

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

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

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-term 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

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

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

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

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

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

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

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

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

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

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.

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

⁶³ Ibid., 31 August 1853; Connolly, "Nominated Upper House", p. 62; Connolly, "Middle-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

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

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

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

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

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

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

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.

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

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

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

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

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.

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

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

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

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

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 compatible 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

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 1855⁴³

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 1864⁴⁴

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*.