



Forbes Flyer

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History reports itself

With the third annual Forbes Society lecture fast approaching, it is a timely opportunity to reflect on the achievements of the Francis Forbes Society to date. The inaugural lecture by Ian Barker QC, entitled *Sorely Tried: Democracy and Trial by Jury in New South Wales* has already been published. Also available for purchase is Philip Powell QC's 2003 lecture on *The Origins and Development of the Protective Jurisdiction of the Supreme Court of New South Wales*. In regard to Powell QC's invaluable contribution to knowledge on the little-known area of the Protective Jurisdiction, members now have the opportunity to read the foreword to the publication by the Hon Justice R S McColl AO in this edition of the *Flyer*.

This year's annual lecture, to be given by Tim Castle and Bruce Kercher, focuses on previously unexplored material contained in the legal reports of Sir James Dowling, the second Chief Justice of the Supreme Court of New South Wales. In the tradition of the preceding lectures, this material will be published in order to add to the body of knowledge on Australia's legal history. The Forbes Society was fortunate to receive a grant from Professor J H Baker, Literary Director of the Selden Society and Secretary of the Maitland Fund, to enable the publication of Dowling's "Select Cases".

The links that the Forbes Society has forged with its British counterpart, the Selden Society, are extremely important for the worldwide preservation of legal history. Frederick William Maitland founded the Selden Society in 1887, partly with a view to ensuring that legal records were preserved for posterity, and to ensure that funding would be

available to scholars researching and publishing the history of the law. The Selden Society recognised that much of Britain's history, whether it be legal, social, economic or political, was contained in the unique legal records that could not be found elsewhere.

While the Forbes Society is concerned chiefly with the preservation of Australian legal history, which covers little more than two centuries of Britain's long historical record, it is nevertheless a task that has only just begun in Australia. The Selden Society has established a formidable benchmark for the Forbes Society to emulate by publishing over 130 volumes containing invaluable and previously unseen source materials, such as early law reports, judges' notebooks, legal treatises and precedent and practice books. Initiatives such as the annual Forbes Society lecture, is one of the first steps toward building a repository of source material and research illuminating Australian legal history.

Speaking of this year's lecture, 'Bringing the Supreme Court to Order 1828-1844', this is just a quick reminder that it is to be held on Thursday 14 October, in the New South Wales Bar Association Common Room. It will be chaired by the Hon Andrew Tink MP, the Shadow Attorney General for New South Wales. It promises to be an interesting night, and as always, your support and attendance at these lectures is appreciated and gratefully acknowledged.

Until next time...

Catherine Douglas
Editor

The 2004 Francis Forbes Lecture

Bringing the Supreme Court to Order, 1828-1844:

**Sir James Dowling,
second Chief Justice of NSW**

**Presented by Tim Castle, Barrister &
Professor Bruce Kercher**

Why should we remember James Dowling, the second Chief Justice of NSW? Coming between two great chief justices, Francis Forbes and Alfred Stephen, Dowling is usually overlooked. But at his death in 1844, he left behind about 250 judicial notebooks from his time on the NSW bench. Among them was a collection that he called 'Select Cases'. Dowling had intended to publish these as the first law reports in any Australian colony. Now, after a delay of 160 years, the Forbes Society intends to publish them.

Tim Castle will explain why Dowling and his 'Select Cases' are so important to the development of the law and the courts in NSW. Bruce Kercher will then refer to a few of the Select Cases, highlighting the process by which received English law was adapted in order to meet the needs of a frontier society. In the cases concerning Aborigines in particular, we can see a struggle over the legal recognition of Aboriginal autonomy. The case law contained therein is richer than many people would imagine today.

1.5 HOUR SEMINAR

1.5 CPD POINTS IN THE SUBSTANTIVE STRAND

Chairperson: Andrew Tink MP,
NSW Shadow Attorney General
Venue: Bar Association Common Room
Date: Thursday 14 October 2004
Time: 5.30pm

REGISTRATION IS NOT REQUIRED

For further details please visit the Bar Association website or contact Travis Drummond,
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The origins and development of the Protective Jurisdiction of the Supreme Court of New South Wales

The Forbes Society recently published the 2003 lecture, delivered by P E Powell AM QC. The Foreword to that publication, written by the Hon Justice R S McColl AO is reproduced below.

When the Hon P E Powell AM QC retired from the Supreme Court of New South Wales on 8 November 2002, the Chief Justice, the Hon J J Spigelman AC, said that his Honour's judgments as the judge in the Protective Jurisdiction of the Court 'decisively developed the law' and remained 'a substantial resource' comprising one third of the judgments listed in the Australian Digest under the category of Mental Health from the inception of the Court in 1824 (www.lawlink.nsw.gov.au/sc).

It is fitting, therefore, that soon after his retirement, Mr Powell should record the origins and development of the jurisdiction to whose jurisprudence he has made such a significant and enduring contribution as well as explain its more recent history in which he was intimately involved.

Mr Powell's paper examines the historical development of New South Wales' mental health legislation and the development of the Supreme Court's protective jurisdiction in the exquisite detail for which his judgments are renowned. I have no doubt that it will prove an invaluable resource. The 'legislative history and antecedent circumstances' of statutes are, of course, extrinsic materials to which the Court will have regard in the interpretation of statutes: see *Risk v Northern Territory of Australia & Anor* [2002] HCA 23; (2002) 76 ALJR 845 per Gummow J at [83]; *Geaghan v D'Aubert* [2002] NSWCA 260; (2002) 36 MVR 542 per Stein JA (Handley JA and Foster AJA agreeing) at [22] - [23]; *Hardman v Minehan* [2003] NSWCA 130; (2003) 57 NSWLR 390 at [66].

This paper complements the early work which was undertaken to ensure the history of New South Wales' lunacy jurisdiction was preserved. The history

of the drafting of the *Lunacy Act 1878* (NSW) (the '1878 Act') which Mr Powell describes in his paper as intended to achieve 'wholesale reform', was preserved by one of its principal architects, Doctor Frederick Norton Manning. During the Second Reading Speech to the *1878 Act* (which appeared in the Sydney Morning Herald of 26 September 1878 - the official 'Parliamentary Debates' did not begin until 28 October 1879) Mr Fitzpatrick, the Colonial Secretary, read into the record a letter from Doctor Manning written, according to Mr Fitzpatrick, 'to give a history of the Bill as it now stands for the information of the Colonial Secretary'.

It appears from that letter that the Lunacy Bill which became the *1878 Act* was first drafted in late 1869 - 1870 by Doctor Manning (who at that time was the Superintendent of the Tarban Creek Asylum - later to be known as the Gladesville Psychiatric Hospital) and Mr Charles J Manning, then the Parliamentary draftsman, with assistance from a Mr William Owen, a Barrister-at-Law and Member of the Board of Visitors to Asylums. It had been considered at sittings in 1870 of the Law Commission which included Sir Alfred Stephen, Sir William Manning, Mr Salomons and members of the legal profession. It had been altered in 1873 and 1874 after Doctor Manning visited Victoria and Tasmania and had developed his experience in lunacy matters in New South Wales and again in 1876 after Doctor Manning visited England where he consulted 'various authorities on the subject'.

Doctor Manning's concern that the genesis of the *1878 Act* be fully understood can be seen in his statement in his letter that:

'... a lengthened memorandum of mine, explanatory of the provisions of the Bill, is among the records of the Colonial Secretary's Office, and ... if it is considered necessary, I can mark against most of the sections references to the English, Scottish, Irish, Colonial and American Acts from which they have been drafted.'

Doctor Manning was later appointed the first Inspector-General of the Insane in New South Wales pursuant to the *1878 Act*.¹

Understanding the genesis of the *1878 Act* assumes significance when one appreciates, as Mr Powell's paper explains, that that Act 'as consolidated and revised in 1898, laid down the pattern of lunacy law in New South Wales for the next eighty years'. Even in 1958 when the Mental Health Act 1958 (NSW) was passed with the intention of bringing 'our legislation into line with modern thought',² according to Mr Powell, the new Act introduced only 'a number of cosmetic changes, [and] changes of major significance were few'.

Nevertheless, in the early period of his time in the Protective Jurisdiction, Powell J 'took the opportunity' of defining in precise terms every phrase in the 1958 definition of a 'mentally ill person' with the exception of the term 'mental illness'.³

In the context of relative legislative stasis for over a century, Powell J's assumption of responsibility for the legal side of the work in the Protective Division of the Supreme Court in early 1982 assumes significance. This was shortly before the then Minister for Health, the Hon Laurie Brereton MP, introduced the new Mental Health Bill, the Crimes (Mental Disorder) Amendment Bill and the Miscellaneous

¹ Defining Madness, Dr Peter Shea, Institute of Criminology Monograph Series, Hawkins Press, 1999 at p 37.

² Second Reading Speech, New South Wales Legislative Assembly, *Parliamentary Debates*, (Hansard), Vol 26, 5 November 1958, p 1868.

³ Shea, above at p 104.

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Acts (Mental Health) Repeal Amendment Bill into Parliament on 24 November 1982. These cognate bills were tabled by Mr Brereton and allowed to lie on the table of the House in order that submissions might be received concerning the draft legislation. Among the views which Mr Brereton said the 'Government would seek out and welcome' were those of the judiciary.⁴

This paper makes plain that Powell J took the opportunity early presented of participating in the reform of the legislation relating to the mentally disabled by making representations to the government to have the law amended. Whether or not he did so in response to Mr Brereton's 'invitation' is of little moment. However, once again, his participation as a judicial officer in legislative reform in the mental health area has historical parallels.

In 1893 the *1878 Act* was amended by the *Lunacy Act Further Amendment Act 1893 (NSW)* (the '*1893 Act*'). The provisions of the *Lunacy Act Further Amendment Bill* which became the *1893 Act* were drafted under the direction of the Master in Lunacy, the Judge in Lunacy and the Inspector-General of the Insane to address, at least in part, inadequacies they had perceived in the *1878 Act*.⁵

In England the statute law relating to lunacy was consolidated in 1890 in 'the great consolidating Act', the *Lunacy Act 1890 (Imp)*, of which Sir Henry Studdy Theobald K.C., M.A. (later to become Master in Lunacy) was the principal draftsman.⁶ As Mr Powell's paper explains, s 116(1)(d) of the *Lunacy Act 1890 (Imp)* was later adopted in New South Wales.

It was not until 22 November 1983 that the Hon Laurie Brereton MP moved in the Legislative Assembly that the Mental Health Bill, the Protected Estates Bill⁷, The Crimes (Mental Disorder)

Amendment Bill and the Miscellaneous Acts (Mental Health) Repeal and Amendment Bill be read for a second time.⁸ Mr Brereton described the Bills he presented that day as representing 'one of the most significant social reforms to be considered by this Parliament in recent decades, they signify a major advance in the way our society regards and deals with victims of mental illness'.

By then, according to the paper, it appears Powell J had been successful in having at least one of the reforms he advocated adopted, the removal from the law 'at least in relation to applications for management orders, questions of 'mental illness' and 'mental infirmity' and the substitution of 'the subject person's 'incapacity to manage his affairs' as 'the ground for making a management order': see s 13 *Protected Estates Act 1983 (NSW)*.

Accepting, as Mr Powell says, that the *Mental Health Act 1958* merely introduced 'cosmetic changes' rather than 'changes of major significance' and that, as Mr Brereton announced, the 1983 measures represented a significant social reform, it can immediately be seen that his Honour's position gave him a unique opportunity to mould the 'new' law of mental health in New South Wales.

This was an opportunity he seized with typical gusto. The product of his endeavours can be found by the diligent reader in the cornucopia of judgments of the Protective Division for which Powell J was responsible in the period 1982 - 2000 which he lists in his appendix.

The significance of Powell J's position will also be appreciated when one sees the enormous increase in the Protective Division's work to which the paper refers from about 50 cases in 1982 to about 350 in 1989. As the paper records, this development coincided both with the increase in the numbers of the aged population, the numbers of the

developmentally disabled living in the community and those who had suffered traumatic brain damage in accidents, as well as the provision of legal aid enabling representation of persons the subject of orders or of applications for orders for involuntary detention and treatment in mental hospitals.

It has long been a concern of those dealing with the mentally ill to ensure that their estates were economically managed. In his Second Reading Speech to the 1878 Act, Mr Fitzpatrick expressed the opinion that that Act would 'tend to the economical management of the estates of the insane ...'.⁹ This was a sound aspiration. Undoubtedly, New South Wales did not want to adopt the practice which prevailed in Lunacy in England in the latter half of the nineteenth century, which was described in the following terms:¹⁰

'The great revolution in Chancery Practice, introduced by the Judicature Acts, left Lunacy in a backwater outside the stream of progress. There the old practice, abandoned by Chancery, still prevailed. Everything was done in a most leisurely and lengthy manner. After inquisition found, a file of affidavits was brought in stating fully all the details of the position of the lunatic, his family and his property. These affidavits were accompanied by a statement summarising them; a long and ample report was then prepared setting out the results of the affidavits and recommending what it was proposed to do. The report was drafted by one of the Report Clerks and was settled by the Master in the presence of the solicitors. It was then brought before the Lord Justices on petition for their approval, and if they approved they issued their fiat and the report became an order.'

⁴ See NSW Legislative Assembly, *Parliamentary Debates*, (Hansard), 24 November 1982 at p 3003. The process of consultation leading up to the final presentation of the Mental Health Bill and cognate bills which by 1983 included the Protected Estates Bill is recorded in *Defining Madness*, Peter Shea, The Institute of Criminology Monograph Series, Hawkins Press 1999 at p 91ff.

⁵ See Hon R E O'Connor, the Minister of Justice's Second Reading Speech, NSW Legislative Council, *Parliamentary Debates*, First Series, Vol 64, 22 March 1893 at p 5366.

⁶ Keely, T.S. 'One Hundred Years of Lunacy Administration' *The Cambridge Law Journal*, Vol 8, 195 at 199.

⁷ The Protected Estates Bill was foreshadowed in Mr Brereton's Second Reading Speech in 1982:

see NSW Legislative Assembly, *Parliamentary Debates*, (Hansard), 24 November 1982 at p 2988.

⁸ NSW Legislative Assembly, *Parliamentary Debates*, (Hansard), 22 November 1983 at p 3087.

⁹ Second Reading Speech, Sydney Morning Herald, 26 September 1878.

¹⁰ *The Law Relating to Lunacy*, Sir Henry Theobald, Stevens & Sons Limited, 1924 at 77.

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In contrast to this somnolent approach one finds, humbly buried in footnote 66 in Mr Powell's paper, a reference to the fact that a sample taken by the Protective Commissioner in 1989 revealed that the average time from the filing of an application to the making of a management order was 26 days, with urgent applications being regularly disposed of in as little as a day. There is no doubt that that expedition was due in great part to Powell J's work.

The paper traces in intricate detail the development of the Supreme Court's Protective Jurisdiction through the multiplicity of legislation governing this field in which the less experienced might become lost were it not for reaching, finally, the calm waters of the summary of the Supreme Court's Protective Jurisdiction found at the end of the paper. That summary is an invaluable guide to those who first come to this subject unfamiliar with the legislative history Mr Powell has painstakingly recorded.

Mr Powell deals modestly in the text of his paper with the substantial contribution he made to the jurisprudence of the Protective Jurisdiction. I commend to the reader with an interest in mental health an exploration of the judgments he lists in the appendix. Regrettably many are unreported, but at least their listing will ensure that a consolidated record of them is preserved so that ready access can be had to the 'substantial resource' of which Spigelman CJ spoke.

For enquiries about membership of the Forbes Society, or to obtain an application form, visit the Forbes Society's web page at

www.forbessociety.org.au

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