

On balance, there are no checks



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COMMENT

Now details of the proposed national anti-corruption commission have been made public, it is clear that much of the criticism of this scheme is directed at a problem that does not exist.

Greens and teals have been wringing their hands over what they claim is the government's plan to restrict public hearings.

The reverse is true. This scheme deserves criticism not for its restrictions on public hearings but for adopting a scheme that has been stripped of the checks and balances that seek to prevent abuse of public hearings in NSW.

If the government's bill is enacted, the NACC will find it easier to hold public hearings than its counterpart in NSW, the Independent Commission Against Corruption.

Compared to the public hearing plans for the national commission, ICAC could soon be held up as a model of restraint and caution.

And if Peter Dutton and the federal opposition believe this scheme will not involve show trials, they should think again.

Private hearings would precede public hearings.

The big difference is that the risk of reputational harm would be guaranteed to receive more consideration at the NSW commission.

ICAC cannot hold a public hearing unless the chief commissioner and at least one of the two other commissioners agrees.

There is no such restriction in the national scheme.

Without this check, which is outlined in section 6(2) of the ICAC Act, far too much power will be vested exclusively in the hands of the commissioner who leads the NACC.

This person will be the unchallenged ayatollah of the new organisation, able to subject people to public hearings even when such a course is opposed by all three of the deputy commissioners.

And while the government's bill says public hearings may be held in exceptional circumstances, that does not amount to a real restriction.

To present it as such is delusional.

The government has decided to leave the term "exceptional circumstances" undefined - and that hands more power to the commissioner.

The decision on whether exceptional circumstances exist has been left to the discretion of the commissioner who may, if this person so chooses, consider any

factor that is relevant in reaching a decision.

This forms a sharp contrast with the approach in NSW where ICAC is required by law to consider the risk of reputational damage to the person being subjected to a public hearing.

The ICAC commissioners, unlike the national commissioner, have no discretion in this matter: they must consider reputational harm.

The head of the national commission "may" have regard to reputational harm but there is no compulsion.

If the commissioner chooses not to do so, there would be no adverse consequences.

The public hearing would proceed and if that resulted in reputational harm, the commissioner could invoke the legal immunity from a damages claim that is part of the government's bill.

If the ICAC commissioners called a public hearing after ignoring the risk of reputational harm along with the other factors outlined in section 6(2) of their governing statute, the consequences would be dire.

Any subsequent public hearing would be vulnerable to challenge aimed at preventing the commission from engaging in conduct that had no basis in law.

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