‘Ineffective’ anti-corruption rules should be reviewed: former judge

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Former Court of Appeal judge Stephen Charles, KC. **Alex Ellinghausen**

There should be a parliamentary inquiry into Victoria’s ineffective anti-corruption regime with a view to emulate NSW’s tough corruption standards, says former senior judge Stephen Charles, KC.

He has identified seven major deficiencies with the legislation for the Independent Broad-based Anti-corruption Commission (IBAC), most notably the requirement that a criminal offence must be established before a finding of corruption can be made.

Mr Charles called on Victoria to emulate the “gold standard” test adopted by the NSW Independent Commission Against Corruption (ICAC). “That standard really covers as broad a range as you can think of,” he said. “It does not include a necessity for finding a criminal offence.”

An IBAC investigation into a $1.2 million training contract awarded to an affiliate of the Health Workers Union revealed serious breaches of duties and obligations of ministers, ministerial advisers and senior public servants.

The contract was awarded to the training group on the eve of the 2018 state election without a competitive tender.

But there was no formal declaration of corruption because there was insufficient evidence to show a criminal offence had occurred. Victoria is the only state to have such a high bar before a finding of corruption can be made.

Premier Daniel Andrews dismissed the report, saying it had found no corruption and declaring it “educational” but nothing more.

Mr Charles said the requirement for a criminal offence to have been established had come after the Baillieu Coalition government had bowed to pressure from advisers who feared it would backfire on MPs.

The Andrews government broadened the ambit of the IBAC jurisdiction to look for public misconduct but kept the requirement for an indictable offence before corruption could be found.

“Victoria, as a result of the confined original legislation, and Labor making flibbertigibbet amendments to it, has a statute which is really completely ineffective for an anti-corruption body,” Mr Charles said.

“I think there should be an inquiry into the way IBAC has been operating in the last 10 years and into the way in which IBAC legislation could be improved.

Mr Charles said improvements were needed in seven areas to make Victoria’s corruption regime effective.

The requirement that there be “exceptional circumstances” for a public hearing to take place should be reconsidered, he said. The requirement that it should be “serious corrupt conduct” was also problematic.

He also called for the end of the restriction on the IBAC publishing recommendations. Only recommendations contained in a "special report" such as the Daintree inquiry can be published. The former judge also said reform was needed to stop delays in publishing when there are adverse findings.

Mr Charles said privilege rules that permitted witnesses not to comply with a summons to produce documents if a claim of privilege is to be made should be deleted.

He said warrants should enable a person to be searched, and it should be an offence to conceal or destroy evidence.

Noting the various definitions of corruption across Australia, the former judge said there should ideally be a single definition for all jurisdictions, but this was unlikely to occur.

"Basically, any anti-corruption body has to be implemented by parliament because it must give the body powers that wouldn't exist without a piece of legislation. The people, above all, who don't want to have an effective one are the politicians who might be investigated."

Monash Associate Professor Yee-Fui Ng has written extensively about the need to ensure ministerial advisers are accountable.

"This has happened again and again, these are not isolated incidents," Dr Yee-Fui said.

"The problem is basically that these ministerial advisers have become very powerful and very influential, but our legal system hasn't kept up with this new development.

"The legal system has proceeded on the basis that there are only ministers and public servants.

"The whole legal edifice was built just upon these two main actors in the executive, but ministerial advisers have come into prominence in the last 40 years. Basically, the law is still lagging behind and hasn't caught up with the new political realities that these are very strong and powerful figures.

"Because of this, they've been able to escape accountability or subvert accountability. The system's not set up for ministerial advisers."

Dr Yee-Fui's work was cited by the IBAC in support of the 17 recommendations it made to ensure that ministers clearly understood their obligations and accountability for the management of ministerial staff, and that the role of ministerial advisers was more transparent and accountable.

"I think those reforms will definitely enhance the system," Dr Yee-Fui said.

The new national anti-corruption body covers the actions of all public officials including ministers and their personal advisers.

Dr Yee-Fui also supported the call for uniformity, provided it did not lead to a weaker standard.