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4 March 2016

The Honourable William Cox  
Independent Reviewer  
By email – [integrity.review@justice.tas.gov.au](mailto:integrity.review@justice.tas.gov.au)

Dear Mr Cox

**Re: Independent Review of the *Integrity Commission Act 2009***

Thank you for your letter dated 1<sup>st</sup> February 2016 addressed to Greens Leader Cassy O'Connor MP inviting a submission to the Independent Review. This submission is on behalf of the Tasmanian Greens MPs.

*Proper role of the Integrity Commission*

The Tasmanian Greens believe that the proper role of the Integrity Commission is a fundamental question that would benefit from close scrutiny by the Independent Review. Confusion around the precise role of the Commission and, in more recent years, a discussion about whether its investigative functions should be removed may have distracted attention from work of the Commission itself.

The Greens believe Tasmania will be well served if your review looks carefully at this issue and assesses whether the objectives of the Integrity Commission are capable of being met under its current structure and with its current powers.

The Tasmanian Greens' policy position is to "provide adequate powers to the Integrity Commission to enable it to act as an effective, independent commission against corruption." Consistent with this position Nick McKim MP, the then Greens Justice Spokesperson, articulated a series of additional recommendations when he participated in the Three Year Review. I have attached these additional recommendations and ask they be considered as part of your review.

Other Australian States have independent commissions against corruption and Tasmania should not think we are immune from misconduct just because of our smaller population size or separation from mainland Australia. It is possible that the reverse is actually true. That is, because we have a smaller population where 'everyone knows everyone', influential stakeholders are more likely to be able to exert improper influence over public officials.

### Crime of misconduct in public office

One issue which we anticipate will be investigated in your review is the creation of a specific crime of misconduct in public office, as recommended by the Integrity Commission.

The Joint Standing Committee on Integrity found in 2015 that:

- there is no specific offence of misconduct in public office in Tasmania;
- Integrity Commission investigations have not resulted in charges or convictions of any offence or crime; and
- that there is a 'disconnect' in the current legislation in relation to prosecuting serious or serial misconduct and imposing an appropriate penalty due to the absence of an offence of misconduct in public office.

The Joint Standing Committee recommended the Government review the proposal from the Integrity Commission to create an offence of misconduct in public office. The Government however has taken the view that this matter should be included in the Independent Review rather than acting on it directly.

The Tasmanian Greens support the creation of the crime of misconduct in public office for the following reasons:

1. Tasmania is the only Australian jurisdiction without the crime of misconduct in public office.
2. While there are relevant provisions in the Criminal Code which would cover some misconduct by public officials<sup>1</sup>, these provisions do not necessarily cover every example of serious misconduct by a public official with complete certainty and some are arguably outdated in their construction. It is in the public interest for there to be complete certainty in this area.
3. Irrespective of whether existing Criminal Code provisions cover the field or not, there is also public interest in the creation of a stand alone offence which specifically applies to public officers. It is in the public interest to criminalise the breach of trust encapsulated in the proposed new crime of misconduct in public office. The proposed new crime is fundamentally different to other broader crimes such as stealing and is worthy of special opprobrium.
4. There is precedence for having two crimes that cover the same conduct with one of the crimes containing an aggravating factor. For example, 'Common assault' and 'aggravated assault'. Acts constituting aggravated assault would also be captured by

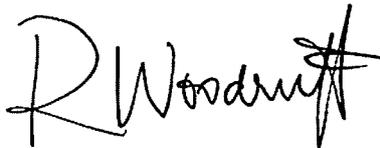
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<sup>1</sup> including but not limited to s.83 corruption of public officers; s.85 public officers interested in contracts; s.234 stealing; s.252A acquiring a financial advantage; s.257 concealing mining discoveries; s.266 secret commissions

common assault, however Parliament has deemed it appropriate to 'carve out' aggravated assault as a distinct crime.

I attach for your information the Amendment Bill Cassy O'Connor MP tabled in Parliament last year, the associated explanatory material, and the relevant extracts of the Hansard of the parliamentary debate on the Amendment Bill.

Warm regards,

A handwritten signature in black ink, reading "R Woodruff". The signature is written in a cursive style with a large, stylized 'R' and a distinct 'W'.

**Rosalie Woodruff MP**  
Greens Justice Spokesperson  
E: [Rosalie.Woodruff@parliament.tas.gov.au](mailto:Rosalie.Woodruff@parliament.tas.gov.au)



# DISSENTING STATEMENT OF MR NICK MCKIM MP, MEMBER FOR FRANKLIN

## Three Year Review

### Dissenting Statement - Mr McKim

#### 1. OVERVIEW

The Integrity Commission was established in response to a crisis of confidence in the integrity of the Tasmanian government of the day. We should not assume that similar circumstances will not exist in the future, and we should ensure that there is an independent authority that has the necessary investigative powers and legislative frameworks to investigate allegations of public sector misconduct and corruption in Tasmania.

The recommendations of the Joint Standing Committee on Integrity (the Committee), taken as a whole, represent a missed opportunity to increase public confidence that a strong anti-corruption watchdog exists in Tasmania with the necessary investigative powers to do its job of investigating allegations of public sector misconduct and corruption, and maximising public sector integrity in Tasmania.

It is likely that the proximity of the statutory five-year review of the Integrity Commission unfortunately led to the Committee in some cases failing to make crucial recommendations to strengthen the powers and functions of the Integrity Commission, instead deferring some of those matters to the five-year review.

Given the government's policy position that the Integrity Commission be stripped of its investigative function and powers, the Committee should have made an unambiguous recommendation that that the investigative function of the Integrity Commission be retained for the foreseeable future, and stronger recommendations to adequately strengthen the investigative powers of the Integrity Commission.

The Committee should also have recommended that relevant legislation be amended to designate the Integrity Commission as a law enforcement agency, as recommended by the Integrity Commission, and that the *Criminal Code Act 1924* be amended to create the offense of misconduct in public office, as recommended by the Integrity Commission in its October 2014 report entitled *Interjurisdictional review of the offense of 'misconduct in public office'*.

An excerpt from the report is below:

*“It has also emerged that Tasmania’s criminal code is lacking the key misconduct offence: the offence of ‘misconduct in public office’ (MIPO). Every other jurisdiction in Australia – including the Commonwealth and both the territories – has some form of this offence.*

*In light of this, the Commission undertook to complete an interjurisdictional review of the offence, with the view to recommending it be introduced into the criminal law of Tasmania. The Commission believes that providing it with the option to recommend consideration of criminal charges in cases of the most serious misconduct would enable it to more effectively meet the objectives of the IC Act.” (p2)*

It is disappointing that the Committee missed the opportunity to make recommendations that, if implemented, would ensure that Tasmania does not remain the only jurisdiction in Australia without the crime of misconduct in public office.

## **2. SUMMARY OF FINDINGS**

- 2.1 This dissenting statement finds that the investigative function of the Integrity Commission should be retained for the foreseeable future.
- 2.2 This dissenting statement finds that the investigative powers of the Integrity Commission will not be enhanced to a satisfactory level due to the failure of the Committee to recommend that enough of the technical amendments proposed by the Integrity Commission be implemented.
- 2.3 This dissenting statement finds that the Integrity Commission is the appropriate body to investigate allegations of public sector misconduct, and that even if criminality is suspected the Integrity Commission should conduct, and retain ultimate authority over, any investigations.
- 2.4 This dissenting statement finds that the Integrity Commission is a relatively inexpensive model, and that the Board should be retained at its current size.
- 2.5 This dissenting statement finds that leaving Tasmania as the only jurisdiction in Australia which does not have a criminal offense of misconduct in public office compromises the capacity of the Integrity Commission to effectively meet its objectives as legislated in the *Integrity Commission Act 2009*.

## **3. RECOMMENDATIONS**

1. That the Integrity commission should retain its investigative function for the foreseeable future.

2. That the Integrity Commission be designated as a law enforcement agency in relevant Tasmanian legislation.
3. That the Integrity Commission retain ultimate authority over its investigations, even where criminality is suspected.
4. That the *Criminal Code Act 1924* be amended to create the offense of misconduct in public office.
5. That the investigative powers of the Integrity Commission be strengthened by implementing the following technical issues in the *Integrity Commission Act 2009* as recommended by the Integrity Commission in Schedule 2 to the Committee's report:
  1. Number 8, S 35(2)
  2. Number 10, S 37(1)
  3. Number 12, S 38(1) (b), (c), (d), (e) and (f)
  4. Number 13, S 38(2)
  5. Number 16, S 44(2)
  6. Number 21, S 52
  7. Number 22, S 52(3)
  8. Number 23, S 52(4) and S 51(4)(a)
  9. Number 26, S 54
  10. Number 29, S 56(2) & (5)
  11. Number 30, S 57(2)(b) & S 58(2)(b)
  12. Number 35 S 74(1)
  13. Number 37, S 80
  14. Number 38, S 81
  15. Number 42, S 96

**Nick McKim MP**  
**Member for Franklin**



**Tasmania**

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**CRIMINAL CODE AMENDMENT  
(MISCONDUCT IN PUBLIC OFFICE) BILL 2015**

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# CRIMINAL CODE AMENDMENT (MISCONDUCT IN PUBLIC OFFICE) BILL 2015

*(Brought in by Cassandra Stanwell O'Connor)*

## A BILL FOR

### An Act to amend the *Criminal Code Act 1924*

Be it enacted by Her Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

#### 1. Short title

This Act may be cited as the *Criminal Code Amendment (Misconduct in Public Office) Bill 2015*.

#### 2. Commencement

This Act commences on the day after the day on which this Act receives the Royal Assent.

#### 3. Principal Act

In this Act, the *Criminal Code Act 1924* is referred to as the Principal Act.

#### 4. Schedule 1 amended (*Criminal Code*)

Schedule 1 to the Principal Act is amended as follows:

- (a) by deleting the existing definition of 'public officer' in section 1 and replacing it with the following:

**Public officer** means a person who is a public authority or a person who holds any office, employment or position, including a voluntary position, in a public authority whether the appointment to the office, employment or position is by way of selection or election or by any other manner.

- (b) by inserting the following definition of 'public authority' into section 1

**Public authority** means -

- (a) the Parliament of Tasmania and any person performing functions or exercising powers under the Parliamentary Privilege Act 1898;
- (b) a person employed in an office of a Minister, Parliamentary Secretary or other Member of Parliament whether in accordance with the State Service Act 2000 or otherwise, except for a person performing functions or exercising powers under the Parliamentary Privilege Act 1898;
- (c) a State Service Agency;
- (d) the Police Service;
- (e) the Governor of Tasmania;
- (f) any person performing functions under the Governor of Tasmania Act 1982;
- (g) a Government Business Enterprise;

- (h) the Board of a Government Business Enterprise;
- (i) a State-owned company;
- (j) the Board of a State-owned company;
- (k) the University of Tasmania;
- (l) a body or authority, whether incorporated or not, whose members or a majority of whose members are appointed by the Governor or a Minister under an Act;
- (m) the holder of a statutory office;
- (n) a local authority;
- (o) a council-owned company;
- (p) a judge of the Supreme Court;
- (q) the Associate Judge of the Supreme Court;
- (r) a magistrate of the Magistrates Court;
- (s) a court;
- (t) members of a tribunal;
- (u) members of the Tasmanian Industrial Commission;
- (v) an integrity entity as defined within the *Integrity Commission Act 2009*;
- (w) any other prescribed, person, body or authority, whether incorporated or not –
  - (i) to which any money is paid by way of appropriation from the Public Account; or
  - (ii) over which the Government or a Minister exercises control.

(c) by inserting the following after section 83:

**83A Misconduct in public office.**

(1) Any public officer who, without lawful authority or justification—

- (a) acts, or fails to act, upon any knowledge or information obtained by reason of his or her office or employment; or
- (b) acts, or fails to act, in any matter, in the performance or discharge of the functions of his or her office or employment, in relation to which he or she has, directly or indirectly, any pecuniary interest; or
- (c) acts corruptly in the performance or discharge of the functions of his or her office or employment,

so as to gain a benefit, whether pecuniary or otherwise, for any person, corporation, association or organisation, or so as to cause a detriment, whether pecuniary or otherwise, to any person or corporation, association or organisation,

is guilty of a crime.

Charge: misconduct in public office

- (2) Any person who has ceased to be a public officer in a particular capacity and who, without lawful authority or justification acts, or fails to act, upon any knowledge or information obtained in that capacity so as to gain a benefit, whether pecuniary or otherwise, for any person, corporation, association or organisation, or so as to cause a detriment, whether pecuniary or otherwise, to any person, corporation, association or organisation,

is guilty of a crime.

Charge: misconduct after public office

(3) Subsection (2) applies to a person:

- (a) whether the person ceased to be a public officer as mentioned in the paragraph before, at or after the commencement of this section; and
- (b) whether or not the person continues to be a public officer in another capacity.

## **5. Repeal of Act**

This Act is repealed on the three hundred and sixty fifth day from the day on which it commences.

# CRIMINAL CODE AMENDMENT (MISCONDUCT IN PUBLIC OFFICE) BILL 2015

## EXPLANATORY MATERIAL

### Elements of the crime

The Bill creates the crimes of 'misconduct in public office' and 'misconduct after public office'.

The crime of misconduct in public office has the following four elements:

1. the person must be a 'public officer' as defined within the Criminal Code;
2. that public officer must do one of the following:
  - (a) act, or fail to act, upon any knowledge or information obtained by reason of his or her office or employment; or
  - (b) act, or fail to act, in any matter, in the performance or discharge of the functions of his or her office or employment, in relation to which he or she has, directly or indirectly, any pecuniary interest; or
  - (c) act corruptly in the performance or discharge of the functions of his or her office or employment;
3. the public officer must perform the act without lawful authority or reasonable excuse; and
4. the public officer must have acted so as to gain a benefit for themselves or someone else or to have caused a detriment to someone else.

The crime of misconduct after public office is deliberately narrower and the elements of this crime are limited to situations where a public officer gains access to information during their course of their duties and then leaves that particular position and uses that information to benefit themselves or others or to the detriment of others.

A subclause is inserted to clarify that the crime of misconduct after public office will enter operation immediately on Royal Assent and apply to people who act inappropriately from that day on, regardless of whether their time in public office had ceased previously or whether they in fact have shifted to a new capacity as a public officer.

The crime of misconduct after public office has the following four elements:

1. the person must have previously been a 'public officer' as defined within the Code but ceased to hold that role
2. the person must have acted, or failed to act, upon any knowledge or information obtained by reason of his or her office or employment as a public officer;
3. the person must have performed the act without lawful authority or reasonable excuse; and
4. the person must have acted so as to gain a benefit for themselves or someone else or to have caused a detriment to someone else.

The elements of both the two new crimes are closely based on the formulation of the crime in Western Australia, which was the recommendation from the Integrity Commissioner.

The Integrity Commissioner found that the Western Australian provision was the most satisfactory codified version of the crime in Australia and would be of most value to prosecuting modern corruption offences in Tasmania.

The proposed formulation expressly includes both an action and a failure to act. This is an improvement on the Western Australian provisions which was recommended by the Integrity Commission.

One important point where this Bill differs from the recommendation of the Integrity Commissioner is with respect to the element requiring that the actions must have been done for benefit or detriment.

The Integrity Commissioner recommended that this element not be carried across into the Tasmanian legislation.

As the Integrity Commission pointed out, leaving out the fourth element would broaden the scope of the offence.

Or put another way, leaving the fourth element in would narrow the scope.

In the view of the Integrity Commission, narrowing the scope in such a way would be an adverse narrowing.

In the view of the Greens, given we are proposing the creation of a criminal offence with all of the serious consequences that flow from that, including the potential for custodial sentences, the limitation created by the fourth element is appropriate.

### **Definition of 'public officer'**

The Bill replaces the existing definition of 'public officer' in the Criminal Code with a definition closely based on the definition as currently in use in the Integrity Commission Act 2009.

In their 2014 report the Integrity Commission examined the existing definition in the Criminal Code of a 'public officer' and concluded that while the definition is clear, due to Tasmanian case law, in regards to what public servants are included within the definition it does not appear to correspond with the modern understanding of the phrase. I take that to mean a reference to the diversification of the public service that exists in 2015 compared to when the current definition was first drafted.

Consistent with the recommendation made by the Integrity Commission in their 2014 report, the definition proposed by this bill expands the scope of the existing definition by the insertion of the words 'including a voluntary position'.

### **Definition of 'public authority'**

The Bill also inserts a definition of 'public authority' into the Criminal Code for the first time.

This provides significantly more certainty to the scope of the term 'public officer' than currently exists and is consistent with the recommendations of the Integrity Commissioner.

The definition is based on the definition as currently used in the Integrity Commission Act but makes one important change.

Currently, for the purposes of the Integrity Commission Act, certain judicial, tribunal and other entities, such as the Governor of Tasmania, are not defined to be public authorities.

Whilst this may have been appropriate in the context of that Integrity Commission Act 2009 and the investigative repercussions that would have flowed, the Greens have taken the position that when it comes to creating a new crime of misconduct in public office, no one should be above the law.

The entities brought into the definition of public authority for the purposes of the Criminal Code and the proposed new criminal offence should be held to the same standard as their counterparts in the other sectors of the public service.

### **Other potentially relevant offences in the Criminal Code**

A range of existing offences provide some grounds for charging public officials who engage in misconduct but these either do not cover the field or were drafted prior to 1924 and are outdated and/or ambiguous.

Existing relevant provisions include:

- s.83 corruption of public officers
- s.85 public officers interested in contracts
- s.234 stealing
- s.252A acquiring a financial advantage
- s.257 concealing mining discoveries
- s.266 secret commissions

The two most directly relevant (sections 83 and 266) do not cover the field and there are significant gaps. For example, both the sections require the public officer to be acting in concert or in an arrangement with a second person. There need to be two people involved. This leaves a significant gap if there is only a single person acting unilaterally for their own benefit or to create detriment to a third party.

Also, importantly, the breach of trust encapsulated in the proposed new crimes of misconduct in public office and misconduct after public office are fundamentally different to other broader crimes such as stealing and are worthy of special opprobrium.

House Extract 23<sup>rd</sup> September 2015  
House of Assembly.

**CRIMINAL CODE AMENDMENT (MISCONDUCT IN PUBLIC OFFICE) BILL  
2015 (No. 37)**

**Second Reading**

[5.06 p.m.]

**Ms O'CONNOR** (Denison - Leader of the Greens - 2R) - Madam Speaker, I move -

That the bill be now read the second time.

In October 2014 the Integrity Commission reported that Tasmania is the only Australian jurisdiction that does not have a criminal offence of misconduct in public office. In its report, the commission made the comment that:

The Commission considers that some of the misconduct it has seen has been worthy of criminal punishment and believes that appropriately dealing with it should have included a referral to Tasmania Police or the Director of Public Prosecutions for potential criminal charges.

The commission went on to point out that not only is the existing legislative regime in Tasmania ambiguous and dated, but that:

It has emerged that Tasmania's Criminal Code is lacking the key misconduct offence, the offence of misconduct in public office. Every other jurisdiction in Australia, including the Commonwealth and both the territories, has some form of the offence.

Having identified the problem, the commission went on to undertake an interjurisdictional review of the offence. The result of that review was the recommendation that:

... to bring Tasmania into line with all other Australian jurisdictions, an offence which captures misconduct in public office, be introduced into the Criminal Code of Tasmania. To be of true value in prosecuting modern corruption offences, it is the opinion of the Commission that the offence should be formulated in a similar manner to that found in section 83 of the Criminal Code of Western Australia.

The Greens are acting on that recommendation today because we believe it will send a strong message about the expected standards of conduct in public office, it will improve transparency and strengthen the faith that Tasmanians have in their public service.

I go to the operational parts of the bill. This bill creates the crimes of misconduct in public office and misconduct after public office. The crime of misconduct in public office has the following four elements:

- (1) The person must be a public officer, as defined within the Criminal Code.
- (2) That public officer must do one of the following -

- (a) act or fail to act upon any knowledge or information obtained by reason of their office or employment; or
  - (b) act or fail to act in any matter in the performance or discharge of the functions of their office or employment in relation to which they have directly or indirectly any pecuniary interest; or
  - (c) act corruptly in the performance or discharge of the functions of their office or employment.
- (3) The public officer must perform the act without lawful authority or reasonable excuse; and
  - (4) The public officer must have acted so as to gain a benefit for themselves or someone else or to have caused a detriment to someone else.

The crime of misconduct after public office is deliberately narrower and the elements of this crime are limited to situations where a public officer gains access to information during the course of their duties and then leaves that position and uses that information to benefit themselves or others or to the detriment of others. A subclause is inserted in our bill to clarify that the crime of misconduct after public office will enter operation immediately on royal assent and apply to people who act inappropriately from that day on, regardless of whether their time in public office had ceased previously or whether they have shifted to a new capacity as a public officer.

The crime of misconduct after public office has the following four elements:

- (1) The person must have previously been a public officer as defined within the code but ceased to hold that role;
- (2) The person must have acted or failed to act upon any knowledge or information obtained by reason of their office or employment as a public officer;
- (3) The person must have performed the act without lawful authority or reasonable excuse, and
- (4) The person must have acted so as to gain a benefit for themselves or someone else or to have caused a detriment to someone else.

The elements of both the two new crimes are closely based on a formulation of the crime in Western Australia, which was a recommendation from the Integrity Commission. The Integrity Commission found that the West Australian provision was the most satisfactorily codified version of the crime in Australia and would be of most value to prosecuting modern corruption offences in Tasmania. The proposed formulation expressly includes both an action and a failure to act. This is an improvement on the West Australian provision which was recommended by the Integrity Commission.

One important point where this bill differs from the recommendations of the Integrity Commission is with respect to the element requiring that the actions must have been done for benefit or detriment. The Integrity Commission recommended that this element not be carried across into the Tasmanian legislation. As the Integrity Commission pointed out, leaving out the fourth element would broaden the scope of the offence; or put another way, leaving the fourth element in would narrow the scope. In the view of the Integrity Commission, narrowing the scope in such a way would be an adverse narrowing. In the view of the Greens, given we are proposing the creation of a criminal offence with all of the serious consequences that flow from that including the potential for custodial sentences, the limitation created by the fourth element, we believe, is appropriate.

The definition of public officer. The bill replaces the existing definition of public officer in the Criminal Code with a definition closely based on the definition as currently in use in the Integrity Commission Act of 2009. In their 2014 report, the Integrity Commission examined the existing definition in the Criminal Code of a public officer and concluded that while the definition is clear due to Tasmanian case law in regard to what public servants are included within the definition, it does not appear to correspond with the modern understanding of the phrase. The Greens take that to mean a reference to the diversification of the public service that exists in 2015 compared to when the current definition was first drafted.

Consistent with the recommendation made by the Integrity Commission in their 2014 report, the definition proposed by this bill expands the scope of the existing definition by the insertion of the words 'including a voluntary position'.

The definition of a public authority. The bill also inserts a definition of public authority into the Criminal Code for the first time. This provides significantly more certainty to the scope of the term 'public officer' than currently exists and is consistent with the recommendations of the Integrity Commission. The definition is based on the definition as currently used in the Integrity Commission Act but makes one important change. Currently, for the purposes of the Integrity Commission Act, certain judicial, tribunal and other entities such as the Governor of Tasmania are not defined to be public authorities. Whilst this may have been appropriate in the context of the Integrity Commission Act 2009 and the investigative repercussions that would have flowed, the Greens have taken the position that when it comes to creating a new crime of misconduct in public office, no-one should be above the law. The entities brought into the definition of public authority for the purposes of the Criminal Code and the proposed new criminal offence should be held to the same standards as their counterparts in the other sections of the public service.

Regarding other potentially relevant offences in the Criminal Code, it is true a range of existing offences provides some grounds for charging public officials who engage in misconduct but these either do not cover the field or were drafted prior to 1924 and are outdated and/or ambiguous. The existing relevant provisions include: section 83 Corruption of Public Officers; section 85 Public Officers Interested in Contracts; section 234 Stealing; section 252A Acquiring a Financial Advantage; section 257 Concealing Mining Discoveries; and section 266 Secret Commissions. The two most directly relevant, that is sections 83 and 266, do not cover the field and there are significant gaps. For example, both the sections require the public officer to be acting in concert or in an arrangement with a second person. That is, there needs to be two people involved. This leaves a significant gap if there is only a single person acting unilaterally for their own benefit or to create a detriment to a third party.

Secondly, and importantly, the breach of trust encapsulated in the proposed new Crimes of Misconduct in Public Office and Misconduct After Public Office are fundamentally different to other broader crimes such as stealing and are worthy of special opprobrium from Parliament and their courts.

Both the Labor and Liberal parties in this place should support this important reform in the interests of ensuring the highest ethical standards in the public sector, to instil public faith that the highest standards are being upheld, and to bring Tasmania into line with every other Australian state, territory and the Commonwealth. It is time for us to join the rest of the country. It is not good enough to assume that Bass Strait provides some kind of inoculation to situations that we have seen in other jurisdictions of misconduct and corruption in public office.

This bill is not designed to cast a slur on our public sector in Tasmania. I have been a minister; I have worked with the most outstanding public servants who work every day to the benefit of the people of Tasmania. There is no reason that public servants in Tasmania should be regarded as a different breed, for some reason, from their counterparts in other Australian states and territories and in the Commonwealth.

I have determined to keep my second reading speech on this bill relatively brief. Our spokesperson for the Integrity Commission and shadow attorney-general, Rosalie Woodruff, will be making a contribution towards the end of our private members' time.

I want to give both the major parties in this place an opportunity to speak their thoughts on why there should or should not be an offence of misconduct in public office in Tasmania, given the very strong recommendations that have come from the Integrity Commission and the fact that we should not regard ourselves as different from every other Australian state, territory and the Commonwealth when it comes to ensuring the highest standards of ethical conduct in public office in Tasmania.

[5.18 p.m.]

**Mr BARNETT** (Lyons) - Mr Deputy Speaker, the Government certainly will not be supporting the bill put forward by the member for Denison, for a whole range of reasons. I wanted to say right up-front, however, that the Government takes fraud and misconduct in public office very seriously. It opposes any form of misconduct in public office. It is very interesting that the member for Denison has made no mention of her attempt to bring this debate on today within 24 hours of an Integrity Commission report, which I have here -

**Ms O'Connor** *interjecting.*

**Mr DEPUTY SPEAKER** - Order, Ms O'Connor. You had your opportunity without interruption.

**Ms O'Connor** - Mr Barnett is misrepresenting the Greens.

**Mr DEPUTY SPEAKER** - There are other forms available to address that.

**Mr BARNETT** - The report of the Integrity Commission, an own-motion investigation into policies, practices and procedures relating to receiving and declaring of gifts and benefits

in the Tasmanian State Service, which has caused a great deal of angst amongst members of the public service.

**Ms O'Connor** *interjecting.*

**Mr DEPUTY SPEAKER** - Order, Ms O'Connor.

**Mr BARNETT** - In my view, Ms O'Connor's efforts of bringing this bill on today are likely to cause maligning of Tasmania's hardworking public servants. In my view the debate today should have been delayed by Ms O'Connor. She should have deferred it and not tried to conflate the two issues. She has made no mention of it in her presentation. As to the Integrity Commission report, it found no evidence gifts to public servants have led to a perceived or actual bias and no crime has been committed or alleged to have been committed. That was never found by the Integrity Commission in that one-year inquiry and investigation.

It is disgraceful for this member to come forward with this bill today. The time and context are entirely wrong. There is an understandable link between the Integrity Commission report to potential amendments to a crimes bill. That is where the member got it right - a very serious matter when you talk about amending the Criminal Code. It has serious consequences.

In light of Ms O'Connor's new-found policy of no gifts, I would like her to explain to this Parliament and the public whether she or any of her current or former colleagues, including Senator McKim, have ever accepted a gift. I would like her to make that clear, including a cup of coffee. This no-gift policy of Ms O'Connor is lacking common sense.

We have a hardworking Tasmanian State Service and they have already acted in response to this report and have agreed to implement the relevant reforms. It is a very important issue and important to this Government. The Government does not support any form of misconduct in public office. This is base political opportunism. No wonder public servants are feeling threatened in a pressure-contained environment. You are feeding on fear, which is a Greens tactic. It has been used before, time and time again, and it is not the time to be considering this bill.

Considering any amendment to a criminal code should be considered in a measured, sensible and balanced way where you can weigh up the pros and cons. The legislation before us is an amendment to the Criminal Code. The member for Denison has made no mention of the three-year review or the five-year review of the legislation the former government introduced - the 2009 Integrity Commission Act. It makes very clear what the objectives of the Integrity Commission are and that is to promote and enhance standards of ethical conduct by public officers by the establishment of an integrity commission to improve the standard of conduct, propriety and ethics in public authorities. It is not a law enforcement agency, as much as the Greens and perhaps others would like it to be. It is not an anti-corruption commission as there is in New South Wales, Queensland and other mainland states. Let us not try to twist and turn and conflate those objectives of the Greens to say this is how things are or should be.

The bill is flawed and it should be at least withdrawn and redrafted if you wish it to proceed any further. I will highlight those flaws shortly. As to the previous government's

bill - Integrity Commission Act 2009 - it called for a three-year review. We have just had copious submissions and witnesses and many months of inquiry. I am on the Joint Standing Committee of Integrity, as is the shadow attorney-general and other members, including the former member, Mr McKim, who is now Senator McKim. You have acted in complete disregard of the three-year and five-year review, which is required by the act that was passed under the previous government, the Labor government, and obviously supported by the Greens in 2009. You are acting, in my view, in an inconsistent way.

Clause 3 I have referred to. It highlights that the primary role is education and raising standards in public office.

If there is any concern for misconduct in public office or for a crime to have been committed, they should be referred immediately to the police and/or the Office of the Director of Public Prosecutions. They are solely matters for those entities. The Integrity Commission was established not as a law enforcement body, nor is it similar to the New South Wales, WA or Queensland anti-corruption commissions. ABC Radio this morning referred to it as an anti-corruption watchdog. That is not accurate; that is entirely wrong. It is not a law enforcement agency. The Integrity Commission released the report in October last year and made the recommendation, as she has referred to accurately. The report recommends that this Parliament legislate to provide for an offence, crime of misconduct in public office. At this stage the Government has no intention to implement this recommendation because we have had a three-year review, we have put forward a copious report with some 268 pages with recommendations. Now there is a five-year review which will kick in at the end of this year, on 31 December 2015, required by the act which you supported and passed in the previous Parliament to this.

The Government certainly agrees that where behaviour does involve some form of criminality, it should be investigated and prosecuted by the appropriate authorities. There is already a legal framework in place to do that. That is called the Criminal Code. Let us take a look at that. The Integrity Commission has never found nor has there been a conviction of a crime to date, nor an allegation of a crime to date based on the evidence we have and based on the three-year review and the report that was undertaken and based on evidence in the public arena. If there is some concern of a possible crime and the Integrity Commission was aware of it, they have the option. My view is they have the moral imperative to refer it to the Tasmanian Police or the DPP. In the Criminal Code there is a whole range of provisions that may capture misconduct in public office.

**Ms O'Connor** *interjecting.*

**Mr BARNETT** - If you would listen, member for Denison, you would learn something in terms of the Criminal Code and the various -

**Ms O'Connor** - Do not patronise me.

**Mr DEPUTY SPEAKER** - Order. Ms O'Connor, I ask you to cease your constant interjections.

**Mr BARNETT** - Your interjections are making it very clear that you do not fully understand the Criminal Code. I will refer to section 83, corruption of a public officer; section 85, public officers interested in contracts; section 234, stealing; section 252A,

acquiring a financial advantage; section 257, computer-related fraud - I do not remember you referring to that one - section 266, secret commissions -

**Ms O'Connor** - Yes, tick.

**Mr BARNETT** - Let us try this one, Ms O'Connor and other members of parliament, section 253A, fraud.

**Ms White** - Are you inciting interjections now? You keep looking across to the member

**Mr DEPUTY SPEAKER** - Order. No-one is inciting interjections and I ask you to direct it through the Chair.

**Mr BARNETT** - The current law already captures a range of criminal behaviours such as stealing, bribery, dishonestly acquiring a financial advantage and fraud. In particular, section 253A of the Criminal Code provides for a general and serious crime of fraud which covers a broad range of behaviours and actions. Section 253A says:

Any person who, with intent to defraud, or by deceit or any fraudulent means -

- (a) obtains property from a person; or
- (b) induces a person to -
  - (i) deliver, transfer or assign, property to another person; or
  - (ii) causes property to be delivered, transferred or assigned, to another person; or
- (c) gains a benefit, pecuniary or otherwise, for any person; or
- (d) causes a detriment, pecuniary or otherwise, to any person; or
- (e) induces any person to do an act that the person is lawfully entitled to abstain from doing; or
- (f) induces any person to abstain from doing any act that the person is lawfully entitled to do -

is guilty of a crime.

It is a very broad-ranging provision. That captures a whole range of misconduct, including misconduct in public office. To suggest that misconduct, including the circumstances described, cannot be investigated and prosecuted under our current criminal law is patently wrong and incorrect.

Should the Integrity Commission believe there are criminal matters of misconduct in the public service, they are encouraged to report those matters to the DPP or the police and have them dealt with in the proper process and in the proper way.

**Ms O'Connor** - You have not yet explained why Tasmania is different from every other place. Why should we not have this provision?

**Mr BARNETT** - I have already partly answered that.

**Mr DEPUTY SPEAKER** - Order, I ask that interjections cease.

**Mr BARNETT** - I have already partly answered that because the Tasmanian landscape of law under the Criminal Code already provides a whole range of provisions that cover a whole range of criminal behaviour and possibly misconduct.

**Ms O'Connor** *interjecting.*

**Mr DEPUTY SPEAKER** - Order. Mr Barnett, you have incited comment and I ask everyone to cease their interjections. Ms O'Connor, you were extended the courtesy without interjection, from what I recall.

**Mr BARNETT** - The Government is currently considering the report of the Joint Standing Committee on Integrity I have referred to, which is the three-year review, and it is noted that it was not unanimous in recommending the creation of a new offence of misconduct in public office. I had another look at it earlier today and it has made a whole range of comments, findings, and recommendations and is definitely worth a read at 268 pages.

As members will know, the three-year review considered many aspects of the law regarding the rights, privileges and responsibilities of public officials, for example, the use of coercive powers, mandatory reporting and whether the Integrity Commission should be a law enforcement body or not. The three-year review required time to hear from the many interested witnesses, a whole range of submissions, and made it very clear there were no easy or quick fixes. Simply picking out one possible recommendation flowing from the three-year review and dealing with that now is not the way to go, particularly when you are talking about an amendment to the Criminal Code.

You do not want a mishmash or an ad hoc approach. You want a comprehensive, sensible, measured approach to any reform and that is exactly what the Government plans to do. We are reviewing the three-year report and recommendations and have indicated that the five-year review which kicks in under the law and was passed by the previous parliament in 2009 makes it very clear that that is required by law and that will be happening early in 2016.

There are many policy and legal issues to consider in making changes to the act and the criminal law and I want to mention some of them. Comparisons with other jurisdictions can be problematic because some of those are based on a code and others, like New South Wales, are based on the common law. Elements of offences, in particular the requisite mental state that must be proved, can vary between states and territories.

In the bill I have perused with reference to misconduct in public office, as been recited by the member for Denison in putting forward this bill, there is no reference to a mental intent or mental state. I refer this to the shadow attorney-general who would know that for very serious crimes you require both a mens rea and an actus reus, a mental intent and a physical action. That is why I suggest you give it further consideration if you remain convinced that you wish to proceed with something like this. I suggest it be withdrawn and redrafted.

**Ms O'Connor** - Are you more likely to support it then?

**Mr BARNETT** - It would need to be reviewed after the five-year review by an independent person, either a judge or a former judge or someone of that ilk, because that is required under the legislation. In my view, your bill is flawed. It needs to be withdrawn and redrafted.

**Ms O'Connor** - You have the capacity to amend it if you wanted to support it.

**Mr BARNETT** - I am not supporting it. I am highlighting a flaw in your bill that should be fixed if you want to proceed with it. We will not be supporting it because it has a flaw, the timing is all wrong and there is a whole range other reasons I have referred to.

In terms of the need for proportionality in responses to misconduct, that is important. The impact of the recent High Court cases on coercive powers to obtain information, abrogating the right to silence, questioning with or without caution, particularly when and where criminal charges may result, and the capacity to question a person without a caution in disciplinary or other inquiries can impact on criminal justice processes to the extent that evidence may be inadmissible or tainted in some circumstances. Another point is the impact and costs across the whole criminal justice system, including investigation by Tasmania Police and subsequent prosecution and matters.

I referred to the five-year review required under section 106 of the legislation. I will be fascinated to hear the Labor Party's response to this bill, not just because it is flawed but in terms of the report and recommendations of the three-year review and the fact that there is a five-year review on the way and the need for a comprehensive, whole-of-government consideration, a measured and balanced approach, rather than an ad hoc, knee-jerk reaction as has been proposed by the Greens. That will commence soon after 31 December 2015. The Government does not consider it appropriate to implement any major legislative reforms prior to the conclusion of that independent review process.

In conclusion, the Government takes fraud or misconduct in public office very seriously and we believe the current law provides a number of different offences that may be used to charge public officials who engage in misconduct. If the Integrity Commission says there are matters worthy of prosecution, they should be referred to Tasmania Police or the Director of Public Prosecutions for them to determine whether there is a basis for prosecution under the existing laws. The Integrity Commission is not a prosecuting authority. It is not a law enforcement agency and it should not be making decisions about whether individuals suspected of committing a criminal offence should be prosecuted. These are decisions that are matters for Tasmania Police and/or the DPP.

It is most disappointing that the member for Denison has proceeded with this bill today on the back of an Integrity Committee report yesterday, because you have -

**Ms O'Connor** - We flagged this with stakeholders - this very date - some time ago.

**Mr BARNETT** - You referred to it some time ago and you have decided to bring it on today, one day after -

**Ms O'CONNOR** - Point of order, Mr Deputy Speaker. Mr Barnett is wilfully misrepresenting me. We referred this matter to stakeholders some time ago and told them this would be the date.

**Mr DEPUTY SPEAKER** - Ms O'Connor, that is not a point of order and you know it.

**Ms O'Connor** - It is misleading.

**Mr DEPUTY SPEAKER** - There are other forms that you can use in the House to address that at a later time.

**Mr BARNETT** - In conclusion, it is very disappointing that this debate has been brought on because this is not the right time or the right place. It is within 24 hours of an Integrity Commission report into gifts and benefits in the state public service. There is a good deal of angst and concern and I would be very interested to hear from the Labor Opposition on their view of the timing of this particular debate.

Any debate on an amendment to the Criminal Code is extremely serious. We are talking about a matter that is of the utmost priority and the utmost seriousness, and any change to the Criminal Code is very important indeed. An ad hoc approach, a mishmash put forward by the Greens today is inappropriate.

**Ms O'Connor** - It is not ad hoc. It is the Integrity Commission's recommendation and Murray Kellam called for it.

**Mr BARNETT** - It is not supported. There have been references to the role of the former chairman of the Integrity Commission. That will provide an opportunity for me to record again our thanks for his service, and also to congratulate Greg Melick on his appointment. I am pretty sure Greg Melick AM SC will do an excellent job in his new role. He has just been appointed for two years, so I congratulate him on that appointment.

This bill is flawed. If the Greens wanted to pursue it, they should pursue it at the right time and in the right place. That would be early next year after the five-year review has reported.

**Ms O'Connor** - And you would listen to us then, too, would you?

**Mr BARNETT** - Yes, absolutely, as long as it has been withdrawn and rewritten to fix the flaws that appear to be quite blatant in not including any mental state in the definition in the bill. There is a whole range of flaws and I hope that this bill will not be supported and will not pass today because it is inappropriate.

[5.44 p.m.]

**Ms GIDDINGS (Franklin)** - Mr Deputy Speaker, I rise on behalf of the Opposition to speak to this bill. We will not be supporting the bill and we have been consistent on that. We said that at the time that you tabled the legislation and our view has not changed. That is not to say that we would not support reform of the Criminal Code or reform around a crime of misconduct in public office being included in the Criminal Code.

There are some areas in which I agree with my colleague who just sat down and other areas where I disagree with him. We agree that there is a five-year review about to start towards the end of this year or the beginning of next year. The issues that were raised within the context of the review of the Criminal Code and the crime of a misconduct in public office led us to believe we needed some further expert advice on that. Considering the delays that have occurred in the three-year review, which was delivered in the fourth year because of elections and changes to the committee et cetera, I did not feel we were in a position to defer or delay that process any further to seek that expert advice for us to draw that conclusion.

There are points that were well made by Mr Barnett that if there is any crime, or concern there has been a crime committed around corruption, there are avenues to refer those to the police and the DPP.

**Ms O'Connor** - Clearly they're inadequate.

**Ms GIDDINGS** - They are not necessarily.

**Ms O'Connor** *interjecting*.

**Mr DEPUTY SPEAKER** - Order, Ms O'Connor. You had your opportunity to make your case. I ask Ms Giddings to direct her contribution through the Chair.

**Ms GIDDINGS** - I do not disagree that there may well not be a case for bringing in a crime of misconduct in public office; we are not saying we would oppose that. What I am saying is that, as the Labor Party representative on the committee reviewing the legislation and the Integrity Commission, I did not feel we had adequate information before us to make that determination then and there. That is why we supported the recommendation to refer that matter to the five-year review. I look forward to hearing what comes out of that five-year review, but if there is any corruption in this state, it must be exposed and sent to the appropriate authorities. I believe if the appropriate authorities did not believe there were adequate mechanisms within the current law to pursue an allegation of a crime being committed right now in Tasmania, they would be drawing that to the attention of the government of the day.

**Ms O'Connor** - The Integrity Commission has.

**Ms GIDDINGS** - No, the Integrity Commission is not that body. They are not the Director of Public Prosecutions, nor are they the police. That is not their role, but they are a body that can expose behaviour they believe may constitute misconduct. They have that avenue open to them that is very public. We saw yesterday how public that can be, even when senior members of the public service asked for that report not to be made public. I am not going to be here today debating the rights or wrongs of that.

I disagree with my colleague on the committee in criticising the timing of this legislation. I do not think it is relevant at all. I give credit to the Greens that they tabled this some six weeks ago and I believe the member when she says she wrote to stakeholders a week ago and said it would be debated today, not knowing the Integrity Commission would release its report yesterday. That is a bit of a furphy and a bit irrelevant in relation to this debate. It goes to show the power the Integrity Commission has. It can expose any behaviour it feels is misconduct, or walking a fine line towards being misconduct, and it can do so very publicly if it wishes to.

We have not seen any serious misconduct or corruption exposed in this state. I know, having read parts of the report yesterday that the Integrity Commission tabled, they took some affront at comments that said the Integrity Commission was not saying there was any corruption or misconduct. We have not had any referrals of that nature, that I am aware of, to the DPP, the police or the Integrity Commission.

While we can join the rest of the country by supporting this bill and saying, 'Yes, we now have that crime', this is not an urgent matter. It can wait until the five-year review. It can allow further expert advice to be sought and for others within the legal fraternity and in the broader community to have their say in relation to it. I do not believe it is necessary to support this bill at this point. If there was corruption exposed and there was no ability to have charges laid then we would see that as very urgent and would reconsider it. The Integrity Commission was deliberately not set up as an ICAC. We do not want, nor did we feel the need, to have an ICAC in Tasmania.

The sad part about political debate and discourse in this day and age is it is very easy to throw the word 'corruption' around. It is throwing a bit of mud. It is trying to do political damage. We lived through years of it in this Chamber with various members of the then government being accused of corruption in various ways, mostly to do with the forest industry, mostly coming from the Greens party. That is what we are trying to avoid, that mudslinging, the reputation damage that occurs that is very difficult to ever undo. It was part of trying to restore trust in the community, trust that had been broken through a lot of that mudslinging, much of it unfounded but thrown nevertheless for political reasons.

We needed to do something so we tried to establish an Integrity Commission that does have teeth, but is not an ICAC. It is not an ICAC where we see people going before the public court process and having their reputation damaged, irrevocably in many respects. ICAC certainly has exposed a level of corruption in other states, but we have not seen that corruption in Tasmania.

**Ms O'Connor** - That is a complacent attitude.

**Ms GIDDINGS** - It is not complacent because we have an Integrity Commission that has the ability to do its own work, as we saw yesterday. It is an Integrity Commission that has the ability to investigate and expose corruption if it exists. It can refer matters to the police and to the prosecution office and nothing of that nature has occurred that we can say, 'Yes, there is definitely a crime that is committed here', or a crime of misconduct in public office if that existed in the Tasmanian Criminal Code.

**Ms O'Connor** - Do you know it used to be in the common law? Until we codified the criminal law in Tasmania there was this crime.

**Ms GIDDINGS** - I have no problem, Ms O'Connor, in having a crime in the Criminal Code. My issue had been, on behalf of my party, that we understood what it meant and how it related to the other provisions in the Criminal Code as well. I have not seen or been presented with any evidence to say there is an urgency in regards to this. There is a level of political expediency on behalf of the Greens in moving this at this point in time, knowing what the outcome of the report was for the Integrity Committee.

If the recommendation comes forward in the future and this Parliament chooses to support this, I can hear what the Greens will say now. As it is already there, 'We were the first to do it, we were the ones who led the way. Thank goodness the rest of you have come on board.' I can hear the rhetoric already. That is fine. That is part of political debate and discourse. We do not oppose a misconduct in public office crime being put into the Criminal Code. We just want to see some further advice provided. We want some scrutiny of that through the five-year review, which is not that far away now. It is very close indeed. I believe the Integrity Commission is an important body and we support it. We will be watching with a very eagle eye to ensure that the Government does not use a five-year review as an opportunity to take the investigative powers away from the Integrity Commission.

**Ms O'Connor** - They would love to.

**Ms GIDDINGS** - Of course they would love to; you are quite right, Ms O'Connor. We saw that in their submission to our own three-year review. There is definitely an intention on behalf of the Government to try to minimise the ability of the Integrity Commission to investigate matters. We do not want to see that occur in this state. Yes, it has an important educative role, but it equally has an important investigative role as well. 'The disinfectant of sunlight' is certainly an important saying. Transparency ensures that people stay on their toes. The threat of exposure of bad behaviour or behaviour in grey areas, all of that is exposed through this ability to investigate and report upon behaviour that might be walking a very thin line.

We also want to make sure that we do not go to the other extreme either. In yesterday's report there are elements of that. One of them was that you cannot, as a public servant, go to a public event and buy a raffle ticket and be the beneficiary of that raffle ticket, for instance. If that is what the Integrity Commission believes they are going a step too far in the other direction as well. This is about getting the right balance and you can undermine people's confidence in an Integrity Commission if they go too far in a different direction. There are lessons for all of us to learn from this. My shadow minister for the Greens wants to say a few words before the debate finishes, so I will wind up. We do not want to be misrepresented here. We are not opposing a crime being put into the Criminal Code, we just want proper process followed.

[5.56 p.m.]

**Ms WOODRUFF** (Franklin) - Mr Deputy Speaker, I am shocked. I know I have only been in this Parliament for a few weeks and I am obviously still naïve because I really thought we would hear a higher standard of debate about this. I cannot believe some of the arguments that have been mounted by the member for Lyons on behalf of the Government. He is a person who sits on the Integrity Committee and knows full well the roles that the Integrity Commission undertakes. I really am surprised we have come to this point. We are the last state in Australia to move to bring ourselves in line with every other jurisdiction. Neither the Government nor the Opposition have mounted an argument for why we should stand alone.

I remind the Government that yesterday the Premier stood here and defended why we should follow South Australia and be the second only state in Australia to introduce the right to appeal legislation, and why we should stand up first amongst the next group to be counted to do the right thing. That is essentially what we are doing here today.

We are extremely fortunate to have an Integrity Commission in Tasmania that is an independent body, established in 2010. The Greens were the first party to call for the establishment of that commission. The role of the commission is to improve the standard of conduct and ethics in public authorities and make sure that the public has confidence that misconduct by public officers will be appropriately investigated and dealt with. It is also to improve the quality of ethical conduct by adopting an educative, preventive and advisory role. The key word here is 'preventive.'

I am glad that the member for Lyons brought up this report that was tabled yesterday on the investigation into gifts and benefits. That shows why Tasmania needs to start moving itself into the twenty-first century and align itself with all the other states on this issue. This report indicates that there is a systemic failure across the 12 state service agencies to adhere to proper practices, policies and procedures that have been set in place by other states. They did not do an investigation into misconduct, which is why they did not find any. That was not the purpose of that work. The purpose was to look at policy and they found that we are severely wanting in our state services.

This is not a matter for reprimand. This is simply a matter for pointing out what needs to be done. This bill today needs to be adopted. It will be another stone in the foundation of our

**Time expired.**

**The House divided -**

AYES 3

Ms Dawkins (Teller)  
Ms O'Connor  
Ms Woodruff

NOES 20

Mr Bacon  
Mr Barnett  
Mr Brooks  
Ms Courtney  
Mr Ferguson  
Ms Giddings  
Mr Green  
Mr Groom  
Mr Gutwein  
Mr Harriss  
Mr Hidding  
Mr Hodgman  
Mr Jaensch  
Mr Llewellyn  
Ms O'Byrne  
Mrs Petrusma  
Mr Rockliff  
Mrs Rylah (Teller)

Mr Shelton  
Ms White

