

Serious and systemic flaws by design



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COMMENT

In the space of two days, it has become clear the national anti-corruption commission looks like incorporating some troubling aspects of its counterpart in NSW.

On Monday, when explaining the jurisdiction of the organisation in question time, Attorney-General Mark Dreyfus gave an answer that was a direct lift from the NSW Independent Commission Against Corruption Act.

What parliament was not told was that the provisions in question were subject to severe criticism in a report tabled in the NSW parliament in 2017.

The former judge who wrote that report, John Nicholson, told the NSW parliament that this part of the ICAC Act meant the NSW commission had been required to adopt an “uncertain standard” using a mechanism that “undermines the presumption of innocence”.

That mechanism is known in NSW as the “could test”.

If reproduced nationally, it would mean the national com-

mission would go beyond cracking down on conduct that adversely affected the honesty or impartiality of public officials.

It would also be empowered to adopt the speculative NSW approach and crack down on conduct that, in the commission’s assessment, “could” adversely affect the honesty or impartiality of public officials.

That’s a bit like empowering traffic police to fine those who “could” have exceeded the speed limit; or cracking down on motorists because they “could” have had too much to drink.

Before parliament votes on the Dreyfus bill, it is worth looking up page 25 of the report Nicholson wrote on this mechanism when he was ICAC’s acting inspector.

It erodes the presumption of innocence, he noted, because conduct that satisfies the “could test” is much easier to establish than conduct that “constitutes or involves” misconduct.

“The first only requires the possibility while the second requires an established fact.”

Nicholson’s criticism is outlined in the same report that covers the injustice inflicted on businessman Charif Kazal who, under the law of NSW, has no way of restoring his presumption of innocence and has taken his concerns about ICAC to the UN Human Rights Committee.

On Tuesday, it became clear that another unfortunate aspect of NSW law seems likely to influence the national commission.

Before the election, Labor had issued design principles that gave the impression the national commission was going to crack down on the worst kind of corruption - that which Labor described in those principles as “serious and systemic”.

That would have ensured the new commission would not waste resources on matters that, while widespread, could not be described as serious.

When Dreyfus reissued those design principles on Tuesday, the pre-election test had been watered down. The latest version shows the commission can either pursue serious “or” systemic corruption. By changing just one word, there will no longer be a requirement for the national commission to focus on corruption that is both serious and systemic.

So why change a perfectly good design principle?

Look no further than section 12A of the ICAC Act, which says the NSW commission “is, as far as practicable, to direct its attention to serious corrupt conduct and systemic corrupt conduct”.

Thank you, NSW.

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