'Working Things Out by Degrees: Cabinet and the Executive Council in the Early Years of Responsible Government.

The first parliament of NSW was opened here 150 years ago this week. And the inauguration of responsible government was a suitably ceremonial occasion. The diary of Lady Denison, the Governor's wife, gives us an entertaining glimpse into frantic preparations behind the scenes, as they mustered enough horses for the state carriage. Then someone offered to lend a horse for Lady Denison's own carriage, although he was not quite sure it would cope with the guns' salute. And every servant who had a dress livery – except for the Denison's butler – was commandeered to march in the procession. But she noted that pouring rain seemed to have set in for a season 'and if it has … alas for the pageant and the walking footmen!'[1]

Lady Denison's final comment 'How we laughed over it all' can be written off as a bit of patronising snobbery. But the word 'we' includes the Governor, Sir William Denison. *His* attitudes and actions would affect whether – and exactly how – the experiment in responsible government would work. The 1855 Constitution sketched the elements of the new system. Everyone understood that the executive was now accountable to parliament: governments would last as long as they could command a majority in the elected Legislative Assembly. But the constitution did not prescribe the detailed workings of the system. In the words of the Attorney General, William Manning, crucial questions 'will have to be worked out by degrees'.[2] Today I am going to look briefly at some of the working out that was going on as parliament opened and continued long after long after the dress liveries were packed away. I'll concentrate on two issues: the relations between ministers and – especially – the relations of the whole ministry to the Governor. (It is not quite as dull as it sounds.) The negotiation on these issues shaped what we understand as responsible government.

Under the old system – in the words of Governor Denison himself – 'the responsibility of the Government was centred in the Governor'.[3] He *was* assisted by an Executive Council, chosen from his senior officials – the Colonial Secretary, the Attorney General etc. From 1856 the members of the Legislative Assembly (and

behind them the voters) would choose the Governor's advisers. How precisely would this work? In 1856 everyone was busy reading, and reading between the lines of, the new constitution. Which said a lot about the legislature and not much about the executive. Some things *were* clearly specified. Section 18 singled out five existing offices: the Colonial Secretary, Colonial Treasurer, Attorney General, Solicitor General and Auditor General. They were, of course, the officers who used to make up the old Executive Council. These public service positions were translated into political ones; the holders of these offices would make up the ministry as long as they had the confidence of the Assembly. The constitution also mentioned the Executive Council; the power to appoint public servants was vested in the Governor, with the advice of the Council. Some constitutional conjuring ensured the Executive Council retained its title and form, but changed its meaning. The transformation of the Executive Council was completed over the next few years. After several exchanges between London and Sydney, it was decided that membership of the Council should be strictly confined to 'such gentlemen as may belong to the Ministry actually in office'.[4] By 1859 it was the rule that ministers had to resign from the Council when their governments ended. Victoria did not adopt this policy, but in New South Wales there was a neat fit between the current ministry and the Executive Council that met the Governor each week.[5]

What about the cabinet? It did not get a mention in the written constitution. But in British practice the cabinet – the private consultation of ministers – held the whole system together. A few years later Walter Bagehot would describe the cabinet as a 'hyphen which joins, a buckle which fastens politics and administration'.[6] In Sydney many crucial questions were left open in 1856. How would colonial cabinets develop and operate? And would those operations reduce the functions of the Executive Council to mere formalities? Or would the Council usurp the functions of British cabinet? A British constitutional expert once told Henry Parkes that the strict membership of the Executive Council meant that 'it most resembles our Cabinet, except that it is presided over by your Governor'. Clearly, there was a close sibling relationship between the colonial cabinet and the Executive Council. And in the beginning it looked as if cabinet was younger child, who might struggle for attention.

The difference between the siblings was the presence of the Governor. Denison most definitely 'presided' over the meetings of the Executive Council. In all the early negotiations about the meaning of responsible government, much depended on the powers and the personality of Governor Denison. After 1856 colonial governors *did* retain significant powers. Denison himself claimed that they must have 'a more intimate acquaintance with the details of Government … than can be necessary for the Sovereign'.[7] Unlike a constitutional monarch he expected to do more than advise, warn and be consulted. This was because governors occupied a pivotal position in imperial-colonial relations; all official correspondence between New South Wales and the British government passed through them. Governors also had instructions to reserve certain kinds of legislation for the royal assent, which meant the acts went off to London for scrutiny by the Colonial Office. Finally, governors expected to study colonial legislation before it was presented to parliament.[8] In 1857 Denison complained to the liberal Premier Charles Cowper that a land reform bill had been introduced in his absence. As a good conservative he also disliked its provisions.[9]

Denison, however, was *not* the kind of English snob who was waiting for the colonials to fall flat on their faces. For that attitude, look in the Mitchell Library for the papers of Samuel Milford, a former Master in Equity at the Supreme Court.[10] Denison might have had a private laugh about the footmen, but he really wanted to make it the new system work. And he was convinced that *he* could make it work. The Governor had opinions on all the 'hot button issues' of contemporary politics – from inter-colonial tariffs, to elementary education to police reform. He bombarded his first ministers with suggestions.[11] The Governor was a member of the Royal Engineers, and was primarily interested in what we call infrastructure and he called 'those great measures of internal improvement which are so imperatively called for'.[12] Denison naturally gravitated to the engineers who were constructing the roads, railways and harbours of New South Wales. And at first he tended to consult these public servants directly without paying too much attention to the politicians. For example, in July 1856 he called an 11 am meeting for high-ranking officers, including the Surveyor General and the Colonial Architect, to discuss the future organisation of public works and buildings. Denison told the Premier, Stuart Donaldson, that 'if Nichols will come here at 12 – we can then go into all that is necessary for the

present'. Nichols was actually the minister with responsibility for public works. The Governor did offer to 'cram' the minister with facts and opinions'.[13]

Characteristically Denison drew up his own blueprint for the conduct of government business. He set out some 'definite rules' for the 'guidance' of ministers. And his rules unambiguously put the Governor and the Executive Council at the centre of things. Denison proposed that the Council should meet every week to consider 'matters which have reference to the general policy of the Government'. The crux of his plan was that the relevant ministers would send minutes on such important matters to the Governor for him to read and approve.   Papers could then be circulated to other members of the Council in time for the meeting. Ministers could deal individually with what Denison called the 'Ordinary details of the current business of the colony'.[14]   This scheme seemed to put the Governor in control of the flow of information and left little room for the cabinet. Indeed it seemed to subvert the collective consultation of ministers outside the Executive Council. Policy discussions would take place in the Governor's presence and he would no doubt make his own decisive interventions. Clearly, defining – and confining – the role of the Governor was one of the hardest questions to be negotiated in this transitional period.

What were the ministers themselves doing in 1856? The first Premier of New South Wales, Stuart Donaldson, was preoccupied with the machinery of government.[15] He had to define the specific responsibilities of five ministers and divide the various agencies of government between them. Given the number and variety of those agencies, it was a bit like getting an octopus into a straitjacket. Although the constitution actually specified five ministers, two of them were Law Officers, the Attorney General and the Solicitor General. So Donaldson had two Law Officers heading one Law Department. They at least had reasonably coherent legal responsibilities and a small number of relevant agencies. But all the other agencies had to be crammed into three unwieldy ministerial departments. Richard Spann once described these departments as 'loose holding companies of semi-autonomous units'.[16] Before 1859, for example, one minister was supposed to deal with Crown lands and public works. These were of course the most politically sensitive areas of government activity.

In 1856 inexperienced ministers were struggling to come to terms with large incoherent ministerial departments, which only made it made it *more* urgent for the Donaldson government to assert itself collectively against the Governor's takeover plans. But the instability of colonial politics complicated the response. The Donaldson government fell in August 1856 because it could not command a reliable majority in the Assembly and was replaced by first Cowper ministry. Consequently, it was actually Charles Cowper who made the formal response. He presented a crucial minute to the Executive Council in September. In my *Politics, Patronage and Public Works,* I credited this initiative to Cowper but I am grateful to David Clune for reminding me that Donaldson had already done most of the work.[17] The Donaldson-Cowper plan gave the cabinet some vital oxygen. First, it provided that issues 'involving new or important principles of policy' *would be* discussed at a preliminary meeting of ministers. Then their collective decision would be ratified by the Governor in Council. So the Minute recognised cabinet as the real forum for policy debate, although it never actually used the word. It headed off Denison's challenge to the initiative of the elected government.[18]

At the same time the Donaldson-Cowper scheme kept the Executive Council in play because it mandated both cabinet discussion and Council approval for every important issue. The new arrangements did not, therefore, starve *the Council* of oxygen. For a whole variety of reasons, the Executive Council had a surprising vitality after 1856. In fact, legislation after that date gave the Council *more* functions; several new boards and commissions were created and placed under the 'control' of the Executive Council.[19] What was actually meant by this nominal control was one of those questions that had to be worked out by degrees.

One of the main reasons for the Council's resilience was the general *wobbliness* of cabinet solidarity in the peculiar conditions of colonial politics. It is well known that cabinets developed in the Australian colonies well before cohesive political parties were organised. This was a reversal of the British experience, and it meant that the collective was not reinforced by party discipline. Nor was it strengthened by shared ideologies. Political developments after 1856 seemed quite subversive of cabinet unity. In the general elections of the 1850s there were recognisable groupings of liberals and conservatives with distinct policies. But this proto-party division

collapsed as conservatives began leaving politics after the 1858 Electoral Act established virtual manhood suffrage. You all know the story. The large liberal majority left in the Assembly fragmented into factions. Many members attached themselves to prominent politicians while others remained independent. Ministries were formed when factions allied and/or influential independents agreed to participate.[20]

When ministries were so loosely constructed, cabinet solidarity was fragile. Even in the early 'party' years, liberal cabinets were problematic because their Premiers found it hard to find an Attorney General. Liberal lawyers were thin on the ground. So Premier Cowper had to recruit James Martin as his Attorney General in 1856 and again in 1857, although Martin disagreed with several liberal policies.

In spite of all these complications, cabinet government proved viable. Early premiers had to learn how to work their cabinets and the shrewd ones quickly realised that they could use the Executive Council to reinforce shaky cabinet unity. They could manipulate the relationship between the siblings. For a start, the *Council* had formal procedures that could be useful to embattled premiers trying to hold things together. It kept a permanent record of decisions. By contrast, cabinet rulings were written in the margin of submissions and dispersed throughout the colonial administration. Even if the Council was only recording pre-existing cabinet decisions, this record locked in ministers who might have been absent or reluctant during the cabinet discussion. Out of deference to the Governor, ministers attended Executive Council meetings regularly, while they sometimes ducked the cabinet. Martin was particularly delinquent. He found cabinet meetings boring.

It seems clear that the Executive Council functioned as a mutual protection society for inexperienced ministers in the first tentative years of responsible government. This helps to explain why boards and commissions dealing with important public works were required to 'report' to the Executive Council. Since everyone agreed that the main business of government was to build infrastructure, these questions were too important and too expensive to be left to one minister. It was crucial to have cabinet decisions on the 'big-ticket items' locked in, ratified and recorded through the Council. But if you read the Executive Council minutes, there were an awful lot of

little ticket items too. The parcelling out of responsibilities and agencies to separate ministers inevitably meant that there were jurisdictional problems. In 1859, for example, there was a dispute about the deployment of police on gaol and customs duties in the coastal town of Eden. This dispute went to the Executive Council, presumably because two different ministerial departments were involved.[21] It appears the Council was used to resolve minor jurisdictional glitches, many of too trivial to have been previously discussed in cabinet. It must have been tedious, but bringing these matters before the Executive Council allowed the more active premiers to keep track of all kinds of deals and decisions. This was reinforced by the fact that most premiers chose the Colonial Secretary's and it was the Colonial Secretary's office portfolio that controlled the Executive Council agenda. We should never underestimate the politics of the paperflow.

Over time as colonial premiers gained more experience and confidence, they began to use the Executive Council proactively rather than defensively. By the 1870s Henry Parkes and John Robertson had become adept at creating new boards for the important matters of the moment. And those matters usually involved infrastructure. By making those boards 'subject to the control of the Governor and Executive Council' (that was the usual formula) the Premier lifted the matter from the exclusive control of the Minister for Public Works.[22] To a large extent they came to treat the Council as an extension of their own department and as a means of controlling and coordinating the whole unwieldy business of government.

But that is another story ...

[1] W. Denison, *Varieties of Vice-Regal Life*, 2 vols, London, Longmans, 1870, vol. 1, pp. 350-1
[2] Manning to Donaldson, August 1856, Letters of the Donaldson Ministry, ML A731, p. 118
[3] Members of the Executive Council, *Votes and Proceedings of the Legislative Assembly of NSW*, 1859-60, vol. 1, p. 1130
[4] *Ibid*., p. 1136
[5] But note that Henry Parkes considered changing these arrangements (Parkes to Helps, Parkes Correspondence, ML A932, pp. 596-609)
[6] W. Bagehot, *The English Constitution* (ed RHS Crossman), London, Collins/Fontana, 1968, p. 68
[7] Denison to Donaldson, 29 July 1856, Denison Papers, ML B205, Letter 26

[8] NI Graham, ‘The Role of the Governor in NSW Under Responsible Government, 1961-1890’, PhD thesis, Macquarie University, 1972, ch. 8
[9] Denison to Cowper, 2 November 1857, Cowper Correspondence, MlL A676
[10] Milford Correspondence, ML Doc 2647
[11] Eg. Denison to Donaldson, 13 April 1857 and 24 June 1857, Denison Papers, ML B205, Letters 57 and 62
[12] Denison to Cowper, 29 September 1856, Cowper Correspondence, ML A876
[13] Denison to Donaldson, 2 and 14 July 1856, Denison Papers, ML B205, Letters 12 and 20
[14] Members of the Executive Council, pp. 1130-1
[15] A. McMartin, *Public Servants and Patronage: The Foundation and Rise of the NSW Public Service, 1786-1859,*Sydney, SUP, 1983, pp. 251-92
[16] RN Spann, *Government Administration in Australia*, Sydney, George Allen & Unwin, 1979, p. 85
[17] H. Golder, *Politics, Patronage and Public Works: The Administration of Public Works, 1842-1900,* Sydney, UNSW Press, 2005, pp. 134-6; D. Clune, ‘Stuart Alexander Donaldson’ in …………(eds), *Colonial Premiers……*., Sydney,………., 2006, pp. ….
[18] State Records of New South Wales: Executive Council; CGS 4342, Minute Books, 1825-1935 [4/1534, 1856-57], M56/49L, 22 September 1856
[19] P. Finn, *Law and Government in Colonial Australia,* Melbourne, OUP, 1987, pp. 45-57
[20] P. Loveday and AW Martin, *Parliament, Factions and Parties: The First Thirty Years of Responsible Government in NSW, 1856-1889*, Melbourne, MUP, 1966, pp. 6-63
[21] State Records of NSW: Colonial Secretary, CGS, 905, Main Series Letters Received, 1826-1982 [4/3415, 1859], 59/5990, Police Magistrate, Eden to Sheriff, 17 October 1859
[22] Golder, pp. 207-11