

The adversary system

adversary system

a system of law where two opponent sides present their case to an impartial judge or jury

inquisitorial system

a system of law where two sides present their cases to a judge who directs the cases and calls for particular evidence

The criminal justice system in Australia is based on an adversarial system of law. The **adversary system** relies on a two-sided structure of opponent sides ('adversaries') each presenting their own position, with an impartial judge or jury hearing each side and determining the truth in the case. The adversary system applies to both civil and criminal matters, but it is in relation to criminal law that the adversarial system is often most controversial. In criminal law the adversary system pits the prosecution against the accused, who will usually be represented by a lawyer. The judge, or jury in indictable offences, acts as an impartial observer who determines the accused's guilt or innocence based on the evidence and arguments presented.

Australia, like many other countries around the world, inherited the adversarial system of law with the English common law system. An alternative to the adversarial system is the **inquisitorial system**, in which a judge or group of judges plays a role in investigating the case or calling for evidence or testimony that has not been requested by either side. Versions of the inquisitorial system are used

in many other countries, as well as some areas of Australian law, for example in coronial inquests or royal commissions.

Supporters of the adversarial system often claim that it is a fairer system because it allows each party equal opportunity to present their case and is less prone to abuse or bias by the official determining the case. Cases are carefully prepared before trial and lawyers have equal opportunity to present the truth, and the jury as an impartial observer without any influence of outside factors. Opponents of the system argue that in many cases the competing sides are not equal before the law, with potential imbalances in resources, skills or knowledge. Where additional evidence or testimony would assist the case, the impartial judge or jury is not in a position to request this, even though it may assist in achieving justice. The system has also been criticised for use of the jury system, where complex technical cases might be misunderstood due to a lack of understanding of the evidence presented and where the reasons for the jury's decision are not disclosed to either side.

Legal personnel in a criminal trial

Criminal trials often involve a large number of participants, both behind the scenes and in the courtroom itself. They are involved in various aspects of the case from the beginning of the investigation through to the end of the trial.

Some of the non-legal participants in a criminal trial include the accused, any witnesses called to testify and the police responsible for investigating the case. Most criminal trials will also involve a number of legal personnel participating in the case and some of the most important are outlined below.

1 Judges and magistrates

Judges and magistrates are judicial officers who preside over court cases and make determinations in court based on the evidence presented by either side. Judges and magistrates are legally qualified professionals who have considerable experience in the law. They act as the umpires of court cases, making sure that the rules are followed and that a fair trial is carried out. Whether a case is heard by a judge or a magistrate will depend on the court in which the case is heard.

Legal representation and Legal Aid NSW

In the Australian legal system, a defendant has the right to a fair trial, and Australian courts have ruled that a trial will rarely be fair for an accused without adequate legal representation. In the event that a case goes to trial, it is unlikely that the defendant will have a fair trial if they represent themselves or arrange for an unqualified person to defend them. The High Court recognised this in a 1992 decision *Dietrich v The Queen*, which for the first time established a limited right to legal representation in Australia. Access to justice is crucial to ensure the legal system functions fairly and equally for all parties who come before it, and this is particularly so in criminal matters where the consequences of inadequate representation for an accused can be high.

Many defendants are able to afford adequate legal representation and will pay for the services of a

barrister or solicitor to advise them and represent their case in court. The quality of legal services will vary, and not all lawyers will have adequate experience representing people before a court. Some defendants may be able to ensure that they receive the best possible defence to the charges against them, for example by hiring the most expensive specialised and experienced barristers to represent their case. In most cases this advice and representation will cost a significant amount of money.

In rare circumstances an accused may even elect to represent themselves in court, but due to the complexities of court and the consequences of inadequate representation in criminal matters, this is not advised unless the offence

relates to a very minor matter. The courts prefer people to be represented so that they will receive a fair trial.

Not everyone has the finances or skill to seek proper legal representation. This can result in injustices in the courtroom and denial of access to a fair trial. In 1979, the NSW Government created the Legal Aid Commission, under the *Legal Aid Commission Act 1979* (NSW). The Commission provides legal assistance and representation to people who are socially and economically disadvantaged to ensure that they have equitable access before the law. In doing so it aims to safeguard people's rights in the legal system and improve access to justice.

Legal Aid NSW is usually accessed by marginalised and disadvantaged groups in society such as disabled persons, women, people of Aboriginal and Torres Strait Islander backgrounds and people who are financially disadvantaged through unemployment or are low-income earners.

The Legal Aid Commission provides free brief legal advice sessions to anyone. However, to access subsidised legal representation, the defendant must be means tested. A means test assesses the defendant's income and assets to determine whether or not they have the means to pay for legal representation. For criminal matters, the Commission does not usually assess the merits or likelihood of the case succeeding, except for matters on appeal. Not all matters can be covered by Legal Aid NSW, as the type of case must fall within the jurisdiction of specific areas of law in order to be eligible. Legal Aid NSW will either provide a legal representative or contribute towards the cost of a private lawyer.

Unfortunately a grant of legal aid is not free, and in most cases a contribution must be made by the user. Legal Aid NSW is largely funded by the Commonwealth and NSW government and the NSW Law Society, but funding is limited and is often considered inadequate to meet the level of demand. There will still be many instances where people who are in need of assistance are unable to receive it.



Figure 3.7 Legal Aid NSW provides legal assistance and representation to people who are socially and economically disadvantaged.

RESEARCH 3.3

Visit the Legal Aid NSW website (www.legalaid.nsw.gov.au) and click on the 'About Us' tab on the navigation bar. Read the information available and answer the following questions:

- 1 How many clients were represented by Legal Aid NSW in the last financial year?
- 2 What percentage of Legal Aid NSW expenditure was spent on criminal law? How does this compare with other areas of law?
- 3 How many calls were made to the Legal Aid Youth Hotline?

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Figure 3.10 A jury is a panel of citizens, selected at random from a jury list compiled from the electoral roll, whose job it is to determine the guilt or innocence of the defendant based on the evidence presented to them at trial.

Challenging jurors

In a criminal trial, both the prosecution and the defence have the right to challenge either the selection of the entire panel of jurors, or individual jurors. Both sides can also exercise a certain number of ‘**peremptory challenges**’ of prospective jurors, which will disqualify individual jurors without having to give a reason. However, challenging the selection of a juror can be difficult: neither side knows anything about them in advance apart from their names, and peremptory challenges are usually based on nothing more than name or appearance (e.g. age, gender, race, clothing, physique).

‘**Challenges for cause**’ are another type of challenge based on the person not being qualified to serve on a jury, being ineligible or disqualified, or being suspected of bias. It may be the case that one of the jurors is acquainted with the defendant or that one of the jurors has been a victim of a similar crime and therefore may be biased.

Eligibility for jury duty

Australian citizens aged 18 years or over become eligible to sit on a jury once enrolled on the electoral roll. It is very difficult to gain an exemption from jury duty and some people view jury duty as an inconvenience and a burden, especially when they are selected to sit on a long trial. However, it is an important part of our justice system for an accused person to be tried by a group of their peers. Exemptions can be sought by certain persons,

including those who are aged over 65 years, are pregnant or care for children full time. There are also some groups of people in society who are ineligible to sit on a jury. They include people who do not speak English, emergency services staff members (police, fire and ambulance), disabled people, convicted criminals and members of the legal profession.

Jury role

Before a court case begins, jurors are sworn in. During the trial, the role of a juror is to listen to the evidence presented to the court, apply the law as directed by the judge and come to a verdict as to the accused’s guilt or innocence.

Jurors are permitted to make notes in order to refresh their memory when deliberating over a verdict. They are not permitted to talk to anyone about the case except for their fellow jurors when they are all together. They may also ask for clarification on matters from the judge. Throughout the case, they are to remain alert and focused on what is being presented to them in the courtroom. Their role is to be unbiased and impartial and make a judgment based solely on the evidence they are presented with. Each jury elects a foreperson who speaks on their behalf.

The jury must remain fair and open-minded when reaching their decision, they should not be influenced by the media or their own personal beliefs when reaching a decision, it is their job to apply the law and base their decision on the evidence and testimony presented throughout the trial. When deliberating over a verdict, the jury does not have any set time limits. They are encouraged to take their time and discuss the court proceedings.

Verdict

A jury is required to reach a verdict of guilty or not guilty and present that verdict to the court. The accused will then be acquitted if found not guilty, or if guilty the judge will then pass a sentence.

Sometimes, it is easy for the jury to arrive at a decision, other times they can deliberate for days

peremptory challenge
when the legal team strikes a juror without needing a specific reason

challenge for cause
when the legal team strikes a juror because it is believed that for some reason the juror will be prejudicial