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Opinion: Rule of law is key to integrity

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Different models for a commonwealth integrity commission have been proposed. Each merits scrutiny and respectful discussion to ensure the right balance is struck between promoting transparency and respecting the rights and reputations of individuals.

There is a real concern, however, that in an attempt to demonstrate their anticorruption credentials, some parliamentarians are ignoring the fact that they are the custodians of our rights. Three issues have attracted attention following the release last week of the government's proposed model.

The first is whether a commonwealth integrity commission should conduct public hearings. The second is whether it should have retrospective powers. The third is whether it should incorporate a federal judicial commission.

On public hearings, the model put forward by Attorney-General Christian Porter has been unfairly criticised because the proposed public sector integrity division would not have the power to conduct public hearings or make public findings of corruption.

Rather, it would investigate and refer potential serious criminal conduct to the Commonwealth Director of Public Prosecutions.

The government is right to seek to ensure that only the courts make findings of criminally corrupt conduct. As a society, we believe everyone is equal in the eyes of the law.

This has two consequences. The first is that no one is above the law: laws are applied with equal force to all.

The second is that everyone, including parliamentarians and public servants, is entitled to equal protection of their rights under the law, especially those accused of crimes, until such time as they are proven guilty before a court.

The presumption of innocence has been deeply ingrained in our legal system for centuries and must not be unintentionally eroded or abrogated.

The commission envisaged by the government would be an investigator, not a judge, jury or executioner. While open courts are a pillar of our legal system, it is accepted that, absent a statutory intention, this does not extend to investigations.

Australians do not expect to be able to ride shotgun on investigations or be a fly on the wall in witness interviews.

Similarly, if hearings are conducted to progress the commission's investigation into allegations of corruption, there is merit in the Attorney-General's argument that these hearings should not be public. If findings of corruption are made or charges are subsequently laid, it may be appropriate for details of the investigation, including the transcript of hearings, to then be made public.

One of the criticisms levelled against state integrity commissions has been the devastating impact that allegations raised in public hearings, sometimes labelled “show trials”, may have in irrevocably tarnishing the reputations of those concerned, particularly when no findings are made or prosecutions launched.

Such accusations have life altering consequences and can destroy careers. It is essential that coercive powers exercised in private hearings are not abused and that safeguards are in place, including legal professional privilege.

There are fundamental arguments for private hearings that must be considered. They are one option that seeks to balance advancing the public interest and the administration of justice with protecting the rights of those accused, including the right to a presumption of innocence and a fair trial if criminal charges are laid.

The government’s model has also attracted criticism because the commission would not have retrospective powers.

The government proposes refining existing and creating new criminal corruption offences. Any retrospective legislation directly undermines the rule of law, which requires that laws must be knowable and able to be obeyed.

Retrospective legislation is neither. To characterise conduct as corruption or charge someone with a law that did not exist at the time of their act is unfair and unjust, regardless of the morality of the act itself.

Additionally, the government has indicated that, subject to consultation, the commission could be empowered to investigate judicial officers.

Porter has an open mind on this, but the opposition at this stage appears to be pressing for judicial officers to be subject to the jurisdiction of a one-stop-shop corruption body.

I am confident that opposition legal affairs spokesman Mark Dreyfus will also keep an open mind on this issue.

The Law Council does not believe this would be appropriate and maintains there should be a separate, stand-alone national judicial commission to investigate complaints against judges, modelled on the NSW Judicial Commission.

The separation of powers is in and of itself a critical safeguard against corruption. A model where the executive oversees the investigation of allegations against judicial officers risks undermining judicial independence, or at least creates the appearance that judicial independence is undermined.

We should be able to have confidence in public administration. But that must not come at the expense of long held principles.

An integrity commission that does not respect the rule of law or the rights of individuals has no integrity at all.

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