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ICAC … even the Star Chamber did better

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It would be a mistake to call the NSW Independent Commission Against Corruption a new Star Chamber. After all, despite the injustices that marred its later years, the Star Chamber was, by the standards of its time, a model of procedural fairness.

Deriving its name from its meeting place in Westminster palace – a room that had gilded stars on an azure ceiling – the court of Star Chamber rose to prominence during the Tudor revolution in government that shaped England's administrative machinery for centuries to come.

By the time of the Pro Camera Stellata Act of 1487, the War of the Roses had undermined royal authority and dramatically subverted the administration of justice. All too commonly, judges took what Bishop Hugh Latimer castigated as "gentle rewards" – bribes – "either to give sentence against the poor, or to put off the poor man's cause". Juries, too, were routinely corrupted or intimidated, tipping the scales of justice towards the rich, the armed and the riotous.

Tasked by Henry VII with being the scourge of the "over-mighty", the Star Chamber's standing gained from the eminence of its membership – which included the kingdom's two chief justices – and was boosted by the breadth of its jurisdiction. Spanning virtually every type of criminal misdemeanour, its remit to punish "errors creeping into the commonwealth"

empowered it to develop new areas of law, such as the law of fraud, and to rein in the widespread abuse of office.

Less constrained than the courts of common law because its proceedings were tried summarily, with no need to satisfy a grand jury and a trial jury, it was nonetheless the first English court in which defendants were fully apprised, from the outset, of the prosecution's accusations and had the right to counsel, to call witnesses on oath and to comprehensively rebut the charges they faced. At a time when the assizes routinely disposed of a half-dozen serious cases in a morning's session, without the defendants properly knowing the crimes they were accused of committing, the Star Chamber's processes of examination, rebuttal and counter-rebuttal were exemplary.

It was those attributes that led Sir Edward Coke, the towering champion of Magna Carta and of the common law, to describe the Star Chamber in its heyday as "the most honourable Court in the Christian world", whose "proceeding according to just orders doth keep all England in quiet".

However, the factors that underpinned its effectiveness in checking abuses – notably the summary nature of its proceedings, its ability to compel testimony under oath, and the power to inflict punishments not available at common law – made it all the more dangerous when it developed abuses of its own.

As a far weaker bench allowed the chamber to become an instrument of Charles I's absolutism, imposing increasingly harsh sentences on his adversaries, it provoked a reaction that led Lord Andover, successfully moving its abolition by the Long Parliament in 1641, to describe it as a "Monster" that had grown "now altogether unlimited". And with the Star Chamber's name becoming a byword for arbitrariness, parliament, when it considered in 1661 a bill that would have established a similar court, could not be satisfied that such sweeping powers, whatever their advantages in uncovering serious crimes, were capable of being reconciled with the liberties the civil war had been fought to secure.

Nor was that lesson forgotten by subsequent parliaments as they, too, struggled with hard to detect offences. High among those offences was corruption, which became a major issue in

the 1780s and then again in the 1880s, in each case because the combination of a more powerful executive and intensified political competition had significantly increased the incentives for political malfeasance.

Under those circumstances, reverting to the inquisitorial procedures of the Star Chamber was tempting. But with the 1883 Corrupt and Illegal Practices Act and the Prevention of Corruption Acts (1889–1916) finally giving English prosecutors a firm statutory basis, the ordinary processes of law enforcement – combined with an aggressively free press, a vigorous opposition, an upright judiciary, and juries that were no longer readily suborned – were viewed as more than sufficient to curb the misuse of public office.

Meanwhile, the lodestar of the rule of law – a term that acquired its current significance in the 1880s – guided the emergence of new safeguards ensuring a fair trial, including for those accused of corruption.

Central to those safeguards were the constraints imposed on prosecutions. It was clear that for the guilty to be apprehended, suspects had to be investigated well before there was any assurance that the evidence against them would meet the criminal standard of proof. But it was equally clear that even being suspected of having committed a heinous offence, much less actually being charged, was a serious matter, which, were it publicly disclosed, could indelibly tarnish an innocent person's reputation, making that disclosure a de facto punishment.

The lead, at least at a conceptual level, in resolving that dilemma was taken on the continent and eventually emulated elsewhere. The decision to prosecute was severed from the investigative phase and vested in magistrates whose institutional loyalties were completely distinct from those of the police services; and until final charges were laid, the entire proceedings were covered by what the French called "le secret de l'instruction" – the confidentiality of prosecution – with publicly disclosing the identity of suspects being itself regarded as a serious offence.

Repeatedly emphasised by the European Court of Human Rights as integral to the fair administration of justice, it is those protections that the structure and operations of ICAC completely disregard. Its proceedings are a humiliating ordeal, at times needlessly repeated in

public after taking place in private; the investigators and those conducting the proceedings are not properly institutionally separated; the hearings are not strictly confined to the matters that triggered the investigations, creating the risk of fishing expeditions that abuse the power to compel evidence under oath; the names of those being investigated are routinely disclosed before there is any reason to believe the criminal standard of proof will be met; and with its processes more than twice as slow as those for which the Star Chamber was pilloried in 1641, its victims are effectively stripped of the right to their good name.

ICAC is, of course, a creature of statute, albeit one that has not shown the self-discipline the public can legitimately expect of a quasi-judicial body; better at destroying public trust than at enhancing it, reforming or even abolishing ICAC should be a priority for the NSW parliament. Until it does, the Star Chamber, and the great jurists who blazed its trail, will shine brighter every day.