

Chapter 7 The sixth council and the Sydney Corporation

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

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

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

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

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

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

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

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

⁴ V&P NSWLC 1851-1855.

⁵ Ibid.

likely to injure another person.⁶

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

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

⁶ *SMH*, 18 July, 11, 25 August 1855.

⁷ *Empire*, 2 November 1853.

⁸ *Ibid.*, 17 November 1853.

⁹ *SMH*, 31 December 1855.

¹⁰ *Ibid.*, 23 November 1855. See also *ibid.*, 15, 19 December 1855.

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

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

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

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

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

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

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

The use of petitions as a means of drawing the council's attention to issues diminished markedly in this period. During the fifth council, there had been on average 92 petitions per session, but in this council less than 57.¹⁵ In theory, petitioning continued to be viewed as integral to the legislative process. In December 1852, Parkes complained in the *Empire* that the government, at the fag end of the session and after many elected members had left Sydney, planned to abolish self-government for the city without giving the public a chance to petition.¹⁶ In a speech in 1853, he expressed a firm belief in "the old-fashioned right of petitioning", coupling it with the right of free discussion.¹⁷ Later however, he explained in the *Empire* that the distances, the inaccessible nature of localities, the scattered state of the population, and the time that must elapse in receiving information, "in getting excited", in holding meetings and in collecting names, all militated against successful petitioning in the colony.¹⁸ In August 1853, the *Herald*, from a conservative viewpoint, when discussing Martin's attack on a public meeting at which a petition against the constitution bill had been presented for signature, asked, "And is not the right of petition as sacred amongst Englishmen as any other right?"¹⁹ Evidence given to the select committee on the Sydney Corporation in 1852 shows that petitioning was regularly engaged in at the municipal level also.²⁰ And the importance of petitions, and of the popular meetings at which many of them were presented to participants for signature, was apparent during proceedings both before and after the passage of the constitution bill.²¹ However, as I have said in Chapter 5, the ritual of petitioning assumed a kind of detached superiority in government and deference in the people, whereas committees were far more important for the sifting of public opinion.

¹⁴ *Empire*, 20 May, 2 November 1853.

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

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

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

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

¹⁹ *SMH*, 29 August 1853.

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

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

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

The Sydney Corporation

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

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

²² MacDonagh, p. 127.

²³ *Ibid.*, pp. 127, 138.

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

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

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

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

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

²⁶ *Ibid.*, 11 August 1852, p. 17.

²⁷ *SMH*, 23 July 1853.

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

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

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

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

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

³⁰ MacDonagh, p. 124.

³¹ *SMH*, 15 July 1852.

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

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

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

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

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

³⁵ *Ibid.*, p. 51.

³⁶ *Ibid.*, 31 August 1852, p. 56.

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

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

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

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

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

³⁹ MacDonagh, pp. 123, 128.

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

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

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

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

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

⁴³ *Ibid.*

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

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

⁴⁴ Ibid.

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

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

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



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

⁴⁷ *SMH*, 15, 17 December 1852.

⁴⁸ *Ibid.*, 17 December 1852.

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

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

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

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

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

⁵¹ *SMH*, 17 December 1852.

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

⁵³ *SMH*, 22 December 1852.

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

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

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

⁵⁴ Ibid., 23, 24 December 1852.

⁵⁵ Ibid.

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

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

⁵⁶ Ibid. See also Golder, pp. 17-18.

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

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

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

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

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

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

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

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

⁶² *SMH*, 3 August 1853.

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

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

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

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

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

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

⁶⁶ *Empire*, 4 August 1853.

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

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

The resulting government bill to abolish the corporation had its first reading on 23 September 1853.⁷¹ The *Herald* gladly reported that attempts to muster public opposition had failed miserably. The city corporation adjourned without passing any condemnatory resolutions and the *Herald* doubted whether it even intended to petition the council.⁷² When Campbell presented a petition purporting to be from the corporation but signed only by the mayor and town clerk, and praying for a hearing by counsel in the house, the move was

⁶⁷ *SMH*, 5 August 1853.

⁶⁸ *Ibid.*, 10 August 1853.

⁶⁹ See *ibid.*, 9, 10 September 1853.

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

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

⁷² *SMH*, 28 September 1853.

rejected.⁷³ On the bill's second reading, Thomson, repeating his performance of the previous year, stressed that it was being introduced in response to the council's address and that the government was open to suggestions for its improvement. He also noted that the government favoured businessmen of known probity, integrity and energy as commissioners, rather than professional men. This was an especially telling comment and has vital implications for the whole argument of this thesis. It is proof of vague and confused ideas, among officials and no doubt more generally throughout New South Wales, about the way up-to-date expertise might be used in public projects. It also highlights Thomson's suspicion of utilitarianism. The bill passed on 5 October and the corporation was abolished on 1 January 1854.⁷⁴ The *Empire*, by this time engaged in the far larger battle, essentially gave up the struggle for the municipal franchise, conceding that the new arrangement was necessary.⁷⁵

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

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

⁷³ Ibid., 5 October 1853.

⁷⁴ Ibid., 5, 6 October 1853.

⁷⁵ *Empire*, 7 November 1853.

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

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

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

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

⁷⁸ MacDonagh, p. 132.

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

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

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

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

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

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

Chapter 8 The sixth council and public health and sanitation

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

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

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

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

Public health and sanitation

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

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

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

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

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

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

⁴ *Ibid.*, pp. 133-135.

⁵ *Ibid.*, pp. 134-140.

general board were considerably reduced. Further, when cholera broke out shortly after, it was decided to exclude London from the statute's operation. The scheme collapsed, and despite attempts to get it back on track, the general board of health, including Chadwick, was dismissed in 1854. A new board, free of Chadwickians and London radicals and under the control of the Engineering Institute, was set up in its place. That board was disbanded in 1858, even though, by that stage, the essential correctness of the statute's main principles had been established, especially the importance of the small, strong, cheap earthenware pipes that had been first baked at Chadwick's instance in 1847.⁶

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

⁶ Ibid., pp. 141-150; Roberts, pp. 83-85.

⁷ See *SMH*, 1, 8, 15, 22 February, 1, 8, 15, 22, 29 March, 5 April 1851.

⁸ Ibid., 8, 15 February, 1 March, 5 April 1851.

⁹ Ibid., 1 March 1851.

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

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

¹⁰ Ibid., 8 March 1851.

¹¹ Ibid., 22 March 1851.

¹² Ibid., 22 February, 1, 8 March 1851.

¹³ *Empire*, 14 October 1851; Hilary Golder, *Sacked: Removing and Remaking the Sydney City Council 1853-1988*, City of Sydney, Sydney 2004, p. 20.

¹⁴ *SMH*, 22 October 1851.

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

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

¹⁵ Ibid., 29 October 1851.

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

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

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

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

¹⁷ *Empire*, 11 January 1853; MacDonagh, p. 142. See also Golder, pp. 4, 20-21 on Sydney's water supply.

¹⁸ *Ibid.*, 16 April 1853.

¹⁹ *Ibid.*, 11 May 1853.

²⁰ *Ibid.*, 23 May 1853; MacDonagh, pp. 139, 144, 146. See Golder, pp. 20-21 on Darvall's pecuniary interest in the water issue.

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

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

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

²¹ Ibid., 17 May 1853.

²² Ibid., 20 May 1853.

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

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

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

²⁴ Ibid., 8 June 1853.

²⁵ Ibid., 25 June 1853.

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

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

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

²⁶ *SMH*, 8 September 1853.

²⁷ *Empire*, 9 September 1853.

²⁸ *SMH*, 16, 22 September, 6, 12 October 1853.

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

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

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

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

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

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

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

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

³³ Ibid., 1 May 1855.

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

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



William Montagu Manning in 1856

*Reproduction courtesy of Parliamentary Archives,
Parliament of New South Wales*

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

³⁵ *SMH*, 15 July 1854.

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

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

³⁶ Ibid., 21 July 1854.

³⁷ Ibid., 20, 21 July 1854; *V&P NSWLC* 1854, vols. 1, 2.

³⁸ Minutes of evidence taken before the select committee on the public health bill, 12 September, 1854, p. 1, *V&P NSWLC* 1854, vol. 2.

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

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

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

⁴⁰ Ibid., pp. 3-5.

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

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

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

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

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

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

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

⁴³ *SMH*, 15 June 1855 (emphasis in original).

⁴⁴ *Empire*, 21 June 1855.

⁴⁵ *SMH*, 22 June 1855.

digested schemes.⁴⁶

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

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

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

⁴⁶ *Empire*, 22 June 1855.

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

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

⁴⁹ *Ibid.*, 22 November 1854.

⁵⁰ *Ibid.*, 1 September, 3 October 1855.

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

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

Chapter 9 The sixth council and law and police reform

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

Law reform

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

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

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

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

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

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

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

³ Ibid., p. 164.

⁴ Ibid., pp. 164-165.

⁵ *SMH*, 25 June 1852.

⁶ See FitzRoy to Pakington, 5 February 1853, CO 201/463, ff. 127, 134-135. Charles Dickens' *Bleak House* provides a harrowing exposé of the state of the English chancery court.

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

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

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

⁷ *SMH*, 16 June 1852.

⁸ *Ibid.*, 17, 25 June 1852.

⁹ *V&P NSWLC* 1852; see also *New South Wales Public Statutes*, 1852-62.

¹⁰ *SMH*, 19 May, 17, 24 June, 5, 11 August 1853. See also Currey, pp. 231-234, 237.

¹¹ *Empire*, 12 July 1853.

¹² *SMH*, 5 August 1853.

¹³ *Ibid.*, 17 June 1853; Currey, p. 237.

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

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

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

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

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

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

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

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

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

¹⁷ Ibid., 21 July 1853.

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

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

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

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

¹⁹ Ibid., 20 February, 8 March 1854.

²⁰ Ibid., 18, 20, 21, 27 July 1854.

²¹ See Alan Atkinson, *The Europeans in Australia. A History*, vol. 2, *Democracy*, Oxford University Press, Melbourne 2004, pp. 297-298.

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

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

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

²² *SMH*, 25 June, 9 July 1852. See *ibid.*, 3 August 1852 for comment in support of the bill.

²³ *Ibid.*, 22 June, 20 July 1854.

²⁴ *Ibid.*, 21, 28 July 1854; *ADB*, 5, p. 209. See *Empire*, 22 July 1854 which opposed the initial proposal.

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

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

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

²⁵ Ibid., 22 June, 5 July 1855.

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

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

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

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

²⁸ *Ibid.*, 20 October 1855.

²⁹ *Empire*, 4 May 1853.

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

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

Police reform

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

³⁰ Ibid., 23 June 1855.

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

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

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

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

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

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

³⁵ *SMH*, 12 August 1852.

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

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

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

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

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

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

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

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

³⁹ *SMH*, 1, 8 December 1852.

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

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

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

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

⁴¹ Ibid., 8 December 1852.

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

⁴³ Ibid.

⁴⁴ See MacDonagh, p. 174.

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

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

⁴⁵ FitzRoy to Pakington, 5 February 1853, CO 201/463 ff. 148-150.

⁴⁶ *Empire*, 4 April 1853.

⁴⁷ *Ibid.*, 21 April 1853.

⁴⁸ *Ibid.*, 19 May, 1853. See also *SMH*, 8, 16, 29 September 1853.

⁴⁹ *SMH*, 6 October 1853; MacDonagh, p. 174.

⁵⁰ *Ibid.*, 8, 12 October 1853.

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

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

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

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

⁵² *SMH*, 24 September 1853.

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

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

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

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

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

⁵⁶ *Empire*, 22 July 1853.

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

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

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

⁵⁷ *SMH*, 29 July 1853.

⁵⁸ *Ibid.*, 25 August, 20, 26 October 1855.

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

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

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

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

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