Legislative Council

8/06/88

INDEPENDENT COMMISSION AGAINST CORRUPTION BILL (NO. 2)

Second Reading

Extract

The Hon. 1. M. MACDONALD [11.49]: I rise on this bill because I believe passionately in its need but deplore many of its means. In the late 1970s while working in the Attorney General's Department I concentrated my research on the issues of organized crime, the illicit drug industry, and their hideous results. Of particular concern and interest to me was the Nugan Hand Bank and its sinister links with many sections of our society. As a result of this intensive research into the dark side of Australian life, I have for years advocated a State crimes commission and supported numerous initiatives to curtail organized crime and corruption. These have included the internal affairs branch of the Police Department, strong powers of the Ombudsman, the State Drug Crimes Commission, and the Judicial Conduct Division. Running parallel to the emergence of effective anti-crime and corruption measures has been my deep-seated concern at the consistent erosion of civil liberties that seem part and parcel of our fight against crime.

Legislators, in their enthusiasm, are adopting laws in many countries which undermine hundreds of years of natural justice. While this is done in an eagerness to stamp out the illicit drug industry, in many instances its effects can be unacceptable to society. This bill, as I will endeavour to demonstrate, does just that: it continues a trend into dangerous directions which challenge the very concept of democracy and freedom that Australians have fought and died for. And I find I have support for this view from a surprising quarter. The Attorney General has said of this bill, "I am a civil libertarian who is obviously very concerned about the extent of the powers that we are going to give this body". That statement says it all, and one can not overstress his own words of "very concerned" enough. We have in this Chamber the duty to look at the powers that concerned the Attorney General and make up our minds as to how they should be enacted into law.

In a world beset by totalitarian regimes which live off summary justice, oppression and the denial of personal liberty, nations like Australia, with our British traditions of justice, have come to treasure and jealously protect those. In essence, I refer to the rule of law and the principles and practice of natural justice. I refer to such freedoms as free speech and assembly, as trial by jury, and the availability of prerogative writs such as *mandamus* and *habeas corpus,* to review abuses of executive power. The bill currently before the House threatens many of those principles and freedoms that hark back to the *Magna Carta*. It must not be allowed through this Chamber without appropriate amendment to ensure it does not violate our great legal traditions.

I know the Government has a mandate to establish an independent commission against corruption, and I endorse that we have an independent commission against corruption. However, the Premier is patently wrong when he claims this bill is endorsed by the people. On the contrary, the details in this bill were not formulated by the Attorney General until he visited, of all places, Hong Kong to learn how that undemocratic dependency ran its justice system. While we accept the Government has a mandate to establish the commission and will not oppose the concept, we reject the false proposition that the electorate has given them a mandate to violate the rule of law. The Government did not seek, nor receive, a mandate to redefine the accepted meaning of corruption to subject all holders of public office, from the Vice-Regent down, to a Royal commission into the widest range of petty matters, often having no criminal implications at all. Nor did it seek or receive a mandate to enable public officials, and indeed all members of the public, to retrospectively be publicly declared corrupt, particularly when actions were considered either legal or not within the ambit of the meaning of that word at the time.

Accordingly, this bill deserves to be vigorously reviewed by this House. Where it offends the fundamental principles of justice it should be appropriately amended so the people of New South Wales get the commission they voted for. The Government has fallen into three traps in its approach to drafting this legislation. Firstly, and most importantly, it tried to meet the secret political agenda, which is the persecution

of its Opposition through the creation of a permanent inquisition into their administration—and the Leader of the Opposition has already pointed to that earlier in his speech. The threats of the Premier and the Attorney General have already exposed their approach to this bill. The Attorney General recently said—and I quote again what the Leader of the Opposition has quoted—"The commission will spend much time examining the workings of the Labor Party". Both the Premier and the Attorney should not forget the words of Francis Bacon, "Revenge is a kind of wild justice, which the more man's nature runs to, the more ought law to weed it out".

There are many examples of political witch hunts rebounding on their creators. The most recent was the Costigan inquiry into corruption in the Federated Ship Painters and Dockers Union of Australia initiated by the Fraser Government. Originally that commission was designed to cause damage to the trade union movement and, hopefully, the Labor Party. Instead, it exposed a multibillion-dollar tax fraud and caused a great deal of damage to the friends and supporters of the Liberal and National parties. The second trap into which the Government has fallen is that the Attorney General in scouring the free world for a precedent has chosen to imitate the model established in an undemocratic colony which has a commission that is directly subject to the Executive. Pertinent, and equally astounding, must be the Attorney's remarks on his return from Hong Kong that he was adopting this model because it prevented New South Wales lawyers from using the rules of natural justice in defending their clients.

The third trap is, of course, the indecent haste with which this bill has been drafted and is being rushed into law. Any legislation affecting the integrity of our citizens who give service in public life, including governors, judges, Ministers, parliamentarians, police and public servants, should always deserve deliberate consideration and wide consultation. This bill was rushed into the Assembly less than two weeks ago. So sloppily was it drafted that credence must be given to the rumour that it was drafted by a Queensland lawyer. The Government was obliged to amend the bill 16 times in the first Committee stages and a few more limes when it was dealt with again in the Legislative Assembly. Upon receiving a broadside from the New South Wales Bar Association the Attorney stated he was prepared to countenance even further amendments. Clearly, this legislation, representing the most profound attack on civil liberties in this State's history, is a drafting shambles.

By its very nature, the commission in this bill will entangle the investigating with the investigated in matters of heated political controversy. Its huge staff will, in a short period of time, embroil much of our bureaucracy and thousands of others in investigations not only about criminality but even about partiality in the policy-making process. The long-term effect of that on our public service would be devastating. We all want to ensure public confidence in the integrity of public life, but poorly drafted or ill-considered legislation will achieve the very opposite. For some years, the judiciary in most States of Australia has refused to accept Royal commissions on the basis that by involving judges in the political process we bring the judiciary into public contempt. The eminent Victorian Chief Justice, Sir William Irvine, made the following comments which should be digested by those opposite who wish to rush this bill into law:

> The subject matter of the Commission proposed by the Victorian Government involves charges both of departmental inefficiency and of corruption of the Public Service. The enquiry must of its nature extend beyond the investigation of any particular charge.
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> It seems to me to be impossible to frame any Commission which could in this case disentangle such issues from subjects of parliamentary controversy.

Accordingly, he refused to take the commission, and most Australian judges have followed his lead. This leads me to the aspect of this bill that I find most dangerous. That is the impossibly wide and vague definition of corrupt conduct, outlined in clauses 7, 8 and 9 of this bill. Certainty has always been the golden rule for those responsible for drafting our criminal laws. If criminal laws are to be obeyed, the public must have a clear understanding of their provisions.

Under clause 8 (1), paragraphs (a), (b) and (d), a citizen can be found to be guilty of corrupt conduct if he does anything that could indirectly adversely affect a public official in the impartial exercise of his official functions, provided that the official in turn has done something that could involve a criminal offence, or even a disciplinary offence, under the Public Service Act. Those latter provisos are contained in

subclauses (1) and (3) of clause 9. I submit this definition has many severe weaknesses. First, section 66 of the proposed Public Sector Management Act, in setting out what constitutes a disciplinary offence, will bring within the ambit of this Act matters that have nothing to do with the ordinary meaning of corrupt conduct. Section 66 of that Act states:

> An officer is guilty of a breach of discipline if the officer—
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> (a) contravenes this Act or the regulations: or
> (b) engages in any misconduct: or
> (c) consumes or uses alcohol or drugs to excess: or
> (d) intentionally disobeys, or intentionally disregards, any lawful order made or given by a person having authority to make or give the order: or
> (e) is negligent, careless, inefficient or incompetent in the discharge of his or her duties: or
> (f) engages in any disgraceful or improper conduct.

This means that a public official could be subjected to this commission under clause 9 if the official has been negligent, careless, inefficient or uses alcohol or drugs to excess. This provision should not be included in such an Act, but it is there in black and white. This stretches the meanings of corrupt as defined in the dictionary, one of which is, "Open to or involved in bribery or other dishonest conduct". Yet, in addition to the largely minor matters listed in the Public Service Act and regulations a long list in clause 8 (2) includes such matters as nonfeasance, misfeasance, oppression, bankruptcy, treason and homicide, which, though criminal, do not necessarily relate to matters of public financial dishonesty. One wonders why the rest of the offences listed in the Crimes Act, such as sexual assault, armed robbery and larceny, were not included. If this were not enough, the definition of corrupt conduct becomes so wide-ranging that it touches upon the ludicrous. For instance, paragraph (v) of subclause (2) of clause 8 describes another form of corrupt conduct as "treason or other offences against the Sovereign". The Imperial Acts Application Act 1969 largely ensures that this offence remains current in New South Wales. Lord Halsbury's *Laws of England* lists numerous offences under this provision including acts which:

> … violate the King's wife or the Sovereign's eldest daughter, unmarried, or the wife of the Sovereign's son and heir.

Really, is this provision needed in such an Act? The question of allegiance embraced in this subclause is drawn so broadly that celebrations by Irish republican public servants on St Patricks Day could be investigated by the corruption commission. It is too absurdly easy to drag a citizen before the commission under this clause of the bill. For example, unauthorized public policy statements by public servants are a breach of discipline in this regard.

All honourable members will recall the ill-fated saga of Sergeant Arantz. More recently, the Minister for Environment intervened in a case where the Director of the National Parks and Wildlife Service exercised his rights under the Public Service Act to prevent an officer of his from delivering a controversial paper at a conference. By application of clause 8 of the bill, the Minister, who is also a public official, is caught directly interfering in the director's impartial exercise of his duties as bestowed on him by the Public Service Act. In this case the Minister could be deemed guilty of corrupt conduct under part 3 of the bill. Of course, that is not the only time he would have offended. Honourable members should remember the bill is retrospective.

Remember when the Minister sacked the head of the Zoological Parks Board, Dr Kelly? The Premier subsequently decided Dr Kelly's actions were proper and reinstated him. This situation meets the requirements of clause 9, as it involves the dismissal of a public official. If the Premier was correct and Dr Kelly's action was both an honest and impartial exercise of his functions, then the Minister could again be deemed guilty of corrupt conduct. However, if the Minister was right and Dr Kelly's conduct was improper, the Premier could be guilty of corrupt conduct under this proposed Act. Subclause (2) of clause 9 contains another dangerous legal precedent for our democratic country. It has long been an established principle of our criminal law that criminal sanctions should not be imposed retrospectively. Yet subclause (2) states:

> It does not matter that proceedings or action for such an offence can no longer be brought or continued, or that action for such dismissal, dispensing or other termination can no longer be taken.

The British system of justice has always bridled at changing the rules after the game has started. This clause seeks to override the statute of limitations in respect of offences. At the root of this principle is the maxim that, "an Act does not make a man guilty of a crime unless his mind be also guilty". Subclause (2) retrospectively declares acts to be corrupt conduct, even if the person concerned, at the time, understood it not to be so. In the past, the Liberal Party, and in particular the current Attorney General, have declared their total opposition to all forms of legal retrospectivity on the basis they were anathema to Liberal Party philosophy. I fear that a great many citizens will be found guilty of corrupt conduct although they have committed no crime or there is no evidence available to the Director of Public Prosecutions to lay charges against them. Thus, we will be in the invidious position where a growing band of our prominent citizens could be publicly labelled as corrupt. Their reputations could be ruined but they will have no access to the courts to clear their names.

Even more scandalous is the situation where, having been declared corrupt, these prominent citizens continue to hold their high office, causing the public to hold our system of public administration in contempt. Surely, honourable members will view this as an intolerable situation which is inevitable while the definition of corrupt conduct in part 3 of the bill brings in merely disciplinary matters and questions for value judgment such as partiality and where proceedings may not be able to be commenced. Those Government members who would suggest such a scenario is fanciful need only to look to the recent experience of Mr Kerry Packer. Unfortunately, the Government under this Act will deny such people their day in court. Clause 18 prevents the courts from taking any effective action against the corruption commission by way of prerogative writ. That is very dangerous because it has long been a tenet of Australian law that when a decision is made that may reflect adversely on a person's reputation, then the rules of natural justice are available to give him or her relief. Sir George Jessell, Master of the Rolls in *Fisher* v. *Keane,* 1878, said that a committee should not:

> …. blast a man's reputation forever—perhaps to ruin his prospects for life, without giving him an opportunity of either defending or palliating his conduct.

Clause 18 effectively endangers this long-held principle, because no proceedings may emanate following an adverse finding. More recently, in the case of *Heatley* v. *Tasmanian Racing and Gaming Commission,* the High Court enthusiastically reaffirmed centuries of British law on the subject. Committees should not have the right to destroy a person's reputation forever and ruin their prospects for life without allowing them access to the courts to clear their names. No citizen should be declared corrupt in this country without due process of law and that means a proper preliminary hearing and trial by jury. There is only one sensible course for the Government to take and that is to withdraw part 3 and redraft it in clear and simple language. It should limit the definition to the conduct described in clause 9 (1) (a), to truly criminal behaviour, and it should withdraw subclause (2) entirely. Disciplinary matters are dealt with adequately in numerous Acts.

I wish to turn to clauses III to 113, which are framed in a way to prevent the exposure of wrong-doing by the commission, particularly the disclosure of embarrassing or illegally obtained information. Who, one might ask, is guarding the guardians? Certainly not the Ombudsman, who is excluded by clause 1 18. This is a very serious deficiency as was highlighted in the recent Grassby case, to which the Leader of the Opposition has already referred. Bodies such as the National Crime Authority and the proposed Independent Commission Against Corruption can ill afford to expose themselves to very proper criticisms such as those made by the magistrate hearing the committal against Mr Al Grassby only a few days ago.

In July 1987 Mr Grassby's house was raided. He was arrested and humiliatingly locked up and charged with accepting bribes from Mr Trimbole. Later he was to lose his employment. The day after Mr Grassby's arrest the *Sydney Morning Herald* reported that the former Leader of the Opposition, Mr Greiner, claimed that the National Crime Authority's actions were taken as a direct result of charges that he had laid against Mr Grassby in the Parliament. Mr Williams, S.M., attacked the National Crime Authority and the federal police for having placed themselves above the law in their failure to disclose certain evidence. He found that the NCA had edited a transcript of conversations between a police officer and a key witness with the pseudonym of Mr Smith in a way that was designed to protect the NCA and its staff rather than provide the court with the fullest material with which to produce its judgment. Mr Williams stated that if the taped interviews between Detective Inspector Provost and Mr Smith had not been reluctantly produced under subpoena, then in all probability these defendants would have been committed for trial and, in all

probability, convicted.

Specifically clauses III to 113 provide that documents and other evidence obtained in the course of Independent Commission Against Corruption investigations should be withheld from a person charged as a result of those inquiries. The most offensive powers are contained in clause 113, which prevents the courts from examining relevant evidence before determining that the disclosure of such evidence is, and I emphasize is, in the interests of justice. How can a court make such a definitive determination without having first examined the evidence? The clause is a dangerous charade, which at first blush appears to provide a discretion in the courts. But in reality the clause requires the court to make its determinations in the dark.

I do not propose to canvass at length the many clauses that offend against the rules of natural justice and deny basic civil liberties. However, a number of those clauses are so profound that they demand honourable members' attention. I commence by turning to the treatment meted out to three groups of citizens. I refer to the judiciary, the police and the media. Judges are caught by the definition of public official. The definition of corrupt conduct specifically mentions the partial exercise of official functions. Judges are constantly assailed with allegations of partiality by disgruntled litigants. They are particularly vulnerable to the definition of corrupt conduct in part 3 of the bill.

When the Judicial Officers Bill was before this Parliament many members of the judiciary held the view that it was an attack on their independence. There can be no doubt that this bill is a demolition of judicial independence. The Independent Commission Against Corruption is empowered to investigate members of the judiciary and also to enter their chambers, seize their papers, tap their telephones, install listening devices in their courts and homes: and force them before the commission to answer questions. The Chief Justice said of the much milder Judicial Officers Bill to the former Attorney:

> In the structuring of a judicial commission I would see it as essential that any authority to inquire into the conduct of individual judges or magistrates should be confined to a bench comprising only members of the judiciary. To go beyond this would be to expose the judiciary lo an unacceptable inroad on the basic principle of judicial independence.

No wonder the concerns of our judiciary are starting to spill over into the public arena as the judiciary—like most of us—read the actual fine print of this bill and not the distortions of the Government. Perhaps the class of public officials that has the most cause to object to this bill are police. The overwhelming majority of corruption allegations will be levelled at them. At the moment, such allegations are dealt with by the internal investigation section, the Ombudsman's office and the police tribunal—a formidable array of investigators.

The progress of the Labor Government's campaign to clean up the police force has been largely successful. The appointment of Mr Avery and the establishment of a range of institutions charged with the task of exposing corrupt police has. as any fair-minded person would agree, dramatically reduced the level of complaints against police that were so prevalent in the 1970s and early 1980s. However, clause I I of this bill will force the commissioner to report all matters before the internal affairs section, the Ombudsman, and the Police Tribunal to the corruption commission, as well as any other matter that comes to his attention which may fall within clause 8. Police could find themselves in the extraordinary situation of being simultaneously investigated by no less than four different bodies. They could also be in double jeopardy if the corruption commission chooses to conduct hearings under clause 18 while a police officer is also being tried by a court or is being dealt with by the Police Tribunal.

It is, I believe, most improper that the commission can conduct a hearing while simultaneously a public official has other related legal proceedings before the courts or other bodies. How could anyone get a fair trial under such circumstances? It is not enough for the Government to attack the independence of the judiciary and harass the police force; they have also singled out for special treatment journalists. Paragraphs (a) and (d) of clause 8 (1) provide the commission with powers to intimidate journalists' sources. This can only lead to the gaoling of journalists whose adherence to ethics constrain them from divulging their sources. Let us take, for example, an article by Dennis Shanahan and another journalist in the *Sydney Morning Herald,* on 17th June, 1987. This article said *inter alia:*

> Last night Mr Carr was in Paris and was unavailable for comment. Mrs Thomsom refused to

> elaborate but confirmed the existence of the file notes obtained by the Herald and Mr Fitzgerald said he believed someone was trying to smear him ….
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> On May 27 this year, in a ministerial memorandum, Mr Carr said that after discussions with the chairman of the SCRA, Mr Tony Bradford, a former ALP City Council alderman, it had been decided a new deputy director of SCRA be appointed.

The revelation of "file notes" and a "ministerial memorandum" in these paragraphs is particularly important. This was a scoop for Mr Shanahan but constituted a clear breach of clauses 8 and 9 of this bill—that is, it represents misuse of information by a public official. This source had to breach the discipline provision of the Public Service Act in giving Mr Shanahan, who is now the Attorney's press secretary, the story. Further, there is no doubt it adversely affected the career of a senior public official. Under paragraph (a) of clause 8 (I) not only would Mr Shanahan be guilty of corrupt conduct, he would be obliged to name his source or face up to one year's goal if he refused. I do not believe Mr Shanahan acted corruptly in this instance.

I make the point, however, that this means that every time a journalist obtains a story based on information leaked by a public official, including a member of Parliament, she or he could be subject to search warrants or telephone taps, listening devices and search seizure, as well as being dragged before the commission and compelled to divulge the source. This is a profound attack on the freedom of the press. Mr K. R. Handley, Q.C., President of the New South Wales Bar Association and prominent member of the Anglican Synod, in his letter to the Attorney General of 2nd June, said in relation to paragraph (d) of clause 8 (I):

> This provision, and the wide powers of the Commission also represent a threat to the traditional freedom of the press in publishing information relating lo the affairs of Government.
>
> We would therefore strongly recommend that clause 8 (1) (d) be amended to limit it to the misuse of information in return for bribes or personal profit or for other corrupt purposes in the ordinary sense of that word.

Mr Chris Warren, the federal secretary of the Australian Journalists Association, said of these provisions:

> All journalists welcome the opportunity for a public airing of issues of public concern that have arisen in recent years .
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> Most of these issues first became public because of the research and courage of journalists who made public information governments may have wished to have been kept secret.
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> If the Government's proposed commission had been in place then, those journalists would have faced having their phones tapped, their contacts interrogated and their everyday actions closely scrutinised.
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> They would have faced jail for publishing the information and for refusing to place their sources at risk by exposing them.

It would be remiss of me to debate this bill without making a few pertinent remarks concerning the question of the commission's accountability under part 7. The Government makes much of the independence of the commission, staling that it will be accountable only to Parliament. If one examines the oversighting powers of the parliamentary committee, it becomes abundantly obvious the commission will be a virtual law unto itself. Frank Costigan, Q.C., and Frank Galbally, Q.C., have severely criticized the failure of the federal Government to make the National Crime Authority properly accountable to the Parliament. Both Costigan and Galbally have argued that such a commission, if it is to be truly accountable, must be subjected to a set of strict guidelines governing its activities. The joint parliamentary committee must have the duty to establish such controls.

The committee should be given powers to regulate the commission's practices with respect to listening devices, telephone taps, informers, search warrants, indemnities, and the protection and maintenance of witnesses. To do this, the committee must be properly resourced and have access to the commission's staff, otherwise it will be impossible to assess its performance. If the chairman of the commission and his deputy are to be seen to be truly independent, then the committee should be given the

role of assisting in their selection. This should be done in the same way as the appointment of Supreme Court judges, ambassadors and other officials in the United States of America, that is, by public hearings where the candidates' bona fides and integrity can be publicly assessed before their appointment.

The legal profession has been quite justifiably incensed by the contempt powers of the commission contained in part 10 of the bill. This part treats the commission as if it were a court. It is to be no more a court than the New South Wales Police Force or the Corporate Affairs Commission. It is to be an investigating body.

Clause 98 (e) and (i) seek to create the new crime of criticism of the commission not limited to its hearing functions. Citizens can criticize judges and their decisions and even the Governor, and not be gaoled. They will, however, not be allowed even to tell the truth about this commission. As the Council for Civil Liberties points out, this clause is modelled on the South African Police Act which prohibits criticism of police under penalty of gaol. This is the way the administration of justice in New South Wales is headed.

The extraordinary search warrants provisions, the denial of legal professional privilege, the absolute secrecy clauses, the ouster of the Ombudsman's jurisdictions, the failure to provide for an absolute right of legal representation, are but some of the denials of our basic freedoms that will be dealt with at length by other speakers. All in all, I think it fair to say that there has never been a more potentially dangerous bill presented to this Parliament. It is not enough to fall back on the good faith and judgment of the commissioner. The *Australian* in its editorial of 29th February said:

> There is the danger that an independent investigative body could become irresponsible and. if unrestrained, could not only improperly and unjustifiably damage the reputation of individuals, as has been the case with at least one recent royal commission, but could also usurp some of the authority of Parliament as the constitutional guardian of legislative probity ….
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> The elimination of corruption might be poor compensation for the unjustified destruction of personal reputations or irrational or partisan interference in the proper processes of government by an over-zealous or egomaniacal commissioner ….
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> The old question as lo who guards the guardians also needs to be dealt with. What is to be done if it is found that the commissioner himself is corrupt or demented? …..

They are not my words but those written in an editorial in the *Australian.* Indeed, who will guard the proliferation of guardians that can undermine the civil liberties of our society? As a House of review, it is our duty to see that all its provisions are properly scrutinized. The only way to do that effectively is to enact appropriate amendments. Then we will have a commission supported by all, especially honourable members on this side of the House.

Finally, Mr Deputy-President, I seek your indulgence and that of honourable members for a few minutes longer in order that I may record my appreciation to some people who deserve specific mention. To my mother, who brought up five children single-handedly and who endured the uncertainty and worry of a parent of a student activist during the hideous Vietnam war era, I offer my congratulations. To my wife Larisa and family, who have managed to survive late nights and weekends while I was consumed with matters of government and who have supposed me over the years; to Frank Walker, who for years ably fought all the just struggles within the party and government; to George Campbell, the late Jim Roulston, George Georges, Senator Arthur Gietzelt, the Hon. Gerry Hand and John McCarthy, who have always fought for a just and fair society and encouraged me to pursue such; to Jack Ferguson, who brought me to Sydney and desired that I remain when I was tempted to leave; and, finally, to a large number of people who have been colleagues and friends—the Hon. Delcia Kite, the Hon. Jack Hallam, Annette McCarthy, the Hon. Bryan Vaughan, the Hon. Ann Symonds, Kristine Niell, Greg Jones, Steve Massellos, Brian Dale, Bob Debus and Bruce Hawker—1 thank you, one and all. I look forward to working with all members of the Chamber, especially the class of '88.