

13 February 2024

## Operation KULLEN

### Reasons for public examination

Operation Kullen is an investigation into suspected serious misconduct by the Parliamentary Commissioner for Administrative Investigations Christopher James Field.

Mr Field is represented by Mr Porter of counsel instructed by Hugo Law.

Mr Field gave evidence on oath on 2 and 3 November 2023 in a private examination.

Since then, the investigation has proceeded. Several witnesses have given evidence in private examinations. Documents have been produced under compulsion and analysed.

It is proposed to further examine Mr Field on 13-15 February 2024.

The *Corruption Crime and Misconduct Act* s 138(1) provides that except as provided in s 140 an examination is not open to the public.

Section 140 provides:

- (2) *The Commission may open an examination to the public if, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so.*
- (3) *A decision to open an examination to the public may be made at any time before or during the examination.*
- (4) *If the Commission decides to open an examination to the public, the Commission may close the examination for a particular purpose.*

A public examination is exceptional in the sense that the default position is a private examination. There must be a positive decision to hold an examination in public.

The exercise of the Commissioner's discretion in the public interest was examined in *A v Corruption and Crime Commission* [2013] WASCA 288.

The Court of Appeal was examining s 152(4) and whether disclosure was necessary in the public interest. However, the court also examined the protean concept of public interest.

*Because the public interest is likely to be multi-faceted, and because the assessment of the public interest will very likely involve the evaluation of competing considerations, the evaluation of which is vested in the Commission and not the court, it will be a rare case in which such a process of evaluation and assessment could be said to lack an evident or intelligible justification. [129]*

Section 140 requires weighing the benefits of public exposure and public awareness against the potential for prejudicial or privacy infringements.

The Commission must separately consider if it is in the public interest to conduct an examination. The public interest may be influenced by matters other than the four specified in s 140.

There may be benefits in an examination in public but the Commission could still decide such an examination is not in the public interest.

As noted in *A v CCC* at [88] questions with respect to the public interest will rarely have one dimension.

An aspect of privacy and the public interest is the possible effect of a public examination on persons other than the witness. Ms Rebecca Poole is a senior assistant Ombudsman. She accompanied Mr Field on several overseas trips. She is also titled Chief of Staff. It is inevitable that her conduct in some aspects will be ventilated during this examination. Ideally Ms Poole would have been examined by the Commission before today. That has not been possible. It is no-one's fault that this has occurred, certainly not Ms Poole.

The Commission has advised Ms Poole's legal counsel about this examination and taken other steps as well. Nevertheless, there is an undoubted prejudice to Ms Poole and other persons who might be named in the course of the examination. This has been taken into account in my decision.

The office occupied by Mr Field is a senior position in the state polity. The Commission has formed a reasonable suspicion of serious misconduct. This is a jurisdictional requirement. The Commission has formed no view as to whether there is serious misconduct. It can do so only when the investigation has concluded and if that conclusion is compelled by the evidence.

Turning to the first matter to be weighed, the senior and important position of the Parliamentary Commissioner justifies public exposure of his actions and his explanation for them. Public awareness will be raised as to whether state funds have been misused. This is always a matter of public interest.

Moreover, I cannot ignore the Parliamentary Commissioner himself put his conduct regarding travel in the public domain. The Annual Report for 2022/23 tabled in Parliament sets out his extensive travel utilizing State funds, illustrated with photographs. Any privacy about his travel has been foregone.

Turning to the second matter to be weighed, there is a clear potential for prejudice to the Parliamentary Commissioner's reputation when allegations are put to him in examination whether ultimately substantiated or not.

I have considered certain evidence given by Mr Field on 3 November 2023. There is no reason for repetition and I would not expect counsel assisting the Commission to venture into those matters.

There are likely to be few if any other privacy infringements. The investigation is concerned only with the Parliamentary Commissioner's public actions, and examination will avoid matters of a private

nature.

In considering the exercise of discretion to hold a public examination I have also taken into account The United Nations Human Rights Committee determination of 7 July 2023. Article 17 of the ICCPR is the right to privacy which relevantly provides:

- (1) *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
- (2) *Everyone has the right to the protection of the law against such interference or attacks.*

I note that Article 17 contemplates that a degree of interference with the right to privacy may, in some circumstances, be lawful.

Although sources of international law, including the ICCPR, do not create directly enforceable rights without domestic legislation, bodies, including the CCC, should construe applicable legislation in a way compatible with international law wherever possible. I have noted the determination and taken it into account.

There may be a degree of double counting in the necessity to weigh the benefits of public exposure and whether a public examination is in the public interest.

I have endeavoured to consider these separately.

What is in the public interest is an evaluative conclusion. Reference to legal authorities demonstrates that the public interest has no fixed meaning and depends on the circumstances. To repeat, questions with respect to the ascertainment of the public interest will rarely have one dimension.

In determining the public interest, I give weight to the seniority of the officer under investigation, the seriousness of his alleged conduct and the risk to the state's reputation. Both are significant factors in favour of a public examination.

The Parliamentary Commissioner Act invests the Parliamentary Commissioner with a number of powers and functions. It is in the public interest the purported exercise of these functions to be questioned in the course of a public examination.

The Parliamentary Commissioner holds a prominent place in parliamentary democracy. Evidence, whether pointing towards or away from misconduct is greatly in the public interest because of the position.

I have noted and reflected on the prejudice to the witness and other officers in a public examination. This is a matter of significance to be put in the scales against a public examination.

### **Conclusion**

In order to displace the default position that examinations must be conducted in private, there must be a positive determination that a public examination is in the public interest. A positive answer can only be given after weighing the matters in CCM s 140.

Having done so, and giving separate consideration to the public interest, I conclude that the public interest is best served by a public examination of Mr Field and that the benefits of that course outweigh prejudice to Mr Field or others.



**John McKechnie AO, KC**  
**Commissioner**