In this chapter we investigate the main features of the trial system, the reasons why we adhere to it and the problems associated with it. We compare the operation of the adversary system with the inquisitorial system used in other countries, and discuss possible improvements that could be made to the trial system.
Key terms

**accusatorial**
Making charges/claims against another party—another term used to describe the adversary trial.

**adjudicator**
A person who determines an issue or dispute in a judicial hearing.

**balance of probabilities**
The standard of proof required in a civil case.

**beyond reasonable doubt**
The standard of proof required in a criminal case.

**burden of proof**
The duty of the party who must prove a case.

**director of public prosecutions (DPP)**
The head of the government body responsible for the prosecution of criminal offences.

**discovery**
Pre-hearing stage in civil proceedings at which parties may require access to relevant documents.

**evidence**
Data to support or prove a fact or issue.

**inquisitorial**
Process in which the judge takes an active role in examining and investigating the evidence.

**interrogatories**
Written questions on an issue in dispute.

**plaintiff**
A person who brings a civil action.

**pleadings**
Pre-hearing stage in the preparation of a civil case in which the issues are clarified.

**standard of proof**
The degree to which an allegation must be proven.
Adversary trial model

The law aims to provide society with peaceful ways to resolve conflicts between individuals. Conflicts may be resolved using any one of a number of different methods, but only the most serious of disputes should be heard in court. Courts use adjudication as their dispute settlement method. This method relies on an impartial third party—an adjudicator—to make a final decision.

An adjudicator can be a magistrate, a judge alone or a judge and jury. Most cases adjudicated in Victorian courts use the adversary model. (There are some exceptions: the workings of the Family Division of the Children’s Court and the Coroner’s Court, for example, incorporate some adapted aspects of the inquisitorial model.)

The adversary trial resolves disputes in the same way that we conduct a debate. A debate involves two opposing teams. Each team prepares and presents a case for or against a point in issue. A debate is strictly ordered. Rules govern the right to speak and the right to rebut the arguments presented. An umpire is appointed who has the responsibility to ensure that these rules are obeyed. Similarly, in an adversary trial, there are two opposing teams. They are responsible for the presentation and preparation of their cases. There are strict rules of procedure and evidence. The judge or magistrate acts like the umpire, being responsible for ensuring that both parties to a dispute obey the rules of procedure and evidence. Ultimately, it is up to the judge (and jury) or magistrate, as an umpire, to determine who is the winner. Of course, the consequences of losing a court case are far more serious than those of losing a debate.

The adversary trial model is used in common law countries throughout the world. The word ‘adversary’ refers to an opponent. The model is based on the concept of two opposing parties fighting for the truth in court. Again, this is like a debate. Another analogy used to describe the adversary model is to compare it with a sporting contest in which two opposing sides battle for victory. The adversary model is also sometimes referred to as the accusatorial system, as it involves one party accusing another party.

Origins of the adversary trial

The adversary mode of trial was established in England and has developed over many centuries. It is used in most countries that were settled by the British. These countries are known as common law countries and include Australia, New Zealand, Canada and India.
In continental Europe, an alternative model of trial developed, derived from Roman law and known as the *inquisitorial* system. Countries that use this system are known as civil law countries. Countries using the civil law system include China and most European countries.

### Elements of the adversary trial

#### Role of the individual

In the adversary system, the individual has full control over the conduct of their case. This means that the individual is responsible both for preparing and for presenting their case in court. In a criminal case, the accused and the prosecutor are responsible for presenting the relevant facts to support their arguments. In criminal cases, which involve an offence against the state, the state is represented by the *director of public prosecutions*. In a civil case, the plaintiff and the defendant are responsible for preparing the case. This includes conducting the interrogatory stages and presenting the case in court.

The parties are responsible for initiating the case. In a criminal case, the prosecution will initiate a case against the defendant. The decision to initiate a case is based on evidence presented to them by a law enforcement officer. The law enforcement officer may be a police officer or other authority such as a transit officer. In a civil case, it is up to the individual parties involved to determine if the case should go to court. The plaintiff will initiate the case by the issue of a writ or summons (depending on which court is to hear the case). If the matter is to go before a higher court, written statements of the alleged facts of the case are exchanged between the parties. This exchange of written statements is known as *pleadings*. The purpose of pleadings is to determine the material facts of the case. When all the pleadings are completed, they are filed with the court.

There may be further pre-trial procedures such as *interrogatories* and *discovery*. These steps ensure that the parties are properly prepared prior to the court hearing. The pleadings and pre-trial procedures discuss the material facts in issue. Alternative pre-trial procedures apply to civil cases heard in the Magistrates’ Court. Each party is responsible for deciding which issues are to be argued in court.

In a criminal case, the defendant has the choice of pleading ‘guilty’ or ‘not guilty’. A defendant who pleads ‘not guilty’ will have the opportunity to present a case in their defence. They may elect to challenge the *evidence* presented, or they may elect to plead ‘guilty’ to some charges and ‘not guilty’ to others. If they plead ‘guilty’, only issues relating to the sentencing of the accused may be raised before the court. In a civil case, the parties decide the relevant points of common law to be considered by the court and the relevant facts in issue.

In presenting their cases, each party decides which arguments they intend to rely on and the evidence that supports these arguments. In a criminal trial of an indictable offence, the prosecution must present the bulk of this evidence at the time of committal. The defendant is under no obligation to disclose evidence prior to the full court hearing.

In a civil case, the parties may disclose their arguments and the evidence they intend to rely on during the interrogatory stages. Parties must decide if they intend to disclose any evidence and when such disclosures should take place.

The parties also have a role in determining the time and place of trial. In a civil case, the plaintiff may nominate the court. If the case is to be heard in the County Court or the Supreme Court they may elect to have the case heard by a judge and/or a jury.

In criminal matters, the nature of the offence will determine which court will hear the case. In a criminal case where the defendant has been accused of an indictable offence, such as a minor theft, the parties may consent to have the case tried in the Magistrates’ Court as a summary offence or as an indictable offence in a higher court. Should the parties consent to the matter being heard summarily, it will be heard and determined by a magistrate. An indictable offence tried in a County or Supreme Court will be heard and determined by a judge and jury.
The role of the individual in preparing and presenting the case reflects the nature of our society. We live in a democratic country that believes each person should be treated equally. All individuals can act freely and are held responsible for their actions. Therefore, each individual is responsible for the consequences of their actions (be they the benefits or the costs). The adversary trial is consistent with this value in that each individual is responsible for the presentation and the preparation of the case. If they win the case, they may be entitled to some benefits. However, if they lose their case, they may be required to pay for the cost of settling the dispute.

Giving the parties to a dispute complete control over their own cases acts to protect the rights of the individual. If the state had complete control over court cases, the rights of the individual might not be adequately protected. The state might not consider the matter to be of much importance and not pursue the matter to the same extent as the individual would.

The adversary trial is based on the assumption that, because each party represents their own interests, they will present the best possible case to support their arguments. Since each party prepares and presents their best case, all relevant facts should be presented to the court and the truth determined. The adversary trial places the ultimate responsibility on the individuals in conflict. Since, under the adversary model, every person is considered to be innocent until proven guilty, the burden of proving a case always rests on the accuser (that is, the plaintiff or the prosecution).

Placing the responsibility on the individual to prepare and present their case is an efficient system. It removes from the state the considerable burden of costs in mounting a legal action. The government has neither the finances nor the staff necessary to take responsibility for the preparation of a case.

This central role of the individual has, however, created some limitations on the effectiveness of the adversary trial. For instance, there is no assurance that all the relevant facts are presented to the court. Each party is responsible for the preparation and presentation of their own case, and is under no obligation to disclose all the facts of the case. Each party therefore discloses only those facts that support their case—since they naturally wish to present the best possible case to support their argument. So evidence that may be critical to an understanding of the case, but which does not particularly assist the case being made by either party, may be lost to the court.

**Burden and standard of proof**

The **burden of proof** means who has to prove the case. The **standard of proof** means the degree of certainty to which the contested facts must be established to be accepted as proven.

In a criminal case the prosecution has the burden of proof. This means that it is the prosecution that must prove the guilt of the defendant. The defendant does not have to prove their innocence. If the prosecution evidence is insufficient to prove the guilt of the defendant, the defendant will be acquitted. In criminal cases the prosecution must prove their case beyond reasonable doubt. Sometimes the burden of proof can be reversed. For instance, this may occur where a defence of not guilty on the grounds of self-defence or insanity is claimed.

In a civil case the person bringing the claim, the plaintiff, has the burden of proof. The plaintiff must present sufficient evidence to prove on the **balance of probabilities** that the facts they claim are substantially the truth.

**Role of legal representation**

In most instances, the role of preparing and presenting an individual’s case is delegated by the individual to legal representatives. A court case often appears, therefore, as a contest between two lawyers.

In both criminal and civil cases, it is the responsibility of the individual to employ a legal representative. If a person does not hire a lawyer to present their case, they may be disadvantaged. The lawyer has expertise in presenting cases in court. The lawyer may be
able to present a more persuasive argument than an individual who does not have any prior experience with court processes. Therefore, the adversary trial may not be a contest between two equal parties.

The accusatorial (adversarial) process involves the examination and cross-examination of evidence as a test for truth. This process may confuse or intimidate a witness. Witnesses must give evidence for one party, as they must support one side or the other. Once they have given their evidence-in-chief, it may be challenged and disputed by the other party. Witnesses can only answer the questions put to them. They may not necessarily relate all the facts that they have witnessed. As a consequence, less than the total of relevant facts may be presented to the court, and the truth may therefore not be determined.

Role of the judge

The judge is responsible for ensuring that both parties obey the rules of court procedure. The most important of these rules is the rule of burden of proof. In a criminal case, the burden of proof—the responsibility for showing the truth of something—is on the prosecutor, who must prove that the accused has committed an offence. In a civil case, the burden of proof is on the plaintiff to substantiate their claim against the defendant.

One function of the judge is to ensure that the party who bears the burden of proving the case has legally satisfied this responsibility. The burden of proof rule requires the accuser to fulfil two responsibilities:

- prove that the facts giving rise to the offence actually occurred (all essential elements of the claim or charge must be proved)
- present evidence that substantiates the existence of the facts in issue and fulfils the onus of proof.

In a criminal case, the prosecution must prove these facts to be in existence beyond reasonable doubt. If the defendant raises a defence, the degree of proof changes. A defendant charged with a criminal offence is only required to prove a defence on the balance of probabilities, thus giving rise to a reasonable doubt. In a civil case, the plaintiff must prove that the alleged facts are those that, on the balance of probabilities, were most likely to have occurred.

The judge must ensure that the burden of proof has been discharged before the facts of the case are decided. The decision about the relevance of the facts of the case as presented
by both parties may be determined by a judge alone or by a judge and a jury. When
deciding if the burden of proof has been discharged, the judge considers the evidence
presented to support the issues involved. Where there is a judge and a jury, the judge does
not reach a decision as to liability or guilt. The judge presents a summary to the jury of
the evidence and the issues presented by the parties. When doing this, the judge must act
impartially and treat each party equally.

A judge presiding over a case in court must ensure that both parties are treated fairly.
The judge is responsible for:

- **deciding the admissibility of evidence** The judge may exclude a jury from hearing
  inadmissible evidence. This evidence may prejudice the jury’s final decision.
- **the selection and empanelling of a jury** The judge is responsible for the process
  through which a jury is selected and empanelled.
- **safeguarding the rules of procedure** The judge must ensure that each party acts
  according to the rules of procedure to guarantee that each has an equal opportunity to
  present their case.
- **deciding all questions of law** Although each party may present evidence to suggest
  the relevant law that applies to their case, the ultimate decision as to the relevant
  law is the responsibility of the judge. In a criminal case, the judge is also responsible
  for deciding the consequences of breaking the law; that is, deciding the appropriate
  sanction. In a civil case, the plaintiff may elect to have either the judge or the jury
  determine the appropriate award.
- **deciding questions of fact when there is no jury** In the Magistrates’ Court, for
  example, the magistrate performs the role of both judge and jury. The magistrate
  decides which version of the facts presented is most likely and how the law applies
  to those facts. Once these two issues have been decided, the magistrate reaches a
decision or verdict. In the County Court or the Supreme Court, where a jury is present,
the jury becomes the trier of facts. The jury must decide the facts of the case and how
the law, as prescribed by the judge, applies to the facts.

The judge is not allowed to intervene unnecessarily in the conduct of the case. The
judge must remain neutral and cannot assist the parties in the presentation of the case,
either to prompt a party to ask an appropriate question of a witness or to introduce a
legal issue. The judge must listen carefully to all the evidence presented by both parties.
The judge can only ask questions of witnesses when it is necessary to clear up any point
that has been overlooked or obscured. The impartial role of the judge in a trial is seen
as the key to ensuring that justice is being done. Justice includes the concept that every
individual will be treated fairly and equally. This can only be achieved if the judge is an
impartial observer of the contest.

**activity**

**Folio exercise**

1. What are the essential features of an adversary trial?
2. What is the role of each of the individual parties in an adversary trial? How does
   this ensure a fair trial?
3. How do the features of an adversary trial reflect our democratic values? Discuss.
4. The role of the individual in the adversary trial places a greater emphasis on
   winning a case than on seeking truth. Do you agree? Why or why not?
5. ‘I regard myself as a referee. I can blow my judicial whistle when the ball goes out of
   play; but when the game restarts, I must neither take part in it nor tell the players how
to play.’

   Justice L J Lawton in *Laker Airways Ltd v. Dept of Trade* (1977) 2 All ER 182 208

   a. What is the role of the judge in an adversary trial?
The need for rules of evidence and procedure

The adversary trial requires rules of evidence and procedure so that the parties have an equal opportunity to present their case before an independent and impartial adjudicator. These rules and procedures aim to ensure that each party is treated fairly.

Rules of procedure

Rules of procedure provide a framework for the presentation of a case. These rules mean that all cases presented before the courts are dealt with in a uniform and coherent manner. They establish guidelines for the presentation of arguments and evidence. The rules are essential to ensure that individuals are treated consistently and without bias.

The rules of procedure set out an orderly process for the examination of evidence. Witnesses are required to give their evidence on oath or affirmation. They will then be subject to three stages of questioning.

In the first stage, the witness will be subject to examination-in-chief. The witness will be asked to give testimony in support of the particular facts alleged by the party calling the witness. The second stage of questioning is cross-examination. The purpose of cross-examination is to test the accuracy of the testimony. At the third stage, the party calling the witness has the opportunity to re-examine. These re-examination questions are aimed at the clarification of any points that may have become obscured by the cross-examination. As a rule, new matters cannot be introduced in the re-examination unless by special leave granted by the judge.

Each party will call witnesses to support their case. Once the plaintiff or prosecution has brought forward all their evidence, the defendant has the opportunity to rebut the case. Again, witnesses in court will present evidence. The evidence of the witnesses is also subject to the process of examination-in-chief, cross-examination and re-examination.

Each party will present their closing summary and the court then will make the final decision as to the defendant’s liability.

During an adversary trial, a judge may be asked to give a ruling on matters of procedure or evidence. If such questions arise after the trial has started, the judge will need to hear submissions from both parties and then make a ruling. These submissions are heard by the judge and, in the case of a jury trial, without the jury being present. During this time, the jury will be sent to the jury room or temporarily excused.

Rules of evidence

The rules of evidence are an essential feature of the adversary trial. These rules ensure that each party is treated equally when presenting their case before the court. The rules have evolved due to the historic use of the jury as a fact-finding body. Juries consist of laypeople without legal training. The rules of evidence protect juries from unreliable forms of evidence.

Evidence is the data or information cited as proof in a court. It also includes the inferences that may be drawn from this information. This evidence consists mainly of the sworn testimony of witnesses. It may also include exhibits, such as documents or items of physical property. If exhibits are to be used as evidence, a witness must authenticate them.
The rules of evidence aim to ensure that evidence considered by a court is both relevant and admissible. Evidence used to support a claim should be:
- relevant to the facts in issue
- legally obtained
- reliable (given orally in court and subject to cross examination).

The rules of evidence are found in the common law and statutory rules. The judge applies these rules when one party disputes the admissibility of evidence proposed by the other.

The major role of the rules of evidence is to exclude evidence that may be unreliable. The rules of evidence are aimed at encouraging the fair and lawful conduct of a hearing. For example, in a criminal case, the rules of evidence ensure that the police use fair and lawful methods to obtain evidence in the investigation of a crime. According to the rules of evidence, testimony that has been unlawfully obtained by police may not be used in court. The trial judge is bound to follow the rules of evidence, although judges may have some discretionary powers in specific cases.

The basic rule of evidence is that all evidence must be relevant. Information considered to be relevant to a case is information that helps prove a fact at issue. Some types of evidence are specifically excluded by the rules of evidence; for example, the use of hearsay evidence. Hearsay evidence is information that a witness, in giving evidence, recounts as having heard from someone else. A witness giving hearsay evidence does not have personal knowledge of these events. The witness is, therefore, not relying on their own experience or observations. Hearsay evidence is excluded because a person’s words may be distorted in the retelling.

There are numerous exceptions to the hearsay evidence rule. For instance, the statements made to another person by a person who has died may be admitted as evidence in some circumstances.

Other rules apply to the use of admissions and confessions as evidence in court. An admission and a confession are not the same thing. When a defendant makes an admission they are not disputing a fact or fact situation. They may not be admitting guilt. However, when a defendant makes a confession they are admitting guilt for an offence.

The wrongful admittance or exclusion of evidence by the trial judge is a ground for appeal.

Witnesses can only give evidence about facts that they know to be true. A witness must give a factual account in answer to specific questions. They cannot give a personal opinion unless the court recognises that the witness is an expert. Expert evidence consists of the educated inferences drawn by the expert witness from a set of circumstances. Expert evidence is only admissible when the questions asked are within the area of expertise of the witness. Expert witnesses may include doctors, engineers, forensic scientists, etc. The judge decides if the evidence given by experts is admissible. In some instances, both parties will introduce experts and these witnesses may give contradictory views.

Evidence about the character of the accused is generally considered inadmissible. This evidence may unfairly prejudice a jury before they reach a decision. Character witnesses can only be called after the verdict has been reached. Evidence about the character of the accused is considered by the judge to determine an appropriate sentence.

Rules of evidence

1. Explain the difference between:
   - relevant and admissible evidence
   - an admission and a confession
   - hearsay and expert evidence.
2. Outline the procedure used in an adversary trial for questioning a witness.
3. What is hearsay evidence?
4. Why is it necessary to have rules that govern the admissibility of evidence?
5. List reasons in favour of evidence in court being oral evidence of eyewitnesses. What problems are associated with the court’s reliance on oral evidence?
6. How do rules of evidence protect the rights of the individual in an adversary trial?
Appraisal of the adversary trial

Several features of the adversary trial limit the effective operation of the legal system, the most serious of these being its costs. These costs include the costs of legal representation and witness fees. These are necessary for preparing and presenting a case. According to the principles of the adversary trial, these expenses are borne by the individual parties.

In a civil case, this means that the plaintiff and the defendant bear the costs of preparing and presenting the case. In a criminal case, the state and the defendant bear the costs. These costs are necessary and neither party can afford to be sparing if they hope to successfully present their case in court. As both parties act in self-interest, they will prepare the best possible case to support their arguments. Thus the costs of litigation increase. There are some limited provisions for a successful party to recover some costs from the other party. However, the costs awarded by the courts may not reflect the total costs incurred.

When an individual decides to take a civil case to court, they risk losing the case and being held liable for the costs of the other party. Costs may be awarded in some criminal cases. The effect of the costs of legal action is that some individuals may refrain from exercising their rights. If an individual is unable to exercise their legal rights, then justice is being denied and the law is not functioning to resolve conflict.

No legal representation

To many individuals, the costs of legal representation may be prohibitive. A person who appears without legal representation can be seriously disadvantaged. They will not be in an equal position to present their case before the court. For instance, few people who are not trained in the law have a detailed understanding of the rules of evidence or procedure.

There is no compulsion to have legal representation. Some provisions exist through legal aid to allow for financial assistance to those who cannot afford legal representation. However, these funds are limited and entitlement is subject to a means test.

There are still a number of people who appear without representation in the lower courts. The magistrate may use some discretion when a defendant in a criminal case does not have a legal representative. The magistrate may advise the defendant to consult a duty solicitor, and delay the hearing of the case. Under an adversary trial, it is the responsibility of the individual to prepare for their day in court by consulting a solicitor before the court hearing.
Finding the truth

The adversary trial is often criticised for depending on the parties to the case to raise the relevant questions to be considered by the court. If either party neglects to raise a relevant point, the court cannot intervene and introduce it. Similar problems arise where the two parties agree on an issue of law. In this case, the court must accept that legal issue, even if the court believes that the issue in law has not been correctly interpreted by either party. In such cases, it is difficult to argue that the adversary trial determines the truth. Critics of the adversary trial claim that it resolves conflicts without necessarily considering legal rights or wrongs.

Why the adversary model?

The adversary model for resolving disputes answers a very basic human instinct for dominance and survival. The role of the lawyer in the adversary trial is similar to that of knights of the Middle Ages, who were professional champions going into battle for their lords to resolve disputes. The modern-day equivalents to these professional champions are our hired lawyers, who conduct verbal battles on our behalf. Such a system appears to satisfy our instinctive notions of justice and fairness. Rules and regulations are well defined to ensure fair play and to ensure that each side has an equal chance to present their argument.

Such a system is efficient in the distribution of resources, as only those individuals who are involved in the dispute bear the major costs of the action. This is believed to lead to quicker dispute resolution. The key arguments and the necessary preparation for the case are presented to the adjudicator. This makes reaching a final decision easier as the main arguments have been clearly defined by the parties.

The efficiency of dispute resolution is also enhanced by the pre-trial stages in the preparation of a case. These pre-trial stages encourage parties to resolve disputes, whenever possible, without pursuing a court action. For example, in a civil trial there may be lengthy pleadings and interrogatories. As a result of this preparatory stage, the parties may elect to resolve the dispute between themselves. In criminal cases, it is possible for plea bargaining to reduce the number of disputed issues or charges prior to the arraignment of the accused before the court. The police may also exercise discretion in deciding to prosecute an individual for an offence by warning an offender rather than pursuing court action.

### 11.1 Strengths and weaknesses of the adversary trial

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<th>Feature</th>
<th>Strength</th>
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<tr>
<td>Role of the parties</td>
<td>• Since individuals take complete responsibility for the preparation and presentation of their case, each party has an interest in presenting the best possible evidence and argument to support it.</td>
<td>• Control of either party may result in delays in the preparation of a case, leading to increased costs.</td>
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For more information on the costs of legal representation and access to the law see the case file on page 444.
Adversary system—criminal justice system in crisis

The adversary system relies on individuals bringing proceedings before a judge. It is the parties who have the prime responsibility for identifying the issues and testing the strength of each other’s case. The judge acts as a referee. The judge oversees the dispute so that it is conducted in accordance with accepted processes. By contrast the ‘inquisitorial’ system uses skilled inquisitors conducting an investigation to ascertain the truth and to apply the relevant law.

In a criminal trial the judge’s role is that of the sole arbiter of the law and to adjudicate between the parties (the prosecution and the defence). The role is crucial to a fair trial in that the judge is the one who determines what evidence is admissible. In the adversarial system, the judge has the power to exclude evidence which, although obviously relevant to the full presentation of the facts, is said to be unfairly prejudicial to the accused. This may be because it has been improperly obtained or where the evidence is considered to be unreliable. For example, evidence of the prior criminal convictions of the accused would be excluded.

### The role of the DPP

The role of the DPP in a criminal trial is to select and present all of the evidence to be relied upon by the Crown. C S Kenny, in *Outlines of Criminal Law* (19th edition) describes ‘the proper role’ of prosecuting counsel in the following terms: ‘A prosecuting counsel stands in a position quite different from that of an advocate who represents the person accused or represents a plaintiff or defendant in a civil litigation. For this latter advocate has a private duty—that of

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<th>Feature</th>
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<tr>
<td>Role of the judge</td>
<td>• The judge remains impartial, thereby ensuring that each party is treated fairly and without bias.</td>
<td>• The expertise of the judge may not be fully utilised.</td>
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<td></td>
<td>• The judge is independent of and separate from the prosecuting authority, guaranteeing impartial and fair treatment.</td>
<td>• A judge cannot offer any assistance to an unrepresented party.</td>
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<tr>
<td>Legal</td>
<td>• Each party has the right to be legally represented (at their own cost). This helps to maintain fairness, as individuals can seek expert and objective advice.</td>
<td>• The cost of legal representation may deter individuals from taking action.</td>
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<td>• Ensures logical and reasoned argument.</td>
<td>• Any unrepresented party will be engaged in a less-than-equal contest.</td>
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<td>Rules of evidence and procedure</td>
<td>• A single continuous hearing ensures that the case is seen as a complete event and not a series of disjointed facts.</td>
<td>• Due to the delays in preparing cases witnesses may not remember all facts.</td>
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<td></td>
<td>• Strict rules of evidence maintain consistency in the way in which courts determine the truth.</td>
<td>• Since some evidence may never be heard in court, the ability of a jury to determine the truth may be limited.</td>
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<td></td>
<td>• The process of examination and cross-examination is fair to both parties as it enables evidence to be tested for truth.</td>
<td>• Witnesses can only respond to questions asked and may not be allowed to tell their whole story.</td>
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<tr>
<td></td>
<td>• Rules of procedure mean that each party is treated in a consistent and fair manner.</td>
<td>• Juries in lengthy trials, heard as a continuous hearing, may not be able to remember all the evidence or maintain concentration.</td>
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<tr>
<td>Standard and burden of proof</td>
<td>• The onus is on the individual bringing the allegation to substantiate their claim. Every individual is treated as equal until an allegation is proven.</td>
<td>• The system is seen as being more concerned with proof than with determining the truth.</td>
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doing everything that he honourably can to protect the interests of his client. He is entitled to "fight for a verdict". But the Crown counsel is a representative of the State, "a minister of justice", his function is to assist the jury in arriving at the truth. He must not urge any argument that does not carry weight in his own mind, or try to shut out any legal evidence that would be important to the interests of the person accused.

'It is not his duty to obtain a conviction by all means; but simply to lay before the jury the whole of the facts which compose his case, and to make these perfectly intelligible, and to see that the jury are instructed with regard to the law and are able to apply the law to the facts.

'It cannot be too often made plain that the business of counsel for the Crown is fairly and impartially to exhibit all the facts to the jury. The Crown has no interest in procuring a conviction. Its only interest is that the right person should be convicted, that the truth should be known, and that justice should be done'.


In the criminal justice system, the adversary trial can appear to be monopolised by the state. The state determines whether or not an act is a criminal offence and decides on the sentencing of offenders. The primary purpose is to establish the boundaries of acceptable behaviour and to prevent individuals from taking their own retribution. The process aims to ensure procedural fairness by balancing the rights of the individual against the rights and interests of society as a whole. Chief Justice Barwick stated in Ratten v. The Queen (1974) 131 CLR 510 517: 'Under our law a criminal trial ... is a trial ... in which the protagonists are the Crown on the one hand and the accused on the other. Each is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or in cross-examination shall be asked'.

**Finding the truth**
The adversarial system is often criticised because it is not sufficiently concerned with finding the truth. The defendant and the state control the investigation. Judges do not actively search for truth. Justice Dawson in R v. Whithorn (1983) 152 CLR 657 682, stated: ‘A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and the judge’s role in that system is to hold the balance between the contending parties without himself taking part in their disputations. It is not an inquisitorial role in which he seeks himself to remedy the deficiencies of the case on either side’.

**Proof not truth**
The adversary trial is also criticised for an emphasis on proof that acquits an accused not because they are not guilty but because there is not proof ‘beyond doubt’ of their guilt. This criticism overlooks the traditional principle that ‘ten guilty persons escaping punishment is better than one innocent party being convicted’. Those critical of the adversary system would suggest that this is too high a price to pay for safeguards from oppressive state practices. In R v. Griffis the South Australian Court of Appeal said: ‘The judgment of Apostilides impliedly affirms the continuance unimpaired of the adversarial system in Australian criminal courts. A trial is not an inquiry into the truth of an issue but is concerned simply with the narrower question whether the Crown has proved its case against the accused beyond reasonable doubt. The witnesses are to be called by the parties, not the judge, and while an exception to the general rule is recognised in Apostilides it is significant that no example or illustration is given of a valid exception. I note that what Dawson J referred to as “only in exceptional circumstances” in Whitehorn has been strengthened in Apostilides to “save in the most exceptional circumstances”’.

The insistence on oral evidence by first-hand witnesses at trial, party control over the pre-trial investigations and limited judicial intervention create a situation where ‘the truth’ may be missed.

This may occur because the parties elect not to present all the evidence at the trial. Furthermore, delays in hearing cases may affect the accuracy of witness recall. As the onus is on the parties to prepare and present their case, a defendant may be significantly disadvantaged if they do not have sufficient resources. This problem becomes even more significant when legal aid guidelines limit representation in some matters.

**Truth by confrontation**
The adversary trial is based on two opposing parties—it is highly confrontational. Both the prosecution and the defence cross-examine witnesses to undermine the opposing case and discover information the other side has not brought out. At times it may appear as if the witness is on trial. Cross-examination may be more about undermining a witness’s confidence than getting to the truth. Again the adversary trial places an emphasis on winning rather than truth or justice.

**Rules for truth**
The presentation of evidence is subject to strict rules. The failure to observe these rules can give rise to appeals and the overturning of a court decision. For example, a party who calls a witness to give evidence cannot lead the witness through their evidence. In other words they cannot ask questions that lead to an obvious ‘yes’ or ‘no’ answer. The witness does not necessarily have the opportunity to tell the whole story but must respond to the questions asked.
Structured questions

The use of expert witnesses raises some concerns for the rules of evidence. In preparing for the trial, the parties choose their own experts. These experts are necessarily aligned with one of the parties. They are witnesses presenting a view in support of one of the parties—not impartial court experts. In some courts the use of court appointed experts has been recommended.

The environment for the hearing of evidence in an adversary trial is intimidating. Typically the environment of the courtroom is formal and lawyers and judges appear in formal court dress. The strict rules of evidence and procedure add to the mystique of the courtroom environment which may intimidate the ordinary person either as a party or a witness in the proceedings.

Limited resources aggravate the inherent problems of the adversarial criminal justice system. It is common for the defendant to be unrepresented in the early stages of the criminal justice process due to a lack of legal aid. For example, a defendant may not be represented at summary hearings before the Magistrates’ Court.

These problems, combined with the contemporary trend towards criminalisation of conduct, have heightened public perceptions that the criminal justice system is in crisis.

activity

Why use the adversary model?

Structured questions

Read the article ‘Adversary system—criminal justice in crisis’ and answer the following questions.

1. Outline the role of the parties in a criminal trial.
2. What difficulties would an individual charged with a criminal offence experience in presenting their case in court?
3. What are the elements of an effective legal system? Use features of the adversary trial as an example to illustrate your response.
4. Briefly describe the advantages of our adversary trial system associated with:
   a. the need for representation
   b. the role of the adjudicator
   c. the rules of evidence and procedure.
5. How efficient is the adversary trial in revealing the truth?
6. Describe the major disadvantages of the adversary trial. Suggest ways in which these problems may be overcome.

An alternative to adversary trial: the inquisitorial model

An alternative to the adversary trial operates in civil law countries. The inquisitorial system of trial is a trial conducted as an inquiry. The inquisitorial trial is, in virtually all aspects, controlled and conducted by an impartial judge. The court calls witnesses. The judge determines the order of trial and conducts most of the examinations. If experts are needed, it is the judge who decides which experts to call and conducts the initial examination.

The trial proceedings are conducted as a fact-finding process. They tend to be less formal and less confrontational than an adversary trial. There also tends to be fewer rules of procedure and evidence than in the adversary system.

The idea that an offender is guilty until proven innocent is sometimes given as a feature of the inquisitorial trial. This is not always so. Key differences between the inquisitorial trial and the adversary system are the extent of pre-trial hearings and the role of the judge. Because of the extensive pre-trial procedures under an inquisitorial system, the accused has several opportunities to establish their innocence before trial. Consequently, only the strongest cases reach the trial stage. This may be why the system sometimes gives the impression of a presumption of guilt.
Inquisitorial systems vary from country to country, and it is difficult to generalise about their procedures. Nonetheless, most contain the following elements.

**Reliance on code provisions rather than case precedent**
Legal systems using the inquisitorial systems are historically based on a legal code or legislation. In this system, decisions were made on a case-by-case basis with reference to, and interpretation of, the applicable legal code. Court decisions generally did not create precedent. In recent years, in many inquisitorial countries, changes have taken place and there is some reference to prior cases.

**Rules to exclude evidence**
Generally, inquisitorial judges do not apply rules that exclude evidence. Where rules of evidence have been implemented, they are generally more limited than the rules of evidence in an adversary model. Exclusion of evidence is usually due to it having been illegally obtained or in recognition of privacy issues.

**Investigation and pre-trial procedures**
There are significant variations in the investigation and pre-trial procedures in inquisitorial countries. In some countries, the prosecutor is an impartial participant in the investigation and trial. In some cases, the prosecutor may refer the investigation of the matter to an investigating magistrate. This is a court official who conducts the investigation, interviews witnesses, collects other evidence, and ultimately decides whether charges should be brought against the suspect. During the investigation process a file or dossier is prepared. This contains witness statements, accounts of investigation and other records relevant to the case. The suspects are questioned. The defence lawyer has access to the documents in the dossier.

**No pleas of guilty**
Traditionally, in an inquisitorial trial there is no need for a plea of guilty. All cases go to trial. The process requires all evidence against the defendant to be presented to the court. The judge then reaches a verdict.

**Trials**
The judge or judges conduct the trial. In some cases jurors, known as lay judges, may also be present. The lay judges sit and deliberate with the professional judges. The professional judges determine which witnesses will be called and the order of proof. It is usually the judge who conducts the initial examination of the witnesses.

After the judge has finished the examination, the other parties may examine the witnesses. There is no formal cross-examination. Evidence regarding the defendant’s work history, family situation and other matters can be heard as evidence at the trial. Generally there is less use of oral evidence, and witness statements and hearsay evidence may be considered. Judges often call the defendant to testify first. The defendant’s statements are not given under oath. A lawyer, who participates in the proceedings and questions witnesses, may represent the victim. If a civil action is brought on behalf of the victim, it may be joined with the criminal case and both cases will be heard at the same trial.

At the final stage of the trial, the lawyers present closing statements. The defendant makes the last statement. The professional judges, along with any lay judges, deliberate and decide on a verdict. If a civil action has been joined to the case, the professional judges will also give a decision in relation to the civil claim.

**Appellate procedures**
Either the defendant or the prosecution can take an appeal. In some situations, the victim may also seek appeal.
The German system—an example of an inquisitorial trial

The Basic Law, the German equivalent to a constitution, was passed in 1949. It guarantees basic human rights to all citizens. For instance, Article 103 of the Basic Law guarantees the right to a fair hearing in court. The major legal codes of German law are the Civil Law Book, the Criminal Law Book and the Codes of Criminal and Civil Procedure.

In Germany, criminal cases are brought by the state prosecutor’s office and are generally started in the State Court if the alleged offence is punishable by more than three years in jail or if the defendant might be sent to a psychiatric hospital. Most serious cases, such as treason, are heard in the Higher State Court. If the case is started in the Local Court (the lowest court in the hierarchy), either party can apply for a re-trial in a higher court. Further appeal can be made only on a point of law. The right of appeal is limited, as the first-instance trials are very long and comprehensive, and this makes complete re-trial impractical and unnecessary.

In a criminal trial, the case is prosecuted by the state attorney. The state attorney sits on the same level as the judge (or judges) and the two or three lay judges. The defence attorney and the accused sit on a lower level than the judges and the state attorney. The judges are presented with a dossier of evidence that has been collected at a preliminary hearing. All the evidence is presented to the court before a case starts.

<table>
<thead>
<tr>
<th>Key features of the inquisitorial trial: Germany</th>
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<tbody>
<tr>
<td>• Prosecution of the case is by a state attorney, who sits on the same level with the judge.</td>
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<tr>
<td>• Judges are presented with a dossier of written evidence prepared at a preliminary hearing.</td>
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<tr>
<td>• All evidence is presented to the court prior to the commencement of the hearing.</td>
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<tr>
<td>• A judge is responsible for conducting the questioning of witnesses.</td>
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<tr>
<td>• Examination of evidence starts with the questioning of the accused.</td>
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<tr>
<td>• Evidence of prior convictions may be introduced during the trial.</td>
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<tr>
<td>• Hearsay evidence is admissible.</td>
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<tr>
<td>• Legal representation is compulsory.</td>
</tr>
<tr>
<td>• Burden of proof is on the prosecution and all cases must be determined ‘beyond reasonable doubt’.</td>
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</tbody>
</table>

Role of the judge

The examination of the evidence starts with the questioning of the accused, which is conducted by the chief trial judge. This evidence may include a discussion of prior convictions. After this examination, the judge will call and question the witnesses. Witnesses do not have to take an oath. The taking of evidence is closed after the questioning of the witnesses. The prosecutor is given the opportunity to provide a summation of the evidence. The defence counsel may also give a final address to the court.

The verdict and the sentence are reached as a majority decision of the judges. This decision must be justified by the judges in a statement of their reason for deciding.

The German system operates with a large number of judges. Unlike the judges in Australian courts, those in German courts are comparatively young. This is due to the recruitment system. All German lawyers have the same training, after which they are qualified to practise as lawyers. The judiciary is seen as a separate career and judges are not drawn from the ranks of practising lawyers, as they are in the Australian system.
Generally, the judges work in panels of three or five and reach a majority decision. In a criminal case, a two-thirds decision is necessary for a guilty verdict or to impose a sentence. Although this is straightforward in the determination of liability, decisions as to sentencing can be more complicated, as a majority decision must be reached.

Lay judges (non-career judges) play an important role in the German court system. They sit alongside the professional judges, with whom they have equal voting rights. The lay judges in a criminal case are ordinary people selected from the population. The use of lay judges is considered to contribute to the common sense of the court and to reflect the values of the general community in the determination of a case. Lay judges are particularly important in criminal cases as there are no juries, and lay judges have the right to vote not only on matters of guilt, but also on sentencing. They do not generally participate in the hearing of civil proceedings in the ordinary courts, and, except in industrial and social courts, they do not participate in the determination of appeals on a point of law.

**Rules of evidence and procedure**

The actual court procedures used differ from court to court; but some key features commonly distinguish this mode of trial from the adversary model.

German law stems from Roman law rather than the common law system. Therefore, there is no strict doctrine of precedent in the German courts. Instead, the courts rely on comprehensive codifications of the law, and on a range of statutes to supplement these codes.

While decisions of higher courts are not binding, lower courts do tend to follow their decisions. If a higher court wishes to deviate from a decision of the High Court, it has to grant special leave of appeal. The rules governing such situations are set out in statute.

The burden of proof is not significantly different from that in Australian courts. Generally it is the person bringing an allegation to the court who must prove their claim. The standard of proof in civil cases is, however, higher than in Australian courts. In German courts, the burden of proof in a civil case is not discharged unless the judge is satisfied beyond reasonable doubt.

Legal representation is compulsory with the exception of the Social Court.

The rules of evidence differ significantly from those that apply in Australian courts. There is no restriction on hearsay evidence, although the judges will regard it as less reliable than the evidence of eyewitnesses. Sworn evidence is only required in those cases where the judge is not satisfied with the unsworn evidence. More frequently, judges will caution witnesses that they may be prosecuted if they do not tell the truth. Judges are free to determine the reliability of evidence in any manner they see fit. However, they must explain how they reached a decision.

The panel system, discussed earlier, provides a further safeguard against judicial abuse. Time limits apply to the initiation of an action and vary according to the nature of the case. Should a case be initiated for which the time limit has expired, the case will not necessarily be dismissed. The onus is on the defendant to raise the limitation as a defence.

Germany does not have extensive pre-trial discoveries in civil cases. The court requires parties to give details of their claim and their defence, and to produce any evidence to support their allegations. When the court receives the plaintiff’s claim, it can either summon the parties to a preliminary hearing or order the parties to submit detailed statements of their claim.

During the preliminary hearing, the court can consider the evidence produced and order that evidence or witnesses be presented. When the courts request detailed statements from the parties, these should include the details of the evidence that the parties intend to produce. If evidence is produced without prior notification, the other party can apply for leave to submit a written explanation after the hearing. When the court grants this application, it will postpone its decision until it has considered the written explanation.
A comparative analysis

It is difficult to make conclusive comparisons between the inquisitorial trial and the adversary trial, because the operation of the inquisitorial trial is subject to significant variations from one country to another. Some general observations are, however, possible.

In an adversary trial, the collection of facts can be limited by the role the individual plays in the preparation and presentation of evidence. In the adversary trial, the truth is ascertained from the evidence presented by both parties, and there is no guarantee that the parties will present all the relevant evidence. The parties will present evidence only to support their arguments. In the inquisitorial trial system, on the other hand, the judge actively ensures that all of the facts have been collected and presented. The inquisitorial system might, therefore, be thought to be superior in this regard, in that there is more likelihood that all of the facts will be presented.

### Comparison of the adversary and inquisitorial systems

<table>
<thead>
<tr>
<th>Feature</th>
<th>Adversary trial</th>
<th>Inquisitorial trial</th>
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<tbody>
<tr>
<td>Role of the judge</td>
<td>• Case conducted before an independent and impartial adjudicator.</td>
<td>• Judge takes an active role in the examination of a case.</td>
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<td></td>
<td>• Judge decides questions of law and procedure.</td>
<td>• Judge determines which evidence or witnesses need to be examined, the issues to be contested and procedures.</td>
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<td>• Judge asks questions only to clarify points raised in examination or cross-examination by the parties.</td>
<td>• Judge conducts questioning of witnesses.</td>
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<tr>
<td>Role of the parties</td>
<td>• Parties are responsible for the preparation and presentation of their case.</td>
<td>• Role varies—responds to the directions of the court in presenting arguments to the court.</td>
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<td></td>
<td>• Parties determine the issues to be contested and the witnesses to be called.</td>
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<tr>
<td>Role of legal representative</td>
<td>• To represent the interests of their client.</td>
<td>• To assist the judge in determining issues for investigation.</td>
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<tr>
<td></td>
<td>• To prepare and present the client's case to the court.</td>
<td>• In some instances, to ask questions after examination by a judge.</td>
</tr>
<tr>
<td>Rules of evidence</td>
<td>• Strict rules of evidence, with a strong reliance on oral evidence.</td>
<td>• Greater dependence on documentary evidence collected by the examining judge.</td>
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<td></td>
<td>• Parties collect the best evidence to support their case.</td>
<td>• Witnesses have more freedom to describe events rather than merely respond to questions.</td>
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<td></td>
<td>• In most cases, previous character cannot be introduced as evidence except as a consideration in sentencing.</td>
<td>• Evidence of prior convictions may be heard in a case.</td>
</tr>
<tr>
<td>Continuous trial</td>
<td>• Conducted as a single, continuous hearing.</td>
<td>• May allow adjournments for further investigation by the court.</td>
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</table>
In recent years, Australian courts have exercised greater control of the pre-trial stages leading up to a case being heard. Under the Crimes (Criminal Trials) Act 1999 there are formal pre-trial procedures used in Victorian courts to identify and resolve legal issues prior to a jury being empanelled to hear a criminal case. These procedures include:

- the Crown must file the presentment outlining the charge within a set time before the trial
- the court can conduct a directions hearing to identify issues. At the directions hearing the court can determine questions of fact, law, evidence and procedure
- the judge presiding over the directions hearing will usually be the judge at the trial
- decisions made at the directions hearing are binding on the trial judge
- a timetable for filing the prosecution case statement and defence response will be set
- the prosecution case statement is a full disclosure
- the accused must file a defence response indicating which facts, inferences or points of law and evidence presented by the Crown they wish to contest
- counsel for the accused has the right to reply to the prosecution opening address outlining the issues of the trial
- the judge addresses the jury at the beginning of the trial, explaining the issues in the trial and the impact of the directions hearing on the trial.

Under the inquisitorial trial there may be fewer safeguards to ensure that the court considers the personal and civil rights of the parties.

Any mode of trial must balance the pursuit of truth and the need to respect the basic civil rights of the individual. To achieve this balance, most legal systems use a mode of trial that incorporates features of both the adversary trial and the inquisitorial trial. This is particularly evident in the operation of tribunals in the Australian legal system.

In the inquisitorial system, the investigation process is conducted by the courts. The judges have control over the collection of evidence as well as the discretion to decide the admissibility of evidence. Judges in the inquisitorial model are not bound by the strict rules of evidence applicable in an adversary trial. The only bar to the admissibility of evidence in the inquisitorial trial is the relevance of that evidence to the case being heard.

Judges in the adversary trial are far more limited in their discretionary powers. For example, the rules of evidence may prevent them from admitting evidence that may have some bearing on the case before them. These rules, therefore, are not necessarily conducive to the determination of the truth.

**Activity**

**Adversary trial on trial**

**Folio exercise**

Read the following article ‘Adversary system on trial’ and answer the following questions.

1. What do you consider the most important flaws in the operation of the adversary system? Justify your view.
2. Why might an adversary trial be more expensive than an inquisitorial trial? Explain.
3. Critics of the adversary trial suggest that Australia should adopt an inquisitorial system of trial. What features of the inquisitorial trial do you think may more effectively operate to discover ‘the truth’ in a case?
4. ‘Rather than speeding up court proceedings, the adoption of an inquisitorial system would slow them down.’ Explain.
5. Do you agree with the suggestion to adopt a European-style inquisitorial system? Explain.
Adversary system on trial

Critics of the adversary system claim that it is difficult to put serious criminals behind bars because they are able to hide behind the common law protections of the adversary trial. John Walker, of the Australian Institute of Criminology, estimates that the criminal justice system costs the taxpayer more than $6 billion a year. Part of this figure includes the cost to the taxpayer of legal representation for individuals accused of committing serious offences. Lawyer and ABC presenter, Anne Warburton concluded: ‘Like it or not, there’s a widespread perception abroad that the law has abandoned commonsense in favour of archaic, often irrational procedures that benefit only two classes of people: the rich who can afford to use them as a sort of strategic weapon and those whose alleged crimes are so bad that scarce legal aid funds must be reserved to make sure they get a fair trial’.

In 1997, cutbacks in funding for legal aid heightened these perceptions that justice is a costly commodity. Is this just a funding problem?

The adversary system evolved in the 18th century. The main aim was to introduce a system that would prevent the fabrication of evidence by prosecution witnesses. From these origins, the adversary system brings with it a range of principles and practices. Evidence is given in accordance with strict rules. There is a preference for oral evidence that can be cross-examined and tested for truth in court. Each party is represented as a case is presented before an impartial body. Today we may ask if some of these procedures and practices have outlived their usefulness. For instance, the right to silence provides that an accused does not have to give evidence in court. The court cannot draw any adverse inference from the failure of the defendant to give evidence. The right to silence had its origins in a time when people could be tortured for refusing to give incriminating evidence.

The adversary trial is based on the notion of gladiatorial battle. As Professor Sutherland explained in 1923: ‘There is no difference in principle between a decision based on a contest of procedural skill between two attorneys and a decision based on a contest of strength between two armed champions’. In this gladiatorial battle in which one side is pitted against the other, the state has almost limitless resources and is therefore more powerful. To provide a balance, the system recognises special protections for the accused such as the common law presumption of innocence.

The continued reliance upon the right to silence today could be questioned. A defendant even in the most incriminating circumstances is under no obligation to make a statement. No explanation may be offered until they come to trial. At trial, the judge cannot comment about their failure to provide an explanation sooner.

It is difficult to accept that in most circumstances an innocent person would fail to offer some explanation before prosecution.

Is it necessary to continue with this protection? When the right to silence evolved it aimed to protect the defendant from the fabrication of prosecution evidence. However, today there are a range of protections for a person suspected of committing a criminal offence. Police questioning is videotaped or recorded. Many would suggest that there is no longer a need for the right to silence.

Certainly the English law now provides that an adverse inference may be drawn on evidence not disclosed at the time of police interview but later relied upon in court. From time to time, however, there are sobering reminders about the need for these protections. In England, the case of the Guildford Five illustrated that individuals still needed protection against prosecution relying on fabricated evidence. In evidence to the Wood inquiry into police corruption, a Sydney detective suggested that he fabricated evidence in more than half his cases.

Critics of the adversary trial often hold up the inquisitorial trial as overcoming many of the problems currently faced by the adversarial trial. The inquisitorial trial—used in many European countries—allows judges to supervise police investigations. The judges, not the lawyers, control the trial and are responsible for the questioning. Legal aid money goes further. Lawyers can make submissions and suggest questions to the judges, but the trial cannot be prolonged by cross-examinations on obscure points. Journalist Evan Whitton concludes: ‘Trials under that system are fairer, shorter, cheaper and more accurate in their verdicts than common law trials: they cost a half to a third as much and put away about three times as many major criminals’.

However, some representatives of the legal profession do not agree. During the Senate’s Constitutional and Legal Affairs Committee’s inquiry into the cost of justice, the president of the NSW Bar Association said: ‘Rather than speeding up court proceedings, the adoption of an inquisitorial system would slow them down. Cases tried by Australian judges have already been reduced to their essentials by professional advocates. On the Continent, that is the judge’s responsibility so that proceedings take much longer … In our system, judges are independent. They don’t have a point of view and don’t pursue a point of view throughout the case … We take the view that the function of the police, the investigatory process, is very different from the judicial process and that the mind-set of the person who is going to adjudge guilt or innocence ought to be different from the mind-set of the investigator’.
Access to the law—costs of legal representation

A legal system which is not affordable is not accessible … There is little point in offering an elaborate system of justice which is so expensive few can make use of it. To the person in the street there is little difference between a situation where individuals have certain rights and are either unaware of them or cannot afford access to them and a situation where they do not have those rights.


Legal rights are of little value unless they can be enforced. We all need access to legal representation to effectively utilise the court system, but in reality, there are significant barriers limiting access. These barriers include:

- the cost of legal services
- the limitations on the provision of legal aid services.

Lawyers’ fees and the cost of court action are major barriers to people seeking access to the court system. Many people are deterred from exercising their rights because they cannot afford legal advice or representation.

Activity

Adversary system cross-examined

Essay

The solution is a non-adversarial system [in which] judges supervise the police investigation; judges, not lawyers, control the trial and do the questioning. The legal aid money goes further; suspects’ lawyers can make submissions and suggest questions to the judge, but they cannot use cross-examination to obscure the truth and prolong the trial.

Trials under the inquisitorial system are fairer, shorter, cheaper and more accurate in their verdicts than common law trials; they cost a half to a third as much and put away about three times as many major criminals.

Evan Whitton, Weekend Australian, 8 February 1997

1 Compare and contrast the operation of an adversary trial with that of an inquisitorial trial.

2 What do you consider to be the three most important strengths of the adversary trial? Justify your view.

3 Explain how the features of an inquisitorial trial may result in ‘fairer, shorter, cheaper’ trials.

4 Describe two possible improvements to the operation of the adversary trial.
Your day in court—a costly business

The cost of legal advice, assistance and representation is often so high that people decide not to enforce their rights. Concern about this has led to several inquiries into the cost of justice. The problem is that one's ability to exercise legal rights is affected by one's financial situation. The cost of legal advice is no deterrent to the rich, but may be prohibitive for the poor. Legal aid may assist you—but legal aid funding is limited and civil cases are usually not funded at all.

A lawyer's fees for a one-day action in the Magistrates' Court might be $2000 or more. Fees payable in a similar action in the County Court or the Supreme Court will be considerably higher.

In many cases, the major component of legal fees is the fee for the barrister. Fees vary considerably among barristers, depending on their experience and the complexity of the case. Some Queen's Counsels or Senior Counsels charge more than $6000 a day. Complex cases may last much longer than a day and, in some instances, go on for days or weeks. In such cases, legal fees may exceed the amount in dispute.

In deciding whether to go to court, a person must take into account the likely legal costs incurred by the other party as well as the fees for their own lawyers. The person who loses an action is also liable for the legal costs of the winning party. However, it is very difficult to estimate at the start of a case the full extent of the costs. This often discourages people from initiating legal proceedings.
The costs indemnity rule provides that costs are awarded at the discretion of the court. The general rule in civil matters is that the loser pays not only their own legal costs, but also those of the winner. However, this rule does not require the loser to pay the full costs.

‘Solicitor/client’ costs are always borne by the individual parties. The rule only applies to ‘reasonable costs’; that is, ‘party/party’ costs incurred by the winner. These are calculated according to scales of costs set by the relevant court. If the costs are disputed an official is appointed to ‘tax’ or approve the bill.

Some people argue that each of the parties should be responsible for their own costs whether they win or lose. This is generally the case in matters involving family law and criminal law.

There are four general categories of costs.

- **Instructions**—these are items in addition to charges for court attendances, interviews, lodging and reading documents (perusal), conferences, and correspondence. Instructions involve less tangible items, such as planning, thought, consideration, anxiety, risk, skill and responsibility in preparing a case for court.

- **Documentation**—this includes charges for drafting and writing documents. Copying and perusal fees are calculated according to the length of the document, although sometimes there is a fixed fee for certain documents.

- **Correspondence**—letters are classified generally as special, ordinary or circular letters, and charges are fixed accordingly.

- **Attendances**—these items are intended to compensate the solicitor for time spent for specific services. In some cases, time limits have been fixed for services.

Lawyers are free to reach agreements with their clients on the charges to be made. In general, however, unless the lawyer and the client enter into a written agreement, the lawyer’s bill, if challenged, will be assessed by the courts at the scale rate.

### The things we pay lawyers for
*(Some examples based on the Practitioner Remuneration Order—2005)*

<table>
<thead>
<tr>
<th>Description</th>
<th>Charge</th>
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<tbody>
<tr>
<td>Copy or photocopy of document, per page</td>
<td>$1.50</td>
</tr>
<tr>
<td>For examining a document, per page</td>
<td>Approx. $26.00</td>
</tr>
<tr>
<td>To file, lodge or deliver any documents or other papers, to obtain an appointment—performance by a junior clerk</td>
<td>$41.20</td>
</tr>
<tr>
<td>Consultation or conference with counsel</td>
<td>$154.90</td>
</tr>
<tr>
<td>(After the first hour, per half-hour or part thereof—$77.10 to $120.30)</td>
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<tr>
<td>On counsel with case for opinion or other papers or to appoint consultation or conference</td>
<td>$62.60</td>
</tr>
<tr>
<td>Telephone conversation per 15 minutes</td>
<td>$34.70 to $64.20</td>
</tr>
<tr>
<td>On settlement of a conveyancing or commercial matter</td>
<td>$49.40 to $77.40</td>
</tr>
<tr>
<td>(After the first half-hour, per half-hour or part thereof—$77.40 to $120.30)</td>
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<tr>
<td>Letter, per page</td>
<td>$33.10</td>
</tr>
<tr>
<td>Draw up a document, per page</td>
<td>$41.70 to $67.80</td>
</tr>
</tbody>
</table>
County Court costs scale
Costs allowed in a matter worth between $20,000 and $50,000 according to the County Court scale of costs

<table>
<thead>
<tr>
<th>Description</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brief to counsel to appear</td>
<td>$105.00</td>
</tr>
<tr>
<td>Solicitor with counsel—half day</td>
<td>$341.00</td>
</tr>
<tr>
<td>To file, lodge or deliver any documents or other papers, to obtain an appointment—performance by a junior clerk</td>
<td>$41.20</td>
</tr>
<tr>
<td>Solicitor with counsel—per day</td>
<td>$1009.00</td>
</tr>
<tr>
<td>Pre-trial conference—solicitor with counsel</td>
<td>$341.00</td>
</tr>
<tr>
<td>Solicitor with counsel—per day</td>
<td>$510.00</td>
</tr>
<tr>
<td>Telephone conversation per 15 minutes</td>
<td>$34.70 to $64.20</td>
</tr>
<tr>
<td>On settlement of a conveyancing or commercial matter</td>
<td>$49.40 to $77.40 After the first half-hour, per half-hour or part thereof—$77.40 to $120.30.</td>
</tr>
<tr>
<td>Letter, per page</td>
<td>$33.10</td>
</tr>
<tr>
<td>Draw up a document, per page</td>
<td>$41.70 to $67.80</td>
</tr>
</tbody>
</table>

Costs of the day
Including—
(a) Practitioner for attending court where no counsel employed $414.00
(b) Attending with counsel—
  – Clerk $201.00
  – (ii) Practitioner or managing clerk $303.00
(c) Counsel’s fees $835.00

Under the Legal Practice Act 1997 (Vic.) lawyers have an obligation to complete any work for a client as soon as reasonably possible.

All lawyers are required to provide a client with details of the fees charged. A lawyer who charges grossly excessive fees is guilty of misconduct. If the fees are assessed, and the charges are reduced by more than one-sixth, the fees are said to be excessive.

Legal aid and needs
Legal aid is ‘the provision of legal advice and assistance to people of limited means’. ‘Legal advice’ refers to advice on legal matters given by a solicitor. This includes making telephone calls, drafting letters, helping with application forms, making referrals to appropriate legal aid services or other agencies, and ongoing work. ‘Legal assistance’ is the allocation of funds by legal aid bodies to cover costs. These costs include the costs of ongoing casework, representation in court, drafting documents, negotiation, advice and counselling.

Victoria Legal Aid
In Victoria, legal aid is mainly provided by Victoria Legal Aid. Victoria Legal Aid has lawyers and administrative personnel on its staff. It can also call for tenders from private lawyers to conduct cases to represent clients receiving assistance.

Victoria Legal Aid operates a telephone advice and referral service during normal working hours. In addition, it operates several offices where people seeking legal
advice can consult a lawyer. Advice on legal matters is free of charge as long as the interviews and any follow-up resulting from the interview (that is, writing letters etc) are limited to one hour’s work.

Legal Aid provides legal assistance to people who qualify under the guidelines. Priority is given to those charged with serious criminal offences, whose liberty is threatened by the charges or whose fundamental democratic freedom would be denied if legal assistance were not provided. Priority is also given to those who experience severe disadvantage (factors include physical or mental health, economic, physical, cultural, linguistic, educational, geographic and intellectual considerations) as well as children, criminal defendants and family law litigants needing duty lawyer services—that is, representation in the Magistrates’ Court.

Any person can apply for legal assistance by completing and submitting a written application. Assistance is limited in relation to conveyancing, probate and wills, maintenance orders and applications by unincorporated or informal associations. Assistance in divorce proceedings in which another body, such as the Aboriginal Legal Service, can offer help is also limited.

Eligibility

Eligibility is determined according to a means test, a reasonableness test and lifestyle guidelines. In serious criminal matters, only the means test is applied if there is reason to believe that the interests of justice will be served by providing assistance. The means test is an assessment of the value of a person’s assets, the amount of disposable income and the anticipated cost of legal assistance.

The reasonableness test takes into account:
- the potential benefit or detriment
- the nature and extent of any benefit that may be gained by the applicant, the public or any section of the public from the provision of legal assistance
- any detriment that the applicant, the public or any section of the public may suffer if Victoria Legal Aid does not grant assistance
- the merit of the applicant’s case; that is, the likelihood of success
- in the case of criminal appeals, whether there are reasonable grounds for appeal.

If an applicant intends to plead ‘not guilty’, Victoria Legal Aid will take into consideration the likelihood of the case being dismissed. Victoria Legal Aid will not fund a case if they believe that it is unlikely that the defendant will be found ‘not guilty’. In these cases, funding for legal aid will only be provided on the condition that the defendant pleads ‘guilty’. This provision aims to conserve the scarce legal aid dollar. However, it also places Victoria Legal Aid in the difficult position of having to judge the guilt or innocence of a defendant before the case goes to court.

The lifestyle guideline considers any conflict between the information provided by the person in their application and their actual lifestyle. For example, there would be a conflict if an applicant claims to have no assets and very little income, but drives an expensive car.

Victoria Legal Aid has set the maximum amounts it will pay in certain types of cases. These are referred to as ceiling costs. The ceiling costs are:
- $10 000 for adults in family law matters
- $15 000 for child representations
- $15 000 for criminal trials in the County Court
- $30 000 for criminal trials in the Supreme Court.
Duty solicitors
Duty solicitors are in attendance at many of the Magistrates’ Courts in metropolitan and country areas. They provide legal advice or legal representation for people who have not received or arranged for a lawyer. Unlike legal assistance through Victoria Legal Aid, there is no need to make an application for this service. There is no means test. The service is free. Duty solicitors offer advice to people charged with criminal offences. They may conduct pleas in an attempt to reduce the penalty if the defendant pleads ‘guilty’ or in bail applications. They can also arrange an adjournment of the hearing. A duty solicitor usually cannot represent a defendant who pleads ‘not guilty’, due to demands on their time.

Community legal centres
Community legal centres started in Australia in 1973 with the Fitzroy Legal Service in Melbourne. Community legal centres now operate throughout Victoria. They provide the ‘third arm’ of Australia’s legal aid system. Community legal centres provide free and accessible legal services. Their advice services operate mostly in the evening. Community legal centres undertake a wide range of legal work, including advice and referral as well as ongoing legal assistance and representation.

Funding cuts have threatened the survival and continued existence of many community legal centres and/or the provision of services and programs they offer to the community.

Aboriginal Legal Service
The Aboriginal Legal Service provides a full legal service to Aboriginal people. The scheme is part of a national network established by the Commonwealth Government and organisations tender to provide legal services. All Aboriginal people, plus their wives, husbands or de factos, are entitled to use the service. It is also extended to any person who identifies with the Aboriginal community through family ties or a similar relationship. In most instances, guidelines similar to those of Victoria Legal Aid apply. There is no strict means test. However, if it is obvious that the person can pay for legal costs, the service will not provide legal assistance. For example, the service does not usually deal with conveyancing matters. People receiving legal assistance are not required to pay any contribution towards legal costs.

The legal profession and legal aid
A significant proportion of legal aid work is provided by private lawyers. Solicitors who are willing to act for people receiving legal aid have their names registered on the Victoria Legal Aid panel of practitioners. About 75 per cent of applications for assistance are assigned to private lawyers. These lawyers charge legal aid at 80 per cent of the scale fee.

Civil Law Assistance Scheme (LawAid) is supported by the State Government, the Law Institute and the Bar Council. The scheme was introduced to supplement the legal aid system by providing assistance in civil matters. In civil cases, in which the litigant is assessed as having a good chance of success, no up-front fees are charged. If the litigant is successful or settles out of court, the lawyer is paid from the amount awarded. The lawyer receives the set fees. Ten per cent of the amount awarded to the litigant is contributed to the funding of the scheme. If the litigant is not successful, no fee is charged.

The Legal Assistance Scheme offered through the Law Institute is a referral service that facilitates pro bono legal assistance from the private legal profession to individuals. It provides access to justice to those members of the community who have
‘meritorious’ legal problems but do not have sufficient funds for legal representation. The scheme provides funds for cases where legal assistance cannot be obtained through government-funded bodies or community-based organisations. The scheme is administered by the Public Interest Law Clearing House.

There are various other bodies that provide legal advice and/or assistance. The Law Institute of Victoria offers a free telephone legal advice and referral service as well as internet advice. All registrars are also able to offer advice to the public in relation to matters within the scope of their duties and knowledge.

**Unmet legal needs**

Some recent cases have had serious implications for the provision of legal aid. These cases have highlighted the need for additional funding for these services. Perhaps the most important of these was the case of *Dietrich v. The Queen*. Dietrich was charged with four drug offences relating to the trafficking and possession of heroin. Before the trial, the accused had applied for assistance to the Legal Aid Commission of Victoria, now Victoria Legal Aid, but had not been successful. The advice he received from the commission was that it would only represent him if he pleaded ‘guilty’.

Under Section 69(3) of the *Judiciary Act 1903* (Cwlth) the accused made an application for the provision of legal assistance. Under the provisions of this Act a judge has the power to request that the attorney-general arrange for representation for the accused. The judge can do this if it is considered to be in the interests of justice. There are time limits within which these applications must be made. Dietrich did not make his application within the appropriate time. As a result, the application was dismissed by a judge of the Supreme Court. So, despite the fact that Dietrich was unable to afford legal representation, at the time his trial commenced, he was unrepresented.

At the start of the trial Dietrich complained about not having a lawyer to represent him. On several occasions during the trial he complained that he was unable to represent himself, that he did not understand what was going on and that he did not feel capable of arguing his case. The judge insisted that the trial continue and Dietrich was found guilty.

Dietrich appealed to the Victorian Court of Criminal Appeal, claiming that:

- a person charged with an indictable offence was entitled to legal representation at the expense of the state
- the failure of the trial judge to appoint a legal representative resulted in a miscarriage of justice.

Based on the earlier High Court decision in *McInnis v. The Queen*, the appeal was dismissed. In the earlier decision, the High Court had already determined that legal aid was not a right. Because there was no right to legal aid there was no duty imposed on the judge to appoint a legal representative. Consequently, the second appeal was also dismissed.

Dietrich was granted leave by the Victorian Court of Criminal Appeal to appeal to the High Court. The High Court case was heard by five judges. The majority decision was that ‘the common law of Australia does not recognise the right of an accused to be provided with counsel at public expense. However, the courts possess undoubted power to stay criminal proceedings that will result in an unfair trial, the right to a fair trial being the pillar of our criminal justice system. The power to grant a stay necessarily extends to a case in which representation of the accused by counsel is essential to a fair trial, as it is in most cases in which the accused is charged with a serious offence’. 
Dietrich was successful in this appeal. Although academics and lawyers are still trying to determine the implications of the complex Dietrich decision, consisting of several separate judgments, there are two important implications for the provision of legal aid. These implications include that:

■ access to legal representation is fundamental to the effective operation of the criminal justice system
■ governments have a responsibility to provide sufficient funds for legal services and their failure to do so may result in an indefinite stay of proceedings in trials for serious criminal offences.

Legal representation—tipping the balance of justice

The current legal aid funding crisis, which sees people going to court without legal representation, has been described as a ‘morbid mockery’ of justice. Consider the impact of not having legal representation in the following cases.

In the Family Court, a woman who had been sexually assaulted, was cross-examined for more than two hours by her attacker. She was unable to get legal aid and the cross-examination was lawful. In another case, the victim of sexual abuse had to give graphic details of the assault after legal representation was withdrawn.

In another Family Court case, a lawyer appeared pro bono (or without payment) after two children were denied legal representation. The application involved a divorced couple. There was a dispute over their two children aged 14 and 15 years. One parent had gone overseas to live. The children had remained with the parent who lived in Australia.

David Grace, chairperson of the Law Institute’s criminal law section, contends that ‘it is likely that many people without legal advice are now pleading guilty to crimes, and undoubtedly convictions are being recorded against some people where, with legal representation, they would have been acquitted. Far from aiming towards achievement of “equality before the law”, the federal government’s policies and actions are achieving the reverse’.

The point that Mr Grace makes is well illustrated by the case of Mathew Rixon. Mathew Rixon stole a car to raise $500 to pay for his mother’s hospital operation for cancer. He was caught by police and charged. He was denied legal aid for a bail application and taken to court the following day. He was faced with the decision of either pleading guilty or spending a number of weeks in remand awaiting another hearing. Rixon, who admitted to previous offences, was jailed for six months.

Rixon has been released pending an appeal against the severity of the sentence. He claims that the sentence would have been very different had he been granted legal aid. His solicitor says that had legal aid been granted for the bail application, the case would have been adjourned for a few weeks. During this time a case could have been prepared.

Another consequence of the lack of legal aid funding is that some people suspected of committing serious criminal offences may not face trial.

In 1996, the trial of an alleged cocaine smuggler resulted in a hung jury. In 1997, the case was listed for re-trial. The defendant was left to face the judge and jury without legal representation. Under legal aid guidelines anyone charged with a Commonwealth offence who faces re-trial will not automatically receive legal aid. A defendant in these circumstances may seek a stay of proceedings on the grounds that he could not get a fair trial without legal representation. The right to a fair trial was established in the High Court’s Dietrich decision. This decision says that legal representation is essential to the operation of a fair trial.
In New South Wales, two brothers who were convicted of rape after representing themselves at trial faced a difficult task in seeking leave to appeal to the High Court. They were challenging a law, passed just before their trial that stops any self-represented accused from questioning the victim in a sexual assault case. Section 294A of the *Criminal Procedure Act 1986* (NSW) allows for the court to appoint someone to ask questions on their behalf. However, the brothers declined to use the lawyer at trial. The evidence of their accuser went untested.

Justice Sully sentenced the brothers to jail for the rape of two girls, then aged 16 and 17, at their Ashfield home. In his judgment, he urged that the Parliament immediately repeal the law, saying it removed basic rights.

The former Chief Justice of Australia, Sir Gerard Brennan, has also expressed concern. At the conference of the Australian Society of Judicial Administration he said:

“The courts are overburdened, litigation is financially beyond the reach of practically everybody but the affluent, the corporate or the legally aided litigant ... Ordinary people cannot afford to enforce their rights or litigate to protect their immunities. To that extent, the coercive force of the law is undermined. If the burden of litigation will increase, some solutions must be found and practical solutions are likely to be radical.”

Legal representation in civil cases is equally important. JW Shaw points out, “…an amateur litigant can be spectacularly successful. One example is to be found in the defendants to a libel case taken by McDonald’s in the High Court of Justice in England. After a vast hearing brought by a highly skilled legal team on behalf of the major corporation in libel the defendants emerged with a reasonable degree of success having vindicated a number of their allegations made against the fast food chain. On the other hand, a South Melbourne resident living in proximity to the Albert Park reserve seeking to oppose the staging of the Commonwealth Games in 2006 was unsuccessful and Mr Stewart has commented that: “it is particularly easy for a non-professional litigant to overlook the hidden requirements of preparing a viable case. It is sometimes difficult to understand the need for, and role of, the barrister and solicitor. However, as the process wears on, the benefits become more and more apparent”.

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**Going to court without a lawyer**

Lack of public funding will alienate disadvantaged Australians from the justice system. Legal aid funding is not keeping pace with the real cost of legal representation and the failure to provide legal representation has a detrimental impact on the effectiveness of the legal system and the delivery of justice.

Without legal aid, there is a rise in the number of self-represented litigants. There is a fundamental inequity in access to representation. The failure of funding to match the real costs in providing legal services has resulted in a significant withdrawal of experienced lawyers from legal aid work. The courts are also disadvantaged by the growth in self-represented litigants. Funding legal representation is likely to result in cost savings to the court system and to the justice system as a whole.

In particular, without legal representation, individuals are under greater pressures to plead guilty or abandon cases. Lack of funding means that lawyers face a serious ethical dilemma. Lawyers who want to provide legal representation for disadvantaged clients cannot do so within the fee caps of legal aid.

Delays in court proceedings and prolonged cases also contribute to the costs. Unrepresented litigants are more likely not to comply with court directions and procedures due to their lack of familiarity with the operation of our courts. Unrepresented litigants...
place increased demands on court officials. The unrepresented litigants also place stress on judicial officers and lawyers between the desire to see justice done, and the need to remain impartial in the delivery of justice. The combined impact of these factors is an increase in costs to the courts and for represented parties. Chief Justice Mason stated in *Cachia v. Haines* (1994) 120 ALR 385 at 391: 'While the right of the litigant in person is fundamental, it would be disregarding the obvious to fail to recognise that the presence of litigants in person in increasing numbers is creating a problem for the court ... all too frequently, the burden of ensuring that the necessary work of the litigant in person is done falls on the court administration or the court itself'.

On one day in the Magistrates’ Court in Victoria, 50 per cent of cases that proceeded involved a self-represented litigant.

There was no legal representation in:

- 30 per cent of criminal matters
- 20 per cent of civil matters
- 60 per cent of family violence matters
- 3 per cent of children’s matters
- 50 per cent of victims of crime had no representation.

In 1997–1998, 35 per cent of Family Court matters were reported to include at least one party who was unrepresented at some stage. By 2000, the estimate increased to 41 per cent.

In 1999, the High Court reported 28 per cent of the litigants appearing before a single judge were unrepresented. In 2000, the High Court reported 29 per cent of civil special leave applications and 18 per cent of criminal applications were by self-represented litigants. In 2004, the High Court reported that applications involving self-represented litigants for special leave rose to 48 per cent and that in proceedings before a single judge, the increase was to 46 per cent.

The impact of the increasing number of self-represented litigants challenges the role of the courts to maintain impartiality at the same time as delivering ‘justice’ where one party is clearly disadvantaged. Self-represented litigants take up more time. Court staff have to explain procedures and provide limited assistance and support.

### Controlling the cost of justice

Over the past decade there has been considerable concern about the increased costs of legal action and the operation of the legal system. In response to these concerns, several inquiries have been established. Recommendations to reduce the costs of legal advice and assistance include:

- abolishing barriers between solicitors and barristers
- increasing funding for legal aid
- improving court processes
- reviewing court and tribunal fees
- increasing the use of paralegals
- reviewing the rules that prevents a solicitor appearing with a barrister
- establishing a national taskforce to develop national guidelines and priorities for the delivery of legal services
- asking the Australian Law Reform Commission to conduct a detailed study of self-represented litigants and their effect on the Australian justice system
- coordinating regional legal services
- establishing an independent and regular review of legal aid fee scales
- streamlining the administration of grants of legal aid
- developing schemes to reasonably assist self-represented litigants.
Increased funding would overcome some problems in relation to the provision of legal services. Other changes are necessary to improve access to the law. Several ways to improve the range of legal services have been suggested. These recommendations aim to increase access to the law. They include:

- reducing the criminal trial waiting list
- expanding community legal education programs—for example, police visits to schools—and raising the community’s awareness of the existence of obligations and rights, and the availability of services
- providing visiting legal advice services to hospitals, old people’s homes and retirement villages. This would recognise the difficulties faced in gaining physical access and the need for specialist knowledge of areas of law affecting the elderly
- expanding duty lawyer services
- establishing a statewide, 24-hour phone service for emergency situations
- providing legal assistance for the most disadvantaged in the community when faced with minor civil claims (such as motor vehicle property claims or fencing disputes).

It has been suggested that the introduction of contingency fees would be one way to increase access to the courts. The contingency fee arrangement is common in the USA and Canada. Under this arrangement, no payment is required by the client if the action is unsuccessful. If the action is successful, the client pays the lawyer a percentage of the settlement award.

However, there are some limitations to the usefulness of contingency fees: they do not assist defendants; and in criminal cases, there are no monetary awards to the successful party. Furthermore, the arrangement will only assist plaintiffs who are prepared to risk having to pay their opponent’s costs if they are unsuccessful.

Some lawyers offer a ‘no win/no fees’ service. This scheme applies to personal injury cases in which the injured party is considered unable to afford the costs of legal action. The case will not be taken on unless there is a good chance of success. A High Court decision has held that solicitors and clients can agree to a ‘no win/no fees’ arrangement provided that:

- the litigant has a reasonable course of action
- the litigant does not have the funds to pay fees in the normal way.

activity

**Access to justice—the cost of legal representation**

Read the articles in the case file ‘Access to the law—costs of legal representation’. Prepare a written report on access to justice and the cost of legal representation that:

- outlines the elements of an effective legal system
- discusses the importance of legal representation in an adversary trial
- briefly describes the costs associated with taking court action
- identifies the factors that contribute to the high costs of taking legal action
- describes the extent to which legal aid services enhance access to legal services
- evaluates how the cost of legal representation limits the effectiveness of the legal system
- suggests ways of providing better access to legal services. You might mention changes in legal procedures and/or changes in the provision of legal services. How could these changes enhance the effectiveness of the legal system?
Access to justice, Indigenous people and evidence

A significant difficulty faced by people in gaining access to the legal system is that they find it hard to understand the processes and jargon. This problem is complicated for Indigenous people because they are unfamiliar with the legal system, lack confidence in dealing with it and experience communication difficulties. These communication difficulties are due to the differences that can occur between speakers of Aboriginal English and Australian Standard English. In cases where an Indigenous person’s first language is an Aboriginal language, the problems are exacerbated. Such difficulties can result in a breakdown of trust in the capacity of the system to deliver justice for Indigenous people.

Communication problems occur for a number of reasons. First, there is a lack of qualified interpreters in Indigenous languages. At present, inadequate measures are taken to deal with the language problems of Indigenous people who come before the courts. Due to the acute shortage of accredited interpreters in traditional languages, a person who needs an interpreter is usually obliged to ask a friend or relative to stand in as an interpreter. In the case of Aboriginal English, there is the further complication that listeners may not realise the speaker is not using Australian Standard English.

Interpreter services are provided to various groups in the community who experience difficulty in using English. However, it is easier to provide interpreters for most migrant communities than for Indigenous people. Generally there is a large pool from which potential interpreters for migrants can be drawn. In the case of an Indigenous language, there may be only a few hundred people who speak the language.

Prior to colonisation, there were over 200 languages spoken. The Queensland Department of Justice’s publication *Aboriginal English in the Courts* estimates that today in Queensland only four of these traditional languages still have over 200 fluent speakers. Nine other traditional languages are still spoken as a first language in the regions around Cairns, Cape York Peninsula and the Gulf of Carpentaria, but each has fewer than 200 speakers. The two main language groups in the Torres Strait are comparatively strong. The Western Language, Kala Lagaw Ya, has at least 3000 speakers, and the Eastern Language, Meriam Mir, has about 100.

It is also easier to find interpreters in the migrant community because there is a high rate of bilingualism among migrants as many other countries teach English as a second language in schools. Several of the migrant languages are studied at tertiary level in Australia, which means that significant numbers of the English-speaking community can speak them. There are relatively few tertiary courses in Aboriginal languages. In order to receive a qualification as an interpreter, a person must be accredited by the National Accreditation Authority for Translators and Interpreters (NAATI). Accreditation is not available for all languages.

Stolen generation

Lorna Cubillo is an Aboriginal woman who, at the age of seven, was removed from her family in 1945. Peter Gunner, at the age of six, was removed from his family in 1956. Both spent the following years living in institutions. In 1999, they sued the Commonwealth Government seeking damages for the suffering and illness caused by their removal.

The case was complex and involved novel legal issues. Determined by the Federal Court, difficulties associated with the hearing of evidence from Indigenous witnesses were evident. Early in the hearing, the Commonwealth sought to have the submission by Lorna Cubillo struck out on the grounds that her mother had died prior to the
date of the removal. However, Lorna Cubillo’s use of the term ‘mother’ referred to the woman who, according to Aboriginal culture, assumed responsibility for her care after the death of her birth mother.

Throughout the trial, the cultural norms conflicted with the hearing of evidence within a traditional adversary framework. This is illustrated by the following.

Mr Dreyfus [Counsel for the Applicants, Cubillo and Gunner, to witness]: Napanangka, where was Lorna Cubillo born?
The interpreter: She is asking how she’s going to talk because where she was born is avoidance for Kathleen to say that place name …

Mr Meagher [to witness in cross-examination]: Who did you marry there?

Mr Dreyfus: Your Honour, this is one of the matters that was raised yesterday and there’s a difficulty in asking the … witness to speak the name of her deceased husband. But if that difficulty can be overcome, and there are means to do so…

Mr Meagher: But, really Your Honour, I can understand her being sensitive to a number of matters, but it can’t be allowed to intrude in the process of being able to get evidence out. It’s a very straightforward matter as to who someone married, even if that person may have died later. It places an intolerable burden if, every time I ask her about a name, it turns out that person may have died …

Access, language and justice

Traditional Indigenous languages are spoken regularly by only a few hundred or even a dozen people who rarely use Australian Standard English. However communication difficulties also arise because there is a failure by the legal system to recognise the differences between Aboriginal English and Australian Standard English.

Aboriginal English has evolved from a number of versions of pidgin languages developed since colonisation. Aboriginal English features differences to Australian Standard English in grammar and meaning. These differences may not be immediately obvious to the average speaker of either language. Consequently, in a courtroom setting, people unfamiliar with Aboriginal English may think they can understand what a witness speaking Aboriginal English is saying. Where an interpreter is used, the court may find it difficult to understand conflicting evidence given by a person interpreting these statements. Understanding a speaker’s meaning is not just a matter of knowing the vocabulary and the grammar. In some cases, the interpreter is not just simply translating the language but also taking into account cultural understandings.

Aboriginal and non-Aboriginal cultures have different assumptions about the way that we ask questions to obtain information. In Aboriginal culture, direct questions are used to determine basic background information. However more detailed personal information requires a conversational manner, where the questioner contributes information and waits for a response from the other person.

In court, lawyers tend to use direct questioning as a matter of course. Direct questions may be interpreted by Indigenous people as hostile. This may cause additional distress and confusion for Aboriginal witnesses.

A common cultural practice in Indigenous communities is a respect for authority. This is manifested in a practice of gratuitous concurrence. Gratuitous concurrence is the tendency to agree with the questioner, regardless of whether or not you actually agree with, or even understand the question. This may indicate a willingness to cooperate with an authority or resignation to a situation. This may result in considerable misunderstanding in an adversary trial dependent on examination of facts. As a result, an Aboriginal witness may appear to be avoiding answering questions or to be giving
inconsistent evidence. The problem is illustrated in the following exchange.

Lawyer: I want you to understand that you don’t have to tell me anything or you don’t have to answer any questions at all. Do you understand that?

Aboriginal witness: Yes.

Lawyer: Now, do you have to tell me that story?

Aboriginal witness: Yes.

Lawyer: Do you have to, though?

Aboriginal witness: Yes.

Lawyer: Do you, am I making you tell me the story?

Aboriginal witness: Yes.

Lawyer: Or are you telling me because you want to?

Aboriginal witness: Yes.

Lawyer: Now, I want you to understand that you don’t have to tell me, right?

Aboriginal witness: Yes.

Lawyer: Now, do you have to tell me?

Aboriginal witness: Yes.

In many court cases, questions about times, amounts, numbers, distances and locations are seen as crucial. Aboriginal witnesses are placed at a disadvantage when asked about details of this kind. In traditional languages, concepts of time or quantity are not expressed in the same manner. Aspects of climate, geography or social life may act as reference points for these concepts. Aboriginal people tend to give a list, describe events, or refer to the context. In court an Aboriginal witness pushed to give a quantified statement may give an inaccurate or misleading account of time, distance or number.

Standard English makes use of certain sounds that are not found in Aboriginal English. There is no ‘h’ sound in traditional Aboriginal languages, and ‘f’, ‘v’ and ‘th’ sounds are rare. Many speakers of Aboriginal English either omit or make a sound like these sounds. So ‘h’ sounds can be dropped from, or sometimes added to, the beginning of words. The ‘f’ and ‘v’ sounds can be pronounced as ‘p’ or ‘b’. The ‘th’ sound can be pronounced as ‘t’ or ‘d’. The resulting words can at times be mistaken for words that sound similar but are quite different in meaning. For example if an Aboriginal witness stated, ‘I went straight ‘ome’, it may be interpreted as ‘I went straight on’ (intended meaning) or ‘I went straight home’ (the standard English meaning).

Many speakers of Aboriginal English, confuse past, present and future tenses. Aborigines may indicate the past tense by using particular expressions, such as before, that time or, among speakers of heavier varieties of Aboriginal English, bin, followed by the verb. For example ‘I never put them on’ could mean: ‘I did not put them on’, ‘I don’t ever put them on’ or ‘I haven’t ever put them on’.

In some versions of Aboriginal English, he (or ‘e) is used to mean either he or she. This difference on its own does not cause problems when the context is clear. This can cause confusion. This is particularly evident where ‘fella’ can be used to refer to either a man or a woman.

Body language is also culturally based. In mainstream Australian culture, making direct eye contact and speaking clearly and loudly demonstrate confidence and honesty. Avoiding eye contact can be interpreted as a sign of dishonesty. However, in Aboriginal communities the opposite is true. In a courtroom this may lead to the credibility of evidence given by an Aboriginal witness being questioned.

A possible solution to these problems is to provide ‘communication facilitators’. Facilitators would be people with fluency in a particular form of Aboriginal English and with a good knowledge of Aboriginal culture. In addition they would have an
Making and Breaking the Law

understanding of court procedure and terminology. In the courtroom, facilitators could assist lawyers by pointing out when language and cultural difficulties occur. Facilitators could also sit with the defendant and explain proceedings in terms they would understand.

Based on Aboriginal English in the Courts


7.1 Many Aboriginal people experience difficulties in communicating effectively, both as witnesses in the courtroom and as defendants in the sentencing process. Some of the difficulties experienced by Aboriginal people in being understood accurately in court are shared with other minority groups in the community. However, other difficulties originate in distinctive features of Aboriginal language and culture.

Communication difficulties

7.2 In the most recent census, 94% of the Indigenous population of New South Wales reported speaking English at home. Less than 1% (837 people) reported speaking an Australian Indigenous language. Of those 837 people, 652 also reported speaking English very well, and six not at all.

7.3 However, Dr D Eades, a leading linguistic authority in this area, believes that the great majority of Aboriginal speakers in Australia who reportedly speak English, in fact speak Aboriginal English, which is the name given to varieties of English spoken by Aboriginal people across Australia:

Most Aboriginal people speak some kind of English in their dealings with the law. For most, it is a dialect of English known as Aboriginal English, (hereafter referred to as AE) … There are a number of varieties of AE, or more accurately, there is a continuum of AE dialects, ranging from those close to Standard English at one end (… ‘light’ AE), to those close to the Aboriginal Kriol language at the other (… ‘heavy’ AE). Speakers of heavy AE usually live in more remote areas, and often also speak a traditional Aboriginal language. Speakers of light AE usually live in less remote areas, and often speak AE as their first language. It is believed that most Aboriginal people in New South Wales speak a light form of AE, although there is virtually no detailed research in this state to date.

7.4 Similar to Scottish English or American English, Aboriginal English is generally understandable to Standard English speakers. Eades believes heavier varieties of Aboriginal English are spoken in the north-west and west of New South Wales. Aboriginal English can be distinguished from Standard English in each area of language: sounds or accent, grammar, vocabulary, meaning, use and style. However, in the legal setting, Eades believes that the areas of meaning, use and style create the greatest communication difficulties for Aboriginal English speakers.

7.5 The following are generally identified as areas where communication difficulties may occur between Aboriginal and non-Aboriginal people in a courtroom setting:

■ The courtroom surroundings, in particular its unusual language, procedure, protocol and layout, can confuse and intimidate many people, especially those not from white, Anglo-Saxon backgrounds.
Differences in pronunciation, grammar and vocabulary exist between Aboriginal English and Standard English. These differences are exacerbated by the courtroom setting where the language used is often very technical and much of the verbal communication between parties in the courtroom is governed by specific legal rules.

Aboriginal society values the use of silence in conversation more than in non-Aboriginal society, which can lead to misunderstanding in court when assessing the reliability or credibility of an Aboriginal witness. Silence can be incorrectly seen as guilt, ignorance or evidence of a communication breakdown.

Aboriginal kinship ties are more complex than those of non-Aboriginal society and can influence the giving of evidence in court by an Aboriginal witness, including whether or not he or she is comfortable speaking on certain issues in court.

Aboriginal people tend to avoid sustained eye contact, which can be misinterpreted as defiance or dishonesty in court.

A long recognised communication problem in court for Aboriginal people is the tendency of Aboriginal witnesses to agree gratuitously with whatever the questioner has put to him or her. This occurs in particular where many ‘yes–no’ questions are being asked by someone in a position of authority.

Aboriginal people frequently do not use numbers or other quantitative means of describing events, such as the days of the week, dates or time. Consequently, in seeking answers to specific ‘how’, ‘where’, or ‘when’ type questions in court, Aboriginal witnesses are frequently seen as vague.

Aboriginal culture places a high value on intellectual property, which means that access to certain knowledge is restricted, as is the right to reveal it. This includes, for example, certain matters which cannot be discussed in male–female company. This can significantly impact on the ability of Aboriginal witnesses to give evidence in court.

Some form of hearing loss is very common among Aboriginal people, usually caused by chronic middle ear infections in childhood. The interaction of such hearing loss with the socio-linguistic differences outlined can greatly compound communication difficulties in court.

**Overcoming communication difficulties**

7.6 The Commission considers that language and communication difficulties for Aboriginal English speakers within the criminal justice system may be ameliorated by:

- increasing awareness of Aboriginal culture within the judicial and executive arms of the criminal justice system; and
- employing linguistic and cultural experts in the sentencing regime.

**Language, disability and fitness to plea**

Roland Ebatarintja was charged with murder and other offences committed at Alice Springs in February 1995.

Roland Ebatarintja is a deaf and mute Aboriginal youth who was born at Alice Springs. At the time of the offences, he was 16. His parents are both Arrente speakers. The family usually spoke Arrente. Roland Ebatarintja is unable to communicate except by using his hands to ask for simple needs, such as food or money.
At the time of the hearing of the murder charges he did not know what he was charged with, and was unable to communicate with his lawyers or to follow court proceedings.


‘If the defendant does not speak the language in which the proceedings are being conducted, the absence of an interpreter will result in an unfair trial. In *R v. Willie*, Cooper J is reported to have ordered four Aboriginal prisoners to be discharged on a charge of murder when no interpreter could be found competent to communicate the charge to them.

‘Given the modern purpose of committal proceedings, the words “in the presence or hearing of the defendant” should not be treated as having only a formal significance. When regard is had to the purpose of committal proceedings and the context of the *Justices Act*, particularly s. 110, those words are to be construed as meaning that the defendant is able to understand what “facts and circumstances” are being alleged against him or her. The text of ss. 106 and 110 and the nature of the proceedings indicate that it is insufficient that the evidence is given in the physical presence or hearing of the defendant. Rather it is necessary “that the defendant, by reason of his presence, should be able to understand the proceedings and decide what witnesses he wishes to call, whether or not to give evidence and, if so, upon what matters relevant to the case against him.” …

‘… In our view, upon the facts which are common ground in this case, the Magistrate (the first respondent) would have no authority to commit the appellant for trial and has no power to take evidence which is not taken “in the presence or hearing of the defendant”. That being so, she has no authority to continue with the proceedings …’

Since 1995, he has been charged with a number of serious violent offences, many of these offences involve violence towards his wife. In February 2002, he was charged with three counts of aggravated assault. This time a Northern Territory Supreme Court judge refused his application for bail. In refusing bail Justice Mildren said: ‘There comes a point where the protection of the community is paramount and I think now is that time. Accordingly, bail is refused … When the present charges are dealt with, they will be dealt with by ex-officio indictment and the question of his fitness to plead will be raised again.

‘In April 2002, Mr Ebatarintja was under 24-hour voluntary supervision in Alice Springs, a decision made by his joint guardians, his grandmother and the Minister for Health. On the 24 April 2002, the Northern Territory Attorney-General, Peter Toyne announced changes to the Northern Territory Criminal Code following the discharge of Roland Ebatarintja in March. These changes gave courts in the Northern Territory the power to order custodial or non-custodial supervision of people who are unfit to stand trial but are deemed a danger to the community. If the court determines that an alleged offender is unfit to stand trial, it will nonetheless be able to consider evidence to determine whether on the balance of probabilities an offence was committed. If the court determines an offence has been committed, it will have the right to order custodial or non-custodial supervision of the offender’.

The following extract from the Northern Territory Parliament *Hansard* Criminal Code Amendment (Mental Impairment and Unfitness to be Tried) Bill (Serial 56), May 2002, reflects the concerns raised during the debate of the proposed amendments.
Mrs BRAHAM (Braitling):

'Mr Deputy Speaker, I welcome this Bill and commend the minister for introducing it. I do not have the technical background of the member for Araluen on the points she raised, but after the briefing I felt comfortable with the spirit and the intent of the Bill.

I welcome these amendments on behalf of the people of Central Australia who have had to bear the consequences in the past decade of at least one man who has been deemed unfit to stand trial. He was discharged by the court and went on to commit further crimes of random violence. I am hoping, minister, that these amendments to some extent will ensure that people in the community are protected from those unprovoked, violent acts committed by people who, for reasons of physical or mental impairment, are not able to stand trial in the ordinary way.

If I can just take the case of Roland Ebatarinja, and how circumstances would have been different if these amendments had been in place a year ago. Roland, as we all know, is a deaf mute and in the past has been ruled unfit to stand trial because of his inability to understand the English language or the legal proceedings. Although that may be true, it does not mean that Roland is not intelligent or that he does not know that he is doing something wrong. It is just that we appear to have no way of knowing whether Roland understands what he is doing or what we are saying to him. According to a recent court report the Supreme Court judge, Justice Dean Mildren, also found it hard to believe that Roland cannot be made to understand that he cannot carry a knife when he can actually learn complex computer games. But what is clear, regardless of Roland’s intelligence or what he knows or what he doesn’t know, is that he poses a significant threat to his family and the community.

Earlier this year, and I am not sure if the minister was in his office at the time, but on the street corner from my office, Roland was witnessed stabbing three people quite cold-bloodedly. One of the victims was seriously wounded. This, of course, occurred less than two years after he was discharged from court on a murder charge because, at that time, he was also declared unfit to stand trial.

Under this new regime, if he had been found guilty at a special hearing, he would have been sent to jail for at least 15 years, and would not have been on the street outside my office in February of this year. He was arrested for those stabbings and was remanded in custody but, when he appeared in court in March, he was discharged from court again ruled unfit to stand trial. I have to admit the reaction of community was grave concern because here was this man back on the streets. They seemed to think that somehow or other the system had let them down, to allow this man to roam free. It was certainly true that he did cause some concern in one of the camps where he was staying. The minister may even have visited that camp; I am not quite sure if it was him or one of his advisors. At present, Roland is under a voluntary supervision order but that is something he can walk away from at any time and commit yet another violent crime for which he would not face the court ...

The rights of a person under a supervisory order are protected by regular reviews. I also welcome the provision that allows for an Aboriginal person’s community to be consulted before any orders are made that might directly affect them. It is difficult, as far as I can see, to define in the Act who that would be. In the case of Roland it was certainly his family who has been involved in that consultation, and his grandmother, and he is under her supervision. But we need to have that direct consultation with the family and the people of the community who are most concerned with this case. I welcome that because I believe the families also will be able to put forward their point of view, the concerns that they have, and whether they are actually able and capable of maintaining that supervision'.

Courtesy of the Northern Territory Parliament, Hansard, 23 May 2002. Criminal Code amendment (Mental Impairment and Unfitness to be Tried) Bill (Serial 56)
Summary

Adversary system

The dispute resolution system used in courts throughout common law countries is based on the concept of two opposing parties conducting a verbal battle for the truth before an impartial body.

Key elements of the adversary trial

- **Role of the individual**—each party is responsible for the preparation and presentation of their own case and will present the best arguments to support their case.

- **Role of legal representation**—in most instances individuals will delegate the role of preparing and presenting their case to a legal representative.

- **Role of the adjudicator**—either a judge or magistrate sitting alone or a judge and a jury. The judge is responsible for ensuring that both parties obey the rules of the court, application of the rules of evidence and procedure, ensuring that the burden of proof is satisfied and, in criminal cases, determining the sanction. In criminal cases in which there is no jury, the judge decides guilt or innocence. In criminal cases in which there is a jury, the judge will sum up the facts and relevant law and determine the sanction if the defendant is found guilty. In a civil case in which there is no jury, the judge will determine liability and the remedy. In a civil case in which there is a jury, the jury may be asked to determine liability and the level of damages.

- **Rules of evidence and procedure**—reliant on the presentation of oral evidence that can be cross-examined and tested for truth in court by both parties. Evidence is presented on oath. The best evidence rule means that evidence should be
presented orally by an eyewitness. Procedures provide for the examination, cross-
examination and re-examination of witnesses in court. Special rules apply to the
taking of expert evidence and confessions.

- **Burden and standard of proof**—criminal case: prosecution must prove the case
  beyond reasonable doubt; civil case: plaintiff must prove the case on the balance of
  probabilities.

**Alternatives—inquisitorial trial**
The inquisitorial model of dispute resolution is used in civil law countries. It varies from
country to country, but general features include:

- the judge controls the investigation of the case and the examination of evidence
- it is not bound by strict rules of evidence. Witnesses can tell their story in response
  to questions put by the judge
- the use of written statements
- the proceedings may be adjourned to allow for further investigation of issues
- as the judge takes a more active role, parties do not have the same reliance on legal
  representation.

**Advantages and disadvantages of the adversary system**

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<thead>
<tr>
<th>Advantages</th>
<th>Disadvantages</th>
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<tr>
<td>Individuals have complete control of their cases and therefore are responsible for the proceedings.</td>
<td>Presentation and preparation of cases can be costly for individuals. This may limit willingness to exercise rights.</td>
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<td>Parties acting out of self-interest will present the best possible case to support their side.</td>
<td>Parties are free to present only that evidence which best supports their case—not all evidence.</td>
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<td>The impartial role of the adjudicator ensures that all parties obtain a fair hearing.</td>
<td>People without legal representation are disadvantaged.</td>
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<tr>
<td>The impartial role of the adjudicator ensures that the courts are independent of political influences.</td>
<td>Taking of oral evidence is time consuming and contributes to the costs of court action.</td>
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<td>The rules of evidence and the process of questioning ensures that the best reliable evidence is presented to the court.</td>
<td>The risk of costs should a party lose their case may deter individuals from exercising their rights.</td>
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<tr>
<td>A single continuous hearing ensures that issues are considered as a whole.</td>
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<tr>
<td>Parties bear the costs of their actions.</td>
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<tr>
<td>Rules of evidence and procedure ensure that all cases are treated in the same manner.</td>
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**Problems**

**Costs of legal representation**

- Reasons for high costs of legal services include the obscurity and inaccessibility of legislation, complexity of the common law and court practices.

- Even if you win a case, not all the costs of a legal action may be covered. Costs are awarded at the discretion of the courts. The court scale fees set the fees that may be charged. However, solicitors and clients may enter into their own arrangements about the fees to be charged.
‘No win/no fee’ arrangements can increase access to legal services. However, the plaintiff still runs the risk of being found liable for the costs of the other party should they lose the case.

Court practices can contribute to costs. For instance, on a hearing date, lawyers need to be available for the whole day. This is a cost to the client.

Legal aid services

Victoria Legal Aid:
- funded by both state and federal governments
- provides legal advice, legal assistance, duty lawyer services, prison visits and education and information services
- has guidelines for legal assistance that are very restrictive with many cases not obtaining legal assistance. Eligibility is determined by a means test and a reasonableness test
- will not fund criminal cases if there is not a reasonable chance that the person will be found ‘not guilty’ and the offence is punishable by imprisonment or a fine greater than $1000
- grants legal assistance in civil cases very rarely
- sets a monetary limit on legal assistance in Family Court cases.

Community legal centres

These centres operate throughout Victoria and offer free legal advice, promote legal education, lobby for changes in the law to make it more equitable and encourage community participation.

Aboriginal Legal Service (ALS)

ALS provides a full range of services to Aboriginal people. All Aboriginal people and their spouses/de factos are entitled to use the service. It also extends to any person who identifies with the Aboriginal community. There is no strict means test.

Civil law assistance scheme (LawAid)

LawAid supplements the legal aid system by providing assistance in civil matters. No up-front fees are charged. If the litigant is successful the fees are taken from the amount awarded. If the litigant is not successful no fees are charged. Legal Assistance Scheme assists in ‘meritorious’ cases by negotiating for lawyers to provide assistance on a pro bono basis.

Recent reforms and recommendations for reform:
- use of contingency fees in civil cases
- abolition of the barrier between barristers and solicitors
- increased funding of legal aid
- increased use of paralegals.

Indigenous people and evidence

There are a number of factors that limit the capacity of Indigenous Australians to access the legal system. These include language problems and cultural differences as well as differing experiences of the law and different levels of understanding of how it operates. These factors limit the extent to which individuals can be treated equally or fairly during an adversary trial. Difficulties experienced by Indigenous people in their dealing with the adversary trial include:

- inability to obtain an appropriate interpreter for a traditional language
- lack of understanding by the lawyers, judges and juries of the difference between standard English and Aboriginal English when an Indigenous person gives evidence
- lack of understanding by the lawyers, judges and juries of the cultural differences when an Indigenous person gives evidence
- unfamiliarity with court processes and procedures.
revision questions

1 Outline in detail the key features of an adversary trial.
2 How does the adversary trial provide for a fair and equal hearing for all individuals?
3 Why are the complex rules of evidence important to the operation of the adversary trial?
4 What are the main advantages of the adversary trial?
5 What are the main disadvantages of the adversary trial?
6 Why is legal representation often necessary for an individual engaged in an adversary trial?
7 Compare and contrast the operation of the adversary trial with the conduct of an inquisitorial trial.
8 How might the operation of the adversary trial be improved?
9 Critically analyse the extent to which aspects of the inquisitorial trial would improve the operation of the adversary trial.
10 What features of an adversary trial contribute to high legal costs?
11 No system or procedure for hearing a trial is totally adversarial or inquisitorial. What aspects of our dispute settlement processes could be described as inquisitorial? Do these aspects make our system more just?
12 The role of the judge in the adversary trial is sometimes criticised as being a waste of legal expertise. Do you think that a judge should have wider powers to offer legal advice and direction to the parties to a trial? Justify your answer.
13 What problems or difficulties may individuals experience in gaining access to justice in an adversary trial?
14 Suggest ways in which access to justice in an adversary trial may be enhanced.

sample exam questions

1 The difference between the adversary trial and the inquisitorial trial has been likened to the difference between a Rolls Royce and a Holden. We may all want a Rolls Royce but most of us can only afford a Holden. When we think about the effectiveness of the adversary trial in resolving disputes we need to ask: What kind of justice can we afford? How often, and in what circumstances, do we need a Rolls Royce?
   a Describe four key features of the adversary trial. [4 marks]
   b Compare and contrast the operation of the inquisitorial trial with the operation of an adversary trial. Critically analyse the extent to which the features of the adversary trial contribute to the effectiveness of the legal system. [8 + 8 marks]

2 ‘Access to the courts may be open in principle. In practice, however, most people find their legal rights severely compromised by the costs of legal services, the baffling complications of existing rules and procedures and the long, frustrating delays involved in bringing proceedings to a conclusion … There is far too much law for those who can afford it and far too little for those who cannot.’
   Derek Bok ‘The law and its discontents: A critical look at our legal system’
   The Thirty-Seventh Annual Benjamin Cardozo Lecture, New York, 9 November 1982
   a Outline the features of an adversary trial that guarantee a fair trial. [8 marks]
   b Analyse two limitations on the effectiveness of the adversary trial. Explain and justify two possible reforms to the operation of the adversary trial. [4 + 8 marks]