had no great tradition of state intervention, recalling instead a primarily agrarian society with remarkably weak central control and remarkably autonomous local bodies and small units of local government. The period had been stereotyped, he said, as "of an 'age of *laissez-faire*' in which governments refused, on principle, to interfere with the 'free' workings of society".[42]

Dunstan referred to Oliver MacDonagh's argument (see Chapter 1, below) that the expansion of the British state was provoked above all by "the irreducible brute matter" of unprecedented social problems, themselves products of massive social changes, with only government, and strong government at that, having the capacity to respond to the new societal problems. Dunstan argued, however, that in general the role of ideology may not have been as one-sided as MacDonagh maintained, noting in particular the role of the Benthamite utilitarians. Dunstan asserted that the only way to test competing arguments about the role of ideology and of individual reformers is to examine the growth of government in its appropriate historical context, referring here to the comment made by

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39 Geoffrey Serle, *The Golden Age: A History of the Colony of Victoria, 1851-1861*, Melbourne University Press, Melbourne 1963 (reprint 1968), p. 60.

40 Ibid., pp. 61-62.

41 David Dunstan, *Governing the Metropolis: Politics, Technology and Social Change in a Victorian City: Melbourne 1850-1891*, Melbourne University Press, Melbourne 1984, p. 15.

42 Ibid., p. 23.

Henry Parris in relation to the British situation, that the issue is really one of balance between the interests of private and public enterprise. Dunstan suggested that perhaps ideology proved itself adaptable at the time, noting John Stuart Mill's dictum, from his 1848 *Principles of Political Economy*, that generally laissez faire should apply unless some great good required a departure from it. Dunstan wondered how many colonial radicals, who, Serle asserted, looked to the *Principles* "as a guiding light", were encouraged to review laissez-faire doctrine accordingly.[43]

Dunstan suggested that the advance of colonial socialism in Victoria under "pretexts of necessity and underdevelopment" had some similarity to MacDonagh's view of government "growing in fits and starts by stealth and crisis, but never conscious design, only to emerge fully-drawn into the twentieth century as a welfare state." Equally however, Dunstan argued that this view might be compared with the experiences of colonial administrators and opinion makers who, he suggested, probably applied ideas derived from Britain when faced with social problems. Dunstan referred here to Louis Hartz's idea of colonial society as a "fragment", which on foundation drew much of its social and political identity from its parent. However, Dunstan made the obvious point, as did Connell, Irving and Davidson, that one must not assume that the colonial fragment will be either "static or necessarily faithful to its perceived parentage". The idea of "simplistic determinism" needs to be avoided, Dunstan said, especially if there are extensive differences of scale and circumstance between the colony and parent, since "fresh inputs" from the parent and other societies also required consideration.[44] Dunstan questioned whether exponents of laissez faire resisted the expansion of the colonial state, or whether, as Serle asserted, full-blown laissez faire never stood a chance in Victoria. He concluded that while Serle's view was persuasive, it was interesting to see the problems of colonial development being contested in these terms and to find that opponents of an orthodox view of the roles of government and private enterprise made their views public. This would hardly have been necessary, he said, if the question had already been settled.[45]

Although concerned largely with events occurring after those dealt with by this thesis,

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43 Ibid., pp. 24-25. Jeremy Bentham was a major influence on J.S. Mill (1806-1873), a British philosopher and economist, but Mill modified utilitarianism's goal of the greatest happiness for the greatest number by adding idealism, ethics and the need for long-term satisfaction.

44 Ibid., p. 25, Dunstan referring in footnote 5, p. 327 to Louis Hartz, *The Founding of New Societies*, New York 1964.

45 Ibid., p. 26.

Macintyre's approach in *A Colonial Liberalism: The Lost World of Three Victorian Visionaries* (1991) is of interest when compared with that of Roe. Macintyre, in discussing three individuals who were in fact directly concerned with law-making, is closer to the coalface than Roe, who was mainly concerned to discuss the evolution of more abstract ideas. Macintyre describes his book as an exercise in comparative history, aiming to place three colonial Victorian liberals in their imperial context. He seeks to demonstrate the existence of a colonial liberal tradition that was more a code of conduct than a political programme, but which nevertheless had powerful political implications. The liberals' model citizen was a reasonable, morally responsible, self-sufficient individual who believed in tolerance, privacy and the rule of law. Macintyre says that the liberals believed that citizens should be free from interference and the hierarchical constraints of traditional society. They favoured representative government, both as a check to despotism and because citizens should possess equal political rights.[46] Macintyre complains that historians have neglected liberalism, viewing it as part of "the cultural baggage" that colonists brought with them to Australia, only to be discarded as irrelevant to their practical concerns in a new country. He argues for a more positive approach, disputing the idea that the principles of colonial government lacked intellectual meaning and depth and querying the meaning the sceptics have attached to "liberalism". Macintyre says that their definition depends on a group of seminal figures who articulated its core principles, including Bentham's utilitarianism and Mill's individualism. This approach, Macintyre says, "has no room for the creative contribution of nineteenth-century Australians".[47] This thesis uses Macintyre's insight in a closely related context.

It seems that a more wholehearted approach than those offered above is appropriate for New South Wales and that there is room to do much more in exploring the creativity of the state in mid-nineteenth century Australia. What this thesis aims to do is to take up the MacDonagh insights in a thorough-going fashion and apply them to New South Wales, a colony where Anglo-Australian parallels are especially clear. While it is possible to begin the process of inquiry also for Van Diemen's Land where MacDonagh began it for Britain, in the 1820s, it is only in New South Wales that political and constitutional arrangements were sufficiently sophisticated, at least by the mid 1830s, to make the exercise worthwhile. Van Diemen's Land had a large, but unelected legislative council until 1851, and perhaps the

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46 Stuart Macintyre, *A Colonial Liberalism: The Lost World of Three Victorian Visionaries*, Oxford University Press, Melbourne 1991, pp. vii, 5.

47 Ibid., p. 11.

lack of thorough-going representation explains why there was no experimentation in that colony of the kind pursued in New South Wales. It may be that the unique Australian approach to methods of government that commenced in the early 1840s in New South Wales (which then encompassed Port Phillip) had important implications for the development of the type of government in use elsewhere in Australia from the mid 1850s, especially as evidenced by the interventionist tendencies described by David Dunstan for Victoria from that period. Thus the arguments of this thesis may throw light on the evolution of law-making, and of government more broadly, in Australia as a whole.

This thesis begins with a chapter examining the explanations offered by scholars for events, associated with law-making, which occurred in Great Britain in the nineteenth century, especially after 1832, and which are said to have heralded the birth of modern government and the beginning of the collectivist welfare state. Particular attention is paid to the model developed by Oliver MacDonagh to explain what he described as an administrative or governmental revolution. While some scholars have supported this approach, others have argued that change occurred mainly in response to the force of doctrines and ideas, much of the disputation centring on the issue of whether or not Benthamism influenced the course of events. Chapter 1 closes with a brief examination of the place of paternalism in nineteenth-century developments in social reform.

From this point, the chapters in the thesis are arranged in broadly chronological order. I seek where possible to apply MacDonagh's insights regarding developments in government and the management of legislative business in Great Britain when considering what law-makers did in New South Wales, especially in the 13 years before the commencement of responsible government in 1856. In the process, I consider the impact of historical events and of ideas on this activity, and the increasing emphasis placed on the need for expertise in government and in the public service, especially by adherents of utilitarianism. I am also concerned to examine the introduction of public opinion into the business of law-making before the advent of responsible government, and the means by which this was achieved, pointing in particular to the growing importance of select committees, as well as to the use of petitions and the role of the popular press.

Chapter 2 provides a background for my subsequent study of the way in which laws were developed in New South Wales and of the relationship between the legislature, the

executive and public opinion, by examining three aspects of early colonial history. The first concerns the constitutional basis for early colonial law-making, the second the evolution of colonial public administration while the third relates to law-making by the colony's first three legislative councils in the years between 1824 and early 1843.

Chapter 3 examines the nature of the relationship which evolved between the executive and the fourth legislative council, the first with elected members, from its commencement in 1843 until the end of the administration of Governor Sir George Gipps in 1846. Here, a major concern is to consider how and at whose instance laws were being made. Once again, this involves exploring the impact of expertise and public opinion. Whereas Chapter 3 is concerned with the dynamics of debate within the legislative council chamber itself, Chapter 4 explores the impact on the legislature and law-making of the expression of public opinion outside the chamber in the period between 1843 and 1846. The first portion of the chapter deals with public awareness as evidenced by petitions to the council and in the press, while the second examines the role of the council's select committees as law-making bodies and as alternative forums for debate.

Chapter 5 deals with the legislative activity of the fourth council in the early years of the administration of the new governor, Sir Charles FitzRoy, from 1846 to 1848, looking at both the work of select committees and the impact of petitions and other influences on law-making. Chapter 6 covers the legislative work of the fifth legislative council and its newly elected members. After an overview of select committee and petitioning activity and legislative output, it examines the work of lawmakers in two broad areas, namely the city and the bush and the regulation of private property, especially in the city. The chapter concludes with a discussion of the origin of ideas applied in this law-making activity. Chapters 7, 8 and 9 explore aspects of the law-making work of the sixth council which sat from October 1851 until the end of 1855. Chapter 7 deals with the Sydney Corporation, Chapter 8 with public health and sanitation and Chapter 9 with law and police reform.

Chapter 10 examines aspects of the preparation of the colony's constitution of 1855-56, namely the use made of select committees and the ideas expressed about the constitution of the proposed upper house, these issues being germane to the principal concerns of this thesis, while Chapter 11 describes briefly what happened to government and the legislative process when the New South Wales parliament was established in 1856. This last chapter considers

how the methods of accountability in law-making, established over the past 13 years, fared under responsible government. It shows that the introduction of responsible government was itself followed by something of a legislative dénouement. Factionalism accompanied the triumph of the liberal democrats and overwhelmed clear utilitarian priorities of the earlier years, militating against the passage of all but a few landmark reforms in the early parliamentary period.

The evidence clearly establishes that the colonial approach to law-making differed significantly from that described by MacDonagh and others as operating in Great Britain from the early 1830s. Colonial legislators in the years before 1856, and especially several of those elected from 1843, were intent on remaking colonial society and they demonstrated a readiness either to develop their own laws without reference to imperial models or to adapt British precedents for their own purposes. A play of both historical forces and of ideas was also present in the complex pattern of attitudes and priorities evident in New South Wales law-making. Intolerable conditions and pressures obviously played a part but so too did ideas—paternalism, laissez faire and Benthamite utilitarianism all having a significant impact in the colonial sphere. And yet the truth of many other aspects of MacDonagh's analysis of nineteenth-century governmental change and its applicability to New South Wales is admitted, especially his emphasis on expertise in law-making and government, and on the crucial position of public servants and the bureaucracy—on central control by experts. So too his emphasis on the critical importance of select committees which became a dominant force in the colonial legislative process, facilitating the introduction of outside opinion and expertise as government itself became more specialised.

Chapter 1 The birth of the modern state

There has been much discussion for well over a century about the implications of certain law-making activity in Great Britain during the nineteenth century, especially after 1832.[1] This activity has been associated with events described as heralding the birth of modern government and the beginnings of the collectivist welfare state, a state in which, broadly speaking, political power is deliberately exercised on the basis that the good of the whole is more important than that of the individual of any particular class. The features or indicators of the emergence of this new system are said to include an increasing concentration of power within the central government; the enactment of interventionist legislation in social and economic fields; the imposition of a growing and increasingly specialised professional and expert bureaucracy in the development and enforcement of laws; greater use of delegated legislation and other administrative discretions; and the use of a range of controls, such as licences, that fettered individual freedom and entrepreneurial action.

At the same time, the conduct of parliamentary business in Great Britain was said to be changing. Whatever the formalities, law-making was becoming the business of the government rather than of the parliament as a whole or, as had usually been the case with social welfare measures, of individual private members. Legislative policy was increasingly planned and systematic, continuous from session to session, and surviving changes in

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1 See, for example, H.A.L. Fisher (ed.), *The Constitutional History of England. A Course of Lectures delivered by F.W. Maitland*, Cambridge University Press, Cambridge 1908; A.V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*, Macmillan and Co. Ltd, London 1905; Oliver MacDonagh, "The Nineteenth Century Revolution in Government: A Reappraisal", *Historical Journal*, 1, 1, (1958); Oliver MacDonagh, "Delegated Legislation and Administrative Discretions in the 1850's: A Particular Study", *Victorian Studies*, 2, Sept. 1958; Oliver MacDonagh, *A Pattern of Government Growth 1800-60: The Passenger Acts and Their Enforcement*, MacGibbon and Kee, London 1961; Oliver MacDonagh, *Early Victorian Government 1830-1870*, Weidenfeld and Nicolson, London 1977; David Roberts, *Victorian Origins of the British Welfare State*, Yale University Press, New Haven 1960; David Roberts, "Jeremy Bentham and the Victorian Administrative State", *Victorian Studies*, 2, March 1959; G. Kitson Clark, *The Making of Victorian England*, Methuen and Co. Ltd, London 1962; Henry Parris, "The Nineteenth-Century Revolution in Government: A Reappraisal Reappraised", *Historical Journal*, 3, 1 (1960); Henry Parris, *Constitutional Bureaucracy: The Development of British Central Administration since the Eighteenth Century*, George Allen and Unwin Ltd, London 1969; Jenifer Hart, "Nineteenth-Century Social Reform: A Tory Interpretation of History", *Past and* Present, *A Journal of Historical Studies*, no. 31, 1965; Valerie Cromwell, "Interpretations of Nineteenth-Century Administration: An Analysis", *Victorian Studies*, 9, March 1966; Harold Perkin, *Origins of Modern English Society*, Routledge, London 1969 (1991 reprint); Arthur J. Taylor, *Laissez-faire and State Intervention in Nineteenth-century Britain*, Macmillan Press Ltd, London 1972 (1974 reprint); L.J. Hume, *Bentham and Bureaucracy*, Cambridge University Press, Cambridge 1981; Peter Dunkley, "Emigration and The State, 1803-1842: The Nineteenth-Century Revolution in Government Reconsidered", *Historical Journal*, 23, 2 (1980); Kim Lawes, *Paternalism and Politics: The Revival of Paternalism in Early Nineteenth-Century Britain*, Macmillan Press Ltd, London 2000.

political administrations. It was becoming clear that maintenance and execution of that policy called for the creation of the government commissions, inspectorates and executive positions which formed the basis of the modern public service. Parliamentary sessions lengthened and time taken up by private members decreased. The use of select committees and royal commissions to gather facts and elicit expert evidence grew rapidly and became regular after 1830, enabling the administration to act with a new confidence, perspective and breadth of vision. The official inquiry process also had a profound effect on public opinion, including opinion in parliament.[2]

The central problem for this thesis is to consider how closely developments in New South Wales in the middle decades of the nineteenth century, principally in the area of law-making, followed those identified as having occurred in Great Britain. One especially significant similarity involved select committees. Committees made an appearance in the law-making process in New South Wales in the earliest sessions of its first legislative body in the 1820s. They were to play a crucial role in the development of colonial legislation.

Considerable disputation has occurred about the causes of change in Britain. Some have seen it as mainly a response to intolerable conditions, others as mainly a response to the force of doctrines and ideas. On occasion, as most of the combatants concede, the coincidence of events, sometimes accidental, determined outcomes. Again, the thesis will consider the relevance of this debate to events that occurred in New South Wales.

The pioneer historians

As early as the 1880s F.W. Maitland commented on a change that had become very apparent after the passage of the British Reform Act in 1832. From that time, he wrote:

> Parliament begins to *legislate* with remarkable vigour, to overhaul the whole law of the country—criminal law, property law, the law of procedure, every department of the law—but about the same time it gives up the attempt to *govern* the country, to say what commons shall be enclosed, what roads shall be widened, what boroughs shall have paid constables and so forth. It begins to lay down general rules about these matters and to entrust their working partly to officials, to secretaries of state, to boards of commissioners, who for this purpose are endowed with new statutory powers, partly to the law courts.[3]

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2 See, for example, MacDonagh, *Early Victorian Government*, pp. 5-6; Parris, *Constitutional Bureaucracy*, pp. 160-172.

3 Fisher, *Maitland*, pp. 383-384 (emphasis in original). Maitland's view of events was cited with approval by Parris, *Constitutional Bureaucracy*, pp. 162, 185.

This was the result, Maitland said, of "a modern movement ... The new wants of a new age have been met in a new manner." But of "this vast change", he remarked, contemporary writers had hardly yet taken notice.[4]

The challenge was taken up by A.V. Dicey in the early 1900s. Dicey detected three main and slightly overlapping phases of "legislative opinion" in the United Kingdom in the nineteenth century. These were a period of old Toryism or legislative quiescence between 1800 and 1830, a period of Benthamism or Individualism between 1825 and 1870, and a period of Collectivism between 1865 and 1900.[5] The outburst of legislative activity after 1830 occurred, Dicey said, simply because "[t]he English people had at last come to perceive the intolerable incongruity between a rapidly changing social condition and the practical unchangeableness of the law", an explanation echoed by later writers such as Oliver MacDonagh, David Roberts and George Kitson Clark.[6] Dicey's reference to "intolerable incongruity" is especially telling, given the emphasis placed by these later writers on the existence of intolerable conditions as the catalyst for change. Dicey also made the acute observation that no statute, whatever its authors or its advocates contend, is so exceptional, isolated or obscure as not to form a precedent and an encouragement for other measures in the same strain, another point taken up by MacDonagh.[7]

Dicey summarised the principles of law reform of the Benthamite school, which he identified as contributing to the end of the era of legislative quiescence, as involving the idea of law-making as a science, the right aim of legislation being to carry out of the principle of utility, with the proper end of every law being the promotion of the greatest happiness of the greatest number. Further, as each person is in the main the best judge of his own happiness, legislation should aim to remove all those restrictions on the free action of an individual which are not necessary for securing the like freedom on the part of his neighbours.[8] Thus stated, this approach fits consistently with the doctrine of laissez faire that prevailed in the eighteenth century and early decades of the nineteenth century. Most importantly, it also required, broadly speaking, that the state should not interfere in the freedom of action of

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4 Ibid., p. 417.

5 Dicey, Lectures 4 to 8, pp. 62-301. See Parris, *Constitutional Bureaucracy*, pp. 258-266 for criticism of Dicey's approach.

6 Ibid., pp. 110-111 (quotation on p. 111).

7 Ibid., p. 41.

8 Ibid., pp. 63-64, 135, 145. In his *Theory of Legislation* (1776), Jeremy Bentham (1748-1832), philosopher and legal reformer, asserted that all British administrative machinery and laws needed drastic reform on the basis of the "utility" principle.

citizens (or at least certain classes of them) in economic matters.

In Dicey's view, legislation of the Benthamite period involved the transfer of political power to the middle class (seen in parliamentary and municipal reforms); humanitarianism (evidenced by emancipation of slaves, mitigation of the criminal law and prohibition of cruelty to animals); extension of individual liberty (as in freedom of contract and dealings with real property, revision of poor laws and extension of religious toleration); and the refining and extension of individuals' substantive legal rights (as in reforms to the law of evidence and procedure and the structure of the court system).[9] In contrast, Dicey said that the fundamental assumption of the later Collectivist period was faith in the benefit to be derived from state intervention for the purpose of conferring benefits on citizens generally, even if this involved interference with individual freedoms. For Dicey, legislative manifestations of this later period included extension of protections for citizens (as in the areas of workers' compensation, agricultural holdings, public health, factories and housing of the working classes); restriction on freedom of contract (seen in laws prohibiting agricultural tenants from bargaining away their statutory entitlement to compensation for improvements and workers their right to payment in money rather than goods); preference for collective action (arbitration and combination laws); and equalisation of advantages (elementary education and employers' liability).[10]

Over 50 years passed after Dicey propounded his views before the publication in 1958 of an important and controversial article in which Oliver MacDonagh offered his explanation for what he termed the governmental revolution in nineteenth-century United Kingdom.[11] MacDonagh acknowledged the importance of Dicey's work as the sole effort so far to explain the change in nineteenth-century executive government, but he said that it failed to provide a history of the change in the nature of the state. MacDonagh offered four explanations for that change. In summary, these were: what men (the term MacDonagh always used) thought and felt contemporary practices should be (doctrines and sentiments); what external or overt events directed current affairs decisively, or made men fully conscious of the tendencies of the time; what underlying social and economic pressures and medical, engineering and mechanical "potentialities" existed; and what was actually taking place within executive government itself. MacDonagh chose to concentrate on the last of these

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9 Ibid., pp. 183-209.

10 Ibid., pp. 258-301. See pp. 64-65 also for Dicey's discussion of collectivism.

11 MacDonagh, "The Nineteenth Century Revolution in Government".

factors, considering it to have been unduly neglected.[12]

MacDonagh referred to the change in executive government as a subtle transformation of the working of the state within society, which destroyed the belief that society did or should consist largely of an accumulation of contractual relationships between individuals. He advanced a five-stage model for the operation of this "legislative-cum-administrative process" which he said applied, with a few exceptions such as slavery reform, peculiarly to the half-century 1825-75. The process commenced with the exposure of an intolerable social evil, resulting in the setting in motion of "an irresistible engine of change" and a demand for remedy and prohibitory legislative enactments. This demand was usually met by a reaction, and then by compromise, as the result of representations and consultations in the course of the drafting of the reformist bill and in the committee stages in parliament, resulting in the weakening of penalties and enforcement machinery in the enacted statute. Despite this, the bill, however emasculated, became law and, as Dicey had said, it set a precedent. A responsibility for the subject of the statute had been accepted, whereupon the first stage of the process was complete.[13]

MacDonagh's second stage involved the discovery that the first statute had left the original evil largely or even totally untouched, not only because of concessions yielded in the initial processes but also because drafters and politicians (despite parliamentary inquiry in some cases) were unfamiliar with the conditions they wanted to regulate, and had paid scant attention to enforcement of penalties and achievement of objects. Their answer was to provide summary legal processes and special officers to see that they were enforced. MacDonagh contended that, like the original legislation, the appointment of such executive officers was a step of immense, if unforeseen, consequence. For the first time, professional officials became responsible for the enforcement of legislation and were able, by means of their experiences and reports, to highlight deficiencies in it. This led to authoritative and irresistible demands for legislative amendments, and a call for centralisation. MacDonagh observed, "without a clearly defined superior authority, the executive officers tended towards exorbitance or timid inactivity or an erratic veering between the two".[14] He noted that the original legislation typically failed to define the powers of the executive officers, often because the formation of an executive had not been contemplated. He also referred to a

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12 Ibid., pp. 54-57.
13 Ibid., pp. 57-58 (quotations on p. 58).
14 Ibid., pp. 58-59 (quotation on p. 59).

growing realisation by the officers of the need for "an authoritative superior both for the definition of the law and status and for protection and support against the anarchic 'public'". Centralisation was also required to facilitate the systematic collection and collation of evidence and reform proposals and to establish a link between parliament and the field executive. The third stage concluded, as the result of pressures arising from experience, in both fresh legislation and the establishment of a central superintending body.[15]

The fourth stage of the model involved a change in the administrators' attitude as they realised that even the new legislation had not provided a complete solution. Experience revealed new means of evading at least some of the new requirements. It also showed that the practical effects and judicial interpretations of statutory restrictions could not always be foreseen. Gradually, administrators realised that problems could not be resolved once and for all by a grand piece of legislation or an increase in personnel. Instead, they saw that improvement was a slow, uncertain process of closing loopholes and tightening enforcement mechanisms in the light of experience and experiment. Thus, the fourth stage involved the substitution of a dynamic for a static concept of administration and the gradual development of expertise in the principles of government in the field. In the fifth and final stage, executive officers and their superiors demanded, and to some extent secured, legislation that gave them discretion, not only in applying provisions, but also in imposing penalties and framing regulations. They also became involved in systematic and truly statistical and experimental investigations. MacDonagh concluded that, in the course of pressures towards autonomy and delegated legislation, experimentation in regulations, specialisation of administrative labour and a dynamic role for government within society, a new sort of state was born.[16]

Earlier in his article, when considering possible explanations for the change in the method of government, MacDonagh referred to one that looked to the social and economic pre-conditions of change, a "master factor" suggesting that social problems of the nineteenth-century kind would inevitably result in the same type of administrative answers. While conceding that trends towards administrative action were inherent in particular situations, MacDonagh argued against this theory. The correlation between social problem and administrative remedy was seldom exact and always prone to be distorted by accidents of personality, ideology, politics, and finance, or the state of expert opinion when the remedy

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15 Ibid., pp. 59-60 (quotation on p. 60).
16 Ibid., pp. 60-61.

was debated. Further, the mere timing of particular reforms could have important and even permanent effects on the whole course of subsequent administration.[17]

Finally, and linked with the issue of a "master factor", MacDonagh commented on the influence of Benthamism on administrative change. He suggested that one must be very circumspect before deciding that Benthamism was the operative force in any particular instance, and he argued that it had no influence on opinion at large or on the overwhelming majority of public servants. He argued strongly against the "blanket" prima facie assumption that "useful", "rational" or "centralising" changes in the nineteenth century were Benthamite in origin, since most of these changes were "natural answers to concrete day-to-day problems, pressed eventually to the surface by the sheer exigencies of the case".[18] Some 19 years later MacDonagh did concede that Bentham had virtually invented the mechanics of government. His ideas for central control and inspection, audit and statistical inquiry all pointed to centralisation and uniformity. This centralisation, MacDonagh said, implied both initiating power for the central body to frame rules and orders, and controlling power to see that they were enforced "equally, persistently and ubiquitously, without hindrance from local or vested interests". This concept of the state's functions, as MacDonagh observed, was not far removed from collectivism.[19]

MacDonagh's 1958 "model" article was followed by books in which he delved further into the origins of modern government and the beginnings of collectivism in the United Kingdom. In *A Pattern of Government Growth 1800-60: The Passenger Acts and Their Enforcement* (1961), he traced the development of British legislation dealing with the transport of passengers by sea, and its enforcement in the period between 1800 and 1860, and he placed the phases of that legislative process within the appropriate stages of his model. His fundamental purpose was to explain, for one particular field, the operation of pressures and tendencies at work in the early and mid-nineteenth century that gave rise to the development of the modern state. He advanced various basic tenets, arguing that reform did not always depend on the presence of "master-reformers" or agitation; that bureaucracy could develop without assistance from "master-bureaucrats"; that the greater part at least of the new administrative system was presented and accepted as a-political; that pressure from localities was often in favour of, and not against, enlargement of central power; and that

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17 Ibid., pp. 54-55.
18 Ibid., p. 65.
19 MacDonagh, *Early Victorian Government*, p. 37.

even very powerful lobbies and interests might be emasculated by the mere establishment of a field executive.[20]

MacDonagh referred to "terrible disclosures of mortality, privation, gross imposition upon poor and ignorant men, and sexual immorality" in the emigrant area, all acting on a sensitive and generally humanitarian opinion and leading to "irresistible demands for remedies". He argued that little thought was given, except in the earliest and least informed stages, to the philosophic, commercial or political implications of what was being proposed, and that increasingly the contradiction with laissez faire and individualism was ignored or explained away. As a result, those concerned with reform were impelled towards centralisation, delegated and discretionary powers, direct management of aspects of a private trade, preparation of innovative regulations and specialisation in administrative labour. That is, they were impelled towards the sort of state we recognise as modern. And all this was achieved with surprising speed and ease.[21] In tracing the development of the passenger legislation, MacDonagh returned to a major strand of his, and Dicey's, argument when he observed that even the passage of a major and theoretically definitive statute failed to stop government growth. He argued that "development continued despite—and also *because* of—the definitive legislation".[22] He also referred to Dicey's observations concerning the role of law itself as the creator of law-making opinion and the tendency of apparently isolated and ad hoc laws to reproduce themselves, often in new areas.[23]

Of particular interest, given matters to be explored in this thesis, are MacDonagh's views about the relative importance of politicians and administrators in the development of the modern state. In the area of passenger legislation, MacDonagh considered that politicians had no permanent and important influence.[24] When speaking of reforms in the areas of public health and sanitation in *Early Victorian Government 1830-1870* (1977), he returned to this theme. While the holder of a particular ministry or the political persuasion of those in office was occasionally important, he concluded that basically these issues were of little weight, as the politics of the case were "essentially governmental and bureaucratic".[25] On the other hand, he emphasised the critical role played by civil servants, referring particularly to

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20 MacDonagh, *Pattern*, pp. 15, 8.
21 Ibid., p. 17.
22 Ibid., p. 246 (emphasis in original).
23 Ibid., pp. 321, 324.
24 Ibid., p. 330.
25 MacDonagh, *Early Victorian Government*, p. 159.

the fact that lawyers formed a large and important component of the nineteenth-century government bureaucracy. He stressed the importance of the role played by run-of-the-mill Victorian public servants of higher grades. These he described as "intelligent, immensely experienced in their own lines of administration, conscientious but, personally, passive and uncreative".[26] They were indispensable to the advance of modern government in that they provided direction, uniformity and permanence in executive practice; created and sustained a continuous, impersonal official memory; constituted a repository of "case-law"; acted as the necessary middlemen between field-work and parliamentary review; and, above all, filtered proposed reforms and framed legislative solutions. In short, MacDonagh said, it was the public servants who "canalized the pressures, and enabled them to be harnessed profitably".[27] As will be seen, from at least the early 1830s, manifestations of this type of official began to appear in New South Wales, the prime example being Colonial Secretary Edward Deas Thomson. Many colonial public servants had long careers in key administrative and financial positions and thereby became the keepers of the colony's corporate memory. Further, because several also held ex officio positions as executive councillors and members of the colony's legislative council in the 25 years or so leading up to responsible government, they played perhaps an even more critical role than their English counterparts in framing laws and administrative procedures. Lawyers also occupied critical positions in colonial government, both as civil servants and politicians. Their influence is of especial concern to Australian historians.

MacDonagh also stressed the importance of a new, small class of nineteenth-century civil servants, the field executive. He asserted, as one might expect given their critical role in his 1958 "model", that they were the leaven of the Victorian state. Their attempts to enforce regulations in the field resulted in a rapid growth of knowledge on the subject of reform and a new pressure for further legislation. MacDonagh remarked that these officials could be regarded as the "earliest of those saving infusions of outside talent, experience and obstinacy ... which set off new ferments in old government" in Britain.[28] Some evidence exists that in New South Wales field officers involved in enforcement of local laws, such as inspectors of distilleries and of nuisances and police magistrates, together with John Hirst's crown land

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26 MacDonagh, *Pattern*, pp. 331-332 (quotation on both pages).

27 Ibid., p. 332. For a similar appraisal of the role of civil servants, see G. Kitson Clark, "'Statesmen in Disguise': Reflections on the History of the Neutrality of the Civil Service", in Peter Stansky (ed.), *The Victorian Revolution: Government and Society in Victoria's Britain*, Franklin Watts, Inc., New York 1973 (article first published in *Historical Journal*, 2 (1959)).

28 Ibid., pp. 332, 334 (quotation on p. 334). See also Parris, *Constitutional Bureaucracy*, pp. 178-180 on the role of administrators in initiating legislation.

commissioners, played some part in the formulation of legislation in the period covered by this thesis.[29] Certainly, the main distinguishing feature of New South Wales, compared with Britain, was the relative shortage of specialist expertise. It will be argued, however, that, at least to some limited extent, the legislature's committees filled this gap.

In another 1958 paper, MacDonagh examined the forces driving administrative change, and the development of delegated legislation and administrative discretions in mid-nineteenth-century England in an apparently adverse climate. He referred to a collectivist government in the 1850s (contrary to Dicey's schema) "moving silently but surely through the waters, unperceived", towards a "despotic" form of administration that conferred wide discretions on public servants and developed almost casually in the "very hey-day of liberal individualism and laissez-faire".[30] MacDonagh returned to this theme in his 1977 book when he observed that, far from administrative change being inevitable, both centralisation and collectivism were alien to the prevailing climate of individualism. In addition, impediments to administrative change in the United Kingdom included the intransigence of the English *ancien régime.* A system of local government that had developed over centuries was seen as part of the natural order of things and was deeply embedded in the old system of politics through patronage. A corresponding situation existed in the established church and the administration of the law. Nevertheless, MacDonagh said, between 1830 and 1870 administrative change took place, "surreptitiously and circuitously", because of an immense underlying pressure, and also because of the difficulty of judging particular executive and legislative actions against "the uncertain yardstick of individualism".[31]

Many such measures, especially involving Ireland, MacDonagh said, "slipped through unnoticed".[32] The Irish situation is of particular interest because of analogies with New South Wales (both being British dependencies), and because Irish precedents (for example, in public education and police) were cited when these issues were being thrashed out in the colony. MacDonagh said that experiments or improvisations in many fields were made in Ireland in a manner scarcely conceivable in contemporary England. Centralised

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29 See, for example, Manning to Thomson, 29 September 1845, Solicitor-General Manning providing two amending clauses to the Impounding Act following suggestions made by the senior police magistrate. SRNSW: Attorney General: 1845 4/2712.2. See also correspondence between the attorney-general and colonial secretary in March and April 1849 regarding a change in the law on the sale of seized goods following a suggestion from the McLeay River bench of magistrates. SRNSW: Attorney General: 1849 4/2832.

30 MacDonagh, "Delegated Legislation", p. 44.

31 MacDonagh, *Early Victorian Government*, pp. 8-9, 12-13 (quotations on p. 9).

32 Ibid., p. 9.

authoritarianism and national uniformity had long been characteristics of Irish government at all levels, and in MacDonagh's view this was so for several reasons. First, the Irish ruling class was too small and too scattered to govern individually or in small groups as in England. Secondly, Ireland was too poor for so small a unit as the parish, so important in England, to be administratively self-sufficient. Thirdly, the Irish ruling class, alien in religion, language, interest and habit to the mass of their fellow-countrymen, bound themselves together on national rather than parish, county or even regional lines.[33] The first two of these factors, at least, look familiar to the historian of mid-nineteenth-century New South Wales. For example, despite the best endeavours of Whitehall and local governors, local government structures in the colony remained undeveloped and ineffectual throughout the period dealt with by this thesis. All was allowed to depend on the executive in Sydney.

MacDonagh's critics

Various aspects of MacDonagh's thesis provoked considerable interest among his contemporaries. Much debate centred on whether the great social reforms in Britain during the middle decades of the nineteenth century were brought about by an impersonal and anonymous independent historical process and as the effect of a pervasive humanitarianism acting under the pressure of "intolerable" facts, or whether they were mainly the deliberate work of Benthamites. Some supported MacDonagh's idea of intolerable evils as the spur for reform. In the *Victorian Origins of the British Welfare State* (1960), David Roberts argued that two factors lay behind the apparent anomaly that politicians of various persuasions—most of whom had been wedded, consciously or unconsciously, to laissez faire in 1833, should have established an extensive administrative state within 25 years. These were the urgent need for social reform and the inadequacies of local government. Roberts said that "whenever social distress and local abuses became intolerable and the resulting agitation for reform loud and clamorous", parliamentarians acted in a manner that usually, and necessarily, demanded extension of the powers and functions of the central government. When combined with the need for efficient supervision of local government, this activity resulted in the growth of a large, powerful and benevolent central government.[34] Kitson Clark agreed, writing in 1962 of the early nineteenth-century campaign against slavery as the model for many future agitations, and arguing that it unleashed a new political weapon of

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33 Ibid., pp. 180-181.

34 Roberts, *Victorian Origins*, pp. 35-36, 38 (quotation on p. 36).

great power, "the weapon of organized moral indignation".[35] While criticising the tendency of historians to force particular reforms into too well-defined patterns, Kitson Clark, like MacDonagh and Roberts, referred to the evolution of the modern state taking shape "unnoticed, unplanned and certainly as far as most men were concerned absolutely undesired", and at the very time they were extolling the benefits of freedom and warning of the dangers of government interference.[36]

This approach was criticised, especially by advocates of the influence of ideas in producing change. In 1960 Henry Parris criticised the validity of MacDonagh's model, finding that it did not meet the facts in a number of important fields of administration during the 1840s and 1850s. There was nothing inevitable, he said, about the process by which institutions responded to changes in the society around them.[37] Jenifer Hart, in 1965, described as misleading and dangerous the view of certain historians she described as Tories, including MacDonagh, Kitson Clark and Roberts, that somehow things happen all by themselves, as a result of chance. This language encouraged one to forget, she said, that there were men (the term that Hart invariably used) behind these processes. It also obscured the fact that in the final analysis the social effects of the Industrial Revolution were caused by men, and it led to the notion that it was better not to plan because so much is achieved unplanned. Hart argued that this approach, which denigrated the role of men and ideas (whether for good or bad), reduced human beings to the mercy of blind forces, with nothing to fall back on but an inert faith in a generally diffused humanitarianism. She asserted that "most social evils were not removed without fierce battles against absurd arguments, vested interests, obscurantism and timidity". Their removal required considerable effort and determination on the part of men (even if only obscure men) to control events.[38]

Twenty years later, in the 1980s Peter Dunkley, one of a new generation of writers, joined Parris in criticising MacDonagh's model when he asked whether emigration administration was the best example of "the hidden pattern and self-momentum of nineteenth-century administrative change". Under the MacDonagh model, he said, one might expect to find that the early passenger legislation was largely devoid of political or

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35 Clark, *Victorian England*, p. 38.

36 Ibid., pp. 109, 281(quotation on p. 109).

37 Parris, "A Reappraisal Reappraised", pp. 29-33, 35.

38 Hart, "Nineteenth-Century Social Reform", pp. 57-61 (quotation on p. 61). J.C.D. Clark, *English Society 1688-1832: Ideology, social structure and political practice during the ancien regime*, Cambridge University Press, Cambridge 1985, p. 4 also questioned the sense of imputing a particular dynamic to historical processes.

administrative content. However, he found an early and growing recognition that the level of British emigration involved questions of poverty, regional development, economic vitality and social discipline, and that legislation was a potent means of controlling emigration flows. Clearly, something more was involved than an instinctive wish to legislate evils out of existence.[39] For Dunkley, the development of the emigration service was more fortuitous than logical, self-generating or inevitable, and could not provide a model for growth in other areas. The idea of "natural answers" arising almost automatically in reaction to the "sheer exigencies of the case" exaggerated institutional responsiveness. Further, Dunkley said, it failed to explain why government acted in one area of social concern and not in another, and why so many reforms of the 1830s and 40s involved central enforcement and the creation of inspectorates, events that could not be the result of mere coincidence.[40]

Later, Andrew Vincent, in a 1990 paper (examining new liberalism in Britain from 1880), also criticised the emphasis on modes of activity in preference to ideas. He referred to the use by MacDonagh, Kitson Clark and Roberts of an interpretative tool that he describes as "the incremental perspective", a belief that there was no overall coherence to historical movements. Vincent argues that it is difficult not to see "the mental climate, concepts and values" having a more significant role to play.[41]

In fact, previous historians had not ignored ideas and attitudes. Kitson Clark and Roberts had agreed with MacDonagh about the role of humanitarianism in nineteenth-century change. Kitson Clark believed that public officials, however important their independent actions, could have done nothing to develop the modern state without public support, and he highlighted the existence of a general tendency towards humanitarianism and reform in most classes of society throughout Victoria's reign.[42] Roberts detected in some a philanthropic eagerness for reform. The abuses of industrial England offended the dictates of reason and religion, he said, although the wave of humanitarianism had not stemmed from any one school. The abuses also contradicted the utilitarians' guiding principle of the

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39 Dunkley, "Emigration and The State", pp. 355-359.

40 Ibid., pp. 377-380. For criticism of other aspects of MacDonagh's model, see P.W.J. Bartrip, "British Government Inspection, 1832-1875: Some Observations", *Historical Journal*, 25, 3 (1982); Bruce Knox, "The Queen's Letter of 1865 and the British Policy towards Emancipation and Indentured Labour in the West Indies, 1830-1865", *Historical Journal*, 29, 2 (1986); Peter Gray, "'Shovelling out your paupers': The British State and Irish Famine Migration 1846-50", *Patterns of Prejudice*, vol. 33, no. 4 (1999).

41 Andrew Vincent, "The New Liberalism in Britain 1880-1914", *Australian Journal of Politics and History*, vol. 36, 1990, p. 392.

42 Clark, *Victorian England*, pp. 280-282.

greatest happiness of the greatest number. Roberts, at least, had permitted some role for Benthamites in reform.[43] Later, however, he had argued that it would be a mistake to exaggerate the role of utilitarians and evangelicals, since their ideas were never widely held. He claimed that the conventional attitude of supporting safe and necessary reforms was far more common.[44]

Hart had already made a significant contribution to this part of the argument. She distinguished compassion from intellectual or ideological motivation. Critics had suggested that the Whig interpretation of history requires heroes and villains, but she had queried whether the Tory interpretation of the humanitarian impact was any better. She claimed that they downplayed the role of men and ideas, especially the role of Benthamites, and that they thought opinion, often moved by Christian conscience, was generally humanitarian.[45] She levelled her sights at Kitson Clark and Roberts for what she described as their vague, false and misleading statements about the humanitarianism of the age. For Hart, the critical issue was how widespread humanitarian feeling was. The nineteenth century was thought to be more humanitarian than it really was partly because of the identification of a concern for morality with a concern for happiness and partly because of misconceptions about religious doctrines in the period. Mines inspector H.S. Tremenheere considered himself a humanitarian, Hart said, but, in reality, he was a moralist, not being shocked by conditions in the mines or by the accident rate, but by the miners' "drunkenness, sensuality, laziness, extravagance, and lack of respect for their masters".[46]

Hart also queried assertions that religious influence supported social progress. She argued that some causes that appear superficially to have been religiously inspired, were not, that many Christians were not interested in social or political problems at all, and that the influence of religion was often hostile rather than conducive to social progress. This was a fundamental issue for law-making throughout the empire. Not only Christians felt moral indignation. Also some individual Christians or groups of Christians supported causes because of secular ideals and philosophies. Hart referred to Christians being worried about the lack of religious faith among the poor, to the existence of a hard core of resistance to social radicalism among the evangelicals, and to the social unprogressiveness of many in the

43 Roberts, *Victorian Origins*, pp. 24-27.
44 Ibid., p. 318.
45 Hart, p. 39.
46 Ibid., pp. 48-53 (quotation on p. 53).

Church of England, with Anglican clergy asserting that poverty was ordained by God and that afflictions were good for people or were sent by God as a punishment. Such doctrines, she said, were hardly conducive to the efforts of others to study disease and public health in a scientific way.[47] Many such points resonate with happenings in New South Wales, especially in relation to efforts to use the moral authority of the state to establish a universal, secular system of education.

Dunkley similarly questioned the extent to which humanitarianism prompted state action.[48] For him, the initial 1828 passenger statute arose principally from the demands of colonial administration and from government's fears about domestic social order, rather than being the product of "unadulterated humanitarianism". In Dunkley's view, "humanitarianism" was too vague a concept to explain administrative growth and change. It did not take account of the Colonial Office's tendency to temporise, to balance conflicting interests and to consider imperial ramifications that were incompatible with humanitarian reform, or the wish of individual officers to maintain the bureaucratic detachment that reflected both their insularity and their views on what government could reasonably be expected to accomplish.[49]

In 1966 Valerie Cromwell had criticised another aspect of MacDonagh's thesis. She noted MacDonagh's reference to a "revolution" in reference to change, and she argued that administrative change of its nature is among the slowest of all historical processes. The pattern of the period, she said, was one of slow adaptation among existing government departments to cope with new administrative problems. Further, she said that the new departments took the form of the old and that a continuity of personnel prevented any "brave new look".[50] She also noted that few writers had so far considered the politics of the period. Safe majorities in the Commons in the 1830s and 1840s had enabled governments to get administrative legislation through that House, "vested interests, weird ideas or no". However, the disappearance of such majorities after 1850 and a period of party fragmentation resulted in a series of weak governments, producing the expected corollary, a situation in which governments avoided difficult legislation at almost any cost.[51] As will be seen, this was a political situation with which colonials became familiar about the same time,

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47 Ibid., pp. 53-57.
48 Dunkley, p. 373.
49 Ibid., p. 375.
50 Cromwell, "Nineteenth-Century Administration", pp. 246-247 (quotation on p. 247).
51 Ibid., pp. 254-255 (quotation on p. 254).

the incapacity of British governments from 1850 having some parallels with New South Wales after 1855.

How important was Bentham?

Kitson Clark suggested that in the history of public opinion too much attention has been paid to men of significant intellectual standing and too little to those in the background. Jeremy Bentham was a probable example of exaggerated attention, he said, and he laid some blame for this on Dicey who, as a jurist rather than an historian, had looked to the philosophy behind laws rather than to the agencies of policy. Kitson Clark agreed with MacDonagh that much administrative and legislative development was the result of the work and hard-bought experience of officials, many of whom had probably never heard of Bentham but on whom public demands imposed novel and onerous tasks.[52]

In a 1959 article in which he discussed Bentham's *Constitutional Code,* Roberts joined MacDonagh in questioning the influence of Benthamism.[53] Roberts agreed that the series of momentous social reforms that brought about an administrative revolution by the 1850s did result in Bentham's blueprint for the administrative state being roughly translated into reality. He also agreed that the obvious similarities between Bentham's *Code* and the mid-Victorian administrative state suggests a causal relation, and he noted that Dicey, among others, considered Bentham's influence on the growth of English government to have been profound.[54] Despite this, Roberts argued that Victorian reformers would probably have formulated schemes of social reform, accompanied by central inspectors, even without Bentham's epochal works. While Bentham's ideas influenced the growth of the central administration, the Victorian administrative state was a direct result of prevailing social conditions in a changing society.[55] However, in 1960 Roberts conceded that it had fallen to the utilitarians to offer a comprehensive and practical plan of reform of public administration in the early 1830s. They had understood the necessity of "Act of Parliament" reform, Roberts said, and saw the need for a strong, benevolent government and an efficient,

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52 Clark, *Victorian England,* pp. 18-20. See also Clark, *Civil Service,* p. 83.

53 Roberts, "Jeremy Bentham". The first volume of the *Code* was published in 1830, two years before Bentham's death.

54 Ibid., pp. 194-196.

55 Ibid., pp. 207-210.

uniform administration.[56]

Parris, on the other hand, stressed the importance of contemporary thought about political and social organisation, pointing to the close connection between law and opinion to which Dicey had referred. He considered, however, that the evolution of that relationship fell into two periods, with the dividing line at about 1830, with Utilitarianism the dominant current of opinion throughout the second period. He argued that the application of the principle of utility led simultaneously to considerable extensions of both laissez faire and state intervention.[57] When criticising MacDonagh's rejection of the influence of Benthamism on opinion at large or on public servants generally, Parris observed that all men (the term that Parris always used) in the field of public administration were definitely not equal, and that one Edwin Chadwick (whose Benthamism MacDonagh did admit) counted for hundreds of rank-and-file public servants. Further, he said, MacDonagh had made no allowance for the unconscious influence of widely diffused ideas on men's minds.[58] Parris suggested that the apparent desire to reduce the importance of Bentham sprang from a need to resolve the apparent contradiction between laissez faire and state intervention. But, he said, MacDonagh had not resolved this puzzle.[59] While it would be absurd to argue that one man had revolutionised British government by the power of abstract thought alone, Bentham's ideas were influential because they derived from the processes of change going on around him. The question, then was, "not *laissez-faire or* State intervention, but where, in the light of constantly changing circumstances, the line between them should be drawn".[60]

Later, in 1969, Parris argued that laissez faire and state intervention were equally characteristic of the middle quarters of nineteenth-century Britain. However, he warned against assuming that laissez faire was in play merely because its slogans were invoked by those who opposed various central government initiatives. Parris noted that in truth such opposition may have stemmed from a threat to the opponents' interests, either absolutely or

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56 Roberts, *Victorian Origins*, pp. 28-29. At pp. 30-31, Roberts noted that while very few young utilitarians knew Bentham or had read his work in 1833, those very few were "men of energy and intellect".

57 Parris, "Reappraisal", p. 35. See also, Parris, *Constitutional Bureaucracy*, pp. 258-273.

58 Ibid., pp. 27-28. Edwin Chadwick (1800-90), a barrister by profession, served as Bentham's private secretary as a young man. As will be seen, he later worked in various areas of social reform in Britain, and was a member and the secretary of the royal commission on the poor law and a commissioner on the board of health. See Roberts, *Victorian Origins*, p. 31.

59 Ibid., pp. 33-34.

60 Ibid., pp. 36-37 (quotation on p. 37, emphasis in original). See also, Parris, *Constitutional Bureaucracy*, pp. 281-282.

relatively to those of some other group. On the other hand, acceptance of centralisation may have come from a belief that government was in the safe hands of one's own kind or that one stood to receive some benefit in return.[61] In the upshot, Parris concluded that both laissez faire and public enterprise were justified by utilitarian principles—there was a place for each, and no inconsistency in advocating both.[62] The relationship between these two principles, as they were worked out in New South Wales, will play a central part in the argument of later chapters of this thesis. Here, as in England, they can sometimes be seen reinforcing each other, and sometimes at odds.

Hart also rejected what she termed the Tories' denigration of the Benthamites, arguing that the Benthamites were the only consistent and systematic advocates of inspection in some form or other. The inception of central inspection in several fields after 1830 obviously occurred, she said, because of the accumulated influence of the Benthamites' arguments, and, more importantly, because some Benthamites held influential positions on commissions of inquiry and in other offices.[63] Dunkley too adduced evidence to show that the men most involved in the shaping of emigration administration were aware of Bentham's principles.[64] Hart continued that, in the enterprise of social reform, many men were assisted whether they knew it or not by Benthamism, not so much because it provided practical and ingenious answers to problems as because "of the humanist notion that the diminution of misery is in itself a sufficient justification for action, and that reforms need not be justified on the ground that they improve the morality of the sufferer".[65] Noting that the Benthamites had provided a theoretical framework, the criterion of utility, against which society's institutions could be judged, Hart argued, like Parris, that people can be influenced by ideas of unknown origin which have become part of the general climate of opinion. Further, she said, the Benthamites did not confine themselves to theories but also made empirical studies, often of a novel kind, to find out what actually happened, and then proposed specific remedies for what they considered evils. Hart viewed the anti-Benthamite historians' case as resting partly on their views about the relationship between Benthamism and laissez faire. These writers identified Benthamism with laissez-faire individualism, saw encroachments on this principle in nineteenth-century British government and concluded therefore that Benthamism could not have been influential. Benthamites were not doctrinaire advocates of laissez faire. In fact,

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61 Ibid., pp. 270-271.
62 Ibid., p. 282.
63 Hart, pp. 44-45.
64 Dunkley, pp. 377-379.
65 Hart, p. 61.

she said, the testing of policy by reference to its effect on human happiness, the main utilitarian principle, led to considerable extensions of both laissez faire and state intervention.[66]

In 1969, similarly during the first phase of this debate, Harold Perkin, in his *Origins of Modern English Society*, explored the influence of Benthamism as one aspect of a discussion of the struggle between ideals in nineteenth-century England. He thought it improbable that MacDonagh's emigration officers had not heard of Bentham in an age of vociferous Benthamism. Perkin argued that the first group of reformers, who discovered and protested about intolerable facts, were primarily "social cranks" for whom what he termed "the professional ideal" had a special appeal, while the second group, the great reforming civil servants, were by definition professionals on whom this ideal operated directly. After reviewing the personnel involved and their activities in legislative and administrative arenas, Perkin concluded that they were conscious or unconscious Benthamites. Bentham, he said, stood above all for efficient and responsible government. His method of dealing with any governmental or societal problem by means of inquiry, report, legislation, administration and inspection was precisely that applied by both groups of reformers, but especially by the professional administrators. This did not necessarily mean that Bentham's influence was involved in every situation in which he had predicted and advocated reform. Rather, Perkin said, the important question is not so much *who* Bentham influenced as *why* they were influenced by him. His answer was that Bentham spoke to them as professionals. In his chosen field of government, the great advocate of reform was the apotheosis of the professional ideal. He stood for expert, efficient administration in the interests of the greatest happiness of the greatest number.[67]

Three years later Arthur Taylor, in *Laissez-faire and State Intervention in Nineteenth-century Britain*, traced the historiography as it existed so far on nineteenth-century laissez faire and Bentham's commitment to it. When exploring the view that the nineteenth century, or a greater part of it, was dominated by the principle and practice of laissez faire, he referred to the problem of arriving at a generally acceptable definition of the term. Given the various possible definitions, Taylor said, it was hardly surprising that one person's laissez faire was another's intervention. No utilitarian believed in government for its own sake.

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66 Ibid., pp. 45-47.

67 Perkin, pp. 267-269.

Bentham and his followers sought better rather than more government, with even the best government being a necessary evil. However, Taylor said, the interventionist implications of Benthamism did manifest themselves in Britain after 1830, in the face of increasing problems arising from industrialisation, population growth and urbanisation.[68]

The persistence or decline of laissez faire, said Taylor, needs to be judged by the content rather than the form of policy and administration. He found that the adoption of laissez-faire policies was more strongly evident the more purely economic the area of government concern. Conversely, where economic considerations were, or appeared to be, subordinate, less emphasis was placed on them and state intervention was less inhibited.[69] Hart and Parris argued that the application of utilitarian principle could lead to extensions of both laissez faire and state intervention. However, Taylor, when looking at areas where social and economic considerations were of seemingly equal importance, claimed that economists pointing to laissez faire were met by humanitarians invoking state intervention, the implication being that a contradiction of principle existed between them. Here, he said, the one tended to moderate the other, citing factory reform where advocates of non-intervention did not prevent the passage of legislation but did restrict its progress and extent. In the "wide field" of economic policy, where government decisions were least fettered by non-economic social or humanitarian considerations, laissez-faire solutions were most evident and persistent. However, even in the economic field, the British government tightened controls over joint-stock banks and the banking system generally, and the overall effect of the legislation was interventionist rather than libertarian.[70] Taylor noted that Victorian governments implicitly believed that economies prospered best when left to the free play of market forces. (This was also a characteristic of the mid-nineteenth-century colonial government.) Thus nineteenth-century England came closer to experiencing an age of laissez faire than any other society in the last 500 years.[71] This is another issue which, as will be seen, can be usefully explored with evidence from contemporary New South Wales.

Moving forward again to the 1980s, we find L.J. Hume, in *Bentham and Bureaucracy*, adopting yet another approach to the question of Benthamite influence. Bentham, he said, contemplated extensive state intervention in the economy, despite his laissez-faire

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68 Taylor, pp. 11-12, 36.
69 Ibid., pp. 54-56.
70 Ibid., pp. 57-59.
71 Ibid., p. 64.

philosophy and individualism. Various facets of Bentham's thinking foreshadowed the activities of modern centralist governments, including an emphasis on the importance of keeping records and on collecting statistics and information useful to legislators and other decision-makers and managers, and on the need for the licensing of some economic activities, for the setting and regulation of standards, for the operation of central inspectorates in areas such as poor relief, and for the overseeing of licensed traders.[72] Hume also referred to Bentham's advocacy of social welfare activities involving maintenance of the poor, care of the sick and insane and provision of public health services, free public education, and a rudimentary form of social insurance through friendly societies. However, these schemes, although apparently motivated by liberal, humanitarian motives, also sprang from a concern to protect the educated and orderly sections of the community against the depredations of an uneducated and starving populace. Bentham, he said, was ingenious in devising frugal arrangements for the care and upkeep of the poor.[73] As will be seen, signs of middle-class defensiveness were also evident in certain colonial legislative arrangements.

How important was paternalism?

A different slant on nineteenth-century developments in social reform has been presented by studies relating to paternalism. In 1979, in his book, *Paternalism in Early Victorian England,* David Roberts argued that the paternalism practised by the English ruling class from the late middle ages to the eighteenth century was given a more deliberate and theoretical form at the beginning of the industrial and urban revolutions, as a means of remedying new and frightening social problems. This transformation involved a synthesis of authoritarianism and deference, with ideas about Christian duty, man's sinfulness and the inevitability of poverty.[74] Roberts noted the paternalists' complex and ambivalent attitudes towards the role of government. Some called for legislative action, but often this was to increase the powers of local government, the established Church and private property, as paternalists, he said, had a decided preference for local over central government and, within the local sphere, for private over public legislation. They believed that laws should be executed by persons of rank in local spheres, not by Benthamite commissioners. In Roberts'

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72 Hume, pp. 2, 95, 102, 123, 133,140.

73 Ibid., pp. 80, 127-128.

74 David Roberts, *Paternalism in Early Victorian England,* Croom Helm Ltd, London 1979, pp. 22, 99-100. See also David Roberts, "Tory Paternalism and Social Reform in Early Victorian England", in Peter Stansky (ed.), *The Victorian Revolution: Government and Society in Victoria's Britain,* New York 1973 (first published in *American Historical Review,* 63 (1958)).

view, the paternalists' idea of a protective and directive government thus had little place for a central bureaucracy.[75]

The social outlook of paternalism, so Roberts argued, had "older and deeper roots than its three closest rivals among social outlooks: the economists' vision of a laissez faire society, the evangelicals' hope of an expanding philanthropy, and the utilitarians' belief in a reforming government".[76] Paternalists therefore played a negative role in most major reforms, largely because, so Roberts believed, economic, social and bureaucratic forces and not any set of ideas (such as that regarding the idea of a paternal government) led to the expansion of a strong central government. However, he claimed that many bureaucrats of the 1840s were more paternalist in social outlook than they were followers of political economy, utilitarianism or the voluntarism of dissent. Again, this is an insight with ramifications for New South Wales, where, as has been noted, there was by this time an entrenched landed class. While Roberts conceded that many of the most notable and creative bureaucrats believed in the utilitarian idea of a reforming government, at the same time they administered their departments in concert with inspectors who held the deepest paternalistic convictions.[77] Roberts also referred to the weak operation of social ideas in politics in the mid 1840s, arguing that they seldom matched economic interests, party ambitions or religious passions, although they often reflected social aspirations and were sometimes employed to shame political opponents.[78] In conclusion, Roberts described the paternalism of the 1840s, in Britain, as the most universal of social attitudes. It was neither progressive, innovative nor logical about social problems, owing its universal acceptance to its caution, respect for the past, generality and adaptability, lack of depth and subtlety, and reliance on plain dictums and home truths. For Roberts, the late flowering of paternalism failed for two reasons. First, it was defensive, inept and anachronistic in the face of disturbing challenges. Secondly, the well-defined personal relationships on which it depended failed to withstand large-scale urbanisation, central bureaucracies, diffuse philanthropy and the individualism, egalitarianism and democracy now rudely asserted by the contemporary lower-middle and working classes. Roberts denied the assertion of some twentieth-century historians that Tory paternalism was the principal source of the welfare state.[79]

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75 Ibid., pp. 40, 46, 200.
76 Ibid., p. 85.
77 Ibid., pp. 206-207.
78 Ibid., p. 248.
79 Ibid., pp. 269-272.

This complex pattern of attitudes and priorities is, again, in evidence among Sydney's law-makers at the time, and so are the apparent contradictions of principle. The implications for a state originally formed to administer a penal system are especially telling. However, a somewhat different view has been taken by Kim Lawes when examining the work of early nineteenth-century paternalists in *Paternalism and Politics: The Revival of Paternalism in Early Nineteenth-Century Britain* (2000). Lawes says that these individuals sought to deal with changing social and political conditions by "focussing on the paternal responsibilities of government and parliament", and that they looked to the state for solutions to both social and economic problems. This "substitution of governmental for familial and community responsibility", Lawes says, distinguishes them from eighteenth-century paternalists and, contrary to Roberts' view, it helps in our understanding the paternalist origins of the Victorian collectivist state.[80] It remains to be seen how well this explanation works for New South Wales. For Lawes, paternalist demands for government intervention and regulation in social and economic areas marked a radical departure from the eighteenth-century minimalist view of government, clashing also with the individualistic, laissez-faire philosophy of the early nineteenth century.[81] On examining historical interpretations of the 1833 Factory Act and its implications for subsequent government expansion, Lawes argues along the lines adopted by Cromwell. That is to say, neither the pro-Benthamites, including Dicey, Parris and Hart, nor the more conservative group of anti-Benthamites that included MacDonagh and Roberts, have paid sufficient attention to the political or parliamentary context in which the statute was enacted. A parliamentary inquiry in 1832 on the proposal, controlled by Michael Sadler and dominated by witnesses reinforcing his paternalist philosophy, convinced even the most committed exponents of laissez faire that some degree of regulation was required. Parliamentarians were forced, Lawes says, to reassess their understanding of the legislature's duties. Further, the government, wishing to undermine Sadler while themselves harnessing the potential power of his paternalist approach, proposed amendments which offered more than its opponents and considerably extended the responsibilities of manufacturers for the welfare, safety and education of child workers. Though some of these proposals ultimately failed, Lawes argues that the most important feature of the resulting enactment was government acceptance of significant interference in master-and-servant relations and of its responsibility for regulation of the entire textile industry rather than mere inspection. Discussion of Bentham's influence, she says, had

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80 Lawes, p.1.

81 Ibid., pp. 2, 7.

diverted attention from this fact.[82]

When considering the problems encountered so far in reconciling collectivism and centralisation with individualistic and laissez-faire ideas, Lawes points to Sadler's role in introducing the idea of a "paternal" or "protective" government to the British parliament in the 1820s. The major difference between the Sadlerite and Benthamite views of government did not turn on whether government functions should be directed locally or centrally, but on the reason for advocating state action. Benthamites were interested in improving the minds of the lower orders by social conditioning, as Hume had pointed out. Sadler and the paternalists, on the other hand, believed that the government's primary role was to improve quality of life, thereby contributing to the institutionalisation of paternalist, protectionist principles and to the development of both the Victorian collectivist and the modern welfare state.[83]

It remains to be seen, then, how this complex historiography can be related to parallel issues in colonial New South Wales.

82 Ibid., pp. 167-168, 181, 184-187.
83 Ibid., pp. 190-193.

Chapter 2 Setting the scene

This thesis is concerned with the means by which the New South Wales government and legislature obtained information and advice for the development of laws. It is also concerned with the functioning of the legislature and its relationship with the colonial bureaucracy and local public opinion, colonial developments being compared with those of Great Britain in the middle decades of the nineteenth century. The present chapter provides a setting for the study by examining pertinent aspects of the colony's early years. The first section considers the constitutional basis for early colonial law-making, the second examines the evolution of colonial public administration, and the third provides an overview of law-making by the colony's first legislature between 1824 and 1843.

The constitutional framework

An appreciation of the colony's constitutional beginnings is relevant to an understanding of why governmental and legislative processes in New South Wales differed in many respects from those of the mother country. In accordance with principles developed in eighteenth-century England, New South Wales fell within the category of "settled colonies", those occupied by British people and hitherto uninhabited, or treated as such. These colonies were distinguished from conquered colonies that had been obtained by conquest or had been ceded to Britain.[1] So far as the introduction of English law to settled colonies was concerned, the generally accepted principle was that stated by Sir William Blackstone in 1765, namely that colonists carried with them, from their first occupation of uninhabited country, only so much of the English law as was applicable to their situation and the condition of an infant colony. For instance, laws governing inheritance and protection from personal injury applied, but those dealing with complex commercial and revenue issues, and considered to be neither necessary nor convenient to colonial circumstances, did not apply. Disputed cases, as to what laws did or did not apply, at what times and under what restrictions, were to be decided in the first instance by the local judicature, subject to revision and control by the

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1 Arthur Berridale Keith, *Responsible Government in the Dominions*, Clarendon Press, Oxford 1912, 3 vols. (2nd edn. in 2 vols, 1928), vol. 1, pp. 3-4; J.M. Bennett and Alex. C. Castles (eds.), *A Source Book of Australian Legal History: Source Materials from the Eighteenth to the Twentieth Centuries*, Law Book Co. Ltd, Sydney 1979, p. 247. See also R.D. Lumb, *The Constitutions of the Australian States*, University of Queensland Press, St. Lucia 1963 (fifth edn. 1991), pp. 3-6, 19; R. Else-Mitchell, "The Foundation of New South Wales and the Inheritance of the Common Law", *JRAHS*, vol. 49, pt. 1, June 1963, pp. 1-22; Alex. C. Castles, "The Reception and Status of English Law in Australia", *Adelaide Law Review*, 1963 - 1, pp. 1-31.

sovereign in council. The whole constitution of a new settled colony, said Blackstone, was also liable to be "new-modelled and reformed by the general superintending power of the legislature in the mother-country".[2]

As a general rule, the date of occupation or foundation of a colony was the critical point for determining what English common law and statute law was to be applied.[3] The invariable usage in such cases, according to James Stephen, in the 1820s legal counsel to the Colonial Office and later under-secretary, was to require the colony's governor to convene an assembly elected by local freeholders.[4] However, in New South Wales, due to the circumstances in which the colony was established and the terms of imperial legislation and other legal instruments applying to it, the colony did not have any form of legislature until 1824, and English foundation law continued to apply to it until the passage of the Australian Courts Act in 1828. The system of government up to that time did not conform with constitutional precepts established in England. There was no separation between the legislative, executive and judicial organs. The governor was not only the sole source of legislative and executive power but also the final court of civil appeal and exercised the power of pardon in criminal cases.[5] Until the establishment of the legislative council in 1824, governors legislated by delegated instruments (regulations, orders and proclamations). In 1812, a parliamentary select committee had commented on the governor's exceedingly wide powers, observing that however just and wise he might be, the concentration of so much authority and responsibility must inevitably at times "create opposition and discontent amongst men unused, in their country, to see so great a monopoly of power".[6]

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2 William Blackstone, *Commentaries on the Law of England*, Clarendon Press, Oxford 1765 (4th edn., 4 books, 1770), vol. 1, p. 107. See also Bennett and Castles, pp. 248-250, 287-289; Castles, p. 4; Arthur Berriedale Keith, *The Dominions as Sovereign States: Their Constitutions and Governments*, Macmillan and Co. Ltd, London 1938, p. 153.

3 Bennett and Castles, pp. 248-249; Castles, pp. 13-19; Else-Mitchell, p. 2.

4 1822 Opinion of Stephen as legal counsel, *HRA*, 4 ,1, pp. 413-415; Herbert Vere Evatt, "The Legal Foundations of New South Wales", *Australian Law Journal*, vol. 11, Feb. 18 1938, pp. 409-424. On Stephen, see Paul Knaplund, *James Stephen and The British Colonial System 1813-1847*, University of Wisconsin Press, Madison 1953; A.G.L. Shaw, "Orders from Downing Street", *JRAHS*, vol. 54, pt. 2, June 1968, pp. 113-114.

5 Else-Mitchell, p. 5; John M. Ward, *Colonial Self-Government: The British Experience 1759-1856*, Macmillan Press Ltd, London 1976, pp. 130-133. See also Alan Atkinson, *The Europeans in Australia. A History*, vol. 1, *The Beginning*, Oxford University Press, Melbourne 1997, pp. 262-263 on Jeremy Bentham's unpublished pamphlet entitled, *A Plea for the Constitution: Shewing the Enormities Committed, to the oppression of British subjects, innocent as well as guilty; in breach of Magna Charta, the Petition of Rights, the Habeas Corpus Act, and the Bill of Rights. As likewise of the several Transportation Acts, in and by the Design, Foundation, and Government of the Penal Colony of New South Wales*, which dealt especially with the power of the governor of New South Wales.

6 C.M.H. Clark, *Select Documents in Australian History 1788-1850*, Angus and Robertson, Sydney 1966, pp. 306-307, Clark citing p. 8 *Parliamentary Papers* 1812, 11, 341. See also Clark, *Select Documents*, pp. 301-308, 311-319; Bennett and Castles, pp. 263-269; Castles, p. 2; Evatt, pp. 409-423.

In the early 1820s the British government considered it necessary to tackle the uncertainty surrounding the making and application of the colony's laws, at least in part, by securing the passage of the statute, 4 Geo. IV c. 96, commonly called the New South Wales Act, 1823.[7] That Act empowered the governor to impose taxes for local purposes and authorised the reconstitution of the judicial system. It also began the gradual process by which the wide-ranging powers of the governor were reined in and free colonists and officials were given a role in local law-making. It authorised the crown to appoint a legislative council of not less than five and not more than seven. From Governor Darling's arrival in the colony in late 1825, governors were also required to perform their functions with the concurrence and advice of an executive council. In 1825, Stephen also pointed to the need to modify the general instructions issued to New South Wales governors, noting how little they had changed from the instructions prepared for first settlement when the colony was regarded exclusively as a receptacle for convicts.[8]

Whether the early 1820s constituted a watershed in the governance of colonial affairs is debatable. Although Paul Finn refers to Governor Macquarie's departure at the end of 1821 as the passing of "the last of the autocrats", he also notes that the colony's first 35 years were not always marked by "unchallenged gubernational and prerogative rule".[9] As Alan Atkinson points out, while the story of formal consultative bodies in New South Wales seems to begin with the passage of the 1823 New South Wales Act, public opinion had in fact been engaged from a much earlier period. Atkinson provides examples of early consultative councils and draws attention to responsibility for aspects of public affairs being placed with various formal groups, committees and prominent individuals by successive early governors.[10] Given the argument of this thesis, it is important to recognise that informal experiments were made from the beginning in attempts to involve public opinion in government. On the other hand, Arthur McMartin says that it is a mistake to regard even the establishment of the legislative and executive councils of the 1820s as limiting the

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7 Law Reform Commission of New South Wales, *Imperial Acts and Documents Relating to New South Wales*, unpublished, October 1973, pp. 5-16. On preparation of the Act, see Else-Mitchell, pp. 13-17; Forbes to Hay, 12 November 1827, *HRA*, 4, 1, pp. 745-751.

8 Stephen to Horton, 27 March 1825, *HRA*, 4, 1, p. 592. See also Ward, *Colonial Self Government*, pp. 136, 141; Lumb, pp. 10-11. The 1823 Act also authorised the erection of Van Diemen's Land as a separate colony. Shaw, p. 117 refers to a process under which the instructions of all colonial governors were to be examined and amended from 1824.

9 Paul Finn, *Law and Government in Colonial Australia*, Oxford University Press, Melbourne 1987, pp. 34-35. See also Stephen to Horton, 27 March 1825, *HRA*, 4, 1, pp. 595-596.

10 Alan Atkinson, "The Primitive Origins of Parliament", *Push from the Bush: A Bulletin of Social History*, no. 24, April 1987, pp. 47-65.

governor's executive authority, because their function was to assist him in the exercise of that authority. Indeed, McMartin suggests that the presence of the executive council strengthened Governor Darling's hand in dealing with the home government, such as when he increased colonial salaries with its support, the secretary of state being wary of overruling the body on whose advice the governor had been specially directed to rely.[11] There can be no doubt, however, that in many ways the existence of the councils and the requirement for consultation did place a limit on the freedom of action enjoyed by governors. The councils, though nominated, were not always entirely quiescent.[12]

Officially at least, governors retained wide legislative and executive powers. They presided over both councils and between 1824 and 1843 introduced all legislative proposals. Until the commencement of responsible government in 1856, the governor was also the head of the executive and had control of the civil service. Civil servants were crown appointees and could only be dismissed by the crown. Nominated and, later, elected members of the legislative council therefore had no control over the officials who were charged with administration of laws that the council enacted. After 1843, many of those laws were initiated by elected members.

The 1823 Act was repealed by the imperial statute, 9 Geo. IV c. 83, called the Australian Courts Act, 1828.[13] It increased the size of the legislative council to not less than 10 nor more than 15 crown nominees. The 1823 and 1828 Acts both required the legislature to make laws for the welfare and good government of New South Wales in circumstances that could not be foreseen in Great Britain or provided for without much delay and inconvenience.[14] While both Acts referred to the need to confer law-making responsibilities on local residents, the imperial government still did not consider it expedient to provide the colony with an elected legislature and the nominated members were meant to be representative only in a very limited sense. Imperial inaction on this front was the source of continual agitation and petitions to the sovereign and British parliament from various

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11 Arthur McMartin, *Public Servants and Patronage: The Foundation and Rise of the New South Wales Public Service*, 1786-1859, Sydney University Press, Sydney 1983, p. 145.

12 See Bourke to Stanley, 25 December 1833, *HRA*, 1, 17, pp. 302-307; Gipps to Glenelg, 1 January 1839, *HRA*, 1, 19, p. 719; Gipps to Russell, 17 July 1840, 1 August 1840, *HRA*, 1, 20, pp. 712-713, 729-730 for examples of difficulties which governors experienced with legislative councillors.

13 Law Reform Commission of New South Wales, *Imperial Acts and Documents Relating to New South Wales*, pp. 30-42. See also Else-Mitchell, pp. 19-20; Castles, pp. 3, 26-31; Bennett and Castles, pp. 269-283; Lumb, pp. 11-12.

14 See Shaw, pp. 116-120.

factions within the colony in the years before 1843.[15] On 1 January 1839, Sir George Gipps, having been governor for some ten months, wrote to the Secretary of State Lord Glenelg offering his views on reforms to the colony's constitution. He agreed entirely with views expressed by his predecessor, Sir Richard Bourke, about the inadequacy of the present legislative council. The council failed to provide the governor with the assistance he was entitled to expect and it did not itself have the kind of popular support necessary to strengthen law-making power. Among other things, Gipps suggested that the governor should not preside in the council, that no judges or ecclesiastics should have a seat and that all members should have the right to initiate bills other than money bills.[16] In the event, Gipps' main innovation, indicative of the influence of forces outside the legislature, was to open its proceedings to the public and press in 1838, an important though informal means of giving some popular consensus to government.[17]

The 1828 Act was continued by annual legislation until 1842 when it was repealed by the Australian Constitutions Act, 1842, 5 and 6 Vict. c. 76, which finally provided a limited form of elected legislature.[18] The 1842 Act replaced the nominated council with a council of 36 members, 12 being appointed and 24 elected. The local legislature was required to define electoral districts and establish the necessary machinery for the conduct of elections. The franchise was conferred on male British subjects aged 21 years and above who owned land worth at least £200 or, as householders, occupied a dwelling of at least £20 clear annual value. Elected members were to own land worth £2 000, or £100 a year. The nominated members of the council were to sit for five-year terms and not more than one half of them were to be crown employees. Councils were to continue for five years, unless sooner prorogued or dissolved by the governor. The Act provided for the election of a speaker, so that the governor's right to preside was removed. Schedules to the Act appropriated funds for executive and judicial salaries and for public worship, putting provision for these purposes beyond council control. This provided the seed for one cause of future frustration

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15 For a discussion of popular agitation for an elected legislature in the 1830s, see Alan Atkinson, "The Parliament in the Jerusalem Warehouse", *Push from The Bush: A Bulletin of Social History*, no. 12, May 1982, pp. 75-104.

16 Gipps to Glenelg, 1 January 1839, *HRA*, 1, 19, pp. 719-722.

17 See John N. Molony, *An Architect of Freedom: John Hubert Plunkett in New South Wales 1832-1869*, Australian National University Press, Canberra 1973, pp. 32-33.

18 Law Reform Commission of New South Wales, *Imperial Acts and Documents Relating to New South Wales*, pp. 49-67; Ward, *Colonial Self-Government*, pp. 143-148, 163-168; Lumb, pp. 12-14. The Act was commonly referred to in contemporary literature as "the Act for the Government of New South Wales". See Molony, pp. 41-43 for Attorney-General Plunkett's role in its drafting. South Australia separated from New South Wales in 1836 as did New Zealand in 1841.

and complaint within the new council. The governor was empowered to assent to bills on behalf of the crown, to withhold assent, and to reserve bills for royal assent. Certain classes of bills (for example, those altering the salaries of the governor or judges, altering electoral districts or increasing the number of councillors) had to be reserved for royal assent. The British government continued to have power to disallow locally made laws at any time within two years after copies were received by the secretary of state.

When forwarding a copy of the 1842 Constitutions Act to Governor Gipps, Lord Stanley drew Gipps' attention to an unusual power in the Constitutions Act that permitted the governor to return to the council, with amendments, any laws presented to him for assent. This power was intended to make up for the absence of a second chamber and to make it unnecessary for him to rely on disallowance by the secretary of state. The council's rejection of any amendments proposed by the governor would not entail the loss of a bill.[19] As it turned out, Gipps was to make frequent use of this provision.

In summary then, the foundation law received into and applying in New South Wales from 1788 to 1828 was English common law and statute law, so far as it was applicable to the colony. In that time and throughout the period covered by this thesis, the colony was also subject to imperial statutes that applied specifically to it (either alone or with other British possessions) by paramount force. Between 1788 and 1823, New South Wales governors also made laws that applied within the colony for various essential purposes. From 1824, they were assisted in their executive and law-making functions by appointed executive and legislative councils which, after 1828 and up to early 1843, theoretically had the power to impose their decisions subject to the overarching supervision of the crown. At the same time, laws were required to be consistent with English law and could not cover certain subject areas (such as the disposal of crown land or the income arising from its disposal). They could be disallowed or consent could be withheld from them, and certain kinds of laws had to be reserved and referred home.

The administrative background

As has been seen in the previous chapter, historians generally agree that a profound change took place in methods of government in Great Britain in the middle decades of the

19 Stanley to Gipps, 5 September 1842, *HRA*, 1, 22, pp. 238-241.

nineteenth century. Significant change and experiment occurred as well in the field of colonial administration in the first 50 years after New South Wales was established. Shortcomings in the conduct of British overseas establishments caused many involved in colonial affairs to believe that while governors required strong powers of their own, colonial development should be subject to tight imperial control. This led to close scrutiny of the decisions of colonial governors and direct appointment of senior colonial officials by the secretary of state.[20] Against that background, this section examines the development of public administration in New South Wales and shows how the public service changed in size, structure and purpose during the period to the 1840s, becoming thereby an essential component in the business of law-making, especially as its leading members sat in the legislature.

Between 1788 and the early 1820s, the colony was subject to centralised, autocratic and paternalistic oversight, both imperial and local, with the fingers of government in almost every pie. The necessity to control convicts deeply influenced every aspect of early colonial life, all authority stemming from this basic responsibility.[21] McMartin says that in no other British colony, before or since, did the central government attempt such comprehensive and detailed control of public affairs as in the first five decades of settlement in New South Wales.[22] Internally, governors ruled with the aid of a small number of service and civilian personnel. R.S. Parker refers to about 100 people holding official positions in the colony's public service in 1822, a number being military and naval officers on half-pay and most of the others salaried employees. McMartin gives the much higher figure of almost 500, saying that earlier estimates failed to include police (numbering about 275 when those manning

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20 Ken Knight, "The Career Service in Australia: From Patronage and Profit to Probity?", Address to Royal Australian Institute of Public Administration, National Conference, Sydney, November 1982, p. 54, Knight saying that while patronage was involved in these appointments, the evidence suggests that great care was taken with the more important administrative posts.

21 See J. J. Eddy, "Australian Nationhood" in James Jupp (ed.), *The Australian People: An Encyclopedia of the Nation, its People and their Origins,* Angus and Robertson, Sydney 1988, p. 66; Russel Ward, *The Australian Legend,* Oxford University Press, Melbourne 1958 (reprint 1974), pp. 15-18; J.W. McCarty, "The Economic Foundations of Australian Politics" in Henry Mayer (ed.), *Australian Politics: A Reader,* F.W. Chesire, Melbourne 1966 (2nd edn. 1967), p. 4; W.D. Borrie, *The European Peopling of Australasia: A Demographic History, 1788-1988,* Australian National University, Canberra 1994, p. 46; Atkinson, *Europeans,* vol. 1, pp. xv, 58, 70.

22 McMartin, p. 4; Knight, "The Career Service", pp. 54-56; Kenneth W. Knight, "The Development of the Public Service of New South Wales from Responsible Government (1856) to the Establishment of the Public Service Board (1895)", M.Ec. thesis, University of Sydney 1955, pp. 5-22; R.N. Spann, *Government Administration in Australia,* George Allen and Unwin, Sydney 1979, pp. 33-39, 252-253. See also Eleanor Dark, *The Timeless Land Trilogy,* Books 1-3, Collins Publishers, London 1941-1953 (A&R Classics edns. 2002) for a fictionalised account concerning the powers and responsibilities of the colony's early governors.

gaols and convict establishments are included) and superintendents and overseers.[23] Given the paucity of other options, convicts were also pressed into government service from an early stage as clerks, supervisors of work gangs and performers of other public functions for which previous experience had equipped them, a practice to be deplored by Governor Ralph Darling.[24]

By 1825 the legislative and executive councils were in place and a public service structure was developing which would vest much administrative power and expertise in a small number of senior bureaucrats, officials who proved to be of remarkable longevity. These developments provided civilian nominees and public servants in the legislature with experience in policy and legislative development and the general business of government. They also attracted considerable public interest and fostered a desire in many colonists for a greater role in the conduct of their own affairs. Over time, pressure from colonists for a share in the exercise of political power began to have an impact and was accompanied by a gradual diminution in the authority of the governors. And yet, aspects of the old paternalism lingered and colonists still placed great reliance on the government and its capacity to provide for them. Free immigrants depended on government too, at least until the beginning of the 1850s, for passages on board ship, land grants and other assistance, for legislation to force ship-owners to meet food and accommodation standards, and generally for the prospect of a better life in a new land. In this way, the autocracy established in New South Wales in 1788 survived as a powerful ruling force in the lives of the people.[25]

The state of colonial society at this time was quite different from that of the old country, despite the common language, ethnicity and cultural and legal background. Many traditional governmental forms, replete with entrenched local structures and interests—parishes, vestries and corporations, local poor relief and squirearchical authorities—had never taken hold in the penal colony. The operation of the full-blown British class system and the pervasive influence of the aristocracy and its clients in positions of power in the

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23 R.S. Parker, "Public Administration as the Study of Bureaucracy", *Public Administration*, vol. 15, March 1956, p. 33; McMartin, p. 52.

24 Brian H. Fletcher, *Ralph Darling: A Governor Maligned*, Oxford University Press, Melbourne 1984, p. 91; G.D. Richardson, "The Archives of the Colonial Secretary's Department of New South Wales, 1788-1856", M.A. thesis, University of Sydney 1951, p. 28.

25 Alan Atkinson, "Free Settlers before 1851", in Jupp, p. 42. See also Alan Atkinson, "Time, Place and Paternalism: Early Conservative Thinking in New South Wales", *Australian Historical Studies*, vol. 23, no. 90, April 1988, pp. 9-10; Alan Atkinson, *The Europeans in Australia. A History*, vol. 2, *Democracy*, Oxford University Press, Melbourne 2004, pp. xiii, 266.

legislature, the judiciary, the armed forces, the Church of England and the upper echelons of the civil service was also absent, although patronage did play a part in appointments to colonial offices. The difference was accentuated by the juxtaposition of the free and freed sectors of the population with the convict population. Further, in the mid 1820s, the colony was not self-supporting and still depended on British expenditure on the convict establishment.[26] In addition, many of the immediate and often detrimental effects of the agricultural and industrial revolutions that were manifesting themselves in the British Isles at this time were obviously absent from the colony. Certainly, inherited English law and the administrative structures and views about the role of government had been imported from Britain, and were reinforced by regular despatches from Downing Street.[27] Also, the colony's public service was established as an institution primarily to serve the purposes of the British government, and the impact of the mores, habits and patterns of institutional behaviour of the British state on the fledgling service was powerful, continuous and far-reaching in the years before 1856.[28]

And yet, there was considerable room for novelty. Finn has argued that despite the multiplicity of ties that bound the Australian colonies to the mother country, the colonies "were not, nor did they become, its distant replicas. So much was left behind. So much was new. So much was 'wanting'".[29] Much earlier, W.K. Hancock, when discussing aspects of society in a "new country", referred to observations of the French political writer, Alexis de Tocqueville (1805-1859) concerning American society as glimpsed in the early 1830s. Tocqueville had been impressed by "the incessant movement, the collapse of hereditary stability and standards, the fluidity of fortune and family in the New World", and its instinctive distaste for the past. Similarly, in Australia, said Hancock, "defiance of 'the truculent, narcotic, and despotic past' has always been a popular democratic theme".[30] More recently, Peter Karsten, when exploring the development of an informal structure of common law, norms and rules by ordinary people in what he terms the lands of the British Diaspora, has pointed out that that those on the periphery of the British empire were not ordinary Britons. On the contrary, they were either "genuine felons pushed *from* the Mother Country"

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26 Borrie, pp. 36-37; Fletcher, p. 80; Russel Ward, pp. 15-42.

27 See Shaw, pp. 113-134.

28 McMartin, pp. 12-13; Spann, p. 34.

29 Finn, p. 2, Finn referring in a footnote to E. Jenks, *The Government of Victoria*, Macmillan and Co., London 1891, p. vii. See also Parker, pp. 31-35.

30 W.K. Hancock, *Australia*, Benn, London 1930 (reprint Jacaranda Press, Brisbane 1966), pp. 231-232 (quotations on p. 232). See R.W. Connell, "Images of Australia", *Quadrant*, no. 52, March-April, pp. 9-19 for comment on Hancock's analysis.

or more adventurous souls who were "drawn *to* the colonies by the opportunities they perceived there".[31] The result was a complex relationship between old and new.

Though many British institutions and practices, such as a network of justices of the peace, proved apposite and useful in the colony, others did not travel so well. On the positive side, one important result of the British connection was that an American "spoils system" in public employment, that is, a system under which political victors award public employment prizes to their supporters, did not evolve in Australia.[32] The absence of such a system meant that the emergent Australian public services became permanent, like their British equivalent.[33] On the other hand, as Hancock remarked, colonial Australia never had effective local government. While administrative power in the American States was dispersed between central and local authorities, local government was a late creation in Australia and did not form an effective barrier between the individual and the central power.[34] To the dismay of imperial authorities, local or district councils failed to take hold and thrive.

One perspective on the state of public administration in the colony in the late 1820s in what he saw as a period of transition was provided by Chief Justice Francis Forbes who had experience in other British colonies. He informed Under-Secretary Horton in March 1827 that the colony differed from every other in the extent of work undertaken by the government. To begin with, Forbes said, "every thing necessarily centred in the governor [Phillip] as the primum mobile of the machine". Government had necessarily become patriarchal—"what necessity began, the love of power and patronage have since continued".[35] The tenor of Forbes' observations and Hancock's later comments on the centralised nature of colonial executive administration has been picked up by Finn in his comparison of English and Australian bureaucracies. Finn identifies, with some force, two characteristics that sharply differentiated the domestic orientation of the British governmental system from that of its Australian colonial counterparts. Firstly, in England the unprecedented problems arising from industrialisation led gradually but inexorably to an

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31 Peter Karsten, *Between Law and Custom: "High" and "Low" Legal Cultures in the Lands of the British Diaspora—The United States, Canada, Australia, and New Zealand, 1600–1900*, Cambridge University Press, Cambridge 2002, pp. 529, 534-535 (quotation on pp. 534-535; emphasis in original).

32 Spann, p. 34.

33 Henry Parris, *Constitutional Bureaucracy: The Development of the British Central Administration since the Eighteenth Century,* George Allen and Unwin Ltd, London 1969, p. 40.

34 Hancock, pp. 234-235.

35 Forbes to Horton, 6, 7 March 1827, *HRA*, 4, 1, pp. 688. On Forbes, see, ibid., p. 944; *ADB*, 1, pp. 392-399. See McMartin, p. 144 for criticism of Forbes' "armchair theorizing" on Darling's administration.

increase in the central government's power, despite the prevailing philosophies and a polity which had long viewed the conduct of administration as a local rather than central concern. Finn refers here in a footnote to MacDonagh's account in *Early Victorian Government* of the technical, political and sentimental and theoretical factors, including humanitarianism, which drove the growth of central government in a period of unprecedented social and economic upheaval.[36] In the colonies however, it was the powerful central authorities that shaped the administrative system and controlled (and often retarded) the devolution of power to local and regional bodies. The increased responsibilities of the central authorities, especially in the development area, "exaggerated their pre-eminence" in the colonial scene. Various consequences flowed from this, especially in the relationship of citizen and state. Finn argues that, when coupled with the exacting circumstances facing the infant colonies, it fostered an enduring tendency to look to the central government for the satisfaction of needs, a tendency that also militated against the growth of local government. Secondly, conditions in the Australian colonies, including settlement and investment patterns and the need for development, impelled governments to undertake activities unnecessary in Britain or conducted by local government, private enterprise or charitable organisations.[37]

Major changes occurred in public administration in the colony between the 1820s and the 1840s. Administrative structures originally put in place to serve the needs of a penal settlement were increasingly ill-adapted to the requirements of an expanding colony with growing numbers of free inhabitants. Besides, as stated above, British administration was itself undergoing sweeping reform at the same time as administration structures were developing in Australia. Australian bureaucracy was accordingly constructed on modern, impersonal lines. Even at the outset, it showed few of the relics of the very different kind of system, or lack of system, that had governed Britain for centuries.[38] As new principles were established in Britain they were incorporated into Australian government, at first through instructions and despatches to governors or subordinate officials. For instance, by the mid 1820s the fee and perquisite method of remunerating public servants was on the decline, with several officers who had formerly retained fees personally being required to pay them into the colonial treasury. The number of such positions was steadily reduced in subsequent years, sometimes by instruction from Britain, sometimes by acts of the legislative council.

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36 Finn, p. 2.

37 Ibid., pp. 2-3 (quotation on p. 3).

38 Parker, p. 34. See also McMartin, p. 13.

From 1856, the New South Wales public service was paid almost entirely by salary.[39] The evolution of Australian self-government and the refining in the British political system of techniques to ensure administrative accountability to parliament were virtually contemporaneous processes.[40]

Various reforms were made between 1820 and 1825 as a result of Commissioner Bigge's recommendations and Colonial Office directives. While Sir Thomas Brisbane, who was governor for four years to December 1825, is said to have cared little for the details of public administration, his successor, Ralph Darling, an army officer who had been governor of Mauritius, was particularly interested and competent in this area. On his arrival in the colony Darling set about the reorganisation of the whole system. He set the general pattern to be followed for the rest of the colonial period and no more significant changes in administrative structures occurred in the next 30 years.[41] During Darling's term many reforms in public administration with a decidedly modern feel were effected. He appointed boards to carry out investigations and make recommendations concerning particular reforms, both on his own initiative and at the suggestion of the Colonial Office.[42] A general purposes board staffed by senior officials to investigate and report on particular issues occasionally co-opted outsiders to assist. This board was involved in making progressive proposals for the classification of public servants and their promotion on merit, reforms predating by more than 25 years those initiated in Great Britain.[43] The church and school corporation was used in early experiments in public education.[44] Darling employed such boards to harness the expertise of some of the colony's most experienced officials in the work of inquiry and investigation.[45] These methods were important precedents for the operation of the legislative council in the 1840s and 50s. They are a significant part of the story which this thesis has to

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39 Ibid., pp. 31, 33.

40 R.L. Wettenhall, "Administrative Boards in Nineteenth Century Australia", *Public Administration* (Sydney), 22 Sept. 1963, p. 256.

41 See McMartin, Part II generally on what he terms "The Darling Revolution" and development of the colonial secretary's supervisory and controlling powers. See also Knight, "Development of the Public Service", pp. 12; Hilary Golder, *Politics, Patronage and Public Works. The Administration of New South Wales,* vol. 1, 1842-1900, University of New South Wales Press, Sydney 2005, p. 33.

42 Fletcher, pp. 89-90; Wettenhall, "Administrative Boards", pp. 256-257. See also S.G. Foster, "Life in the Office", *Push from the Bush: A Bulletin of Social History*, no. 1, May 1978, pp. 20-22; S.G. Foster, "Convict Assignment in New South Wales on the 1830s", *Push from the Bush: A Bulletin of Social History*, no. 15, April 1953, pp. 36-40.

43 Ibid., pp. 90-91.

44 Wettenhall, "Administrative Boards", p. 257.

45 McMartin, p. 152.

tell about the application of local expertise to government.

Between 1825 and 1831 Darling substituted a highly centralised, unified administrative system for the loose collection of semi-autonomous departments that he inherited. He relocated public offices, subdivided departments, redistributed functions and improved the management of colonial finances. Free clerks replaced convicts wherever possible and various suggestions were made in an endeavour to attract suitable recruits to the public service. Darling sought to ensure that clerical positions were filled by men of ability and integrity, offering salaries commensurate with those paid by private employers and establishing the principle of promotion by ability, not seniority. Darling was closely involved in reform of the convict system. He was also involved in the colony's general development, in the perennial problems associated with the grant and sale of land, including its survey and valuation, in the construction of roads into the interior, the establishment of country towns and the condition of Sydney. His oversight extended to securing the passage of laws to control stray dogs and regulate the slaughtering of cattle. He and his wife were active in promoting social welfare, though much of this activity was generated by charities and private individuals rather than by direct government effort and funding.[46]

Significant developments in the colony's bureaucracy thus occurred during the 1820s and 1830s. A number of the new departments were headed by dedicated and competent civil servants with secure tenure who exercised considerable influence in the colony in the years before responsible government. And these were not anonymous, subordinate, faceless public servants like those of the post-1856 years, when ministerial responsibility took hold. Their appointments were publicised, they made public statements and reports in their own names,

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[46] Fletcher, pp. 103, 121, 172, 175-176, 201. For different perspectives on the role (constructive or otherwise) of colonial women of the upper classes, and of Eliza Darling, see Anne Summers, *Damned Whores and God's Police*, Penguin Books, Camberwell, Victoria 1975 (revised edn. 2002), pp. 328-330; Miriam Dixson, *The Real Matilda: Woman and Identity in Australia 1788 to the Present*, Penguin Books, Ringwood, Victoria 1976 (1994 edn.), pp.179-219; Elizabeth Windschuttle, "Leading the Poor and Sapping their Strength" in Elizabeth Windschuttle (ed.), *Women, Class and History: Feminist Perspectives on Australia 1788-1978*, Fontana Books, Melbourne 1980, pp. 53-80; Marian Quartly "Transplanting Patriarchy" in Patricia Grimshaw, Marilyn Lake, Ann McGrath and Marian Quartly, *Creating a Nation 1788-1900*, Penguin Books, Ringwood, Victoria, p. 71; Atkinson, *Europeans*, vol. 1, pp. 267-272. See also Robert van Krieken, "Towards 'Good and Useful Men and Women': The State and Childhood in Sydney, 1840-1890", *Australian Historical Studies*, vol. 23, no. 93, Oct. 1989, pp. 405-425; and Brian Dickey, with contributions from Elaine Martin and Rod Oxenbury, *Rations, Residence, Resources: A History of Social Welfare in South Australia since 1836*, Wakefield Press, Netley, South Australia 1986 for examples of the involvement of government in social welfare in Australia.

their views were known and their personalities and actions were subject to public scrutiny.[47] In Britain, such officials were described as public officers, and they stood in a relationship to their minister not unlike that which existed between the minister and the crown. Both were advisers on the exercise of power. However, in another way, the relationship was different. On the upper level, ministers were expendable while the crown remained. At the lower level, the pattern was reversed as the advised were transitory and the advisers permanent.[48] In pre-1856 New South Wales, one should read "governor" for "minister". In Britain, the parliament and public were slow to adjust to this state of affairs, hence the abuse heaped on powerful civil servants such as James Stephen and Edwin Chadwick. The same might be said of attacks on certain of the more prominent colonial public servants.[49] Australian public officials have also been described as traditional intellectuals, tied to the ruling class, the term "public" in public sector being said to really mean "system-maintaining".[50] This hypothesis viewed the governor and the leading officials who sat with him in the executive council as an unofficial cabinet, their dual legislative and executive status placing them in a position more like that of politician than public servant.[51] At the very least, this cohort of public servants became accustomed to the exercise of considerable and largely unfettered power in the 18 years between 1825 and the institution of the first legislative council with popularly elected representatives in 1843.

Of the various positions established in this period, the most influential for law-making in the years before 1856 were the colonial secretary, attorney-general and solicitor-general.[52] In mid-1825, Earl Bathurst appointed Alexander McLeay, an experienced civil servant and administrator then almost 58 years old, as Governor Darling's colonial secretary.[53] Darling and McLeay appear to have been well suited because it was "inherent in Darling's method of administration ... that undue importance should be attached to civil servants".[54] McLeay's

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47 See R.L. Wettenhall, "The Ministerial Department: British Origins and Australian Adaptations", *Public Administration*, vol. 32, Sept. 1973, pp. 241-242.

48 Parris, pp. 93-100, 104.

49 Ibid., p. 104. See ibid., pp. 126-131 on what Parris termed the "grey eminence myth" concerning the position of powerful permanent public officials.

50 Desley Deacon, *Managing Gender: The State, the New Middle Class and Women Workers 1830-1930*, Oxford University Press, Melbourne 1989, p. 10, Deacon citing R.W. Connell and T.H. Irving, *Class Structure in Australian History: Documents, Narrative and Argument*, Cambridge University Press, Melbourne 1980, pp. 112, 201.

51 Ibid., p. 48. See also McMartin, p. 256; Michael Roe, "1830-50" in F.K. Crowley (ed.), *A New History of Australia*, William Heinemann, Melbourne 1974, p. 100.

52 See Stephen to Horton, 27 March 1825, *HRA*, 4, 1, pp. 593-594 for Stephen's view on the role of a colonial secretary.

53 Fletcher, p. 86; *ADB*, 2, pp. 177-180.

54 Richardson, p. 30.

very efficiency and ability in the face of the mediocrity of most contemporary public servants made him by far the most influential officer of the crown in New South Wales. He engaged in multifarious activities that established him as a powerful permanent head of the government, a fact that attracted criticism.[55] During his term of office, McLeay served as a member of the legislative and executive councils. However, he did not enjoy a good relationship with Darling's successor, Richard Bourke, who removed him from his position in acrimonious circumstances in December 1836. McLeay withdrew into private life, only to re-emerge nearly seven years later when he was elected speaker of the first partly representative council. He was replaced as colonial secretary by Edward Deas Thomson.

The Scots-born son of a senior civil servant, Thomson had been educated in Edinburgh, England and France, and had traveled in the United States before taking up the position of clerk to the executive and legislative councils of New South Wales in January 1829, at the age of 28. He was able and conscientious, although his biographer, S.G. Foster, calls him "a dull dog", a calculating, self-righteous prig when young, a staid pillar of society in his prime and an irritable opponent of change in his old age. When appointed as colonial secretary, Thomson was the governor's son-in-law, having married one of Bourke's daughters in 1833.[56] Thomson served the colony with distinction for over 27 years as clerk to the councils, colonial secretary and a member of the executive and legislative councils. As colonial secretary, he was the chief adviser to four governors, the colony's most senior executive officer after the governor, and the channel through which all official correspondence flowed. He played an increasingly important role in the preparation and presentation of the government's legislative program and the colony's political development in the years before 1856. From 1856, he served as a member of the legislative council until his death in July 1879.

Many junior officers who commenced their working careers in the colonial secretary's office in this period progressed to higher office after 1856, armed with a wealth of experience in public administration accumulated in these significant years. For example,

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55 See ibid., pp. 26-32 on McLeay and his relationship with Darling.

56 See *ADB*, 2, p. 523; S.G. Foster, *Colonial Improver: Edward Deas Thomson 1800-1879*, Melbourne University Press, Melbourne 1978, p. xiv. See also Foster, "the Office", pp. 20-31 for a description of the functioning of the colonial secretary's office between the 1820s and the 1840s and its paternalistic and hierarchical structure.

William Elyard, who joined the office as a 17-year old clerk in 1822 and served until 1856, became the first under-secretary in the colonial secretary's department in that year. Michael Fitzpatrick, recruited at 20 years of age in 1837, also served later as clerk of the executive council, and in 1856 became under-secretary of the lands and works department.[57]

The colony's first four attorneys-general served relatively short terms.[58] However, this changed when John Hubert Plunkett, an Irish-born Roman Catholic with aristocratic connections, who had been solicitor-general since 1831, was appointed in 1836. Plunkett held the post until March 1841 when he returned to Britain on leave, but resumed it in August 1843, serving until he was required to relinquish the post in 1856. In the years before 1856, Plunkett was the colony's first law officer, a legislative drafter for the executive, an adviser with Solicitor-General William Montagu Manning, the second crown law officer, (from 1844), on bills passed by the legislature, and an official member of the legislative council. He was concerned with a wide range of legislative issues and not merely those relating to the administration of justice. After 1856, Plunkett served in both houses of parliament and as vice-president of the executive council and representative of the government in the upper house. He became attorney-general once again in the 1860s.[59]

Solicitor-General Manning did not emerge as a significant legislator until the early 1850s. A barrister, he followed his family to the colony in 1837 and, shortly after, was appointed a magistrate and chairman of quarter sessions, also serving as commissioner of the court of requests for two years. He was appointed solicitor-general in September 1844. Although Manning was involved in the examination of legislation and legislative drafting in his official capacity from 1844, he did not enter the legislature until the first session of the sixth council in October 1851. A highly cultivated man who described himself as an independent liberal conservative, Manning had friends among the colonial land-owning elite, including James Macarthur, and, like them, was a member of the Australian Club. He had a multiplicity of other interests, many of them charitable. Manning cannot be overestimated as a source of ideas, saying himself late in his career that he had always been disposed to look at the law from a public rather than from a professional point of view. More is said in

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57 Foster, "the Office", pp. 23-24. Michael Fitzpatrick was later elected to parliament, serving as the colonial secretary for a time. *PR* NSW, p. 133.

58 See Terry Kass (incorp. research by Jean Morris), 1996 (updated 8 May 2001, accessed 31 May 2005), *A Brief History of the Attorney General's Department*, http://www.lawlink.nsw.gov.au/history%5Clah.nsf/pages/hist_chp1.

59 *ADB*, 2, pp. 337-340; Molony, *John Hubert Plunkett.*

Chapter 8 about his ideological background.[60] He virtually assumed Thomson's role as manager of government legislative business in 1854-55 when Thomson was on leave. Manning sat in both houses of parliament from 1856 and served as attorney-general on four occasions during a parliamentary career of just under 40 years.

Campbell Drummond Riddell, the colonial treasurer, was another long-serving bureaucrat, from 1829 to 1856. A member of the executive council from 1831, Riddell entered the legislature in 1843 and he was a member of the upper house of parliament from 1856 until December 1858. He acted as colonial secretary during Thomson's absence from the colony after 1853. William Lithgow, the colony's first auditor-general and second in civil rank to the colonial secretary, served from June 1825 (he had briefly been Governor Brisbane's private secretary) until April 1852. Yet another relatively long-term bureaucrat, John George Nathaniel Gibbes, the collector of customs, served from early 1834 until May 1855. Neither Lithgow nor Gibbes was an executive councillor, but both were official members of the legislative council for most of their public service careers. Despite their lengthy experience, neither played any significant role in law-making, apart from casting their votes in council. George Barney, appointed colonial engineer in early 1836, chief commissioner of crown lands in 1849 and surveyor-general in 1855, also served as an official member in the fourth and sixth legislative councils. Sir Thomas Livingstone Mitchell, Barney's predecessor as surveyor-general (from 1828), sat for a few months in the fourth council in 1844 as a member for the Port Phillip District. He apparently took little part in council proceedings but was a member of three select committees, and often appeared before them in his official capacity.[61]

Thus, an administrative framework was established in the mid 1820s that was to subsist, virtually unchanged, until 1856. The after effect will be mentioned briefly in Chapter 11. Further, from the late 1820s many key positions in the colonial bureaucracy were filled by men who were to occupy prominent roles in the executive and legislative business of the colony throughout the years leading up to the commencement of responsible government.

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60 *ADB*, 5, pp. 207-209; C.H. Currey, "The Influence of the English Law Reformers of the Early 19th Century on the Law of New South Wales", *JRAHS*, vol. 23 pt. 4, 1937, p. 228.

61 For Riddell, see *ADB*, 2, pp. 377-379; for Lithgow, *ADB*, 2, pp. 119-120; for Gibbes, *ADB*, 1, p. 439; for Barney, *ADB*, 1, pp. 60-61; for Mitchell, *ADB*, 2, pp. 238-242.

Early principal legislation—1824–1843

As has been seen, until 1824, the governors legislated alone to meet particular local needs not met by English law. Between 1824 and 1843, an executive council and a legislative council made up of nominees were interposed to assist them. In this period, the colony's first acts (as distinct from the earlier orders and similar instruments) were produced. The executive's legislative brief in the years between 1824 and 1843, when all bills were introduced by the governor, was specified by the New South Wales Act, 1823. The legislative council was to make laws for the peace, welfare and good government of the colony. Those three broad heads of legislative activity obviously overlap. However, they provide a convenient shorthand method of summarising the sweep of the executive's legislative concerns in the period.

The maintenance of the peace involved a multiplicity of matters, the most important being the administration of justice.[62] This included the regulation of the judicial system, development and amendment of the criminal and civil law, enforcement of that law and the provision of prisons and other penal establishments. These matters in turn entailed making provision for and regulating judges, magistrates, court officials, jurors, a network of justices of the peace and police forces. The executive was also concerned with the control of convicts, issues arising from their transportation, and the suppression of bushrangers.

The welfare or quality of life of the colony's inhabitants depended on public works and facilities such as roads, sewerage and drainage works, cemeteries, abattoirs, pounds and markets. In addition, the executive was responsible for laws relating to hospitals, quarantine stations and lunatic asylums, and the regulation of the medical profession as well as other professions and businesses such as the law, surveying and auctioneering. The government regulated the supply of necessities of various kinds including flour and bread, was involved in public education, the relief and care of orphans and the destitute, the setting up of libraries and scientific institutions and the provision of means of communication, especially postage. It was concerned with the control of public nuisances, including those caused by dogs, and with threats to public health entailing, among other things, suppression of stock diseases and prohibition of the unregulated slaughtering of animals in urban areas.

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62 The information in this and the following two paragraphs is based on material relating to enacted legislation set out in *V&P* NSWLC 1824-1843.

Measures introduced for the maintenance of the peace and the welfare of inhabitants involved public expenditure and, often, the use of public facilities and the participation of public officials. "Good government", on the other hand, could be said to involve mainly commerce and the economy. It called for the raising and protection of the revenue and the control of customs, the import and export of goods and the regulation of the currency, banking and the use of weights and measures. The colonial legislature regulated the use of crown land, including its enclosure and fencing, but could not, at this time, legislate as to its disposal, a responsibility retained by the British parliament. It made laws relating to shipping, ports and wharves, the registration of commercial documents and transactions and of official records, the regulation of government printing and the printing and publication of newspapers and other material. It enacted laws dealing with relations between masters and servants, marriage, the administration of insolvent and deceased estates, the control of hawkers and pedlars, the construction of buildings, the oversight of the gas light utility and the periodic taking of censuses. Much effort was expended on laws regulating the supply of liquor and the licensing of public houses. Bills introduced by the governor dealt with a plethora of other matters including immigration, the naturalisation of aliens, the structure and regulation of municipal corporations, the control of vagrancy, ecclesiastical issues, oversight of charitable institutions, Aborigines and the upholding of the sanctity of the sabbath.

From 1824 to the commencement of limited representative government in 1843 the colony's executive, supported by the public service, was thus busily engaged in the preparation of laws covering a multiplicity of topics, producing an abundant and wide ranging volume of black-letter or legislatively-enacted law. Early activity in this field ties in with E.G. Wakefield's observation that new countries demanded "ample government", government that provided for all needs and circumstances. In considering the predicament of the pioneers in Australia and extending his view beyond the 1840s, W.K. Hancock asserted that collective action was indispensable to their survival, and to the subduing of an obstinate natural environment, and that this action, of necessity, had to be provided through the state. In fact, Hancock argued that in the twentieth century Australian democracy looked on the state "as a vast public utility whose duty it is to provide the greatest happiness for the greatest number". Hancock said that the results of this attitude have been defined as "*le socialisme sans doctrine*". However, he believed that its origins were individualistic, "deriving from the levelling tendency of migrations which have destroyed old ranks and

relationships and scattered over wide lands a confused aggregate of individuals bound together by nothing save their powerful collectivity". Hancock maintained that, to Australians, "the State means collective power at the service of individualistic 'rights'". Thus, no opposition existed between their individualism and their reliance on government.[63] While perhaps placing greater emphasis than is warranted on Australian rural settings as opposed to the urban, Hancock's stress on the importance of the government, and on central government at that, holds true for early New South Wales.

The character of these early laws was shaped to some extent by the process of their drafting. As no professional parliamentary draftsmen were employed in New South Wales before 1856, the drafting of local laws in the early years appears to have been tackled by numerous hands, including successive attorneys-general, the judges, the colonial secretary and private members of the legal profession.[64] At least one vice-regal representative tried his hand. In February 1840, Governor Gipps informed Secretary of State Lord John Russell that he had personally prepared a law to enable markets to be established in various towns.[65] The system for referral of laws to London in accordance with the Constitutions Acts meant that the efforts of local drafters were scrutinised by highly experienced and knowledgeable Colonial Office personnel. The interchange of views concerning local laws and their occasional disallowance served to educate the colonial executive, officials and legislators in this period on legislative policies and procedures and drafting conventions that were acceptable to the imperial authorities.

The first three legislative councils (1824–43) enacted 302 public acts (see Table 1 below). These acts dealt with measures of the kind listed above. From the outset, the colony's infant legislature followed the practice of the House of Commons by referring certain draft laws and other matters to select committees.[66] Select committees were composed of members appointed by the legislative council to consider or take evidence on

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63 Hancock, pp. 52-55 (quotations on p. 55). Connell, "Images of Australia", p. 16 criticised Hancock's concentration on rural history when the majority of Australians have always lived in the cities. See also Summers, pp. 103-104.

64 The engagement of parliamentary draftsmen was not raised until mid 1856. See *SMH,* 2, 8 August 1856. See also Parris, pp. 172-178 on the drafting of government bills in Great Britain in the nineteenth century.

65 Gipps to Russell, 10 February 1840, *HRA*, 1, 20, p. 498.

66 See Sir Reginald F.D. Palgrave and Alfred Bodham-Carter (eds.), *Sir Thomas Erskine May's Parliamentary Practice: A Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, William Clowes and Co. Ltd, London 1893 (tenth edition), Chapter 15, pp. 378-399; Sir Courtenay Ilbert, *Legislative Methods and Forms*, Clarendon Press, Oxford 1901, pp. 29, 105. Finn, p. 6 refers to the need for a study of the role of Australian committees of inquiry in the colonial period.

any matter referred to them by the council and to report their opinion for the council's information and assistance. Their object was usually to take evidence from anyone they should choose to call, and they used a wide variety of witnesses, including members themselves on occasion. Petitions relating to the subject of inquiries were also referred to them. Private bills originating on the petition of interested parties were required to be referred to a select committee which heard promoters and opponents of the measures, often by counsel. In these cases, the council's standing orders required the committee to ensure that the object and content of the bill fell within its title and preamble, as specified at the time of its introduction, and to discover any clash of interests, private or public. Opposing petitions were also to be referred to the committee dealing with the bill.[67] The public policy involved in public bills was also examined by committees on occasion, again with an eye to private interests.

In the 18 years between 1824 and 1842, about 63 matters were referred to select committees at an average of 3½ per year. Of these references, 37 related specifically to bills, 24 being public bills and the balance private measures related mainly to the establishment of assurance, utility and other companies. General issues examined by committees included the state of the female factory and convict boys, Sydney's water supply (twice), immigration (four times), police and gaols, Aborigines and light houses (twice). A board of inquiry appointed by the council in 1839 examined sickness on immigrant ships. Public bills examined in the same way dealt with matters such as the regulation of customs (twice), insolvent debtors (three times), publicans' licensing, distillation of spirits, bushranging, parish roads, catarrh in sheep, medical practice, crown lands, shooting on Sundays and the Sydney Corporation.[68] Clearly, in this period members of councils spent a good deal of time in committee. Foster refers to Thomson, the leading official, being the chairman of 13 subcommittees and a member of another nine in the "old council", presumably from 1837 after he became colonial secretary (the third council having commenced in August 1829 when Thomson was still its clerk).[69] Thus, Thomson sat on an average of just over 3½ committees per year in six years, the legislative council sitting for about 154 weeks in all in

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67 See *V&P* NSWLC 1830-1835 for standing rules and orders adopted on 26 April 1830, 2 August 1832 and 4 June 1835 relating to presentation of bills, including private bills, and petitions, and to the conduct of select or sub-committees.

68 See *V&P* NSWLC 1824-42.

69 Foster, *Colonial Improver*, p. 64.

this period.[70] However, while the council passed 138 bills between 1837 and 1842, only 27 of these were examined by committees (one also being withdrawn and two committees dealing with two bills each). Thomson's was an extreme case, the bulk of all members' time before 1843 being spent in the council chamber. The practice of referring issues to committees from an early stage is significant nevertheless, in that it set a precedent for gleaning expertise and opinion from outside the council. In devoting their time to such work, especially when developing legislation, members displayed their sensitivity to public opinion by offering outsiders an opportunity for input into the legislative process.

The following Table shows that, in a period of approximately three years, the second council enacted an average of over 8½ acts per year while the third council enacted a yearly average of a little under 19½ in 13 years. Before Governor Gipps opened his first legislative session in 1838, the third council enacted 121 bills at an average of approximately 15 per annum. However, in the five years from 1838 to 1842, 132 acts were passed at an average of over 26 per year. The early years of Gipps' administration were therefore extremely productive in legislative terms. This was presumably largely due to Gipps himself, though it is also possible that public exposure made the law-making process more accountable and therefore more productive. This is a point of considerable interest when we turn to a consideration of events that occurred in the remaining years of Gipps' administration. It could be argued that Gipps' accession to power and the opening up of council debates was a legislative turning point as significant in some ways as the establishment of a partly elected council. Further, even before 1843, by the use of committees and the opening up of debate to public scrutiny, council members were becoming accountable to public opinion, and the way in which the population at large could affect legislative activity and even the detail of laws was being broadened. These points are to be expanded in the following discussion.

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70 The 1838 session occupied about 24 weeks, that in 1839 38 weeks, in 1840 26 weeks and in 1841–42 30 weeks. *V&P* NSWLC 1838-1842. The period between 1824 and 1843 included the last year of the reign of George IV, the reign of William IV and the accession of Queen Victoria.

Table 1[71]

Legislation enacted by first three councils 1824–1843

Council		Session	Bills enacted
First	1.	Aug. 1824 – Nov. 1825	23
		Session total	**23**
Second	1.	Dec. 1825 – Aug. 1826	5
	2.	Feb. – Dec. 1827	5
	3.	Mar. – Oct. 1828	14
	4.	Feb. 1829	2
		Session total	**26**
Third	1.	Aug. – Oct. 1829	6
	2.	Jan. – May 1830	14
	3.	Sept. – Nov. 1831	2
	4.	Jan. – Oct. 1832	22
	5.	May – Aug. 1833	13
	6.	March – Oct. 1834	25
	7.	May – Oct. 1835	18
	8.	June – Aug. 1836	12
	9.	May – Sept. 1837	9
	10.	May – Oct. 1838	30
	11.	Feb. – Nov. 1839	25
	12.	May – Dec. 1840	34
	13.	June 1841 – Jan. 1842	21
	14.	May – Sept. 1842	19
	15.	Jan. – Feb. 1843	3
		Session total	**253**
		Grand total	**302**

[71] For figures on bills introduced and enacted, see *V&P* NSWLC 1831-1843 and *Public General Statutes of New South Wales*, 1824 -1843.

Chapter 3 From the first elections to the departure of Governor Gipps, 1843–1846

A new legislative regime was instituted in New South Wales in 1843 in accordance with the 1842 Constitutions Act. This chapter examines the nature of the relationship which evolved between the executive and the legislature from the commencement of that regime until the end of Governor Gipps' administration in July 1846, a major concern being to consider how and at whose instance laws were being made in this period.

The dynamics of the early years of partly representative government

The elections from early to mid 1843 to fill seats in the first legislative council occurred at a time of economic depression. A drought in 1838 had been followed by a cycle of events that pushed the Australian colonies into a severe economic slump in the early 1840s, resulting in insolvencies, bank failures, low prices, low wages and unemployment.[1] At least some of the candidates for election adverted in their campaign speeches to the hard times and their capacity to confront them. They also considered it important to emphasis their attachment to the colony and, in some cases, to indicate how they would conduct themselves as lawmakers, if elected. Native-born William Charles Wentworth, barrister and squatter, describing himself as "a son of the soil", asserted that after having "devoted the best energies of my life to promote the interests of my country, ... few will be found in its Councils more competent to assist in extricating it from its difficulties; still fewer—with more experience, purer intentions, or greater zeal".[2] Another native-born lawyer, George Robert Nichols, unsuccessful at this election but elected to the next council and thereafter to become a prominent legislator, referred to the precarious condition to which every colonial pursuit was reduced, "Australia now [being] in its utmost need, [and requiring] qualified practical men as

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1 See, for example, C.M.H. Clark, *A History of Australia*, vol. 3, *The Beginning of an Australian Civilization 1824-1851*, Melbourne University Press, Melbourne 1973, pp. 197-198; Michael Roe, "1830-50" in F.K. Crowley (ed.), *A New History of Australia*, William Heinemann, Melbourne 1974, pp. 107-109; Sylvia Morrissey, "The Pastoral Economy, 1821-1850", in James Griffin (ed.), *Essays in Economic History of Australia*, Jacaranda Press, Milton, Queensland 1967 (1974 reprint), pp. 85-97; John N. Molony, *An Architect of Freedom: John Hubert Plunkett in New South Wales 1832-1869*, Australian National University Press, Canberra 1973, pp. 48-49; Alan Powell, *Patrician Democrat: The Political Life of Charles Cowper 1843-1870*, Melbourne University Press, Melbourne 1977, pp. 10-11.

2 *SMH*, 7 January 1843.

Chapter 5 The fourth council and Governor FitzRoy, the early years, 1846–1848

The new governor, Sir Charles FitzRoy, was markedly different in manner and outlook from his predecessor. A relaxed aristocrat who owed his position partly to patronage, he nevertheless had a background in the army, politics and colonial administration and possessed a shrewd judgment of men and affairs and a strong desire to avoid conflict. Above all, he wanted a smooth administration. He disliked making speeches and was happy and confident enough to rely on trusted subordinates, especially Colonial Secretary Thomson.[1] Some critics, misjudging the relationship, suggested that Thomson had virtually supplanted the governor. FitzRoy's high connections probably made him less concerned about rebukes than Gipps had been. Further, while Gipps had decided policy ideas of his own, stemming in part from his previous colonial service and a determined compliance with his instructions, FitzRoy, to the dismay of the Colonial Office and the Secretary of State, Earl Grey, paid far less regard to the policy implications of his decisions. He was not inconvenienced by high principles, and was content to act as an intermediary between the home authorities and local public opinion. The latter became increasingly important to him, FitzRoy priding himself on his popularity with all classes.[2]

When he opened the sixth session of the fourth council in early September 1846, the governor offered conciliatory words, noting his intention of becoming acquainted with local issues and visiting country districts, and declaring that in that session he would advance only measures of immediate necessity.[3] The *Herald,* in reviewing the coming session, urged

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1 When FitzRoy recommended an increase in Thomson's salary in 1852, the *Herald* noted that, from the outset, FitzRoy had "the sagacity to perceive how eminently fitted [Thomson] was, not less by personal ability than by matured local experience", to discharge the colonial secretary's onerous and multifarious duties as the chief civil officer, "without dictation or inference from his immediate superior". *SMH*, 6 August 1852. The Victorian *Argus* reported Thomson's salary increase with the comment that "[s]uch an active Secretary as our neighbours' possess is decidedly a dead bargain at £2,000 per annum, [Thomson being] ... in short, a statesman in little". *Argus*, 25 August 1852.

2 On FitzRoy, the contrast between the new governor and his predecessor, and FitzRoy's relationship with Thomson, see *ADB*, 1, pp. 384-389; S.G. Foster, *Colonial Improver: Edward Deas Thomson 1800-1879,* Melbourne University Press, Melbourne 1978, pp. 84-85, 100-102; John M. Ward, "Australia's First Governor-General: Sir Charles FitzRoy 1851-1855", George Arnold Wood Memorial Lecture, University of Sydney, 23 September 1953, pp. 1, 8-9, 21-22; John M. Ward, *Earl Grey and the Australian Colonies 1846-1857: A Study in Self-Government and Self-Interest,* Melbourne University Press, Melbourne 1958, pp. 280-282; C.M.H. Clark, *A History of Australia,* vol. 3, *The Beginning of an Australian Civilization 1824-1851,* Melbourne University Press, Melbourne 1973, pp. 343-344; Ruth Knight, *Illiberal Liberal: Robert Lowe in New South Wales, 1842-1850,* Melbourne University Press, Melbourne 1966, 145-150.

3 *V&P* NSWLC 1846.

members to meet the new ruler in a similar spirit, while at the same time "boldly asserting the rights of their adopted country".[4]

Some general trends relating to the council's work soon became apparent, when a member, Edward Brewster, attempted to reform the legal profession by amalgamating the barristers' and solicitors' branches. This proposal was the subject of committees in 1846 and 1847 and it reveals some of the broad philosophical principles that influenced members' behaviour. In introducing the bill, Brewster appealed to the authority of Jeremy Bentham. Bentham, he said, had believed that the delays and high costs that disgraced the English courts of justice were the result of the division of the profession. MacDonagh's doubts about Bentham's influence in Great Britain can have no currency for New South Wales. Colonial legislators were apparently very familiar with his work, either using it to support their arguments or perceiving a need to refute it when inconvenient, as Wentworth had done when calling for legislative intervention in the commercial sphere during debate on his 1843 interest bill. The *Herald* referred to Bentham as "the highest authority ... [and] by far the most profound and philosophical Jurist of modern times".[5] At least one early Australian writer, C.H. Currey, in 1937, saw the influence of Bentham and his followers as pivotal in the cause of law reform in New South Wales in the period covered by this thesis.[6] Brewster, a member of the "senior branch" of the profession himself, or in other words a barrister, but one who had applied unsuccessfully to practice as a solicitor, referred to the multiplicity of objections that his peers took in legal actions "to gain a reputation for sharpness, ... not to promote the ends of justice, but to raise and refute points". If the profession were thrown open, all practitioners would be interested in coming to the merits of a case as quickly as possible and judges would be better able to make rules to stop prolixity. In other words, like Bentham, he argued that institutional processes could only be justified by their general usefulness. He drew attention to the absurdity of excluding colonists from becoming barristers unless they went to England, and he argued that as the interests of the judges were with the bar there would be no impetus for reform while the barristers' monopoly on advocacy work before the higher courts continued.[7]

Debate on the bill provides an example of a play of Benthamite and laissez-faire

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4 *SMH*, 2 September 1846.
5 Ibid., 25 April 1848.
6 C.H. Currey, "The Influences of the English Law Reformers of the Early 19th Century on the Law of New South Wales", *JRAHS*, vol. 23, pt. 4, 1937, pp. 229-241.
7 *SMH*, 16, 25 September 1846.

elements in a colonial setting, showing how they worked on the spot, and what compromises and combinations were necessary in making them work in tandem. Both could play a part in law-making, as Parris, Hart and Taylor argued in relation to the British situation, and as Dunstan says of colonial Victoria. In Sydney, Robert Lowe observed that as "an out-and-out free trader", he found himself in a difficult dilemma. While it was easy to apply Adam Smith's doctrines to the trade in corn and land, here he was asked to give an opinion on a monopoly from which he, as a barrister, benefited. Lowe renounced the monopoly, describing it as a restraint on freedom of men to employ their intellect as they thought fit. Darvall disagreed, arguing that cheap law was a curse. However, in Lowe's opinion, of all taxes, a tax on justice was the most cruel as it was a tax on rights, a tax that prevented the poor and weak man from asserting his rights against the rich and powerful. As a separate class, barristers, Lowe said, were a burden on the administration of justice. The division of the profession was a multiplication of labour to create expense, being not only a waste of human effort but a waste to the community which was forced to pay for the monopoly. Its removal would also remove a great deal of corruption, Lowe said, the power possessed by attorneys to select barristers being a source of patronage exerted on occasion without regard either to the barrister's abilities or the client's interests. Its removal would also break the monopoly of legal appointments and introduce something like independence into the profession, rather than leaving "the eaters of thirty-six dinners [a reference to the fact that barristers qualified by spending a fixed period, measured by Lowe in meals, in the inns of court in London] ... jumping, like trouts, at a May-fly—at every office of even £200 year, which might happen to fall vacant".[8]

Another incalculable advantage of breaking the monopoly, Lowe said, would be to open the field "to the aspirations of native youth without expatriating them", and without cutting off possible careers for those unable to afford the passage home. This was a classic example of the moral progress which was meant to result from free trade, a notion with complicated ramifications in this period. Had Wentworth been unable to travel home as a youth, Lowe said, "the country would have been deprived of one of its brightest ornaments, and the Council of one of its most distinguished supporters". Lowe, with his particular interest in colonial education, saw the prospect of local instruction of prospective barristers as a means of fostering the establishment of a general education system and even a university. A division on the previous question resulted in 16 members, including Gibbes,

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[8] Ibid., 16 September 1846. Knight, p. 154, said that Lowe argued for free trade in the face of almost united opposition. However, see text on Windeyer's similar approach.

voting for the bill to proceed, with nine, including Thomson (normally a keen free-trader) and Riddell, against. In debate on the second reading, barrister Richard Windeyer declared that the idea that amalgamation of the profession would provide cheap law was a delusion. True free-trade principles would involve making the price or value of the article what it was really worth, or in other words abandoning the rule making it unprofessional for a barrister to accept less than a certain fee for his work.[9] More follows on this bill shortly.

The principal workshop in law-making

In the early FitzRoy years, council business became even more workmanlike, time-consuming and precise, increasingly drawing on and involving popular opinion and skills in the business of law-making. This was partly thanks to FitzRoy himself, but it was much more due to the groundwork of previous years. Shortly after the fourth council's dissolution in 1848, the *Herald,* commenting on the burdens on legislators, discussed the various calls on their time. After mentioning work in the council chamber, it referred to their labours in "the principal workshop", the committee room. There, it said, unobserved by the multitude, the member was required to sit "at a paper-covered table, to think and talk, and talk and think, through many of the choicest hours of open day".[10] A total of 35 select committees had been appointed in the council's last three sessions following FitzRoy's arrival, 11 in the short second session in 1846, 17 in 1847 and seven in 1848. These committees produced respectively 297, 594 and 123 pages, including reports, minutes of evidence, replies to circular letters and associated material. Nine committees related specifically to bills, four of which were public bills. Two, in successive years, dealt with proposed reform of the legal profession. These committees were crucial to the relationship between public opinion and law-making.

There were changes in the committee work-load of some members. Nicholson, who had dominated committee appointments in the council's early years, was now speaker and a member of seven sessional committees only. Cowper, representing the rise of organised urban interests, took Nicholson's place as one of the leading men in committee work. He sat on 27 of the 35 committees appointed, including all appointed in 1848. He also chaired a number of important committees, including that on immigration in 1847 and railways, a particular interest of his, in 1848. Cowper's biographer, Alan Powell, suggests that Cowper's

9 Ibid., 16, 25 September 1846. See also ibid., 28 September 1846; Knight, p. 154.
10 Ibid., 23 June 1848.

talents were well adapted to the unspectacular but exacting grind of committee work, and that Cowper was without peer in this area.[11] Some were much less skilled. The *Herald*, in a biting, personal attack on Wentworth in 1847, following the failure of his roads bill, suggested that, unlike Cowper, he was not up to the job. It pointed to Wentworth's chairmanship of committees on roads and bridges in successive years and said that, because of his want of industry and "constitutional love of ease", he had failed to prosecute the matter. Deadlines had not been met and the only result was a little report of three pages followed by a bill of about the same dimensions, and when the bill was rejected on technical grounds there was no time left in the session to consider what ought to be done. In the number of committee appointments, Cowper was followed by Thomson (21), Lowe (17), Plunkett (15), Windeyer, who died in December 1847 (14), Lamb (13) and Wentworth, Robinson and Murray (12 each). In these three sessions, Lang, previously an active committee man, was a member of only one committee, and he vacated his council seat in November 1847. Since the earlier sessions, the committee workloads of Wentworth and Robinson had decreased dramatically, while those of Thomson, Lamb and Murray had increased.[12]

During the 1847 session, the committees' output was almost 600 pages of material. The strain told. In July, for instance, when Wentworth proposed that the council go into committee on his publicans' bill, Attorney-General Plunkett protested that he was "not in a state" to consider such an important measure immediately. On the previous day, he had been in the house until nine o'clock in the evening, that day he had been on committees "from ten to the opening of the House and was at work by six o'clock at his office business", and he was really exhausted.[13] Later in the session, when moving the second reading of a bill to improve the management of deceased estates, Plunkett said that he had delayed its introduction in the hope that Cowper would have moved to refer the issue to the committee on the rules of the supreme court which he was chairing. However, Plunkett found that Cowper's hands were so full of other business in committees that he could not be expected to take any more. It was therefore his duty, he said, to bring the bill in in its present imperfect shape.[14]

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11 Alan Powell, *Patrician Democrat: The Political Life of Charles Cowper 1843-1870*, Melbourne University Press, Melbourne 1977, pp. 29, 38-39.

12 *V&P* NSWLC 1846-1848.

13 *SMH*, 31 May 1847.

14 Ibid., 15 July 1847. See John N. Molony, *An Architect of Freedom: John Hubert Plunkett in New South Wales 1832-1869*, Australian National University Press, Canberra 1973, pp. 70-71, 85 on Plunkett's work-load and responsibilities as attorney-general.

Debate on the bill to unite the legal profession shows that members often had different agendas in agreeing to references to committees and in endeavouring to tailor their terms of reference. Windeyer suggested that Brewster's bill be referred to a committee because of the complexity of the issue. Barrister Darvall, who opposed the bill, seconded this motion but suggested that the committee might examine ways to correct monstrous abuses in the law, saying somewhat surprisingly that the breaking of the bar's monopoly on advocacy work would simply "admit a larger number of licensed plunderers of the public". Brewster did not oppose the committee's appointment. However, Wentworth, in a ploy to divert the thrust of the original proposal, successfully moved that the committee inquire into ways of reducing legal expenses and the best means of admitting colonial youth as advocates, as well as considering the amalgamation issue. The *Herald* regretted the success of this last motion, since, as Windeyer and Lowe suggested, it was apparently intended to ensure that the bill was shelved altogether. However, the editor said, while colonists were habitually apathetic on questions of a public nature, there was no apathy on this subject—"The public mind is erect upon it"—and the editor noted that a petition presented in its support from Sydney residents had 1 100 signatures, "procured in two very wet days".[15]

Clearly, this was a project which required the kind of expert opinion that could only be gathered by a select committee, and even that might be inadequate. Brewster, the bill's originator, was not appointed to either of the ten-man committees, both chaired by Wentworth, which sat to consider it. The first heard from John Gurner, the retired chief clerk of the supreme court, and from S.F. Milford, the master in equity, both of whom opposed amalgamation, and from solicitor Randolph Want, who also opposed it in metropolitan areas but thought that it might have advantages in the country. Witnesses from the bench and bar, including Chief Justice Alfred Stephen, Justice Dickinson (with written back-up from Justice a'Beckett of Port Phillip) and English barrister Ross Donnelly, opposed fusion. They were supported by veteran solicitor James Norton, but his younger colleagues, Robert Johnson and James Martin, favoured amalgamation and the opening of the profession to local talent. The predictions as to the bill's fate were borne out by the report of the second committee. It dismissed any idea of fusion of the profession, and concluded that the topic of lessening legal expenses was "so wide, cumbrous, and complex" that it would probably require "a paid Commission of Lawyers to elaborate all its details, and to produce a new and perfect code of

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15 Ibid., 25, 29 September 1846. See Michael Roe, *Quest for Authority in Eastern Australia 1835-1851*, Melbourne University Press in association with Australian National University, Melbourne 1965, p. 196, Roe arguing that moral enlightenment permeated moves to remodel the legal profession, the implication being that many victims of the law were "really victims of lawyers".

proceedings".[16] This exercise provides an example of the recognition by this time that some issues before the council were so complex that they required distinctive expertise, an awareness that was in itself a very significant development in the attitude of law-makers. However, while the original reform bill failed, another bill to enable colonial youth to be called to the bar without going to England was passed in 1848.

Professions of ancient standing, such as the law, were well placed to offer their expertise and opinions to the council. The lobbying ability of the Church of England was similarly in evidence when the government wished to implement the recommendations of the 1845 select committee on the establishment of a general cemetery. Three clergymen from different denominations and a long-standing Sydney resident commented on aspects of the proposal, while the surveyor-general, colonial architect and the city's commissioner of police gave evidence about possible sites for the location of new cemeteries. Police Commissioner Miles also addressed health issues and the likely effects of relocating the existing burial ground on the city's poorer classes.[17] The bill to establish the cemetery attracted petitions from Anglican clergy and laity who objected to a general cemetery and wished land devoted to Anglican dead to be controlled by their brethren. Cowper, commonly referred to at this time as the "Member for the Church of England", defended the Anglican bishop against an attack by Lowe. While he supported the concept of a general cemetery, Cowper said, he did not see why the Church of England could not manage its own portion of it, an approach supported by the *Herald*.[18] However, Cowper, who had chaired the cemetery committee, seconded a motion by O'Connell to defer the bill for six months. He suggested that much of the opposition to it outside the council had been excited by the way some members had dealt with the petitions. Public representations had not been met fairly, Cowper said, but had been treated with prejudice and indifference, if not contempt.[19] Other members pointed to the bill's long public exposure and the lateness of the opposition to it. George Allen, a Wesleyan, referred to the fact that while the Sydney Anglican diocese numbered some 25 000, only 800 people had signed the laity's petition.[20]

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16 Ibid., 25 September 1846; *V&P* NSWLC 1846-1847. See also J.M. Bennett, with contributions by E.J. Minchin and Anthony Fisher, *A History of Solicitors in New South Wales*, Legal Books Pty Ltd, Sydney 1984, pp. 59-64.

17 See report from the select committee on the general cemetery bill and minutes of evidence, *V&P* NSWLC 1845.

18 *SMH*, 7, 8 July 1847; Powell, pp. 19, 26.

19 Ibid., 6 August 1847.

20 Ibid.

As with the legal profession reform, a question of conflict of interest arose. Wentworth commented that it was the practice of Anglican dignitaries to perpetuate dissensions between one sect and another. The council, he said, had nothing to do with such quarrels. Plunkett agreed, saying that he had had no communication with his own Church concerning the bill. He sat in the council as attorney-general, not as a representative of the Church of Rome, and he would not agree to any bill that infringed the rights of any religion. Thomson, an Anglican, said the same. A move to defer the bill's progress was lost by 21 votes to two, cast by O'Connell and Cowper, and the bill passed.[21] This success might be contrasted with the failure, in Britain, in the 1840s and early 1850s of Chadwick's plans for a unified system of publicly owned sanitary burial grounds for the entire London metropolis. The result was a bill to turn London's cemeteries over to parishes and private companies.[22]

The Church's prowess in the lobbying department had also been in evidence in 1844 when introduction of the national education system recommended by a select committee chaired by Lowe was deferred, partly because of Anglican pressure.[23] It was manifest again in 1846 when the Anglican bishop was permitted to address the council in opposition to Lowe's Church of England clergymen's benefices bill. The bishop denied the council's competency to interfere in the temporal affairs of the Church of England, particularly as that Church was not the established church in the colony. Darvall, Lowe and Windeyer denied that the council lacked the capacity to regulate such affairs. Windeyer, while agreeing with the bill's principle, said it should be deferred, as it reduced the bishop's powers to nothing. As far as he had been able to gather, "the public opinion, the general belief", was that the clergy required stricter rather than less supervision from their bishop.[24] The *Herald,* querying why Lowe should wish to interfere when the doctrine and discipline of the Church had already been settled by royal authority and parliament, noted that the measure was likely to encounter stiff opposition from members of the Church and from the bishop and clergy of the Sydney diocese. Lowe agreed to its deferral. [25]

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21 Ibid. See also FitzRoy to Grey, 16 December 1847, *HRA*, 1, 27, pp. 89-101, the governor providing a comprehensive history of the measure, prepared by Thomson, because he had received a remonstrance against it from the Anglican bishop.

22 David Roberts, *Victorian Origins of the British Welfare State*, Yale University Press, New Haven 1960 (second reprint 1961), pp. 249, 259; Oliver MacDonagh, *Early Victorian Government 1830-1870*, Weidenfeld and Nicolson, London 1977, pp. 146-148.

23 See report from the select committee on education and minutes of evidence, *V&P* NSWLC 1844; Knight, pp. 84-85; Powell, pp. 23-25.

24 *SMH*, 23 September 1846.

25 Ibid., 24 September 1846. See ibid., 17 September 1846 for an earlier editorial on the bill; Knight, pp. 151-152, suggests that Windeyer advised Lowe against introducing it.

The social and commercial life of Sydney provided numerous openings for the expression of expert and popular opinion, and for the lobbying of interest groups. Various matters relating to Sydney's needs were addressed in the early FitzRoy years as a result of committee deliberations before and after 1846. In at least one case, in 1845, philosophic objections to government intervention in economic areas did not preclude the local executive from adopting a creative idea from the trustees of the Sydney savings bank, who wanted statutory authorisation to lend money to the Sydney Corporation to enable it to lay water pipes. At that time also, Robinson had introduced a bill to permit the Melbourne savings bank to lend money to Melbourne's corporation and its mechanics' institute. Both bills were referred to the same select committee, which recommended that the two savings banks be authorised to advance specified sums to their respective municipal corporations. Those recommendations were embodied in the 1845 Savings Banks Act, but another, by the same committee, that the savings banks might lend to the government for public works on the security of debentures charged on general revenue was not.[26] It had been opposed by Gipps although, for many, the government, far from being excluded from the field, was seen to be responsible for the provision of necessary infrastructure. A further Savings Bank Act was enacted in 1848 to pick up the idea.[27]

By this time the council was forced to consider the population of the city as an interest group in itself, concerned for its own health and comfort. While the 1845 committee on cattle slaughtering had been principally concerned to prevent the disposal of stolen animals, the thrust of the Lamb-chaired committee of 1848 on the expediency of removing slaughter-houses from the city differed substantially.[28] The 1848 committee was appointed on the initiative of Patrick Grant, the member for the Northumberland Boroughs, principally for reasons of public health. Wentworth and Bland were less than enthusiastic. They argued that the proposal might result in the sale of tainted meat, but they were probably more concerned to look after the interests of the owners.[29] Wentworth had been interested in the protection of property rights since the 1820s. However, the *Herald*, bewailing six years of council inaction on the issue of Sydney's health and comfort, was shocked that Wentworth opposed the bill. According to the *Herald*, he was more sensitive to "grievances which are abstract and

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26 See report from the select committee on bills to enable the savings' banks to grant certain loans, *V&P* NSWLC 1845; Gipps to Stanley, 23 November 1845, *HRA*, 1, 24, pp. 633-635.

27 See *V&P* NSWLC 1848; *SMH*, 19 May 1848.

28 See report from the select committee on the act to regulate the slaughtering of cattle, *V&P* NSWLC 1845 pt. 1.

29 *SMH*, 19 April 1848.

speculative" than to those which daily assaulted the senses and lungs of his own 40 000 or 50 000 constituents.[30]

Whereas the earlier committee heard from five witnesses, three of whom operated boiling-down works or slaughter-houses, the later committee took evidence from 27 witnesses. The opening group of 14 included Sydney residents (two being city aldermen) living near slaughter-houses and butchers' premises, four medical practitioners, two architects and surveyors, an engineer and the town clerk, all of whom attested to the chronic and unacceptable nuisance and health hazard caused by the vast bulk of the 78 butchers who operated within the city. One of the witnesses, Thomas Hyndes, a city councillor, referred to slaughter-houses in Druitt Street built on "Mr Wentworth's property". Then followed the evidence of five butchers, some of whom owned a number of slaughter-houses and three of whom were city councillors, a factor that may well explain the city corporation's inability to act effectively, despite frequent complaints. Evidence was also taken from members of the field executive, that is, from present and former inspectors of nuisances and the senior police magistrate about the inadequacy of the present law, both to suppress nuisances and to enable the inspectors to issue orders for that purpose. The corporation's inspector of slaughter-houses, on the other hand, who was paid a fee per head of animals slaughtered, was far less condemnatory in his evidence, being unable to give an opinion on some matters and suggesting that enforcement of a stringent law would resolve nuisance problems. Other witnesses, including the medical officer of the Tarban Creek lunatic asylum and a Parramatta butcher, gave evidence that meat could be transported safely for some distance without contamination, thereby countering earlier objections on this score. Finally, the colonial secretary and deputy surveyor-general gave evidence about the way nearby Glebe Island might be acquired and adapted for use both by slaughter-houses and as a cattle market.[31]

The committee report neatly summarised the gist of the evidence and recommended the passing of an act to require the removal of slaughter-houses from the city. The committee was also of the view, despite petitions and the evidence of their proprietors, that the owners of these establishments were not entitled to compensation: "The interests of the few must ... yield to the general good".[32] This was a clearly utilitarian conclusion. On the day the select committee reported, Wentworth presented a petition from a butcher who said he had been

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30 Ibid., 24 April 1848.

31 Report from the select committee on slaughter houses and minutes of evidence, *V&P* NSWLC 1848.

32 Ibid.

unaware that a committee had been appointed and who asked that action be deferred.[33] In fact, with virtually no time left in the session, the question of a legislative solution was left to the new council.

William Bland acted with Wentworth on this issue, both of them representing Sydney in the council, but in debate on the government's Sydney roads bill in the same year, they were at odds. Bland was one of those who supported the outlay of public funds for the repair of parish roads in the eastern suburbs. These roads should be repaired, he said, to enable the populace to use them for recreation purposes. He complained that while members were not opposed to raising funds to be spent outside the bounds for the benefit of squatters, improvements to towns and peopled districts were put aside. It was time, he said, that people in towns awoke to their own interests. If they did, they "would crowd the table of that House with petitions" calling for a return of funds illegitimately sent out of the colony for immigration purposes.[34]

The topics debated in these cases are of great significance for the argument of this thesis, heralding the emergence of well-organised and continuously active public interest groups in Sydney, and of committees well designed to take account of their concerns. Bland's call for his constituents to look to their rights constituted a turning point. In the early life of the fourth council, one might well have expected legislation for town life to have preceded that favouring the scattered few beyond the limits of location. The reverse was true. However, just as the inhabitants of other capital cities had done—just as Parisians made the French Revolution, and citizens of the City of London exercised enormous influence over the British government—so Sydney's residents took the lead in the rise of collective self-consciousness and of popular political organisation, the emergence of the liberals being a symptom of that phenomenon. In Sydney, where the population was close-packed and growing, reaching over 49 600 in 1846, and where newspapers were readily available and provided a focus for town opinion, the people, at the legislature's doorstep, were able to organise and lobby with far more efficiency than those elsewhere.[35] From this point, an ever-present public opinion permeated law-making for the metropolis, but also for the colony as a whole. The towns, and Sydney in particular (by way of liberal opinion), thus fuelled the

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33 *SMH*, 7 June 1848.

34 Ibid., 6 April 1848.

35 An appendix to the 1848 select committee report on railways placed the population of the Sydney police district in 1846 at 49 630, an increase of "39-78" per centum in five years. See *V&P* NSWLC 1848.

main developments with which this thesis is concerned. From this time also, interest groups were becoming better organised, and more used to the idea that they could instigate or even shape legislation. Professional groups, especially of lawyers and medical practitioners, were well placed, as was the Anglican Church. All were well organised and well connected, and with a clear sense of their own importance for government. But so were interests concerned with the management of the city of Sydney, such as lawyers with a professional interest in public policy, and tradespeople, especially merchants and publicans. I return to these points in the following chapter.

The thoroughness of committee work in areas of this kind is well illustrated by the case of the 1846 committee on the city's lunatic asylum, chaired by Cowper. Unlike issues dealing with Sydney as a whole, however, the expertise employed in this case was narrowly focused. The committee took evidence from visiting magistrates and other official visitors and medical officers, the superintendent of the institution and the colonial architect, each being carefully questioned about the adequacy of the buildings and the inmates' food, clothing and recreational needs, and on organisational aspects, including the chain of command, staffing and inspection. The committee report showed the same degree of care, logically setting out findings and recommendations for reform.[36] However, when Thomson introduced a lunatics bill towards the end of the 1847 session which purportedly followed the committee's recommendations, members denied that this was true. According to Cowper, the bill's provisions accorded in some measure with the committee's recommendations, but it was not in his view designed to do what the committee intended.[37] His comments stressed the importance of expert evidence.

Thomson said that the bill had been framed by the crown law officers with reference to Irish laws. He had no objection to the introduction of further matters but considered that it would be preferable to leave matters of detail, such as the keeping of registers, to government regulations, an indication perhaps that the local executive, like that in Britain, was inclining to the use of delegated legislation. For Cowper however, it was imperative that the need for good record-keeping be stated in the law itself rather than being left to government, both the English statute and committee members being very decided on this point. While ruled-up registers were provided at Tarban Creek, no entries had been made in

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36 See report from the select committee on the lunatic asylum, Tarban Creek, *V&P* NSWLC 1846, vol. 2; Powell, p. 39; Roe, p. 192.

37 *SMH*, 9 September 1847.

them. And while the bill was based on Irish laws (owing to Plunkett's familiarity with that system, no doubt), the committee had been told that the English law was much better. Why adopt an inferior system? Another deviation, he said, involved private asylums. The committee had expressly excluded such establishments, recommending instead superior accommodation for private patients in the public institutions. He also referred to the lack of attention shown in the bill to paid visitors and the board of inspection. Committee evidence had disclosed the extraordinary fact that the current board had met only once within the walls of the Tarban Creek asylum. Further, an absolutely necessary object of the committee's report, that the asylum should be managed by a competent medical officer, had not been addressed in the bill at all.[38] It seems that the hard-pressed law officers had preferred their own approach to law-making and had looked to familiar precedents rather than attempting the more time-consuming task of translating the committee's report into law. In so doing, they discounted the growing importance of committee work. The council deferred the bill for six months.

While the new reality was beginning to focus on the relationship of the council with its committees, some members still clung very much to the old idea that the main dynamic of council activity lay in its relationship with the executive. Wentworth, for instance, reintroduced a bill dealing with the appropriation of ordinary revenue in 1846 which arose from a select committee's examination of the issue in 1845, a previous bill having lapsed for want of support. Subject only to the deductions made by the 1842 Constitutions Act, the bill aimed to strike down so much of all local laws as permanently vested appropriation of the colony's ordinary revenue elsewhere than in the council.[39] Thomson objected that this approach would render all appropriations under the affected acts illegal and necessitate the passing of an act of indemnity. However, he said, if Wentworth would agree to alter his bill's details, he would confer with him on framing clauses to repeal such appropriations as the council thought fit. Wentworth would only agree that the bill's operation should be prospective.[40] FitzRoy withheld assent. Earl Grey considered that the bill attempted to usurp parliament's function to define the limits of the council's authority, constituting "a precedent for diverting from the Legal Tribunals to the Legislative Council the right of interpreting the

38 Ibid.
39 Ibid., 11 September 1846.
40 Ibid., 17 October 1846; Foster, p. 86.

Act of Parliament". A more serious objection in principle, he said, could hardly be imagined.[41]

As Wentworth well knew, committees might be used against the government, a method evident in earlier years when he chaired committees which resulted in a radical reduction in the water police establishment (1843), reported on general grievances (1844) and prevented the repeal of his Liens on Wool Act (1845). In 1847, when he moved the second reading of his roads bill, following examination of the state of public roads and bridges by select committees in 1846 and 1847, he anticipated opposition from the colonial secretary because the bill intruded on the provisions of the Constitutions Act dealing with district councils. His proposed elective roads trusts were similar to district councils in many respects, he said, but they would not raise taxes, merely spending money granted to them. The committee, he said, was "nearly unanimous" in recommending the new system, scarcely a witness before it or a respondent to its circulars being opposed. He could see no use for select committees at all if the evidence taken by them, and the reports founded on that evidence, were set aside merely because it was thought their implementation might interfere with the utterly inoperative district council system.[42] Berry, an old-fashioned member who could not be expected to have understood the new approach, replied that he saw little use for committees in any event since they took one-sided evidence.[43] In fact, committees were not debating chambers but were clearly designed to get things done. In that respect, they were almost a new form of executive designed to shape policy which the council might convert into law. Berry complained of measures being "smuggled" through the council, a practice daily gaining ground and much to be deprecated, he said. Further, in this case, the bill embodied the very worst part of the district council system, a system Berry abhorred. Thomson did believe that the bill "trenched too much" on the part of the Constitutions Act instituting district councils, and his motion to defer the bill passed by ten votes to six.[44] The bill's failure provoked an anguished complaint from the *Herald* that the council, after receiving a mass of evidence that demonstrated that the colony's roads and bridges were in a parlous state, had done nothing.[45]

The work of the fourth council's committees might be assessed to some extent by the

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41 Grey to FitzRoy, 29 May 1847, *HRA*, 1, 25, pp. 606-608.
42 *SMH*, 25 September 1847.
43 Ibid.
44 Ibid.
45 Ibid., 1 October 1847.

fact that 74 reports were brought up and printed during its five-year life. Thirteen were produced in 1843, 19 in 1844, 21 in 1845, six in 1846, 11 in 1847 and four in 1848. The *Herald* commented after the council's dissolution that, bearing in mind that it had only 36 members, these figures established that "in point of *industry*, at least, the country has no cause of complaint of its first experiment in representative legislation". In the *Herald's* view, the "*merits* of the laws enacted and reports brought up" were even more praiseworthy than the amount of business despatched. Many of the additions to the statute book in the last five years were "monuments of legislative wisdom" that only a local legislature could have conceived and enacted, because "only a *local* legislature could have perfectly understood what our local requirements were, and how they were to be met". It suggested that even with all its resources, the imperial parliament would have been unequal to the task which the colony's representatives had so admirably performed. Many of the committee reports in particular, said the paper, attested as much to "the zeal, diligence, and ability" of the first elective council as the best of its enactments. It referred to these "elaborate volumes" covering "almost every imaginable subject connected with the polity, resources, and exigences [sic] of the colony", as an invaluable resource, compiled from a variety of "trustworthy sources" and arranged "with consummate judgment". The reports, when coupled with the returns supplied by executive departments, formed, in the *Herald's* view, a "*colonial encyclopaedia*" for the period, "authenticated by the stamp of authority".[46] The authority it spoke of was not the old authority of government, but the authority of informed and expert public opinion.

Petitions and other influences in the law-making process

When compared with committees, in which lawmakers sat down with local experts to work through issues, petitions were fairly blunt instruments. They were designed to state simple and often carefully crafted cases, one way or the other, on issues debated in the council. The council's standing orders specified that the only questions to be entertained on the presentation of a petition were whether it should be read and, if read, whether it should be received.[47] The ritual of petitioning assumed a kind of detached superiority in the authority being petitioned and deference in the people.[48] There was no room for careful discussion and

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46 Ibid., 28 June 1848 (emphasis in original).

47 See, for example, clauses 110-113 of the standing orders passed by the legislative council on 27 October 1843, *V&P* NSWLC 1843.

48 See Ravi De Costa, "Identity, Authority, and the Moral Worlds of Indigenous Petitions", *Comparative Studies in Society*, vol. 48, no. 3, July 2006, p. 672.

consideration, and for compromise, as was possible in proceedings before inquiries where members (often with different agendas) had the opportunity to quiz witnesses appearing before them and to caucus with one another. And committees were more egalitarian, especially as people from a wide range of social backgrounds might be interviewed. An impatience with petitions begins to appear during this period as they came to be viewed (at least by some members) as very inaccurate guides to public opinion.

Petitions continued to play a prominent role in the law-making process. However, while 345 general petitions had been presented in the fourth council's first four sessions (including 203 in 1844), only about 109 general petitions were presented in the last three sessions and most of these dealt with aspects of the administration of justice. A few specifically sought amendment of laws, such as those applying to publicans' licences and jurors' allowances. Thirty petitions related to public bills, being mainly opposed (as against 38 in the Gipps era). Thirteen of these were presented in FitzRoy's first short session, five against abolition of the division between the legal profession (while two supported it) and four against a party processions measure.[49] That measure was introduced to prevent a repetition of disturbances in Melbourne between "Orangemen" and "ribbonmen", Protestants and Catholics of "the lower orders".[50] Another 13 petitions against 11 different bills were presented in 1847, including those from distiller Robert Cooper and merchant John Lord who objected to a distillation laws consolidation and asked to be heard at the bar of the council and to call witnesses against it.[51]

Petitions sometimes gave rise to bills or resulted in their amendment. The Melbourne courts of requests bill, although introduced by governor's message, was not a government measure. Thomson explained that it had been introduced wholly in consequence of a petition from inhabitants of the Melbourne area.[52] In another example of what we might call "petition power", Thomson noted during debate on the government's 1846 wharfage rates bill that its original principle had been completely altered in consequence of a petition.[53] Shortly after a clause in Lowe's 1846 bill to simplify the law on imprisonment for debt abolished the lower courts' power to imprison on a close vote, Plunkett presented a petition supporting his

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49 *V&P* NSWLC 1846-1848; Index to the Votes and Proceedings of the First Legislative Council 1843-1855, n.d., Office of the Legislative Council, Sydney (unpublished).

50 *SMH*, 15, 16 October 1846. See Clark, pp. 344-346.

51 *V&P* NSWLC 1846-1848; Index to the Votes and Proceedings of the First Legislative Council 1843-1855.

52 *SMH*, 16 October 1846.

53 Ibid., 15 October 1846.

objection to it. The clear implication is that Plunkett either elicited the petition or hurried it on. It was signed by 63 merchants, traders, shopkeepers and others, the signatures all collected in a few hours, so Plunkett said, despite inclement weather.[54] Bland also presented a petition opposing this aspect of the bill.[55] In spite of their limitations, petitions were still treated very seriously. Thus, although Lowe denied that the petitioners in either case had any vested interest which the council was required to maintain, the bill was recommitted and a clause allowing courts of requests to imprison in certain cases was reinstated. [56] At about this time, the *Herald* urged members not to introduce petitions raising frivolous and vexatious issues, advice which implied that, despite declining numbers, petitions were still an important part of the legislative process, to be managed responsibly.[57]

O'Connell's 1846 bill to amend the Melbourne Corporation Act to exclude the village of St Kilda from the city limits provides an example of competing petitions. In this case, the distance between Melbourne and Sydney must have made it difficult to rely on anything else but petitions as an expression of public opinion. In 1845, Nicholson had presented a petition from St Kilda residents praying for exclusion from the city. They objected to being subject to taxation without receiving any corresponding benefit. The petition was referred to a select committee which decided that its claim was reasonable.[58] However, a rival petition was received from the Melbourne Corporation seeking compensation by the extension of the city's boundaries elsewhere if St Kilda was excluded. O'Connell objected that while Sydney had an area of 2½ square miles, Melbourne embraced 21 square miles.[59] The bill passed but was reserved as the result of a further petition from the Corporation, this time objecting to a clause that conferred jurisdiction for Melbourne on all New South Wales justices. FitzRoy did not see any validity in the Corporation's claim and recommended the bill. It subsequently received royal assent.[60]

Another example of the play of opposing interests was presented by Brewster's legal profession bill. Plunkett presented a petition opposing the bill signed by almost every member of the Sydney bar. Fusion, they said, would damage their professional standing and

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54 Ibid., 23 September 1846.
55 See ibid., 30 September 1846.
56 Ibid.
57 Ibid., 20 October 1846.
58 See report from the select committee on the petition from St Kilda, *V&P* NSWLC 1845.
59 *SMH*, 30 September 1846.
60 FitzRoy to Grey, 9 January 1847, *HRA*, 1, 25, pp. 308-309, the Corporation's petition being at pp. 312-313. See also Grey to FitzRoy, 31 July 1847, *HRA*, 1, 25, p. 695.

increase petty litigation and abuses. Petitions on the same side came from the remaining Sydney barristers and from practitioners at Port Phillip, who asked that their district be exempted from its operation. On the other hand, Bland presented petitions signed by several hundred residents of Sydney and Parramatta praying that the legal profession be reunited.[61] When the bill came on for its second reading, Plunkett moved that two barristers, whose interests would be invaded by the measure, be heard at the bar of the house against it. He expressed surprise that some members intended to oppose his motion, given that the council had heard from distillers or their counsel, and had listened to the Anglican bishop most attentively in the last few days speaking against Lowe's clergymen's benefices bill. Windeyer reminded members how many nights they had already spent hearing parties interested in the distilleries measure. Further, if the council heard barristers against the bill, it could not refuse to hear those in favour of it, and, he said, he had already received applications from such people. He therefore suggested a different way of garnering the different opinions, a select committee from which the council "would derive in the end the advantage of getting at the truth".[62] This, as has been seen, is what happened.

The operation of various pressures, within and outside the council chamber, was evident in 1847 during proceedings on a publicans' licensing bill. Petitioners frequently called for law reform in this area and publicans formed an important lobby group. Wentworth abandoned his fourth attempt to secure the passage of a bill at this time because, he said, it had been mutilated in committee. His endeavours to reduce the licence fee and "emancipate" publicans from the magistrates' unlimited discretion to fix trading hours failed.[63] His running mate in the Sydney electorate, Bland, also objected to the fact that publicans' livelihoods depended on the discretion of magistrates who could refuse licences without giving any reason. However, other members were not impressed by the publicans' arguments. There is some implication at this point that members were beginning to think of petitioning as a form of shadow-boxing. Cowper said that the fact that a class of citizens affected by a bill was not satisfied with it was no reason to give it up and Lowe remarked that the publicans had wanted the bill to begin with, but after the legislature had made amendments to it for the public good they had changed their minds. He urged the council to have more confidence in its own deliberations, even if its decisions were unpopular.

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61 *SMH*, 24, 25 September 1846; V&P NSWLC 1846.

62 Ibid., 25 September 1846. See also Sir Reginald F.D. Palgrave and Alfred Bonham (eds.), *Sir Thomas Erskine May's Parliamentary Practice: A Treatise on the Law, Privileges, Proceedings and Usages of Parliament*, William Clowes and Sons Ltd, London 1893 (tenth edn. 1898), pp. 400, 450-451.

63 See ibid., 18, 21 August 1847.

Plunkett, who had moved some of the amendments, observed that if the publicans wished to have a bill "fashioned to their own liking", in this or any other council session, they might have to wait a long time.[64]

When the government's national education bill was debated in 1848, Lowe, who had chaired a select committee on education in 1844, noted that opinions in favour of the general education scheme were daily gaining ground on those opposed to it. Displaying a weariness with the petitioning process and indicating an awareness of the social unprogressiveness of many in the Church of England (as noted also by Jenifer Hart), Lowe attacked Cowper and his Anglican allies. He referred to the repeated introduction of the "same senseless array of petitions, three-fourths of the signatures to which were not in the hand-writing of the petitioners", and putting forward the same falsehoods and misrepresentations regarding the operation and tendency of the national education system as had been put about previously.[65] A reliance on petitions was by no means dead (as the next chapter shows) but generally the council was moving towards more refined methods of consultation. The declining number of petitions during this council may suggest a corresponding feeling among the population at large.

Other methods of introducing outside opinion to council deliberations continued. When opposing the government's deceased estates bill in 1847, Lamb said that he had received objections to it from several respectable professional men. Cowper and Wentworth said that it deserved consideration all the same, having been introduced by the attorney-general and recommended by the judges of the supreme court and the curator of estates.[66] In 1847, during debate on Plunkett's intestate estates measure, Thomson suggested that Plunkett should postpone consideration of the bill until he could discuss with the current curator of estates the issue of provision of security for the due performance of his functions. Plunkett had admitted when he introduced this bill that it was not "fully formed".[67]

During debate on the 1847 distillation laws amendment bill, discussion turned on the issue of hearing interested parties by counsel at the bar of the house. Thomson, the manager of government business, said that while he was anxious not to shut the door to private parties appearing to defend their own interests, nothing was more likely to impede the course of

64 Ibid., 21 August 1847.
65 Ibid., 12 May 1848.
66 Ibid., 15 July 1847.
67 Ibid., 30 July 1847. See ibid., on 15 July 1847 for the admission regarding the state of the bill.

legislation than allowing all private persons who imagined that their interests were threatened to come before the house.[68] However, John Lord, a petitioner, was permitted to appear by counsel and members heard at length his objections to various clauses of the bill and his suggestion that, if the council called competent witnesses, it would find that certain clauses would render the distilling process impossible.[69]

Outsiders continued to play a part in the actual preparation of bills. When Lowe's 1846 church bill was deferred, the *Herald* suggested that some measure dealing with ecclesiastical discipline, "well matured by the Bishop and clergy", should be submitted to the council at an early date.[70] On bringing in the 1847 Melbourne buildings bill, Robinson said it had been drawn by the Melbourne Corporation.[71] Brewster said that his two bills of the same year dealing with the conveyance of real property and leases were based for the most part on material prepared by some of the most eminent conveyancers in London (Lord Brougham had said the same when he introduced their forerunners into the House of Lords) and they had since been adopted by the British parliament.[72] Brewster also said that his 1847 bill dealing with the taxation of attorneys' costs did not altogether originate with him but was suggested by some of his honourable and learned friends.[73] Odd divergences from normal procedures involving outside participation in law-making also occurred. On going into committee on the government's 1848 savings banks bill, Thomson informed the house that the bank's trustees "had framed the bill anew" since its second reading, at the suggestion of their legal adviser. But, he said, the bill thus amended presented nothing new in principle.[74]

Members often sought to enlist outside support for their measures. When Lowe introduced a bill to simplify aspects of legal practice in 1848, he said that his aim was to have it printed so he could distribute it among members of the legal profession.[75] However, sometimes there seemed to be too little public interest in law-making. In debate on renewal of the Squatting Act in 1847, Lowe expressed surprise that colonists had done nothing "to prevent their prospects being blighted". While numerous meetings had been held to raise relief for Ireland, currently stricken by famine, he said, none had been held to prevent the

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68 Ibid., 1 July 1847.
69 Ibid., 3 July 1847.
70 Ibid., 24 September 1846.
71 Ibid., 8 July 1847.
72 Ibid., 31 July 1847.
73 Ibid., 25 August 1847.
74 Ibid., 2 June 1848.
75 Ibid., 26 April 1848.

colony's lands from being taken away.[76] However, Darvall deprecated what he saw as Lowe's attempt to turn the community against the squatters, saying that people generally knew their own interests; "they are pretty keen", and if they did not oppose the squatting regulations, it might be because they did not agree with Lowe's views.[77]

Many examples of *Herald* editorials referring to or calling for council action and community participation in the law-making process have already been provided. When discussing the necessity for a clause in his re-introduced libel laws bill in 1847 to enable those who obtained a verdict against the proprietors of newspapers to recover damages, Windeyer, himself a former journalist, said that he intended to consult "with those who would be most interested in the operation of the clause".[78] The *Herald*, anxious to preserve freedom of the press, congratulated Windeyer on behalf of the community generally, and newspaper proprietors in particular, for having introduced the bill, and canvassed its provisions in detail.[79]

In FitzRoy's short speech to dissolve the fourth council on 20 June 1848 (read by the speaker), the council was thanked for the great ability and effective co-operation it had shown in maturing government legislation. As noted in Appendix 1.1, during FitzRoy's first three sessions of approximately ten months, 47 of the 56 government bills introduced had been enacted. In all, 80 bills received assent in this period at an average of over 26½ per session. Four other bills were reserved and assent was withheld from one. The average for the early FitzRoy years therefore exceeded, but only sightly, the five sessions under Gipps. In total, in five years and eight sessions, the fourth council passed 172 of the 252 bills introduced. Governors declined to assent to only five bills, with 11 reserved for consideration by the home government, a mere fraction of the number passed. Governors assented to 156 bills at an average of over 31 bills per year. This was a substantial achievement, given that in the pre-1843 period, when the government alone held the law-making reins, the yearly average had been was 15 before Gipps' arrival and over 26 thereafter.[80] It was against this background of achievement that candidates for election to the fifth council prepared to go to the polls in the latter half of 1848.

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76 Ibid., 12 August 1847.
77 Ibid.
78 Ibid., 11 June 1847.
79 See ibid., 3 July 1847. See ibid., 6 July 1847 for a further editorial on the bill.
80 *V&P* NSWLC 1846-1848; Appendix 1.1.

Towards the end of the 1840s, two distinct ways of understanding the functioning of the council were unfolding. One, typical of old-fashioned, Whiggish legislators like Wentworth, focussed on the relationship between the council and the governor and his officials. Under this rubric, the main point of members' activities was to preserve and extend the authority of the representatives of the people, and yet those who took this attitude were not much interested in exercising government themselves. This was an oppositionist and libertarian approach which focussed a lot on the rights of property, issues of taxation and so forth. Wentworth constantly harped on questions of government control over the people's money.[81] As has been seen, this anti-executive, old-fashioned view was evident in Wentworth's attitude to committee work. Secondly, there was the new, utilitarian approach, which made sudden and massive strides in this period as a means of extending government power. In this case, supply was not so much a point at issue between government and the peoples' representatives. This approach involved making the council useful to the business of government, even despite the priorities of officials themselves. The council itself could not be thought of as a governing body, but it could play an active part in government, especially through the gathering of opinion—expert opinion and public opinion. This was done mainly through committees. And the committees did more than gather. The committee reports analysed opinion and made recommendations. Even the selection of witnesses, as seen in the case of slaughter-houses, was a type of executive decision affecting the final report and therefore affecting legislation. Thus, the connection between these reports and legislation now became a vital point. Further, the council committees were in a sense executive bodies. They were designed, not just to talk, but to get things done.

For these reasons, the late 1840s was an obvious turning point, comparable with the arrival, in 1855-56, of responsible government. It involved a fundamental shift in the relationship between executive government and public opinion.

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81 See Sir Henry Parkes, *Fifty Years in the Making of Australian History*, Longmans, Green and Co, London 1892, pp. 23-24. There, Parkes described Wentworth in the late 1840s and early 1850s speaking of the people in the manner of a conventional English Whig gentleman of 100 years previously. For Wentworth, Parkes said, constitutional reform meant "putting an end to government from Downing Street, and handing over the affairs of the colony, including the public lands, to his own class".

Chapter 6 The fifth council, 1849–1851

This chapter deals with the legislative work of the fifth council, which sat for three sessions from 1849 to 1851. An overview of select committee and petitioning activity and legislative output is followed by an examination of the council's law-making work in two broad and overlapping areas. The first relates to the city and the bush and the second to the regulation of private property, especially in the city. Legislative work in the council chamber and in committee is considered as well as related activities out of doors. The chapter concludes with a brief discussion of the origin of ideas applied in this law-making activity.

The council's first session commenced in May 1849. As Appendix 2 shows, 11 of the old council's 12 nominees were re-appointed, and 15 previously elected members were returned again.[1] FitzRoy's speech to open the session, in referring to the existence of a considerable depression, may have evoked unpleasant memories of an earlier time. Now, however, the difficulty arose largely because political convulsions in Europe had hindered the market for colonial exports. The local labour shortage had been addressed by the resumption of immigration in 1848, FitzRoy said, some 13 161 souls being added to the colony's population, with another seven ships on the way. The rapidly swelling numbers would test Sydney's services to the limit. The governor also referred to his receipt of several imperial despatches, including those proposing changes to the constitutions of the Australian colonies and the renewal of some form of transportation.[2]

This council appointed 45 select committees, 22 in 1849, 19 in 1850 and four in the five-week session in 1851 (as compared with the 35 committees appointed in the last three sessions of the fourth council). It is clear that members were turning ever more instinctively to committee work. The 1849 committees produced some 758 pages of material, about the same amount as that produced in the aggressive committee period of 1844. The 1850 committees examined many public and private legislative proposals and a miscellaneous collection of more general issues, including police, banking and the operation of masters and

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1 See C.M.H. Clark, *A History of Australia*, vol. 3, *The Beginning of an Australian Civilization 1824-1851*, Melbourne University Press, Melbourne 1973, pp. 385-389 for comment on the membership of the new council.

2 *V&P* NSWLC 1849; Clark, p. 415; Ruth Knight, *Illiberal Liberal: Robert Lowe in New South Wales, 1824-1850*, Melbourne University Press, Melbourne 1966, pp. 188-189, 209-210.

servants laws. However, these committees produced only some 138 pages altogether, as little direct evidence was taken. Three of the four committees appointed in the short, final session in 1851 were of a sessional nature. The fourth, appointed to consider the Australian Constitutions Act enacted by the British parliament in 1850, adopted a declaration and remonstrance opposing the new constitution by 18 votes to eight (the minority comprising nominees Berry and Parker and the six official members). Plunkett, James Macarthur and Wentworth led the way in committee appointments, each sitting on 21 committees over the three sessions. They were followed closely by Thomson, the newly-elected George Robert Nichols (20), and Donaldson (19) while Speaker Nicholson sat on 16 committees. Cowper, who vacated his seat in March 1850, sat on 17 committees in 1849 alone, and Lowe, who left the council in November 1849 and the colony in January 1850, sat on ten.[3]

Petitions continued to be of considerable significance in the business of law-making. They even began to have an active rather than a reactive purpose so that, like committees, they now prefigured change rather than protesting against it. Roughly 100 petitions were presented in the council's first session (compared with about 109 in the last three sessions of the fourth council). As with committees, this represented a sizable increase, highlighting the increasing involvement of public opinion in the legislative process. Even more petitions, approximately 156, were presented in 1850. About 20 were presented in the short 1851 session.[4] The large increase in the number of petitions presented in 1849 and 1850 might be explained in part by public concern about prominent issues such as the possible resumption of transportation and the allocation of funds appropriated for denominational education. However, it appears that petitioners were also becoming more attuned to happenings in the council and to the way in which council decisions might impact on their lives. Here, De Costa's reference to petitions as a focus for other types of political action, such as mass meetings, and as an element in the growth of political awareness in both the petitioned and petitioners, is telling.[5] As council members became more interested in social engineering and in moral issues, such as drink and gambling, so too did an increasingly articulate and organised middle class begin to claim a role in the development of legislative policy in those

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3 *V&P* NSWLC 1849-1851. See Alan Powell, *Patrician Democrat: The Political Life of Charles Cowper 1843-1870*, Melbourne University Press, Melbourne 1977, pp. 45-46 on Cowper's resignation; Knight, pp. 250-251 and Clark, p. 434 on colonial reaction to Lowe's resignation and departure.

4 *V&P* NSWLC 1849-1851; Index to the Votes and Proceedings of the First Legislative Council 1843-1855, n.d., Office of the Legislative Council, Sydney (unpublished).

5 Ravi De Costa, "Identity, Authority, and the Moral Worlds of Indigenous Petitions", *Comparative Studies in Society and History*, vol. 48, no. 3, July 2006, pp. 673-674.

areas. And as in England from the second quarter of the nineteenth century, at least some sections of the population noticed the existence of unacceptable social conditions and began to demand change. At the same time, consideration in the council of matters relating to free enterprise attracted the attention of those members of the middle class engaged in the economy, and they also pressed for a part in the framing of legislative responses.

In legislative terms, as Appendix 2.2 shows, the fifth council was very productive. Members sat for 85 days in 1849. Only the 1843 and 1844 sessions, of 86 and 95 days respectively, were longer. In that first session, the government introduced 32 bills, of which 27 passed and received assent. Elected members introduced more bills than the government (39), but less (24) were successful. Of the total from elected members, 15 were introduced by Nichols and of those 12 were enacted, that is, one half of the successful measures on the elected members' side, evidence of Nichols' sudden and considerable impact on law-making. In 1850, the government introduced 29 bills and elected members 39. The success rate of official proposals outweighed that of elected members by 26 to 20, with one of the elected members' bills being reserved. Among elected members, Nichols led the way again, with 14 proposals, nine of which passed. Only six bills were introduced in the session between late March and 2 May 1851, called to give effect to the 1850 Australian Constitutions Act and to formalise the separation of the new colony of Victoria from New South Wales. Five of those bills passed.[6] In two years, 103 bills were enacted, with one reserved, at an average of 51½ laws per year, considerably more than the 31 per year for the fourth council and nearly twice the figure for the pre-1843 Gipps legislature.

The city and the bush

The purpose at this point is not only to consider the importance of law-making for urban areas, but also to contrast urban-orientated activity with what was done for rural areas. In this period, issues to do with urban governance and development, public health, amenities and safety received attention, a number of them relating especially to Sydney. Many were addressed by Nichols, who had been appointed the city's first solicitor in July 1843.[7]

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6 *V&P* NSWLC 1849-1851; see also *SMH*, 13 October 1849, 22 November 1850.

7 The city's records show that Nichols was appointed on 28 July 1843. In a letter to the Sydney Corporation dated 7 June 1844, following a complaint about his absence from meetings of the bye-laws committee, Nichols said that he considered the £100 p.a. "which the Corporation pay me ... merely as a sort of retaining fee to secure my professional services ... and not as a salary constituting me their servant". City of Sydney Archives, NSCA-AGY-74; City Solicitor Letters 1843-1850 NSCA-CRS 876/1. The *ADB* item on Nichols states, incorrectly, that Nichols was the city's solicitor "in 1854-56". *ADB*, 5, p. 336.

George Robert Nichols M.L.C.
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Born in Sydney in 1809 of a successful emancipist father, the English-educated Nichols was the first native-born Australian to be admitted as a solicitor. He was a forceful orator, had a striking physical appearance, being over six feet tall, and possessed great personal charm. He had lengthy experience as an advocate in lower courts in both Sydney and the interior, specialising in criminal law. Yet his law-making interests were eclectic. With a strong sense of social justice, he was wide-awake to English law-reform initiatives and was keen to adapt appropriate measures for colonial use. Known at this point as "Radical Bob", he described himself as "a radical reformer". He had been actively involved in politics from the 1830s, as an associate of Wentworth, who moved his admission as a solicitor, and as a close friend of William Bland. His influence among the native-born was accentuated in the late 1830s by his role as the proprietor and editor of the *Australian*. Several colonial solicitor-politicians, including James Martin, served their articles with him. Nichols was also a leading Freemason and a trustee of the Sydney Grammar School.[8]

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[8] See *ADB*, 5, pp. 335-336; Michael Roe, *Quest for Authority in Eastern Australia 1835-1851*, Melbourne University Press in association with Australian National University, Melbourne 1965, pp. 85-86; Clark, p. 386; Alan Atkinson, "Time, Place and Paternalism: Early Conservative Thinking in New South Wales", *Australian Historical Studies*, vol. 23, no. 90, April 1988, pp. 12, 18; R.B. Walker, *The Newspaper Press in New South Wales, 1803-1920*, Sydney University Press, Sydney 1976, pp. 23-24; *SMH*, 2 March 1843; Clayton Utz, *One Hundred and Fifty-Five Years of Legal Service 1833-1988*, unpublished Sydney 1988, pp. 3-6; J.M. Bennett et al., *A History of Solicitors in New South Wales*, Legal Books Ltd, Sydney, pp. 37, 61, 67-68, 70.

Sydney, the colony's capital, is important for the argument of this thesis, not only because it represented the most focused, immediate and unavoidable form of public opinion, but also because it offered the most urgent problems of social engineering. Also, forces and conditions of the kind identified by MacDonagh and others as occurring in Britain after 1830 and precipitating legislative change there can be clearly seen in Sydney, beyond anywhere else in New South Wales. As MacDonagh pointed out, from the early 1830s, British governments instituted inquiries into municipal government, public health and sanitation in towns, and policing. The utilitarian Edwin Chadwick was heavily involved in the latter two areas and other convinced utilitarians in the former (see Chapters 7, 8 and 9 on local reforms in these areas). MacDonagh argued that the utilitarians involved in the British local government reforms failed to grasp the doctrine's tutelary, despotic and mechanical aspects, but Chadwick, the master Benthamite reformer, was certainly intent on imposing comprehensive administrative answers in the areas of public health and policing, which necessarily entailed state interference with private interests.[9] The influence of utilitarianism can be detected in New South Wales also in the desire of many within and outside the council to promote the greatest happiness of the greatest number by addressing similar problems. Indeed, colonial law-makers, unencumbered by many of the entrenched vested interests opposed to change and centralised control which beset British politicians, were sometimes able to obtain more efficacious legislative results than those produced by the imperial parliament.

Sydney was declared a city, and its citizens were incorporated, by the Sydney City Incorporation Act in 1842, a law styled on municipal reforms made by the Whig government in Britain in 1835. These emphasised democratic individualism by providing for a universal and equal suffrage for (but only for) ratepayers, a delegatory rather than a parliamentary system of representation, and a tight control of the elected by the electorate through frequent elections. However, as MacDonagh said, little attention was given to means of ensuring impartial and rational administration, a prescient comment given subsequent events in New South Wales.[10] The Sydney Act conferred power on its corporation to impose rates and carry out various essential municipal functions relating to the lighting of the city and the provision

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9 Oliver MacDonagh, *Early Victorian Government 1830-1870*, Weidenfeld and Nicolson, London 1977, pp. 121-122, 135-136, 140-143, 171. See also ibid., pp. 96, 99-101 on Chadwick's involvement in poor law reform.

10 Ibid., p. 122. See also, Roe, pp. 83-84; J.B. Hirst, *The Strange Birth of Democracy: New South Wales 1848-1884*, Allen and Unwin, Sydney 1988, pp. 255-256.

of roads, sewers and water, in a similar fashion to the English municipal corporations. The city's councillors were to be elected by citizens in wards by a poll on a particular day without previous nominations. The councillors then chose the mayor and a small body of aldermen, the aldermen having functions relating to the election of councillors and as justices, and the mayor being the city's principal justice. Dicey described the British municipal reforms, which aimed to transfer power to the urban middle class at large at the expense of self-perpetuating oligarchs, as being influenced by Benthamism.[11]

The colonial experiment in local government was unsuccessful, the corporation's failure over seven years to carry out its functions and safeguard public health being viewed by many with understandable disquiet. As Michael Roe noted, public health was a subject of paternalist concern, and the corporation was especially vulnerable for its deficiencies in this area.[12] In May 1849, the council appointed a select committee, chaired by Lowe, to inquire into the working of the corporation.[13] One wonders whether such an inquiry would have been possible for an English city, given the number of competing interests involved. The committee examined 21 witnesses with a range of experience and expertise in facets of civic administration. They included present and former members of the corporation, the town clerk and his assistant, the city treasurer, the secretary of the gas company, the Port Jackson health officer, a surgeon, Sydney residents, and barrister Archibald Michie.

The surgeon, Isaac Aaron, who Roe described as "a political radical and the colonies' nearest counterpart to Edwin Chadwick", advanced a comprehensive six-point plan for a complete and efficient system of sewerage, drainage, paving, cleansing, and a proper supply of wholesome water for Sydney, based on his knowledge of systems in use in Birmingham and London.[14] He called for the replacement of the present ignorant, inexperienced and inefficient civic body by "a different set of men", or in other words by paid commissioners. Further, he recommended the ovoid form for the main-sewers as the cheapest, the strongest and the best adapted for the purpose. As will be seen in Chapter 8, this was the very form that Chadwick had advocated for adoption in England two years earlier.[15] Michie, who had

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11 See Chapter 1; MacDonagh, p. 122.

12 Roe, p. 192.

13 See Knight, pp. 241-243; Roe, pp. 84-85; Hilary Golder, *Sacked: Removing and Remaking the Sydney City Council 1853-1988*, City of Sydney, Sydney 2004, pp. 9-16.

14 Roe, p. 192; Minutes of evidence taken before the select committee on the city corporation, 1 June 1849, pp. 59-62, *V&P* NSWLC 1849.

15 Minutes of evidence taken before the select committee on the city corporation, 1 June 1849, p. 62, *V&P* NSWLC 1849.

worked in England on the reports of the municipal corporation commissioners, gave evidence that, in his view, the corporation had failed in its prime object, to provide beneficial self-government in local affairs, and had degenerated into a vehicle for gross abuses. A majority of the committee concluded that the working of the corporation was unsatisfactory, both to the public and to the corporation itself. (The corporation, mimicking the legislature, appointed its own select committee to examine the council's report with a view to rebutting its charges.) The Lowe report pointed to numerous problems, including shoddy and even fraudulent financial practices, patronage and favouritism in carrying out public works, a concentration on roadworks (often in inappropriate places) to the neglect of other services, such as water and lighting, a failure to maximise revenue, and dilatory and inconsistent conduct of civic business. The report also criticised the appointment of aldermen as justices, which in the committee's view encouraged people with no interest in civic service but merely a desire to acquire social status, to seek office. In short, the report stated that the corporation was guilty of gross and palpable misconduct. As the committee did not wish to place the city's management in the hands of the executive government, it recommended "a middle course" (possibly influenced by the evidence of Aaron and Michie), the repeal of laws relating to the corporation and the appointment of a commission to manage the city. The report also recommended that the commission itself be investigated annually by a committee of the legislature.[16] Reform along these lines would have involved the city being ruled partly by a select committee of the council, or a series of them.

While Lowe, after the style of Chadwick, had been instrumental in tailoring the committee's recommendations, he was unable to carry them through the council due to the opposing principles and interests of other members.[17] When he moved for adoption of the first recommendation, the repeal of the Corporation Act, Nichols moved that the existing law should be amended instead. And when he proposed the appointment of the commission, Cowper, a committee member, moved instead for appointing fewer councillors, with an elected mayor. Lowe then withdrew his remaining resolutions. A petition prepared at a public meeting in the city called for the corporation to be reformed, but with retention of the elective principle.[18] When a government bill to reform the corporation, introduced in the last

16 Report from and minutes of evidence taken before the select committee on the city corporation. *V&P* NSWLC 1849.

17 On Chadwick's manipulation of legislative commissions of inquiry, see, for example, MacDonagh, pp. 99-102, 135-136, 142, 172.

18 Knight, p. 242; *SMH*, 10 September 1849.

days of the 1849 session, lapsed, the *Herald* referred to the disappointment of Sydney's inhabitants that no reformatory measure had been passed.[19]

When he re-introduced the reform bill in 1850, Thomson stressed that the government was doing the council's bidding. FitzRoy said later that the bill (which departed from the British model) was introduced to comply with the corporation's own resolution that it should be reformed rather than abolished. The most important reform was that councillors were to be elected, not in wards, but by all citizens after public nomination and that aldermen were to be elected by citizens and not by the councillors, with the mayor being elected by citizens from among the councillors and aldermen. FitzRoy hoped that by breaking away from local influences in the wards, a more respectable class would be returned to the city corporation.[20] The bill's second reading was approved by a vote of 17 to six, and it became law.[21] Subsequently, Earl Grey informed FitzRoy that he had refrained from advising the Queen to confirm the measure until he had received a fuller explanation of the new electoral arrangements and their expected benefits. Wentworth had argued that making the city a single electorate would introduce "only the very lowest demagogues" into the city corporation, and Grey too suggested that everything would depend on whatever popular feeling happened to prevail at election time.[22]

Sydney was not the only town in the colony, nor the only one large enough to experience distinctive problems and to require distinctly urban solutions. In 1851, just before the gold-rushes, Sydney and its suburbs had a population of 54 000, Melbourne 23 000, and Maitland, Parramatta, Goulburn, Bathurst, Windsor, Newcastle and Brisbane all between 1000 and 4 500.[23] So Sydney was certainly by far the largest, and was unique in many ways. But Melbourne was also unusually large. The others were still very much country towns, though Brisbane also had a port. Thus, in discussing urban problems in any way comparable with those currently being tackled in Britain, I am mainly referring to Sydney and Melbourne. However, it will be seen that some issues, involving changing sensibilities and lower tolerance thresholds when it came to smells and squalor, and to large questions of

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19 *SMH*, 13 October 1849.

20 FitzRoy to Grey, 2 December 1850, CO 201/432, ff. 238-240; Golder, pp. 17-18.

21 *SMH*, 12 July 1850.

22 Grey to FitzRoy, 20 September 1851, CO 201/442, ff. 267-269; SRNSW: Governor's Despatches: Despatches from Secretary of State: 4/1336; *SMH*, 27 June 1850.

23 1851 census, *New South Wales Government Gazette*, 7 November 1851 (supplement); 1851 census, *Victorian Government Gazette*, 6 April 1851.

social justice, applied to the smaller towns also. In every case, legislators drew their sense of urgency from what they saw about them in Sydney (or, perhaps, responded to Sydney opinion) but once again it does not follow that these were issues to do with Sydney exclusively. The same issues are linked with the theme, raised by MacDonagh, about ideology (or at least sensibility) as opposed to unbearable urgency as the cause of change. In the end, in the colonial context, it seems that the two types of motivation for legislative effort cannot be disconnected.

Several bills about this time related to urban health and amenities, including those dealing with the slaughter of stock. An 1849 government bill to amend the law applying to slaughter-houses in Sydney arose from the 1848 select committee on the subject. It represented a compromise between the conflicting interests of slaughter-house proprietors and the public. The government considered it impracticable to require removal of all slaughter-houses from the city before a public abattoir was established. While the bill itself recited that their presence represented a nuisance to the health and comfort of residents, it permitted the licensees of existing premises to continue for the time being.[24] At the same time, it prohibited the keeping of pigs and the operation of fell-mongering and similar establishments in the city, restricted the movement of cattle through city streets and increased the powers of the city's justices and inspector of nuisances to police the cleansing of slaughter-houses and butchers' shops.[25] The establishment of a public abattoir for the city was delayed because of the need to consult imperial authorities about the sale of the existing cattle market, but a bill to enable its establishment was enacted in 1850. The government, Thomson said, would have preferred the city corporation to handle this matter, as had been done in Melbourne, but as it had not done so, the executive was forced to act.[26]

In his speech to open the 1850 session, FitzRoy had referred to a bill to provide better sewerage for Sydney, thereby promoting the health of its citizens. The legislative scheme proposed by the government was simple and cheap, he said, and ideal for Sydney. When

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24 *SMH*, 3 October 1849.

25 Ibid., 10 October 1849. Surgeon, Isaac Aaron, had also called for the removal of slaughter-houses, soap boiling works, piggeries and tanneries from the city in his evidence before Lowe's select committee. See minutes of evidence taken before the select committee on the city corporation, 1 June 1849, p. 60, *V&P* NSWLC 1849.

26 Ibid., 8 August, 25, 26 September 1850. See also FitzRoy to Grey, 12 February 1850, CO 201/426, ff. 204-209; Grey to FitzRoy, 10 August 1850, CO 201/431, ff. 204-214 on the establishment of the abattoirs and associated issues, Earl Grey querying whether the site would be accessible by the proposed railway and was of sufficient size to accommodate Sydney's future needs. See also FitzRoy to Grey, 2 December 1850, CO 201/432, ff. 235-236.

Thomson introduced the bill, it transpired that he had availed himself of the expertise of a recent arrival in the colony, Pearson Thompson, who had given him a copy of a law adopted for the sewerage of Cheltenham in Gloucestershire, which was similar to Sydney in terms of population and the number and spread of houses. However, there was one difference. In Cheltenham, he said, a private company did the sewerage work. Here, despite the government's general commitment to laissez-faire principles, it was proposed that the city corporation would assume the responsibility.[27] The measure would not entail additional taxation, Thomson said, as the connection of private premises with public sewers would be achieved on a voluntary basis, citizens being compelled to participate only if public health were endangered by an accumulation of filth. England, he said, had provided examples both of the devastation wrought by disease and of the means of avoiding it. Sydney had escaped thus far from the scourge of disease, but given the city's increasing population this good fortune was unlikely to continue unless this long-delayed work was undertaken. Both Nichols and Lang (now re-elected as a member for Sydney) tried to get more funds for the city to cover the cost of the work before the bill's passage, but without success.[28]

Later in the 1850 session, Martin introduced a bill for paving the city. Owners should be responsible for keeping the footways in front of their premises in repair and, in default, the city corporation would do the work at their expense. The same principles, he said, were used for paving work in London. However, Thomson warned members to "look narrowly" into it, saying it was clearly a taxing measure which might press heavily, especially when coupled with the cost to be borne by citizens for sewerage work. Donaldson for one, the owner of city property, did not like it. The bill had a second reading, but Martin agreed to withdraw it.[29] Another attempt to improve the city environment also failed in this session. A government bill to increase the size of Hyde Park did not proceed because a select committee chaired by Wentworth recommended against it, although, as Thomson said, it presented a rare opportunity to enhance the city, both in terms of an increase in public space and better traffic flows. The bill had been introduced in response to a petition from a number of citizens, but that petition was trumped by another from several men who held property in the vicinity, its presenter, Wentworth, warning that if the government pressed on with the

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27 Ibid., 11 July 1850.

28 Ibid., 11, 18 July, 27 September 1850; FitzRoy to Grey, 2 December 1850, CO 201/432, ff. 233-234. Lang replaced the financially embarrassed Bland, who had retired.

29 Ibid., 8 June, 28 August, 10, 12, 21 September 1850. For Donaldson, see *ADB*, 4, pp. 84-86; Alan T. Atkinson, "The Political Life of James Macarthur", Ph.D. thesis, Australian National University 1976, pp. 385, 390-391.

proposal, it must expect very heavy claims for compensation.[30]

Melbourne's situation was also subject to scrutiny. In 1849, Henry Moor, a member for Port Phillip, introduced two bills dealing with urban problems there. The first regulated buildings and party walls. As Moor said, wooden houses were being built in almost every street of the city "against the walls of buildings of great value", seriously endangering life and property. This substantial measure, of 105 clauses and a number of schedules, passed with little difficulty. Moor said most of its provisions had been taken from the British Metropolitan Building Act, and some from the Sydney Building Act of 1837.[31] The measure, he said, protected both property owners and the public good. Moor's second bill aimed to regulate the formation, drainage and cleansing of Melbourne's streets and alleys in the interests of public health, and was modelled on a British law passed in 1847 for Belfast. Although the bill was withdrawn before its second reading, after the speaker ruled it to be of a private nature, it was taken up again by the government in 1850.[32]

Problems of urban management were not restricted to Sydney and Melbourne. In 1850, a government bill to amend slaughtering laws, arising from representations made by a field operative, the police magistrate at Maitland, was introduced. Its object was to extend provisions for the protection of public health to larger towns in the interior. Although Maitland was the largest of the country towns, it was still small compared with Sydney and Melbourne and had few of the public health problems that were normal by now in those places. This reform therefore suggests that changing sensibilities and a new intolerance of offensive odours and conditions had come into play. The bill prohibited the licensing of slaughter-houses within one mile from the limits of any city or town, and provided that, after five years, no more licences to slaughter animals within city or town limits were to be issued or renewed. During debate, the law was amended so that it would apply only to towns whose inhabitants asked for it.[33]

A concern to suppress possible outbreaks of urban unrest in towns throughout the colony, but especially Sydney and Melbourne, led the government to continue the law

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30 Ibid., 26 July, 21 September 1850. See *Empire*, 25 June 1853 on the importance of Hyde Park for public health and recreation.

31 Ibid., 4 August 1849. The initial Sydney Building Act, 8 William IV No. 6, was amended by the local legislature in 1838, 1839 and 1845.

32 Ibid., 22, 29 September 1849.

33 Ibid., 27 June, 23 August 1850; see FitzRoy to Grey, 2 December 1850, CO 201/432, ff. 231-232.

against party processions for another three years in 1849.[34] This measure passed despite petitions against it. Lowe presented a petition signed by 2 374 people who objected to the fact that the law looked like one used for Ireland, a by-word for sectarian strife, while Plunkett presented another from the office bearers of several temperance and total abstinence societies who claimed that their processions were for the public good.[35] In 1850, a more significant government legislative initiative on the public order front related to policing, an issue of concern throughout the colony but one of especial importance in Sydney because of the prevalence of crime and mob violence. The issue was one of considerable sensitivity. MacDonagh noted the existence of a very general prejudice, among all classes in early Victorian England, against police action as apparently incompatible with British liberty.[36] A similar prejudice, mingled with anti-authoritarianism and arising no doubt from the colony's origins, existed in New South Wales, probably in an even more intense form than in England. In addition, in both countries, professionalism in the area of public order was viewed as a threat by ordinary justices of the peace, likely to encroach on their status and ability to influence the appointment of constables.[37] Michael Roe also detected a concern for morality and a drive towards purity affecting matters to do with police, with an emphasis being placed on the need for high standards, especially in the quality of ordinary policemen.[38]

Edwin Chadwick had considered policing problems in Britain in the mid 1830s, and he had taken a comprehensive utilitarian approach. He saw the police as the state's executive enforcement arm, its fundamental aim being to eradicate crime rather than to punish criminals.[39] A 1839 royal commission, which he chaired, had recommended the introduction of a national, centralised system based on Irish police reforms of 1836, but the proposal was blocked by forces opposed to centralisation in England. The resulting British statute was permissive, not compulsory, boroughs were completely exempted from its operation and there was no general or national board of control.[40]

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34 See ibid., 14, 15, 16 October 1846, the measure having been introduced originally after an outbreak of sectarian violence in Melbourne in October 1846.

35 Ibid., 14 June 1849.

36 MacDonagh, pp. 167-168.

37 Ibid., p. 168.

38 Roe, p. 191, Roe noting that legislative council inquiries had resulted in the dismissal of Police Commissioners, W.A. Miles and J.L. Innes, and Darlinghurst Goal Superintendent, Henry Keck, for inefficiency between 1848 and 1850.

39 MacDonagh, pp. 167-170.

40 Ibid., pp. 172-174.

The policing issue had a similarly chequered history in New South Wales. Before the 1850 session, the *Herald* drew attention to the unsatisfactory state of colonial policing. As in England, there were several police forces, accountable to different authorities. The problem was accentuated by an increasing population, immigration of expiree convicts from Van Diemen's Land to the colony and the winding back of the military force. Instead of meeting this challenge with increased augmentation, the council (on Wentworth's motion) had abolished the mounted police in order to cut government spending, resulting, at least in the *Herald's* view, in increased crime in rural districts.[41] On introducing a police bill in 1850, Thomson noted that the issue had been the subject of three select committees, in 1835, 1838 and 1847, all of which had recommended the establishment of a central department to control policing. He then moved for the appointment of yet another select committee, which he chaired. Although the *Herald* was disappointed with its report, the progress of the resulting bill was relatively uneventful and it passed in late September. It provided for a professional, centralised force for the whole country under the control of an inspector-general and several provincial inspectors, along the lines of the Irish peace preservation system. As Chapter 9 shows, this bill was disallowed by the British government and the whole issue was revisited in 1852.[42]

In 1958, in the first of his publications on this issue, MacDonagh suggested that what men thought, and felt, about contemporary practices should be seen as one explanation for change in nineteenth-century Britain.[43] G.R. Nichols obviously had a decided view on the need for interventionist legislation to fine-tune various aspects of urban life for the greater public good, even when no pressing need for action existed. He also possessed the professional skill, with the help of British precedents in many cases, to run off drafts of new laws at short notice. And, given his position as the city's solicitor, it is not surprising that many of his bills related to Sydney and therefore, implicitly, to Melbourne. In 1849, Nichols introduced bills to enable all Sydney justices of the peace to perform the duties of police magistrates (thus resolving a staffing problem) and to authorise them to punish criminally negligent stage-coach drivers, who had become a major problem in the city.[44] He also brought in a bill for the criminal punishment of tradesmen and manufacturers who, when

41 *SMH*, 29 May 1850. See ibid., 4 June 1850. See also, ibid., 21 June 1850 for an editorial about native police.

42 Ibid. 20 June, 4, 26, 27 September 1850; FitzRoy to Grey, 2, 5 December 1850, CO 201/432 f. 237, CO 210/433 ff. 3-7; Grey to FitzRoy, 20 September 1851, CO 201/442, ff. 266A-266B.

43 See Chapter 1.

44 *SMH*, 2 June 1849.

entrusted with materials for the purpose of manufacturing goods, fraudulently disposed of them or committed other abuses.[45] His bill dealing with malicious damage to works of art aimed to protect objects in museums, galleries, libraries and churches, vital matters for civic culture, and it extended to such other items as tombstones, monuments and mile-stones. Nichols had also for many years displayed a particular interest in laws governing merchant seamen and the working of the port of Sydney, contributing to the making of laws on these subjects before he entered the council. His 1849 bill to amend and consolidate laws relating to merchant seamen adopted verbatim a number of clauses of an 1844 English law. It passed with virtually no opposition.[46]

Nichols also displayed an interest in the proper management of children. His bill to provide for the care and education of juvenile criminals (another largely urban issue) followed an English precedent, except that Nichols' measure covered misdemeanours as well as felonies and set an upper age limit of 19 rather than 21 years. It had overtones of social engineering and was symptomatic of an obsession of the 1830s and 1840s with education of the children of the urban poor as a means of stemming a rising crime rate.[47] Another Nichols bill empowered a supreme court judge to place young criminals as apprentices with people willing to provide for their maintenance and education, rather than sentencing them to gaol or labour on the roads in company with seasoned criminals. Despite hesitation on Plunkett's part, the combined arguments of Nichols and Martin carried this measure.[48]

In 1850, Nichols introduced a further array of bills related to aspects of city life, some to do with the cultural wellbeing of its citizens. One legalised art unions, the growth of this activity, especially in Sydney, making such legislation necessary.[49] Another sought to revamp the law relating to places of public exhibition and entertainment, FitzRoy agreeing that the old law, passed in 1828, was too restrictive and no longer suited to the colony's circumstances.[50] Nichols said that he had been pressed to introduce a bill for the prevention

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45 Ibid., 15 August 1849.

46 See *Public General Statutes of New South Wales*, 1847-51, Act 13 Vic. No. 28, sec. 33; *SMH*, 30 June, 28 July, 4, 11 August, 5 September 1849.

47 See Richard Johnson, "Educational Policy and Social Control in Early Victorian England", in Peter Stansky (ed.), *The Victorian Revolution: Government and Society in Victoria's Britain*, Franklin Watts, Inc., New York 1973 (first published in *Past and Present, A Journal of Historical Studies*, 49 (Nov. 1970), pp. 199, 226. See also Atkinson, p. 4; MacDonagh, p. 170.

48 *SMH*, 4, 15 August 1849; FitzRoy to Grey, 16 December 1849 (Despatch No. 246), CO 201/418, f. 14; Atkinson, p. 4.

49 FitzRoy to Grey, 2 December 1850, CO 201/619-620, f. 227.

50 Ibid; *SMH*, 12 September, 1850.

of cruelty to animals (largely copied from British law and identified by Dicey as of a Benthamite nature) by several men, including the city corporation's inspector of nuisances, to lay to rest a doubt as to whether British law applied in the colony.[51] The *Herald* commended Nichols for displaying humane and philanthropic principles in bringing the measure forward.[52]

Colonial legislative attention now focussed, as in Britain, on urban issues, in preference to the needs of the interior.[53] In New South Wales, urban and rural interests and ideas had begun to diverge, a fact highlighted by the debate in and outside the council concerning the 1851 electoral redistribution. Two bills introduced in the council's last session provided for the division of Victoria and New South Wales into new electoral districts, the number of electors in the electorates and the membership of the new legislatures. The bill for New South Wales attracted the attention of Henry Parkes' radical *Empire,* a newspaper first published in late December 1850, initially as a weekly but, from 20 January 1851, as a daily. From this time, Parkes, then aged thirty-five, provided a running commentary through the *Empire's* pages on the needs of the day, moving in the process (as we see below) from an orthodox individualist approach to a more utilitarian and centralist one. Over 40 years later, Parkes wrote that "[a] public organ [had been] wanted by our young party, and I came forward to supply the want".[54] He meant the liberal party, but in fact his application of liberalism in the early 1850s was subtle and evolutionary. It was also focussed very much on Sydney. In the case of the electoral bill, Parkes pressed for extension of the franchise purely on the basis of population.[55] On that basis, he said, Sydney should have 15 seats rather than the three proposed. He exhorted Sydney's merchants and "happily-circumstanced citizens, with leisure and superior intelligence", to get up a committee, as citizens in Hobart, Launceston, Adelaide, Geelong and "other much younger places" had done, to ensure that Sydney's interests were protected.[56] The council, Parkes said, ought not assemble without being put in possession of the sentiments of the people, and the squatters

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51 *SMH*, 7, 14 September 1850. Grainger, p. 59, asserted that this bill "originated with Martin".

52 Ibid., 22 November 1850.

53 See Anne Isobel Coote, "Space, Time and Sovereignty: Literate Culture and Colonial Nationhood in New South Wales up to 1860", Ph.D. thesis, University of New England 2004, a study in the growth of New South Wales to nationhood to 1860 and of changing concepts regarding the colony's territory.

54 Sir Henry Parkes, *Fifty Years in the Making of Australian History*, Longmans, Green and Co, London 1892, p. 84. At p. 94, Parkes asserted that his organ had done its work, the *Empire* creating "the first distinct party with a Liberal creed and the means of vigorous action".

55 *Empire*, 28 December 1850. See also, Walker, p. 62. For Parkes, see ADB, 5, pp. 399-406; Sir Henry Parkes, *Fifty Years*; A.W. Martin, *Henry Parkes: A Biography*, Melbourne University Press, Melbourne 1980.

56 Ibid., 8 February, 1 March 1851 (quotation in latter).

must not be permitted, on the basis of the electoral arrangements proposed, "to enjoy almost exclusively the power of making the laws".[57]

When Thomson introduced the electoral bill, he explained that the scheme of representation proposed was based on property as well as population, and involved the division of the electorate into three classes or interests. These were the towns, comprising commercial, trading and manufacturing interests, the counties, representing agricultural interests (with some pastoral elements), and the intermediate and unsettled pastoral districts. In making these arrangements, the government had been guided, he said, by the findings of the 1844 select committee on the elective franchise and practices.[58] The government also appears to have subscribed to the idea that a member of the legislature was, to use Peter Loveday's words, first and foremost, the representative of "interests", and only secondarily, a representative of a constituency (and certainly not of his constituents). By "interests", Loveday said (in a 1957 article), were meant those activities which were "productive" of "real wealth" for the colony, of a surplus of exports over imports, being, up to 1851, almost entirely pastoral interests.[59] Thus, Thomson could argue that towns grew out of the productive (or pastoral) interests, implying that as they did not produce wealth, they had a reduced claim on representation in the legislature.[60]

The proposed electoral arrangement offended the liberal merchant, John Lamb. In England urban areas were represented on a population basis and no special rights were provided for wool growers or other groups, Lamb said. Thomson had quoted very selectively from the 1844 committee's evidence, and the government had failed to take Sydney's wealth and position and its shipping and mercantile interests into account, leaving it with inadequate representation. Wentworth, on the other hand, described the bill as an improvement. He argued that Sydney's representation should not be extended because the city was the seat of government, and in it (contrary to the situation pertaining in rural electorates perhaps), "dense masses of people were easily drawn together, with a view to overcoming the

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57 Ibid., 8, 31 March 1851(quotation in latter). See also *SMH*, 26, 29 March 1851, the latter edition containing an outline of the more important of the bill's 82 clauses. See ibid., 29 March 1851.

58 Ibid., 5 April 1851. See also P. Loveday, "The Member and His Constituents in New South Wales in the Mid-Nineteenth Century", *Australian Journal of Politics and History*, vol. 5, no. 2, Nov. 1959, p. 206; S.G. Foster, *Colonial Improver: Edward Deas Thomson 1800-1879*, Melbourne University Press, Melbourne 1978, pp. 108-113; John M. Ward, *James Macarthur: Colonial Conservative, 1798-1867*, Sydney University Press, Sydney 1981, pp. 168-172.

59 Loveday, p. 206. See also J.M. Main, "Making Constitutions in New South Wales and Victoria, 1853-54", *Historical Studies Australia and New Zealand*, vol. 7, no. 28, May 1957, pp. 369-370.

60 *SMH*, 5 April 1851.

government and the legislature". He even suggested that the seat of government be moved in order to avoid constant intimidation from radical elements. At one time a champion of public opinion, Wentworth now urged the government to be firm, and to concede nothing to popular clamour.[61] James Macarthur ventured that, even with two members, Sydney was well represented. Like Wentworth, he referred to the city's position as the seat of government and also as the seat of the colonial press, which exercised a large influence. If anything, Sydney had always been too powerful, Macarthur said. Both Wentworth and Macarthur appear to have adopted the colonial secretary's approach, seeing the provision of representatives for Sydney as a concession to the "population principle".[62]

Wentworth's arguments were fallacious, Nichols said: "the day ... was near at hand when democracy or the votes of the people would have the preponderating influence". The basis of representation should be population, and the general wealth of the community, George Street's buildings and their contents being "in all probability worth the whole of the squatting stations and their sheep and cattle".[63] The *Empire* bemoaned the adoption of "great interests" rather than population as the basis on which representation was determined.[64] In addition to allocating electorates, the new Electoral Act reduced the franchise for freehold and household qualifications laid down in 1843, from £200 and £20 to £100 and £10 respectively, and extended it to leaseholders and licensed occupants of crown land.[65]

The focus of council debates proved that Nichols' prediction had already come to pass. Although the council's select committees examined issues relating to crown lands, catarrh in sheep (twice), the payment of rural workers' wages in wine, and cattle protection, few government measures now related purely to issues of the interior. Such matters were left principally to elected members. Members with pastoral interests, such as Donaldson, Murray and Wentworth, continued to be concerned about diseased sheep, stolen stock, wool and cattle mortgages and impounding, but the prominence of these issues, which had previously dominated council attention, now receded. When Wentworth's liens on wool law came up for renewal in 1850, Thomson and Plunkett wanted to refer it to another select committee. Wentworth saw no need, given that the 1845 committee had taken a great deal of evidence in

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61 Ibid., 12 April 1851.

62 Ibid. See also Loveday, p. 206.

63 Ibid. See ibid., 17, 18 April 1851 for a continuation of the debate; ibid., 19 April 1851 for comment on speakers espousing either democratic or conservative principles.

64 *Empire*, 23 April 1851.

65 See FitzRoy to Grey, 5 May, 1851, CO 201/441, ff. 18-22.

support of the bill's principle. He proposed instead to move a series of resolutions on the bill's third reading to "fortify the hands of the local Government". If Earl Grey chose to disallow the bill in the face of these resolutions, Wentworth said, his Lordship might as well legislate for the colony in future himself, as the matter was of a purely domestic nature, with no prerogative or imperial implications. Nine other members agreed with these sentiments, deprecating imperial interference. The bill passed without reference to a committee.[66]

In spite of his concern for Sydney, Nichols represented a country electorate and he was a solicitor with wide local court experience in the bush. He was active in proposing legislation which was not exclusively rural, but which nevertheless had important implications for the bush. Among his measures in 1849 were bills to facilitate the admission of documents in court proceedings throughout the colony and to permit and reduce the cost of service of court process by persons other than the sheriff, legislation of a Benthamite nature, according to Dicey (writing in the British context), because it extended the substantive legal rights of individuals.[67] Another of his bills, dealing with distresses for rent (which was held over), included "a new feature", a requirement that persons who wished to become bailiffs should be able to read and write and be licensed by the magistrates' benches in the districts in which they wished to work.[68]

Postage on newspapers, introduced in 1849, was also of particular interest in rural areas. In 1850, about 16 petitions called for its abolition and Nichols promptly introduced a bill to remove it. In debate, both Thomson and Wentworth suggested that the petitions emanated from the press rather than the public. Nichols countered that the petitions had been signed by 7 000 people, of all classes, and from every district in the colony. However, the bill was withdrawn.[69] When, shortly after fatalities were suffered when a steamer's boiler exploded, Nichols introduced a bill to extend the Steam Navigation Act to steamers plying inland waters, the *Herald* referred to "the impetuosity which usually distinguishes his attempts at legislation". It suggested that in this case it would have been better if "practical men" had inquired into the working of the existing Act and had framed a bill applicable to

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66 *SMH*, 26 July 1850. See FitzRoy to Grey, 2, 3 December 1850, CO201/432, ff. 227-228 and 344-354, the second despatch being devoted to a discussion of the bill, the council's nine resolutions on it and the reasons why the governor had assented to it as a temporary measure.

67 Ibid., 22 June, 4 July 1849.

68 Ibid., 3 October 1849.

69 Ibid., 7, 10 September 1850. Earlier, the *Herald* complained about the postage issue. South Australia had managed to introduce uniform penny postage, it said, without imposing "a tax on the diffusion of knowledge". Ibid., 4 June 1850.

all passenger vessels.[70] In short, utilitarian expertise was sometimes useful also for the bush.

The regulation of private property

The contest of principle between the rights of free enterprise and public need, and the curtailing of the former, are matters of relevance in the search for the cause of legislative change in New South Wales. Most law-making for Sydney involved a clash between private property rights and the interests of the public at large. The same conflict was played out as well in other, more general legislative areas. Similar conditions, accentuated by embedded institutional arrangements, prevailed in Britain. Various examples show how far the council was prepared to go in fine-grained reform of property rights in the interests of social justice, Nichols again being a prime mover in this area. His pawnbrokers' bill of 1849 was directed at the suppression of frauds by persons who, the *Herald* said, had set up brokers' shops in every street in the last few years, had become an intolerable nuisance and had taken advantage of poverty among the lower orders. No bill discussed in the session to that stage was of more importance to the public, the *Herald* said, and Nichols himself noted that the 1844 select committee on the insecurity of life and property in Sydney had pointed to the need for such a measure. Its provisions were partly based on English law, but Nichols also relied on the expertise of the chief justice, who had been involved in drafting the law now applying in Van Diemen's Land. Pawnbrokers needed to be licensed, Nichols said, as they were in England. While the measure met with no opposition in the council, an amendment suggested by the governor, to exempt certain loans made by commercial interests—merchants, bankers and auctioneers—was adopted, despite Nichols' protests.[71] Here was an example once again of a clash between private property rights and public interests.

Other measures in this area demonstrate how inventive local law-making was becoming, especially in regulating property rights within families. Two 1850 bills dealt with women's independent rights to property in distinctive colonial circumstances. Nichols, ever attentive to immediate and home-grown problems, introduced a bill to amend the law applying to public houses so as to provide relief for the wives and children of publicans whose husbands had deserted them for the Californian gold diggings. It allowed the wives to acquire their husbands' publicans' licences. However, when Thomson and Plunkett opposed

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70 Ibid., 26 August 1850. See also FitzRoy to Grey, 2 December 1850, CO 210/432 ff. 232-233.

71 Ibid., 18, 30 June, 31 August, 5 September, 10 October 1849. See also Atkinson, p. 6 for comment on the social impact of free enterprise generally and regarding the licensing of pawnbrokers in particular.

the bill, the latter saying it related to no more than ten or 12 applicants, Nichols withdrew it.[72] Another peculiarly local bill was introduced by Wentworth after consideration in select committee. It amended the law of dower and was strongly supported by most legally qualified members. It prevented British widows from making claims on the property of deceased husbands. Many long-lost wives, who had made no effort to contact their husbands (many of whom had been convicts), had made claims of dower with respect to colonial land which had been sold to purchasers who had no notice, or means of knowing, of the wives' existence. While Plunkett protested about interference with the rights of widows and the retrospective operation of the bill, other members considered the measure to be absolutely necessary, the circumstances of the colony being totally different from those of England.[73] FitzRoy similarly reported that he was not aware of any imperial precedent for an annuities bill, introduced in 1850, which aimed to encourage people to provide for their support in old age and which Plunkett introduced in his individual capacity at the instance of the provident society. Plunkett said that he was satisfied that the bill would promote the growth of "economical and careful habits among the labouring classes", earning the *Herald's* praise for such a humane and philanthropic measure.[74]

Management of the economy and capital works also involved a balancing of issues to do with public and private interests. From the late 1840s, considerable interest was shown in improving the means of public communication, both within the colony and with the outside world.[75] This area also involved what MacDonagh termed engineering and mechanical potentialities. In early 1848, the *Herald,* abandoning its usual laissez-faire principles, called on government to assume responsibility for railway formation. Great national thoroughfares should not be handed over to joint stock companies, it said. At the very least, the legislature should ensure that the government could purchase any railway that was constructed, as the equivalent British law did, and as Secretary of State Gladstone had suggested in a despatch of January 1846.[76] However, in 1849, Cowper, chairman of the Sydney railway company's

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72 Ibid., 11 June 1850.

73 Ibid., 21 September 1850. See also FitzRoy to Grey, 2 December 1850, CO201/619-620, ff. 229-230.

74 Ibid., 12 July, 22 November 1850; FitzRoy to Grey, 2 December 1850, CO201/432, ff. 215-216.

75 See Alan Atkinson, *The Europeans in Australia. A History*, vol. 2, *Democracy,* Oxford University Press, Melbourne 2004, pp. xiv-xv, 197-286 for a detailed study of the implications of the global revolution in communications in the mid-nineteenth century.

76 *SMH*, 4 February 1848; ibid., 31 July 1849. See Atkinson, *Europeans*, vol. 2, pp. 265-286 on colonial railway expansion. See also Arthur J. Taylor, *Laissez-faire and State Intervention in Nineteenth-century Britain*, Macmillan Press Ltd, London 1972 (reprint 1974), pp. 57-59 who suggested that "Victorian government" implicitly believed that economies prospered when left to the free play of market forces .

provisional committee, attempted to entrench laissez-faire methods by introducing a private bill to incorporate the company so that it could begin construction work. After the mandatory select committee reported on the bill, Thomson moved for its re-appointment to consider a despatch from Earl Grey that actually urged direct government involvement. Although some members expressed concerns, the project was endorsed and an address from the council requested the governor to take the necessary steps to provide a government guarantee of the railway company's construction costs in accordance with the committee's recommendations.[77]

When the self-confessed protectionist Martin introduced a bill to encourage agriculture by abolishing the duty on brandy and spirits distilled from local produce, Thomson told him that it would have no support from himself or those "who acted with him".[78] The bill startled the *Herald*. It could not recall a more objectionable measure, which would interfere with the source of one-fourth of the colony's income at a time when colonists should be thinking about "our fast-increasing poor" and the need to enlarge to the police establishment and pay for military defences.[79] The second reading debate saw a division between members who supported some degree of protection and those in the free trade camp. Martin argued for the provision of a new incentive for agricultural growth, complaining that the interests of only two classes were represented in the council—commercial agents and wool growers—and that they were both intent on preying on citizens and dividing the spoils between them. Thomson, wedded to laissez faire on the economic front, said that the salutary effect of free trade was well established. Never again, he said, would he entertain the idea of governments or legislatures selecting articles of commerce on which to impose either restrictive or protective duties. The market must find its own level. The only article that the council had a right to tax was spirits because trade in that commodity necessitated the maintenance of a large police force. Wentworth, on the other hand, supported the removal of tax on local commodities. Yes, he said, he had wavered for a time between free trade and protectionist principles but now he had decided the latter were best. The motion for the bill's second reading was lost by 17 votes to five.[80]

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77 Ibid., 2 June, 19, 31 July, 29 August 1849.

78 Ibid., 21 June 1850.

79 Ibid., 27 June 1850.

80 Ibid., 3 July 1850. Wentworth's speech drew a quick response from the *Herald* which said that he had "ratted" from the free trade ranks. See ibid., 6 July 1850. See also Taylor, pp. 54-56.

Debate on Martin's bill highlights a fundamental distinction between the attitudes of the free-traders and the protectionists. The former, including Thomson, the liberals and most merchants in the council, saw tariff duties purely in terms of revenue. To attempt more would involve undue interference with private property and amount to robbery of its subjects by the state. It would also result, in Thomson's view, in a violent change in fortunes in many circles. The extreme protectionist Martin, on the other hand, believed that economic measures should have a levelling effect in a limited sense and result in a proper distribution of the fruits of the colony's prosperity. Wentworth adopted a more moderate protectionist approach, arguing for exemption of all local commodities from taxation.[81]

The council's endeavours to regulate professions and trades drew responses from disparate pressure groups. Over the years, proposals for legislative regulation had been examined in committee. On the one hand, committees were good instruments for trading and professional groups, because they offered them the possibility of shaping their own legislation. On the other hand, committees also threatened free enterprise, by drawing together expert opinion about the public good, with the prospect of legislative intervention of a kind that jeopardised previously unfettered activities of professions and trades. The field was also strewn with petitions. In 1849, medical practitioner John Dickson, a member for Port Phillip, accepted Plunkett's long-standing invitation to produce a comprehensive measure for regulation of the medical profession. His bill's principles were said to be in line with the recommendations of an 1848 select committee and with measures adopted in Van Diemen's Land and Canada. Persons wishing to practice medicine who came to the colony without specified documents would be required to pass an examination set by a new medical board, which would also possess power to regulate medicines sold by chemists, whose activities also affected public health.[82] The *Herald* criticised the bill for failing to provide some means of educating medical students in the colony. It also attracted a number of opposing petitions. C.L.D. Fattorini, a medical doctor, wanted provision to be made for professionals who had not qualified in Great Britain or Ireland. The profession also sought to ensure that it had a hand in shaping the law for its own regulation. Various medical professionals and chemists urged that the bill be referred to a committee. Sixteen other chemists, seeking representation on the medical board, petitioned to be heard by counsel

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81 Ibid., 21 June, 3 July 1850. See also Atkinson, "Time, Place and Paternalism", pp. 5-6 for a similar exposition relating to debate on the government's 1852 customs duties measure.

82 Ibid., 4 July 1849.

before the house.[83] Although Plunkett was reluctant, Nichols argued for a committee and Lamb agreed, saying the subject was too important to pass over "without ... the ordeal of a select committee".[84] The committee brought in a progress report and then broke up. Due to the conflicting statements of witnesses, it said, it was unable to proceed further, and it suggested that the matter be deferred to the next session. It was not taken up again by this council.[85]

Bills aimed at regulating the activities of publicans invariably attracted the attention of petitioners, most of whom opposed the measures or aspects of them. In 1849, Plunkett introduced a substantial bill, based partly on existing laws and partly on a bill previously introduced by Wentworth, to consolidate and amend laws relating to public houses and the sale of fermented and spirituous liquors. He had taken special care, he said, to meet the many objections likely to arise during the bill's passage and to embrace the most important of the suggestions coming from out of doors.[86] The Total Abstinence Society petitioned to include provisions to restrain intemperance, and a number of publicans asked that various types of gambling be allowed, while others strongly opposed all gambling.[87] Plunkett presented a petition signed by 2 830 people that alleged that a disproportionate increase in the issue of licences for public houses had resulted in a sudden rise in crime and drunkenness.[88] Nichols presented another from officers of the United Friends' Society, praying that they be allowed, like Freemasons and Odd Fellows, to hold their meetings in public houses.[89] In short, a great variety of interests, public and private, intersected on this issue.

When moving the bill's second reading, Plunkett said that petitioners had demonstrated that the proportion of public houses to the population in Sydney was far greater than in the major commercial cities of Europe. To his mind, they provided a fertile source of crime. While not denying the benefit of free trade principles, Plunkett said that they should not apply to a traffic that resulted in crime. Besides, intervention was needed to protect the businesses of respectable publicans. According to Nichols, if disreputable persons had obtained licences, it was the fault of magistrates and the attorney-general. He objected to

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83 Ibid., 18, 21 July 1849; *V&P* NSWLC 1849; Index to the Votes and Proceedings of the First Legislative Council 1843-1855.

84 Ibid., 25 July 1849.

85 See *V&P* NSWLC, 1849; Atkinson, "Time, Place and Paternalism", p. 4.

86 *SMH*, 15 June 1849.

87 Ibid., 26 July 1849; *V&P* NSWLC, 1849.

88 Ibid., 15 June 1849; *V&P* NSWLC 1849.

89 Ibid., 10 August 1849.

a limit being placed on licence numbers.[90] The bill had progressed rapidly to the committee stage when the *Herald* made a strong protest, saying that many interested parties were unaware of its sweeping terms. When the debate resumed, a number of members presented additional petitions from publicans and wine growers containing a variety of competing claims. Among other things, Nichols proposed an amendment to give the governor discretion to issue licences at a reduced fee for houses remote from towns, so as to provide travellers on new roads with accommodation. The colonial secretary protested that that would be very difficult, if not impossible to manage. Attempts by Nichols and Martin to secure permission for various games to be played in public houses failed, as did Nichols' attempt to strike out a clause that prohibited publicans from supplying alcohol to Aboriginals.[91] Nichols, for all his interest in social justice, displayed a consistent concern for free enterprise, and for freeing publicans (among others) from unnecessary restrictions. It is significant perhaps that from 1848, his brother Charles was the part-owner of an emancipist-edited newspaper, *Bell's Life in Sydney*, which addressed a mass lower-class audience, was popular in public houses and spoke kindly of liquor interests.[92]

Nichols is a classic example of the way laissez-faire ideas might be moderated, from individual to individual, by other, ad hoc priorities. In his case, these priorities included a high regard for the voice of the people. Nichols was always keen to respond to calls from outside the council and especially from petitioners for intervention, whether in support of or opposition to legislative proposals.

Other measures relating to the distillation of spirits and the prevention of adulteration of malt liquors were introduced in 1849-50, the first by the government and the second by Martin. During debate on the latter, Nichols observed that brewers deserved encouragement, saying that he had discussed the issues involved with them.[93] Clearly, publicans were a very important and active interest group, and, with all their interest in free enterprise, closely connected themselves with a multi-faceted public opinion.

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90 Ibid., 13 July 1849.
91 Ibid., 1,4, 18, 19, 20, 26 July 1849.
92 Roe, p. 86. See also FitzRoy to Grey 10 January 1848, *HRA*, 26, pp. 167, 169.
93 *SMH*, 21 June 1850.

The origin of ideas

In 1937, the legal historian, C.H. Currey, when discussing the influence of early nineteenth century English law reformers and Benthamism on New South Wales law reform, observed that ideas ignore national boundaries.[94] As has been seen, government and elected members were acutely attuned to the manner in which various British laws and those of other colonies operated, and were surprisingly up-to-date with legislative developments in London. For example, two of Nichols' 1849 proposals, one dealing with damage to works of art and the other with indictable offences, were based on British laws, enacted in 1847 and 1848 respectively. Indeed, in April 1850, Earl Grey noted, following receipt of FitzRoy's report on the colony's 1849 legislative output, that it was "satisfactory to observe how speedily the most important of our Acts of Parliament are copied in the Colony".[95] It is hardly surprising that many colonial bills were based on British initiatives. A bill introduced by Attorney-General Plunkett to confirm certain marriages, and thereby protect individuals exposed to the consequences of invalid marriages because of a failure by certain Presbyterian marriage celebrants to observe local legal requirements, arose from a bigamy trial before the supreme court. It copied almost verbatim two British Acts confirming certain Presbyterian marriages celebrated in Ireland.[96] One of Nichols' 1850 bills simply adopted various imperial laws dealing with a number of subjects, including dog stealing, malicious injury by fire and extortion.[97] Another, providing for the more speedy trial and summary punishment of female offenders, was based on an imperial law that Nichols asserted worked well.[98]

Instances of straight copying were unusual however, colonial drafters demonstrating a ready ability to select and adapt according to local circumstances. The government bill to establish a uniform rate of postage and consolidate the law relating to the conveyance and postage of letters, enacted in 1849 after reference to a select committee, was a reform with a clear British precedent, resolving an issue that had occupied the council, off and on, for some years. However, in his second reading speech, Thomson emphasised that the circumstances

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94 C.H. Currey, "The Influence of the English Law Reformers of the Early 19th Century on the Law of New South Wales", *JRAHS,* vol. 23, pt. 4, 1937, p. 229.

95 For damage to works of art, see FitzRoy to Grey, 16 December 1849 (Despatch No. 248), CO 201/418, f. 4. Grey's observation dated 28 April 1850 was endorsed on papers attached to FitzRoy to Grey, 16 December 1849 (Despatch No. 246), CO 201/418, f. 44.

96 *SMH*, 1 August, 20, 26 September 1850; FitzRoy to Grey, 2 and 4 December 1850, CO 201/432, ff. 230, 356-359, the governor forwarding with the second despatch a copy of the *Herald* supplement of 30 March 1850 reporting the supreme court's judgment in the bigamy case.

97 Ibid., 24 August 1850.

98 Ibid., 13 June 1850. See also FitzRoy to Grey, 2 December 1850, CO 201/619-620, ff.208-209.

of the colony were entirely different from those of England, thereby necessitating considerable modification of the law that applied there.[99] Other considerations also applied. Sensitive perhaps to local memories of the convict system, the New South Wales female offenders law just mentioned omitted the punishment of whipping which English justices could impose.

Many members of the fifth council, both nominated and elected, applied themselves assiduously to their legislative tasks at the beginning of a period of sustained original and characteristic New South Wales law-making, and even nation-building, activity in the years leading up to 1856. This trend was epitomised by the energetic and independently-minded Nichols, who introduced a new and activist approach to law-making based on a wide experience of colonial conditions. Nichols in particular was attuned to public opinion, the period between 1849 and 1851 experiencing a growth in the political awareness of various interest and pressure groups, an increase in petitions and, with more select committees, an expanded opportunity for outsiders to offer their opinions to the law-makers. A greater emphasis was now placed on legislation dealing with centres of population, and serious efforts were made at last to address urban problems threatening health and safety, especially in Sydney. Concern about social and moral issues became more prominent, as did interest in issues to do with the colony's development, the latter trend becoming even more pronounced when commercial quantities of gold were discovered later in 1851. The importance of rural issues receded and urban and rural interests began to diverge, as shown in the debate on the distribution of electoral seats in the new council. The members of that council, the sixth, would bear the responsibility of drafting the colony's new constitution and settling the legislative framework for responsible government.

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99 Ibid., 10 August 1849. See also, ibid., 5 July, 27 September 1849; FitzRoy to Grey, 16 December 1849 (Despatch No. 246), CO 201/418, ff. 26-28.

Chapter 7 The sixth council and the Sydney Corporation

The following four chapters explore aspects of the law-making of the sixth council, which sat for a little over 4¼ years between October 1851 and December 1855. The council had 54 members, 18 of whom were appointed and 36 elected. The council's membership is shown in Appendix 3. Sir Charles FitzRoy, now designated governor-general, continued to administer the colony for most of the period, being succeeded by Sir William Thomas Denison, the former governor of Van Diemen's Land, in January 1855. Of the officials, Colonial Secretary Thomson took leave between early 1854 and 1856. While in Great Britain, he and Wentworth watched over the progress of the colony's new constitution through the Colonial Office and the British Parliament. Treasurer Riddell acted as colonial secretary during Thomson's absence, though the crown law officers, and especially Solicitor-General William Manning, largely took over Thomson's duties as manager of government legislation in the house.[1]

A total of 327 bills were initiated during this council's term. Of these, 243 were enacted, while three more, including the constitution bill, were reserved for royal assent. Appendix 3.3 contains details of bills initiated and summarises the council's total output. The council was highly successful in legislative terms, producing an average of over 57 laws per year (compared with a little over 51 per year for the fifth council, just over 31 for the fourth and slightly over 26 for the pre-1843 Gipps era). Private bills became increasingly prominent. While five of the government's 142 enacted measures were private bills, 49 of the elected members' 101 successful bills fell in this category. This represents a sizeable increase in private legislation, generated mainly by a surge in commercial, mining and associated activities. Another 17 private bills had to do with infrastructure and communications—dams, bridges, railways, tramroads and steam navigation. Charles Cowper introduced 23 of the private bills. Intent on strengthening his ties with Sydney merchants, it was Cowper rather than the members for the city who guided a spate of company incorporation bills through the council.[2] Another striking aspect of the figures is that G.R. Nichols, still by far and away the most active elected member, especially if one

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1 S.G. Foster, *Colonial Improver: Edward Deas Thomson 1800-1879*, Melbourne University Press, Melbourne 1978, pp. 103-104.

2 See Alan Powell, *Patrician Democrat: The Political Life of Charles Cowper 1843-1870*, Melbourne University Press, Melbourne 1977, p. 52 on Cowper's role. See also *Empire*, 16 November 1853 for comment on the creation of corporations "*ad infinitum*"; and *SMH*, 1 February 1855 on the distinction between public and private bills.

discounts Cowper's role as the promoter of private bills, was responsible for 40 of the 145 measures introduced by elected members. Of these, 29 were enacted. Many related to the regulation of local and social affairs in Sydney and in Maitland, which was in Nichols' electorate, and this reflects both Nichols' official role as solicitor for the Sydney Corporation and his continuing humanitarian interest in public health, welfare and safety. By now a conservative of liberal and independent views, Nichols admitted that he had started out as a radical but, he said, he had always been a radical reformer of proved abuses.[3] His work did a great deal in giving this council its distinctive character.

The sixth council appointed a record 184 select committees, 15 in 1851, 37 in 1852, 35 in 1853, 50 in 1854 and 47 in 1855 (compared with an average of 15 committees per session in the fifth council). Over 60 dealt with private bills (including those that failed in particular sessions) and at least nine dealt with claims for compensation and individuals' petitions. However, the overwhelming majority related to general issues or public bills.[4] As will be seen, committees played an especially prominent role in law-making activities related to the Sydney Corporation and preparation of the new colonial constitution.

Little committee work dealing with legislation was undertaken in the council's first session of 41 sitting days, in the latter half of 1851. By far the most contentious of its committees was one chaired by Wentworth to formulate petitions about the colony's grievances, to be sent to Great Britain. Between 1852 and 1854, committees on the urgent demand for labour, occasioned in part by gold discoveries in New South Wales and Victoria, the troubles of the Sydney Corporation and issues of gold fields management, marriage laws, roads and railways, and intemperance produced a total of 654 pages of evidence and associated material. Some legislative proposals dealt with by committees in the council's last session in 1855 were held over for the new parliament.[5] In that session, the issue of committees' powers came under serious consideration, in such a way as to suggest that they were now understood to be fundamental to the legislative process. James Martin queried whether expert witnesses appearing before committees should be paid, while Nichols introduced a bill, which was subsequently discharged, seeking to empower committees to compel witnesses to attend and to punish them for perjury and for giving false evidence

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3 For Nichols' comment, see E.K. Silvester (ed.), *New South Wales Constitution Bill. The Speeches in the Legislative Council of New South Wales on the Second Reading of the Bill*, Thomas Daniel, Sydney 1853, p. 194.

4 *V&P* NSWLC 1851-1855.

5 Ibid.

likely to injure another person.[6]

Outside the chamber, select committee work was now regarded as an index of members' usefulness. Parkes, in the *Empire*, remarked that committee attendance by some members was often so scanty as to prevent the holding of meetings or virtually to destroy their object, and this at a time when almost everything was referred to committees. The burden was unfair and inefficient, he said, because a few were required to do everything, or let everything go undone.[7] In a campaign aimed at exposing legislative inefficiencies and exploring ways in which the legislature might be made more productive and members more responsible in performing their tasks, Parkes' ideological position moved from that of liberal-democratic opposition to a more interventionist one. He castigated members for what he termed "legislative loitering" on the grounds that at least two-thirds of the 1853 session was squandered in idleness, and the house was adjourned frequently for want of numbers or a disinclination on the part of members to work.[8] Legislative work was therefore monopolised by a few members.

Again, at the end of the year, the *Sydney Morning Herald* suggested that one of the new parliament's first tasks should be to clearly define the duties and privileges of select committees. It was imperative that committees should be conducted fairly and impartially, and that they should be open to the public, it said.[9] A thorough examination of select committee procedures, especially regarding the rights of persons accused of misconduct to defend themselves, was called for. The personal feelings of a few more active and able members should not lead the house to unnecessarily extend parliamentary privilege on contempt or to exclude interested persons from committee hearings. The local legislature was very different from that of Great Britain, the *Herald* said, because the House of Commons was divided into established parties which were sufficiently strong to exercise a check on each other.[10] MacDonagh noted that official inquiries in Great Britain were often conducted by unscrupulous partisans, Chadwick being perhaps the main offender. However, in MacDonagh's view, an informal adversary system usually resulted in the enlargement of true knowledge when counter-partisans secured a counter-exposition of their own a session

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6 *SMH*, 18 July, 11, 25 August 1855.
7 *Empire*, 2 November 1853.
8 Ibid., 17 November 1853.
9 *SMH*, 31 December 1855.
10 Ibid., 23 November 1855. See also ibid., 15, 19 December 1855.

or two later. Such a development was less likely, but not unknown, in New South Wales.[11] Generally speaking however, committee work here was less adversarial and its conclusions less contingent on events in the legislature proper. Thus, committees had more authority because they seemed more impartial. In short, committees were pivotal in New South Wales, even beyond their role in Britain.

Cowper, who had returned to political life, sat on about 118 committees, followed by Nichols (86), Martin (80), and two newly elected members, the versatile A.T. Holroyd, a physician, barrister and explorer (64), and Sydney builder and former city mayor, Edward Flood (61), while James Macarthur and George Allen each sat on about 52. Of the officials, crown law officers Plunkett and Manning sat on 58 and 40 committees respectively. Before their departure for Great Britain in 1854, Wentworth sat on 35 and Thomson on 27. Donaldson sat on 36 committees, but he vacated his seat in February 1853 and did not return to the council for two years. Henry Parkes, who entered the council in May 1854, sat on 44 committees in its remaining two sessions, later praising himself for his diligence: "I was placed on nearly all the more important committees. If regularity of attendance and zeal were merits, I was a most meritorious committeeman. I was always in my place, and I took my full share in the examination of witnesses".[12]

These figures provide some indication of the workloads of conscientious members in the council chamber and committee rooms. After the 1851 session, the *Herald* summarised members' voting records for the 56 divisions held in the council and in committees of the whole house. While the officials and most nominated members performed creditably on this index, the record of some elected members was poor and four of them did not vote at all. Robert Fitzgerald took his seat and immediately left Sydney. Marsh, Murray and Suttor failed to take their seats at all, and Darvall's poor voting performance in committees of the whole house drew adverse comment.[13] The crown nominees, especially when they voted as a block, were thus able to exercise a greater influence than their numbers might otherwise indicate. Parkes, through the *Empire,* was highly critical of the failure of elected members to

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11 Oliver MacDonagh, *Early Victorian Government 1830-1870,* Weidenfeld and Nicolson, London 1977, pp. 6, 34, 42, 51, 102, 142, 171-172. When patent manipulation occurred in colonial committees, onlookers were obviously shocked. See *SMH,* 13 August 1856 which applauded the appointment of a committee that it hoped would vindicate Sydney's commissioners against charges made by what it had termed Martin's scandalously partial 1855 committee on sewerage works. See ibid., 15, 19 December 1855.

12 Sir Henry Parkes, *Fifty Years in the Making of Australian History,* Longmans, Green and Co, London 1892, p. 57. On Holroyd, see *ADB,* 4, pp.411-412.

13 *SMH,* 17 January 1852. See *Empire,* 31 October 1851 for similar criticism.

meet their obligations. In 1853, a critical year, he noted that half of the elected members were absent for the session's first fortnight, and that in its first five months the house was never full, attendance averaging 40 in one of those months and varying from less than a quorum to about 30 for the other four months.[14]

The use of petitions as a means of drawing the council's attention to issues diminished markedly in this period. During the fifth council, there had been on average 92 petitions per session, but in this council less than 57.[15] In theory, petitioning continued to be viewed as integral to the legislative process. In December 1852, Parkes complained in the *Empire* that the government, at the fag end of the session and after many elected members had left Sydney, planned to abolish self-government for the city without giving the public a chance to petition.[16] In a speech in 1853, he expressed a firm belief in "the old-fashioned right of petitioning", coupling it with the right of free discussion.[17] Later however, he explained in the *Empire* that the distances, the inaccessible nature of localities, the scattered state of the population, and the time that must elapse in receiving information, "in getting excited", in holding meetings and in collecting names, all militated against successful petitioning in the colony.[18] In August 1853, the *Herald*, from a conservative viewpoint, when discussing Martin's attack on a public meeting at which a petition against the constitution bill had been presented for signature, asked, "And is not the right of petition as sacred amongst Englishmen as any other right?".[19] Evidence given to the select committee on the Sydney Corporation in 1852 shows that petitioning was regularly engaged in at the municipal level also.[20] And the importance of petitions, and of the popular meetings at which many of them were presented to participants for signature, was apparent during proceedings both before and after the passage of the constitution bill.[21] However, as I have said in Chapter 5, the ritual of petitioning assumed a kind of detached superiority in government and deference in the people, whereas committees were far more important for the sifting of public opinion.

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14 *Empire*, 20 May, 2 November 1853.

15 The first session of only a few days in May 1851 is excluded from this calculation.

16 *Empire*, 17 December 1852. See ibid., 14 September 1854 for a discussion of the right of British subjects to petition authorities on any public matter.

17 Parkes, p. 41, Parkes referring to a newspaper report of his speech to a meeting of Sydney citizens on 5 September 1853 after the second reading of the constitution bill.

18 *Empire*, 14 September 1854, Parkes also commenting on Martin's contempt for petitioners.

19 *SMH*, 29 August 1853.

20 See minutes of evidence taken before the select committee on the city corporation, 17, 19, 31 August 1852, pp. 37, 40, 53. *V&P* NSWLC 1852. See also *SMH*, 15 March 1851, the *Herald* agreeing that ratepayers' should not be required to use "the popular spur of petitions" to induce councillors to do their duty.

21 See, for example, *Empire*, 9, 30 December 1853, 30 October 1854, 2 February, 4 October 1855.

During this council, even contentious legislative proposals failed to attract the number of petitions that might have been anticipated on the basis of petitioning activity in previous sessions.

The Sydney Corporation

Resolution of the ongoing impasse presented by the ineffective and factious Sydney Corporation and by preparation of the colony's new constitution provided dominant themes during the council's first three sessions. The council also tussled with the neglected issue of public health and sanitation, and with law and police reform. It dealt with these issues in the light of precedents provided by Great Britain and elsewhere, with select committees, petitioners and the press all playing prominent roles. In doing so, it broached large issues of principle, of the kind MacDonagh described for Britain as a whole in this period. This chapter deals with the Sydney Corporation and the following chapters with public health and sanitation (Chapter 8), law and police reform (Chapter 9) and the constitution (Chapter 10).

As has been seen, the Sydney City Incorporation Act of 1842, modelled on the British reforms of 1835, had proved a failure. Similar problems in Britain, as MacDonagh observed, were a result of responsibility being left in the hands of amateurs with no coherent policy or expert knowledge.[22] Although abolition of Sydney's corporation was recommended by Lowe's select committee in 1849, Lowe had been unable to carry the day and the Incorporation Act was reformed instead. The reforms failed to provide a spur for increased civic activity. Indeed, as in Britain, reforms decreased rather than increased the efficiency of local government. MacDonagh's description of the British municipal corporations as "petty parliaments" and "bear-pits for party struggle" rings true for Sydney.[23] Members of the city corporation held interminable committee meetings, aping the procedure of the legislature, quarrelled among themselves, and failed to meet their increasingly pressing duty to provide municipal services for the city. When giving evidence before the 1852 select committee on the corporation's operation, Town Clerk John Rae disclosed that 483 meetings had been summoned between November 1850 and November 1851, including 427 for the corporation's 17 committees, and for over a third of the latter there had been no quorum. He suggested that if the number of committees was reduced and the corporation forced to act as

22 MacDonagh, p. 127.
23 Ibid., pp. 127, 138.

a board, business would be dealt with more quickly and efficiently, and the members would be more responsible for its decisions.[24] Another witness, William Piddington, a city councillor in 1852, also complained about the corporation's committee system. It confined committee members to consideration of discrete issues which were not later debated in full corporation meetings, preventing members from speaking and voting on all subjects connected with corporate affairs. Piddington himself had therefore declined to attend any committee meetings.[25] The city corporation also operated under standing orders, like a legislature, as did British municipal corporations. This unnecessary formality, Rae said, impeded the conduct of corporation business.[26]

The government, apparently unwilling to become involved in new areas of reform, refused to act on these problems, arguing that they were the province of the legislature. This reluctance continued into the 1850s, even to the point of negligence, given the potentially tragic consequences of the corporation's failure to provide sewerage, drainage and clean water for the rapidly growing city. The *Herald* later complained, "The citizens leave it to the Council, and the Council leave it to the Government, and the Government leave to the citizens".[27] The government did introduce a bill to amend the corporation's act in the new council's first session in November 1851. However, its object was merely to substitute £10 for £20 as the municipal franchise, so as to align it with that for elections for the legislature under the 1850 Australian Constitutions Act. Even this bill became bogged down in committee and was stood over for six months.[28]

In mid June 1852, two aldermen and eight councillors petitioned the council for an amendment of the corporation's act so as to rein in the powers being exercised by the popularly elected mayor, William Thurlow. Shortly afterwards, a *Herald* editorial, referring to this petition, said that further attempts to tinker with the corporation's machinery would be useless. The machinery did not need mending, but breaking up, as demonstrated by nearly ten years of failure. In the mother country, it said, experiments to replace municipal corporations with machinery of a very different kind had been crowned with signal

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24 Minutes of evidence taken before the select committee on the city corporation, 11 August 1852, pp. 16, 18, 21. *V&P* NSWLC 1852.

25 Ibid., 19 August 1852, p. 40. Piddington was a member of the legislative assembly between 1856 and 1877, serving as chairman of committees and, in the 1870s, as colonial treasurer. *PR* NSW, p. 186.

26 Ibid., 11 August 1852, p. 17.

27 *SMH*, 23 July 1853.

28 Ibid., 29 October, 27 November, 19 December 1851.

success.[29] In fact, improvement commissions had been set up in England since the eighteenth century on an ad hoc basis by private acts of parliament to deal with specific problems in specific towns. In many cases, they operated where municipal corporations had proved incapable of taking effective action in fields such as lighting, water supply, street cleaning and paving, and police.[30]

Early in the council's second session, the government again introduced the franchise-lowering bill. Cowper suggested that it should go to a committee, which might also explore the larger issue of the corporation's efficiency, and Thomson agreed.[31] The committee, chaired by Cowper, took evidence from 16 witnesses over eight sessions. Ten witnesses were or had been serving members of the city corporation, two were salaried corporation employees, two had served as assessors under the corporation's act, and the rest were city residents. Many had appeared before the 1849 committee. The work of this committee was not especially efficient. Witnesses were quizzed variously and inconsistently about such issues as the corporation's performance before and after the 1850 amendments, the franchise, methods of electing members and the mayor, the committee system, rating and revenue, and the efficiency of the corporation's paid officers. They were not specifically pressed to declare whether they favoured maintenance of the elective franchise (with or without a reformed corporate structure) or the appointment of commissioners, and on the whole their evidence was not particularly helpful in aiding the committee to frame its recommendations. Only three witnesses definitely favoured the appointment of commissioners. Most others wanted the corporation and the franchise to stay, although they agreed that the corporation's performance was highly unsatisfactory. Thomson himself took the same view. He had already remarked in council that the government had no wish to be "trammelled" with the task of appointing commissioners. The inconclusive state of the evidence was reflected in the committee's report.[32]

The views of witnesses on the role and the value of the municipal franchise and its relationship, if any, to that for the legislature are of especial interest for the purposes of the present discussion. In response to a query from Robert Campbell as to whether he would disenfranchise the city because of its citizens' apathy, ironmonger Elias Weekes, a city

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29 Ibid., 26 June 1852. See ibid., 10 July 1852 for another editorial in similar vein.

30 MacDonagh, p. 124.

31 *SMH,* 15 July 1852.

32 Ibid.; Report from and minutes of evidence taken before the select committee on the city corporation. *V&P* NSWLC 1852. See Powell, pp. 53-54.

councillor, advanced the utilitarian view that the good of the many should not be limited by the wishes of the few to retain that franchise. When Martin suggested that the city corporation was a legislative institution on a small scale, Weekes said that he could not support that contention, given its limited powers. Men were beginning to entertain more practical notions, he said, and they did not see any representative principle at stake in having a lamp-post here and a drain there. It was a mere question of comfort and convenience whether the city was properly lighted, paved, and drained. They wanted these things to be done as well and as cheaply as possible, and would support any system that would achieve that result. When Martin asked whether Weekes was suggesting that the present practical age favoured centralised and despotic systems, Weekes replied that in the management of the simple things for which the corporation was responsible, no great principles were involved. The abolition of the municipal franchise, he said, would have no impact on the representative principle in so far as it related to the legislature.[33]

Samuel Hebblewhite, a corporation assessor versed in the activities of some English municipal corporations, apparently agreed with Weekes when he said that Sydney's citizens did not regard the municipal franchise as a privilege but as "a great bore". But when Martin asked whether they considered it any less a bore to vote for the legislative council, Hebblewhite said that many thought that membership of the council had just as little honour attached to it and they did not bother to vote.[34] George Thornton, a city councillor for some years, said that the present corporation was too much "a mimicry" of the legislature.[35] Ralph Robey, a city councillor for about 12 months in 1847, argued that even if municipal corporations worked tolerably well in established English towns, the system was unsuited to carry out the works required by a young, growing city like Sydney. In England, corporations had existed for centuries, there were usually many retired business people who formed a petty aristocracy and were able to serve on them, and most major works had long since been completed. And he agreed that the elective principle was not appropriate for mere matters of business, such as these, and that the protection of the people's political rights rested elsewhere. It was unfortunate that political questions had been imported into arrangements for the formation and repair of roads and drains, Robey said.[36] Long-term resident Henry

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33 Minutes of evidence taken before the select committee on the city corporation, 27 July 1852, pp. 9-11. *V&P* NSWLC 1852. Weekes was a member of the legislative assembly from 1856 to 1863, serving as colonial treasurer in the late 1850s and early 1860s. See *PR* NSW, pp. 212-213 and *ADB*, 6, p. 375.

34 Ibid., 24 August 1852, pp. 46-47.

35 Ibid., p. 51.

36 Ibid., 31 August 1852, p. 56.

Hollinshed, one of the corporation's first assessors and a councillor for a year, argued that, as the local community lacked education in municipal matters, it was unfit to exercise the franchise. The situation was different in elections for members of the legislative council, because then the interest of electors was not mixed up with the spending of money in their immediate neighbourhood, as was the case with the city corporation.[37]

Cowper's report was presented in early December. Witnesses generally agreed that the current municipal body was too large. The committee accordingly proposed the removal of the councillors but the retention of six aldermen, one of whom should be elected as mayor. The initial body of aldermen might be appointed by the government. Subsequently, they might be elected under a system which awarded between one and four votes to electors, depending on the value of the property they occupied in the city.[38] This system of voting, termed by MacDonagh "the rich-man's system", had been employed by parish vestries under a British statute of 1819. The boards of guardians of poor law unions in England and Wales were also elected by ratepayers after 1834, on a franchise weighted according to property. MacDonagh commented that Chadwick heartily approved of this undemocratic system of voting, believing that government by the rich and wise would better secure his immediate purposes.[39] In other words, this was an attempt to combine the principle of representation, in spite of the apathy of some witnesses, with management by experts, which most now wanted. In Sydney, only a few committee witnesses had been quizzed specifically on this proposal, the interrogator on three of these occasions being Allen (who himself believed that the corporation should be abolished). Witnesses Thomas Broughton and Robey opposed the idea. Only Hollinshed spoke in its favour, arguing that members of the city corporation needed to be selected by men who understood something of the business to be performed rather than by the labouring classes. Piddington had no objection to a limited trial of "the experiment". Any increased influence allowed to the larger rate payer, he said, would not affect the lives and liberties of the rest of the citizens, as would be the case if a similar system applied to the legislative franchise.[40]

The *Herald* described the report's recommendations as "half measures", arguing that

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37 Ibid., 7 September 1852, pp. 58-59.

38 Report of the select committee on the city corporation. *V&P* NSWLC 1852; Powell, p. 54.

39 MacDonagh, pp. 123, 128.

40 Minutes of evidence taken before the select committee on the city corporation, 19, 31 August, 7 September 1852, pp. 42, 55-56, 59. *V&P* NSWLC 1852. See *SMH*, 15 December 1852 for Allen's view on the corporation's fate; Powell, p. 54.

the council should not adopt "the old system *in little*" but should sweep away the present arrangements and substitute a small, well-paid working board, employed exclusively on city business, holding office during good behaviour, appointed by the government and responsible to the citizens through the legislative council.[41] But, as Cowper said, it had been difficult to decide how, if the corporation were abolished, commissioners would be appointed. He understood that in England the inhabitants of towns where commissioners had replaced corporate officers were equally dissatisfied with that system. Even in London, the old system had been restored after the commissioners of sewers failed. An elected corporation had recently been established in Hobart Town, he said, and the committee had accordingly decided that Sydney's corporation should be given one more chance. Altogether, he was not happy with giving so much responsibility to government. Cowper never had much affinity with Bentham nor with any aspect of utilitarianism. Instead, he appealed to John Stuart Mill, who, in his *Principles of Political Economy*, pointed to the danger of unnecessarily increasing the direct power and indirect influence of government. Collisions between government agents and private citizens were thereby multiplied, said Mill, and there was a serious risk of concentrating all skill and experience in managing large projects, and all power of organised action, in a dominant bureaucracy, leaving none elsewhere.[42]

Dissatisfied with this outcome, the government was forced into action. Undeniably, the situation now demanded a new approach altogether. Thomson had no choice but to oppose the report's adoption, describing it was one of the crudest documents ever sent to the house. The government, he said, did not want the odium of appointing aldermen to perpetuate the evils of the present corporate arrangement. The only remedy was to abolish "the little republic" and to appoint commissioners. These could be appointed jointly by the government and the legislature, as had been done in suburbs of London and some English country towns. The possible constitutional problem of commissioners levying local rates could be resolved by legislation.[43] Some members supported Cowper's solution. In doing so, however, Martin expressly objected to the process of relying altogether on the deliberations of select committees. Council decisions should not be guided, he said, by the opinions of witnesses, however intelligent and respectable. Members were bound to exercise their own

41 *SMH*, 13 December 1852 (emphasis in original).

42 Ibid., 15 December 1852. See John Stuart Mill, *Principles of Political Economy with some of their Applications to Social Philosophy*, John W. Parker, London 1848 (7th edn., William J. Ashley (ed.), Longmans, Green and Co, London 1909), Book 5, Ch. 11, paras. 8-14, 22.

43 Ibid.

judgment. In his view, the original corporation act, based on the English corporation acts, had worked well. Sydney's corporation had failed because of a lack of funds and because of injurious changes made by the government, which had thrown elections into the hands of the small voters. Respectable men were not prepared to canvass the whole city, and petty agitators had taken control. The best remedy would be to raise the franchise to £50, to deprive worthless men of their influence. But as there was no time to remodel the corporation, the only option, he said, was to place the matter in the government's hands for the time being.[44] Wentworth, who despite being a member, had failed to attend any committee meetings, sided with Martin, blaming the colonial secretary's "democratic constitution" for the current mess. English corporations worked well because the franchise was fixed at £25. Here, it should be at least £50. The house, he said, was bound to allow another trial of the elective principle, but under a more conservative arrangement.[45]

Most council members, however, agreed with the government's approach. Darvall, who was not a committee member, complained that the report did not reflect the evidence given to it. He moved for the preparation of a bill by the crown law officers to abolish the corporation, to transfer its powers (other than the power to levy rates) to a paid board of three commissioners, and to authorise the council to fix the municipal rate, which should be high enough to cover necessary expenditure without recourse to an endowment from general revenue. He objected strongly to a franchise based on property values. In important municipal matters, such as the due supply of lighting, of water, and of safe and well repaired streets, the poor man was equally interested with the rich, and his health and life were equally dear to him.[46] Douglass agreed. The appointment of commissioners, he said, had transformed Dublin into one of the most beautiful and healthy cities in the world. No city, except Lisbon, possessed Sydney's natural advantages for cleanliness and health. All that was needed to improve these advantages was the application of a little science. Douglass, a doctor of medicine with considerable experience in infectious diseases, was obviously awake to the benefits of harnessing up-to-date expertise to aid in the resolution of public problems. He also expressed surprise that, in the nineteenth century, any committee of a British legislature could recommend a franchise based on property values. Nichols, who played virtually no role in preparation of the committee's report, bemoaned the citizens'

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44 Ibid.

45 Ibid., 17 December 1852. See Powell, pp. 53-54 on Cowper's position.

46 See Hilary Golder, *Sacked: Removing and Remaking the Sydney City Council 1853-1988*, City of Sydney, Sydney 2004, pp. 20-21 for comment on Darvall's motivation.

apathy, but it might be explained, he said, by the fact that most of them considered the corporation to be totally inadequate. Their failure to turn out at recent municipal elections clearly showed that they did not care "two straws" about that franchise. He had some difficulty in voting to abolish the franchise, but he agreed that the best plan would be to appoint commissioners who would be responsible to the public through the council and the press.[47] In the end, the council rejected Cowper's motion for adoption of the report and voted in favour of Darvall's proposal for a commission, by 21 votes to nine.[48]

Henry Parkes
Reproduction courtesy of New South Wales Parliamentary Archives

Henry Parkes, writing in the *Empire,* professed himself astonished by the report's rejection. Parkes was already an important political organiser, but in policy matters he still followed Cowper's lead. The despotic proposal to substitute crown-appointed commissioners for popularly elected members, he said, must surely awake the citizens from their inattention. Thomson had overshot the mark, and, he confidently predicted, the people

47 *SMH*, 15, 17 December 1852.
48 Ibid., 17 December 1852.

would accept no constitutions containing even a particle of nomineeism.[49] Here, Parkes, like Cowper and other colonial liberals, made no distinction between two kinds of nomineeism, one involving the placement of crown appointees in bodies such as the House of Lords and other upper houses throughout the empire, and the other the appointment of utilitarian experts (and indeed, as Chapter 10 argues, the two issues overlapped).[50] The *Herald,* on the other hand, congratulated colonists on the overthrow of the corporation. Citizens had relinquished the municipal franchise and had surrendered authority to the council for the simple reason that the vast majority of them refused to elect or be elected.[51]

The whole principle of government nomineeism was bound up with other, hotter issues touched on by Parkes in the *Empire* on 20 December 1852. He described the debate on the corporation as second only in importance to that on the constitution bills, contending that it involved principles not merely analogous but identical. Members seemed to think that a municipal franchise was totally different in nature from a legislative one, and that municipal self-government could be annulled without damaging the legislature. That view, Parkes said, was fallacious, because a municipal body possessed both legislative and executive powers. It was subordinate, and that was all, because, within its charter, its by-laws were as valid and binding as acts of parliament, their compulsory operation requiring the elective principle to make them constitutional and just.[52] On the same date, a public meeting of about 600 people, chaired by Cowper, was held in Sydney to obtain support for a petition calling for adoption of his select committee's recommendations. However, that proposal was defeated, chiefly because of opposition to the new scheme of weighted votes. An amendment in favour of unconditional household suffrage was adopted instead.[53]

The abolition bill's first reading was moved on 22 December 1852. Thomson stressed that, as the bill had been prepared to comply with the council's address, it was not a

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49 *Empire*, 16 December 1852. Many subsequent *Empire* editorials commented critically on members' constant references to the apathy of Sydney's citizens. See ibid., 24 December 1852, 18 February 1853, for example. However, on occasion it also mentioned public apathy. See ibid., 20 May, 23 July 1853. See also *SMH*, 11 March 1853; A.W. Martin, *Henry Parkes: A Biography*, Melbourne University Press, Melbourne 1980, p.110 for comment on the poor voter turnout at the council election to replace Lamb. See A.W. Martin, "Henry Parkes: Man and Politician" in E.L. French (ed.), *Melbourne Studies in Education 1960-1961*, Melbourne University Press, Melbourne 1962, pp. 3-24 and Martin, *Parkes*, p. 71 on Parkes' motivation and political career.

50 See Martin, *Parkes*, p. 101 for comment on Parkes' relationship with Cowper; Powell, p. 53 on Cowper's "covert encouragement" of Parkes' political ambitions.

51 *SMH*, 17 December 1852.

52 *Empire*, 20 December 1852. See also Golder, pp. 18-20 on Parkes' relationship with the Sydney Corporation.

53 *SMH*, 22 December 1852.

government measure in any sense. It was not improbable, he said, that some of his executive colleagues might oppose it, and he deeply regretted the necessity for its introduction. In fact, only two officials, Thomson and Merewether, and crown nominee Parker voted with the 14 who supported the first reading while five officials, including Riddell, Plunkett and Manning, and crown nominee Holden were among the 11 who voted against it. However, once again, the responses of those on either side was varied. Among the abolitionists, Donaldson said that the system had always been rotten and unsound, and that the change recommended by the 1849 committee was correct. Sydney's citizens were not apathetic, but had better things to do with their time than attend to municipal matters. Commissioners might be appointed as one might appoint housekeepers. No constitutional principle was involved, and no disgrace would fall on the city as the result of resignation of the municipal franchise. John Lamb now believed that the citizens demanded change. A liberal, and in many respects an ally of Cowper, he was also a pragmatic businessman, and he would sooner, he said, have the government's £10 000 per annum spent on the city without the elective principle than the elective principle without the money.[54]

While liberals tended to confuse various kinds of nomineeism, the key to the legislative activism of at least some conservatives lay in their desire to support any kind of nomineeism that would place the best people in important positions. They were thus a peculiar combination of meritocrats and patricians. In this instance, the principal protagonists included James and William Macarthur, Nichols and Holroyd. All voted for the first reading. Holroyd challenged the worth of a petition presented by Wentworth from 900 Sydney citizens that called for rescission of the abolition resolution, and suggested that 525 of the signatures had been obtained by stealth. Holroyd denied that the city could have been taken by surprise by the bill. It had been generally expected, he said, that the select committee would recommend abolition of the existing rotten system, with its "miserable incapables" who disgraced the city, and their replacement by commissioners appointed either by the executive government or by the house.[55]

Some members hesitated, questioning the wisdom of abolition. Wentworth said that if the municipal franchise was to be abandoned, it mattered little whether the government appointed six aldermen or three commissioners. The branding of Sydney's citizens as unfit

54 Ibid., 23, 24 December 1852.
55 Ibid.

for municipal self-government was highly impolitic as it could reflect on the question of the colonists' qualification to elect their own legislative representatives, he said, and he urged that the bill should be stood over to the next session. Holden also urged delay and referred to the absence of petitions calling for the corporation's abolition. Others, arguing from a liberal perspective, strongly opposed abolition. Campbell and Flood both defended the corporation, with Flood presenting a petition with 220 signatures which he had been told were meant to be attached to the petition opposing abolition presented by Wentworth.[56] A further petition was presented by Wentworth, purporting to be from the city corporation, but it was rejected by 14 votes to ten. Thomson moved the bill's second reading, but also announced that the government would not proceed further in that session, given the division of opinion. There were also problems, he said, in selecting competent commissioners for the council's approval. He subsequently agreed to withdraw the bill, a result regretted by the *Herald* and applauded by the *Empire*.[57]

When the council's third session commenced on 10 May 1853, it was not the abolition bill that made the first appearance but a bill to replace the corporation with an elected board. It was introduced by solicitor William Thurlow, Sydney's mayor, who had been elected to replace Lamb as a member for Sydney, defeating Parkes in the process.[58] Thurlow explained that the bill had been drafted with the assistance of several men well versed in municipal affairs, and that it was principally modelled on the Hobart Town Act.[59] It provided for the election of six aldermen, one for each ward, who would choose a mayor from their group, and for the lowering of the franchise to £10. Thomson observed that the government ought not disfranchise the city unless on petition from its citizens. If their apathy was such that they did not act, they could hardly expect the government to take the initiative. (In fact, then, they were apathetic about both exercising the franchise and asking for its abolition.) But the present bill was not satisfactory, he said, since it promised the creation of a civic oligarchy possessing unlimited power, a power which extended, in fact, even with regard to its own remuneration. Further, a clause relating to the city's endowment infringed the constitutional prohibition on the introduction of money bills by private members. Thomson suggested that Thurlow's bill should be referred to yet another select committee.[60] His criticism and that of

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56 Ibid. See also Golder, pp. 17-18.

57 Ibid., 24 December 1852; *Empire*, 24 December 1852.

58 Ibid., 16 May 1853. See Martin, *Parkes*, pp. 108-110 for an account of Thurlow's election.

59 Ibid., 21 July 1853. See also *Empire*, 23 July 1853 in which Parkes variously described the 48 page draft as "deplorably chaotic", "a large and useless heap of rubbish" and a "quagmire".

60 Ibid., 21 July 1853. See also ibid., 23 July, 3 August 1853.

the *Empire* brings to mind MacDonagh's description of British improvement commissions, as generally oligarchic, being made up of leading citizens and magistrates who held office for life. They were possessed of powers appropriate to a body of experts, but could demonstrate no particular energy or expertise.[61]

At this stage, a new facet to the debate emerged. It related to the right relationship between local government, which was close to the people and might in theory therefore be genuinely and especially representative, and the central legislature. One detects the hesitant emergence of a new argument at odds with the utilitarian understanding of local government. For the liberal democrat, Campbell, a supporter of Thurlow's bill, the abolition of the municipal franchise would involve giving up the right of taxation by representation. The fault in the present system arose from a poor choice of representatives by citizens and the remedy was to extend the franchise in the manner proposed by the bill. The conservative Martin, on the other hand, predictably focussed on local responsibilities rather than local rights—the main concern for the liberals. In pressing for retention of a reformed city corporation, Martin argued, with some undue optimism, that the city corporation had provided a school for people to acquire experience in deliberative discussion which might fit them for higher office as well as affording offices of honour and reputation for a class of strong willed and well intentioned men, whose abilities did not fit them to aspire to a wider or higher sphere.[62] MacDonagh's verdict seems more realistic. He noted that the British local government reforms of the 1830s had a very different effect on the practice of local citizenship, establishing egalitarian principles and widening "the circle of privilege", so that the new municipal corporations formed a training ground for democratic agitation and a forum for radical and democratic influence.[63]

Wentworth, a consistent supporter of retention of the municipal franchise, proposed a compromise. The corporation should be suspended until the executive had completed the public works that were indispensable for the health and safety of the city's inhabitants. While there were English precedents for the legislative appointment of commissioners, such appointments should be made by the executive, he said. Thurlow's bill was defeated at the

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61 MacDonagh, p. 124. See also Michael Roe, *Quest for Authority in Eastern Australia 1835-1851*, Melbourne University Press in association with Australian National University, Melbourne 1965, p. 192.

62 *SMH*, 3 August 1853.

63 MacDonagh, pp. 126-127 (quotation on p. 126).

beginning of August by a vote, 27 votes to three, on the previous question.[64] Its loss demonstrated that the sheer need for decisive action could cause men of liberal principle to compromise their views, just as MacDonagh said had happened in England. Here, added impetus was perhaps provided by the inevitability of the result and the desire to concentrate on a bigger fish—the details of the new constitution. Ideology was overridden by need. Only the bill's more radical supporters, Thurlow, its sponsor, and Campbell and Flood, held their ground.

These developments spurred Parkes into action, his views extending the issue to which Martin and MacDonagh had referred. In the *Empire*, Parkes set about condemning the centralisation of colonial power. While a bold and vigorous public opinion and a powerful and independent press provided infallible safeguards against an undue concentration of power in the central government in Great Britain, the case was very different, he said, in New South Wales. Colonists had permitted the growth of a powerful and compact body interested in excluding the people from a voice in management of their local affairs, the monopoly of power by the central government being assisted by the dispersal of the population over an enormous area, which had impeded the formation of towns in the interior.[65] New South Wales had no Manchester and Birmingham to aid in fighting "the battle of the masses". Here, the brunt of the contest was thrown on the capital, and the capital had been deliberately deprived of the constitutional means of fostering the country's cause. In a direct attack also on the concentration of expertise, Parkes criticised what he saw as the vesting of the colony's actual government in the executive staff, acting through its influence in the council.[66]

The *Herald*, on the other hand, called on the government to do its duty. The paper appreciated the advantages of special expertise in government administration even if many politicians did not. The appointment of commissioners had been eminently successful in various parts of England, it said, and affairs of local detail, not involving political rights but relating exclusively to the provision of municipal services, were invariably better handled by crown-appointed commissioners than by bodies elected by ratepayers. Such undertakings

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64 *SMH*, 3 August 1853. See also *Empire*, 2 August 1853 which suggested, on the date of the debate, the imposition of a legislatively appointed substitute for the corporation for a limited period followed by the revival of direct elections.

65 See James Macarthur, *New South Wales; its Present State and Future Prospects*, D. Wather, London 1837, pp. 173, 199-200, 219-220, 248, 257-258, 273, Macarthur predicting this development as a good thing because a conscientious, efficient, centralised government would be very beneficial.

66 *Empire*, 4 August 1853.

required a peculiar sort of men, fitted by training and experience for the work assigned to them. Such men were rarely, if ever, selected by the irresponsible masses, but were readily and scrupulously chosen by the responsible advisors of the crown.[67] Thus, the two newspapers neatly summed up the main opposing positions on the issue of city government, laissez-faire liberalism on the one hand, allied with the emergent democracy, to be exercised at a number of levels, and utilitarianism on the other—the rule of experts, now favoured by the more intelligent of the old elite.

However, such confidence in the executive's ability to select appropriate experts appears to have been misplaced. On 10 August 1853, Thurlow asked Thomson whether the government intended to do anything about the corporation during the present session. Thomson replied that bills to remove powers over drainage and water supply from the corporation were with the solicitor-general. When they were introduced, he said, the government would be in a better position to make its intentions known.[68] However, government inaction continued after the bills were introduced.[69] On 20 September, an exasperated Cowper, having tried in vain to save the democratically elected corporation, saw no other realistic solution than to move that the corporation be abolished for the time being and that three commissioners be appointed by the government. He thereby temporarily incurred the wrath of his liberal and radical supporters. However, this issue was soon subsumed by the larger controversy over the form that representative government for the colony as a whole should take and Cowper's motion passed almost unanimously.[70]

The resulting government bill to abolish the corporation had its first reading on 23 September 1853.[71] The *Herald* gladly reported that attempts to muster public opposition had failed miserably. The city corporation adjourned without passing any condemnatory resolutions and the *Herald* doubted whether it even intended to petition the council.[72] When Campbell presented a petition purporting to be from the corporation but signed only by the mayor and town clerk, and praying for a hearing by counsel in the house, the move was

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67 *SMH*, 5 August 1853.

68 Ibid., 10 August 1853.

69 See ibid., 9, 10 September 1853.

70 Ibid., 21, 22 September 1853. See Powell, pp. 53-54 for comment on Cowper's awkward situation, and his political dexterity in managing it.

71 FitzRoy reported to Secretary of State Newcastle that the government had not revived the 1852 abolition bill in 1853 because of its extreme reluctance to displace representative municipal government. FitzRoy to Newcastle, 15 February 1854, CO 201/473 ff. 43-47. See also Golder, pp. 20-22.

72 *SMH*, 28 September 1853.

rejected.[73] On the bill's second reading, Thomson, repeating his performance of the previous year, stressed that it was being introduced in response to the council's address and that the government was open to suggestions for its improvement. He also noted that the government favoured businessmen of known probity, integrity and energy as commissioners, rather than professional men. This was an especially telling comment and has vital implications for the whole argument of this thesis. It is proof of vague and confused ideas, among officials and no doubt more generally throughout New South Wales, about the way up-to-date expertise might be used in public projects. It also highlights Thomson's suspicion of utilitarianism. The bill passed on 5 October and the corporation was abolished on 1 January 1854.[74] The *Empire*, by this time engaged in the far larger battle, essentially gave up the struggle for the municipal franchise, conceding that the new arrangement was necessary.[75]

In evidence before the 1852 select committee on the city corporation, Elias Weekes had suggested that the corporation be should replaced by a commission of "three competent men ... one of [whom] should be a practical man, a scientific engineer for instance".[76] In the event, the government appointed two well-connected gentlemen, Gilbert Eliott and Frederick O. Darvall, together with the former town clerk, John Rae, as the city's commissioners. Eliott, the chief commissioner, was a former artillery officer who had arrived in Sydney in late 1839 and was appointed as a police magistrate for Parramatta by Governor Gipps in 1842 on the recommendation of the Earl of Auckland, a near relative. Darvall, the brother of the barrister-politician, J.B. Darvall, was a partner in a tannery business but apparently never actively engaged in business and was experiencing financial difficulties. The legally qualified Rae, who had served the city corporation since July 1843, was at least familiar with the city's administration and finances. However, Eliott later conceded that "none of us were practical men".[77]

According to MacDonagh, Victorian obsessions with self-expression, representation and equality of numbers in local government reform had terrible and tragic consequences in Great Britain. There, the failure to order efficiently the relationships and structures of central

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73 Ibid., 5 October 1853.

74 Ibid., 5, 6 October 1853.

75 *Empire*, 7 November 1853.

76 Minutes of evidence taken before the select committee on the city corporation, 27 July 1852, p. 9. *V&P* NSWLC 1852.

77 For Eliot, see *ADB*, 4, p. 135; for Darvall, *ADB*, 4, p. 23; for Rae, *ADB*, 6, pp. 1-2. See also Golder, pp. 26-28 (quotation on p. 28); J.B. Hirst, *The Strange Birth of Democracy: New South Wales 1848-1884*, Allen and Unwin, Sydney 1988, pp. 255-256.

and local power was indirectly responsible for avoidable suffering, disease, misery and death.[78] That New South Wales escaped from at least the worst of these consequences was probably more due to good luck that good management, since the replacement of Sydney's municipal corporation with commissioners failed to resolve the city's problems. The executive had been reluctant to become involved in the appointment of a commission to run the city, but it could hardly have anticipated the findings of a select committee, chaired by Martin, which in mid December 1855 reported on the city commissioners' performance thus far.[79] The committee took extensive evidence and appointed a board of inquiry of four experts, James Hume, an architect and surveyor, Edmund T. Blackett, an architect who had trained as an engineer, draftsman and surveyor, James Houison, a builder, and David Lennox, a bridge-builder, to examine sewerage works carried out during the commissioners' tenure. The commissioners in turn engaged Henry T. Plews, a mining engineer, to accompany the committee's experts on their inspection of the sewers.[80] Committee members also personally inspected underground tunnels and made geological investigations. The final report described numerous problems, involving mismanagement, poor workmanship and lack of supervision, entailing, it said, massive monetary losses for the city. It described the appointment of the commissioners as a mistaken experiment, and recommended that the governor-general replace them with 12 men who had been members of a previous council, plus a salaried mayor who had previously held that office. The city's engineers should be dismissed and barred from holding any position in the public service, and damages and the recovery of overpayments should be sought from the sewerage works contractor.[81] It was a damning indictment either of the kind of utilitarian expertise currently available in the colony for the management of towns or else of the government's will and ability to take advantage of it.

However, this assessment did not receive universal acclaim. The *Herald* condemned the committee's chairman (Martin), its partial methods of inquiry and its report. The council,

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78 MacDonagh, p. 132.

79 See *SMH*, 13 June 1855 on the committee's appointment; *Empire*, 29 October 1855 on the pending committee report. See also Golder, pp. 24-25, 31-36 on committee scrutiny of the commissioners' proceedings in 1854 and 1855.

80 See minutes of evidence taken before the select committee on the city commissioners' department, pp. 73, 78, 191, 195-196, the evidence disclosing that the members of the committee's board had very lengthy and extensive experience in excavation, blasting and building work. For Blackett, see *ADB*, 3, pp. 173-175; for Lennox, *ADB*, 2, pp. 106-107.

81 Final report of the select committee on the city commissioners' department. *V&P* NSWLC 1855. See also Elena Grainger, *Martin of Martin Place: A Biography of Sir James Martin (1820-1886)*, Alpha Books, Sydney 1970, pp. 80-81 for comment on the committee and Martin's role as its chairman.

after a lengthy debate, rejected the committee's recommendations and resolved instead, by a majority of 22 to six, to ask the governor-general to take whatever steps the public interest seemed to demand.[82] The issue was thus returned to government. Conceivably, had the government really understood the advantage of a commission of expert professionals, adopted a less half-hearted approach and supported such experts (assuming that they were available), this might have gone a long way towards resolution of the city's immediate problems. In the end, government by inexpert commission proved both ineffective and politically unacceptable.[83]

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82 *SMH*, 17, 20, 22 December 1855. See *Empire*, 20 December 1855 on the rejection of the committee's recommendations.

83 A municipal corporation for the city of Sydney was re-established in 1857 at the instance of Parker's conservative government (possibly in an attempt to appease liberal-democratic feeling) while the liberal Cowper was responsible for the passage of the Municipalities Act in 1858.

Chapter 8 The sixth council and public health and sanitation

In this and the following chapter, it is proposed to examine two additional aspects of colonial law-making by the sixth council, namely public health and sanitation, and law and police reform, and to compare developments in these areas with those occurring in Great Britain. In these areas, by and large, the government took the reformist and utilitarian lead, despite obvious conflicts with the tenets of laissez faire and the interests of its conservative supporters, and despite the pattern of government law-making activity during the 1840s. As has been shown, in that period the government, and Gipps and Thomson in particular, had no brief for or interest in advancing a broad, ideological Benthamite program of reform or initiating wide-ranging legislative schemes. The initiative for reform on various fronts had been left largely with individual elected members and, in latter years, with G.R. Nichols in particular. Apart from dealing with necessary administrative and revenue measures, the government approached reform in a piecemeal fashion and only in areas of undeniable need. As has been seen in Chapter 7, such a situation arose in 1853 when the government reluctantly introduced the bill to abolish the Sydney Corporation. However, in some areas this now changed.

The main concern of this and the next chapter is to consider the extent to which the reforms under consideration were part of some large ideological, utilitarian program, and the extent to which they were a fragmented response to obvious, undeniable need, the central issue of the debate about MacDonagh's theory of government growth in Britain. Broadly speaking, three main bodies of initiative appear to have been at work, centring on Henry Parkes and the *Empire*, G.R. Nichols and William Manning. These men provided unfolding competing and interacting sources of ideas and action, for all of which overwhelmingly need was a pressing but not a necessary rationale. The important and developing role played by Parkes through his newspaper has been referred to in the last two chapters. The *Empire* emerges as a very interesting focal point for ideas about government responsibilities in the early 1850s. As has been seen, Parkes himself was a very clever man, and he apparently used the pages of his paper to explore ideas, moving in the process from an opportunist, liberal-democratic perspective to a more far-sighted interventionist one. This development might be explained by the fact that the Chartism from which Parkes came allowed for a certain amount of government action. Generally speaking, Parkes occupied a position half-way between laissez faire and paternalism, much turning from time to time, no doubt, on the extent to

which he felt that he needed to follow Cowper's more commercial, free-enterprise line. The evolution of the *Empire's* approach within what was a vigorous and very fruitful debate about the right degree and purpose of government action will be traced in this and the next chapter.

Nichols should need no further introduction. In the sixth council, he was again actively involved in the issues canvassed in these two chapters, both as the city's lawyer and because of his deep concern with public health and welfare, reform of the law and public safety. As noted in Chapter 2, the urbane Manning came to the fore as a significant law-maker in the early 1850s, entering the legislature for the first time in October 1851. However, his reformist credentials appear to have developed over some years. Manning was educated at University College, London, which had been founded by Jeremy Bentham with others, and he was obviously well acquainted with the great Benthamite law reformer, Henry, Lord Brougham, because his appointment as solicitor-general of New South Wales was confirmed through Brougham's influence in 1845. The legal historian, C.H. Currey, described Lord Brougham as perhaps the most notable of those "who had sat at the feet of Jeremy Bentham", Brougham having been responsible for an impressive array of law reform measures, often in association with commissions and committees, between the 1820s and the 1850s.[1] Despite Manning's relative inexperience when compared with other officials in the legislature, it was he who became the virtual manager of government business after Thomson's departure and who led the uncharacteristic government reformist charge during the sixth council's term.[2]

Public health and sanitation

MacDonagh described the public health and sanitation conflicts in Great Britain in the three decades to 1854 as in many ways the most complex and illuminating of all the phases of administrative reform. They led to the significant development of new administrative methods while also producing the last major victory of individualist over collectivist principle, when the combined opponents of Edwin Chadwick's planned sanitary reforms triumphed, at least for the time being, and forced him from the field. Public health problems in Great Britain were the product of its rapid transformation into a nation of great cities during industrialisation. The problems, and the inability of local and national governments to

1 C.H. Currey, "The Influence of the English Law Reformers of the Early 19th Century on the Law of New South Wales", *JRAHS*, vol. 23, pt. 4, 1937, pp. 230-232.

2 *ADB*, 5, p. 207; Currey, p. 228. Manning did not sit in the executive council before 1856.

undertake remedial measures, became especially obvious in the 1830s.[3] This situation was replicated in Sydney in the late 1840s and the 1850s, albeit on a much smaller scale but with an added element, the impact of gold discoveries, which swelled the city's population with immigrants. In England, where the urban poor lived in lamentable, overcrowded conditions with no basic drainage or sanitation, the death rate in the largest cities increased dramatically in the 1830s thanks to cholera and typhus epidemics. This happened at a stage when the medical and engineering "potentialities" to which MacDonagh referred were at a rudimentary stage of development and the experts were ill-equipped to provide answers.[4]

Investigations into the link between disease and the living conditions of the poor by a small group of doctors and philanthropists in London in the 1830s bolstered the belief that foul atmosphere was the main source of all infection, focussing attention on dwelling houses and the need to reduce overcrowding and provide interior sanitation. Then followed a much more extensive inquiry into the sanitary conditions of the working classes conducted by Chadwick for the poor law commissioners, which gave him the opportunity to produce a comprehensive, Benthamite scheme, the result being his 1842 report, *The sanitary condition of the labouring classes*. Chadwick disagreed with the dwelling house remedy, seeing the problem not in medical terms, but as an administrative and engineering one. While adhering to the atmospheric theory of infection, he suggested that house, street and main drainage, water supply and street cleansing and paving were all necessarily connected. The danger lay in the presence of filth, which needed to be removed as far away and as fast as possible. Chadwick's system of arterial drainage was based on a new type of sewer invented by John Roe, a London engineer, which was constructed and laid in a manner that ensured that water rushed through it with great speed and force, carrying all matter with it. Cesspits and the manual removal of refuse would be dispensed with, the only requirements being a constant supply of water and a destination for the removed waste, which Chadwick proposed should be piped to the country for use as fertiliser. His revolutionary scheme contemplated the abolition of all existing local authorities dealing with paving, street cleansing, drainage and water supply, and their replacement with a single body with control over natural physiographical areas—towns and their hinterlands—rather than "arbitrary" urban ones.[5] In 1848, a public health bill based on Chadwick's scheme met with substantial opposition and the powers of his

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3 Oliver MacDonagh, *Early Victorian Government 1830-1870*, Weidenfeld and Nicolson, London 1977, pp. 133, 147-150. See also David Roberts, *Victorian Origins of the British Welfare State*, Yale University Press, New Haven 1960 (second reprint 1961), pp. 70-72.

4 Ibid., pp. 133-135.

5 Ibid., pp. 134-140.

general board were considerably reduced. Further, when cholera broke out shortly after, it was decided to exclude London from the statute's operation. The scheme collapsed, and despite attempts to get it back on track, the general board of health, including Chadwick, was dismissed in 1854. A new board, free of Chadwickians and London radicals and under the control of the Engineering Institute, was set up in its place. That board was disbanded in 1858, even though, by that stage, the essential correctness of the statute's main principles had been established, especially the importance of the small, strong, cheap earthenware pipes that had been first baked at Chadwick's instance in 1847.[6]

It has been seen that when Sydney was incorporated in 1842, the city corporation became responsible for paving, drainage, sewerage and water supply. These powers were supplemented by the Sewerage Act of 1850. It has also been seen that the city corporation proved to be signally inept in performing the functions thus delegated to it. From time to time, elected legislators attempted to remedy the situation by introducing bills to address aspects of the corporation's responsibilities, such as paving. Endeavours to remove slaughter-houses and the burial ground from the city have also been mentioned. The press constantly called for action. Early in 1851, an extraordinarily detailed series of ten articles by "our special reporter" on the sanitary state of parts of Sydney appeared in the *Herald*.[7] The reporter referred to similar sanitary surveys of London and other urban areas undertaken by the Benthamite reformer, Dr Southwood Smith, and others. His articles, as useful in their way as a select committee report, exposed the existence of an intolerable state of affairs in Sydney arising from poorly constructed and overcrowded buildings owned by unscrupulous landlords with no, or insufficient, water, sewerage, drainage and privies. Rubbish removal, paving, kerbing and guttering and street cleansing were also notably absent. The result was that the weakest class, to whom the upper classes owed a duty, were being neglected, brutalised and contaminated, the reporter said, vice and dirt being closely allied, and prostitution being intimately connected with the absence of efficient sanitary regulations.[8] "The evils which accumulate in towns are active, while the authorities are passive", the reporter said, sheeting blame home to Sydney's municipal authorities.[9] Although successive governments in England recognised the need to promote the health of towns, here the newly enacted Sewerage Act was not being enforced. In England, politicians took the lead, thereby thwarting Chartist agitators who had found supporters in dens of filth and fever. At least one

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6 Ibid., pp. 141-150; Roberts, pp. 83-85.
7 See *SMH*, 1, 8, 15, 22 February, 1, 8, 15, 22, 29 March, 5 April 1851.
8 Ibid., 8, 15 February, 1 March, 5 April 1851.
9 Ibid., 1 March 1851.

such politician relied on the golden rule, the reporter said, when urging fellow Englishmen, in town and country and of all classes, to make "the material, moral, and spiritual condition of our neighbours as healthy as we would wish our own to be".[10] However, the health of towns involved far more than sewers and drains. People also needed to be educated in the chemistry of life, and to be made to understand the importance of healthy air and a healthy environment, the reporter said.[11] He also stressed the need for technical expertise.[12]

When the sixth council's first session commenced in mid October 1851, the *Empire* declared that the city would be left almost wholly without drainage unless it received endowment from the government.[13] The *Herald* agreed. A report from the city corporation's board of health and a petition framed by its select committee on drainage for presentation to the governor-general both highlighted the corporation's inability to act without a substantial injection of funds. In a manner reminiscent of British inquiries of various kinds into social evils, the board of health reported on the abundant and intolerable nuisances that threatened public health—filth, lack of water, stench from unclean outhouses, dirty streets and overcrowded lodgings. Its members complained that, without funds, they were unable to do what they had been instructed to do. "They can inquire, they can deliberate, they can advise", the *Herald* said, "but they cannot act". Contributing to the pressure on government for legislative action, the *Herald* continued: "They see a thousand things which ought to be done at once; but what with the defective state of our municipal laws, what with the insufficiency of their administrative powers, and above all what with their want of money, their hands are quite tied up". Further, the board warned that unless the squalor and wretchedness of many parts of the city were relieved, the health of the wealthier classes in the better kept and ventilated parts of the city would not be preserved. As the city contained one quarter of the colony's population, and as people were constantly flowing through it, to and from the remotest corners of New South Wales, the outbreak of a disease such as cholera would affect the whole colony and paralyse the industrial pursuits of all classes. The endowment issue could no longer be delayed, the *Herald* said.[14]

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10 Ibid., 8 March 1851.
11 Ibid., 22 March 1851.
12 Ibid., 22 February, 1, 8 March 1851.
13 *Empire*, 14 October 1851; Hilary Golder, *Sacked: Removing and Remaking the Sydney City Council 1853-1988*, City of Sydney, Sydney 2004, p. 20.
14 *SMH*, 22 October 1851.

Despite this pressure, disagreements of the kind experienced in Britain regarding an appropriate solution were immediately apparent, and crossed ideological boundaries. A bill to make a technical amendment to the 1850 Sewerage Act was stood over after the liberal Lamb and conservatives James Macarthur and Wentworth pointed to difficulties with the original measure. When Lamb presented the city corporation's petition seeking endowment for the sewerage work, he said that Thomson's earlier estimate of its cost had been too low. He had spoken to Thomson's expert and had obtained very different information about the Cheltenham sewerage project which Thomson had proposed as the model for Sydney's work. The work should be carried out and supervised in a manner different from that originally contemplated, Lamb said. Macarthur went even further. The 1849 select committee had found that the city corporation was incompetent, but even the corporation of the city of London was not competent to deal with such an issue. He quoted from an article in the *Quarterly Review* of March 1850 on new methods of carrying out and managing sewerage works and he suggested that action should be withheld for a few years until the result of the English experiments, which might involve a less expensive process, were known. For Wentworth, the Sewerage Act was a dead letter, and he wanted the work to be entrusted to a board of paid commissioners. Macarthur had shown that the science of city drainage was in its infancy and was not even understood in the mother country, except perhaps by a small number of scientists. Therefore, they should wait, Wentworth said. When Thomson would not withdraw the bill, Wentworth successfully moved that it be read a second time in six months.[15]

As noted previously, the report of the 1852 select committee on the working of the Sydney Corporation recommended its replacement by a smaller body, initially appointed by the government. It will be recalled that during the debate on that report, Dr Douglass, when supporting the call for a commission, had spoken of the need for the application of a little science to bolster Sydney's natural advantages for cleanliness and health.[16] The subject of Sydney's water supply, drainage and sanitary condition came under close press scrutiny again in 1853, especially from Parkes in the *Empire*. In mid-January, during a dry summer, Parkes called attention to the fact that some parts of the city with private water pipes which were rated for water had received none for two to three weeks. Although both the government and the Sydney Corporation had caused examinations to be made and reports prepared, neither knew which was responsible for remedying the situation. "What is everybody's business is nobody's", Parkes said. Here Parkes seems to have adopted the liberal-democratic view of

15 Ibid., 29 October 1851.
16 Ibid., 15 December 1852; *ADB*, 1, pp. 314-315.

citizenship mentioned in the previous chapter, suggesting that citizens, rather than government, were primarily responsible for resolution of the problem. Surely some competent private citizens could take the matter in hand, as they had done in establishing the gold escort company, he said. It was preposterous to leave all matters of public utility to corporations or legislatures. There are a hundred things that those bodies would never do unless they were compelled to do so by voluntary associations of intelligent and earnest people, Parkes said, perhaps mindful of the propagandist public health associations, formed in Great Britain in the mid 1840s, which supported the sanitary reform movement.[17] In April, Parkes, again through the *Empire,* called for community action to draw attention to the need to employ scavengers to remove refuse from the streets and for a law to require the collection of unwholesome matter, some accumulations of filth having been left for years. This was not the proper business of the executive, which already had more than enough to do, he said.[18]

These fulminations may have had some effect as, in May, Edward Flood, a former Sydney mayor, moved for the appointment of a select committee on the best means of supplying Sydney and its suburbs with clean water.[19] He criticised the government for spending money on an inquiry but not implementing its recommendations. Although a public meeting had been called to set up a water company (presumably similar to private water companies in England), that kind of enterprise should not fall into private hands, Flood said. The duty lay with the government. Dissension emerged again. Thomson opposed the appointment of a select committee, proposing instead an address to the governor-general calling for adoption of the recommendations of the government's board. Martin wanted Thomson to provide more specific proposals. Darvall viewed the appointment of a committee as useless. As nothing could be expected of the Sydney Corporation, the duty lay with the government, but a water company would be better than both, he said, the implication being that the issue would be better handled by private enterprise.[20] A select committee was not appointed.

In May, in the *Empire*, Parkes changed tack. He expressed concern that a government commission, in attempting to remedy abuses, might cause greater injury, and suggested instead that the duty belonged to the government. He queried why the government had not

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17 *Empire*, 11 January 1853; MacDonagh, p. 142. See also Golder, pp. 4, 20-21 on Sydney's water supply.
18 Ibid., 16 April 1853.
19 Ibid., 11 May 1853.
20 Ibid., 23 May 1853; MacDonagh, pp. 139, 144, 146. See Golder, pp. 20-21 on Darvall's pecuniary interest in the water issue.

used funds from the sale of land in the city to promote its sanitary condition, and asked why it had not insisted on compliance with building conditions essential for public health, such as those requiring the free circulation of air. During the years when nothing was done, and when lives were lost as a result, the government could have done any number of things without interfering with the city corporation's jurisdiction, he said.[21] In the same month, the *Empire* carried two articles on Sydney's water supply which demonstrated Parkes' acute awareness of developments overseas. Apart from domestic purposes, a sufficient supply of water was needed for fire fighting and street cleansing and, in particular, for the cleansing of the sewers as soon as an extended and efficient system of sewerage for the city had been adopted and commissioned, he said. He regretted that the government's board of inquiry had not undertaken more extensive investigations, such as a hydrographical survey of the Sydney area. The subject had engaged the attention of eminent men in England and on the Continent and many successful schemes, applying both scientific and practical knowledge, had been developed. He canvassed local issues such as drought, rainfall averages and the rate of evaporation from storages, a matter that he said should be tested by actual experiment, as had been done by an eminent hydraulic engineer in Great Britain.[22]

In the second article, Parkes considered the cost of constructing water storages, a matter on which no local data had been produced. In England, the cost of storages and of transmitting water in pipes for the supply of towns was well known, and the article provided detailed costings on various water works in Great Britain. On the basis of information contained in the 1851 New South Wales census, Parkes estimated the number of houses and buildings that would require water and the rating revenue that would be received.[23] These articles, like those published in the *Herald* in 1851, offered technical arguments for public debate and constituted an important expansion of the method used by select committees. And as with committees during the 1840s, by emphasising new expertise and the public gathering of information, Parkes seemed to move away from the private enterprise approach, his comments providing yet another example of need shaping a utilitarian method of action.

Drainage and sewerage being issues intimately connected with water supply, the *Empire* also carried informed articles on these. A detailed critique of the sewerage and drainage systems employed in Great Britain and elsewhere was provided, and a scheme was suggested

21 Ibid., 17 May 1853.
22 Ibid., 20 May 1853.
23 Ibid., 21 May 1853. See ibid., 16 December 1854 for comment on water-conserving schemes adopted in Sydney, including the use of water tanks.

for Sydney which involved separating house and sewerage drainage from surface water and natural drainage, as had been proposed for London by the metropolitan commission of sewers. It was fortunate, the *Empire* said, that so little had been done in Sydney, because the city had less to undo and could readily take advantage of all modern improvements and the latest adaptations of engineering science, including sewer types and the cheap, glazed, jointed and closely fitting stoneware pipes that Chadwick had advocated. The article also contemplated the conveyance of sewage to district receptacles, where the solid matter could be compressed into cakes for use as manure and the liquid discharged at low level or used for irrigation, as had been done for years in many countries and, recently, in Edinburgh. Reference was also made to the use in London and elsewhere of a portable pumping apparatus with hose and air-pipes which could be employed for the periodic removal of sewage from Sydney's estimated 6 000 cesspits until the sewerage works had been completed.[24] Another article, essentially relating to the need to reserve areas of land for public recreation and healthful exercise, commented also on the total absence of town planning in Sydney, while giving some credit to Colonial Secretary Thomson for an initiative involving plans to provide "a thorough drainage", a reference presumably to the government's Sydney sewerage proposal.[25]

Against this background, government bills for Sydney's sewerage and water supply had their first reading in September 1853. In spite of Parkes' expectations, their provisions were largely of a formal, administrative nature, the sewerage bill being based on the 1850 Act. No revolutionary Chadwickian solution to Sydney's problems was proposed. The government had been induced to act, Thomson said, because Sydney's citizens had petitioned the governor-general to adopt measures to secure the city's water supply and to provide a system of drainage and sewerage. The house had similarly asked the government to attend to Sydney's water supply and these requests could be met without interfering with the corporation, even though the proposal related to its main functions, Thomson said. The corporation would still be left with paving, lighting and the maintenance of cleanliness and order. The government proposed that commissioners with the highest professional skills should be appointed to carry out functions under these laws, with £200 000 to be raised for the purpose and all expenditure to be authorised by the council. While compliance with the 1850 Sewerage Act had been voluntary, the new law would require all owners and occupiers to connect their private drains to the general sewer, and rates were to be assessed on the same

24 Ibid., 8 June 1853.
25 Ibid., 25 June 1853.

principle as applied in Cheltenham in England, Thomson said.[26] Thus, at virtually the same time as Thomson was apparently resisting the use of high expertise to resolve the vexatious problem of the Sydney Corporation, the government, when bringing in these bills, had considered that technical expertise should be applied to the tasks at hand. For some reason, as was seen in Chapter 7, this resolve failed when it came to the appointment of the city commissioners.

Parkes, writing in the *Empire,* agreed that the work could not be left to "slobbering, impractical hands" in the corporation, but he strongly objected to the prospect of a permanent commission of government nominees, even if composed of competent people. Referring to recent debate in the council and press about a possible board of public works, he launched into a detailed discussion of the relationship between nominated and elected bodies. Similar nominated boards in England and Ireland not only attended to public works in general, but occasionally carried out improvements in towns without interfering with their corporations, and, after the works had been completed at public expense, put the corporations in possession of them, he said. Further, these boards had been responsible to the legislature and not to the government.[27] As was seen in Chapter 7, Parkes had canvassed the issue of nomineeism as opposed to election in late 1852 when he connected the debate on the Sydney Corporation with that on the constitution bills. This issue resurfaces in Chapter 10. The second reading of the sewerage and water bills was deferred after members complained that the government should not proceed with them while ignoring the larger issue of the corporation's incompetence. From September, the sewerage and water bills travelled as part of a package with the bill to abolish the corporation, all three passing on 11 October.[28]

In November 1853, the *Empire* carried further editorials on Sydney's sewerage and water. One criticised avaricious landlords for cramming as many people as possible into the city's tenements, with no regard for public health, while another approvingly summarised the extensive statutory powers that had been conferred on the new commissioners, and said that they had thus become the city's chief health officers. These officials had all the powers necessary to thoroughly cleanse the city, nothing was free from their jurisdiction and no one could resist their proceedings. Parkes further called on the commissioners to become familiar with the city, suggesting that they should avail themselves of medical assistance in cleansing

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26 *SMH*, 8 September 1853.
27 *Empire*, 9 September 1853.
28 *SMH*, 16, 22 September, 6, 12 October 1853.

it. In comments smacking of social engineering and the tenets of moral enlightenment, he asserted that they should also sponsor moral purification of the people. Public attention must be drawn to the connection between physical and moral impurities, he said. The one could not be effectively purged without amelioration of the other. Compulsory attention to cleanliness would have a decided tendency to improve moral character, a purified house tending to awaken personal comparison, Parkes said. No occupation, no pressure of business, could justify the prevailing general disregard for these matters.[29]

In the *Empire* during 1854 Parkes turned his readers' attention to the dwelling houses of the poor. In January 1854, he wrote of a city of over 80 000 inhabitants without drainage and scantily supplied with water. A city of this size could only be prevented from becoming a "pestilential cesspool" by the strict enforcement of stringent sanitary laws. While there was as yet no means of assessing the city's disease and mortality rates, returns published by the Metropolitan Association in London showed that ventilation and cleanliness in superior lodging houses had a dramatic effect in diminishing the mortality rate there. An act to enforce cleanliness and prevent overcrowding of common lodging houses had enabled the police to remove typhus from several English towns, and Sydney's commissioners should endeavour to do likewise, Parkes said.[30] In January and March, the *Empire* published two articles by "F.S.P", both making a connection between offensive odours and disease and death. The articles also touched on humanitarian and philanthropic efforts to improve the living conditions of the lower classes. The first referred to unsatisfactory tenements constructed by speculative builders in Sydney, a problem that had occurred in the new towns in England also. Societies recently formed in England, America and on the Continent to improve the dwellings of the working classes had demonstrated that airy, light, ventilated and drained buildings could be erected at no greater cost than the badly ventilated and constructed dwellings usually occupied by the poorer classes. A builder of substance might undertake to erect such a building in Sydney for a group of families to rent, the article said. Sydney's workers were also urged to combine in a self-help initiative and form a co-operative or building society to erect a "joint stock building" which could include a common kitchen, other common amenities and even employ a "joint stock" cook along the lines of the club system in London.[31]

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29 *Empire*, 8, 9, 10 November 1853. See Michael Roe, *Quest for Authority in Eastern Australia 1835-1851*, Melbourne University Press in association with Australian National University, Melbourne 1965, p. 192.

30 Ibid., 7 January 1854. See ibid., 22 April 1854 for comment on the city commissioners' activities and apparent lack of action on sanitary reform.

31 Ibid., 20 January 1854; MacDonagh, pp. 134-135.

In the second article, the author called for the enactment of a comprehensive "Bill of Health" or sanitary act covering water supply, sewerage and drainage, "scavengering" and street watering, ventilation of workshops and factories and the abolition of cesspools and other nuisances. Benthamite and anti-laissez-faire views were advanced. While the author (probably Parkes himself) conceded that some would complain of interference with individual rights, an Englishman's home being his castle, the owner should not be allowed to kill others with impunity even if the owner wished to commit suicide. Further, the "rights" of Sydney landlords and house-owners should not be permitted to prevent the removal of the city's estimated 10 000 cesspools in the interests of public health.[32] Later in the year, the *Empire* addressed modern improvements in dwelling houses and the recent interest of the benevolent and the scientific in the issue. Model lodging houses for single people and dwelling houses for families had been erected in London by various benevolent societies, and Prince Albert had devoted much attention to the subject, it said.[33] Prevalent social problems and possible solutions to them had thus been forcefully drawn to the attention of legislators and the public alike.

At the commencement of the council session in June 1854, the governor-general announced an ambitious plan to introduce bills on public health and common lodging houses along the lines of those recently enacted by the British parliament. These wide-ranging proposals threatened free enterprise, as their burden would fall particularly heavily on employers, landlords and building owners. The *Empire* hailed the announcement.[34] However, the *Herald,* noting the bill's sweeping and detailed nature, queried whether sufficient notice had been taken of differences between old and young countries. Further, its 75 pages and 130 clauses appeared to supplant all existing laws on housing and urban arrangements without specifically repealing them. The *Herald* observed that it provided for a general, three-man board of health appointed by the governor, and local boards to consist of district councils where they existed and boards elected by inhabitants where they did not. Towns could be declared subject to the act by the governor following a procedure initiated by the general board and its inspector, the board also hearing appeals. Otherwise, most executive powers resided in the local boards, each of which was to appoint a surveyor, inspector of nuisances

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32 Ibid., 14 March 1854. See ibid., 8 October 1854 for comment on the activities of Sydney's land developers.

33 Ibid., 1 May 1855.

34 *V&P* NSWLC 1854, vol. 1; *Empire*, 7 June 1854. See also Alan Atkinson, "Time, Place and Paternalism: Early Conservative Thinking in New South Wales", *Australian Historical Studies*, vol. 23, no. 90, April 1988, pp. 5-6.

and, if it so chose, a medically qualified health officer. The local boards were to be responsible for streets, erection of buildings, construction of drains, removal and prevention of nuisances and water supply. They were virtually a substitute for both the late city corporation and the existing city commissioners, the *Herald* said. It questioned how the new arrangements would work in Sydney, especially if the city commissioners somehow became the general board and were therefore required to abandon the work they had already started.[35]

William Montagu Manning in 1856

Reproduction courtesy of Parliamentary Archives, Parliament of New South Wales

Solicitor-General Manning, Lord Brougham's protégé, apparently drafted both bills, judging from the fact that he had the carriage of them in the council. When moving the public health bill's second reading, he suggested optimistically, that as the measure was not political, it would probably not attract much public interest. Its principal object, as Lord Morpeth had said in parliament when introducing its British equivalent, was the relief of the working classes. Although clauses directly affecting public health were compulsory, others, such as those providing for the establishment of public gymnasia and baths, were permissive. Manning confessed that he had doubts about the operation of the local boards, given the general lack of public spirit in the community, but he hoped that some energetic and able people would rise to the task. Besides, it was disgraceful that the colony's large country

35 *SMH*, 15 July 1854.

towns could not manage matters of this sort. While the government had considered excluding Sydney from the statute's operation, because special acts already covered the city, it had decided that it would be better if the bill's great general principles applied to the whole country. (London's exclusion from the British act had proved to be a major reason for its ultimate failure.) As the bill would undoubtedly be referred to a select committee and probably would not pass in the current session, technical questions such as the position of the city commissioners and the repeal of conflicting laws could be handled at a later stage, Manning said. Meanwhile, the public, especially in the interior, would have the opportunity to consider the matter. Adopting an expansive and optimistic view of the colony's future, Manning claimed that the bill heralded a new era in legislation by turning attention to the practical object of all legislation, the attainment of great ends and not simply mechanical and administrative aspects.[36] His statement prefigured the view of the legal historian Frederick Maitland, that the modern legislator's task was to provide general rules, leaving their implementation to public officials and to the courts.

The public health and common lodging houses bills, and a Sydney paving bill introduced by Nichols, were referred to the same select committee, chaired by Cowper, together with two petitions. One of these was from a Sydney landholder, Thomas Hyndes, who objected to the paving bill. The other, presented by Parkes, was from 70 men engaged in the butchery trade, who prayed for the suppression of the slaughter and sale of butchers' meat on Sundays.[37] The committee took evidence from only three witnesses, the former Sydney town clerk, John Rae, now a city commissioner, the petitioner Hyndes himself and a Sydney property owner, Samuel Hebblewhite. Nichols handled much of the questioning. Rae, by now an experienced municipal administrator, described the public health bill as "a most excellent measure", which closely followed England's Public Health Act of 1848. However, he said, as the previous session's sewerage and associated measures had already essentially conferred all necessary powers in this area on the city commissioners, either Sydney should be exempted from the bill's operation or, if it was included, to prevent inconvenience and expense, the present commission should be appointed as the general board for the colony.[38] When the liberal Cowper pointed out that the public health bill, with its elected boards, was based on the representative principle, Rae replied that he looked on that as a secondary feature of the bill. The colony's general health was a matter for its government, and if the government or

36 Ibid., 21 July 1854.
37 Ibid., 20, 21 July 1854; *V&P* NSWLC 1854, vols. 1, 2.
38 Minutes of evidence taken before the select committee on the public health bill, 12 September, 1854, p. 1, V&P NSWLC 1854, vol. 2.

the legislature appointed persons to carry out measures to preserve general health in different districts, this would not interfere with any principle of franchise. In any event, the city's commissioners were not an irresponsible body, Rae presumably meaning that they were not unaccountable. They were amenable to public opinion and the strictures of the press, and the legislature could remove them at any moment, he said. Indeed, they were actually less irresponsible than the other board would be. Under questioning from the radical Flood, Rae denied that an honorary board would be likely to perform as well as a paid board devoting all its time to the business. Further, it was not inconsistent that the commissioners for the metropolis, "which is the Paris of this Colony", should be the general board.[39]

Nichols and Rae, who undoubtedly knew each other well because of their lengthy connection with the city corporation, then engaged in a detailed discussion about how the common lodging houses bill might be made to operate more effectively. The discussion involved a consideration of that law's relationship to the colony's building laws and of the enforcement powers needed by the city commissioners and their inspectors of nuisances on the one hand and the police on the other. In so doing, they compared various provisions with those in the English statute and discussed that statute's operation in large cities like London and Liverpool. There followed a similar discussion, involving Rae, Cowper and Nichols, concerning Nichols' paving bill, with which Rae generally agreed. Requiring landlords to pave in front of their own properties was the most equitable method of proceeding, Rae said, especially as the paving would enhance the value of the freehold and result in increased rents. Rae suggested, under questioning from Nichols, that the city commissioners should have a discretion as to the sequence in which the work should proceed and as to the materials to be used.[40] The questioning of Hyndes and Hebblewhite was restricted to the paving bill. Hyndes was purely concerned about the bill's implications for vested rights and its infringement of laissez-faire principles. What was being proposed was direct taxation "of me and my property, in perpetuity", to keep pavement in repair for the benefit of the public, he said. The cost of the work should be borne by the ratepayers, as occurred in London, and he quoted from an article published in the *Empire* in the previous month. When Cowper commented that Hyndes was the only petitioner against the bill, Hyndes referred to another petition currently in preparation and with several hundred signatures, and in fact a petition with 363 signatures of "Sydney house and landed proprietors" opposed to the bill was presented to the council by Holroyd soon afterwards. Hebblewhite, however, though a property owner, supported the bill.

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39 Ibid., pp. 2-3 (quotation on p. 3).
40 Ibid., pp. 3-5.

If the paving was left to the landlords themselves, he said, it would never be done. He suggested that the work should be performed in stages at a rate specified in the act rather than being left to the commissioners' discretion. He also felt that while landlords should bear the bulk of the expense, it would be more equitable if part was borne by ratepayers.[41]

In a progress report in late November the committee—or Cowper, as chairman—noted that there had been insufficient time to give these important bills the attention they deserved. While there was no doubt that the appointment of boards of health would be beneficial, the report continued, it would be very desirable for their managers to be elected by the people and not appointed by government. Chadwick, as MacDonagh pointed out, had tussled with the same dilemma when considering what form the general body under his public health scheme should take. However, unlike Cowper, Chadwick had been intent on avoiding concessions to the representative principle. Cowper also observed that the paving bill displeased many of Sydney's property owners and faced strong opposition in its present shape. Despite the evidence offered, he said, the committee had been unable to reach a satisfactory conclusion, either as to performance of the work or the sources for its funding. No doubt, Cowper himself disliked the bills, as being inconsistent with laissez faire. In spite of Manning's high hopes for them, they lapsed in committee.[42]

Manning re-introduced a slightly modified bill for promoting the health, convenience and enjoyment of town populations early in the council's last session in 1855. The *Herald* emphasised different features from those highlighted in 1854. Those looking in the bill for municipal institutions, for "government *of men*", would not find them, it said. The new bill covered a panoramic range of subjects, including the regulation of slaughter-houses, unwholesome trades and burial grounds, street paving, erection of waterworks, imposition of special requirements for establishments using large volumes of water, and prevention of epidemic and pestilential diseases. District councils were to be abolished, and the structure of the local boards vested "in the property and not the population", their electors having from one to 12 votes according to the rateable value of their property. While the boards would exercise the essential duties of a municipality, the *Herald* doubted that their "very unpoetical nature" would make them the object of much popular ambition, especially as the government had limited municipal action to an extremely inferior class of duties. However, the council

41 Ibid., pp. 6-8, (quotation on p. 6); General summary of the weekly abstracts of petitions received by the legislative council during session of 1854, p. 7, *V&P* NSWLC 1854.

42 Progress report of the select committee on the public health bill, *V&P* NSWLC 1854, vol. 2; MacDonagh, p. 140. See also Atkinson, p. 5.

had power to make the bill more worthy of the colony and better adapted to British ideas of municipal institutions, it said.[43] The dilemma facing Parkes, sitting midway between free-enterprise and paternalism, was clearly apparent when he commented in the *Empire* on the draft legislation, including the revised public health bill, before the house in 1855. These new laws, he protested, proposed "to invade our house and resettle, by brand new rules, our domestic arrangements". And yet, he also observed that modern society fully recognised the need to legislate on matters of public health and mortality, and he questioned whether anything less than deliberate legislation could effectively grapple with injurious influences that were strengthened by "the selfishness of capital and the authority of vested interests". Thus, for Parkes, the free play of laissez faire was a good thing in principle but unacceptable where public health was concerned.[44] His was a clear case of laissez-faire notions being overridden by the urgency of circumstances. But that shift in priorities itself had an ideological gloss. It depended on ideas about paternal duties of government.

On the motion for the second reading, Manning referred specifically to the "political" clause for election of the directors of the local boards by ratepayers according to the amount they paid in rates. This principle was adopted in all English financial institutions, he said. His suggestion that the bill should be referred to a select committee after approval of its second reading was queried or opposed outright by most other members. Nichols, a great adopter of British precedents but also well aware of the difficulties involved in prosecuting under unsatisfactory civic laws, said that the house should invent laws of its own and not slavishly adopt those of other countries. However good and beneficial they may be there, they would be totally useless in a young colony. He had expected, he said, a very different measure involving municipalities "in a simple form", and he had prepared a bill for that purpose if this one did not pass. Other members, including the conservative James Macarthur, the liberal Cowper and the radical Lang, agreed that the bill was far too complicated.[45] After considerable debate, the bill and a common lodging houses bill were both referred to a select committee, where they lapsed. The *Empire* summed up the general mood. The bill was too cumbersome and costly, its provisions were only applicable to a small part of the colony, and the British act was unsuitable in a country which, with the exception of Sydney, had nothing but embryonic towns. Further, it said, as past experiments with municipal institutions had not been successful, local representative bodies should not be imperilled again by crude and ill-

43 *SMH*, 15 June 1855 (emphasis in original).
44 *Empire*, 21 June 1855.
45 *SMH*, 22 June 1855.

digested schemes.[46]

Nichols' paving bill was also re-introduced in June 1855. Nichols initially believed that it should be referred to that year's select committee on the public health package. However, this did not occur. After a protracted second reading debate, in which the government supported the bill and Cowper, Martin, Parkes and Flood all suggested it stand over, the second reading was approved and the bill passed, with amendments (including Rae's about paving materials) and limited in operation to George and Pitt Streets and portions of intersecting streets.[47]

In 1854, in the council's penultimate session, Nichols, busily engaged as the city commissioners' legal adviser and intent again on closing loopholes and tightening enforcement mechanisms, added to the multiplicity of laws applying to Sydney and touching on public health in the broad Chadwickian sense. He successfully introduced a bill to provide for the watering of Sydney's streets and the levying of a rate to cover the cost.[48] He also sponsored a private bill to enable the city commissioners to construct a tramroad from their Pennant Hills quarry, which provided paving material for Sydney's streets, to the Parramatta River, where it might be shipped to the city centre.[49] In 1855, he brought in a bill to extend the powers of the city commissioners and their officers, mainly in relation to cattle slaughtering and the sale of diseased and blown meat. Greater powers were thus conferred on inspectors of slaughter-houses and inspectors for nuisances and a new position of inspector of provisions was created, that officer being authorised to inspect butchers' premises—a power that police inspectors possessed but failed to exercise. Recent British legislation on improvement of towns had conferred similar powers, Nichols said. The bill passed after amendment.[50]

Consideration of the issue of public health and sanitation in the early to mid 1850s heightened awareness within and outside the legislature of the nature and magnitude of the task. Most elected members baulked at the prospect of adopting daunting British precedents. Slavish copying would not work. What was needed were laws to fit the country. A strong

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46 *Empire*, 22 June 1855.

47 Ibid., 22 June 1855; *SMH*, 12, 22 September 1855. See also *SMH*, 20 September 1855 for an editorial in support of the bill.

48 *SMH*, 30 September, 14 October 1854. See *Empire*, 7 October 1854 for a proposal to water Sydney's streets with water pumped from the harbour by a small steam engine to a reservoir at Wynyard Square.

49 Ibid., 22 November 1854.

50 Ibid., 1 September, 3 October 1855.

desire for democracy and municipal institutions, for government of local issues by local representatives elected by their peers, is also evident. On that basis and with those signposts, resolution of the whole public health issue, with the exception of the paving of a few Sydney streets, was left to the new parliament, established in 1856, which, in the event, decided against the enactment of any grand public health measure. Instead, in the late 1850s, when Chadwick's scheme was in its death throes in England, the New South Wales parliament chose to hand over to the municipalities power over roads, sewerage, water, lighting, hospitals and asylums for destitute children, public libraries and gardens and other associated matters.[51] Thus, despite urgings from Parkes and Manning for the adoption of an ambitious ideological program of utilitarian reform, in the first half of the 1850s most legislators preferred Nichols' more pragmatic approach which concentrated on discrete, limited and manageable reforms. And in the late 1850s, with regard to towns, even those principles were left to the mercy of locally elected bodies.

51 See the Municipalities Act 1858, *New South Wales Public Statutes 1852-62*, 22 Vic. No. 13.

Chapter 9 The sixth council and law and police reform

This chapter is concerned with law-making in the areas of law and police reform in the period of the sixth council (1851-55), with the approach of legislators and the press to these reforms and, especially, that of William Manning, of G.R. Nichols and of Henry Parkes as expressed in the *Empire*. Once again, it is intended to examine how far the drive for reform was prompted by ideology and how far by urgent need. The law reforms to be examined relate (mainly) to the regulation of private affairs and relationships and involve two main themes. One was concerned with the revision of outmoded legal forms and practices and the other with the regulation of practices touching on human sensibilities and how they might be made more rational and humane. Police reform, on the other hand, was concerned with the regulation of public order in the community as a whole.

Law reform

In MacDonagh's view, early Victorian society was absorbed with issues of law and public order, partly because of their theatrical and spectacular facets, and partly because of the widespread belief that the divide between civilisation and chaos was thin and insecure. At the same time, he said, in their traditional form both systems, and especially the law, were anachronistic, irrational, wasteful, anomalous and costly, and represented easy targets for the exercise of both new theory and common sense. The pragmatic and humanitarian eighteenth-century tradition of legal reform was carried over into the first three decades of the nineteenth century by British politicians such as Peel, Brougham and Russell. Henry Brougham, Whig lord chancellor of the mid 1830s and Jeremy Bentham's committed disciple, remained heavily involved in attempts to codify English law and rationalise legal procedures into the 1840s and 1850s, as president of the Law Reform Association, and by retaining control of the association's organ, the *Law Review*.[1] The work of various English law commissions of the period was even more significant. They reviewed the conduct of the common law and chancery courts, the law of procedure and the rules of evidence and pleading, as well as a number of substantive legal areas.[2] As this chapter shows, a number of the results of their

1 Oliver MacDonagh, *Early Victorian Government 1830-1870*, Weidenfeld and Nicolson, London 1977, pp. 162-163. See also Michael Roe, *Quest for Authority in Eastern Australia 1835-1851*, Melbourne University Press in association with Australian National University, Melbourne 1965, p. 196 on the impact of moral enlightenment on jurisprudence and law reform.

2 Ibid., pp. 163-166. See also C.H. Currey, "The Influence of the English Law Reformers of the Early 19th Century on the Law of New South Wales", *JRAHS*, vol. 23, pt. 4, 1937, p. 232.

deliberations were adopted by the New South Wales legislative council in the early 1850s.

Reformers in Britain were confronted by at least two significant lobby groups. An anti-reform lawyers' interest was extremely powerful in both houses of parliament, and during the period covered by this thesis, it forestalled attempts to remedy the jurisdictional problems that added to the technicality and obscurity of the law and the expense, slowness and uncertainty of legal actions.[3] As is already apparent, in New South Wales the legal lobby in the council was equally potent in determining whether reforms of the law would be instituted or not, and, if so, in what form, and some legally qualified members actively promoted reform of perceived defects in the colony's legal system. The second restraining influence in Britain was that of the unpaid justices of the peace, the landed gentry throughout the countryside who operated as agents of amateur, summary government. They opposed central interference and regulation, and attempts to impose uniform procedures and introduce paid, professional legal officers to deal with petty offences.[4] Colonial justices of the peace were not without influence in the reform process, especially as a number of them sat in the council. But here, as we will see, their role had distinctive complexities.

In 1852, it was the government, with Solicitor-General Manning in the vanguard, which launched into a wholesale adoption of the principles of recently enacted British laws, many of them related to the administration of justice. It was especially fitting that Manning should have taken the lead, given his education at Bentham's university and his connection with Brougham. The British laws involved in this effort dealt with aspects of the law of evidence, trust property, the equitable jurisdiction and criminal justice. When moving the second reading of the trust property measure, Manning noted that the council now opposed the simple transcription of British laws, requiring instead that their substance should be adapted to colonial circumstances, slavish adoption of British precedents being unacceptable to colonial legislators.[5]

Two government bills, based respectively on a British statute and on Chancery orders of 1850, and both designed to lessen the delay and expense of equity proceedings and to aid simpler and quicker methods of obtaining equitable relief, were enacted in the 1852 session.[6]

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3 Ibid., p. 164.
4 Ibid., pp. 164-165.
5 *SMH,* 25 June 1852.
6 See FitzRoy to Pakington, 5 February 1853, CO 201/463, ff. 127, 134-135. Charles Dickens' *Bleak House* provides a harrowing exposé of the state of the English chancery court.

The common ground existing between Manning and Nichols on some issues was evident again when Manning introduced a bill to remove unnecessary formalities from bills to be presented to the council, along the lines of a similar bill introduced by Nichols in the 1851 session, its principal features being based on a British act. Although Martin and Wentworth grumbled that the bill would encourage careless drafting, the measure passed and Manning immediately took advantage of it when preparing other government bills during the session.[7] Three more 1852 bills were based on British laws relating specifically to reform of the criminal law. One extended the summary jurisdiction of magistrates in cases of larceny involving prisoners of less than 16 years old, Manning proposing that this jurisdiction be extended to persons of any age charged with larcenies involving less than five shillings.[8] Another dealt with the better prevention of various offences, while a third, to improve the administration of criminal justice, included local additions so as to reduce technical impediments in criminal proceedings.[9]

In 1853, Manning took the initiative once again, successfully introducing bills dealing with equity practice, trustees and the execution of wills, while both crown law officers were involved in the passage on a bill to reform the law of pleading.[10] Parkes, through the *Empire,* hailed the introduction of the common law and equity reforms. The adoption of well-digested changes to assimilate the colony's law and practice with that of the mother country could never be wrong, he said.[11] Attorney-General Plunkett delayed the second reading, and the commencement, of the law pleading bill in order to give the local legal profession time to become familiar with the English reforms. Manning handled the committee stages of the debate on this bill.[12] The equity practice bill was intended to remove a number of intolerable grievances and was founded on a British act, framed by law commissioners in 1852, which, Manning said, had passed in the latest session of parliament.[13]

At this time too, colonial reformers demonstrated a new willingness to intervene in delicate issues involving private lives and domestic and sexual relations. This change of attitude did not occur by accident. The radicalism of the utilitarian centralist approach involved the creation of a new and better society from the bottom up. Paternalists too, such as

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7 *SMH,* 16 June 1852.
8 Ibid., 17, 25 June 1852.
9 *V&P* NSWLC 1852; see also *New South Wales Public Statutes,* 1852-62.
10 *SMH,* 19 May, 17, 24 June, 5, 11 August 1853. See also Currey, pp. 231-234, 237.
11 *Empire,* 12 July 1853.
12 *SMH,* 5 August 1853.
13 Ibid., 17 June 1853; Currey, p. 237.

James Macarthur, took a direct interest in the domestic affairs of their own people—labourers and tenants—as the landed classes had long done in Britain.[14] Here then, "conservative" and Benthamite ambitions overlapped in a fairly neat fashion.

One local reform measure which touched on these issues and was not based on British reforms was a bill to require that criminals should no longer be executed in public but within gaol walls, before authorised witnesses alone. In New South Wales, the move for private hangings was an issue of human sensibility and moral refinement that depended on the belief that the people were brutalised by public executions. Feeling against harsh, vindictive punishments also fell within the purview of moral enlightenment, culminating in opposition to public executions, "the ultimate anti-rational amusement".[15] The bill was introduced by medical practitioner Henry Douglass, who, as a young man, had been the honorary treasurer of an English society to abolish capital punishment, a reform for which Jeremy Bentham had campaigned because he saw that punishment serving little purpose. The council's legal members entered the fray in force in response to this proposal from a layman. Douglass had sole responsibility for the bill, and Martin contended that only legally qualified members were competent to draft bills. Douglass responded that the bill was modelled on a law in force in Massachusetts and that he had been assisted in drawing it by "a lawyer from whom they would all be glad to take lessons" (Wentworth, in all probability).[16] Lawyers outside the house, including members of the judiciary, were frequently involved in discussing reforms and aiding members in the preparation of bills. Further, most private bills were prepared by solicitors in private practice, and even legally qualified members, including the crown law officers, sought outside legal assistance on occasion.

Attorney-General Plunkett agreed with Douglass that public executions were extremely demoralising. However, as executions had been carried out in public in England for centuries, the practice should not be altered without due deliberation. Time should be allowed for public consideration and, as the bill was so novel, it would need, if passed, to be reserved for royal assent. Martin argued, and Darvall agreed, that as no law required that executions should be held in public, the manner of their regulation should be left to the executive. However, it would be difficult to convince the public of the wisdom of private executions, he said.

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14 Alan Atkinson, *Camden: Farm and Village Life in Early New South Wales*, Oxford University Press, Melbourne 1988, passim.

15 Roe, pp. 197-198 (quotation on p. 198).

16 *SMH*, 21 July 1853. See ibid., 15 August 1855 on Douglass' antecedents and opposition to capital punishment.

Nichols, though probably also in agreement with the reform, suggested that it might be repugnant to British law. In any event, as such a bill should originate with the government, the council should either adopt an address calling on the executive to arrange for private executions or, if necessary, instruct the crown law officers to prepare an appropriate bill for the purpose. Manning agreed that it would have been better if the government had dealt with the issue but, he said, as Douglass had introduced his bill, Nichols' amendment was purely one of form. Anyway, as the house seemed to favour the measure, Manning did not see why the matter should be taken out of Douglass' hands and placed in those of the executive, especially as the government's motives might be distrusted by public opinion.[17] It was crucial, after all, in every execution, to prevent any suspicion of official cruelty, error or arbitrary power.

Of non-legal members, Colonial Secretary Thomson said that it was imperative that no uncertainty should exist about the proper execution of capital sentences. Their only present guide on the subject was the practice in some states of the American Union, and it was necessary that the fullest inquiry be made before any legislation was adopted. The self-styled democrat, Robert Campbell, opposed both the bill and Nichols' amendment. Opponents of public executions were merely squeamish, he said, and the sight of a criminal's last struggles provided a check to crime. Private feelings, he thought, must give place to the public good. The liberal Cowper similarly doubted that the bill was necessary. The executive should consult with the home government on the matter and, by the time its response was received, the public would be prepared to entertain the subject. Nichols' amendment was lost by 19 votes to 18 and the second reading was approved by a substantial majority. The bill subsequently passed with minimal amendment.[18] The debate on this bill raises, once again, the vexed question as to the wisdom of leaving matters, traditionally open to public opinion (in the form of crowds and the press) in the hands of a few "unaccountable" and nominated experts—in this case prison officials and officers of the law.

In early 1854, the *Herald* carried editorials on the inadequacy of punishments for domestic assaults. The law in England had been made more stringent and British journals continually carried reports of magistrates summarily awarding imprisonment rather than fines, it said. Similar legislation should be enacted in the colony, otherwise colonists could justly be accused of barbarism. Council members who received the British statutes and were

17 Ibid., 21 July 1853.
18 Ibid., 21 July, 11, 18 August 1853.

skilful in adapting them to colonial necessities should attend to the matter, it said.[19] Attorney-General Plunkett subsequently successfully brought in a bill, based on a British law, to extend the summary jurisdiction of magistrates to aggravated assault cases.[20]

Bills to reform aspects of the law of evidence, based on British precedents, were introduced by Manning in 1852 and 1854. On their face, the immediate concern of these measures was to enable parties to give evidence on their own behalf and, thus, to provide courts with all available useful evidence. However, the matter also raised the possibility of spouses testifying against each other. This in turn brought into play the issue of whether the rights of the public and the authority of the state might legitimately and systematically override all other relationships within the community, even that between husband and wife. Part of the resistance to reforms of this kind arose from ideas on the sanctity of family life, and especially regarding the marriage relationship, which was supposedly the direct creation of God. The pitting of husband and wife against each other in court was viewed with alarm, as were other Benthamite reforms which transgressed similar societal taboos.[21]

Manning's 1852 bill was based on a law passed by the British parliament in 1851. Its main principle, the right of parties to give evidence on their own behalf, was called for, Manning said, because the business of courts of justice was to ascertain the truth, and no means of arriving at it should be excluded. He had introduced the measure, not because it had passed in England, but because he was convinced of its intrinsic value. However, he said that he had omitted a clause that permitted the taking of evidence of husbands and wives for or against one another, even though it had been adopted in the Commons, because the Lords, on the best authority, doubted its wisdom. This bill provoked much debate among the council's legally qualified members. Nichols supported Manning. He had long since concluded that the proposed change was consistent with justice. He quoted from Lord Brougham, who had said that Bentham, the most illustrious teacher of jurisprudence of all time, had set a higher value on the admission of the evidence of parties than on any of his other doctrines. Whatever might be said of lawyers and their tenacity for established usages, Nichols said, at the present time they were the greatest law reformers, even against their own interest, and the Solicitor-General was entitled to the fullest credit for his efforts to simplify the law and make it less expensive. However, other lawyers, Martin, Wentworth and Broadhurst, forcefully opposed

19 Ibid., 20 February, 8 March 1854.
20 Ibid., 18, 20, 21, 27 July 1854.
21 See Alan Atkinson, *The Europeans in Australia. A History*, vol. 2, *Democracy*, Oxford University Press, Melbourne 2004, pp. 297-298.

the bill's adoption. English precedents should not necessarily be adopted, especially as, in this case, widespread perjury might result. The imperial law had passed only the previous October, and the council should wait to see how it operated, a view supported by Attorney-General Plunkett. Martin moved that the bill be delayed for six months, but members voted, by 22 votes to ten, in favour of its second reading.[22] The bill passed.

This law was soon found to be deficient, the omission of the British provision permitting husbands and wives to give evidence for and against one another being found to be inexpedient, and in 1854 a bill was introduced to rectify the omission. The evidence of husbands and wives was to be admissible, and married persons were be competent but not compellable as witnesses, except in criminal cases and in cases of adultery.[23] When Manning moved that the report of the committee of the whole house on the bill be adopted, Darvall objected on the familiar basis that English law reforms should not be adopted before their effect had become apparent. The bill, he said, went further than merely introducing interested evidence. The contemplated testimony would destroy domestic happiness and expose a wife who gave evidence against her husband to his later anger and unkindness. Further, a malicious person might call a wife to give evidence against her husband. When Murray, Broadhurst and Douglass also opposed the bill, Manning said that he agreed with Jeremy Bentham's view that the law of evidence had been devised to conceal facts. Members had lost sight of the fact that nothing should interfere with the due course of justice as administered in the courts, the primary object of the bill being that the judge and jury should have all of the facts. They might then decide what credit should be given to them. Manning criticised Broadhurst's consistent opposition to law reform proposals. It was exceedingly difficult to persuade lawyers of the need for change, he said. The bill's progress was blocked by 18 votes to ten and Manning subsequently abandoned the contentious clauses. An abbreviated bill passed instead, ensuring that the local law on the receipt of evidence from parties outside the jurisdiction was the same as in England.[24]

In the council's last session, in 1855, two government bills introduced by Manning and two prepared by elected members, were concerned with law reform. One government bill, striking at secret transactions, reformed the law relating to bills of sale over personal property by providing that they would be void unless they were registered in the supreme court within

22 *SMH*, 25 June, 9 July 1852. See ibid., 3 August 1852 for comment in support of the bill.
23 Ibid., 22 June, 20 July 1854.
24 Ibid., 21, 28 July 1854; *ADB*, 5, p. 209. See *Empire*, 22 July 1854 which opposed the initial proposal.

21 days of execution. Another, relating to deceased estates, was similar in intention, and prevented a mortgagee of devised real estate from claiming the mortgage debt out of personal estate left to another person, without some explicit provision in the will.[25] Both measures were modified copies of recent British acts, and both tended to privilege a limited, canonical body of written evidence, in a thoroughly Benthamite fashion.

Curiously, while the reforms to the law of evidence trumpeted the need for all useful evidence, the reforms relating to secret transactions were exclusionary in that respect. And yet both seem Benthamite. Similarly, with Bentham himself, there was a contradiction between his Panopticon, in which all kinds of detail were to be gathered by the central inspectorate, and his ideas on legal and constitutional codification, which drew a clear line around the kind of law to be enforced by courts.[26]

Another bill related to reform of an aspect of the law on rape. Rape was a slippery issue in the criminal law, much depending on the interpretation of context, the relative strength of the parties (physical strength and strength of character), the nature of consent and so on. Here, the issues were somewhat different from those raised by the evidence bills, but the debate still involved the state's oversight of matters of intimacy. However, the debate itself shows a willingness on the part of colonial politicians to tackle questions that legislatures had previously avoided. In 1855, Darvall attempted to change the operation of the criminal law by abolishing the death penalty for rape as had been done in Great Britain in 1841. In civil cases, defendants and plaintiffs might both state their cases but in rape trials the prisoner was incompetent as a witness, even though, in many situations, only he and the prosecutrix knew what had occurred, Darvall said. Though he had vigorously opposed the government's attempt to allow husbands and wives to give evidence against each other, in this case Darvall used an argument similar to Manning's. The prisoner should be permitted to give evidence on oath, leaving it for the judge and jury to decide what weight to give to it, rather than restricting him to an unsworn statement from the dock. Plunkett strenuously opposed the bill. There had been no suggestion in England that the principle of criminal law, that the accused could not be sworn to testify on his own behalf, should be changed, he said. The motion for

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25 Ibid., 22 June, 5 July 1855.

26 See A.V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*, Macmillan and Co. Ltd, London 1905, pp. 129-135; Arthur J. Taylor, *Laissez-faire and State Intervention in Nineteenth-century Britain*, Macmillan Press Ltd, London 1972 (reprint 1974), pp. 35-36; L.J. Hume, *Bentham and Bureaucracy*, Cambridge University Press, Cambridge 1981, pp. 78-79, 95, 125; David Roberts, "Jeremy Bentham and the Victorian Administrative State", *Victorian Studies*, 2, March 1959, pp. 194-195.

the bill's first reading was supported by lawyers, Holroyd, Martin, Broadhurst and Nichols, as well as by James Macarthur, Douglass and Murray, and the bill was brought in. In further debate, Douglass said that during the time of his involvement with the English society to abolish capital punishment, it had been argued that it was unjust for a person to be sentenced to death on the evidence of only one witness. That principle had been adopted in Great Britain and the death penalty for rape had been abolished when Sir Robert Peel took the matter up and commissions inquired into the state of the criminal law. Nichols noted that a government bill to adopt imperial legislation abolishing the death penalty in certain cases, including rape, had been introduced into the council some ten to 12 years before, but the portion relating to rape had failed when it was opposed by Plunkett and Windeyer. The latter, as he recalled, had then drawn attention to the country's position as a penal colony. But times had changed, Nichols said, and though the supreme court's judges disagreed, the council should now follow the lead of the British parliament and abolish the death penalty for rape.[27] The bill failed on the motion for the second reading, when the house was counted out.[28]

Legislating by a piecemeal selection of apparently appropriate precedents from the British reform basket, as the council had been doing so far, did not please Parkes, who was now pursuing an active utilitarian and centralist approach through the pages of the *Empire*. Shortly before the council's third session commenced in 1853, Parkes commented on the work of English law reformers and the royal commission which had revised common law and chancery practice and proceedings. He noted that agitation for law reform had been promoted chiefly by Brougham's Law Reform Association, whose members were intent on applying Bentham's general principles of jurisprudence. Bentham himself, Parkes said with apparent approval, was intent on bringing laws within reach of those they bound by making them simple, concise and uniform. The agitation for reform, the agitator Parkes went on, had prepared the public mind for the reception of important truths, and had paved the way for that most desirable objective—a thorough simplification of the national jurisprudence. Reform was equally necessary in the colony and there was plenty of work for legislators and a law amendment society here.[29] When commenting on the 1855 laws aimed at preventing frauds, Parkes referred with approval to the criticism made by some council members of the crown law officers' practice of introducing British reforms, especially on court procedure, in a piecemeal fashion as soon as they had been adopted in Great Britain. Clearly, a more

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27 *SMH*, 15 August 1855. See ibid., 8 September 1855 where the *Herald's* opposed the giving of sworn evidence by an accused. See also *Empire*, 17 August 1855 for criticism of Plunkett's approach to the bill.

28 Ibid., 20 October 1855.

29 *Empire*, 4 May 1853.

systematic revision of whole areas of law would be preferable.[30] However, Parkes himself pointed out, again in the *Empire,* that reformatory legislation was proverbially slow, with "the work of *law* reform" being, perhaps, the slowest of all.[31] Certainly, some colonial lawmakers, such as the practical Nichols, appreciated that gradual change, by slow advances, by closing loopholes and tightening enforcement mechanisms, was far easier, especially where well-digested British precedents existed, than attempting to enact sweeping reforms which presented opposing interests with a larger target and frightened others. As MacDonagh noted, the irresistible engine of legislative change invariably met reaction.

In another 1855 article calling for simplification and codification of laws, Parkes drew attention to a bill introduced by Nichols to regulate the impounding of cattle, which consolidated the colony's law on the subject. Parkes expressed the hope that Nichols or some other competent person would deal with other areas of local law in a similar fashion. Laws dealing with police were in special need of attention. These laws were pre-eminent in "cumbrous complexity", he said, six or seven acts existing to manage a population of less than a quarter of a million. Magistrates would never know the extent of their jurisdiction, he went on, until all police laws were condensed into one good, sound, efficient and practicable code.[32] It is to those laws that I now turn.

Police reform

When one moves from law reform to reforms relating to police, one moves from an area in which "conservatives" often agreed with radicals, in their intervention in private relations, to one in which "conservatives", or some of them, resisted change. Here, they resented an aspect of centralism that undermined their semi-private (personal) authority—as employers, landlords and rural magistrates. The police reform movement was partly inspired by long-standing principles, partly by long-evolving problems and partly by the exigencies of the gold-rush. In this area, Solicitor-General Manning was less involved as the government's prime mover. Other government officials more directly concerned with the business of law enforcement, including the Inspector-General of Police, William Mayne, and the Colonial Secretary, Deas Thomson, played prominent roles in promoting government initiatives, while G.R. Nichols and Parkes in the *Empire* took an active interest as well.

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30 Ibid., 23 June 1855.

31 Ibid., 14 June 1855 (emphasis in original).

32 Ibid.,, 21 June 1855. See also Impounding Act 1855, *New South Wales Public Statutes*, 1852-62, 19 Vic. No. 36.

As was seen in Chapter 6, a major, comprehensive government initiative in 1850 resulted in the passage of the Police Regulation Act, which provided for the establishment of a professional, centralised police system for the whole country, under the control of an inspector-general and several provincial inspectors of police.[33] Its passage represented both a departure from the government's old laissez-faire line and something of an official *coup*, because the colony's leading gentry resented centralisation of policing as much as their counterparts in England did. Regrettably for the government, the 1850 Act had included an unconstitutional provision which disqualified police officers from voting for or being elected to the legislature. Being *ultra vires*, this prevented the secretary of state from letting the bill stand. Accordingly, in 1852, after the new Constitutions Act of 1850 authorised the council to make laws on the election and qualifications of elected members, the government was forced to revisit the area. It introduced two bills, one dealing with the disqualification issue and the other with police regulation. MacDonagh, Valerie Cromwell and Kim Lawes have suggested, in the British context, that, in law-making, issues of timing can be crucial and the relationship of circumstances and ideological priorities can shift from year to year.[34] In New South Wales in 1850, wide-ranging police reform had been possible but, two years later, a different climate prevailed.

In the debate in August 1852, Colonial Secretary Thomson said that the provisions of the 1850 measure for the pay and superannuation of officers and men had been a powerful inducement to them to resist the temptations of the gold fields. Also, he said, great improvements had been made as a result of the unified approach established under the new system.[35] Unfortunately for the reformers, the opponents of the centralised system were better organised than in 1850, and they attacked fundamental aspects of the regulation bill. Wentworth objected to the inspector-general's control of native police in the interior. The old system of leaving management of police beyond the boundaries to the local justices had been far better, he said. The government's proposal that the inspector-general should control the

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33 See MacDonagh, p. 169. Despite the passage of this law and the abolition of the mounted police, several colonial law enforcement agencies survived. While the inspector-general controlled the regular police, mounted road patrols and the native police, there were also water police, and troopers attached to the crown land commissioners and gold police, scant co-operation existing between the latter. See evidence given before the select committee on the police regulation bill, *V&P* NSWLC 1852. See also, *SMH*, 11 October 1855 on a move by members with pastoralist connections to abolish the native police.

34 Ibid., p. 159. See also, Oliver MacDonagh, "The Nineteenth-Century Revolution in Government: A Reappraisal", *Historical Journal*, 1, 1 (1958), pp. 54-55; Valerie Cromwell, "Interpretations of Nineteenth-Century Administration: An Analysis", *Victorian Studies*, 9, March 1966, pp. 246-247; Kim Lawes, *Paternalism and Politics: The Revival of Paternalism in Early Nineteenth-Century Britain*, Macmillan Press Ltd, London 2000, pp. 184-187.

35 *SMH*, 12 August 1852.

water police but not the gold police was also queried. Thomson here departed from his anxiety to centralise, arguing that as the gold police were confined to particular localities and were organised for special purposes it was more efficient for them to act under their own officers. The inspector-general himself agreed, as did Solicitor-General Manning. If the gold police were placed under the inspector-general's control, they would be liable to obey orders from local justices in ordinary cases (as opponents of the bill obviously hoped) and that would be incompatible with their special duties to enforce the gold regulations and collect the gold revenue from which they were paid, he said.[36] The regulation bill was referred to a select committee chaired by barrister, Arthur Holroyd, while the disqualification bill, which had been in the fly in the ointment, was all but forgotten.[37]

The ensuing committee report, though short and based on minimal evidence, recommended several important changes. The most important was to limit the operation of the new police system to the metropolitan district and, in a significant victory for justices of the peace, to restore to benches of magistrates entire control over local constabulary beyond the boundaries.[38] The report generated a prolonged debate. The government and its supporters expressed dismay at the proposal to dismantle the new scheme after such a short trial and to return to the old, fragmented one. Thomson, a committee member, entirely dissented from the majority's conclusions. It was proposed to upset a system which had been recommended by several select committees between 1835 and 1850 and was admirably suited to the colony's circumstances, he said. For Mayne, the new system had already proved to be thoroughly adapted to the suppression of crime. The only opposition it received was actuated by prejudiced feelings of the local magistracy, he said. J.R. Holden concurred. No evidence before the committee had proven the system's failure, and there should be no return to the old corrupt system. If the new system worked so badly, where were the petitions against it? The public out of doors was well satisfied, and only the local benches objected, Holden said. Plunkett, who had sat on previous police committees but not on this one, took a similar line. The committee's recommendations were unsupported by evidence and departed radically from those of past committees. He, more than anyone else perhaps, knew how badly the old police system had worked, the attorney-general said. Even the most diligent magistrate in

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36 Ibid. See ibid., 21 May 1853 for comment on the work of the gold police and commissioners which lend support to John Hirst's view of goldfields management (Introduction).

37 The irony of the situation was compounded when the new Police Disqualifying Act also failed because FitzRoy mistakenly assented to it instead of forwarding it to London for royal assent as required by the Constitutions Act. The problem was finally rectified by the enactment of yet another bill in 1854.

38 See report from the select committee on the police regulation bill, *V&P* NSWLC 1852.

remote districts could not have been expected to attend constantly to his duties, and local benches had generally been looked on with distrust. Oversight of all of the country's police business by one responsible head was essential. He too called attention to the lack of petitions against the present system, either from the people or from the magistrates themselves.[39]

The conservative Wentworth was strongly associated with the interests of pastoralists, but he was also wholly uninterested in the sense of duty and local prestige attached to the work of the unpaid magistrates. He adopted an intermediate position. A radical change from a system established after many years' consideration—the new one—should not be proposed without strong and voluminous evidence, he said. The committee had adduced no condemnatory evidence and had "carefully excluded" supporting evidence from the inspector-general and his officers, leading Wentworth to believe that its conclusions were based on prejudice, not facts. While some changes might be required, it did not follow that the whole system should be abolished, with a reversion to an even more impracticable and disjointed one. It would be better to reduce the size of each district, and to restrict the operation of the system to the settled portions of the colony. The moderately conservative and conciliatory chairman of committees, Henry Watson Parker, also called for the adoption of a middle course. Initial discussions on the new system had included suggestions of limiting the trial to settled districts or the county of Cumberland, he said. Parker moved an amendment to Holroyd's motion for the report's adoption, calling for the house to go into committee on the bill so that amendments could be made to it.[40]

An array of interests was represented on the opposing side, complicating the conservative-utilitarian approach displayed in respect of many of the law reform measures. Conservatives who were country gentlemen were unable to be wholly utilitarian, in the sense of being centralist. As already noted, many members of conservative and paternalistic inclination resented government interference with the regulation of local affairs by leading members of the rural squirearchy. For example, James Macarthur, a committee member and magistrate, argued that the recommendations did not call for abolition of the whole system, simply that it be confined to the metropolitan district—that is, that it not apply to country electorates, including his. He agreed that the committee had not taken detailed evidence, saying that it relied instead on the opinions of its own individual members, the implication

39 *SMH,* 1, 8 December 1852.
40 Ibid., 8 December 1852. See *ADB*, 5, pp. 397-398 on Parker.

being that these were to be preferred and valued above those of witnesses. Most oppositionists, including Macarthur, Martin, Donaldson and Cox, argued that the trial of the new system had proved that it was impracticable and unsuitable to colonial circumstances, and that magistrates and other colonists generally opposed it. Douglass, a magistrate for 30 years, argued that under the new system, the magistracy had become subservient to the constabulary, obviously an undesirable state of affairs for the interior's elite and a factor likely to disrupt social stability. The thinly populated colony was vastly different from Ireland and England, he said. Further, in the mother country, there were always plenty of competent men of superior class willing to become chief constables, whereas such men could not be found in New South Wales. More depended then on the country gentlemen. Nichols said that he would regret a return to the old system, but he warned that if the colonial secretary rejected the committee's report it would be the end of the bill altogether, as the committee would not change its mind. A man with considerable experience of rural conditions, Nichols agreed with other speakers that it was physically impossible for the provincial inspectors to adequately cover the areas assigned to them.[41]

George Macleay, another magistrate, adopted an approach which was likely to offend those of his own class. The proper remedy, he said, would be to appoint public officials, resident police magistrates, for country districts. He agreed that the new provincial inspectors could not service the huge areas allocated to them. Certainly, chief constables in Ireland were gentlemen who could be entrusted with wide powers, but he suggested that similar men had not been appointed to the senior police posts in the colony. It was perfectly impossible, he said, to tolerate the attitude of those men who now assumed an importance they did not deserve.[42]

Parker's amendment was defeated, Holroyd's motion that the report be adopted was carried, and the bill went into committee.[43] The result was that the operation of the new system was confined to the county of Cumberland, with police outside that area again falling under the control of the local magistracy. A similar situation applied in England after passage of its 1839 law.[44] FitzRoy reported that the loss of the centralised system was a matter of

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41 Ibid., 8 December 1852.

42 Ibid. The *Herald* records the speaker as "Mr. W. McLeay". However, as William Macleay did not enter the council until 1855, it has been assumed that the speaker was in fact his cousin, George Macleay, who was a member of the council between 1851 and 1856. See *ADB*, 2, p. 181 for George Macleay and *ADB*, 5, p. 186 for William Macleay.

43 Ibid.

44 See MacDonagh, p. 174.

extreme regret, and was the result of extraneous causes, the chief of which was the discovery of gold, which would have disrupted any police force, however long established.[45] The governor-general might also have mentioned the disallowance of the 1850 Act. In the event, the colony was deprived of a professional, trained, specialised and centralised police force which could enforce the law in a uniform, impartial and efficient manner.

Before the commencement of the council's 1853 session, Parkes, in the *Empire,* carried editorials on the increase of disorder and crime in Sydney, an issue of long-standing concern, now aggravated by the gold discoveries. He called on the government to take immediate and effective steps to improve police efficiency in the city. During the past two years, many people, newly rich from gold digging, had adopted dissolute habits, he said, and they had been joined by mere adventurers and criminals from all quarters of the globe, who had no respect for the colony's institutions or settled occupations.[46] In another editorial, Parkes called for wholesale revision of the liquor licensing system, another area of persistent difficulty. Drunkenness, the prevailing vice of the city, took up the bulk of police time, he said.[47] In fact, the second bill of the session, brought forward by the government, dealt with the extension of the policing regime from the city and port to the suburbs. The colonial secretary introduced it in response to a call from the field executive, the superintendent of police, who cited the rapid increase in suburban population.[48] After that bill's passage, Inspector-General Mayne introduced another dealing with the policing of the port and suburbs. Its object was to rectify gaps in the current law complained of by the press and in petitions to the council. The new provisions closely followed the 1839 British law reorganising the London police system, Mayne said, and were necessary to protect property and, in some respects, to preserve individual liberty.[49] The bill's 24 clauses related to such offences as pilfering from ships' cargoes and the wharves, the sale of liquor to children under 16, cock-fighting, nuisances in public streets, and riotous and indecent behaviour by drunkards. The bill conferred new powers on police to board vessels, apprehend offenders, detain carriages, boats and animals, and grant recognisances to persons charged with offences. It was enacted without difficulty.[50] In the case of Great Britain, MacDonagh emphasised the crucial role played by field officers in bringing about legislative change—a

45 FitzRoy to Pakington, 5 February 1853, CO 201/463 ff. 148-150.
46 *Empire*, 4 April 1853.
47 Ibid., 21 April 1853.
48 Ibid., 19 May, 1853. See also *SMH,* 8, 16, 29 September 1853.
49 *SMH*, 6 October 1853; MacDonagh, p. 174.
50 Ibid., 8, 12 October 1853.

dynamic process in which they discovered defects, or a want of coverage, in existing laws and called for better and new provisions and powers.[51] The measures just discussed provide good examples of this process at work in New South Wales. Indeed, in the smaller colonial society, it may well be that field officers had greater direct access to law-makers, and more influence in bringing about legislative change, than did their contemporaries in Britain.

The government successfully introduced two more police bills during this session, one relating to recruiting and the other to the water police. The object of the first was to adopt the recommendation of the 1852 select committee on police for the engagement of 200 trained policemen from England and Ireland for the colonial force.[52] The water police regulation bill was also intended to carry out recommendations of the 1852 committee, and to comply with instructions from Secretary of State Pakington, issued at the instance of the Board of Trade, regarding adoption of a Canadian law said to have worked well. The bill, which had been referred to the Sydney Chamber of Commerce for approval, vested supreme authority over the water police in the inspector-general, but left executive and judicial functions with the water police magistrate (whose position had been reinstated). It provided for the appointment of shipping masters for Sydney and other ports, an important feature unanimously supported by witnesses before the select committee, and it contained provisions relating to the engagement, discharge and desertion of seamen and the licensing of seamen's lodging houses. Nichols, always interested in matters to do with the port, contributed to the law's development in the committee stages, and all of its additional clauses were approved apart from one stipulating that seamen could only be on shore if they had a pass. When Campbell and Darvall, expressing liberal sentiments, complained that this clause constituted a gross interference with a subject's liberty, Riddell and Manning agreed to drop it.[53]

The government also introduced a bill in 1853 to give the police power to apprehend people carrying firearms in suspicious circumstances, a particular problem in the vicinity of the Victorian border, where desperate criminals, including many from Van Diemen's Land, crossed into New South Wales. Thomson said that it was a measure to protect life and property and to prevent robbery and murder, and was not a re-enactment of the old

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51 See Chapter 1. See also Henry Parris, *Constitutional Bureaucracy: The Development of British Central Administration since the Eighteenth Century*, George Allen and Unwin, London 1969, pp. 200-203; David Roberts, *Victorian Origins of the British Welfare State*, Yale University Press, New Haven 1960 (second reprint 1961), pp. 182-185, 203.

52 *SMH*, 24 September 1853.

53 Ibid., 29 September, 6 October 1853; FitzRoy to Newcastle, 15 January 1854, CO 201/473 ff. 49-50.

bushrangers' measure, which related to convicts illegally at large. The proposal raised a significant issue of principle, some legal members viewing it, once again, as an unacceptable interference with individual rights and freedoms. This also in turn highlights an important complication in the utilitarian approach to the freedom of the individual. Bentham himself was strong on the question of the rights of the subject, considering that government should be all-powerful but also transparent and accountable to its subjects.[54] However, the application of the utility test in circumstances such as these could result in the protection of individual liberty giving way in the face of the greater public good, at least in the eyes of some.

Nichols' approach to the bill demonstrates the dilemma facing legislators when dealing with issues concerning the liberty of the subject. It also shows that inconsistencies in approach could occur. Nichols did not object to seamen being required to carry passes and he was not concerned about centralised government control. However, obviously dismissing any thought of a greater or competing good in this case, he described the bill as monstrous on the grounds that it gave too much power to country constables and reversed the onus of proof, an apprehended person being deemed guilty until proven innocent. Similarly, Holroyd said that it was a bill to annoy and harass innocent travellers, and he moved that it be read this day in six months. Plunkett, on the other hand, expressed surprise at the opposition to what he described as an absolutely necessary bill. Last year, he said, Nichols had made it a crime for anyone to carry arms at all. Riddell pointed out that Nichols had also introduced the vagrants bill, one of the most arbitrary measures ever introduced into any British legislature. Nichols protested that the vagrants measure had not reversed the onus of proof. The progress of the government's bill was approved by a vote of 16 to 13, but Nichols successfully moved in committee that no one should be apprehended unless a reasonable suspicion existed, a requirement that cast a certain burden of proof on the police.[55] Before its third reading, Parkes, in the *Empire,* commented on the bill, also in radical vein. Government lawyers and officials were intent on retaining the ruthless rules of convict management, he said, rather than implementing the principles of the English constitution. The government proposed to supplement an inefficient police force, not by strengthening and re-organising the body, but at the expense of essential liberties.[56] When Nichols continued to oppose the bill in committee, Manning responded in utilitarian terms. However, he stressed need rather than ideology,

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54 See Dicey, pp. 170-175; Hume, pp. 1-2, 4, 7, 56-57, 63, 78-79, 83.

55 *SMH*, 21 July 1853. In 1852, Nichols successfully introduced a bill to regulate the carrying of firearms and other offensive weapons in Sydney and other prescribed towns. See ibid., 1, 9 December 1852. A Nichols 1849 bill to control vagrants and other disorderly people was disallowed.

56 *Empire*, 22 July 1853.

saying that in England as well as in the colony, the state of society and the public good required some interference with long-held constitutional liberties. When a vote to defer the bill was tied and the chairman of committees voted with the noes, it was Manning, on behalf of the government, who offered to delete the requirement for persons carrying arms to prove that they were for legitimate purposes. Despite the offer, the bill was lost.[57]

Another example of the contribution of executive officers to legislative policy development occurred when, in 1855, Nichols, after consulting with several government officers concerned with the regulation of police in Sydney, successfully introduced a bill to amend the police laws applying to the city, its port and suburbs. Among other things, the bill extended the summary jurisdiction of the city's magistrates and provided them with powers similar to those enjoyed by magistrates in London. It increased magistrates' powers in relation to persons carrying stolen goods, and made legal the practice of selling unclaimed stolen goods in police custody after a set period. New powers were introduced to regulate relations between landlord and tenant, being designed in part to keep the peace and prevent breaches of the law by either party. The bill regulated dealings in second-hand goods, a fruitful source of crime. In addition, magistrates were empowered, in case of disturbances, to appoint special constables, who were to be subject to regulations made by the metropolitan superintendent of police. New offences of assaulting or resisting special constables, sheriffs and bailiffs were created and magistrates could now impose imprisonment rather than fines for these offences. A provision similar to one contained in the Glasgow police statute, to regulate the hours of operation of currently unregulated "cook-shops" or "houses of public resort" which "afforded all sorts of enjoyments" was included. These places were open at all hours, Nichols said, while licensed publicans were obliged to close their premises at a specified time. A number of nuisances was proscribed, and magistrates were authorised to issue one warrant for a number of drunkards instead of one for each offender, saving much time and paperwork. Magistrates could also punish thefts of property valued at more than 40 shillings, removing the option of prisoners to elect to have such matters tried by a higher court. The bill passed with some minor amendments.[58]

This last measure is also of particular interest. Its development involved a number of the elements mentioned by MacDonagh (and referred to in Chapter 1) in his description of his model of the "legislative-cum-administrative process", by which the operations and functions

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57 *SMH*, 29 July 1853.
58 Ibid., 25 August, 20, 26 October 1855.

of the nineteenth-century state were transformed. The initial legislative action had obviously failed to stamp out a variety of intolerable abuses occurring in Sydney and its environs. Although certain summary procedures, and special enforcement officers, were in place, deficiencies existed which the increasingly experienced field personnel drew to the attention of legislators. It was realised that no large scale, grand scheme was possible or would resolve the various problems. Rather, MacDonagh's closing of loopholes and tightening of enforcement mechanisms was required, involving an extension of summary procedures and the conferring of a discretion on field personnel to make regulations. The bill also provides an example of an impartial state taking active responsibility for the protection of the interests of all classes of society, in that it sought to police landlords and tenants and the proprietors of public houses as well as individuals committing the enumerated offences.[59] The fact that it was introduced by the radical of old but now conservative Nichols, an elected member, and not by the government, provides added interest. Although Nichols chose to assert on occasion (when it suited him) that a particular area of action should be dealt with by the government, he clearly believed that law-making was the responsibly of the legislature as a whole. He, as a general purpose lawyer, the city's solicitor and an intelligent man familiar with the detail to be regulated and the concerns of such diverse groups as publicans and law enforcement personnel, was peculiarly well placed to prepare measures of this type.

The efforts of the sixth council in the area of law reform largely involved the ready adoption of recent British precedents, but always with a view to their adaptation, often by a process of trial and error, to local conditions. In addition, as we have seen, a locally generated reform to abolish public hangings was successful. In the field of police reform, the government's attempt to install a professional, centralised police force failed under a concerted attack from members advancing the views of various vested interests, in much the same way as similar reform efforts failed in Great Britain. In New South Wales, however, the discovery of gold added a distinctive perspective and resulted in a somewhat piecemeal tightening of various controls in the area of law enforcement, to meet immediate needs. Probably Manning's exertions in the law reform area were ideologically driven—that is, by utilitarian centralist precepts. However, it is difficult to detect any consistent ideological approach among other legislators. Variations were not wholly from class to class but also from individual to individual, and for particular individuals (especially among the lawyers) even from year to year. At the same time, as in the mother country, permanent and

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59 See Alan Atkinson, "Time, Place and Paternalism: Early Conservative Thinking in New South Wales", *Australian Historical Studies*, vol. 23, no. 90, April 1988, p. 6.

increasingly expert public servants, largely divorced from politics and from special interests, were ever more thoroughly involved in the development of legislative policy.[60] They were to play a role of continuing importance after 1856.

60 See MacDonagh, *Early Victorian Government*, p. 177.

Chapter 10 The Constitution of 1855–56

A great deal has been written about the colony's constitution of 1855–56 and the manner in which it was debated and dealt with in New South Wales and Great Britain from the beginning of the 1850s. It is not proposed here to canvass that history as such but, rather, to examine some aspects of the preparation of the constitution, especially as they relate to the main points of this thesis. Of especial interest is the use made of select committees, and the ideas expressed about the composition of the proposed upper house.

The two select committees which prepared draft constitutional documents in 1852 and 1853 took a somewhat different form from that usually adopted for the examination of legislation, their chairman, Wentworth, breaking with the very important tradition of inclusive law-making which had been gradually established over the 1840s. The proposed constitution produced by the second of these committees attracted a great deal of agitation outside the house at public meetings and in the press, and petitioning underwent something of a revival, 23 of the 59 general petitions presented in the 1853 session relating to the constitution.[1] On the ideas front, while participants on all sides of the debate saw the need to laud the British constitution, it was generally recognised that it was impossible to emulate in all its detail. That constitution was unwritten, had evolved over centuries and was the result of historical events in the old country which could never occur again, much less be compressed into a single generation.[2] Considerable indecision existed in the early 1850s about the structure of the new legislature. Wentworth, the central figure in all discussions concerning constitutional reform, had long favoured a single chamber, and in his speech in June 1852 to propose the appointment of the first constitutional committee he indicated that he was still of that view.[3] However, the legislative council's 1851 petition on constitutional grievances, of which he was himself the prime mover, proposed the adoption of the Canadian constitutional model which consisted of an elected lower house and an upper house whose members were nominated by the crown.[4] There was indeed a consensus in support of a system with a lower

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1 *V&P* NSWLC 1853. Another 17 petitions related to private bills.

2 See, for example, *Empire*, 7 June, 20 September 1853; *SMH*, 6 August, 5 September 1853; also petition against the constitution of 411 inhabitants and others of Bathurst and its vicinity, ordered to be printed on 9 December 1853, *V&P* NSWLC 1853, vol. 2.

3 See C.H. Currey, "The Beginning in New South Wales of Responsible Government", *JRAHS*, vol. 42, pt. 3, 1956, p. 106; Alan T. Atkinson, "The Political Life of James Macarthur", Ph.D. thesis, Australian National University 1976, p. 374; *SMH*, 17 June 1852.

4 See *ADB*, 2, p. 588. On Wentworth's dominant role, see, for example, *SMH*, 4 June 1853. See John M. Ward, *James Macarthur: Colonial Conservative, 1798-1867*, Sydney University Press, Sydney, 1981, p. 183 on the Canadian model.

house elected by some sort of popular franchise from which the prime minister or premier and most other cabinet ministers would be drawn and which would control supply, and an upper house comprised of a conservative elite to provide a check on hasty law-making by the lower chamber.[5] This thesis is concerned to examine ideas about the nature and purpose of the expertise residing in the upper house, an issue bearing directly on the relationship between expertise and law-making.

Little thought seems to have been given to the question of how responsible government would actually work in New South Wales under the new constitution, despite the detailed practical experience of the previous ten years and all of the lessons which, as it would seem, had been learnt in that time. There appears to have been a lack of genuine understanding of current methods of British government, a proper consideration of this issue being overwhelmed by an exchange of democratic and anti-democratic rhetoric. Very few colonial politicians, at least outside government ranks, appreciated that the public service (rather than the upper house) would be the key to moderating executive excesses and to making the new system work in practice. In fact, it seems probable that few in New South Wales truly appreciated the increasingly expert role that public officials had played in colonial government, let alone in the government in Britain, to this stage—a significance discussed by MacDonagh in his consideration of the development of the modern state.[6]

David Dunstan has shown that the idea of expertise in government was much more sharply articulated in Victoria. He speaks of the government in Melbourne partaking of a "bureaucratic-managerial (as opposed to a representative-political) mode".[7] With the urgent need to develop services in that city from the early 1850s, there began a long tradition of creating various commissions and boards, "to keep the reins of power within a charmed circle of influential types" who were equipped to get things done.[8] In New South Wales, while derogatory comments were made in the late 1840s about Colonial Secretary Thomson's dominant position in the executive and, before his departure overseas in January 1854, laudatory ones about his abilities and capacity, the importance of his expertise at the head of

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5 C.N. Connolly, "The Middling-Class Victory in New South Wales", *Historical Studies*, vol. 20, no. 78, April 1982, pp. 371-372; P. Loveday, "The Legislative Council in New South Wales, 1856-1870", *Historical Studies*, vol. 11, no. 44, April 1965, pp. 482, 484.

6 See Oliver MacDonagh, *A Pattern of Government Growth 1800-60: The Passenger Acts and Their Enforcement*, MacGibbon and Kee, London 1961, pp. 330-332; Oliver MacDonagh, *Early Victorian Government 1830-1870*, Weidenfeld and Nicolson, London 1977, p. 159.

7 David Dunstan, *Governing the Metropolis: Politics, Technology and Social Change in a Victorian City: Melbourne 1850-1891*, Melbourne University Press, Melbourne 1984, p. 19.

8 Ibid., p. 55.

colonial administration, under the governor, was not fully understood. Donaldson, on becoming premier and colonial secretary in 1856, was shocked by the workload that Thomson had been carrying.[9]

The carefully developed usefulness of select committees was, for similar reasons, too easily forgotten. As has been seen, some legislators in late 1855 were actively thinking about the need to refine the powers, privileges and procedures of select committees once the new parliament commenced, but they apparently failed to realise that committees would be of considerable importance in future in ensuring that democratic rhetoric did not overwhelm the actual, long-terms needs of the people. Like the public service, select committees were not part of the received wisdom and rhetoric of constitutional reform.

Wentworth's subversion of committee practice

The 1850 Constitutions Act authorised the legislative council to alter existing laws dealing with its constitution, and to establish instead "a Council and a House of Representatives, or other separate Legislative Houses", the new constitution to be reserved for royal assent. In January 1852, Governor-General FitzRoy forwarded to the Secretary of State, Earl Grey, the council's 1851 petition about constitutional grievances, which suggested the adoption of a constitution similar in outline to that under which Canada had obtained responsible government. The characteristic features of that system were that the governor did not choose his advisors (although nominally appointing them), that they comprised a ministry whose advice he normally accepted on all colonial matters and that ministers usually held power only while they collectively had the support of the popular house.[10] FitzRoy said that the sentiments expressed in the petition had general support. He believed, however, that neither the legislature nor the public was anxious for responsible government to the extent that it existed in Canada. Most people understood, he thought, that although the colony had many talented and educated men, there were not enough who were also independently wealthy and therefore capable of holding office in the tenuous fashion necessary in responsible

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9 See S.G. Foster, *Colonial Improver: Edward Deas Thomson 1800-1879*, Melbourne University Press, Melbourne 1978, pp. 85, 124-125, 142-143; *SMH*, 5 December 1853.

10 See John M. Ward, *Colonial Self-Government: The British Experience 1759-1856*, Macmillan Press Ltd, London, p. 308. See also T.H. Irving, "The Idea of Responsible Government in New South Wales before 1856", *Historical Studies*, vol. 11, no. 42, 1964, pp. 192-193.

government.[11]

While it appears that informed colonists were aware of the nature of the Canadian system, neither the conservatives nor the liberals who voted for Wentworth's proposal for a formal protest to London in 1851 were necessarily seeking any form of constitutionally entrenched responsible government at that stage. Typically for Wentworth, the purpose of the exercise was to secure plenary powers of legislation in all colonial matters and full control over patronage and the revenue, including that arising from crown land. This was not necessarily responsible government.[12] The petition did not introduce any detailed concerns about the need for local expertise in policy, law-making and government. It seems to have created some doubt in London about the colonists' intentions, it being unclear whether they were calling for responsible government. The Colonial Office believed that Australians could not be denied what Canadians had received.[13] However, the cabinet as a whole hedged on the issue.[14] In December 1852, the new Secretary of State, Sir John Pakington, informed FitzRoy that Her Majesty's government agreed that the colony's rapid progress in wealth and population necessitated the closer assimilation of its institutions to those of the mother country. He invited the council to draft a new constitution on the basis of the Canadian system, without mentioning responsible government.[15] His successor, the Duke of Newcastle, confirmed in January 1853 that he agreed with this approach, again without referring to responsible government.[16] By then however, the first of Wentworth's select committees had produced a draft constitution, and Wentworth's covering report referred to the advantages that the colony would derive from the responsible government which it was meant to introduce.[17]

It was predictable that the veteran Wentworth, that curious mix of idealism on the one hand and combative arrogance and vindictiveness on the other, with his long-standing

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11 FitzRoy to Grey, 15 January 1852, *V&P* NSWLC 1853, vol. 1. See also John M. Ward, *Earl Grey and the Australian Colonies 1846-1857: A Study in Self-Government and Self-Interest*, Melbourne University Press, Melbourne 1958, p. 299; Ward, *Colonial Self-Government*, pp. 243, 290-293, 296-299, 307; Ward, *Macarthur*, pp. 183-184.

12 Ward, *Colonial Self-Government*, pp. 299-303, 305. See also Irving, pp. 192-194, 196-200.

13 See ibid., p. 305; Ward, *Macarthur*, pp. 184-185.

14 Ibid., pp. 305-306; Irving, p. 201; Brian Dickey, "Responsible Government in New South Wales: the Transfer of Power in a Colony of Settlement", *JRAHS*, vol. 60, pt. 4, Dec. 1974, pp. 217-222.

15 Pakington to FitzRoy, 15 December 1852, *V&P* NSWLC 1853, vol. 1; Ward, *Macarthur*, p. 185.

16 Newcastle to Fitzroy, 18 January 1853, *V&P* NSWLC 1853, vol. 1; Ward, *Macarthur*, pp. 185-187. See *Empire*, 12, 14, 21 May 1853 and *SMH*, 27 May 1853 for comment on the imperial despatches and their implications.

17 Report from the select committee to prepare a constitution for the colony, *V&P* NSWLC 1852, p. 479.

fixation on matters constitutional, should take the initiative.[18] Over 36 years earlier, he had declared, as a twenty-six-year-old colonial embarking on legal studies in England, that he intended to use the professional knowledge and skill acquired there to secure a free constitution for his country.[19] Then, Wentworth had meant not responsible government but a constitution similar to those of the old American colonies, where officials were crown nominees but where government efficiency depended on the executive heeding local opinion as represented in each lower house. Although he had long since been displaced in popular eyes from the role of liberty's champion which he assumed on his return to the colony in 1824, the time to fulfil his promise to his own land had now arrived.[20] In mid-June 1852, Wentworth moved for the appointment of a select committee to prepare the new constitution, his aim probably being to preclude discussion of the subject by the whole house (let alone the public) until his committee had reported. John Lamb, for one, expressed regret that Wentworth did not state his own views and let the house know what he intended to submit to the committee.[21] Wentworth undoubtedly wished to exclude the newly prominent liberal opinion, and perhaps even hoped to present the council with a *fait accompli.* In any event, he was determined to do things his own way. And in spite of resorting to a committee, he did not intend to follow the by-now customary manner of handling committee business.

Wentworth's view on select committees had long been equivocal, although he had been a member of over 90 between 1843 and the end of the 1852 session. Given the growing importance of committees and the relatively small number of legislators available for committee duty, avoiding appointments would have been difficult. However, Wentworth was not an enthusiastic advocate of the introduction of outside opinion into the legislative process, even from experts, and he never showed much appreciation of the usefulness of committees for gathering public opinion. Moreover, in the constitutional field he was the supreme authority, having a record as a constitution-maker dating back to his work for the Patriotic

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18 On Wentworth's character, and the early slights and insults that helped shape it, see *ADB*, 2, pp. 584-585; C.M.H. Clark, *A History of Australia*, vol. 2. *New South Wales and Van Diemen's Land*, Melbourne University Press, Melbourne 1965, pp. 44-50; Alan Atkinson, The *Europeans in Australia. A History*, vol. 2, *Democracy*, Oxford University Press, Melbourne 2004, pp. 18-19, 56-64. See also J.M. Main, "Making Constitutions in New South Wales and Victoria, 1853-1854", *Historical Studies Australia and New Zealand*, vol. 7, no. 28, May 1957, pp. 372-373 on Wentworth's dominance on constitutional issues.

19 *ADB*, 2, p. 583; Clark, *A History*, vol. 2, p. 44; Atkinson, *Europeans*, vol. 2, p. 18.

20 See *ADB*, 2, pp. 586-587. Darvall's speech to a meeting of the constitution committee on 15 August 1853 was accompanied by cries of "out with Wentworth", and a meeting on 6 September 1853 concluded with "three groans for Wentworth", coupled with threats to burn his effigy. *SMH*, 16 August 1853; *Empire*, 7 September 1853; C.M.H. Clark, *A History of Australia*, vol. 4. *The Earth Abideth For Ever 1851-1888*, Melbourne University Press, Melbourne 1978, pp. 34-39.

21 *SMH*, 17 June 1852.

Association in the 1830s.[22] In the past (as, apparently, in this case), Wentworth had often used committees for tactical purposes. On other occasions, of less importance to himself personally, he was criticised as a committee chairman for his dilatory habits and his committees' poor output. His approach was undoubtedly consistent with his consciousness of his own intellectual superiority, with his concept of law-making as a lofty business that called for special qualities and expertise, and with his Whiggish outlook, including his faith in aristocratic and classical values and in British political institutions of the eighteenth-century type.[23]

Usually, as has been seen in previous chapters, committees on legislation examined and reported on draft laws prepared elsewhere, but in the case of the 1852 and 1853 constitutional committees Wentworth undoubtedly handled most, if not all, of the drafting.[24] As always, in 1852 his first concern was to ensure that the people's representatives obtained control of all territorial revenue, including that from land. If this could be achieved, Wentworth said, he had no objection to the establishment of a civil list, restricting the authority of the legislature in the payment of officials, or to an upper house. The form of any upper house was the only matter likely to cause a difference of opinion in the committee, Wentworth said, that issue being a matter of great difficulty and delicacy. Neither the House of Lords nor the federated system applying in the United States provided a precedent to guide the colony in this experiment.[25] Wentworth did not mention Canada at this point, although he was apparently very familiar with its constitution. During debate on the constitution bill in 1853, he informed Cowper that "he had known what the constitution of Canada was for the last twenty years".[26]

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22 Wentworth drafted two constitution bills for the Patriotic Association in 1835, one on the Canadian model. See Alan Atkinson, "The Parliament in the Jerusalem Warehouse", *Push from the Bush: A Bulletin of Social History*, no. 12, May 1982, pp. 86-87, 93; *ABD*, 2, p. 586.

23 See *ADB*, 2, pp. 588-589; Atkinson, *Europeans*, vol. 2, p. 62.

24 Although Parkes referred to the 1853 draft bill as "the Wentworth-and-Macarthur juggle of a Constitution", Thomson identified Wentworth as its author. See *Empire*, 15 August 1853; *SMH*, 31 August 1853. See also Ward, *Earl Grey*, pp. 309, 327; Ward, *Macarthur*, p. 192; Atkinson, "Macarthur", p. 376. Main, p. 375, footnote 31 said that "in all probability" Plunkett drafted the bills that the 1853 committee adopted. John N. Molony, *An Architect of Freedom: John Hubert Plunkett in New South Wales 1832-1869*, Australian National University Press, Canberra 1973 referred at p. 80 to "the authors" of the new constitution, saying at p. 92 that Plunkett stood "besides Wentworth as drafter of the bill". Ward, *Colonial Self-Government*, p. 309 said that contemporary comment attributed the 1853 report and constitution bill to Wentworth and that posterity has agreed. However, he continued, no conclusive proof exists. Thomson, James Macarthur and Plunkett were all active on the committee and, he asserted, Macarthur "had more experience in constitution making than Wentworth".

25 *SMH*, 17 June 1852. See Atkinson, "Macarthur", pp. 375-376; Ward, *Macarthur*, p. 187; C. N. Connolly, "The Origins of the Nominated Upper House in New South Wales", *Historical Studies*, vol. 10, no. 78, April 1982, p. 58, on Wentworth's sustained push for control of colonial revenue and crown lands, his work on the constitution being seen as secondary to that campaign.

26 Ibid., 31 August 1853.

William Charles Wentworth in 1872
Reproduction courtesy of the Mitchell Library, State Library of New South Wales

Wentworth's old-fashioned slant on government included a view of the people's representatives in the legislature in perpetual opposition to the government's nominees, as in the old American colonies. On that basis, he unashamedly put forward the names of ten of his allies for the committee and did not include any current nominated members.[27] The omission of nominees, with which Martin, Darvall and Holroyd agreed, provoked much debate. Few recalled that those nominees who had been involved in the management of central government departments for many years were the very people who possessed expertise on issues with which the legislature was now grappling. However, this vital point did not escape Murray. The knowledge and experience of the members on the government benches, and especially of Thomson and Plunkett, he said, rendered them peculiarly capable of dealing with the subject. Thomson himself asserted that there was no reason why officials or other nominees should be excluded from the most important functions yet confided to any committee of the council. He demanded a ballot, and Wentworth's preferred members, Holroyd, Augustus Morris, member for the pastoral districts of Liverpool Plains and Gwydir,

27 Ibid., 17 June 1852, nominee Broadhurst describing Wentworth's proposed committee as comprised of "men rowing in the same boat".

and Nichols (the latter on a tied vote with Douglass), were displaced by Thomson, Plunkett and Cowper, the remaining members being Douglass, Wentworth, Donaldson, James Macarthur, Lamb, Martin and Murray.[28] For the *Herald*, this committee was a decided improvement on that originally named, as its members represented both sides of the house and all of the colony's leading agricultural, pastoral, commercial and professional interests.[29]

The 1852 constitutional committee was appointed on 16 June and reported on 17 September. Wentworth chose not to call witnesses, an unprecedented approach for such important and novel issues. However, this omission does not appear to have attracted adverse comment, either within or outside the council. No official record exists as to how frequently members sat as a committee, if at all, or how they reached their conclusions. Clearly, Wentworth was the prime mover. It seems that at least some type of informal discussions must have occurred. As Wentworth had forecast, the committee's report disclosed that the principal difficulty had been to devise a scheme for an upper house that could effectively check "the democratic element" in the lower chamber, while also being "competent to discharge with efficiency the revising, deliberative, and conservative functions" that would devolve on it. Committee members, it said, adopted four different approaches to the form of an upper house. Some favoured a wholly nominated body and others a wholly elected one, and others again took a middle course, favouring a partly elected and partly nominated body. Some wanted a property qualification and age limitation while others disagreed. The report was accompanied by three bills. One provided for a civil list, one for a constitution with a bicameral legislature and the third (required because the committee went further than the 1850 Constitutions Act permitted by vesting control of crown lands in the local legislature) was an imperial enabling act.[30]

The second reading of the civil list bill was listed for mid-December. However, several members pressed for postponement and Wentworth agreed. Having considered representations concerning the state of the house (a quarter of the elected members having left Sydney) and of parties within it, the division of public opinion on the measures and the division of opinion among his committee members, he had decided to pause. "A measure of this vast importance ought not to be passed without the fullest consideration", he asserted. He also sought to refute a claim made by the press that he had intended to smuggle the

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28 Ibid., 17 June 1852; Foster, p. 121.

29 Ibid., 18 June 1852.

30 Report from the select committee to prepare a constitution for the colony. *V&P* NSWLC 1852; Ward, *Macarthur*, pp. 187-188.

constitution bill through the council. That imputation was clearly false, he said, because the bills had been printed and circulated widely throughout the colony. He observed all the same that no petitions had been received against them.[31]

The decision to adjourn the debate appears to have nonplussed opposing members who had failed to organise any concerted resistance to the bills.[32] Nevertheless, a popular meeting held in Sydney in early December 1852, relating mainly to grievances about laws regulating the gold fields, did generate some comment on the new constitution. The meeting provided a foretaste of the kind of debate, involving pro- and anti-democratic rhetoric, that would characterise proceedings within and outside the council until word of the enactment of the imperial enabling statute reached the colony in October 1855. Activist newspaperman, James McEachern, who had been in California for eight years, urged working-class men throughout the colony to unite and organise a democratic league to defend rights of industry and free government. Another speaker criticised the constitution bill for perpetuating unequal representation, while a third called for united action by miners and the working classes of Sydney to secure popular rights.[33] Henry Parkes, writing in the *Empire* and reverting to type as a former Chartist sympathiser, rejoiced to see the emergence of such a grand political movement.[34] However, McEachern's democratic league was apparently still-born.[35]

A second select committee, also chaired by Wentworth, was appointed in May 1853 to reconsider the form of the constitution bill in the light of imperial despatches received on the 1851 petition. The membership was the same, except that Donaldson and Lamb, who had both retired, were replaced by George Macleay, member for the pastoral district of Murrumbidgee, and the liberal Sydney solicitor and mayor, William Thurlow.[36] Again, no evidence was taken, and with his lifelong preparation, Wentworth obviously considered

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31 *SMH*, 13 December 1852. See, for example, ibid., 3 December 1852; *Empire*, 7, 10 December 1852, for editorials and reports clearly indicating that the bills were circulating in the public domain. See *SMH*, 19 August 1853 on the circumstances of the bills' deferral. See also, Ward, *Macarthur*, pp. 188-189; Sir Henry Parkes, *Fifty Years in the Making of Australian History*, Longmans, Green and Co, London 1892, p. 32.

32 Both Cowper and Thurlow later sought to explain the absence of petitions in 1852, Cowper complaining of being taken by surprise by postponement of the debate. See *SMH*, 31 August, 2 September 1853.

33 *Empire*, 7 December 1852.

34 Ibid., 10 December 1852. See also ibid., 18 February, 31 May 1853. See A.W. Martin, "Henry Parkes: Man and Politician" in E.L. French (ed.), *Melbourne Studies in Education 1960-1961*, Melbourne University Press, Melbourne 1962, pp. 11-12 regarding Parkes' denials that he had ever been a Chartist; A.W. Martin, *Henry Parkes: A Biography*, Melbourne University Press, Melbourne 1980, pp. 16-17 on Chartist agitation shortly before Parkes emigrated to New South Wales.

35 Main, p. 378, who also argued that Chartism had no public voice in the colony at this time.

36 See *Empire*, 21 May 1853 on the ballot.

himself fully in command of the subject.[37] We now have evidence of attendance, the better documented procedure adopted for this committee possibly being a response to comment on the way the previous one had been managed. Thus it appears that two of the committee's 14 meetings were abandoned due to poor attendance, and Macleay, Murray and Thurlow were present at less than half of the meetings.[38] Either proceedings were not sufficiently compelling to demand all members' undivided attention or else some believed that Wentworth and other more dominant members had the matter in hand. The meetings consisted largely of the posing of a series of questions and motions, 38 by Wentworth and nine by other members, on the form of the new legislature, the franchise, the representation of electorates, the civil list and so on.[39] These were voted on by those present, sometimes on a division, in imitation of committees of the whole house. Wentworth, the chairman, voted only on the need to follow Canada's constitution and when votes were equal. The committee also deliberated on the form of the constitution bill, including additional clauses submitted by Wentworth.

The committee reported in late July. It considered that it was bound to adopt a constitution similar in outline to that of Canada.[40] This approach was supported by the *Herald* but it had been condemned in the *Empire* by Parkes, who was vehemently opposed to a nominated upper house, let alone one whose members had life tenure.[41] Various changes had been made to the previous session's constitution bill. These included provisions which Wentworth hoped would protect its conservative stamp, including an insistence that any alteration to the constitution would require a two-thirds vote of both houses. A loosely-drawn provision contemplated the creation of an order of hereditary nobility which would elect members of the upper house from among its own number. Although Wentworth argued briefly for this scheme, he appears to have included it as a political ploy to deflect the thrust of democratic opposition from other aspects of the proposed constitutional arrangements

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37 See *ADB*, 2, pp. 588-589.

38 *Empire*, 5 August 1853. See also Ward, *Earl Grey*, p. 327; Ward, *Colonial Self-Government*, pp. 309-310; Ward, *Macarthur*, pp. 189-190. See also Foster, pp. 121-123 on Thomson's contribution and support for a nominated upper house.

39 See proceedings on the select committee on the new constitution, *V&P* NSWLC 1853, vol. 2, pp. 123-128. Two of the nine motions by committeemen were the subject of amending motions by other members.

40 Report from the select committee on the new constitution, *V&P* NSWLC 1853, vol. 2. See Ward, *Macarthur*, p. 190.

41 *SMH*, 30 July 1853; *Empire*, 21 May, 15 June, 19 July 1853.

(such as a nominated upper chamber) and to force compromise.[42] In that sense, it was symptomatic of the air of intrigue that hung around the work of the committee—in contrast to the openness in committee work used hitherto. In any event, many conservatives, including Douglass, Nichols, Manning and Martin, opposed the idea outright, while James Macarthur and Plunkett, together with the *Herald,* saw no need for it. It did indeed attract much of the public opposition, including that of petitioners, as it was probably intended to do, and it was abandoned in the final scheme in favour of what now appeared as a compromise with liberal opinion, an upper house of at least 20 nominees chosen by the government for life.[43]

While the bill extended the franchise for the lower house and removed the property qualification for election to it, the critical factor remained the distribution of representation. The report proposed that the new, fully elected assembly should have the same number of members as the present council, but the majority determined that the 18 seats held by nominated members should be distributed among the electoral districts on the "interests" principle established by the 1851 Electoral Act. In liberal eyes, this disadvantaged Sydney, which gained only one additional seat. The report was accompanied by two draft bills, one to confer the constitution and grant a civil list and the other to authorise the Queen to assent to the constitution bill and to repeal various inconsistent imperial laws.[44]

On 3 August, a public meeting, convened in Sydney to oppose the constitution bill, itself established a constitution committee. It is possible, though difficult to prove, that the very existence of this committee was a result of Wentworth's decision to abandon the by-now established method of canvassing public opinion through council committees. Parkes' assertion, in the *Empire,* that the committee, made up of men of every class (including himself), was the equal of the legislative council in numbers, ability, education, character, property and antecedents, lends some slight support to this hypothesis.[45] The committee—again, possibly copying procedures of council committees in drawing in popular opinion—convened a series of public meetings in Sydney and country centres at which resolutions

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42 Atkinson, "Macarthur", pp. 380-381; Atkinson, *Europeans*, vol. 2, p. 254; Main, pp. 375-378; Molony, pp. 88-90, who argued at p. 88 that the idea of hereditary titles served its purpose in diverting attention from the nominated upper house. See also, for example, *Empire*, 19, 29 July, 20 September 1853 for attacks on the peerage scheme.

43 See Connolly, "Nominated Upper House", p. 53; Loveday, p. 482; P. Loveday and A.W. Martin, *Parliament, Factions and Parties: The First Thirty Years of Responsible Government in New South Wales, 1856-1889*, Melbourne University Press, Melbourne 1966, pp. 10-11; *SMH*, 30 July, 3, 6 August 1853.

44 Report of the select committee to prepare a constitution for the colony, *V&P* NSWLC 1853 Vol. 2; *SMH*, 30 July 1853.

45 *Empire*, 15 August 1853.

opposing aspects of the constitution were carried, and petitions to the legislature, the sovereign and British parliament were prepared.[46] The committee's members included politicians James Bligh, a Bathurst solicitor, Cowper, Darvall, Flood, Alexander Park, member for the county of Durham, H.S. Russell, member for the far northern electorate that included Brisbane, and Thomas Smart, member for the Sydney Hamlets, together with many other influential colonists.[47] It was however dominated by prosperous liberal merchants and professional men who agreed with the conservatives that the upper house should represent the colonial elite, while disagreeing with them on the manner in which it should be filled.[48] Although Cowper was named as a member, he chose to divorce himself from the committee's public meetings. His presence, he said, might be seen as getting up a party outside the council to support his opposition within it.[49] Darvall, the successful barrister and a recent recruit to liberal oppositionist ranks, had no such qualms. He virtually assumed command of the opposition forces.

On 9 August 1853, Wentworth, describing himself as the father of the constitution bill, moved its first reading. It was not opposed.[50] On 11 August, however, Darvall presented a petition in which 19 members of the constitution committee sought a postponement of the bill's second reading to allow all colonists sufficient time to consider the measure. That petition was followed by another, with a similar prayer, signed by 2 630 colonists, which Darvall presented on 16 August after a well-attended Sydney meeting convened by the constitution committee.[51] Clearly, with the lapse in the careful gathering of opinion by select committees, oppositionists now perceived the necessity to resort to the old device of petitioning. The meeting was chaired by Sydney merchant, John Gilchrist, a colonist of 25 years, who confessed that he, like too many others, had been little more than "a looker-on" in the past. But the time had arrived for everyone with a stake in the colony to express an opinion. That sentiment was echoed by Darvall, who called for two elected chambers. Adopting an extreme democratic position with, one suspects, little real thought about the consequences, Darvall said that it mattered little whether the people chose to be governed as a republic or a monarchy as long as the government was based on popular and representative

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46 See *SMH*, 3, 16, 17, 29 August, 6, 7 September, 1 October, 5, 30 November, 2, 5, 9 December 1853; *Empire*, 3, 15, 16, 29 August, 5, 7, 10, 13 September 1853.

47 See *Empire*, 3, 12, 15, 22 August 1853, the latter edition including a list of 80 committee members. As Appendix 3 shows, Parkes himself did not enter the legislature until May 1854. See also Martin, *Parkes*, pp. 112-119 on the committee's activities.

48 *Empire*, 15 August 1853; Loveday and Martin, p. 18; Connolly, "Nominated Upper House", pp. 63-64.

49 *SMH*, 31 August 1853.

50 Ibid., 10 August 1853.

51 See *V&P* NSWLC 1853, vol. 2.

principles. Tutoring his listeners, Darvall said that the council should be dissolved and an election held so that the people could express their views. If the council refused to postpone the bill's second reading, he continued, the people should petition the governor-general to dissolve it and, if that failed, they should petition the Queen and parliament to decline to entertain the bills. That is, Darvall suggested the petitioning of successive levels of authority, right to the top, in the traditional manner outlined by De Costa.[52] Parkes, on a different tack, suggested that a body delegated by the people should draft the constitution, instead of the present council with its nominee members.[53] The constitution committee did in fact appoint a sub-committee to attempt this exercise. Both the *Herald* and *Empire* correctly forecast the demise of the peerage proposal, which by that time had served the purpose that Wentworth had apparently intended for it.[54] In any event, any possibility of its success was destroyed by Daniel Deniehy, radical orator, man of letters and solicitor, in a devastating speech in which he denounced the idea of "a bunyip aristocracy".[55]

According to the *Herald,* the meeting provided evidence that at least some colonists had awakened from their lethargy, but the paper condemned the active part played by council members in an assembly that had been specially convened to consider a measure before the legislature and to appraise representatives of opinions held out of doors. In comments reflecting current perceptions about the proper role of legislators outside the council, and possibly within its committees as well, the *Herald* contended that that role should have been "to listen, to ponder, and to draw impartial conclusions", precisely the method used hitherto in select committees.[56] They had no right to interfere, to tell constituents what opinions they should hold and in what terms they should express them.[57] Solicitor-General Manning condemned the actions of those members who, being in a minority and not able to get their way, left the council and went to another, lower authority to express their views, assisting outsiders to compel the house to submit to their authority. Such actions, Manning said, decreased the legislature's influence and, ultimately, its independence.[58] A number of other conservative members, including Wentworth, James Macarthur, Martin, William Bowman

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52 Ravi De Costa, "Identity, Authority, and the Moral Worlds of Indigenous Petitions", *Comparative Studies in Society and History*, vol. 48, no. 3, July 2006, p. 671.

53 *Empire*, 16 August 1853; *SMH*, 16 August 1853.

54 *SMH*, 30 July, 3 August 1853; *Empire*, 21 May, 29 July, 13 August 1853.

55 Ibid., 16 August 1853. See *ADB*, 4, pp. 44-45 on Deniehy.

56 Ibid. See *Empire*, 16 August 1853, Parkes estimating that almost 4 000 people attended the meeting. Martin said that half that number attended. *SMH*, 25 August 1853.

57 Ibid., 17 August 1853, Wentworth arguing that members attending public meetings became mere delegates, losing the capacity to act as free agents. See ibid., 27 August 1853 where Darvall was condemned for attending a meeting called for the purpose of petitioning the council.

58 Ibid., 2 September 1853.

and Postmaster-General William Christie, also expressed disquiet, contesting the right of participants at public meetings and of petitioners to dictate to the house. The council, they said, was the only competent authority to make laws.[59]

It is difficult to exaggerate the importance of Wentworth's intellectual authority and force of character in shaping the new constitution. However, while his approach certainly restricted participation by the liberal democrats, as he intended, it also accentuated the elitist appearance of the old regime by excluding the public from the constitution-making process. In so doing, Wentworth presented the liberal leadership with a clear target, a godsend for them at the beginning of the democratic movement. In that sense, his methods served a purpose in New South Wales similar to the Victorian government's handling of the Eureka Stockade in December 1854.[60] They reinforced and crystallised democratic thinking by a display of authoritarianism, and this in spite of all the gradualist care taken hitherto by the more diplomatic and up-to-date conservatives in the legislative council. This aspect of the constitution debate also brings to mind, once again, an analogous situation played out over 40 years later when the form of the constitution for the Australian commonwealth was being debated. In both cases, politicians were charged with novel and critical tasks. In 1853, the people were denied an active involvement, partly due to Wentworth's intellectual dominance, which precluded the inclusive approach of earlier council committees. In the 1890s, however, politicians of all colours, after some hesitation, came to appreciate the need to involve, and be involved, with the public. They attended publicly organised meetings on the federation issue, arranged for the people to choose delegates to attend federation conventions and, in the end, made an unusual effort to bring them into the law-making process by organising referendums on federation and the adoption of Australia's constitution bill.[61] In the early 1850s the ingenuity so far shown in linking the legislative process with public opinion was not allowed to develop to this extent.

The upper house and the uses of special expertise

The debate on the composition of the upper house focussed attention on contemporary ideas about the use of expertise in government and its relationship with the representative principle.

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59 Ibid., 17, 23 August, 1, 3 September 1853. See *Empire*, 2 September 1853 for comment on these views.

60 See Clark, *A History*, vol. 4, p. 82; Molony, p. 94; T.H. Irving, "1850-70" in F.K. Crowley (ed.), *A New History of Australia*, William Heinemann, Melbourne 1974, pp. 141-142.

61 See Helen Irving (ed.), *The Centenary Companion to Australian Federation*, Cambridge 1999, pp. 10-12, 74-84.

Here, it is possible to detect a tendency to think about the upper chamber as a body useful for the overall purposes of government and law-making. However, the evidence is vague and ambiguous. No-one other than Manning spoke clearly in those terms, and Manning did not say much. This demonstrates both the tentativeness and backwardness of thinking in New South Wales, as also seen in proceedings regarding the city corporation in Chapter 7, and it also shows, once again, Wentworth's dominance in keeping the debate within old-fashioned paradigms. The utilitarian agenda which has been rather more evident previously is now mostly hidden, though it can be detected in shreds of rhetoric.

The most obvious distinction in contemporary ideas was between an upper house designed to protect the interests of a certain class, the rich, and an upper house designed to promote the long-term interests of the population as a whole by wise and skilled intervention in law-making. But the distinction was not absolutely clear because, for many, the interests of the rich were seen to an extent as the interests of everyone, civilisation being undermined if property rights were not respected. Nevertheless, while much overlapping occurred, two logically opposed extremes—the protection of self-interest by the rich and the exploitation of high expertise—can be detected. Contemporary statements mix these positions up to varying degrees, but the fact that they can be perceived at all provides evidence of the ways in which ideas were operating at the time. And while everyone (except extreme Chartist democrats) might see some advantage in protecting the interests of the rich, only conservatives and utilitarians (often, but not always, the same people) could really see the point of an upper house with special expertise of some sort.

By 1853, most colonial conservatives were keen to have a nominated upper house with no ceiling on numbers because they opposed the idea of an unyielding oligarchy and wanted to copy that flexible defence of interests, the House of Lords. The *Herald* considered that the particular quality of the Lords that the local legislature would require was "its *political utility*" as a deliberative body independent of both the crown and the people.[62] Conservatives were also mostly keen for management by experts, though there were various ways of defining useful expertise. Whereas, in the past, the main issue in the qualification of legislators had been social respectability, now it was ability and intelligence. The nub, at least for them, was how far the upper chamber should be an assemblage of experts, of the "best men", a matter of concern also for utilitarians. Hence, as on previous occasions, this striking

62 *SMH*, 6 August 1853 (emphasis in original). See also Connolly, "Nominated Upper House", p. 62.

antipodean overlap between conservatism and centralist radicalism is evident. On the other hand, the conservatives' liberal and radical opponents were calling for some type of elective upper house with a fixed membership that could not be swamped.[63]

When he moved the constitution bill's second reading in mid August 1853, Wentworth dwelt for some time on the purpose and composition of the upper house. Consistent with his old-fashioned views, he made no mention of the need for expertise in the utilitarian sense. Instead, he hoped for a lasting conservative British constitution (based on interests) and not a "Yankee" one (based on mere numbers). What was needed, Wentworth said, was a "powerful body ... formed of men of wealth, property and education", not necessarily from any particular section of the community, but "from every class that had the energy to aspire to rank and honour".[64] Wentworth's ideas on creation of a nominated upper house with life membership and, especially, on one made up of peers voted onto it from among their number, suggested creation of a patrician class rather than a body of experts. From the 1830s, with increasing wealth, Wentworth felt himself the prototype of a new nobility, a governing class which would adapt colonials to the way of life of the eighteenth-century Whig aristocracy.[65] He wanted both to protect the interests of the rich and to establish something like a paternalist and aristocratic body (whether hereditary or not) for the good of the people as a whole. However, he never spoke in technocratic terms, having no sympathy with that way of thinking.

Some clue as to Wentworth's thinking on the composition of the upper house might be revealed by considering what type of expertise he wanted to nourish in the future ruling class of New South Wales when he instigated the foundation of Sydney University in 1849–50. That proposal was considered by a select committee in 1849, Wentworth saying then that his model was the new University of London, a non-sectarian body with associated denominational colleges.[66] He wished the university, under state auspices, to be open to all classes and denominations, viewing higher education as fundamental to the accumulation of local expertise, to making government more intellectually self-sufficient and to providing the

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63 Ibid., 31 August 1853; Connolly, "Nominated Upper House", p. 62; Connolly, "Middling-Class Victory", p. 374.

64 Ibid., 17 August 1853. See *Empire*, 17, 19, 20, 23, 26, 30, 31 August, 5 September, 15 October, 22 November 1853 for criticisms of Wentworth's speech; and *SMH*, 19 August 1853 for another viewpoint.

65 *ABD*, 2, p. 586.

66 See Clifford Turney, Ursula Bygott and Peter Chippendale, *Australia's First: A History of the University of Sydney Volume 1 1850-1939*, University of Sydney in association with Hale and Iremonger, Sydney 1991, pp. 7-9, 25, 27, 29, 37-39, 42, 44-45.

foundation for self-government. After the progress of Wentworth's initial bill to establish the university was blocked in 1849, an amended bill passed in 1850. This was in spite of a flurry of petitions from various religious groups, supported by the *Herald*, who objected to Wentworth's proposal to exclude clergymen from the management of the institution and protests from some of the more democratic liberal members who objected to so much money being spent on an academy for the local elite.[67]

Here again, there are ambiguities and the evidence does not enable any clear-cut conclusions to be drawn. At least one fundamental purpose of the university was to fit men for the high offices of state but special expertise might be thought of as that of mere educated men, or it might be thought of in more technocratic terms. Wentworth viewed both educated intellect and property, or substance, as necessary prerequisites for men who were to play any part in the management of the state.[68] Clearly, he saw the need for an upper house made up of the leading members of an educated class. However, just as ideas about expertise in government were vague and confused in New South Wales, it seems that Wentworth had not thought out precisely how the education of that class should be focussed and what kind of skills in government should be fostered. His ingenious and distinctly colonial scheme for Sydney University, as it evolved by 1850, contained elements from divergent ideas currently circulating in Great Britain about the purposes of universities. On the one hand, it included aspects of the ancient universities of Oxford and Cambridge so as to emphasise classical and mathematical studies, and, on the other, it drew on features of the new University of London and the so-called "godless" Queen's Colleges of Ireland, which emphasised the secular, utilitarian and directly vocational purposes of higher learning. However, both traditions viewed classical and mathematical studies as a prerequisite for professional education and both offered degrees in Arts, Law and Medicine. A university in the former tradition might well have produced future leaders for New South Wales somewhat akin to gentlemen in an almost eighteenth-century mould, while an institution of the latter kind would presumably have fostered the skills of merchants and public servants like Chadwick. By combining these elements, perhaps Wentworth intended to secure the best of both. In the event, Sydney University's first principal was the Professor of Classics, John Woolley, but there were also chairs in mathematics and chemistry. However, the University offered degrees only in the

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67 Ibid., pp. 29, 31, 44; *SMH*, 11 October 1849, 10, 25 September, 1850; *V&P* NSWLC 1850. See Clark, *A History*, vol. 3, pp. 432-433; Martin, *Parkes*, p. 91; Knight, pp. 246-248; Ward, *Macarthur*, pp. 164-166 for proceedings on the bills and Lowe's role in blocking the first bill.

68 Ibid., p. 30; *ABD*, 2, p. 588; *SMH*, 7 September 1849; Clark, *A History*, vol. 3, pp. 432-433; Martin, *Parkes*, pp. 91-93.

traditional gentlemanly fields of Arts, Law and Medicine.[69] It seems that the university was not designed to turn out technocrats.

Wentworth's combining of disparate elements in the formation of the university, like his own strange combination of ingenuity and laziness, mirrors to an extent the colony's own strange combination of inventiveness in law-making and lack of awareness as to quite what had been achieved and how best to maintain that achievement in the future.

Typically, Martin adopted an idiosyncratic approach to the form of the upper house, calling for a franchise consisting solely of large freeholders, as he believed that it would place "our government ... in the hands of our best men". While not all landowners were fitted by education to make the best judgments, property, Martin said, conferred a conservative tendency and a disinclination to follow mob-orators.[70] His approach was rejected by Plunkett, James Macarthur, Thomson, Manning and Douglass, among others. Plunkett, arguing for nomination, said that "a governor responsible to the people was much more likely to select properly qualified individuals than large farmers ... would be".[71] Macarthur agreed, asking why more confidence or respect should attach to an upper house selected by landholders than one nominated by responsible ministers, answerable to the country. For Manning, Martin's proposal was objectionable because it would set one class against others, raising one above the rest.[72]

For Plunkett, what was needed for an upper house were members who possessed knowledge and experience, as in the House of Lords, members who understood the laws and the policy of the state and who could guide the house safely in all respects. Supporting a nominated chamber, Plunkett said that some of "the very best men" (such as retired judges) would not be prepared to contest an election and risk being disgraced by some contemptible candidate who was better than they at canvassing. That Plunkett was not thinking in purely

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69 Ibid., pp. 7, 9-11, 27, 29-31, 34, 37-38, 41-42, 55, 59-60, 68.

70 E.K. Silvester, (ed.), *New South Wales Constitution Bill. The Speeches in the Legislative Council of New South Wales on the Second Reading of the Bill*, Thomas Daniel, Sydney 1853, p. 89; *SMH*, 25 August 1853; Elena Grainger, *Martin of Martin Place: A Biography of Sir James Martin (1820-1886)*, Alpha Books, Sydney 1970, pp. 68-71.

71 SMH, 25 August (Plunkett), 1 September (Macarthur, Douglass, Thomson), 2 September 1853 (Manning). See also Silvester, pp. 76, 80, 97ff., 158, 161, 172, 181. See *Empire*, 25, 27, 30, 31 August 1853; *SMH*, 25, 29 August 1853; Grainger, pp. 68-7 on Martin's speech. See also Atkinson, "Macarthur", pp. 380-381. Parkes, *Fifty Years*, p. 39, Parkes recalling that he had quoted Bentham at a public meeting on 5 Sept. 1853 to oppose Martin's notion that property qualifications secured political fitness.

72 *SMH*, 1, 2 September 1853. The *Herald* also viewed Martin's scheme as representation by a class, saying Martin preferred it to a nominated upper house because he believed that it would be more conservative. Ibid., 29 August 1853. See also Silvester, pp. 133 (Macarthur), 181-182 (Manning).

terms of social status but also of practical experience in law-making is borne out by his further observation that he foresaw, after a few years, the governor selecting men for the upper house who had distinguished themselves in the lower chamber and that, ultimately, they would have "the best men from among the representatives themselves".[73]

For the utilitarian reformer Manning, deciding on the form of constitution involved employing mankind's natural virtues, and even its natural vices, for what he termed "purposes of utility". In comments touching on both sides of the debate, Manning said that he could not ascribe to the idea of the divine right of the majority to govern, nor was he sure that the extent and value of particular interests or particular classes should be allowed to affect the issue at all. All classes were necessary to build up the fabric of society and all were mutually dependent on one another. No one had an inherent and personal right to a share in government. That depended entirely on fitness, on one's relations to one's fellow man, and on "those maxims and balances which were necessary to preserve the equipoise of the State", a view evincing tinges of paternalism of the kind referred to by Kim Lawes, and even of Michael Roe's moral enlightenment. After canvassing the various schemes suggested for the upper house, Manning came down in favour of an upper house with members appointed for life by the governor on the advice of responsible ministers. Such a house would provide the closest analogy to the House of Lords, and would consist of "men of honour, wealth, and intelligence"—upright and intelligent men of substance but men also, given Manning's earlier comments, fit to exercise the duties of their position.[74] Besides, as Manning well knew, a number of experts did reside in the House of Lords, especially among the law lords (and they included his patron, the utilitarian reformer, Lord Brougham).

A few other conservative members referred specifically to the issue of responsible government, some with a better understanding of what was involved than others. James Macarthur warned against democracy, deploring the tyranny of ignorant, irresponsible, selfish majorities. He favoured a lower house elected on a property franchise to guarantee informed, responsible voting, and an upper house nominated for life to ensure that it was powerful and independent. Responsible government would come gradually and New South Wales would not have a two-party system until there were sufficient men trained in public business to be able to form separate administrations, he said. Clearly recognising the importance of

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73 Ibid., 25 August 1853; Silvester, pp. 106-108; Connolly, "Nominated Upper House", p. 59.

74 Ibid., 2 September 1853. See also *Empire*, 3 September 1853, Parkes describing Manning's speech as "more candid and manly" than any of the other defenders of nomineeism.

expertise, Macarthur said that it would be necessary for governments to call on the business talent of "the distinguished men" of both houses if they were to survive and carry on administration in a firm and efficient manner.[75] Thomson, who was keen to point out that the bill did not emanate from the government, argued that there could be no reasonable objection to the nomination of the upper house by the governor and his executive council, because no responsible ministry would select individuals who were unacceptable to the public. Once appointed however, its members must be independent of both the crown and the people, and the only way to ensure their independence was to appoint them for life.[76]

For an advocate and active legislator, Nichols' speech on this issue was curiously lacking in substance. He chose not to rely on the weighty, formal authorities used by other speakers. He quoted instead the rustic words of clockmaker, "Sam Slick", said to be familiar with the workings of British and American governments, to illustrate points about elective upper houses, republics and the British constitution. Perhaps, as a man of the people, Nichols' personal interest and affinity lay in the lower chamber. He had obviously given some thought, however, to the mechanics of government under the new regime, and provided a fairly accurate summation of the course which Denison chose to follow. Opponents of a nominated upper house misunderstood the system, he said. Nominees could not exercise undue influence because the lower house held the purse strings. Once the constitution bill became law, members of the lower house would be elected. Recognising the benefit of the expertise and experience of colonial officials, Nichols hoped that certain members of the present government would be elected. He singled out Plunkett for special mention, as an official who had demonstrated his worth by his ability and long service, both as an adviser to the crown and as a member of the legislative and executive councils. Once the election was over, the governor would form his ministry which, under responsible government, would be chosen in accordance with the wishes of the majority in the lower house. The upper house would then be selected by the governor on the recommendation of the new ministry. Thus, Nichols said, the first nominees would virtually be appointed by the people themselves through their representatives, but their representatives would exercise their choice on broadly utilitarian principles.[77]

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75 Silvester, pp. 132-133; *SMH*, 1 September 1853. See *Empire*, 1 September 1853 on Macarthur's speech. See also Ward, *Macarthur*, pp. 187-193; Atkinson, "Macarthur", pp. 377-382 on Macarthur's role in the development of the constitution bill.

76 Ibid., pp. 166, 171-172; *SMH*, 1 September 1853. See also Foster, pp. 121-123 on Thomson's views and role in the proceedings. See *Empire*, 2 September 1853 for criticism of the nominees' role in the debate; and ibid., 6 September 1853 for criticism of Thomson's speech.

77 *SMH*, 2 September 1853. See also Silvester, pp. 197-198.

Liberal members were less inclined to think in terms of utilitarian expertise. Cowper called for an upper house elected on a restricted property franchise. He argued that upper house members should represent their order. If they were mere nominees, they could not be independent, and on the other hand the elective principle would enable members of the aristocracy to elect their own representatives.[78] However Darvall, the bill's leading opponent, casting about for other ideas (none fully formed), suggested that when elections for the lower house were held, delegates could also be elected whose sole function would be to select "the choice and best men" to form the upper house. Such a house might have a longer term than the lower and an age qualification perhaps. Alternatively, the upper house could be elected from members of the lower house.[79]

Only one speaker seems to have fully appreciated the current importance of the public service, and its pivotal role in government. The conservative, M.H. Marsh, member for the pastoral districts of New England and Macleay, contemplated a radical change in the way that responsible government would operate, perhaps anticipating the difficulties that would face a legislature deprived of the services of expert official members. The members of the present government should retain their offices and pay, he said, and the governor should be able to select members from the lower house to advise him and to carry on government business in the chamber. These members would form a privy council and would be unpaid. The real labour of preparing government measures would be done by the experts, the officials who headed the public service, while the business of processing legislation through the parliament would be handled by the unpaid privy councillors. It would be impossible, for some time, to get a good responsible government in any other way, Marsh said, drawing attention to FitzRoy's comment about the dearth of people of leisure and ability in the colony capable of devoting their whole time to government business. Under his plan, Marsh said, the duties of the privy councillors would be light, and almost entirely confined to the parliamentary session, and no doubt many, who were eminently suitable, would readily accept the task.[80]

Thurlow was also unconvinced that officers of the government should be pensioned off

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78 Ibid., 31 August 1853; Silvester, pp. 119-121, 148. See *Empire*, 1 September 1853 for criticism of Cowper's speech; *SMH*, 2 September 1853 saw Cowper's speech as the best on his side of the argument. See also Connolly, "Nominated Upper House", p. 63; Loveday, p. 484 on the liberals' views on the form and function of the upper house.

79 Ibid., 24 August 1853; Silvester, pp. 63-66, 69. See *Empire*, 24 August, 5 September 1853, an editorial in the latter attacking Wentworth's claim that the nominated upper house was analogous to the House of Lords; *SMH*, 25, 27 August 1853 on Darvall's speech.

80 Ibid., 24 August 1853; Silvester, p. 75. Marsh did not vote on the second reading division.

and he praised the past endeavours of those "good public servants ... the law officers of the Crown". However, he lapsed into the error of linking nomineeism under the old regime, when the crown alone made the selections, with nominations to the upper house under responsible government which would be made by the governor-general and his ministers in council.[81] The people were heartily sick of nomineeism, Thurlow said. With so many recent arrivals, it was quite possible to elect both houses. And if colonists were competent to elect members for the lower house, "where all the intelligence of the country will be needed", they were equally competent to elect, either from their own number or the general population, a small number, say 21, for the upper house. For the sake of independence, these members should hold their seats for a longer period than lower house members, Thurlow said. He urged the council to pause before grafting nomineeism onto the constitution. It had enough talented and experienced members to frame a constitution that was peculiarly their own, to fit the exigencies of the colony, without copying from other countries, he said.[82]

Given the array of possibilities presented by the oppositionists, Wentworth's tactical superiority and degree of preparedness was sure to win the day. On 2 September, after approval of the constitution bill's second reading, the committee stage was stood over to 6 December.[83] The constitution committee appointed by the public meeting on 3 August, having failed to delay the bill's progress by its initial pressure and petitioning activity, convened a further meeting on 5 September, this time to prepare petitions to the Queen and British parliament, praying for a legislature with two popularly elected houses, as Darvall had suggested. The meeting was addressed by a number of men, including Darvall, Cowper and Parkes, the last citing Bentham in support of his argument that people were entitled to participate in the framing of the constitution. One of the successful resolutions called for a parliament of two popularly elected houses, the upper house one-third the size of the lower, elected for a longer period, with members retiring at different intervals and whose qualifications were determined "by age, property, and residence". Nothing too radical there. However, the constitution committee's efforts to produce a detailed alternative constitution failed. Two distinct and dissimilar schemes, one for an upper house appointed by an electoral college and the other for election of that house by the people from a list of crown nominees, were recommended, but neither proved acceptable to a majority of general committee

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81 See ibid., 31 May 1856 for a discussion of this issue.
82 Silvester, pp. 187-192.
83 See *Empire*, 12 October 1853 on Wentworth's tactics in postponing further debate to December.

members.[84] Instead, another series of resolutions were carried. One called for an essentially conservative but also utilitarian upper house consisting of:

> those members of society who are most identified with the country by long experience of its various interests, who are best known for their intelligence and personal independence, and who have most merited the confidence of their fellows, by the exercise of a matured judgment and the performance of public services.[85]

This would be an upper house constituted, no doubt, by the very same men that the conservatives favoured, the only difference being that these men would be elected from a list of 100 persons selected by the lower house and from as many additional names as the governor chose to nominate.[86] Some of the most radical members of the committee were aghast at the prospect, but it reflects a recognition of some of the most successful aspects of colonial government since the 1830s.

Meetings were also held in various country towns to prepare petitions opposing the bill. Obviously, petitions were now being seen as the only available means of introducing popular opinion into the legislature, the committee system having failed to do so.[87] Between mid-August and December 1853, 16 petitions from rural areas opposing aspects of the bill, with 3845 signatures, were presented to the council.[88] Only five rural petitions, with 228 signatures, were in support, undoubtedly a matter of regret to the *Herald,* which had suggested that most people in the interior were conservative and would gradually make themselves heard to good effect.[89] But the conservatives did not need petitioners. As the *Herald* said later, the bill was safe.[90] It was a depressing outcome for exponents of the rule of the people on the eve of a new era.

In the *Empire* between September and early December, Parkes had continued to pump

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84 *SMH*, 5 November 1853. See ibid., 17 October 1854; Alan Powell, *Patrician Democrat: The Political Life of Charles Cowper 1843-1870*, Melbourne University Press, Melbourne 1977, pp. 55, 61 on the constitution committee's loss of support and liberals' lack of unity; Loveday and Martin, p. 23. Martin, *Parkes*, p. 116, Martin stating at p.118 that the "alternative constitution" was to be devised for propaganda purposes, to show what the liberals could do if they had power—but the sub-committee formed to draft it failed to agree.

85 Ibid., 2 December 1853.

86 See ibid., 30 November, 2, 5 December 1853.

87 See ibid., 6 September, 1, 25 October 1853; *Empire*, 7, 10, 13 September 1853.

88 See *V&P* NSWLC 1853.

89 Ibid; *SMH*, 25 August, 7, 8 December 1853. See ibid., 9 December 1853 for comment on the failed petitioning activity to that date. See *Empire*, 3, 30 December 1853 and *SMH*, 23 December 1853 for an exchange on the weight and value of the petitions to the Queen and the British parliament.

90 See *SMH*, 23 December 1853.

out editorials on aspects of the constitution bill.[91] However, the *Herald*, which supported most of the bill's principles, noted that while public meetings and petitions might appear to indicate unanimous opposition, no alternative scheme that commanded the support of any section of the community had been propounded. And an overwhelming majority of the council had decided on the principles that the constitution should contain, principles that generally accorded with those adopted in other British colonies.[92] The council met in early December, with only eight absentees, to consider a modified constitution bill.[93] The hereditary clauses had been deleted, but while the members of the first legislative council were to be appointed for five years, later members would be appointed for life.[94] In committee, attempts to increase Sydney's membership in the lower house failed, while the amended provisions for the upper house were confirmed, as was the two-thirds clause for the making of constitutional amendments. The bill was read a third time and passed on 21 December by a vote of 27 to six.[95]

The sixth council was prorogued on 22 December 1853, and the constitution bill was forwarded to the Secretary of State, the Duke of Newcastle, on 29 December, with copies of the petitions for and against it.[96] Various elements in the colony, including Darvall, Cowper and the *Empire*, continued to agitate and to propose resolutions, organise meetings and get up petitions against the measure.[97] Well into 1855, they entertained hopes that the British parliament would reject it. However, apart from making various amendments, including one to reduce the requirement for constitutional change from a two-thirds vote in both houses to simple majorities in those houses, the essential features of the measure as passed in New South Wales were confirmed. The Constitution Act, as an annexure to the enabling British statute, received royal assent on 16 July 1855. Governor-General Sir William Denison received official notification of its enactment on 31 October 1855.[98] A new era beckoned.

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91 *Empire*, 8, 10, 13, 15, 16 (2 items), 20 September, 12, 15 October, 3, 7 December 1853.
92 *SMH*, 22 October 1853.
93 Ibid., 7 December 1853.
94 *Empire*, 8 December 1853.
95 Ibid., 9, 10, 17, 22 December 1853; *SMH*, 10, 14, 16, 22 December 1853.
96 FitzRoy to Newcastle, 29 December 1853, CO 201/467 ff. 401-407.
97 See *SMH*, 14, 17, 18 October 1854 on Darvall's resolutions in the council against the constitution.
98 See Ward, *Macarthur*, p. 194; *New South Wales Public Statutes*, 1852-53, Constitution Act 17 Vic. No. 41 and imperial ratifying statute 18 & 19 Vic. cap. 54; *Empire*, 20 March, 29 April, 30 October 1854, 2 February, 20 October 1855; *SMH*, 1 November 1855. See *Empire*, 31 October 1855 for criticism of the Colonial Office and British parliament for apparently ignoring colonial protests. However, Colonial Office papers reveal that the contemporaneous constitutions of South Australia, New South Wales and Victoria were closely examined. See papers attached to FitzRoy to Newcastle, 29 December 1853, CO 201/467 ff. 408, 457-474; Grey [?] to FitzRoy, 3 July 1854, CO 210/475 ff. 475-478; Russell to Denison, 20 July 1855, CO 201/485 ff. 485-504.

Chapter 11 Aftermath

It has been seen that in the years before responsible government was formally inaugurated, colonial lawmakers had been making themselves gradually more accountable and responsible to the people of New South Wales. They had been testing local opinion by holding lengthy inquiries, often involving expert testimony, and, to a lesser extent, by having regard to petitions. Some aspects of this evolution, such as the use of committees and available expertise, mirrored events that MacDonagh described as occurring in Britain. Indeed, it might be argued that the foundation of modern methods of government and law-making in Britain—more centralised and utilitarian—had its counterpart in New South Wales in a government which was proto-democratic in a peculiarly Australian way. Here, local methods of responsibility, innovative and effective in the way in which they catered for local needs and priorities, pre-dated democracy. The purpose of this chapter is to describe briefly what happened to government and the legislative process after 1855 and to consider how the old methods of accountability in law-making fared under the new regime, the point of the 1855-56 constitution having been, after all, to create responsible government or, rather, given what has been shown, a more obvious and formal type of responsible government.

Loveday and Martin have described the new constitution as "incomplete" in the sense that it left undefined almost all details of the relations between the colony's future legislative institutions and the executive.[1] Initially at least, the filling in of those details fell to the governor-general and the bureaucrats. Like Sir George Gipps, Governor-General Sir William Denison was an expert administrator, zealous and able, with a firm belief in his own abilities and opinions, and a commitment to the implementation of imperial policy. A skilled army engineer and previously the occupant for eight years of the difficult post of lieutenant-governor of Van Diemen's Land, Denison wished to ensure that the transition to the new order occurred with as little disruption to administrative stability and efficiency as possible. He was impatient with politicians and almost contemptuous of popular colonial parliamentary government, being convinced that the task at hand required the services of proven, capable

1 P. Loveday and A.W. Martin, *Parliament, Factions and Parties: The First Thirty Years of Responsible Government in New South Wales, 1856-1889*, Melbourne University Press, Melbourne 1966, p. 7.

advisers who were experienced in the colony's administration.[2] In fact, it has been said that Denison considered responsible government to mean nothing more than government by civil servants.[3]

Denison was re-sworn as governor-general under a new commission and instructions on 19 December 1855. As a result, the old executive council ceased to function but its members continued on as the heads of government departments and the public service carried on with business as usual. On the same day, Denison endeavoured to consult a few eminent and impartial members of the old legislature, including Sir Charles Nicholson (speaker), Henry Watson Parker (chairman of committees) and James Macarthur about the formation of an interim executive council. Macarthur and Solicitor-General Manning urged that no appointments be made until Deas Thomson returned to the colony. Macarthur and other leading conservative politicians, such as Nicholson, shared Denison's view that Thomson, the most able and efficient government expert, should form the first ministry and launch the new political era even before the outcome of any election was known. Macarthur contemplated that he and Thomson would stand for the two lower house seats allocated to West Camden. Nicholson hoped that Thomson would rise to the occasion, as he could well provide "a rallying point", having the "constitutional independence [to] enable him to resist the undue interference of the Governor on the one hand, and the assaults of the democratic party on the other".[4] Denison expected much of Thomson and looked forward to receiving his assistance in managing the transition to the new order. He and Thomson had been close friends since Thomson's visit to Van Diemen's Land in 1849.[5] Denison had told his brother then that FitzRoy was lucky to have Thomson, "a perfect man of business", as his colonial secretary

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2 Ibid., p. 24; *ADB*, 4, pp. 48-50, 52-53. See Denison to Cooper, 23 September 1856, Denison Correspondence, FM 3/795, ML for an example of Denison's view of colonial politicians, including ministers, and their attempts to govern responsibly. Responsibility, Denison said, was but a name, meaning nothing but the right of the majority to make fools of themselves. See also S.G. Foster, *Colonial Improver: Edward Deas Thomson 1800-1879*, Melbourne University Press, Melbourne 1978, p. 130; Alan Powell, *Patrician Democrat: The Political Life of Charles Cowper 1843-1870*, Melbourne University Press, Melbourne 1977, p. 58; John M. Ward, *Earl Grey and the Australian Colonies 1846-1857: A Study in Self-Government and Self-Interest*, Melbourne University Press, Melbourne 1958, p. 280; John M. Ward, *James Macarthur: Colonial Conservative, 1798-1867*, Sydney University Press, Sydney 1981, p. 198.

3 K. Bailey, "Self-government in Australia 1860–90" in J. Holland Rose, A.P. Newton, E.A. Benians (gen. eds.), *Cambridge History of the British Empire*, Cambridge University Press, Cambridge 1937, ch. 14, vol. 7, p. 399.

4 Foster, p. 131, Foster citing Nicholson to Macarthur, 15 September 1855, Macarthur Papers, vol. 27, MS. A2923, ML; Ward, *Macarthur*, pp. 200-203. See also Brian Dickey, "Responsible Government; the Transfer of Power in a Colony of Settlement", *JRAHS*, vol. 60, pt. 4, Dec. 1974, pp. 222-225.

5 See C.H. Currey, "The Beginning in New South Wales of Responsible Government", *JRAHS*, vol. 42, pt. 3, 1956, pp. 116, 118-121; Foster, pp. 130-134; Alan T. Atkinson, "The Political Life of James Macarthur", PhD thesis, Australian National University 1976, pp. 392-393; Ward, *Macarthur*, pp. 203-204.

and as the defender of the government in the legislature.[6]

On his return to Sydney in early January 1856, Thomson had many lengthy discussions with Denison and his fellow conservatives about future political arrangements. From the outset however, Thomson was reluctant to commit himself. On 21 January, Denison wrote to him to confirm that he wished him to form the first ministry. He stressed Thomson's qualifications and expertise—his long acquaintance with the colony, his knowledge of its wants, his thorough familiarity with the machinery of all the existing establishments, his well known and recognised administrative ability—all of which naturally singled him out as the person best qualified to conduct the business of government in the present circumstances. Thomson endeavoured without success to meet Denison's request that he form the first ministry, informing Denison that, with one exception, the colleagues with whom he had served for so many years were unwilling to join him.[7] He also declined a petition from West Camden constituents to run for the lower house, on the ground of ill-health. He was probably also concerned not to risk the pension that he was entitled to receive under the Constitution Act when he retired as colonial secretary on the appointment of the new ministry. However, S.G. Foster suggests that there were other, more substantial reasons for Thomson's reluctance. These included uncertainty as to whether he would remain in Australia after he retired and a disinclination, after his long-term, unchallenged leadership of the government, to engage in political wrangling and submit himself to popular election. Thomson did indicate, however, that he would accept a seat in the upper house.[8]

Denison, in sole control of the government, manoeuvred adroitly through uncharted waters in managing the initial phases of the new system, ensuring, at the same time, that he maintained a firm control on events by means of the executive council. In early February, he appointed Macarthur, Nicholson, William Macleay and the senior military officer, Colonel Bloomfield, to a provisional executive council, saying that these were men unconnected with party politics and on whose impartiality and intelligence he could rely. However, he soon discovered that "they knew precious little about administration", and was obliged to add three of the old, experienced bureaucrats, Thomson, Riddell and Merewether, to the temporary

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6 Foster, p. 130; Michael Roe, *Quest for Authority in Eastern Australia 1835-1851*, Melbourne University Press in association with Australian National University, Melbourne 1965, p. 56.

7 Denison to Thomson, 21 January 1856, CO 201/493, ff. 258-260; Thomson to Denison, 24 January 1856, CO 201/493, ff. 261-263; Ward, *Macarthur*, pp. 203-204; Dickey, p. 224.

8 Foster, p. 134; Loveday and Martin, p. 9.

executive.[9] Despite contrary suggestions from some quarters, Denison decided not to appoint the members of the new upper house before he had an executive council supported by a majority in the lower house.[10] Resolution of that issue therefore depended on the outcome of the lower house elections, which took place between 11 March and 19 April 1856. At that time, Deas Thomson made a second abortive attempt to muster support for a ministry. He told Denison that he had offered Stuart Donaldson the positions of colonial secretary and leader of the lower house, Plunkett and Manning the crown law positions, and Parker the post of auditor-general, but that only Manning was willing to serve with him.[11]

Although there was no recognised leader with a majority in the assembly after the elections, Denison commissioned Donaldson to form a ministry.[12] Donaldson succeeded, and he and his proposed ministerial colleagues, Macarthur (whose place was taken shortly after by Thomas Holt), Manning, Darvall and Nichols, replaced the provisional executive council on 29 April.[13]

The new parliament opened on 22 May 1856 but was then adjourned so that the proposed ministers, other than Manning, a current department head, could submit themselves to the electorate again, as required by the constitution, before accepting an office of profit. In the interim, Denison kept the old officials in their posts and they attended to the administration of public business while Denison and the new executive councillors worked on nominations for the upper house.[14]

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9 Denison to Grey, 19 February 1856, CO 201/493, ff. 251-255; Currey, p. 121.

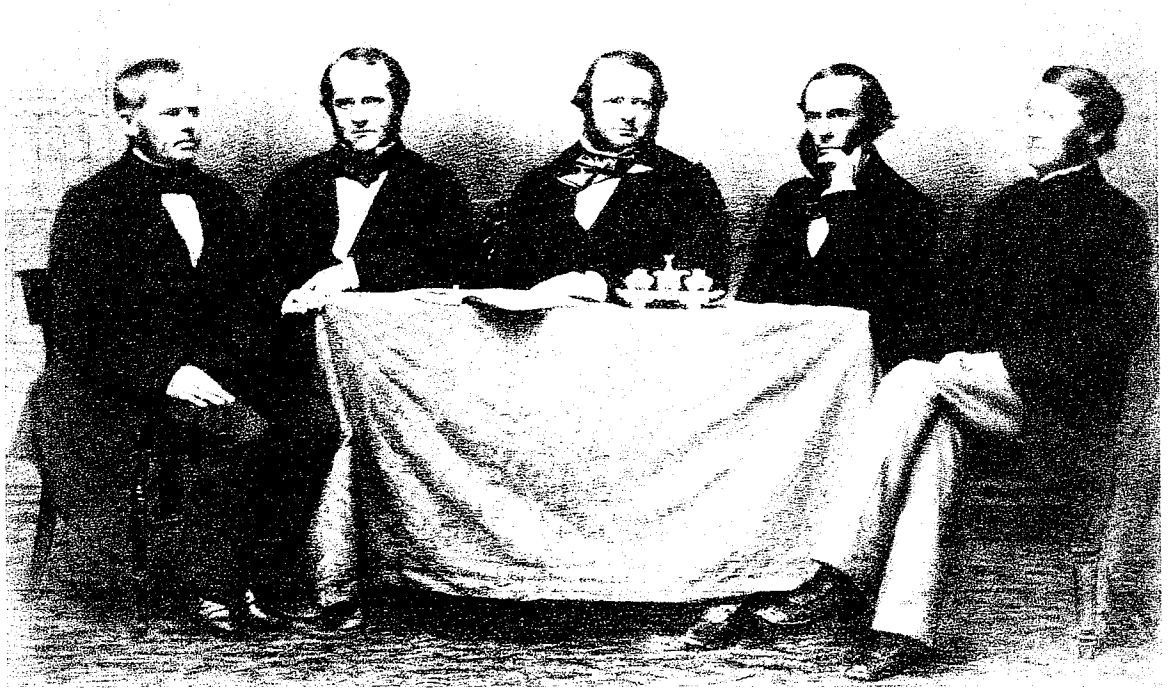
10 *SMH*, 5 April 1856, for example, suggested that the crown should constitute the upper house initially and that the new ministry, when in place, could add to it to bring both houses into harmony. See also John M. Ward, *Colonial Self-Government: The British Experience 1759-1867*, Macmillan Press Ltd, London 1976, p. 319.

11 Thomson to Denison, 20 April 1856, CO 201/493, ff. 93-94; Dickey, p. 226.

12 See *SMH*, 27 May 1856, which noted that it would probably be impossible to find five among the 54 members of the assembly whose "paternal creed and traditional politics are exactly identical". See also Loveday and Martin, p. 23; Dickey, pp. 226-227; Ward, *Macarthur*, pp. 204-210; C.M.H. Clark, *A History of Australia*, vol. 4, *The Earth Abideth For Ever 1851-1888*, Melbourne University Press, Melbourne 1978, p. 108; A.W. Martin, *Henry Parkes: A Biography*, Melbourne University Press, Melbourne 1980, pp. 139-140; Powell, pp. 61, 66-67, who noted that Cowper expected to be offered the premiership. Indeed, Denison told Labouchere that he should have sent for Cowper because he had more experience and administrative talent than Donaldson. However, the conservative Denison distrusted Cowper because he was "a needy man, and associated with needy men". Denison to Labouchere, 12 June 1856, Denison Correspondence, FM 3/795, ML.

13 See Currey, pp. 126-128; Denison to Labouchere, 14 May 1856, CO 201/494, ff. 86-91; Denison to Labouchere, 11 August 1856, CO 201/494, ff. 390-394.

14 See Currey, pp. 127-128.



The first executive council under responsible government
(T. Holt, W.M. Manning, S.A. Donaldson, J.B. Darvall, G.R. Nichols)
Reproduction courtesy of the Mitchell Library, State Library of New South Wales

The 36 members of the upper house were, as Denison reported, selected with the greatest care and without reference to their political views, "to make the upper house as much as possible the representative of all the varying parties, classes and interests of the community", thereby ensuring that the house would have the community's confidence. Some seats were offered to members of the former government, Denison said, partly out of respect and partly because "their knowledge of administrative arrangements and ... the mode in which Government had hitherto been conducted would render their services valuable".[15] These men, Thomson, Merewether and Riddell, could offer the chamber the benefit of their very substantial experience and expertise. They were joined by four other experienced crown nominees from the old council, George Allen, Alexander Berry, Edward Broadhurst and James Mitchell (president of the medical board) and by former elected representatives, Roger Therry, now a supreme court judge, William Dumaresq, W.P. Faithfull and Robert Fitzgerald, all pastoralists, George Hill, a Sydney butcher, slaughter-house owner, pastoralist, alderman and magistrate and Francis Lord, a Bathurst merchant.[16]

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15 Denison to Labouchere, 22 August 1856, CO 201/494, ff. 512-514.

16 See *ADB*, 4, pp. 398-399 on Hill. His selection highlights the egalitarian nature of colonial society. Both of his parents had been transported and he had very little formal education.

The upper house appointees to serve in a legislature for the first time also possessed wide experience and talents. They included the military commander, Colonel Bloomfield, supreme court judges Stephen and Dickenson, lawyers James Bligh, G.K. Holden, Robert Johnson and R.J. Want and surgeons A.M. a'Beckett, Joseph Docker and J.F. Murray (also a landed proprietor, and Terrence Murray's brother). Merchants John Campbell, David Jones and H.G. Smith were joined by men who had mixed mercantile activities with other pursuits, such as sugar-refiner and banker Edward Knox, financier J.L. Montefiore, brewer Robert Tooth and entrepreneur Robert Towns. While Alexander Busby, native-born R.P. Jenkins, Robert Lethbridge and James Walker were mainly pastoralists, and Alexander Warren was an agricultural proprietor, many of the other upper house nominees also had rural interests.[17] In short, about one third of the nominees were pastoralists or farmers, over a quarter were merchants, businessmen and manufacturers and the remainder were professionals, judges and retired public servants. All in all, it was an impressive group, including many men of community standing, and some with long records of voluntary public service in education, religion and charity as well as in politics. The bias, if any, favoured the urban elite of educated conservatives from the city and suburbs, especially judges and lawyers.[18] However, the chamber also included men such as Holden, a conservative liberal, Cowper's liberal lawyer friend, Bligh and five others, a'Beckett, Alexander, Jones, Johnson and Montefiore, who had been listed as members of constitution committee.[19] While Denison referred to "respectability" as well as "character" as the selection criteria, the assemblage was hardly one of politically conservative patricians, but rather consisted of men who were capable of applying their particular expertise to the business of law-making.[20] Denison's priorities may have influenced at least some of the selections, but the group as a whole indicates the existence, in spite of the rhetoric of the constitution debates, of a wide consensus on the need for expertise in the upper chamber. Thomson declined the presidency, pleading that the post was political and might endanger his pension. It was accepted by Chief Justice Alfred Stephen.

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17 See *ADB*, 1-6; *PR* NSW pp. 38-43; C.N. Connolly, *Biographical Register of the New South Wales Parliament 1856-1901*, Australian National University Press, Canberra 1983.

18 See Ward, *Macarthur*, pp. 216-217; C.N. Connolly, "The Middling-Class Victory in New South Wales, 1853-62: A Critique of the Bourgeois-Pastoral Dichotomy", *Historical Studies*, vol. 19, no. 76, April 1981, pp. 380-381. See also A.W. Martin, "The Legislative Assembly of New South Wales, 1856-1900", *Australian Journal of Politics and History*, vol. 11, no. 1, 1956 for a study of the occupational status of members of the New South Wales lower house between 1856 and 1900.

19 See *SMH*, 20 August 1853 and *Empire*, 22 August 1853 for lists of members of the constitution committee.

20 Denison to Labouchere, 22 August 1856, CO 201/494, f. 514.

Once Donaldson and his colleagues had been re-elected, the new ministers took control of their portfolios and the old officials were permitted to retire and receive their pensions. Although Thomson had disappointed Denison, and Donaldson complained that "the highly paid pensioners" were not assisting their successors, Thomson did provide Denison with advice on the urgently necessary task of re-organising the work of the government departments.[21] Governor Darling's centralised administration system of the late 1820s, in which the colonial secretary's department acted as the focal point and clearing house for most government business, was essentially unchanged. Thomson provided a comprehensive plan for the allocation of government business among a new system of departments, each headed by a minister responsible to the legislative assembly.[22] However, Thomson said, it was no easy matter to adapt the machinery of government to the form required by the new constitution. A transitional period, with some inconvenience, was inevitable. Had he been a member of the new administration, Thomson said, he would have submitted the subject to a commission of experienced government officers, selected from different departments, who were intimately acquainted with all details of public business—that is, to the experts. Perhaps with some presentiment of things to come, Thomson suggested that ministers should concentrate on "large measures of general policy", leaving the details more appropriately to departmental heads. To prevent inconvenience to the public service and to ensure that the machinery of government was never stopped or impeded by changes in administrations, it was in his view necessary that a permanent under-secretary and clerical staff must be attached to each minister.[23]

When Denison wrote to the Secretary of State, Henry Labouchere, in August 1856, he drew attention to one aspect of the inexperience of the politicians who now bore executive responsibilities. In the past, when they were in opposition, these men had commonly criticised government extravagance. Now they found that the setting up of the new departmental arrangements to enable business to be allocated among the five responsible ministers necessitated an increase, rather a reduction, in the expenses of government. Denison

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21 Foster, pp. 135, 143, Foster citing Donaldson to James Macarthur, 4 July 1856, Macarthur Papers, MS A2923, pp. 577-579, ML; Arthur McMartin, *Public Servants and Patronage: The Foundation and Rise of the New South Wales Public Service, 1786-1859*, Sydney University Press, Sydney 1983, p. 266.

22 See ibid., pp. 142-147. See also Ward, *Macarthur*, pp. 219-220; Loveday and Martin, p. 108; McMartin, p. 251. See also Dickey, pp. 230-239 on administrative arrangements.

23 See *SMH*, 11 July 1856 in which the letter, Thomson to Denison, 2 July 1856, on departmental arrangements was reproduced. See also Currey, pp. 133-134. The leaking of Thomson's letter to the *Empire* caused outrage among Donaldson's ministers and others. See, for example, James Macarthur to Donaldson, 11 July 1856 and Stephen to Donaldson, 9 [?] July 1856, Donaldson Papers-letters received 1829-1857, CY 1355 (A726 vol. 2), ML.

observed that this ignorance of the functions of government and of the expense which their due performance necessarily entailed, would be one of the great difficulties facing each ministry for several years to come.[24] In fact, this issue caused Donaldson's downfall. When he moved on 20 August for the appointment of a select committee to report on the proposed ministerial arrangements and on ministerial salaries, which Thomson had recommended should be the subject of a permanent appropriation, his motion was carried by only 24 votes to 22. Believing that his ministry was incapable of maintaining a majority in the house, Donaldson resigned.[25]

Both houses of the new parliament had first met for the despatch of business on 5 August 1856. While the upper house provided stability (even with membership changes), the lower house did not. The new legislature was dissolved on 19 December 1857. In that short period, there had been four ministries. As forecast by James Macarthur, in the absence of a political party structure, the new ministries, chosen mainly on personal rather than ideological grounds, were highly unstable. This chronic instability was heightened by the fact that neither side of the lower house was homogeneous. Besides, members' interests fell into more than one area.[26] Denison informed Labouchere that he was not in the least surprised that Donaldson's ministry had been forced to resign. As there were no party attachments, many of the questions raised, especially those involving changes in existing arrangements, affected the personal feelings of some members and "the peculiar fancies of others" and led them to change their alliances.[27] It was hardly an auspicious start for "responsible government".

Although the Constitution Act provided for five-year parliamentary terms, there were ten ministries in the first ten years of responsible government. The political instability of this period contrasted starkly with the lengthy periods of concentrated legislative activity after 1843, especially during FitzRoy's administration from the latter half of 1846. Donaldson's conservative ministry lasted for two months and 20 days. The first ministry of his successor, Charles Cowper, the leader of the liberal-democratic movement, was gone in only one month and seven days. Then followed Parker's ministry, a mixed, shifting conservative body, which

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24 Denison to Labouchere, 11 August 1856, CO 201/494, ff. 392-393.

25 See Foster, p. 143; McMartin, pp. 266-273.

26 Loveday and Martin, p. 25. See also P. Loveday, "The Legislative Council in New South Wales, 1856-1870", *Historical Studies*, vol. 11, no. 44, April 1965, on the functioning of the upper house between 1856 and 1870.

27 Denison to Labouchere, 13 September 1856, CO 201/495, ff. 68-73. See also Denison to Labouchere, 28 October 1856, CO 201/495, ff. 268-272 on Cowper's appointment and fall and the appointment of Parker's ministry; also *SMH*, 31 May, 3 June 1856 for discussion of government under the new regime, the principles of which, the editor said, were little understood.

survived for almost a year before falling under a Cowper onslaught. Cowper's second ministry lasted until October 1859, but that administration was also punctuated by ministerial changes and the dissolution of the first and second parliaments, the second parliament lasting only for a little over 12 months. During the third parliament, which commenced on 30 August 1859, Cowper's second administration fell and was replaced in late October 1859 by William Forster's ministry, which survived until early March 1860. The third parliament was dissolved on 10 November 1860 during Robertson's administration, which merged with Cowper's third ministry in January 1861. A further succession of short-lived ministries, with numerous personnel changes, continued into the early 1870s. While membership of ministries was fluid, so too was that of the parliament itself, with frequent resignations, especially from the lower house, and some deaths (including that of Nichols in 1857).[28] The attendance of members could be patchy. For example, there was no quorum in the lower house on nine occasions between mid-December 1858 and mid-March 1859.[29] In *The Parliament of New South Wales 1856–1965* (1971), G.N. Hawker provides a comprehensive account of the conduct of parliamentary business in these early years. He notes that the legislative assembly was counted out on 93 occasions after the commencement of business during the 1859–60 session of 123 sitting days, an indication of deliberate delaying tactics, members often choosing not to take their places in the chamber for the conduct of business.[30]

Some major pieces of legislation were passed during the new parliament's early years, including the repeal of the two-thirds requirement for constitutional change, introduced by Donaldson initially, in 1857, the restoration of Sydney's municipal government during Parker's administration in the same year, electoral reforms in 1858 and land law reforms in 1861. However, the post-1856 governments were nowhere near as legislatively productive as the law-makers of the preceding 13 years, as appears from the tables at the end of this chapter. This was despite the fact that a number of the new ministers, such as Cowper, Nichols, Manning, Martin and Murray, had been actively involved in the pre-1856 law-making bonanza. The experience of others in that period, however—of Donaldson, Darvall and Robert Campbell, for example—had consisted largely of criticism from the sidelines. A few of the old officials survived the transition and sat in the parliament, Manning, for instance, with considerable success and longevity, and Plunkett for a far shorter and more

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28 See *PR* NSW pp. 27-28, 35, 38-70, 92-218, 263-271; Martin, pp. 140-141, 148, 150-154, 164, 170-174, 177-180, 209-214; Ward, *Macarthur*, pp. 211-215, 217-237.

29 See *V&P* NSWLA 1858-59, vol. 1.

30 G.N. Hawker, *The Parliament of New South Wales 1856-1965*, Victor C.N. Blight, Government Printer, Sydney 1971, p. 64.

uncomfortable period. Thomson, whose time had clearly passed, played a peripheral role as the government's representative in the upper house during Parker's administration. In all, it was exceedingly difficult for members of the parliament, especially those whose first legislative experience occurred after 1855, to acquire the law-making expertise which many members of the old regime had possessed. It was equally difficult for the experienced old-hands to organise the forces around them as they had done hitherto. The old networks and relationships were largely broken up and the source of power was relocated. As a result, the machinery of law-making was fundamentally unsettled, the triumph of the democratic electoral principle overwhelming the clear utilitarian priorities of the earlier period.

Despite the disruption, select committees continued to be popular, their utility for information-gathering and as vehicles for developing and promoting policy ideas with the aid of expert evidence being well established. Both houses made effective use of them.[31] In his study of the New South Wales parliament, Hawker observes that the most obvious thing about the parliamentary committees in this period was their number, the legislative assembly appointing 589 committees between 1856 and 1880. About half of these related to private bills and a further tenth was appointed to continue the work of committees that lapsed on prorogation of an earlier session. Nevertheless, a substantial number dealt with a wide range of other purposes, including the examination of public legislation.[32] However, many of the parliamentary committees suffered, like the parliament itself, from frequent changes in membership, assembly records showing, for instance, that in the short 1857 session of just over four months, four committees did not meet at all and seven others were stopped by the parliament's prorogation.[33]

Committees had been employed for tactical purposes on occasion before 1856, and with democratic pressures fully in play that aspect now assumed a greater importance, as factions fought for control of government. A motion to appoint a committee was an easy way to test a government's strength on a particular issue, 20 opposition motions of this kind succeeding in the first ten years of responsible government. As previously, committee reports were sometimes adopted against government wishes and governments seldom acted on them. On the other hand, governments sometimes appointed committees to remove troublesome issues

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31 Ibid., pp. 81-88 for a discussion of the parliament's committee system.
32 See ibid., pp. 83, 87.
33 *V&P* NSWLA 1856-57 and 1857, vol. 1.

from public gaze, a tactic hardly conducive with public accountability.[34] And some members, such as Cowper, who had extensive pre-1856 experience in committee work, continued to dominate their proceedings, even when burdened with ministerial responsibilities.[35] Committees also served other purposes. Participation on committees enabled members, whether factional leaders or lesser men, to increase their understanding of the political and personal realities of the house and of aspects of public administration, and, as Hawker says, to "win support, or be won themselves, for a particular parliamentary grouping".[36] Committee work, along with patronage, contacts with the bureaucracy and with long-serving ministers, were all necessary parts of the democratic parliamentary regime before development of a party system.[37]

In spite of the instability of the times, the public service, with its now firmly established routine, soldiered on with day-to-day administration.[38] In Britain, as MacDonagh pointed out, civil servants, who provided direction, uniformity and continuity in executive practice, were permanent figures on the landscape, while politicians came and went.[39] In the colonial context, Desley Deacon has argued that the autonomy and power that the public service had acquired by 1856 had been strengthened by the visibility and influence of its leaders as members of the legislative council in the previous 13 years. Their dual legislative and executive status strongly coloured the expectations of future departmental heads about their role.[40]

By 1855, the New South Wales public service, which then numbered more than 2 000, had developed many features characteristic of the modern bureaucracies to which MacDonagh and others referred, including specialisation of functions, hierarchical structure, regulations defining responsibilities, and objective qualifications for office and promotion. As McMartin notes, quality had also improved, 47 of the pre-1856 public servants being either university graduates or previously commissioned officers, while patronage, in its classic eighteenth-century form, had ceased to operate (only to be re-introduced after 1856 as "a

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34 Hawker, p. 86.
35 Ibid., p. 84.
36 Ibid., p. 86.
37 Ibid., p. 94.
38 Ibid.
39 See Chapter 1.
40 Desley Deacon, *Managing Gender: The State, The New Middle Class and Women Workers 1830-1930*, Oxford University Press, Melbourne 1989, pp. 47-48, 50-55.

dubious ministerial perquisite").[41] Importantly, with the installation of the new departmental system from 1856 as outlined by Deas Thomson, each minister, however inexperienced, was assisted in carrying out his supervisory and policy-making duties by an under-secretary and a clerical staff. On a change of government, or of minister, a new incumbent was supported by a group of knowledgeable officials who were ready and able to advise him on the numerous decisions which he would be called on to make as the head of his portfolio. Further, with the ever-increasing volume of business dealt with by the departments, an ever-increasing number of decisions were actually made within the bureaucracy by the public servants themselves although, nominally, they were made by the minister.[42]

Table 1—Legislation between August 1843 and December 1855[43]

Council	Duration	Bills initiated	Bills passed	Bills assented to	Bills reserved for royal assent	Assent withheld from bills
Fourth Aug. 1843–June 1848	c. 5 years	252	172	156 average 31. 2 p.a.	11	5
Fifth May 1849–May 1851	2 years	145	103	102 average 51 p.a.	1	
Sixth Oct. 1851–Dec. 1855	c. 4 ¼ years	327	246	243 average 57. 2 p.a.	3	

41 McMartin, pp. 249-250; Paul Finn, *Law and Government in Colonial Australia*, Oxford University Press, Melbourne 1987, p. 57. On patronage, see P. Loveday, "Patronage and Politics in New South Wales, 1856-1870", *Public Administration, Journal of the Australian Regional Groups of the Institute of Public Administration*, vol. 18, 1959, pp. 341-358.

42 Ibid., pp. 289-290; Finn, pp. 48-49, 61-62. See also Henry Parris, *Constitutional Bureaucracy: The Development of British Central Administration since the Eighteenth Century*, George Allen and Unwin, London 1969, pp. 131-133.

43 See summaries of proceedings on bills, *V&P* NSWLC 1843-1855.

Table 2—Legislation between May 1856 and November 1864[44]

Parliament	Duration	Bills in or received by legislative assembly	Bills passed and assented to	Bills reserved for royal assent
First Apr. 1856–Dec. 1857	1yr, 7m, 19d	117	53 average 32. 3 p.a.	3
Second Feb. 1858–Apr. 1859	1yr, 1m, 15d	70	39 average 34. 9 p.a.	
Third July 1859–Nov. 1860	1yr, 3m, 11d	103	20 average 15. 6 p.a.	
Fourth Dec. 1860–Nov. 1864	3yr, 10m, 10d	265	112 average 29 p.a.	4

While the legislators of the new regime had been provided with precedents and methods for highly productive, inclusive and accountable law-making as a result of the activities of the preceding 13 years, the legislative returns of the early parliamentary period failed to live up to the promise of the immediate past, at least in terms of the number of bills enacted. Importantly however, two of the few major reforms that were pushed through in the first three years resulted in the displacement of conservative rule and the beginning of a lengthy period of liberal-democratic ascendancy. These were the repeal of the two-thirds requirement for constitutional change and the electoral reforms of 1858. So far as select committees were concerned, the solid groundwork of the pre-1856 years paid dividends, with the system being firmly entrenched in parliamentary practice from the outset. It also proved to be capable of further development to meet the political exigencies of the day. And throughout this period of fluctuating political fortunes, the public service provided stability and continuity, as in Britain, and ensured that the day-to-day administrative needs of the community were met.

44 See summaries on proceedings on bills, *V&P* NSWLA and *J* NSWLC 1856-1864.

Conclusion

A central problem for this thesis has been to consider how closely New South Wales in the mid nineteenth-century followed developments in government and the management of legislative business in Great Britain and, in particular, to apply Oliver MacDonagh's insights regarding those developments to the colonial context in a thorough-going fashion. Conversely, I have also attempted to use those insights in order to further enlarge our understanding of Australian experience. Consideration of these problems has involved the probing of a number of facets and, given the nature of the problem, it has not always been possible to arrive at clear-cut conclusions.

The thesis has considered what colonial governments and legislators actually did in the field of law-making from the mid 1820s, and especially in the 13 years leading up to the commencement of parliamentary government in 1856, and for what purposes and by whom legislative power was being exercised. It has considered the impact of historical events and of ideas about this activity, and the increasing emphasis placed on the need for expertise in government and the public service, especially by adherents of utilitarianism. The thesis has examined the introduction of public opinion, especially of an expert nature, into the business of law-making, well before responsible government, and the means by which this was achieved, looking in particular at the growing importance of select committees, the use of petitions and the role of the popular press.

In the area of law-making itself, it has been seen that when the first partly elected legislative council commenced business in 1843, a small number of elected members hit the ground running, took the initiative from the executive and encroached on areas which, until then, had been the exclusive province of government. Exercising their own enterprise and imagination, they were determined to address pressing public problems arising from the severe economic depression. In introducing innovative and creative bills, they exhibited genuinely interventionist and paternalist aspirations. They thus highlighted differences of opinion between themselves and the laissez-faire Gipps government, which was roundly criticised for its apparent indifference to community suffering. Members such as Wentworth and Windeyer, who were traditionally suspicious of government, also initiated attacks on government bills from this council's first session. This and associated harassing tactics assumed greater prominence between 1844 and the end of Gipps' administration in June

1846. A great deal of energy was expended on obstructive tactics aimed at righting grievances with the imperial government, Wentworth in particular being fixated on securing control of colonial revenue and crown lands for the local legislature. In this period, the government and elected members assumed Whiggish stereotypes, of a government-versus-opposition and empire-versus-colony character, typical of Wentworth's approach before 1843, with activity in the house and a number of its committees being directed to rousing public opinion against the government.

Appendix 1.1 shows that the effects of this confrontation on the law-making endeavours of the government and elected members were varied. In 1843, 16 of the government's 20 bills were enacted and one was reserved while, coincidentally, 16 of the elected members' 20 bills were successful, with another reserved and assent being withheld from one. When matters became more difficult in 1844, legislative output slackened and only 12 of 21 government bills and six of the 23 elected members' bills were enacted, three of the latter being reserved and three denied assent. However, in 1845, 19 of the 21 government bills were enacted and one reserved and ten of 19 elected members' bills succeeded with one reserved. In the last spiteful session of Gipps' administration, four of the nine government bills were enacted but none of the elected members' nine bills. Nevertheless, during the last 3½ years of Gipps' administration, 76 laws were enacted, 54 initiated by the government and 22 by elected members, with two government and five elected members' bills reserved and assent being withheld from four. In this period, Wentworth was the dominant figure in the opposition ranks, his opposition being apparent in law-making as well as in antagonistic rhetoric, since he introduced 21 bills, with eight enacted, one reserved and assent being withheld from another.

Although grievances with the imperial government continued to exercise the minds of many elected members, and especially that of Wentworth, until 1853, the advent of FitzRoy's more relaxed administration in mid-1846 saw the resumption of a positive and sustained approach to the exercise of law-making, at least on the part of the so-called conservative elected representatives. Here, the occurrence of a similar dichotomy of method as occurred between 1844 and mid 1846 can be detected, but now all at once, as the liberals adopted the oppositionist line and the conservatives became the constructive legislators again. The conservative ranks included Wentworth, long since liberty's champion, his popularity, especially in his own electorate of Sydney, having fallen away. It has been

argued that the relatively short period of rabid anti-Gipps activity between early 1844 and mid 1846, though it has captured the attention of historians as typical of the time, was an aberration in a remarkably long period of original law-making, even before the colony obtained responsible government. In the little over nine years from mid 1846 to 1855, 246 government and 179 elected members' bills were enacted (with eight elected members' bills reserved and assent withheld from one). And as has been shown in Chapter 11, the magnitude of that effort far exceeded anything that politicians of any political persuasion could produce in the early parliamentary period. Between the middle of 1846 and the fourth council's last session in 1848, Wentworth continued to dominate in terms of bills initiated by elected members, introducing 14 bills, with nine enacted, another reserved and assent being withheld from one. Robert Lowe, in a brief flurry as an elected member before he returned home to England, introduced 11 bills, eight of which were enacted. By contrast, in that period, Cowper brought in only three bills, one receiving assent and another being reserved, a scanty record duplicated to some extent when he became the liberal leader in the early period of responsible government.

In the period between 1849 and 1855, bridging the end of FitzRoy's administration and the beginning of that of Denison in January 1855, G.R. Nichols was by far and away the most active elected legislator, as Appendices 2.1 and 3.1 show. He introduced 69 bills of which 50 were enacted, extraordinary numbers involving prodigious stamina for an elected member without the benefit of the bill production and management resources (such as they were) that the government possessed. Wentworth, who left the colony before the 1854 session started, introduced 26 bills, 17 being enacted and two reserved. On the liberal side, Cowper introduced 30 bills and was successful with 26. However, Cowper can be seen as the promoter of entrepreneurs, as all but two of these were private bills, figures which make a clear statement about the priorities of those on the liberal side of politics at that stage. It has also been seen that, on the government side, once Thomson, the generally staunch supporter of laissez faire, left for Britain in early 1854, the creative utilitarian Manning, sought, with varying success, to introduce various reformist proposals.

In their desire to remake colonial society and to introduce measures that were not entirely in keeping with imperial policy, local politicians of the 1840s and '50s saw no need to rely absolutely on British precedents in their law-making. True, a good many British laws were adopted. However, from the mid 1840s these were almost invariably tailored to

colonial circumstances rather than being simply copied by imperial laws adoption acts, that format becoming the exception to the rule. From 1843, novel solutions to particular colonial problems were developed, invariably by elected members. And this approach continued, the willingness of the early "conservative" legislators to experiment leading directly into the period of dense and impressive social reform of the late 1840s and early 1850s. In this period also, Manning attempted to obtain a degree of a Chadwickian reform in the area of public health, while also promoting law reform initiatives along the lines of those introduced by British utilitarian reformers.

Although obvious difficulties exist in attempting to compare the long-established British parliamentary system, with its party political structure, with the pre-parliamentary New South Wales legislature, the figures cited above are instructive. They illustrate a number of points which support the argument that the colonial approach to law-making differed significantly from that described by MacDonagh and others as occurring in Great Britain from the early 1830s. Contrary to the situation in Great Britain and despite the governor's dominant position and the steady stream of directives from London, law-making in New South Wales before responsible government was not purely the business of government. In New South Wales, as appears from the governors' speeches to open and close legislative sessions, legislative policy was not planned, systematic or continuous from session to session in any formal sense. In fact, more system can be perceived in the legislative program of elected members, especially the more active ones. Further, the elected members, who occupied a somewhat similar position to that of private members in the British parliament, were not reined in or restricted during legislative sessions. On the contrary, they frequently dominated proceedings, providing impetus, structure and creativity and dictating what laws would and would not be enacted. Critically, in doing so, they influenced the form of the evolving state, its institutions and public administration as, for example, in their steadfast refusal to accept Whitehall's scheme for district councils. This role was reinforced by the nature of the laws that they themselves chose to initiate and support over the 13-year period from 1843, such as Wentworth's bill to establish the University of Sydney, Cowper's to initiate railway construction and Nichols' various measures to improve and civilise city life. It is to a consideration of the reasons, or causes, for the enactment of colonial laws that I now turn.

A complex pattern of attitudes and priorities was evident in New South Wales law-making. From the first session under the new legislative regime, the pressure of historical events, including severe economic conditions, propelled some politicians into action, and this action was of an interventionist and paternalistic nature. At the same time, the government, while itself displaying paternalistic tendencies, was wedded to laissez faire and a consequent commitment to avoid legislative interference with the free operation of economic forces. At once then, a play of both historical forces and of ideas is evident. Further, as has been shown by the foregoing figures, the actions of particular politicians, of determined men of the kind described, in English circumstances, by Jenifer Hart, were critically important in the course of colonial law-making. This juxtaposition of what some historians, such as MacDonagh, Kitson Clark and Roberts, proponents of change by irresistible historical process, have viewed as opposing or mutually incompatible forces continued throughout the 13-year period under examination. Intolerable conditions and pressures, whether they were caused by economic depression or by Sydney's problems at the legislature's very doorstep, clearly played a part. But so too did ideas.

The government, at least until the early 1850s, together with liberal politicians, inclined to laissez-faire policies, especially in economic areas. Many "conservative" politicians, who themselves exhibited radical tendencies, and even the radical liberal, Parkes, increasingly adopted a utilitarian approach to colonial problems. The presence and operation of other philosophies and attitudes, of paternalism and its focus on the responsibilities of government and the legislature to solve social and economic problems, and of a desire by some, including utilitarians, to engage in social engineering to protect the orderly and educated sections of the community against assaults from the poor and uneducated, were also evident. It has been seen that much local legislative activity involved a clash between private and public interests, which in turn involved friction between free enterprise and protectionist philosophies. Hancock and Atkinson have drawn attention to the long tradition of state intervention in New South Wales, its early manifestations being noted in the 1820s by Chief Justice Francis Forbes. For Hancock, no clash with individualism was involved because the state was envisaged as a universal provider, an idea with paternalistic overtones that has also been explored by Kim Lawes in her examination of British factory legislation and the paternalist responsibilities of both government and parliament in Britain.

These ideas necessarily lead to a consideration of the impact of utilitarianism in New South Wales. Whatever may have been the case in Britain, everyone who was anyone in governmental, legislative and press circles in New South Wales knew about Bentham and perceived the need either to invoke his policies or to demonstrate their inapplicability when advancing their own legislative schemes. The argument advanced by Parris and Hart, and supported by Dunstan, that utilitarianism could lead to extensions of both laissez faire and state intervention, by the testing of policy against its effect on human happiness or the greater public good, appears apposite for New South Wales, as does Taylor's idea that, sometimes, the one philosophy might moderate the other. As has been seen, the play of these ideas was apparent in moves to regulate trades, businesses and professions, in various proposals to ease economic distress and in government participation in sewerage and similar "public" works. Thus, that part of MacDonagh's thesis that argued for intolerable conditions and historical forces as the sole impetus for legislative change must be rejected, at least for New South Wales. The approach of historians such as Dunstan, Parris, Hart and Andrew Vincent, who have seen a place for both historical events and the operation of a mental climate, has a much closer fit.

However, the truth of many other aspects of MacDonagh's analysis of nineteenth-century governmental change, and its applicability to the colony is admitted. In particular, his emphasis on the growth and importance of expertise in law-making and government and on the critical position of public servants and the bureaucracy—of central control by experts—resonates with circumstances that have been shown to exist in New South Wales. It is clear, for instance, that public servant E. Deas Thomson, with his growing experience, professionalism and expertise, proved to be of invaluable assistance to both Gipps and FitzRoy. His position at the centre of both executive and legislative action made him a much more powerful figure in the colonial scheme of things than was possible for civil servants in Great Britain. Further, with growing confidence and competence, Thomson had been instrumental in keeping the legislature focussed and on an even keel in the years before 1854. In addition, the crown law officers played a crucial role in colonial law-making, which became more interventionist when the utilitarian Manning entered the council in the early 1850s. And although Denison was disappointed when Thomson failed to pursue the premiership, Thomson did provide expert, detailed suggestions for the structure of administration under the new regime. As Perkin pointed out, Jeremy Bentham made sense to professionals, to those having responsibility for expert, efficient administration of the state

and its institutions in the interests of the greatest happiness of the greatest number. It has also been seen that the issue of expertise in government extended to areas such as the replacement of Sydney's corporation by a commission and, in a diffused way, in that area of the debate on the new constitution that related to the composition of the upper house.

Of the other indicators of the emergence of modern government mentioned by MacDonagh and others, clearly executive power in New South Wales was (and continued to be) concentrated in the central government, as previously mentioned. In addition, a number of pieces of interventionist social and economic legislation was enacted and the government exhibited an interest in the use of delegated legislation—regulations—to fill out the detail of legislative schemes. Further, in many cases, neither government nor elected members quibbled about imposing administrative controls, by way of licences and so on, that fettered individual freedom and entrepreneurial action. Another similarity with developments in Great Britain, and which MacDonagh viewed as of tremendous significance in the expansion of the law, relates to the contribution of field executives, a matter to which John Hirst has also referred. It has been seen that colonial public servants of this type, and especially those involved in law enforcement, were becoming increasingly active in making suggestions as to the expansion of the law and the refinement of enforcement techniques.

Legislators in this 13-year period used various more or less experimental methods to harness public opinion and to convert the more expert and interested variety into law. As MacDonagh said, the official inquiry process provided administrators with new confidence, perspective and breadth of vision. It also profoundly affected public opinion, especially in the legislature, by exposing the actual state of things, MacDonagh viewing this exposure as the most potent cause of reform. Antipodean legislators adapted the legislative council select committee so that it became a law-making institution (though not legislative body) itself, a dominant force in the colonial legislative process which facilitated the introduction of outside opinion and expertise as government itself became more specialised. Select committees provided an alternative forum for debate, their relationship with the legislative council being somewhat akin to that between two legislative chambers, with mainly constructive results. From 1843, committees made a remarkable effort to gather information and opinions about social problems, the implication being that the government should do something about them. This suggests that the legislature had genuinely interventionist and paternalist aspirations. But then, by 1844, committees were also being used to marshall

public opinion against the government. It is strongly arguable that the colony's committees assumed a greater importance and exercised a much more dominant influence than those in Great Britain, a development explained perhaps in part by the difference in the size and expertise residing within the two legislatures, that is, between the Houses of Commons and Lords as compared with the legislative council of the 1840s and early 1850s.

The two-way conversation between the council and its constituency was also evident in the use of petitions and in the press. Both were sources of energy and life and both raised public expectations as to what might be achieved. Petitioning was a traditional British method of bringing concerns to the attention of politicians. This method of introducing public opinion into the legislative process had its limitations, being stereotyped and restricted in format and the manner of presentation. However, as De Costa points out, petitioning itself represented an interaction between the petitioners and the authority being petitioned, involving not only the recognition of that authority but also an implicit belief that it would act with benevolence and justice. In any event, the method was readily adopted in New South Wales. The popular press raised public awareness of various possibilities. This is especially evident in the use made by Parkes of the editorial pages of the *Empire* from the early 1850s. However, from the early 1840s, the conservative *Sydney Morning Herald*, no slouch in this department, had been tacking away continually with suggestions to politicians for reforms and informed criticisms of legislative proposals, legislators and enacted laws.

A number of historians of differing interpretative persuasions, including Connell, Irving, Davidson, Atkinson, Dunstan, Paul Finn, W.K. Hancock and Peter Karsten, have rejected the idea that colonial society in eastern Australia was a mere replica of its parent. This study has not only confirmed the correctness of that rejection, at least in the area of law-making, but has also revealed the powerful uniqueness within Australia of the New South Wales legislature in this period, as it pioneered methods of legislative accountability. What has also been revealed is 13 years of tremendous legislative and, even, nation-building effort which provided a strong launching pad for responsible government, even though the introduction of such government was itself followed by something of a legislative dénouement.

After Edward Deas Thomson's death in 1879, the *Manning River Times*, a paper of small circulation to the north of Sydney, reflected on his life's work. In doing so its editor

reflected on "the old days"—the period before responsible government, which has been the main focus of this thesis. Thomson, he said, "had no easy fight to make". Like the pilgrim, he had had to face and do battle with giants, with men of the stamp of Robert Lowe, Wentworth, Dr Lang, J.B. Darvall, Richard Windeyer, James Martin and G.R. Nichols. In that now remote period, debates on state policy were not "the vapid, intemperate wranglings" currently endured, which were symptomatic of the new age of liberal democracy. No, said the editor, and we might well agree with him, these men had expressed "the matured opinions of such cultivated talent, as would do honour to any land".[1]

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1 Obituary of E.D. Thomson, *Manning River Times*, 2 August 1879, Deas-Thomson Papers, MS A1531, vol. 4, CY 730, ML.

Appendix 1[1]

Fourth Council

(8 sessions—1 August 1843 to 20 June 1848)
12 Crown nominees, 24 elected members

Members appointed by governor

Name	Date of appointment	Cessation of membership	Official position Office Date	Remarks
Allen, George, Attorney	28 July 1845	Dissolution June 1848	- -	Nominee on fifth and sixth councils - see Appendices 2 and 3.
Barney, George	17 July 1843	Seat vacated August 1843	Colonial Engineer 1 Jan. 1836	Nominee on sixth council - see Appendix 3.
Berry, Alexander	as above	Dissolution June 1848		Nominee on fifth and sixth councils - see Appendices 2 and 3.
Blaxland, John	as above	Seat vacated 13 Sept. 1844		Died August 1845.
Darvall, John Bayley, Barrister	24 July 1844	Dissolution June 1848		Elected member of fifth council - see Appendix 2.
Elwin, Hastings	17 July 1843	Seat vacated July 1844	Chairman of Committees 1843-44	
Gibbes, John George Nathaniel	as above	Dissolution June 1848	Collector of Customs 1 May 1834	Nominee on fifth and sixth councils - see Appendices 2 and 3
Hamilton, Edward	as above	Seat vacated May 1846		Nominee on fifth council - see Appendix 2.
Icely, Thomas	as above	Dissolution June 1848		Nominee on fifth and sixth councils - see Appendices 2 and 3.
Jones, Richard	as above	Seat vacated Nov. 1843		Elected member of fifth council - see Appendix 2.
Lamb, John	10 Sept 1844	Dissolution June 1848		Elected member of sixth council - see Appendix 3.

[1] Appendix based on *PR* NSW, pp. 8, 13-23; *V&P* NSWLC 1843-1848; *ADB*, 2, p. 387.

Members appointed by governor cont.

Name	Date of appointment	Cessation of membership	Official position Office Date	Remarks
Lithgow, William	17 July 1843	Dissolution June 1848	Auditor-General 14 June 1825 to 30 April 1852	Nominee on fifth and sixth councils - see Appendices 2 and 3.
Lowe, Robert, Barrister	7 Nov 1843	Seat vacated Sept. 1844		Elected member of fourth council - see over.
O'Connell, Lieut.-General Sir Maurice Charles K.C.H.	17 July 1843	Dissolution June 1848	Senior Officer commanding H.M. Land Forces 1838-47 Governor-in-Chief 12 July 1846-2 Aug 1846 Member of Executive Council 5 Oct. 1837-17 Jan. 1848	Died 23 May 1848.
Parker, Henry Watson	11 May 1846	as above	Chairman of Committees, May 1846 to 28 June 1848	Nominee on fifth and sixth councils - see Appendices 2 and 3.
Plunkett, John Hubert, B.A.	7 Aug. 1843	as above	Attorney-General 5 Aug. 1843 to 5 June 1856. Member of Executive Council 10 Nov. 1846 to 19 Dec. 1855	Nominee on fifth and sixth councils - see Appendices 2 and 3.
Riddell, Campbell Drummond	17 July 1843	as above	Member of Executive Council 25 June 1831 to 28 April 1856. Colonial Treasurer - 1 Aug. 1829 to 28 April 1856	Nominee on fifth and sixth councils - see Appendices 2 and 3.
Thomson, Edward Deas	as above	as above	Colonial Secretary and Registrar of Records 1 Jan. 1837 to 28 April 1856. Member of Executive Council 1 Jan. 1837 to 28 April 1856.	Nominee on fifth and sixth councils - see Appendices 2 and 3.

Elected members

Name	Electoral District	Date of Election	Ceased sitting	Official position Office Date	Remarks
Airey, John Moore Cole	District of Port Phillip	Dec. 1847	Dissolution June 1848		
Bland, William	City of Sydney	June 1843	as above		Elected member of fifth council – see Appendix 2.
Bowman, William	Cumberland Boroughs, viz., Towns of Windsor, Richmond, Campbelltown and Liverpool	as above	as above		Elected member of fifth and sixth councils - see Appendices 2 and 3.
Boyd, Benjamin	District of Port Phillip	Sept. 1844	Seat vacated Sept. 1845		
Boyd, Thomas Elder	as above	Aug. 1845	Seat vacated Jan. 1846		
Bradley, William	County of Argyle	June 1843	Seat vacated July 1846		Nominee on fifth council - see Appendix 2.
Brewster, Edward Jones, Barrister	District of Port Phillip	June 1846	Dissolution June 1848		
Coghill, John	Counties of St. Vincent and Auckland	June 1843	Seat vacated April 1845		
Condell, Henry	Town of Melbourne	as above	Seat vacated March 1844		
Cowper, Charles	County of Cumberland	July 1843	Dissolution June 1848		Elected member of fifth and sixth councils - see Appendices 2 and 3.
Curr, Edward	District of Port Phillip	Sept. 1845	Seat vacated June 1846		Elected member of fifth council - see Appendix 2.
Dangar, Henry	County of Northumberland	Oct. 1845	Dissolution June 1848		Elected member of fifth council - see Appendix 2.

Elected members cont.

Name	Electoral District	Date of Election	Ceased sitting	Official position Office Date	Remarks
Donaldson, Stuart Alexander	County of Durham	Feb. 1848	Dissolution June1848		Elected member of fifth and sixth councils - see Appendices 2 and 3.
Dumaresq, William	Counties of Hunter, Brisbane and Bligh	June 1843	as above		Elected member of sixth council- see Appendix 3.
Ebden, Charles Hotson	District of Port Phillip	as above	Seat vacated April 1844		Elected member of fifth council - see Appendix 2.
as above	as above	Mar. 1848	Dissolution June 1848		
Faithfull, William Pitt	County of Argyle	July 1846	Dissolution June 1848		
Foster, John Fitzgerald Leslie	District of Port Phillip	June 1846	Dissolution June1848		Elected member of fifth council – see Appendix 2.
Foster, William, Barrister	County of Northumberland	June 1843	Seat vacated Oct. 1845	Solicitor-General 12 Jan. 1848 to 19 Nov. 1849	
Grant, Patrick	Northumberland Boroughs, viz Towns of East Maitland, West Maitland and Newcastle	10 Sept. 1845	Dissolution June 1848		Election challenged - subsequently resworn.
Lang, John Dunmore, D.D.	District of Port Phillip	June 1843	Seat vacated Nov. 1847		Elected member of fifth and sixth councils – see Appendices 2 and 3.
Lawson, William	County of Cumberland	as above	Dissolution June 1848		
Lord, Francis	County of Bathurst	as above	as above		

Elected members cont.

Name	Electoral District	Date of Election	Ceased sitting	Official position Office Date	Remarks
Lowe, Robert, Barrister	Counties of St. Vincent and Auckland	April 1845	Dissolution June 1848		Elected member of fifth council - see Appendix 2.
Macarthur, Hannibal Hawkins	Town of Parramatta	June 1843	as above		
McLeay, Alexander	Counties of Gloucester, Macquarie and Stanley	June 1843	Died 19 June 1848.	Speaker 1 Aug. 1843 to 19 May 1846	
Mitchell, Sir Thomas Livingston, Knt.	District of Port Phillip	April 1844	Seat vacated 15 Aug. 1844	Surveyor-General 27 May 1828 to 5 Oct. 1855	
Murray, Terence Aubrey	Counties of Murray, King and Georgiana	June 1843	Dissolution June 1848		Elected member of fifth and sixth councils – see Appendices 2 and 3.
Nicholson, Sir Charles, M.D.	District of Port Phillip	as above	as above	Chairman of Committees 2 Aug. 1844 to 19 May 1846 Speaker 20 May 1846 to June 1848	Elected member of fifth and sixth councils - see Appendices 2 and 3.
O'Connell, Maurice Charles	District of Port Phillip	Aug. 1845	as above		
Panton, John	Counties of Cook and Westmoreland	June 1843	as above		
Robinson, Joseph Phelps	Town of Melbourne	Mar. 1844	as above		Died 13 August 1848.
Suttor, William Henry	Counties of Roxburgh, Phillip and Wellington	June 1843	as above		Elected member of fifth and sixth councils - see Appendices 2 and 3.

Elected members cont.

Name	Electoral District	Date of Election	Ceased sitting	Official position Office Date	Remarks
Therry, Roger, Barrister	County of Camden	June 1843	Seat vacated Jan. 1845	Attorney-General 21 Mar. 1841 to 4 Aug. 1843	
Thomson, Alexander, M.D.	District of Port Phillip	as above	Seat vacated Mar. 1844		
Walker, Thomas	District of Port Phillip	as above	Seat vacated Sept. 1845		
Wentworth, D'Arcy	Northumberland Boroughs, viz., Town of East Maitland, West Maitland, and Newcastle	as above	Seat vacated Aug. 1845		
Wentworth, William Charles, Barrister	City of Sydney	as above	Dissolution June 1848		Elected member of fifth and sixth councils – see Appendices 2 and 3.
Wild, John	County of Camden	Feb. 1845	as above		
Windeyer, Richard, Barrister	County of Durham	June 1843	Died 2 Dec.1847.		
Young, Adolphus William	District of Port Phillip	April 1844	Seat vacated July 1845	Sheriff 8 Oct. 1842 to 1 Dec. 1849	

Appendix 1.1

Part 1

Fourth council—bills initiated by government and elected members[1]

Session 1 (1843) 1 August–28 December 1843

Bills initiated by	**No. initiated**	**Assented to**	**Reserved**	**Assent withheld**
Government				
Gov.'s message	16	12	1	
Attorney General	2	2		
Col. Secretary	2	2		
Total Govt.:	**20**	**16**	**1**	
Elected members				
W. Bowman	1	1		
A.D. Lang	1			
C. Nicholson	2		1	
R. Therry	1	1		
W.C. Wentworth	6	4		
R. Windeyer	2			1
Total elected:	**13**	**6**	**1**	**1**
Add Govt.:	**20**	**16**	**1**	
Total for session	**33**	**22**	**2**	**1**

Session 2 (1844) (Extraordinary) 5–8 March 1844

Bills initiated by	**No. initiated**	**Assented to**	**Reserved**	**Assent withheld**
Gov.'s Message	1	1		
Attorney General	2	2		
Total for session	**3**	**3**		

[1] See *V&P* NSWLC, Summaries of Proceedings on Bills during sessions 1843-1848.

Session 3 (1844) 28 May–30 December 1844

Bills initiated by Government	**No. initiated**	**Assented to**	**Reserved**	**Assent withheld**
Gov.'s message	13	4		
Attorney General	2	2		
Col. Secretary	6	6		
Total Govt.:	**21**	**12**		
Elected members				
W. Bland	1	1		
C. Cowper	4			
J. Foster	1		1	
J.D. Lang	1			
F. Lord	1			
J.P. Robinson	4	1		
T. Walker	1			1
W.C. Wentworth	6	1	1	2
R. Windeyer	2	1	1	
A.W. Young	2	2		
Total elected:	**23**	**6**	**3**	**3**
Add Govt.:	**21**	**12**		
Total for session	**44**	**18**	**3**	**3**

Session 4 (1845) 29 July–13 November 1845

Bills initiated Government	**No. initiated**	**Assented to**	**Reserved**	**Assent withheld**
Gov.'s message	10	8	1	
Attorney General	5	5		
Coll. of Customs	1	1		
Col. Secretary	5	5		
Total Govt.:	**21**	**19**	**1**	
Elected members				
C. Cowper	3	1		
* J.B. Darvall	1	1		
* J. Lamb	1	1		
J.D. Lang	1			
F. Lord	1	1		
R. Lowe	2	1	1	
T.A. Murray	2	1		
J.P. Robinson	2	1		
W. C. Wentworth	6	3		
Total elected:	**19**	**10**	**1**	
Add Govt.:	**21**	**19**	**1**	
Total for session	**40**	**29**	**2**	

* Non-official members

Session 5 (1846) 12 May–12 June 1846

Bills initiated by Government	No. initiated	Assent	Reserved	Assent withheld
Gov.'s message	5	2		
Attorney General	3	1		
Col. Secretary	1	1		
Total Govt.:	**9**	**4**		
Elected members				
E. Brewster	1			
C. Cowper	1			
R. Lowe	2			
W.C. Wentworth	3			
R. Windeyer	2			
Total elected:	**9**	**0**		
Add Govt.:	**9**	**4**		
Total for session	**18**	**4**		

Session 6 (1846) 8 September–31 October 1846

Bills initiated by Government	No. initiated	Assent	Reserved	Assent withheld
Gov.'s message	6	2		
Attorney General	2	1		
Coll. of Customs	2	2		
Col. Secretary	2	2		
Col. Treasurer	1	1		
Total Govt.:	**13**	**8**		
Elected members				
E. Brewster	2			
C. Cowper	2	1	1	
R. Lowe	4	3		
T. A. Murray	1			
M.C. O'Connell	1		1	
J.P. Robinson	1	1		
W.H. Suttor	1	1		
W.C. Wentworth	2		1	1
R. Windeyer	3	2		
Total elected:	**17**	**8**	**3**	**1**
Add Govt.:	**13**	**8**		
Total for session	**30**	**16**	**3**	**1**

Session 7 (1847) 4 May–2 October 1847

Bills initiated by	No. initiated	Assented to	Reserved	Assent withheld
Government				
Gov.'s message	19	16		
Attorney General	4	4		
Col. Secretary	2	2		
Col. Treasurer	1	1		
Total Govt.:	**26**	**23**		
Elected members				
E. Brewster	5	2	1	
C. Cowper	1	1		
H. Dangar	1	1		
*J.B. Darvall	2	2		
J. Foster	2	1		
R. Lowe	3	3		
T. A. Murray	1	1		
J.P. Robinson	2	1		
W.C. Wentworth	7	4		
R. Windeyer	2	1		
Total elected:	**26**	**17**	**1**	
Add Govt.:	**26**	**23**		
Total for session	**52**	**40**	**1**	

* Non-official member

Session 8 (1848) 21 March–20 June 1848

Bills initiated by	No. initiated	Assent	Reserved	Assent withheld
Government				
Gov.'s message	14	14		
Attorney General	2	1		
Col. Secretary	1	1		
Total Govt.:	**17**	**16**		
Elected members				
S.A. Donaldson	1	1		
C.H. Ebden	1			
J. Foster	1			
R. Lowe	4	2		
T.A. Murray	2			
J.P. Robinson	1			
W.C. Wentworth	5	5		
Total elected:	**15**	**8**		
Add Govt.:	**17**	**16**		
Total for session	**32**	**24**		

Part 2

Summary of bills in fourth council

Session	Initiated	Passed	Assented to	Reserved	Withheld
1. 1843	33	25	22	2	1
2. 1844 (Ext.)	3	3	3		
3. 1844 (2)	44	24	18	3	3
4. 1845	40	31	29	2	
5. 1846 (1)	18	4	4		
6. 1846 (2)	30	20	16	3	1
7. 1847	52	41	40	1	
8. 1848	32	24	24		
Totals	**252**	**172**	**156**	**11**	**5**

Appendix 2[1]

Fifth Council

(3 sessions—15 May 1849 to 2 May 1851)
12 Crown nominees, 24 elected members

Members appointed by governor

Name	Date of appointment	Cessation of membership	Official position Office Date	Remarks
Allen, George, Attorney	8 Dec. 1848	Dissolution 30 June 1851		Nominee on fourth and sixth councils - see Appendices 1 and 3.
Berry, Alexander	as above	as above		Nominee on fourth and sixth councils see Appendices 1 and 3.
Gibbes, John George Nathaniel	as above	as above	Collector of Customs	Nominee on fourth and sixth councils - see Appendices 1 and 3.
Hamilton, Edward	as above	Seat vacated May 1850		Nominee on fourth council - see Appendix 1.
Icely, Thomas	as above	Dissolution, 30 June 1851		Nominee on fourth and sixth councils - see Appendices 1 and 3.
King, Phillip Parker	27 May 1850	as above		Elected member of sixth council – see Appendix 3.
Lamb, John	8 Dec. 1848	as above		Nominee on fourth council. Elected member of sixth council - see Appendices 1 and 3.
Lithgow, William	8 Dec. 1848	Dissolution 30 June 1851	Auditor-General	Nominee on fourth and sixth councils - see Appendices 1 and 3.

[1] Appendix based on *PR* NSW, pp. 8, 13-23 and *V&P* NSWLC 1849-1851.

Members appointed by governor cont.

Name	Date of appointment	Cessation of membership	Official position Office Date	Remarks
Parker, Henry Watson	8 Dec. 1848	Dissolution 30 June 1851	Chairman of Committees	Nominee on fourth and sixth councils - see Appendices 1 and 3.
Plunkett, John Hubert, B.A.	8 Dec. 1848	Dissolution 30 June 1851	Attorney-General	Nominee on fourth and sixth councils - see Appendices 1 and 3.
Riddell, Campbell Drummond	as above	as above	Member of Executive Council Colonial Treasurer	Nominee on fourth and sixth councils - see Appendices 1 and 3.
Thomson, Edward Deas	as above	as above	Colonial Secretary Member of Executive Council Salary increased from £1500 to £2000 from Aug. 1846.	Nominee on fourth and sixth councils - see appendices 1 and 3.
Wynyard, Major-General Edward Buckley, C.B.	as above	Seat vacated Feb. 1851	Senior officer Commanding H.M. Land Forces Member of Executive Council 18 Jan. 1848 to 28 July 1853.	

Elected members

Name	Electoral District	Date of Election	Ceased sitting	Official position Office Date	Remarks
Bland, William	City of Sydney	Dec. 1849	Seat vacated July 1850		Elected member of fourth council - see Appendix 1.
Bowman, William	Cumberland Boroughs, viz., Towns of Windsor, Richmond, Campbelltown and Liverpool	July 1848	Dissolution 30 June 1851		Elected member of fourth and sixth councils – see Appendices 1 and 3.
Byrnes, James	County of Cumberland	Mar. 1850	as above		
Cooper, Daniel, junior	Counties of St. Vincent and Auckland	June 1849	as above		
Cowper, Charles	County of Cumberland	July 1848	Seat vacated March 1850		Elected member of fourth and sixth councils - see Appendices 1 and 3.
Curr, Edward	District of Port Phillip	Sept. 1848	Seat vacated June 1849		Elected member of fourth council - see Appendix 1.
Dangar, Henry	County of Northumberland	July 1848	Dissolution 30 June 1851		Elected member of fourth council - see Appendix 1.
Darvall, John Bayley, Barrister	County of Bathurst	as above	as above		Nominee on fourth council and elected member of sixth council - see Appendices 1 and 3.

Elected members cont.

Name	Electoral District	Date of Election	Ceased sitting	Official position Office Date	Remarks
Dickson, John	District of Port Phillip	Sept. 1848	Dissolution 30 June 1851		
Donaldson, Stuart Alexander	County of Durham	July 1848	Seat vacated June 1849		Elected member of fourth and sixth councils - see Appendices 1 and 3.
as above	as above	July 1849	Dissolution 30 June 1851		
Ebden, Charles Hotson	District of Port Phillip	July 1850	as above		Elected member of fourth council - see Appendix 1.
Fitzgerald, Robert	County of Cumberland	March 1849	as above		Elected member of sixth council - see Appendix 3.
Foster, John Fitzgerald Leslie	District of Port Phillip	June 1849	Seat vacated July 1850		Elected member of fourth council - see Appendix 1.
Grey, Henry (Earl Grey)	City of Melbourne	July 1848	Seat vacated Nov. 1850	Principal Secretary of State for the Colonies July 1846 to Feb. 1852	Law officers reported election valid and would have to stand until Earl Grey should notify his resignation but the election was not published in the NSW *Government Gazette.*
Hill, George	Counties of St. Vincent and Auckland	as above	Seat vacated 1848		

Elected members cont.

Name	Electoral District	Date of Election	Ceased sitting	Official position Office Date	Remarks
Jones, Richard	Counties of Gloucester, Macquarie and Stanley	Oct. 1850	Dissolution 30 June 1851		Nominee member of fourth council and elected member of sixth council - see Appendices 1 & 3. Died 6 Nov. 1852
Lang, John, Dunmore, D.D.	City of Sydney	July 1850	as above		Elected member of fourth and sixth councils – see Appendices 1 and 3.
Lowe, Robert, Barrister	as above	July 1848	Seat vacated Nov. 1849		Nominee and elected member of fourth council - see Appendix 1.
Macarthur, James	County of Camden	July 1848	Dissolution 30 June 1851		Elected member of sixth council - see Appendix 3.
Macarthur, William	District of Port Phillip	Feb. 1849	as above		Elected member of sixth council - see Appendix 3.
Martin, James, Attorney	Counties of Cook and Westmoreland	July 1849	as above		Elected member of sixth council - see Appendix 3.
M'Intyre, Donald	Counties of Hunter, Brisbane and Bligh	July 1848	as above		
Mackinnon, Lauchlan	District of Port Phillip	Sept. 1848	Seat vacated June 1849		
as above	as above	July 1849	Seat vacated June 1850		

Elected members cont.

Name	Electoral District	Date of Election	Ceased sitting	Official position Office Date	Remarks
Mercer, William Drummond	District of Port Phillip	July 1850	Dissolution 30 June 1851		
Moor, Henry	as above	July 1849	as above	Registrar of the Lord Bishop of Melbourne	
Murray, Terence Aubrey	Counties of Murray, King and Georgiana	July 1848	as above		Elected member of fourth and sixth councils – see Appendices 1 and 3.
Nichols, George Robert, Attorney	Northumberland Boroughs, viz., Towns of East & West Maitland & Newcastle	July 1848	as above	Solicitor to the Commissioners of the City of Sydney	Elected member of sixth council - see Appendix 3. Died Sept. 1857.
Nicholson, Sir Charles, M.D.	County of Argyle	as above	as above	Speaker 15 May 1849 to 30 June 1851	Elected member of fourth and sixth councils - see Appendices 1 & 3.
Oakes, George	Town of Parramatta	as above	as above		Elected member of sixth council - see Appendix 3.
Palmer, James Frederick	District of Port Phillip	Sept. 1848	Seat vacated June 1849		
Snodgrass, Lieut.-Colonel Kenneth, C.B.	Counties of Gloucester, Macquarie and Stanley	July 1848	Seat vacated Sept. 1850		Died October 1853.
Suttor, William Henry	Counties of Roxburgh, Phillip and Wellington	as above	Dissolution 30 June 1851		Elected member of fourth and sixth councils- see Appendices 1 & 3.

Elected members cont.

Name	Electoral District	Date of Election	Ceased sitting	Official position Office Date	Remarks
Wentworth, William Charles, Barrister	City of Sydney	July 1848	Dissolution 30 June 1851		Elected member of fourth and sixth councils – see Appendices 1 & 3.
Westgarth, William	City of Melbourne	Nov. 1850	as above		

Appendix 2.1

Part 1

Fifth council—bills initiated by government and elected members[1]

Session 1 (1849) 15 May–12 October 1849

Bills initiated by:	No. initiated	Assented to	Reserved	Assent withheld
Government				
Gov.'s message	26	21		
Att. General	3	3		
Coll. Customs	2	2		
Col. Treasurer	1	1		
Total Govt.:	**32**	**27**		
Elected members				
C. Cowper	2	1		
H. Dangar	1	0		
J.B. Darvall	4	3		
J. Dickson	2	1		
S.A. Donaldson	1	0		
R. Fitzgerald	1	1		
J.F.L. Foster	2	1		
R. Lowe	2	1		
W. Macarthur	1	1		
L. Mackinnon	1	0		
J. Martin	1	0		
H. Moor	2	1		
T.A. Murray	1	1		
G.R. Nichols	15	12		
W.C. Wentworth	3	1		
Total elected:	**39**	**24**		
Add Govt.:	**32**	**27**		
Total for session	**71**	**51**		

1 See *V&P* NSWLC, Summaries of Proceedings on Bills during sessions 1849-1851.

Session 2 (1850) 4 June–2 October 1850

Bills initiated by:	No. initiated	Assented to	Reserved	Assent withheld
Government				
Gov.'s message	23	21		
Att. General	5	4		
Col. Treasurer	1	1		
Total Govt.:	**29**	**26**		
Elected members				
J. Dickson	4	1		
S.A. Donaldson	3	2		
J. Martin	5	1		
H. Moor	4	1		
T.A. Murray	3	1		
G.R. Nichols	14	9		
W.C. Wentworth	6	5	1	
Total elected:	**39**	**20**	**1**	
Add Govt.:	**29**	**26**		
Total for session	**68**	**46**	**1**	

Session 3 (1851) 28 March 1851–2 May 1851

Bills initiated by:	No. initiated	Assented to	Reserved	Assent withheld
Government				
Gov.'s message	4	4		
Total Govt.:	**4**	**4**		
Elected members				
J. Martin	1	0		
W.C. Wentworth	1	1		
Total elected:	**2**	**1**		
Add Govt.:	**4**	**4**		
Total for session	**6**	**5**		

Part 2

Summary of bills in fifth council

Session	Initiated	Passed	Assented to	Reserved	Withheld
1. 1849	71	51	51		
2. 1850	68	47	46	1	
3. 1851	6	5	5		
Totals	**145**	**103**	**102**	**1**	

Appendix 3[1]

Sixth Council

(6 sessions—14 October 1851 to 19 December 1855)
18 Crown nominees, 36 elected members

Members appointed by governor

Name	Date of appointment	Cessation of membership	Official position Office Date	Remarks
Allen, George, Attorney	13 Oct., 1851	Dissolution 29 Feb., 1856	- -	Nominee on fourth and fifth councils - see Appendices 1 and 2.
Barker, Thomas	6 April, 1853	as above	Director of the Sydney Railway Company 4 Aug., 1853 Commissioner for Railways 1855	
Barney, George	13 Oct., 1851	as above	Colonial Engineer 1 Jan., 1836 Chief Commissioner of Crown Lands 1 Jan., 1849 Surveyor-General 11 Oct., 1855	Nominee on fourth council - see Appendix 1.
Berry, Alexander	as above	as above		Nominee on fourth and fifth councils - see Appendices 1 and 2.
Bradley, William	10 Nov., 1851	as above		Elected member of fourth council – see Appendix 1.
Broadhurst, Edward, Barrister	13 Oct., 1851	as above		
Christie, William Harvie	14 May, 1852	as above	Postmaster-General 1 May, 1852	
Cox, Edward	26 Nov., 1851	Seat vacated May, 1852		
Denison, Alfred	13 Oct., 1851	Seat vacated Nov., 1851	Member of Senate of Sydney University 24 Dec., 1850	
Dobie, John	13 Oct., 1851	Seat vacated March, 1855	Surgeon in the Royal Navy on half-pay	

[1] Appendix based on *PR* NSW, pp. 8, 13-23.

Members appointed by governor cont.

Name	Date of appointment	Cessation of membership	Official position Office Date	Remarks
Gibbes, John George Nathaniel	13 Oct., 1851	Seat vacated May, 1855	Collector of Customs	Nominee on fourth and fifth councils - see Appendices 1 and 2.
Holden, John Rose	3 Nov., 1853	Dissolution 29 Feb., 1856		Elected member of sixth council from Sept., 1851 to April, 1853 - see over.
Hughes, John	13 Oct., 1851	Seat vacated Oct., 1853		
Icely, Thomas	as above	Seat vacated April, 1853		Nominee on fourth and fifth councils – see Appendices 1 and 2.
as above	3 April, 1855	Dissolution 29 Feb., 1856		
Lithgow, William	13 Oct., 1851	as above	Auditor-General	Nominee on fourth and fifth councils - see Appendix 1.
Longmore, Alexander, Attorney	as above	Died 27 Oct., 1851		
Manning, William Montagu	as above	Dissolution 29 Feb., 1856	Solicitor-General 1 Sept., 1844 to 12 Jan., 1848 Actg Supreme Court Judge, 12 Jan., 1848 to 19 Nov., 1849 Solicitor-General 19 Nov., 1849 to 5 June, 1856	
Mayne, William Colburn	14 May, 1852	as above	Inspector-General of Police 1 Jan., 1852	

Members appointed by governor cont.

Name	Date of appointment	Cessation of membership	Official position Office Date	Remarks
Merewether, Francis Lewis Shaw	13 Oct., 1851	Dissolution 29 Feb., 1856	Actg Colonial Treasurer with Stephen Greenhill 8 May, 1841 to 31 July, 1841 Clerk of the Councils 14 April, 1842 to 13 April, 1843 Clerk of Executive Council 14 April, 1843 to 10 June, 1851 Postmaster-General 10 June,1851 to 30 April, 1852 Auditor-General 1 May, 1852 to 28 April, 1856 Actg Colonial Treasurer 26 Jan., 1854 to Feb., 1856 Member of Executive Council 7 July, 1852 to 28 April, 1856	
Mitchell, James	28 May, 1855	as above	President of N.S.W. Medical Board	
Parker, Henry Watson	13 Oct., 1851	as above	Chairman of Committees 17 Oct., 1851 to 29 Feb., 1856	Nominee on fourth and fifth councils - see Appendices 1 and 2.
Plunkett, John Hubert, B.A.	as above	as above	Attorney-General Member of Executive Council	Nominee on fourth and fifth councils - see Appendices 1 and 2.
Riddell, Campbell Drummond	as above	as above	Member of Executive Council Colonial Treasurer Actg Colonial Secretary 26 Jan., 1854 to Feb., 1856.	Nominee on fourth and fifth councils - see Appendices 1 and 2.

Members appointed by governor cont.

Name	Date of appointment	Cessation of membership	Official position Office Date	Remarks
Spain, William	13 Oct., 1851	Seat vacated 31 Dec., 1851	Inspector-General of Police 1 Jan., 1851 to 31 Dec., 1851	
Stirling, John	30 Jan., 1854	Dissolution 29 Feb., 1856	Chief Inspector of Distilleries 1 Jan., 1847 to 25 Jan., 1854 Actg Auditor-General 26 Jan., 1854 to Feb., 1856	
Thomson, Edward Deas	13 Oct., 1851	Seat vacated Left colony on leave of absence, 25 Jan., 1854	Col. Secretary Member of Executive Council	Nominee on fourth and fifth councils - see Appendices 1 and 2.
Ward, Captain Edward Wolstenholme, R.E.	28 May, 1855	Dissolution 29 Feb., 1856	Deputy-Master and Chief Officer of Branch Royal Mint 26 April, 1853 to 31 Dec., 1867	

Elected members

Name	Electoral District	Date of Election	Ceased sitting	Official position Office Date	Remarks
Bettington, James Brindley	Pastoral Districts of Wellington and Bligh	Sept., 1851	Seat vacated March, 1853		
Bigge, Francis Edward	Pastoral Districts of Moreton, Wide Bay, Burnett and Maranoa	as above	as above		
Bligh, James William, Attorney	County of Bathurst	as above	Dissolution 29 Feb., 1856		
Bowman, George	Counties of Northumberland and Hunter	as above	as above		

Elected members cont.

Name	Electoral District	Date of Election	Ceased sitting	Official position Office Date	Remarks
Bowman, William	Cumberland Boroughs, viz., Towns of Windsor, Richmond, Liverpool, Campbelltown and Penrith	April, 1853	Dissolution 29 Feb., 1856		Elected member of fourth and fifth councils - see Appendices 1 and 2.
Campbell, Robert	City of Sydney	Nov., 1851	as above		
Chisholm, James	Counties of King and Georgiana	Sept., 1851	as above		
Cooper, Daniel	Counties of Murray and St. Vincent	March, 1855	as above		
Cowper, Charles	County of Durham	Sept.,1851	as above		Elected member of fourth and fifth councils - see Appendices 1 and 2.
Darvall, John Bayley, Barrister	County of Cumberland	as above	as above		Nominee on fourth council and elected member of fifth council - see Appendices 1 and 2.
Donaldson, Stuart Alexander	County of Durham	as above	Seat vacated Feb., 1853		Elected member of fourth and fifth councils – see Appendices 1 and 2.
as above	Sydney Hamlets	Feb., 1855	Dissolution 29 Feb., 1856		

Elected members cont.

Name	Electoral District	Date of Election	Ceased sitting	Official position Office Date	Remarks
Douglass, Henry Grattan, M.D.	Counties of Northumberland and Hunter	Sept., 1851	Dissolution 29 Feb.,1856	Member of Lunatic Board	Clerk of Legislative Council 19 Feb., 1825 to 7 Sept., 1827
Dumaresq, William	Counties of Phillip, Brisbane and Bligh	as above	as above	Actg Col. Treasurer 1 April, to 31 July, 1829	Elected member of fourth council – see Appendix 1.
Egan, Daniel	Pastoral District of Maneroo	April, 1854	as above		
Finch, Charles Wray	Pastoral Districts of Wellington and Bligh	April, 1853	as above		
Fitzgerald, Robert	County of Cumberland	Sept., 1851	as above		Elected member of fifth council – see Appendix 2.
Flood, Edward	North-eastern Boroughs, viz., Newcastle with Stockton and Raymond Terrace	as above	as above		
Holden, John Rose	Cumberland Boroughs, viz., Towns of Windsor, Richmond, Liverpool, Campbelltown and Penrith	as above	Seat vacated March 1853		
Holroyd, Arthur Todd, Barrister	Western Boroughs, viz., Bathurst Plains and Carcoar	as above	Dissolution 29 Feb., 1856		
Hood, Thomas Hood	Pastoral Districts of Clarence and Darling Downs	April, 1855	as above		
Jeffreys, Arthur	Pastoral District of Maneroo	Sept., 1851	Seat vacated March, 1854		

Elected members cont.

Name	Electoral District	Date of Election	Ceased sitting	Official position Office Date	Remarks
Jones, Richard	Stanley Boroughs, viz., North Brisbane, South Brisbane and Kangaroo Point, and Ipswich	Sept., 1851	Died 6 Nov., 1852		Nominee on fourth council - see Appendix 1.
King, Phillip Parker	Counties of Gloucester and Macquarie	as above	Died Feb., 1856	Chairman of Denominational School Board	Nominee member of fifth council – see Appendix 2.
Lamb, John	City of Sydney	as above	Seat vacated Feb., 1853		Nominee on fourth and fifth councils – see Appendices 1 and 2.
Lang, John Dunmore, D.D.	City of Sydney	as above	Seat vacated October, 1851		Elected member of fourth and fifth councils – see Appendices 1 and 2.
as above	County of Stanley	Aug., 1854	Dissolution 29 Feb., 1856		
Leslie, George Farquhar	Pastoral Districts of Clarence and Darling Downs	Sept., 1851	Seat vacated March, 1855		
Macarthur, James	Western Division of County of Camden	as above	Dissolution 29 Feb., 1856		Elected member of fifth council – see Appendix 2.
Macarthur, William	Pastoral Districts of Lachlan and Lower Darling	as above	Seat vacated Feb., 1855		Elected member of fifth council – see Appendix 2.
Macleay, George	Pastoral District of Murrumbidgee	as above	Dissolution 29 Feb., 1856		
Macleay, William	Pastoral Districts of Lachlan and Lower Darling	March, 1855	as above		

Elected members cont.

Name	Electoral District	Date of Election	Ceased sitting	Official position Office Date	Remarks
Marsh, Matthew Henry	Pastoral Districts of New England and Macleay	Sept., 1851	Seat vacated August, 1855		
Martin, James, Attorney	Counties of Cook and Westmoreland	Sept., 1851	Dissolution 29 Feb., 1856		Elected member of fifth council – see Appendix 2.
Morris, Augustus	Pastoral Districts of Liverpool Plains and Gwydir	as above	as above		
Murray, Terence Aubrey	Southern Boroughs, viz., Goulburn, Queanbeyan, Braidwood and Yass	as above	as above		Elected member of fourth and fifth councils – see Appendices 1 and 2.
Nichols, George Robert, Attorney	Northumberland Boroughs, viz., Towns of Morpeth, East Maitland and West Maitland	Sept., 1851	Dissolution 29 Feb., 1856		Elected member of fifth council – see Appendix 2. Died 12 Sept., 1857.
Nicholson, Sir Charles, M.D.	County of Argyle	as above	as above	Speaker 14 Oct. 1851 to 29 Feb., 1856	Elected member of fourth and fifth councils – see Appendices 1 and 2. Knighted 1852. Chancellor of Sydney University.
Oakes, George	Town of Parramatta	as above	as above		Elected member of fifth council – see Appendix 2.

Elected members cont.

Name	Electoral District	Date of Election	Ceased sitting	Official position Office Date	Remarks
Osborne, Alick	Counties of Murray and St Vincent	Sept., 1851	Seat vacated Feb., 1855	Surgeon of the Royal Navy, on half-pay	
Osborne, Henry	Eastern Division of the County of Camden	as above	Dissolution 29 Feb., 1856		
Park, Alexander	County of Durham	Feb., 1853	as above		
Parkes, Henry	City of Sydney	May, 1854	as above		
Richardson, John	County of Stanley	Sept., 1851	Seat vacated July, 1854		
as above	Stanley Boroughs, viz., North Brisbane, South Brisbane and Kangaroo Point and Ipswich	Sept., 1855	Dissolution 29 Feb., 1856		
Rusden, Thomas George	Pastoral Districts of New England and Macleay	Aug., 1855	as above		
Russell, Henry Stuart	Stanley Boroughs, viz., North Brisbane, South Brisbane and Kangaroo Point and Ipswich	Jan., 1853	Seat vacated Aug., 1855		
Samuel, Saul	Counties of Roxburgh and Wellington	Oct., 1854	Dissolution 29 Feb., 1856		
Smart, Thomas Ware	Sydney Hamlets	Sept., 1851	Seat vacated Jan., 1855		
Smith, Richard Joseph	Pastoral Districts of Moreton, Wide Bay, Burnett and Maranoa	Mar., 1853	Dissolution 29 Feb., 1856		

Elected members cont.

Name	Electoral District	Date of Election	Ceased sitting	Official position Office Date	Remarks
Suttor, William Henry	Counties of Roxburgh and Wellington	Sept., 1851	Seat vacated Sept., 1854		Elected member of fourth and fifth councils - see Appendices 1 and 2.
Thurlow, William, Attorney	City of Sydney	Mar., 1853	Seat vacated Dec., 1854		
Wentworth, William Charles, Barrister	City of Sydney	Sept., 1851	Seat vacated April, 1854		Elected member of fourth and fifth councils - see Appendices 1 and 2.

Appendix 3.1

Part 1

Sixth council—bills initiated by government and elected members[1]

Session 1 (1851) 14 October–22 December 1851

Bills initiated by:	No. initiated	Assented to	Reserved	Assent withheld
Government				
Gov.'s message	19	10		
Col. Treasurer	1	1		
Sol. General	1	1		
Total Govt.:	**21**	**12**		
Elected members				
C. Cowper	3	2		
J.B. Darvall	2	1		
S.A. Donaldson	1	1		
H.G. Douglass	2			
J.R. Holden	1	1		
J. Lamb	1	1		
J. Martin	2	2		
G.R. Nichols	3	2		
W.C. Wentworth	2	2		
Total elected:	**17**	**12**		
Add Govt.:	**21**	**12**		
Total for session	**38**	**24**		

1 See *V&P* NSWLC, Summaries of Proceedings on Bills during sessions 1851-1855.

Session 2 (1852) 8 June–28 December 1852

Bills initiated by :	No. initiated	Assented to	Reserved	Assent withheld
Government				
Gov.'s message	38	32		
Attorney General	3	3		
Auditor General	1	1		
Sol. General	2	2		
Total Govt.:	**44**	**38**		
Elected members				
G. Allen	1	1		
C. Cowper	2	2		
J.B. Darvall	1	1		
H.G. Douglass	2	1		
J.R. Holden	1	1		
A.T. Holroyd	2	2		
J.Martin	5	2		
A. Morris	1			
T.A. Murray	1			
G.R. Nichols	6	3		
W.C. Wentworth	8	5		
Total elected:	**30**	**18**		
Add Govt.:	**44**	**38**		
Total for session	**74**	**56**		

Session 3 (1853) 10 May–22 December 1853

Bills initiated by:	No. initiated	Assented to	Reserved	Assent withheld
Government				
Gov.'s message	28	26		
Attorney General	2			
Auditor General	1	1		
Col. Secretary	1	1		
Sol. General	1	1		
Total Govt.:	**33**	**29**		
Elected members				
J. Bligh	2	2		
R. Campbell	1			
C. Cowper	10	10		
J.B. Darvall	1			
H.G. Douglass	3	1	1	
J. Martin	2	2		
A. Morris	1	1		
G.R. Nichols	7	7		
W. Thurlow	2			
W.C. Wentworth	6	3	2	
Total elected:	**35**	**26**	**3**	
Add Govt.:	**33**	**29**		
Total for session	**68**	**55**	**3**	

Session 4 (1854) 9–16 May 1854

After new members were sworn in on 9 May 1854, the legislative council was adjourned to "this day week". On 16 May 1854, the council was prorogued to 6 June 1854.

Session 5 (1854) 6 June–2 December 1854

Bills initiated by:	No. initiated	Assented to	Reserved	Assent withheld
Government				
Gov.'s message	32	24		
Attorney General	1	1		
Auditor General	1	1		
Col. Secretary	1	1		
Col. Treasurer	1	1		
Sol. General	2	1		
Total Govt.:	**38**	**29**		
Elected members				
G. Bowman	1	1		
C. Cowper	8	6		
J.B. Darvall	2	1		
H.G. Douglass	3	1		
A.T. Holroyd	2	2		
J. Martin	2	1		
A. Morris	1	1		
G.R. Nichols	16	11		
H. Parkes	3			
Total elected:	**38**	**24**		
Add Govt.:	**38**	**29**		
Total for session	**76**	**53**		

Session 6 (1855) 5 June–9 December 1855

Bills initiated by:	No. initiated	Assented to	Reserved	Assent withheld
Government				
Gov.'s message	37	25		
Auditor General	3	3		
Col. Secretary	2	2		
Col. Treasurer	2	2		
Sol. General	2	2		
Total Govt.:	**46**	**34**		
Elected members				
G. Bowman	1	1		
C. Cowper	5	5		
J.B. Darvall	2			
S.A. Donaldson	2	2		
H.G. Douglass	1	1		
A.T. Holroyd	2	2		
J.D. Lang	1	1		
G. Macleay	1	1		
T.A. Murray	1	1		
G.R. Nichols	8	6		
H. Parkes	1	1		
Total elected:	**25**	**21**		
Add Govt.:	**46**	**34**		
Total for session	**71**	**55**		

Part 2

Summary of bills in sixth council

Session	Initiated	Passed	Assented to	Reserved	Withheld
1. 1851 (2)	38	24	24		
2. 1852	74	56	56		
3. 1853	68	58	55	3	
4. 1854 (1)	Nil				
5. 1854 (2)	76	53	53		
6. 1855	71	55	55		
Totals	**327**	**246**	**243**	**3**	

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legislators in our new form of government".[3] Emancipist doctor William Bland emphasised his long service in various spheres of colonial life while settlers John Panton and Captain William Dumaresq and barrister and agriculturalist Richard Windeyer spoke of their intention to make tours of their proposed electorates to state their principles and elicit local views.[4]

The fourth council, which sat for the first time on 1 August 1843, had 36 members, 12 nominated by the governor and 24 elected by enfranchised colonists. The members of the new council and details of their length of service are listed in Appendix 1. While five of the six official members had sat in previous councils, as had three of the six unofficial nominees, only one of the 24 elected members, Hannibal Macarthur, had done so.[5] The elected group therefore lacked legislative experience. Nevertheless, from the outset it was clear that at least some of their number would play a dominant role in proceedings. They readily adopted legislative habits and advanced proposals on a range of issues, being far from content to restrict themselves to putting forward proposals to remedy specific patent or perceived social wrongs and injustices, as appears to have been the habit of private members of the British parliament in the late eighteenth and early nineteenth centuries.[6] That is to say, they were prepared to tackle any area of need, their special focus in 1843 being on matters economic. This was especially true of the lawyers among them, men trained by profession to argue causes to and fro, and to find and manipulate precedents. Given the poor economic conditions and the existence of other grievances relating to the impact of imperial land, monetary and immigration policies, the seeds for conflict between the executive government and the new council were present from the start.

Any advantage conferred by the previous legislative experience of the government's nominees was offset by the governor's absence from the centre of the legislative stage. He was no longer to preside at or attend council sessions and was therefore unable to shape its

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3 Ibid., 2 March 1843. For Nichols, see *ADB*, 5, pp. 335-336; Clark, p. 188.

4 Ibid. For Bland, see *ADB*, 1, pp. 112-115; Norman J. Dunlop, "Dr William Bland", *JRAHS*, vol. 11, pt. 6, 1926, pp. 321-351. For Dumaresq and Panton, see Norman J. Dunlop, "Who's Who in the First Elective (1843) Parliament of New South Wales", *JRAHS*, vol. 13, pt. 3, 1927, pp. 180 and 191 respectively. For Windeyer, see J.B. Windeyer, "Richard Windeyer: Aspects of his Work in New South Wales, 1835-1847", *JRAHS*, vol. 50, pt. 2, July 1964, pp. 83-85; *ADB*, 2, pp. 615-617.

5 The only other member of the previous council to contest the elections, Hannibal's cousin, James Macarthur, was defeated. Colonial Engineer Barney sat in the place of Attorney-General Plunkett until he returned to the colony from leave in late August. See Gipps to Stanley, 18 July 1843, *HRA*, 1, 33, pp. 42-45.

6 Henry Parris, *Constitutional Bureaucracy: The Development of the British Central Administration since the Eighteenth Century*, George Allen and Unwin, London 1969, pp. 160-170.

proceedings by his presence. The *Sydney Morning Herald* noted that the new constitutional arrangements had sealed the governor's lips, the only substitute being "cold, dry, laconic messages" handed up to the speaker, by which the governor now communicated with the house.[7] And yet Governor Gipps found it necessary to defend himself against possible criticism for sending so many messages to the new council. In a despatch to the secretary of state in January 1844, he asserted that the absence of a second legislative chamber necessarily brought him into more frequent and direct communication with the representatives of the people than occurred in older colonies with two chambers.[8] Later, in 1844, the constant need for the governor to refer matters to Downing Street was criticised by the council's select committee on general grievances. The governor, it said, lacked appropriate delegated powers and was thus reduced to the position of a mere subordinate imperial officer. Accountability to England impaired the executive's vigour, "by suspending its decisions, until distance and delay have weakened their force, and thus rendered them comparatively valueless, even when right, and utterly unsatisfactory, or odious, when wrong".[9]

The governor's place as the council's presiding officer was assumed by the speaker, the 76-year-old Alexander McLeay, the former colonial secretary.[10] Edward Deas Thomson, the present colonial secretary, who had managed government business in the old council, continued in the role as leader of the house. In addition, he became the government's senior spokesman. In the old council he had been subordinate to Gipps. He was thus relatively unpracticed and, indeed, apparently uninterested in political debate when he became responsible for defending government measures and ensuring that public business was dealt with efficiently.[11] As S.G. Foster points out, Thomson occupied an awkward position as the servant of two masters in the council, having responsibilities both to the executive government and to the legislature and being constrained in the expression of his own views, a comment that could also be applied, though perhaps to a lesser extent, to the other official

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7 *SMH*, 8 December 1843; Ruth Knight, *Illiberal Liberal: Robert Lowe in New South Wales, 1842-1850*, Melbourne University Press, Melbourne 1966, p. 49.

8 Gipps to Stanley, 1 January 1844 (No. 1), *HRA*, 1, 23, pp. 309-311.

9 Report of select committee on general grievances, *V&P* NSWLC 1844, vol. 2; Clark, pp. 318-319.

10 Wentworth, another candidate for the position, was irritated by McLeay's election, saying that only a person with a legal education was fit to be the speaker. *SMH*, 2 August 1843. See also Molony, pp. 46-47 on McLeay's election.

11 S.G. Foster, *Colonial Improver: Edward Deas Thomson 1800-1879,* Melbourne University Press, Melbourne 1978, pp. 64-67; Ruth Knight, *Illiberal Liberal: Robert Lowe in New South Wales, 1842-1850*, Melbourne University Press, Melbourne 1966, pp. 49, 53.

appointees.[12] Thomson himself referred to the peculiar position in which he was placed at the new council's first meeting, noting that it was rendered more difficult because he followed one so skilled in "able advocacy and clear exposition" of government measures.[13] Gipps, appreciating the sensitivity of Thomson's position, decided that government measures should be introduced to the legislature by means of a messenger who was not a council member, thereby distancing Thomson somewhat from government proposals.[14]

The executive suffered from a number of setbacks. Gipps' absence from the council chamber, Thomson's inexperience and his ill health early in the first session, Attorney-General Plunkett's initial absence on leave, the governor's inability to appoint the solicitor-general to the council and the disinclination of most official members to enter into debates which did not specifically relate to their areas of responsibility, or at all, left the government severely disadvantaged from the outset.[15] These difficulties were compounded by others, at least one of the executive's own making. Neither Gipps nor at least some of the official members appear to have fully appreciated the effect that the colony's economic woes had on members, both personally and as representative colonists. Among the members who assembled in August 1843, Richard Jones, a non-official nominee, member of previous councils, magistrate and leading public figure in Sydney since the late 1820s, was declared bankrupt by November and forced to resign his seat.[16] Earlier that year, Terence Murray, now member for the counties of Murray, King and Georgiana, had settled a substantial portion of his real property on his wife, hoping thereby to save it if the depression caused his bankruptcy.[17] The economic circumstances of Charles Cowper, a member for the county of Cumberland, had been in decline since 1838.[18] The personal fortunes of Hannibal Macarthur, a pastoralist and the member for Parramatta, were hard hit.[19] When speaking in support of his interest bill in September 1843, Wentworth disclosed that he had been deprived of stock worth £15 000 because of the insolvency of other parties to a transaction.[20] Richard Windeyer, because of his ambitious agricultural pursuits, was always financially pressed. Indeed, the prevailing economic circumstances operated in a fashion similar to the

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12 Ibid., p. 81.
13 *SMH*, 2 August 1843.
14 Foster, p. 67.
15 Gipps to Stanley, 1 January 1844, *HRA*, 1, 23, pp. 309-310; Molony, pp. 48-49; Foster, p. 68; Knight, pp. 53, 79.
16 *ADB*, 2, p. 25.
17 Ibid., p. 275.
18 Powell, p. 10.
19 *ADB*, 2, p. 149.
20 *SMH*, 16 September 1843.

intolerable conditions in England in the 1820s and 30s to which MacDonagh and others referred as a precipitant to law-making activity there.[21] In the fourth council's earliest days, they caused a ground-swell of pressure for legislative action—any action—that might forestall further calamities or reverse the colony's fortunes. In this way, there were similarities with the 1890s, when economic disaster was part of the reason for radical legislation and even for federation itself.[22] In the early 1840s, inventive minds among the elected members, and especially those with legal qualifications, took over when the government failed to act.

Gipps conceded in his short speech to open the first session that the period was "one of acknowledged difficulty", but he proceeded to lecture members on relevant great truths, including the laissez-faire nostrum "that the enterprise of individuals is ever most active, when left as far as possible unshackled by Legislative Enactment, and that industry and economy are the only sure foundations of wealth". Some members were probably unsettled by Gipps' suggestion that the colony's embarrassments could be partly the effect of "our own errors" and "our excessive speculations", and by his call for people to exercise frugality and prudence in overcoming difficulties. He returned to this theme when he prorogued the council in December 1843. The events of the session had convinced him, he said, that the colony could not be relieved from the depression by any direct legislative enactment. Indeed, he implied that the council's early efforts to relieve the colony's economic distress were a waste of time.[23]

In a despatch in late October 1843 canvassing reasons for the council's agitation against both local and British governments, Gipps did note that the council was largely comprised of men "who have suffered severely in their fortunes by the great depreciation which has lately taken place in the value of all Colonial property". However, this observation was made in the context of explaining the prevalent inclination of colonists "to ascribe their losses or disappointment" to measures taken by the British government, especially those touching assisted immigration and crown land sales.[24] Members themselves clearly expected

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21 See Chapter 1. As noted there, Dicey, Roberts and Kitson Clark also referred to the force of intolerable conditions as a catalyst for change.

22 See Stuart Macintyre, "Making a Commonwealth" in Geoffrey Bolton (gen. ed.), *Oxford History of Australia*, vol. 4, *1901-1942 The Succeeding Age*, Oxford University Press, Melbourne 1986, pp. 100-102.

23 *V&P* NSWLC 1843. See also Gipps to Stanley, 1 January 1844, *HRA*, 1, 23, p. 309.

24 Gipps to Stanley, 28 October 1843, *HRA*, 1, 23, pp. 199-200.

the government to introduce measures to ease the distress, indicating in their address-in-reply "an anxious desire to co-operate" with it in the adoption of "such measures as the peculiar exigencies of the times may require".[25] A fundamental ideological difference is revealed here between the government and certain leading members. The members looked to the government for positive action and the government believed in laissez faire. Only gradually did members begin to appreciate, as had members of the British House of Commons, how far they might become part of the government themselves. Here, Gipps' apparent lack of sensitivity to the financial situation of members and other colonists, and to their grievances generally, when coupled with his ideological attachment to laissez faire, may have diminished his ability to influence law-making at least as much as did his absence from the house.

Another of the executive's problems related to the non-official crown appointees. This group proved to be somewhat unstable. Some rarely participated in debate and others frequently voted against the executive. Of the three old hands among them, only merchant and settler Alexander Berry sat for the duration of the fourth council and he was a determined opponent of laissez faire.[26] Richard Jones was forced to resign in November 1843, and was replaced by barrister Robert Lowe, a brilliant orator who burst onto the scene like a comet, having been in the colony for a little over 12 months. Lowe subsequently deserted to the opposition.[27] The third old hand, land-owner and merchant John Blaxland, vacated his seat in September 1844 and was replaced by another barrister, the well-connected Eton and Cambridge man, John Bayley Darvall, who proved a firmer friend to the government, at least at this time.[28] In January 1844, Gipps reported to Lord Stanley that he had obtained little assistance from the unofficial nominees before he appointed Lowe.[29] Of the other unofficial nominees, Blaxland, uniformly, and Berry very frequently opposed the government. However, he said, he did not regret appointing them because their opposition prevented the crown nominees from appearing as a distinct body antagonistic to the majority, the elected representatives of the people, and because it lessened the initial resentment to

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25 *V&P* NSWLC 1843.

26 See *ADB*, 1, pp. 92-95.

27 The *Herald* expressed surprise at Lowe's appointment, saying that the governor had passed over "all the old colonists" in favour of a man with no colonial experience and no stake in the colony. *SMH*, 10 November 1843. Gipps later bitterly regretted having appointed him. See Gipps to Stanley, 27 July 1844, *HRA*, 1, 23, pp. 704-705, 708-709. See also *ADB*, 2, pp. 134-137; Clark, p. 319; Knight, passim.

28 For Blaxland, see *ADB*, 1, pp. 117-118; for Darvall, *ADB*, 4, pp. 23-25.

29 See Knight, p. 63.

their presence in the council.[30] Gipps' view of the role of the unofficial nominees differed significantly from that of at least some members. Murray, for example, referred to the six unofficial nominees as the pivot on which the council revolved, corresponding to the upper house in other colonies and intended to hold the balance between the government and the people's representatives. "[S]trip them of their independence", he said, "and they become a useless incumbrance".[31] Wentworth agreed.[32]

Even appointees who were government officials could not be relied on to toe the government line. Divisions with some officials on one side and some on the other were not infrequent. While the colonial treasurer voted to defer Wentworth's solvent debtors' bill, the colonial secretary, collector of customs, auditor-general and attorney-general favoured a second reading.[33] Auditor-General Lithgow, either inattentive or a loose cannon, voted with those supporting a second reading of Wentworth's interest bill while the colonial treasurer, commander of the forces, colonial secretary and collector of customs were on the opposing side.[34] More strikingly, when Lithgow objected to one penalty in the governor's postage act amendment bill as too severe, Colonial Treasurer Riddell responded, testily one suspects, that that particular clause had already been the subject of a very lengthy discussion and no less than three divisions.[35] Both Lithgow and Attorney-General Plunkett tried to limit the government's reduction of customs duty on spirits.[36] Collector of Customs Gibbes voted in favour of a controversial and successful amendment proposed by Wentworth to the government's tariff bill, increasing customs duty on imported flour, when four other official members voted against. An editorial in the *Herald* remarked on "the not very creditable spectacle of four of the principal officers of the Government opposing each other on questions relating to the revenue".[37] The Commander of the Forces Sir Maurice O'Connell voted with the opposition to block the second reading of the government's district councillors' qualifications bill despite entreaties from Colonial Treasurer Riddell not to do so.[38] In 1844, Lithgow and O'Connell voted on a division in favour of barrister William

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30 Gipps to Stanley, 1 January 1844 (Separate), *HRA*, 1, 23, p. 310; Knight, p. 53.
31 *SMH*, 10 August 1844.
32 Ibid.
33 Ibid., 18 August 1843.
34 Ibid., 22 September 1843.
35 Ibid., 9 September 1843.
36 Ibid., 20 December 1843.
37 Ibid., 22 December 1843.
38 Ibid., 9 December 1843. See Knight, p. 60 for comment on O'Connell's vote which particularly incensed Gipps.

Foster's interest bill, while Thomson and Plunkett opposed it.[39]

Despite such defections, elected members displayed a traditional, even habitual, suspicion of government officers. The 1844 select committee on general grievances even proposed that a colonial tribunal for impeachments be created to ensure that executive officers were held accountable for performance of their official duties.[40] One gains the impression that at least some of the official nominees would have preferred to have remained backroom boys, seeing their role essentially as public servants, in the mould of those referred to by MacDonagh, rather than as politicians. They seem to have been averse to involvement in political debates and manoeuvres.[41] When responsible government was finally achieved, and such tactics became fundamental to business, even Thomson and Plunkett, very active legislators in the 1840s and early 1850s and now required to relinquish their official posts, were unwilling or unable to adapt to the new regime. Thomson refused to become the first premier, although he served briefly as the government's representative in the upper house during Parker's 12-month ministry in 1856–57. Plunkett declined the post of attorney-general under Cowper, but served as president of the legislative council in 1857–58 and as attorney-general for a short period in the 1860s.[42] Solicitor-General Manning proved the exception to the rule, sitting in parliament until 1895 and serving as attorney-general on a number of occasions.[43]

If the crown's nominees did not form a united block, neither did the elected representatives, despite Gipps' fears that they would.[44] Members sometimes referred in debate to "the opposition side" and on some issues men representing the squatting interest or the Port Phillip district voted together. But in the first few years there was no consistent, stable group of elected members with common philosophical allegiances opposed to the government. Members who united against some official measures opposed each other on others and sometimes sided with the government. In 1843, a motion to defer the second reading of Wentworth's interest bill was won by 21 votes to 12, being supported by four

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39 Ibid., 18 December 1844. For Foster, see Dunlop, *JRAHS*, p. 182.

40 Report of select committee on general grievances, *V&P* NSWLC 1844. On Wentworth's role, see Clark, pp. 318-319. See also Michael Roe, *Quest for Authority in Eastern Australia 1835-1851*, Melbourne University Press in association with Australian National University, Melbourne 1965, pp. 77-79; Roe, "1830-50", pp. 92-93 .

41 See Chapter 1; Foster, p. 68.

42 For Thomson, see *ADB*, 2, p. 526; Foster, pp. 131-132. For Plunkett, see *ADB*, 2, p. 339; Molony, pp. 221-236, 244, 247-249, 254-257; Powell, p. 86.

43 *PR* NSW, pp. 63, 171, 263-265, 268-269.

44 See Gipps to Stanley, 28 October 1843, *HRA*, 1, 23, p. 199.

officials, members of the Port Phillip push and others. The minority comprised Auditor-General Lithgow, nominees Berry, Blaxland, Hamilton and Jones and elected members Bland, Cowper, D'Arcy and William Wentworth, Macarthur, Dumaresq and Lawson.[45] The following year, some but not all of this latter group voted for Foster's similar bill and were joined by several members who had opposed Wentworth's measure.[46] Again in 1843, Windeyer opposed Wentworth's debtors' protection and interest measures but seconded Wentworth's motion to introduce his liens on wool bill and supported amendments that Wentworth proposed to the government's postage, water police and tariff measures.[47] Bland frequently supported Wentworth, his electoral running mate, but he was decidedly opposed to Wentworth's stand on the government's tariff bill.[48]

Individual members also changed horses from time to time. Wentworth seconded two motions in support of J.D. Lang's corporations educational powers bill but then voted with opponents to defer its second reading.[49] He was also criticised for his contradictory approach to interference with vested rights and the issue of free trade.[50] Foster vehemently opposed Wentworth's 1843 interest bill but introduced his own measure to cap interest rates in 1844, a radical change of stance to which the *Herald* devoted a critical editorial.[51] A group of more conservative members, comprised of a mix of official and unofficial appointees and elected members often, but not invariably, voted together. This group included officials Thomson, Riddell and Plunkett, Hastings Elwin (nominee, chairman of committees and the colonial manager of a loan and trust company) and elected members, barrister William Foster, Roger Therry (commissioner of the court of requests who acted as attorney-general while Plunkett was on leave), Lowe (for a brief period) and merchant, banker and benefactor, Thomas Walker.[52]

Other factors sometimes came into play. Wentworth was personally hostile to Gipps for thwarting his 1840 attempt with associates to secure a significant area of land in New Zealand from Maori chiefs in direct defiance of British policy. Gipps had then decided not to

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45 *SMH*, 22 September 1843.
46 Ibid., 18 December 1844.
47 Ibid., 14 September, 14, 22 December 1843.
48 Ibid., 22 December 1843.
49 Ibid., 10, 17 November 1843. For Lang, see *ADB*, 2, pp. 76-83; J. Elford, "A Prophet Without Honour: The Political Ideals of John Dunmore Lang", *JRAHS*, vol. 13, pt. 3, 1927.
50 Ibid., 19 September, 22, 23 December 1843.
51 Ibid., 20 December 1844.
52 For Elwin, see Dunlop, "Who's Who", pp. 181-182. For Therry, see *ADB*, 2, pp. 512-514; for Walker, ibid, p. 565.

appoint him to a council vacancy. Fellow barrister, the choleric and legislatively energetic Richard Windeyer, was also no friend of Gipps in political matters.[53] Further, as Appendix 1 reveals, the rapid turnover of members, especially those representing distant Melbourne and the Port Phillip district, was probably another factor that militated against the formation of stable alliances and consistent voting patterns in the 1840s. The six southern electorates had a total of 17 members in less than five years (Charles Ebden being elected twice), and of these only Charles Nicholson held his seat for the life of the council. In the other 18 representative seats, only ten of the originally elected members sat for their full terms. Windeyer died, aged 41, in December 1847 while the octogenarian McLeay departed this earth just before the council's dissolution in June 1848.

Richard Windeyer as a young man
Reproduction courtesy of private owner, copy held in the Mitchell Library, State Library of New South Wales

53 For Wentworth, see Clark, p. 318; *ADB*, 2, p. 587; for Windeyer, *ADB*, 2, p. 617. For criticism of Windeyer's debating style, see *SMH*, 25 November 1843, 26 March, 4 July 1844.

The council and the executive, 1843: the initial onslaught

In May 1843, James Macarthur, a moderate conservative candidate with paternalist leanings who had been defeated by Charles Cowper in the recent election, viewed events from the distance of his Camden estate. He offered Thomson "his decided and settled opinion ... that unless the Government come forward to support the Public Credit in the present emergency the whole community will be involved in Bankruptcy".[54] However, at the council's first meeting, Thomson, like Gipps an advocate of laissez faire, warned members of the dangers of over-legislation, explaining that "legislative interference in matters where it is not imperatively required, has been productive of more mischief than any legislative omission to interfere".[55] The views expressed by Gipps, Thomson and members of like ideological bent in the fourth council's early life about the legislature's inability to remedy economic ills bring to mind David Roberts' argument, with regard to Britain, that paternalist ideas played a negative role in most major reforms in that country in the mid-nineteenth century. Here, Roberts also referred to MacDonagh's thesis that economic, social and bureaucratic forces were far more significant in stimulating the expansion of strong central government than any set of ideas.[56] In New South Wales, the impetus for such growth was provided largely by elected members, concerned with urgent practical, sometimes personal problems, rather than by the government or its bureaucrats, who were more detached and often more ideologically driven. Elected members actively promoted measures that conferred additional functions on central government. Windeyer's 1843 monetary confusion bill involved the creation of a central government land board and provision of a treasury guarantee, while Wentworth's liens on wool bill imposed additional registry functions on government. In the 1843 session, members, mainly elected, also combined to block a government attempt to perfect the operation of district councils, the institutions for dispersed local government provided for in the 1842 Constitutions Act.[57]

Previously, all legislative business had been initiated by the executive, Gipps' administration having been responsible for a steady stream of bills over several years. And yet the legislative program that the executive offered at the start of the first partly representative session was as sparse as it was sketchy. In his opening speech, Gipps

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54 James Macarthur to Edward Deas Thomson, 4 May 1843, ML A1531, vol. 3 (CY 721).
55 *SMH*, 2 August 1843.
56 David Roberts, *Paternalism in Early Victorian England*, Croom Helm Ltd, London 1979, p. 206.
57 See *SMH*, 2, 9 December 1843.

mentioned a bill to establish a general registry for deeds and another to regulate the sheriff's office, and the need to revise the law that established the colony's savings bank. The first government bill was not introduced until the end of the session's second week and the savings bank measure was not presented until the end of the first sitting month.[58] The government presumably expected to maintain control of business, but its inactivity immediately lost it the initiative and active elected members rose to fill the void. Thus, the tone of the council's early sessions was set in train from the beginning. By and large, the tactics adopted by the government's opponents and other elected members early in the first session continued, to a greater or lesser extent, until Gipps' administration ended in June 1846, with the prorogation of the fifth session. Broadly speaking, the tactics took two forms. The first involved the introduction of elected members' bills, initially aimed at alleviating the intolerable financial conditions and, later, directed at grievances against the British government. The second tactic was frequently of a more spoiling nature. It involved attacks on government proposals, root and branch, whether bills, financial estimates or moves to manage the flow of government business. Oppositionists introduced resolutions condemning the executive and instigated the preparation of addresses and petitions from the council to the governor, the British parliament and the sovereign concerning grievances of various kinds. As will be seen, they were also active in promoting the use of select committees to examine legislative proposals and other aspects of government and in employing various means, such as petitions, to harness popular opinion.

The executive's response to these developments was curiously muted, despite the fact that on the legislative front many of the elected members' measures encroached on areas which had necessarily been the government's business before 1843. Many involved the creation of new government functions, or the alteration or deletion of existing ones, and the use of public funds, resources and officials, and were thus in essence money bills that in principle only government could introduce. Occasionally officials objected, but generally they acquiesced. In fact, though consistent with its belief in laissez faire, the executive did more, or less, than acquiesce. During the council's first two years, it sometimes denied all responsibility for what could reasonably be considered to be government concerns, especially in the prevailing conditions. When an 1843 select committee on the government's bill to amend the 1841 insolvent law recommended that the governor should appoint

58 *V&P* NSWLC 1843.

assignees in place of trustees appointed by creditors (who had been responsible for frequent mismanagement and occasional dishonesty), Gipps refused. The government, he said, had nothing to do with the administration of insolvent estates and should not be seen to be responsible for the assignees' good conduct or for making good losses arising from their mismanagement. However, he did not object to the power of appointment of the new functionaries being vested in the chief justice.[59] While official members, and the colonial secretary specifically, often refused to help members with the development of legislative proposals, especially in the council's early days, they did assist with the detail of some measures. For example, Windeyer conferred with Thomson to obtain the names of public servants with financial expertise who would be suitable for appointment as land-board commissioners under his monetary confusion bill.[60]

A number of the bills introduced by elected members to combat the circumstances of the depression were highly innovative and, in response to local opinion, aimed to regulate economic affairs and relations between debtors and creditors in ways not contemplated, or likely to have been, in Britain. One, Wentworth's solvent debtors' bill (renamed the debtors' property protection bill) was intended to restrain the waste or sacrifice of a debtor's property occurring as the result of the exercise of a power of sale by one creditor, until the property was saleable again at its fair value. The proposal involved deferring the legal rights of individual creditors at the instance of a majority of them and thus entailed a significant and, some argued, unprecedented and unjustified interference with creditors' rights.[61] Even so, the *Herald*, normally of a staunchly laissez-faire bent, observed that as extraordinary diseases required extraordinary remedies, the bill might be defended if its operation was limited to one year.[62] Several crown appointees and elected members objected to the bill's interference with the relationship between debtors and creditors and favoured its deferral. William Foster, implacably opposed to Wentworth, commented that he "knew of no royal road, no legislative road to prosperity".[63] But the bill, with amendments and limited to two years' operation, passed and received assent.

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59 Gipps to Stanley, 1 January 1844 (No.1), *HRA*, 1, 23, pp. 290-292. See also Burton to Gipps, 27 December 1843, HRA, 1, 23, p. 295, Justice Burton expressing regret that the chief justice was so burdened.

60 *SMH*, 23 November 1843.

61 See ibid., 9, 16 August 1843; Roe, "1830-50", pp. 108-109.

62 Ibid., 16 August 1843.

63 Ibid., 17, 18 August 1843 (quotation in former). See ibid., 19 August 1843 for a further editorial on the bill.

A second innovative proposal, Wentworth's liens on wool and live stock bill, the idea for which was suggested by an unnamed eminent mercantile man, enabled proprietors of sheep to give a preferential lien over their wool clips from season to season and allowed owners to give valid mortgage securities on cattle, sheep and horses without the necessity to deliver possession to the mortgagee. The object was to relieve a class whose property was comparatively valueless and who, in the present state of things, were unable to raise money on either their land or wool. Wentworth conceded that the bill was a novelty, but he argued that its principles were not novel to the British constitution, citing various analogies and precedents. As the bill entailed the setting up of a registry in the supreme court for agreements made under it, it involved the use of public facilities and officials, and thus public revenue. However, no objection was made to it on that basis.[64] This bill also passed and received assent. The legal historian, C.H. Currey, stated that this measure, "an unqualified boon" to colonists, represented a unique contribution to the English law of personal property.[65] Secretary of State Lord Stanley was highly critical of it, his comments highlighting its innovative nature. The Liens on Wool Act was so irreconcilably opposed to immemorially recognised English principles governing the alienation or pledging of personal property, he said, that he would have advised the Queen to disallow it had it not been for the colony's exceptional circumstances. Gipps was instructed not to allow the measure to create a precedent and to see that it was repealed before its expiry. As for the debtors' property protection measure, the Queen was not to be advised to disallow it as it would expire in two years, but the governor was prohibited from assenting again to a law that enabled a debtor to retain possession of his property or avoid his ordinary legal responsibilities to all his creditors.[66]

Wentworth's third innovative bill directed at the colony's economic problems involved a substantial interference with existing rights and a direct assault on laissez-faire principles. It entailed not only a prospective fixing of interest rates on future transactions at five percent per annum but also a retrospective operation, in that the new rate was to apply to existing transactions. Mortgagees might also offer their mortgages to the crown in return for

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64 Ibid., 11 August 1843. See ibid., 1, 6 September 1843 also.

65 C.H. Currey, "The Influence of the English Law Reformers of the Early 19th Century on the Law of New South Wales", *JRAHS,* vol. 23, pt. 4, 1937, p. 239. See also A.R. Buck, "*Attorney General v Brown* and the Development of Property Law in Australia", *Australian Property Law Journal,* vol. 2 (1994), pp. 136-137.

66 Stanley to Gipps, 28 October 1844, *HRA*, 1, 24, pp. 57-58. See Gipps to Stanley, 7 October 1843, 1 January 1844 (No. 1), *HRA*, 1, 23, pp. 180-181, 280-283 for Gipps' comments on the bills.

government debentures secured on the colony's general revenue at a rate to be determined under the bill, a board appointed by the governor to decide whether the mortgage security was adequate. Wentworth was aware that the school of political economists founded by Jeremy Bentham opposed the setting of a fixed rate of interest on loans of money. However, he argued that a lender should only exact a just and proper return for the loan of his money, advancing the novel proposition that the interest payable to a lender should not exceed a fair division of the profit made by the borrower by use of the loan. There was nothing like a free trade in money, he said. While Bentham might have said that the legislature had no right to interfere in such matters, the question was "no longer a private one, between borrower and lender—it had become a public question—it was for the Legislature to say how long the mischief should continue in operation".[67]

Many members contributed to the debate on this bill, and their remarks highlighted the emerging contradictions of the period. Some elected members, such as Wentworth and Windeyer, traditionally suspicious of officialdom, were nevertheless prepared to offer unprecedented new powers to government to regulate aspects of the colony's commercial life. On the other side, the government and its supporters were intent on avoiding acceptance of them. The only elected member who was also an official, Roger Therry, applauded Wentworth for introducing the bill but said he was unable to support it, relying on views expressed by great men, including Bentham and Adam Smith, against usury laws. He was for "a free trade in money, as he was for a free trade in everything else". He queried why, if a landlord got as much rent as he could, a farmer as much for his produce as he could, and a manufacturer likewise for his goods, money should be exempted. Usury laws added to the difficulties of borrowing money and (as William Foster had also said) they encouraged fraud and litigation. Further, in objecting to the retrospective clauses, Therry said that persons who lent their money, be they English or colonials, were entitled to the interest on it. While he agreed that high interest was "eating up the vitals of the country, [he could not allow] the faith of the colony, which was involved in contracts, to be broken".[68] Hastings Elwin, who

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67 *SMH*, 16 September 1843. For the terms of the bill, see New South Wales Parliamentary Archives, Legislative Council 1, Manuscript Records, 4th Council, 1st Session, Bills: Interest Bill. On Bentham and the political economists, see Arthur J. Taylor, *Laissez-faire and State Intervention in Nineteenth-century Britain*, Macmillan Press Ltd, London 1972 (reprint 1974), pp. 13-16, 34-38; David Roberts, "Jeremy Bentham and the Victorian Administrative State", *Victorian Studies*, 2, March 1959, pp. 194-195, 199, Roberts saying that while Bentham wished the government to regulate many things, the economy was not one of them; Sir David Lindsay Keir, *The Constitutional History of Modern Britain since 1485*, Adam and Charles Black, London 1938 (sixth edn., 1960), pp. 369-370.

68 Ibid., 22 September 1843.

was particularly interested in such matters as the director of a loan company, concurred. The bill invaded private rights and deprived people of their lawful property without compensation. He also objected to the bill's likely interference with the right of the future disposition of a man's property. Referring to the debenture clause, he expressed astonishment that one so jealous of the power of the government as Wentworth should wish to vest such a power in the executive. Foster's motion to defer the second reading of the bill for six months (in effect, indefinitely) succeeded by 21 votes to 12.[69]

Another innovative bill arose from the report of the select committee on monetary confusion which Windeyer had chaired. This measure entailed the adoption of the *Pfanbriefe* scheme that operated in Prussia and under which a landholder might obtain credit by mortgaging his land to a government land board on the security of a *pfanbriefe*, or pledge certificate, on which the payment of interest was to be guaranteed by the colonial Treasury. The *Herald* asserted, in laissez-faire mode, that the measure smacked of "the exploded doctrine of bounties and protective duties on commerce" and of "illegitimate interference with the pursuits of private industry". It was "a manifest deviation from the proper business of Governments—the impartial protection of the lives and properties of their subjects".[70] Debate on the bill, involving many members, provides another example of the difference in principle existing between some elected members and the government regarding the legitimacy of legislative interference in commercial affairs.

Thomas Walker remarked that if a bill could be framed that would relieve financial distress by involving government intervention, the council would be justified in proceeding with it. He was astonished that the government continued to be silent and inactive in the face of the colony's economic problems. If officials were unable to devise any means of relief, "it would not have been too much to send down to this House and say so, and to ask the House to assist in framing or suggesting some measure ... but the government had done nothing ... but ask for a vote of the enormous sum of £400 000 to keep up the government establishment of the country".[71] Walker could not understand why members would refuse to assist Windeyer to make the bill better if they could. For Wentworth, it was clear that the government's "cold-blooded calculating policy" of turning a deaf ear to cries of distress and thwarting every measure brought forward by elected members for public relief would be

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69 Ibid.

70 Ibid., 14 November 1843. See Foster, pp. 74-75 on government opposition to the bill.

71 Ibid., 23 November 1843.

persevered in to the end of the session. If this measure were thrown out, he said, it would be vain to look for any measure of a similar nature from the government.[72] Murray added that he was voting for the bill because it would force the government to bring in something else. However, other elected members, including Therry, opposed the bill. Again, Elwin and Foster asserted that one must look to some source other than the legislature for relief. According to Elwin, the British parliament rarely if ever intervened in a matter such as this, and when it did it almost invariably did mischief.[73]

Among the government officials, Riddell objected to management of the government fund being vested in a board. Further, he said, public funds should not be jeopardised for the benefit of a small section of the community. When Windeyer called on the colonial secretary to say what the government intended to do, Thomson expressed embarrassment, saying he had not intended to speak. Government officers, he said, had been silent because the government strongly opposed the entire bill. He would be guilty of a mockery if he assisted in any way to perfect a measure he was bound to oppose. Great distress did exist, Thomson said, but the majority of the witnesses before the select committee did not believe that it could be relieved by legislation. In any event, the bill was illegal because the council was prohibited from passing any revenue measure that had not been initiated by the government.[74]

The bill passed by 11 votes to nine. The *Herald* suggested that while the majority was not happy with it, they voted for it because the council was bound to do "*something*" for the relief of the country.[75] Gipps had anticipated that the council would vote an address to himself instead, praying that he introduce that or some similar measure. If the council had adopted this course, Gipps said, he would have taken the opportunity of explaining why the government could not interfere in the manner proposed without risk to itself or danger to the public. He reported later that a motion by Cowper for that very purpose had been rejected.[76] The *Herald* regretted its loss, saying that had the address been presented, a conference would have ensued which would have elicited the governor's views on "the present extraordinary

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72 Ibid.

73 Ibid., 23 November, 7 December 1843.

74 Ibid., 23 November 1843. See Foster, pp. 74-75 on Thomson's approach.

75 Ibid., 25 November 1843 (emphasis in original). See ibid., 7 December 1843 for debate on the bill's third reading. See Knight, pp. 56-59 on Lowe's opposition to Wentworth's and Windeyer's bills.

76 Gipps to Stanley, 29 November, 14 December 1843, HRA, 1, 23, pp. 230-231, 252-253. See Powell, p. 21 on Cowper's opposition to Windeyer's bill.

crisis of our affairs".[77] Gipps withheld assent from the bill. His refusal, he said, was generally supported by the mercantile interest and public press.[78]

The most active elected members effectively hijacked the 1843 session, forcing most government business into the fag end of the session when many members had already left town to attend to their own affairs. The session did not end until 28 December 1843, but from at least mid-November quorums were scarce.[79] The government's lack of preparedness, even three months into the session, is illustrated by a comment from Thomson when introducing the colonial distillation bill on 7 November. He hoped to be able, he said, to introduce a much more detailed measure on the topic within a few days, together with some other bills that "were in a forward state of preparation".[80] Among the government bills that did pass at this late stage was a bill to protect the revenue by prohibiting colonial rectifiers from mixing wine with spirits. This measure, an important exception to the executive's usual laissez-faire approach, passed uneventfully, despite strenuous criticism from the *Herald* that it represented over-legislation and "a violent collision with the progress of free trade, and a sweeping infringement of vested rights".[81]

The government encountered major difficulties with other bills during this session because of the elected members' deep-seated antagonism towards Whitehall and its own lack of co-ordination. During debate on the postage act amendment bill, Auditor-General Lithgow moved an amendment to which both the colonial treasurer and attorney-general objected. Government opponents then moved a series of amendments involving attacks on the home government. When Wentworth successfully moved to deny the privilege of franking to departments whose expenses were defrayed by the home government out of the military chest, the government was forced to postpone the bill to the next session.[82] A bill to regulate the appointment and duties of the sheriff was amended, again on Wentworth's motion, to vest the power of appointment in the governor alone, thereby attacking the long-standing patronage system under which all colonial offices worth accepting were disposed of

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77 *SMH*, 8 December 1843.
78 Gipps to Stanley, 14 December 1843 *HRA*, 1, 23, pp. 252-253.
79 See *SMH*, 15 November 1843.
80 Ibid., 8 November 1843.
81 Ibid., 19 October 1843. See also 8, 9 November 1843; Gipps to Stanley, 1 January 1844 (No. 1), *HRA*, 1, 23, p. 284.
82 Ibid., 9, 14 September, 15 December 1843. See ibid., 3 October 1843 for an editorial on the bill.

by the secretary of state. This amendment was carried without objection.[83] Difficulties also arose concerning the government's wish to reduce the qualification of district councillors because of the depreciated state of colonial property, the qualification being the same as for a member of the legislative council. Members opposing the measure disagreed with the original purpose of district councils, namely, the raising of taxes for police, gaols and public works in local districts. As district councillors possessed uncontrolled taxing powers, they complained that lowering the qualification would place those powers in the hands of people who would not be liable to the taxes they imposed. The colonial secretary lamely referred to the executive's ability to issue instructions to guide district councillors in the use of their powers, but he was defending the indefensible. Decentralisation in the form of local institutions with taxing powers had always been unpopular. The second reading was rejected by eight votes to five.[84]

A short tariff or custom duties bill, introduced in mid December 1843, was designed to reduce duties on imported and locally manufactured spirits to prevent smuggling and raise funds to meet the resulting deficiency. Thomson said that the bill's more general and discriminatory character had been limited in response to a despatch just received from Downing Street.[85] The lack of co-ordination among government officers was again evident in the collector of customs' comment that he had been unaware that changes had been made to the schedules because of the despatch and had planned to add duties on coffee, tea, beef and rice. Auditor-General Lithgow added to the debacle by saying that he thought the reduction of the duty on spirits, by one-half, was too great. He suggested a reduction of one-third. Attorney-General Plunkett similarly tried to restore duties to a level that had applied before smuggling became a significant problem.[86] More broadly, the course of the debate illustrates that the division between proponents of protection and free trade was by no means as clear cut as contemporary commentators and the *Herald* made out. Various members favoured duty increases on imported produce, the finale being a motion by Wentworth to increase the duty on imported flour. Thomson expressed astonishment, noting that earlier in the session Wentworth had opposed anything in the shape of a protective duty. The resulting debate saw members adopting a variety of approaches to justify their decisions to support or

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83 Ibid., 2, 9 December 1843; Gipps to Stanley, 1 January 1844 (No. 1), *HRA*, 1, 23, pp. 286-287. See Clark, p. 305 on Wentworth's desire for all public service positions to be open to colonists.

84 Ibid., 2, 9 December 1843. See Knight, pp. 59-60 on Lowe's support for the bill.

85 Ibid., 8, 13, 20 December 1843.

86 Ibid., 20 December 1843.

oppose the increase. Wentworth's amendment was carried by ten votes to seven, the collector of customs voting with the majority.[87]

Thus, the most striking features of the fourth council's first session were the seizure of the legislative initiative by a small number of elected members and their introduction of innovative, and sometimes highly creative, measures that highlighted the difference of principle between them and the executive and its allies. The members' concern was to address the pressing needs of the day whereas the executive was intent of maintaining its laissez-faire approach. Already, the existence of two distinct but related agendas, or of the two sides of the one coin, was apparent. The first involved the conflict as to whether the legislature ought to take pervasive action in managing society and the economy. This involved members being innovative and responsive to local opinion, in spite of British precedent and policy, when the greater public good demanded action. It also involved a balancing of issues of laissez faire and state intervention of the kind referred to in Chapter 1. And in New South Wales at this time the initiative was taken by elected members rather than by MacDonagh's bureaucrats. The second agenda involved the more traditional and familiar conflict between the power of the crown and that of the people's representatives, especially regarding taxation and the control of land, that is, regarding property rights. Here, all the rhetoric, bitterness and customary posturing is evident. At the same time however, ideological distinctions were not always clear-cut or well-articulated, and motivation as well as alignments in the house were ad hoc. It was a pattern with important implications for the future.

The council and the executive, 1844–46: settling down.

An extraordinary council session of four days was convened in early March 1844, principally to pass a bill to rectify a jurisdictional problem for magistrates arising from a judicial decision.[88] In his speech to open the regular (third) session in late May 1844, Gipps lamented the reverses that had so grievously injured personal fortunes and the colony's credit in the last three years, but, he said, nothing in the state of public finances should create alarm. On the legislative front, he referred to an intention to define and extend the powers of

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87 Ibid., 22 December 1843. See ibid., 23 December 1843 for an editorial on the vote which the *Herald* asserted provided a good clue to the state of opinion in the council on free trade and protective duties. See Knight, pp. 62-63.

88 *V&P* NSWLC 1844; *SMH*, 6 March 1844.

the contentious district councils and to introduce a bill to permit Aborigines to give unsworn testimony in legal proceedings. While the council's address-in-reply acknowledged the present imperfect constitution of district councils, it warned that the council would not necessarily agree to an extension of their powers, as numerous petitions were opposed to such a move.[89] A *Herald* editorial on 30 May 1844 was more to the point, referring, in terms to which MacDonagh, Roberts and Kitson Clark would relate, to gigantic grievances that pressed on the country. "[W]e *feel* their intolerable weight; ... we *see* their disastrous consequences; and the whole community calls upon its representatives to strain every nerve, to exert all their talents and all their influence, for the obtainment of ample and undelayed redress". Adopting the traditionalist approach to colonial conflict, the *Herald* exhorted the council to show its stuff, standing as it did between the colony and its oppressors.[90]

The government was somewhat better prepared with bills at the opening of this session but this did not prevent members from launching assaults on most of them. Only four of the 13 bills offered by governor's message passed, two after reference to select committees.[91] For the second time, members blocked the government's attempt to perfect the district council system.[92] Some slackness in presentation of government business was also evident in Plunkett's comment, when moving the second reading of the Aborigines' evidence bill, that he had only become aware a few minutes earlier that he was to have that honour. This measure was doomed, though the old council had passed a similar measure in 1838, which had been disallowed in unusual circumstances.[93] Lowe's declaration that competent witnesses must believe in the existence of a God and a future state of rewards and punishments was supported by a number of members. The paternalistic and humanitarian principles displayed by many members some few short weeks later during debate on the apprentices' bill were nowhere in evidence and the superior liberal educational backgrounds of some participants did not temper their comments (Therry and Lang excepted) in opposing

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89 *V&P* NSWLC 1844.

90 *SMH*, 30 May 1844 (emphasis in original). On the conflict between Gipps' government and the council from 1844 to 1846, see Foster, pp. 68-73, 76-83; Powell, pp. 23-30; Knight, pp.73-81, 85-96, 127-138.

91 *V&P* NSWLC 1844.

92 See *SMH*, 26, 27 July 1844; Gipps to Stanley, 27 July 1844, *HRA*, 1, 23, p. 707; Knight, pp. 86-87.

93 See John Ferry, "An Examination of the various Aboriginal Evidence Bills of New South Wales, South Australia and Western Australia in the period 1839-1849 as well as an analysis of the racial attitudes which were espoused during the controversies", B.A. (Hons) thesis, University of New England 1980, for a history of endeavours to enact laws on this topic in Australia. See also Roe, "1850-30", pp. 118-119; S.G. Foster, "Aboriginal Rights and Official Morality", *Push from the Bush: A Bulletin of Social History*, no. 11, Nov. 1981, pp. 68-98; Clark, pp. 428-430; Molony, pp. 137-156.

the reception of Aboriginal evidence. The bill failed by 14 votes to ten.[94]

The object of Plunkett's bill on apprentices was to enable magistrates to exercise oversight over apprentices' indentures so that parents and guardians could force masters to do their duty and masters could compel apprentices' obedience, under threat of gaol.[95] In the committee stages, members expressed concern about imprisonment, Nicholson saying that he could not conceive of anything in the conduct of children that could justify it, especially given the kind of gaols that existed in the colony.[96] Plunkett agreed with Windeyer's call for modification of the punishments and suggested himself that the amelioration of punishments should extend to apprenticed orphan school children. An amendment moved by the influential new member for Melbourne, Quaker banker and landowner, Joseph Phelps Robinson, to raise the age at which a child could be apprenticed was also carried.[97] The welfare of children was seen to be a matter of continuing concern into the 1850s, and as an important area of government responsibility.[98]

Although 12 of the elected members' 23 bills passed in 1844, assent was withheld from three of them, and three others were reserved for royal assent. Here too some of the council's work was of a pioneering nature. A bill introduced by Windeyer to amend laws applying to civil juries provided for majority verdicts, a subject not yet touched by English law reformers. The bill passed and received assent.[99] Officials began to show a greater willingness to help members to perfect their legislative schemes. The only amendment to a bill dealing with medical witnesses introduced by the Sheriff, Adolphus Young, newly elected in April 1844 as a member for Port Phillip, was suggested by Thomson.[100] And the colonial treasurer suggested the names of the three trustees to receive funds under Wentworth's Bank of Australia bill.[101] Thomson's attitude was also changing and, by 1845, with growing confidence and freedom perhaps, he displayed a greater willingness to assist members to develop workable laws. On a number of occasions, Attorney-General Plunkett,

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94 *SMH*, 21 June 1844.
95 Ibid., 5 July 1844.
96 Ibid., 11 July 1844.
97 Ibid., 27 July 1844. For Robinson, see *ADB*, 2, p. 387.
98 See Alan Atkinson, "Time, Place and Paternalism: Early Conservative Thinking in New South Wales", *Australian Historical Studies*, vol. 23, no. 90, April 1988, p. 4.
99 *SMH*, 25 July, 3 August 1844. See ibid., 30 October 1844 for a detailed editorial, tracing the history of colonial jury laws, which described the changes made by the bill as unprecedented and extraordinary.
100 Ibid., 8 August 1844.
101 Ibid., 19 December 1844.

clearly overworked and also out of step with the laissez-faire inclinations of Gipps and Thomson, invited elected members to produce bills to consolidate existing laws.[102] When Windeyer introduced his bill on civil juries, Plunkett expressed regret that he had not comprehensively revised laws on juries generally, as these "were now scattered throughout the books".[103] And when Young introduced his medical witnesses' bill, Plunkett said that he had hoped that medically qualified members of the house "would have turned their attention to the subject, and would have introduced a comprehensive measure to regulate the medical profession".[104] This approach was catching. When introducing a bill to extend the operation of the Bushranging Act in 1844, Thomson said that he had thought that the select committee on insecurity of life and property might have considered the issue. As it had not, he had been forced to take action because the present law was about to expire.[105] And when Plunkett introduced an amending bill dealing with medical witnesses in 1845, he again referred to his expectation that Drs Bland and Nicholson "would not only have taken this subject in hand, but would have proposed some measure to put the medical profession in all its branches upon a proper standing". He still hoped they would take up "this duty, for the performance of which they were so competent".[106]

As will be seen in Chapter 4, the government's difficulties in the 1844 session were accentuated by the time and energy that members expended on select committees, several of which dealt with grievances. Again, difficulties were experienced with the financial estimates, being exacerbated by Gipps' inclusion of a provocative note concerning control of land revenues. Also, from this session, elected members began a campaign to seize control of casual revenue. And in early October, Windeyer moved to adjourn the council until the end of the following month to prevent Gipps from proroguing once the appropriation bill passed, aiming to forestall the loss of the representatives' work over the past several months on committees. When Thomson, putative controller of council business, protested that this move was without precedent in the House of Commons or any colonial legislature, Wentworth responded that a government which unfairly had left the representatives to introduce the measures that should have emanated from it was now endeavouring to prevent them from completing what it should have done. Windeyer's adjournment motion succeeded

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102 See Molony, pp. 48-52 for comment on Plunkett's workload in this period.
103 *SMH*, 11 July 1844.
104 Ibid.
105 Ibid., 11 July 1844. See also ibid., 15 October 1844.
106 Ibid., 8 October 1845. See also ibid., 15 October 1845.

by 11 votes to seven.[107] The *Herald* supported the council's move. The governor, it said, would certainly have prorogued the house immediately after obtaining supply, leaving no check on government activities until it was reconvened eight months later.[108]

When Gipps opened the council's fourth session in July 1845, he noted an improvement in the colony's condition. In 1844, exports had exceeded imports for the first time, and public finances, another great test of public prosperity, were satisfactory. He briefly outlined his legislative program, and expressed regret that he had not received a response from England to the council's 1844 addresses, even though he had delayed the session's start in the hope that they would arrive.[109] The government and its officials were better prepared than hitherto, and the legislative proposals of both the executive and elected members fared better. Twenty of the government's 21 bills passed, one of them being reserved, while 11 of the 19 bills introduced by non-official and elected members passed with one reserved. The *Herald* observed that although the session was 25 sitting days shorter than that in 1843 and 34 sitting days shorter than the combined sessions in 1844, it was more productive than either.[110]

By and large, apart from a peppering of addresses, members concentrated on law-making. Now the conflict between the government and the active elected members was more narrowly and more superficially focussed. The main issue of contention was the control of finances. In that respect, government and elected members returned to type. Attempts by elected members to secure council control of casual revenue was the focus of several bills and amendments. When Collector of Customs Gibbes introduced a second bill to regulate customs, his attempt in 1844 having failed, he retained most of the previously adopted clauses, even some that had been amended in a manner contrary to British precedent.[111] The bill passed and Gipps assented to it. When reporting to Lord Stanley, he drew attention to provisions of that and several other local laws that directed what had been the crown's share of fines, penalties and forfeitures into the colony's revenue.[112] Secretary of State Earl Grey later told Sir Charles FitzRoy, Gipps' successor, that these measures deviated from the usual,

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107 Ibid., 11 October 1844.
108 Ibid., 14 October 1844.
109 *V&P* NSWLC 1845.
110 *SMH*, 6 December 1845.
111 Ibid., 21 August 1845.
112 Gipps to Stanley, 23 November 1845 (Despatch No. 199), *HRA*, 1, 24, pp. 626-627; Gipps to Stanley, 23 November 1845 (Despatch No. 204), *HRA*, 1, 24, pp. 636-637. See also, *SMH*, 13, 17 September, 1845; Gipps to Stanley, 23 November 1845 (Despatch No. 205), *HRA*, 1, 24, pp. 643-644.

constitutional method of imposing fines, and that the clear design of this innovation was to deprive the crown of a claim on the proceeds of fines, penalties and forfeitures under the colony's Constitutions Act. Nevertheless, he said, the crown would not insist on the right. FitzRoy thus reaped the benefit of a relaxation in the home government's attitude to financial control, a benefit denied to the hard-pressed Gipps.[113]

Other measures were similarly directed at aspects of financial control and government expenditure. For example, Lowe introduced a bill for audit of the accounts of the expenditure of the colony's ordinary revenue by a select committee. The bill passed but was reserved.[114] Earl Grey informed FitzRoy that it could not be confirmed because it prevented the executive from incurring expense in collecting revenue without the express authority of an antecedent act of the council.[115] When Cowper introduced a bill, prepared in consultation with several other members, that arose from a dispute concerning the manner of payment of the registrar-general's salary, Thomson adopted a conciliatory line. While the bill was constitutionally improper as a money bill, he said, he did not object to its principle and was prepared to help in achieving its objective. However, after the bill passed, Gipps proposed extensive, controversial amendments. This bill lapsed.[116]

In his speech to prorogue the 1845 session, Gipps praised the council's co-operation in passing some important measures.[117] The speech drew a strong response from the *Herald.* In fact, it said, an almost total want of sympathy existed between the council and the governor, the one being, "in all its aims and objects ... especially *colonial*, and the other essentially *British*; one studying, as its paramount duty, the interests of the country placed especially under its charge, and the other, the good graces of the Minister in whose smile it officially exists". The *Herald* asserted that a "mental reservation" to avoid offending his masters in Downing Street had accompanied all of Gipps' executive and legislative measures from the first day of his administration.[118] Indeed, the conflict had become more simple, superficial and obvious, members straining to shake free from imperial restrictions and to take control

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113 Grey to FitzRoy, 6 August 1846, *HRA*, 1, 25, pp. 159-160.

114 Gipps to Stanley, 23 November 1845 (Despatch No. 197), *HRA*, 1, 24, pp. 623-624; *SMH*, 1 October 1845; Knight, pp. 128-129.

115 Grey to FitzRoy, 24 October 1846, *HRA*, 1, 25, pp. 226-228.

116 *SMH*, 7, 12 November 1845; Knight, p. 131.

117 *V&P* NSWLC 1845.

118 *SMH*, 14 November 1845 (emphasis in original).

of their own internal affairs.

The final, spiteful council session before Gipps' departure, in July 1846, lasted only one month, the council being adjourned on Wentworth's motion until after Gipps had left the colony. It transacted very little legislative business. In his speech to open the session, Gipps said that he had been compelled to call it together earlier than usual because of the impending expiry of certain temporary laws. He never addressed the council again, proroguing it by proclamation after the successful adjournment motion, thus thwarting arrangements for committee work to continue during the recess.[119] The *Herald* undoubtedly added to the tension. The day before debate commenced on the bill to extend the statute commonly called the Squatting Act (which provided for a tax on stock on lands beyond the limits of location and the policing of those lands), it published an editorial headed "The Struggle of To-Morrow" in which it referred to the tug of war between prerogative and liberty, between the representatives of the crown and the representatives of the people. To renew the Act for a single day, it said, would virtually admit the justice of the governor's claim that the secretary of state had the absolute right to dispose of the colony's waste lands and their purchase money as he thought proper without reference to the colony's legislature.[120] Thus public argument and rhetoric focused on traditional and habitual battles, and not on the more fundamental issues that were beginning to emerge within the law-making process.

When he moved the bill's first reading, Thomson stressed its temporary nature. While the government had hoped to have some definite measure on crown lands available before this, he said, it had been prevented from doing so because a bill dealing the issue was yet to be dealt with by the British parliament. Windeyer opposed the bill on a number of grounds and he proposed the preparation of an address to the governor stating why the council could not pass it.[121] His amendment for the address was carried by 19 votes to ten and the bill was defeated. On this occasion, all six non-official members voted with the government officials.[122] The *Herald* congratulated colonists on the unanimous decision of their representatives, pointing out that of the 29 members present when the vote was taken, all of

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119 See *V&P* NSWLC 1846; Gipps to Gladstone, 25 June 1846, *HRA*, 1, 25, p. 109. The adjournment motion was carried by 18 votes to six.

120 *SMH*, 2 June 1846. See Knight, pp. 133-134.

121 Ibid., 4 June 1846.

122 Ibid., 5 June 1846.

the "constitutionally appointed organs of the community" voted for the address, merging their political differences in a determined struggle against imperial despotism.[123] In his report on the defeat of the bill, Gipps asserted that all but four of the elected members who voted for the address were squatters.[124]

The fifth session was disappointing in legislative terms. Nevertheless, during five sessions in under three years, 76 bills had been enacted at a yearly average of over 25. Of the enacted bills, 20 had been introduced by elected members and two more by government nominees. Another seven bills were reserved for royal assent (five of these being elected members' measures) and the governor withheld assent from four more of the elected members' bills. In 1843, after the long delay imposed by British uneasiness about elections, the council's active elected members had successfully spread their legislative wings.[125] Their early efforts were successful partly because of the peculiar times, but also because in several instances they had important and radical legislation to advance and the government appeared ill-unprepared and/or unable to resist.

Later, these members turned to more populist tactics (urged on by the *Herald*) and began to move away from restrained and detached parliamentary methods as they put down deeper political roots among the population. Meanwhile, the government had become better organised to deal with them, and the overall result was a sharper and nastier contest.

123 Ibid., 6 June 1846. See also *V&P* NSWLC 1846.

124 See Gipps to Gladstone, 25 June 1846 (Despatch Nos. 126 and 127), *HRA*, 1, 25, pp. 118, 110-111; Molony, pp. 56-57.

125 See Appendix 1.1 for details of legislative activity between 1843 and 1846.

Chapter 4 The fourth council and public opinion, 1843–1846

Whereas Chapter 3 was concerned with the dynamics of debate within the council chamber in the period between 1843 and 1846, this chapter explores the impact on the legislature and law-making of the expression of public opinion outside the chamber in that period. The first portion of the chapter deals with public awareness as evidenced by petitions to the council and in the press, while the second examines the role of the council's select committees as law-making bodies and as an alternative forum for debate.

The council, petitioners and the press

The relationship between the council and public opinion was of growing significance in law-making, the influence of public opinion being manifest especially in petitions and the press. The new representatives adapted quickly to the use of what Michael Bentley, writing of Britain in the 1830s, describes as "the traditional device of petitioning".[1] Ravi De Costa, in an article which will be cited a number of times below, notes that that device—involving an interaction between the petitioner and the authority being petitioned and in which the former appeals to the latter in a moral setting that recognises particular claims as sensible and legitimate—had been used in England since at least the thirteenth century. It developed rapidly in the last decades of the eighteenth century and had become the central feature of the campaign to abolish slavery. That campaign did not stem from the personal grievances of petitioners, and was closely related, in De Costa's view, to the emergence of new modes of social identification in England's nascent urban and industrial enclaves.[2] It thus became clear that a petition could act as a "crystallisation point" for various types of popular action.[3]

Petitions had of course been presented to the council before 1843, but the practice accelerated with the arrival of elected representatives. While fewer than 80 petitions were presented between 1832 and 1839 and about 60 in the last four council sessions before the new council commenced, some 90 general petitions and five specifically related to public

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1 Michael Bentley, *Politics without Democracy: Great Britain, 1815-1914: Perception and Preoccupation in British Government*, Basil Blackwell in association with Fontana, Oxford 1984, p. 77.

2 Ravi De Costa, "Identity, Authority, and the Moral Worlds of Indigenous Petitions", *Comparative Studies in Society and History*, vol. 48, no. 3, July 2006, pp. 670-673. As noted in Chapter 1, Kitson Clark also highlighted the significance of the anti-slavery campaign.

3 Ibid., p. 673, De Costa citing Lex Heerma van Voss. 2001:3. "Introduction". *International Review of Social History*, Supplement 9: 1-10.

bills were presented by members on behalf of various groups or individuals in 1843 alone.[4] Many petitions sought suspension of the provisions of the Constitutions Act relating to district councils and many others called for alterations to publicans' licensing laws. Almost all were introduced by elected members, only one being introduced by an official and none by a non-official nominee. Petitions seeking legislative amendments resulted in Nicholson's two bills, dealing with raw sugar and the Sydney Dispensary. Wentworth presented a petition from merchants, ship-owners and masters of vessels seeking a thorough revision of the Water Police Act and leave to give evidence before the select committee on that law, while Nicholson presented petitions from similar groups praying that the water police establishment not be abolished and that the council pause before adopting the select committee's recommendations. Windeyer introduced petitions from officers of the Law Society objecting to the government's sheriff bill, while the Society's chairman and secretary asked to be heard before the council—a frequent prayer. Dr Thomson, a member for the Port Phillip District, presented a petition from local lawyers opposed to the government's general registry proposal.[5]

During the 1844 session, the number of petitions increased radically, totalling over 225, signalling an increasingly close relationship between the council and public opinion and a growth in new expectations of the legislature. A considerable number of the general petitions related to the recommendations of the select committee chaired by Lowe on education, while a lesser number arose from discontent among Presbyterians (either favouring or opposing repeal of the Presbyterian Temporalities Act) and revision of the Squatting Act. The recommendations of Lowe's committee in favour of a system of general secular education saw Cowper, a keen Anglican churchman, presenting the bulk of the numerous petitions organised by his co-religionists in opposition to the system. Bowman, Macarthur, Lord, Dumaresq, Foster, Lamb and Bradley all presented opposing petitions, and Attorney-General Plunkett presented three from Roman Catholic interests, who also opposed the recommended system. Counter-petitions were introduced by Lang, Robinson, Bland, Wentworth, Walker, Darvall and Colonial Secretary Thomson. D'Arcy Wentworth, Nicholson, Windeyer and Lawson presented petitions from both opponents and supporters of the proposed system. Earlier discussions of the education issue, in 1836 and again in 1839, had attracted smaller flurries of petitioning, largely from members of the already well-

4 *V&P* NSWLC 1832-1843.

5 For petitions generally, see *V&P* NSWLC 1843-1846; *Index to the Votes and Proceedings of the First Legislative Council 1843-1855*, n.d., Office of the Legislative Council, Sydney (unpublished).

organised Anglican lobby.[6]

Some elected members appear to have been especially favoured as vehicles for the presentation of petitions, or especially adept at their initiation and use. Cowper presented 35 of the general petitions in 1844 followed by Lang (26), Windeyer (25) and Robinson (22), while Nicholson presented 14 and Wentworth 12. Nine members introduced petitions supporting Wentworth's Bank of Australia bill, while one opposing petition sought to restrict the application of funds raised under it to payment of the Bank's debts. Controller of Customs Gibbes presented petitions seeking amendment of the customs measure and opposing the colonial spirits proposal, while Plunkett presented a petition from the Total Abstinence Society calling for a select committee on the regulation of liquor sales and another from citizens opposed to the publicans' licensing amendments. Walker's 1844 bill to authorise the export of colonial spirits arose from a petition from a local spirit manufacturer (Robert Cooper).[7] Lord's country towns courts of request bill of the same year was also introduced in response to petitions. It was referred to a select committee but lapsed.[8]

The number was down in 1845, when only 40 general petitions were presented, some praying for revision of various laws, such as those relating to regulation of public houses and the imposition of duty on spirits. Another eight petitions supported or opposed public bills, one of these carrying 4 000 signatures. In debate on the distillation laws amendment proposal, Windeyer referred to the numerous petitions presented against the bill. When he, Lowe and Wentworth pressed the council to agree to hear counsel on behalf of the petitioners at the bar of the house, Thomson said that he had no objection to that course. Despite the evidence so offered, the bill passed and received assent, the governor informing Lord Stanley that public sentiment, both in and outside the council, had swung against the distillers since the original law passed in 1839.[9] Only 12 general petitions and one in favour of a public bill were presented in the short final session of Gipps' administration in 1846.[10]

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6 See *V&P* NSWLC 1836, 1839, 1844. See also C.M.H. Clark, *A History of Australia*, vol. 3, *The Beginning of an Australian Civilization 1824-1851*, Melbourne University Press, Melbourne 1973, pp. 310-312; Ruth Knight, *Illiberal Liberal: Robert Lowe in New South Wales, 1842-1850*, Melbourne University Press, Melbourne 1966, pp. 82-96; Alan Powell, *Patrician Democrat: The Political Life of Charles Cowper 1843-1870*, Melbourne University Press, Melbourne 1977, pp. 23-26 on the education issue and petitioning in relation to it.

7 Gipps to Stanley, 5 February 1845, *HRA*, 1, 24, p. 241; see also *SMH*, 27 July, 10 August 1844.

8 *SMH*, 2 August 1844.

9 Ibid., 10, 16, 23, 31 October 1845; Gipps to Stanley, 23 November 1845 (Despatch No. 200), *HRA*, 1, 24, p. 629.

10 *V&P* NSWLC 1843-1846; V&P Index 1843-1855.

There will be some discussion of the vicissitudes of petitioning in Chapter 5.

Some members attached considerable importance to petitions. Plunkett was in the habit of commenting adversely when elected members' proposals were not based on or supported by petitions from interested community groups. For example, during debate on Wentworth's debtors' protection measure in 1843, he referred to the fact that no petitions had been presented in favour of it and that he had heard nothing of public feeling on the subject. He asked whether in such circumstances the council should sanction a measure which deviated from all known British law and interfered with current contracts made on the basis of the existing law, the implication being that radical measures might be legitimate if they had support outside the house.[11] Other members and participants in the legislative process adopted the same tactic. In debate on the district councils bill, Cowper referred to numerous petitions from various quarters opposed to the local council system.[12] The *Herald* noted that while in 1843 Foster had pointed out that no petitions had been presented in support of Wentworth's interest bill and that the press was opposed to it, he had conveniently overlooked the existence of the same conditions when introducing his bill on the same topic in 1844.[13] Local and home governments were also influenced by colonial public opinion expressed in this way. Gipps informed Lord Stanley that he had received two petitions praying that Foster's bill should not become law. They were from merchants and other inhabitants, and bankers, merchants and traders respectively, the first having 82 signatures, while the list of signatories to the second was headed by "H. Elwin, Chairman Trust Company", a nominated council member until July 1844.[14] The bill was denied royal assent, partly because of the opposing petitions.[15] Adverse comment was also made if proposals were not solicited by those directly affected by them. Colonial Treasurer Riddell expressed surprise that Lang had introduced a bill to extend the powers of the Sydney and Melbourne Corporations when those bodies had not sought such attention.[16]

The press influenced the legislative process in a number of ways, some of which have already been mentioned. Most importantly, newspapers raised public awareness. Official Hansard reporting did not commence in New South Wales until 1879. Before then, council

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11 *SMH*, 17, 18 August 1843.
12 Ibid., 26 July 1844.
13 Ibid., 20 December 1844. See ibid., 16 September 1843 for Foster's comments regarding Wentworth's bill.
14 Gipps to Stanley, 31 December 1844, *HRA*, 1, 24, pp. 156-161. See also ibid., p. 380.
15 Stanley to Gipps, 16 June 1845, *HRA*, 1, 24, pp. 377-381.
16 *SMH*, 17 November 1843.

proceedings were recorded in the press, principally by the conservative daily, the *Sydney Morning Herald,* which dominated the scene in the 1840s, and from December 1850 also by the radical *Empire*. Until 1854, when Congregational minister John West became its editor, the *Herald* was controlled directly by its proprietors, Charles Kemp, a devout Anglican, and John Fairfax, a tolerant Congregationalist, the proprietors presenting something of a dichotomy of views on some issues. In 1844, the moderate conservative, James Macarthur, described the paper as ridiculously conservative, but R.B. Walker suggests that it steered an independent course, drawing fire from both sides on occasion.[17] The advent of elected members increased the influence of the press. In addition to reproducing letters from the public commenting on legislative developments, the *Herald* published candidates' electoral manifestos, commented on their respective merits for election and reported on political activities such as electoral meetings and the many public gatherings held to discuss topical issues. It frequently commented on the council's performance and that of individual members and on the relationship between nominated and elected members and the community. As has been seen, it often criticised the governor and imperial authorities. A notable illustration is its reference to the Downing Street despatches attacking Wentworth's preferable liens and solvent debtors laws. The *Herald* criticised both the tone and the content of these "imperious missives", and suggested that they emanated from Under-Secretary Stephen, "the virtual sovereign of all the colonies—The Queen rules by her Minister, and the Minister by his clerk!"[18]

The *Herald* also ran editorials calling for legislative change in many fields, and showed particular interest in building construction and the alignment of Sydney streets, editorials on these topics appearing in 1843, 1845 and 1846.[19] In 1845, Wentworth successfully brought in a bill to extend the operation of the 1837 Sydney Building Act to meet one of the problems highlighted by these editorials.[20] It also advocated the abolition of police rewards, called for action on unseaworthy ships and the revision of laws dealing with merchant seamen and lunatic asylums. Editorials in March 1846 on merchant seamen's and building laws both highlighted the active involvement of G.R. Nichols, the solicitor for the

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17 R.B. Walker, *The Newspaper Press in New South Wales, 1803-1920*, Sydney University Press, Sydney 1976, pp. 34-36. For Kemp and West, see *ADB*, 2, pp. 40-42, 590-592; for Fairfax, *ADB*, 4, pp. 148-149. See also Michael Roe, *Quest for Authority in Eastern Australia 1835-1851*, Melbourne University Press in association with Australian National University, Melbourne 1965, p. 28 and Clark, pp. 403-404 on Kemp and Fairfax.

18 *SMH*, 18 March 1845.

19 See ibid., 14 October 1843, 31 May, 4 June, 13 October 1845, 14, 17 May 1846.

20 Ibid., 10 September 1845.

city corporation, in agitation for and preparation of legislative improvements.[21] The *Herald* contained regular reports and commentary on business to be covered in coming council sessions and dealt with in sessions just past, and it provided a running commentary on the legislative policy behind various bills before, during and after their passage. It also published detailed reports on more significant laws passed by the council. A surprising number of members had had press experience in England or in the colony as newspaper proprietors, financial backers, columnists or reporters—including Benjamin Boyd (member for Port Phillip between 1844 and 1845), Richard Jones, Lang, Lowe, Nicholson, Wentworth and Windeyer—and these at least were aware of the value of the fourth estate in communicating with and influencing the public.[22] While the colonial press reported overseas news, local politicians were undoubtedly especially attuned to contemporary local opinion as expressed in that medium. Gipps also paid careful attention to the *Herald.* When its editor attacked the council's rejection of the government's district councils' bill in 1844 as more discreditable to the colony and more calculated to injure its character for good sense and sound British feeling "than any thing which has occurred since the establishment of a local legislature", the governor sent a copy home to Stanley.[23]

In various ways, then, individuals and bodies outside the council participated in law-making, and members displayed no reluctance in admitting that they had gleaned ideas from sources out of doors. Indeed, from the outset, the new council engaged in the use of more or less experimental methods to convert public opinion into law, especially the opinion of experts outside the chamber. In 1843, Wentworth was the vehicle for introduction of three bills he did not prepare himself. A bill to regulate and protect friendly societies was, he said, presented to him by interested parties who had assured him it was strictly in accordance with imperial laws applying to similar societies in the mother country.[24] A bill to facilitate the more effective collection of rates imposed by the Sydney Corporation and to remedy defects in the Sydney Incorporation Act, 1842, had been prepared, he said, by the city solicitor (G.R.

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21 See ibid., 19 February 1844 (police rewards); 23 April, 4 June 1845, 6 June, 23 July 1846 (unseaworthy ships); 5, 6 March 1846 (merchant seamen); 14, 17 March 1846 (building and alignment laws); 9 June 1846 (lunatic asylums); 5, 17 March 1846 (for Nichols' participation).

22 Walker, pp. 21-24, 34, 37, 62. Other politicians, members of later councils, including James Macarthur, James Martin, Henry Parkes and George Robert Nichols, had had similar experience. See Elena Grainger, *Martin of Martin Place: A Biography of Sir James Martin (1820-1886)*, Alpha Books, Sydney 1970, pp. 18-44 on Sydney newspapers generally and on Martin's journalistic work for G.R. Nichols, the editor of the *Australian* in the late 1830s.

23 *SMH*, 27 July 1844; Gipps to Stanley, 27 July 1844, *HRA*, 1, 23, pp. 706-708.

24 Ibid., 14 October 1843.

Nichols).[25] And again, when Wentworth introduced a bill to regulate hawkers and pedlars and remedy deficiencies in the existing law, he excused himself for the lateness of its introduction, saying that it had not been long in his hands.[26] And the idea for Wentworth's liens on wool bill was suggested to him, he said, by a Sydney merchant.[27]

The introduction of these bills provides the first evidence of the council being used by what might be called lobby groups with legislative agendas of their own. Nichols and the Sydney Corporation were the two most important parties in this regard. They were to be the source of a good deal of future legislation. Indeed, the position of bodies like the Corporation and other formal and semi-formal groups, and even of select committees, as conduits for public opinion is of central concern for this thesis. Wentworth gleaned ideas from other sources also. In committee debate on his debtors' protection measure in 1843, he made the rather startling admission that he liked parts of a new draft of the bill that he had seen in a newspaper better than his own and moved to adopt the first clause in that draft instead.[28] When introducing the 1845 bill dealing with savings bank loans, Thomson, vice-president and a trustee of the bank, told the house that his fellow trustees had requested help after they found that they had no power to lend money to Sydney Corporation to enable it to lay water pipes.[29] Attorney-General Plunkett said the arrangement of his 1846 jury laws consolidation measure had been suggested "by a party for whose judgment he had the greatest deference".[30] And when he moved the second reading of a bill to amend the law of libel, in the last days of the first session in 1846, Windeyer said it was introduced at the suggestion of certain friends who had assured him, on the basis of their experience, that the colony could safely adopt the new English Act on the subject.[31]

The council's select committees

As has been seen, even before 1843 the relationship between the council and its select committees had been of crucial importance in law-making. With the arrival of a partly elected legislature, committees played an even greater role, partly because of the absence of a second legislative house. In the very early period, in 1843, select committees, such as those

25 Ibid., 10 November 1843.
26 Ibid., 30 November 1843.
27 Ibid., 11 August 1843.
28 Ibid., 19 August 1843.
29 Ibid., 25 September 1845.
30 Ibid., 29 May 1846.
31 Ibid., 10 June 1846.

dealing with crown land sales, immigration, distressed labourers, insolvency and, especially, monetary confusion, made a remarkable effort to gather information and opinions about social problems, the implication being that the government should do something about them. Like the Wentworth and Windeyer laws of the same period, this early committee activity suggests that the council had genuinely interventionalist and paternalist aspirations. However, by 1844, in a parallel with events in the chamber, committees were being also employed to marshall public opinion against the government.

Committees operated both as an additional chamber, capable of debating and deciding issues, and as a medium between the council and public opinion, since witnesses before the colony's committees more clearly represented the opinion of a small community than they could do in England. Through committees, individuals and pressure groups were given the opportunity to participate in policy development and law-making. Indeed, committees can be viewed as law-making (though not legislative) bodies in their own right. In February 1845, the *Herald*, summarising legislative activity in 1844, referred to the committee rooms as "the scenes where the actual business is transacted", the council chamber being the place of talk while the committee room was that of work.[32] The thoroughness of committee deliberations and the increasing expertise of members ensured that committee recommendations could be received by the council with confidence, although modifications often occurred in the house, and for a variety of reasons some proposals were delayed or failed to progress altogether. The work of committees also contributed to public acceptance of council laws. Another aspect of their work is touched on by Kim Lawes, in the British context, when she refers to difficulties experienced by early nineteenth-century reformers in convincing politicians that social problems could be overcome by legislation. Like MacDonagh, Lawes points to the increasing importance of parliamentary select committees as a device to identify the extent of the country's social and economic problems. For MacDonagh, the exposure of the actual state of things in committee was the most potent cause of reform in the nineteenth century.[33] In New South Wales, while this function of the colony's committees was barely evident before 1843, it became increasingly important thereafter.

In the period of a little under three years covered by this chapter, the council appointed

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32 Ibid., 3 February 1845.

33 Kim Lawes, *Paternalism and Politics: The Revival of Paternalism in Early Nineteenth-Century Britain*, Macmillan Press Ltd, London 2000, p. 17; Oliver MacDonagh, *Early Victorian Government 1830-1870*, Weidenfeld and Nicolson, London 1977, p. 6.

72 select committees, 15 in 1843, 23 in 1844 and 24 in 1845. Of the 10 appointed in the short 1846 session, none reported because its premature termination. Some committees were sessional (dealing with such matters as standing orders and the council's library), over 20 related specifically to local bills or legislative proposals, and the balance dealt with an array of general issues, often involving aspects of imperial or local administration. In 1843 select committees produced over 370 pages of reports, minutes of evidence and associated material and in 1844 over 760. The 1843 monetary confidence committee report and minutes of evidence occupied some 60 pages while the 1844 crown lands grievances report, appendices, evidence and responses to a circular letter took up 250 pages and the report of the education committee some 139 pages. In 1845, the reports of 21 committees filled over 500 pages. This equates with considerable periods of work. Nicholson's committee on immigration and Murray's on crown land sales (both 1843) and Cowper's committee on crown land grievances (1844) took over 3½ months and Wentworth's committee on general grievances (1844) 5½ months. However, the 1843 monetary confusion committee reported in a little over two months, as did Lowe's education committee and the 1845 committees on the proposed repeal of the liens on wool law and the general cemetery, and most committee reports were produced in a much shorter period. The workload for committee members could be tremendous, especially for conscientious members who attended regularly. In terms of appointments to committees in this period, Nicholson led the way, being a member of some 41 committees, followed by Cowper (37), Wentworth (36), Robinson (who did not enter the council until 1844), (29), Thomson (26), Lang (24), Plunkett and Windeyer (23 each) and Lowe (18).[34]

The kinds of witnesses called, the frequency with which certain kinds of witnesses were used, the nature of evidence given by them and the use made of it all provide an insight into both the relationship between members and witnesses and the active and original manner in which the first partly elected council harnessed public opinion and employed it in law-making. Council members themselves, and not just the officials, were frequently called as witnesses, some because they held appointments relevant to the work in hand and others because of their business or occupational experience and expertise or familiarity with colonial conditions. Settler and brewer William Bradley appeared before committees on

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[34] *V&P* NSWLC 1843-1846. For comment on the committee work of some members during this period, see Knight, pp. 80-81 on Lowe; Powell, p. 29 on Cowper; John N. Molony, *An Architect of Freedom: John Hubert Plunkett in New South Wales 1832-1869*, Australian National University Press, Canberra 1973, pp. 51-52 on Plunkett.

postage, monetary confusion and scab in sheep, settler John Panton before the postage and distressed labourers committees, settler and former master mariner John Coghill before those on crown land sales and distressed labourers, while Windeyer and merchant Thomas Walker both appeared before committees on immigration and extension of the electoral franchise.[35] Several men who later became council members appeared, the most notable being J.P. Robinson, who gave evidence frequently. Committees took evidence from a wide variety of other sources as appropriate to the terms of their inquiries. These included experienced landholders and other settlers, ship-owners, merchants, bankers, auctioneers and valuers, professionals, including lawyers, medical practitioners and accountants, magistrates, police and immigration officials, officials of the convict and commissary establishments, members of local and district councils, clergymen, those involved in poor relief and employment schemes, members of the working and unemployed classes and, on one occasion, an Aborigine, who gave evidence before the Windeyer-chaired 1845 committee on the condition of his people. Some witnesses fell within more than one of these categories, being called on occasion to give evidence arising from different facets of their experience. For example, Robinson provided information to different inquiries as a person familiar with the English postal system, as a bank director and as someone versed in employment conditions in the interior, especially in the region occupied by the wealthy squatter and merchant Benjamin Boyd, for whom he acted as agent. Written material was received as well, often in response to circular or other letters despatched by committees, from judges, benches of magistrates and other persons unable or not called to give evidence in person.[36]

The 1843 committee on the bill to amend the 1840 Water Police Act, introduced by governor's message at the direction of the secretary of state, is a good example of the range of abilities used. Coghill, the former master mariner, was a member. The committee took evidence from Captain Robert Towns, a ship-owner, landholder and influential colonist who was one of the petitioners seeking the law's revision. Towns believed the water police establishment was unnecessary but that the continued operation of other provisions would be useful, if modified. These provisions, he said, had been examined by "Captain Dacre, Mr Nichols and myself", and he had some remarks on them for the committee, the original Act having been prepared by Nichols on behalf of Sydney merchants and ship-owners, who were

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35 See Appendix 1; Gipps to Stanley, 18 July 1843 (despatch nos. 112, 113), *HRA*, 1, 23, pp. 42-45 for particulars concerning these men.

36 *V&P* NSWLC 1843-1846.

angered by unmanageable seamen in port.[37] The committee also examined two magistrates. The first was a visiting magistrate, while the second, Captain Hutchinson Hothersall Browne, was the water police magistrate (and destined to make frequent appearances before committees in other guises). While the visiting magistrate considered that the establishment's duties could be transferred to the ordinary bench, his colleague not unnaturally demurred. However, both agreed that punitive aspects of the Act required amelioration and that home government directives for changes would render the law useless. Browne suggested that additional clauses could be added to assist seamen to recover their wages, and he presented the committee with copies of provisions of certain English laws that he thought might serve as precedents. He also handed in various other statements and returns relating to the working of the Act.[38]

Of the other witnesses examined, Henry Moore, a merchant and ship-owner, thought that the offices of the harbour master and water police magistrate might be combined. Merchant Daniel Egan agreed, saying that a separate establishment was unnecessary. Egan also said that the only necessary provisions of the Act were those dealing with the regulation and discipline of seamen, even though provision for the latter had met with Lord Stanley's disfavour.[39] Questioning by committee members established that conditions in the port, so far as the availability of seamen and desertion rates were concerned, had changed substantially since the Act was passed. The committee recommended that various amendments be made, including abolition of the superintendent's (that is, water police magistrate's) office.[40] During subsequent debates in the council chamber, Therry bemoaned the loss of this office and the transfer of its functions to the ordinary police, pointing, as had some witnesses, to the benefit of having the position filled by "a nautical gentleman ... who could traverse the harbour ... and look at the practical working of the Act".[41] That is, Therry directed attention to the importance of a field executive, the leaven of MacDonagh's Victorian state. The government also supported retention of the position. Despite this, the committee's recommendations were adopted by nine votes to seven, an indication of its

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37 Minutes of evidence taken before the select committee on the water police amendment bill, 11 October 1843, p. 2.

38 Ibid., 13 October 1843, pp. 4-5, 16 October 1843, pp. 8-11. The minutes of evidence refer to the water police magistrate/superintendent as both "Browne" and "Brown". The former appears to be correct. The evidence of F.L.S. Merewether to the 1843 committee on the petitions of distressed mechanics and labourers also refers to "Captain Browne, the Water Police Magistrate".

39 Ibid., 13 October 1843, pp. 5-8.

40 Report from the select committee on the water police amendment bill, *V&P* NSWLC 1843.

41 *SMH*, 14 November 1843.

authority, and its deliberations were translated into law.[42]

The 1843 select committee to consider the petition of some 4 000 Sydney inhabitants concerned about the plight of unemployed artisans and labourers signalled the beginning of an interest in Sydney as a social phenomenon with its own distinctive problems, problems also partly characteristic of the new cities in Britain. The committee considered both the actual condition of the city's unemployed and the demand for labour of various kinds in the interior. It took evidence from seven of the affected individuals, including an articulate activist, upholsterer Benjamin Sutherland. Sutherland was a member of the Mutual Protection Society, which aimed to improve the condition of the working classes and to secure the return of appropriate people to represent them in the city's corporation and legislative council. Michael Roe has suggested that this Association forcefully expressed what he terms "the immigrant claim", the assertion that as the government had brought people to the colony, it had a duty to rescue them from destitution.[43]

Sutherland provided the committee with a statement that he and several others had prepared in less than three days by canvassing the various city wards. It showed the numbers of unemployed men and of their dependent wives and children, listing such details as the men's occupations, the length of time since they had worked and their children's ages.[44] Committee members, including Lang, Thomson and Plunkett, were obviously particularly interested in Sutherland's evidence about his Society, which organised public meetings and had prepared two petitions to the council. Sutherland informed the committee that the Society included six members of the city corporation and a number of employers.[45] Questioned by Cowper about its aim to secure a proper return of members to the council, Sutherland responded that "we considered [that] to be one means of ameliorating our condition".[46] The crown officials probed aspects of Sutherland's evidence about the attitudes of the unemployed to different types of employment and wage rates. He was asked a total of 181 questions. The committee also took evidence from council members Panton and Lawson

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42 Ibid. See also ibid, 15 November, 14 December 1843; Gipps to Stanley, 1 January 1844 (No. 1), *HRA*, 1, 23, pp. 292-293.

43 Michael Roe, "1830-50" in F.K. Crowley (ed.), *A New History of Australia*, William Heinemann, Melbourne 1974, pp. 122-123. See also Roe, *Quest*, pp. 93-94; R.M. Hartwell, "The Pastoral Ascendancy, 1820-50", in Gordon Greenwood (ed.), *Australia: A Social and Political History*, Angus and Robertson, Sydney 1955 (reprint 1968), pp. 57-58.

44 Minutes of evidence taken before the select committee on the petition from distressed mechanics and labourers, 13 November1843, pp. 3-10.

45 Ibid., p. 8.

46 Ibid.

and seven other witnesses concerning employment prospects in various parts of the colony, some witnesses suggesting that labouring positions for single men as shepherds, hut-keepers and such like were available up-country. The chairman Lang was concerned to know what wages were offered and in what form they would be paid, especially in remote areas. Other aspects of employment relations and law were probed.[47] Caroline Chisholm gave evidence about the difficulties of obtaining employment for men with families anywhere in the colony and concerning her scheme to settle families in groups on long term clearing leases in the country on land provided by private benefactors.[48] The committee also took evidence from Francis Merewether, the colony's immigration agent, George Allen, a committee member of the Benevolent Society, and the Rev. Robert Ross, its secretary, as to the existence and causes of distress and ways of relieving it, and from J.P. Robinson, on this occasion as to Boyd's employment requirements at Twofold Bay.[49]

The committee report called for immediate relief of the destitute, the "draughting off" as many as possible of the city's unemployed to the interior and along the coast, and the initiation of public works by the government in association with the city corporation, to relieve unemployment.[50] That is, it called for action that could be achieved without legislative intervention. Another select committee, in 1844, concerned the condition of Sydney. It inquired into insecurity of life and property and the means of preventing daily outrages against public peace in the city and its environs. Its report called for augmentation of police numbers, heavier sentences for criminals, prohibition of night auctions, the passage of a pawnbrokers' law and an increase in the fee for an auctioneer's licence.[51] Committee member Robinson promptly brought in a bill to deal with the pawnbroking aspect, but it failed to proceed in the 1844 session because of its close relationship with a bill to regulate auctioneers, which was also delayed.[52] The work of both committees illustrated the council's interventionist and paternalist habits.

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47 Ibid., 10, 13-16 November 1843, pp. 1-3, 10-17, 20-22, 24-26.

48 Ibid.,14-15 November 1843, pp. 17-20. On Chisholm, see Clark, pp. 240-243; Alan Atkinson, *The Europeans in Australia. A History*, vol. 2, *Democracy*, Oxford University Press, Melbourne 2004, pp. 262-264.

49 Ibid.,16 November 1843, pp. 23-24, 26-29. See *ADB*, 1, pp. 5-7 on the multi-faceted Allen who was, among other things, a solicitor, a nominee member of the legislature, an active Wesleyan, a philanthropist and Sydney's mayor in the mid 1840s.

50 Report from the select committee on the petition from distressed mechanics and labourers, *V&P* NSWLC 1843.

51 See report from the select committee on the insecurity of life and property and minutes of evidence, *V&P* NSWLC 1844.

52 See *SMH*, 27 July, 3 August, 26 September 1844.

The 1844 committee, chaired by Riddell, to inquire into the state of distress said to exist among agricultural labourers and mechanics and their families took further evidence from Caroline Chisholm regarding her re-settlement scheme, her own interventionist and paternalistic tendencies perhaps setting an example for legislators and the government. It also heard from Francis Merewether and officials involved in public works projects, including Colonial Architect Mortimer Lewis, Surveyor-General Sir Thomas Mitchell and the Sydney Corporation's superintendent of works, William Moir. It took evidence from council member Coghill about his experiences in obtaining labourers to work in the country, and from the Rev. W.H. Walsh of the parish of St Lawrence in Sydney concerning the level of distress in the city and the occupations of those affected.[53] Chisholm, an optimistic advocate of the unemployed and of her scheme to assist them, denied that ample positions existed for shepherds and farm labourers, evidence contradicted to a considerable extent by Merewether and Coghill, both of whom said that new immigrants had readily obtained employment in the interior.[54] The committee recommended that any further sums appropriated by the council for public works should be spent in the interior, especially on bridges. In so doing, it relied heavily on Mitchell's "very able report". Mitchell, himself interested in schemes to open up the country, had pointed to the need to open the way to the Illawarra with a view to preparing land for sale there.[55]

The nine-page report of the 1843 select committee on immigration carefully weighed the evidence received from 22 witnesses and the responses from magistrates to a circular letter about conditions of employment and prospects in the colony. The report was published by the *Herald* shortly after its tabling.[56] It also referred to the condition of the agricultural and manufacturing poor of Britain and to reports of committees of the British parliament as well as to that of the council's own recent committee on unemployment in Sydney—thereby illustrating the cumulative effect of such inquiries. It canvassed reasons for the reluctance of immigrants to work in rural areas and possible means of overcoming this problem before making a comprehensive set of recommendations which it considered would re-establish immigration to the colony.[57]

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53 See minutes of evidence taken before the select committee on distressed labourers, 29 August, 3 September 1844, pp. 7-14.

54 Ibid., 27 August 1844, pp. 1-6, 10.

55 Report from the select committee on distressed labourers, *V&P* NSWLC 1844.

56 See report from the select committee on immigration, *V&P* NSWLC 1843; *SMH*, 14 December 1843.

57 Ibid.

Economic depression also focussed attention on the intricacies of insolvency laws. The 1843 select committee on the government bill to amend the 1841 Insolvent Act had reported that many amendments were required to this complicated statute.[58] However, as time was short, the committee concentrated on a few changes of obvious utility based on the evidence of 14 witnesses, who included court officials, businessmen and merchants, a solicitor and an accountant. The committee also obtained comments from three judges. One, Chief Justice James Dowling, had chaired two previous committees on the subject and another, Justice Burton, had been heavily involved in the Act's drafting. The judges did not favour changes, especially piecemeal ones.[59] The last of the committee's recommendations showed that members were not afraid to break new ground. It called for the abolition of imprisonment for debt before the imperial government had adopted this policy, suggesting that imprisonment enabled a vindictive creditor to deprive his fellow creditors of the benefit of the debtor's labour.[60] This recommendation caused Gipps to hesitate in assenting to the amending bill, considering that in a matter of such importance a colonial legislature ought scarcely to take the lead of parliament. However, he gave way as the measure "grew in favor every day with the Public". He had waited, he said, as long as he could for objections from any quarter, but none came.[61] The secretary of state was not impressed. As the amendments raised questions of permanent importance, the Queen's decision would be suspended until the effect of the law in the colony had become apparent and a report on its operation had been provided.[62]

The 1844 session saw the use of select committees as a means of discomforting the executive. Much time and energy was expended on a series of aggressive committees dealing with land and general grievances, the preparation of petitions to the sovereign and parliament on corn export and crown land grievances, and an address on police and gaol expenditure under the schedules to the Constitutions Act.[63] The thoroughness of committee inquiries was now employed as a means of pitting public opinion against the government. Twenty-six witnesses gave evidence before the Cowper-chaired land grievances committee, including

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58 See report from the select committee on the Insolvent Act, *V&P* NSWLC 1843.

59 See ibid., appendix. See also Burton to Gipps, 27 December 1843, *HRA*, 1, 23, pp. 294-295. Burton also criticised the drafting of the amendments, saying one clause was "so clumsily contrived, that *really* we shall find a difficulty in knowing what to do". (Emphasis in original).

60 Ibid. See also *SMH*, 16, 27 December 1843.

61 Gipps to Stanley, 1 January 1844 (No. 1), pp. 290-292.

62 Stanley to Gipps, 28 October 1844, *HRA*, 1, 24, pp. 58-59. For Gipps' response, see Gipps to Stanley, 12 September 1845, *HRA*, 1, 24, pp. 526-527.

63 See *V&P* NSWLC 1844. On grievances generally, see S.G. Foster, *Colonial Improver: Edward Deas Thomson 1800-1879*, Melbourne University Press, Melbourne 1987, pp. 72-81. On the land grievances committee, see Powell, pp. 27-29; Knight, pp. 81-82.

eight current and future elected council members and two official members, Riddell and Thomson. Settlers George Cox and George McLeay, who had both given evidence to the immigration committee, appeared again. The committee also received well over 100 responses to its circular letter calling for comment on the topic from justices of the peace, who were mainly the local squirearchy, throughout the colony. An appendix to its report set out the terms of resolutions passed at various public meetings held across New South Wales concerning the government's regulations on the occupation of crown land under squatting licences published in April 1844. Council members were prominent in moving and seconding the various resolutions objecting to government policy which were passed at Sydney's public meeting. Among other things, the committee's report called for the reining in of the powers of crown land commissioners, the repeal of the Crown Lands Occupation Act (the Squatting Act) and the reorganisation of the border police.[64] A subsequent committee chaired by Cowper prepared petitions to the Queen and parliament praying for repeal of the imperial legislation which precluded the council from controlling the disposal of crown land and revenue arising from it.[65] In praising the report of the land grievances committee, the *Herald* said that it would bring the character of the council before the British public in a very favourable light. Clearly, it said, not all wisdom in the management of colonial affairs was lodged at government house.[66]

The 15-page report of the general grievances committee referred to the value of the evidence of a number of its 16 witnesses in support of the committee's attacks on the district council system and the transfer of the cost of police and gaols to the colony. It also relied on the evidence of three experienced solicitors in its recommendations on the independence of the judiciary and the need for legislation to support legal claims against the government. The committee concluded that remedies for the six grievances which it identified all required the sanction of the crown or of the British parliament and were thus outside the council's power.[67]

While council members wished the poor and ill-educated to be better regulated and policed, they resisted interference with the conduct of the affairs of their own kind.

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64 See report from the select committee on crown land grievances, *V&P* NSWLC 1844, vol 2.

65 See report from the select committee on crown land grievances (petitions to the Queen and both houses of parliament), *V&P* NSWLC 1844 vol. 2.

66 *SMH*, 25 July 1845.

67 See report from the select committee on general grievances and minutes of evidence, *V&P* NSWLC 1844, vol. 2.

However, two 1845 committees involved members dealing with men like themselves. The 1845 committee on the state of the law governing scab and catarrh in sheep took evidence about the efficacy of the current enactments from only four witnesses, council members Bradley and Murray and two magistrates. The committee also received replies to a circular letter, respondents including council member, surveyor and pastoralist, Henry Dangar, and pastoralist, William Macarthur.[68] Another 1845 committee, on the operation of the Slaughtering of Cattle Act, heard from the proprietors of three boiling down works as well as several men involved in the pastoral industry. As the evidence suggested that the recent practice of boiling down cattle provided a cover for cattle stealing, committee members quizzed witnesses on possible legislative means of preventing this.[69] In a display of anti-inspectorate sentiment, Dangar, who claimed that the practice of boiling down had become indispensable to graziers, objected to surveillance of pastoralists by government inspectors which, he said, entailed "an arbitrary introduction of a low official on gentlemen's estates".[70] These committees provided evidence of a desire on the part of both committee members and witnesses to exercise personal and exclusive control over issues that particularly concerned them.

Astute members perceived the benefit of urging that at least certain of their proposals be referred to committees. In September 1843, less than two months into the fourth council's first session, during debate on his interest bill, Wentworth said that the best way to demonstrate that all investments had become ruinous would be to form a committee of the house, and take the evidence of merchants, farmers and other classes.[71] In 1844, he similarly urged that his bill to consolidate the law dealing with publicans' licences be referred to a select committee.[72] And when Gipps took steps at the beginning of the 1845 session to follow up on Lord Stanley's suggestion that the objectionable Liens on Wool Act be repealed, Wentworth successfully moved for the appointment of a select committee to review the executive's proposal to repeal this patently useful measure, thereby appealing to expert public opinion. It will be recalled that much the legislative energy early in the life of the fourth council came from economic difficulties (including unemployment in Sydney). Wentworth pointed to the success of the Liens on Wool Act in saving those engaged in

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68 See report from the select committee on the scab and catarrh in sheep, appendix and minutes of evidence, *V&P* NSWLC 1845.

69 See report from the select committee on the Act to regulate the slaughtering of cattle, appendix and minutes of evidence, *V&P* NSWLC 1845.

70 Ibid., appendix p. 6. On Dangar, see *ADB*, 1, pp. 280-282.

71 *SMH*, 16 September 1843.

72 Ibid., 24 August 1844.

grazing and pastoral pursuits from the bankruptcy that had befallen other classes in society, saying he was sure that the weight of evidence before the committee would compel the secretary of state to change his edict and the governor to recommend that he adopt that course. On this occasion, Wentworth had official support. Thomson did not oppose such ventilation of the subject which, he said, was of much interest out of doors. And Plunkett hoped that the committee would make out a compelling case to ensure the continuance of such a beneficial measure.[73]

This committee took evidence from 12 witnesses, including bankers, merchants, solicitors, the registrar-general, former council member, Hastings Elwin and the settler, William Ogilivie. With the exception of solicitor, G.K. Holden, whose support was lukewarm, all witnesses viewed the operation of the law as highly beneficial. They knew of virtually no instances of fraud. Its repeal would be detrimental, they said, and the Act should be made permanent. A letter from the mayor of Melbourne, solicitor Henry Moor, was attached to the report, together with extracts of letters that Moor had written under a *nom de plume* to the Melbourne *Standard* in response to Lord Stanley's criticisms. The committee found that Stanley's opinions concerning the Act were incorrect. However, in the event that his concerns were not removed by the evidence taken, it decided to cover all possibilities, recommending a series of legislative manoeuvres, involving the enactment of two bills, to ensure that the principles of the original legislation, and priorities for cattle mortgages under it, were preserved.[74] The committee's recommendations were adopted and both bills were enacted without opposition.[75]

On other occasions, members resisted reference to a committee. Wentworth's Bank of Australia bill, arising from the institution's collapse in early 1843 and entreaties from its board, only became the subject of a committee after pressure was applied by other members.[76] When introducing the measure, Wentworth said it was of such importance that he did not expect any opposition unless it be thought to be a private bill. Plunkett responded that it was dangerous to treat the measure as a public law without a select committee to investigate the correctness of assertions in its preamble. Windeyer agreed, especially as those who were most materially effected by the proposal had no objection. Wentworth resisted and

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73 Ibid., 8 August 1845.

74 See report from the select committee on the Preferential Lien on Wool Act, appendix and minutes of evidence, *V&P* NSWLC 1845.

75 *SMH*, 18, 22 October 1845.

76 Gipps to Stanley, 1 January 1845, *HRA*, 1, 24, pp. 164-166.

the bill reached the committee stage before he was finally forced to go to a committee.[77] The committee took evidence from 20 witnesses, who were examined by the bank's solicitor, Randolph Want, as well as by committee members. The committee report, commending the bill, stated that while it was not entirely clear that legislative interference was absolutely necessary, the council's imprimatur should be obtained to ensure the success of the plan to resolve the institution's difficulties. The report referred specifically to the evidence of solicitor, James Norton, and landholder, James Macarthur, to the effect that litigation and confusion would be avoided if the scheme proposed by the bill was effected.[78] The bill passed with a large majority, though Plunkett opposed it because it involved the disposal of bank assets by a lottery, lotteries being repugnant to English law.[79] Gipps reserved it chiefly on this basis.[80] His doubts were confirmed when the bill did not receive royal assent. Lord Stanley also commented that the committee on the bill had included two men, Wentworth and Coghill, one the committee's chairman, whose names also appeared on the list of those for whose benefit the law was made, a circumstance justifying some doubt as to whether "the measure was adopted with a due amount of vigilance and circumspection".[81]

Not infrequently, legislative proposals originated in select committees which had been appointed to deal with general issues. As previously noted, Robinson's 1844 bill to prevent fraud in the taking of goods in pawn arose from evidence given in the select committee on life and property.[82] Different approaches and types of committees were involved in the passage of other bills. Nicholson's 1843 Sydney Dispensary bill passed after the Rev. Dr McGarvie, a Presbyterian minister, was called to address the council on the operating body's power to hold land.[83] A committee of the whole council, sitting over several days, examined witnesses regarding the government's spirit duties temporary reduction bill in 1845. Distillers and rectifiers and their employees, brewers, millers, merchants and brokers, reverend gentlemen connected with temperance and abstinence societies, and inspectors of distilleries, were all examined with a view to obtaining opinions on the likely effect of a reduction of duty on smuggling, illicit distillation and drunkenness.[84] More generally, petitioners to the council on a variety of issues sometimes obtained permission to address the

77 *SMH*, 5 ,12 October 1844. See also ibid., 20 November, 18, 19 December 1844.
78 See report from the select committee on the Bank of Australia shares bill, minutes of evidence and appendix, *V&P* NSWLC 1844.
79 *SMH*, 24 December 1844.
80 Gipps to Stanley, 1 January 1845, *HRA*, 1, 24, pp. 164-170.
81 Stanley to Gipps, 17 May 1845, *HRA*, 1, 24, pp. 350-351.
82 *SMH*, 3 August 1844.
83 Ibid., 8 November 1843.
84 Ibid., 4, 19, 20, 25, 26 September 1845.

council personally or by counsel on proposed laws. On occasion, the council also examined officials in the house to satisfy itself on various issues or to decide between competing claims. A process of that kind occurred in 1845 when officials of the supreme court and the registrar-general were examined in connection with Cowper's bill dealing with the funding of registry functions.[85]

Thus, in the fourth council's first few years, public opinion played an increasingly important role, via petitions, the press, council committees and other means, in the development of legislative policy and the preparation of laws. As has been seen, it was the depression that really propelled early legislative and committee effort. But once that crisis passed, more long-term issues took over, some of them related to the depression, such as the suddenly growing bulk of Sydney, right on the council's doorstep. The period also witnessed a significant development, the introduction of bills suggested or even drafted by outside interests or inspired by press comment. Further, the great increase in the number of petitions indicates that interests out of doors were acutely aware of events unfolding in the council and believed that pressure from themselves might influence outcomes. The press played a crucial role in raising this awareness. Thus, an interchange of views was taking place between the council and its constituency, adding energy and immediacy to council proceedings. In the process, public opinion was being shaped by new expectations, by a belief that it should be consulted and by a readiness to demand attention, the outline of incipient democracy being visible just below the surface. This, then, was the state of affairs when Sir Charles FitzRoy assumed the administration of the colony at the beginning of August 1846.

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85 Ibid., 7, 12 November 1845.