

## **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 marshal

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”.<sup>1</sup>

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<sup>1</sup> Obituary of E.D. Thomson, *Manning River Times*, 2 August 1879, Deas-Thomson Papers, MS A1531, vol. 4, CY 730, ML.