

# The history of australian adversarial system

[Law](#), [Criminal Justice](#)



Throughout history, many changes have been made to mold the Australian criminal justice system into what it is today. The Adversarial system is not only recognized in Australia but worldwide. The roots of the adversarial system date from as far back to the colonial period. Since the colonial period, the Australian system has adjusted by removing and adding components, to ultimately create an effective and fair criminal justice system. Characteristics of the adversarial system include fair trial, the accused right to remain silent at trial, as well as rules of evidence. The Adversarial system is basically a means for both parties to present their case with supporting evidence. This type of system allows the judge to make decisions based off the presentation of the case rather than doing the investigation(Adversarial system, 2018). Both of the parties are essential to have an adversarial system. Along with the judge the jury will also get to hear the case presented. This system, is a team effort from police officers, to judges, to lawyers, and jurors. Because of the influence from the colonial period, Australia today has taken its key characteristics of their criminal justice system and formed laws, while giving its citizens a fair trial, and ultimately the country its own voice and order. To begin, fair trial, being a part of the system has definitely come a long way than when it originally was introduced in the 1840's. There are different roles in the criminal justice system that include a judge, a prosecutor, and the one being accused.

These three roles are essential, to make up a fair trial. Each role has its own tasks and duties to abide by when a trial is taking place. A judge is who ensures a fair trial, decides on what questions are being asked, and ultimately is the person in charge. The judge is the ultimately who decides

what sentence is appropriate for each case. The prosecutor is the person who takes on the responsibility of presenting the case to the jury and the judge. Obligations of the prosecutor involve disclosing all the evidence relevant to the case as well. If evidence seems to not be admissible in court the judge may throw out evidence. The prosecutor may also object to that evidence. The accused will plea at the arraignment hearing, declaring his or her guilt or innocence. The accused will more than likely do as the defence says when being advised on whether to admit guilt or innocence. The accused does not have too big of a role unless he or she is questioned by the judge or is being cross-examined by the prosecutor. By being cross examined, the accused opens him or herself up to any questions. Since the accused is not required to disclose any evidence, more than likely he or she will remain silent as that is their right to do so. However, once the accused is questioned in a cross-examination, because he or she is under oath, the truth has to be revealed despite the evidence being self incriminating or not. The defence counsel during a criminal trial is there in the “ best interest of the accused”. The jury, will also look at the evidence presented and decide guilt or innocence when appropriate. The jury is also another component of a fair trial. Jurors are supposed to be unbiased when presented evidence.

Additionally, the earlier colonial period, was not as forgiving to its citizens being accused of a crime. Today the goal is to have a fair trial, but earlier on in history, fairness was not a main concern. Sometimes representation was not available. In the colonial New South Wales, activist Edwin Withers fought for a fair trial after he, himself, was wrongly accused of committing crime and was sent to Tarban Creek Lunatic Asylum. After being released his goal

was to shed light on the injustice. He was released on a writ of Habeas Corpus. Upon release, his goal was to advance fair trials and implement more representation for the working-class. Thus, the results included the passing of the Jervis Act of 1848. The Jervis Act, re-examined how the court system went about issuing warrants, looking at evidence, and convictions. This became a reality when three separate pieces of legislation were brought together by the British parliament. This was seen as a law reform to the people of New South Wales.

Following fair trials, another characteristic, Rules of Evidence, is quite important in today's Australian criminal justice system. Evidence can be seen in many forms like witness statements, DNA, photos, etc. More importantly witnesses as evidence can be very compelling when presenting a case. Sometimes when presenting a case, people might see it as a "show". Having a witness testify can be very moving, but because of how influential having a witness statement is, steps have to be taken to measure whether or not a witness is competent to stand trial. Also, a witness has to be relevant to the case. According to Journal of Law and Medicine, written by Roy G Beran, witnesses can often be seen as "hired guns" in favor of the defendant, making his or her case stronger. Witnesses are a tool. The witness speaks in front a jury and is under oath. Being under oath means that legally one cannot lie under any circumstances. Speaking under oath was first seen as a method to get people to not lie. It was a psychological tool that was meant to convince people that morally they should tell the truth. In today's society, lying under oath, also known as perjury, is a crime. Today, perjury is equivalent to a maximum ten years in prison.

In addition, the rule of evidence was not always this way. Back in the colonial period, there was a problem when it came to indigenous people. Because the indigenous peoples' beliefs did not correlate with the rule about lying under oath, evidence would be seen as inadmissible. The indigenous people did not believe in a higher power that would bring a spiritual consequence. Today, lying under oath, no matter what the belief is, as previously stated, is punishable by the criminal justice system. Taking a step back into history, in Britain, the jurors were familiar with the defendant, making them completely biased. Comparing that to today's system, jurors have no knowledge of the case and are completely unbiased, for the sole purpose of making a decision based only on facts and statements presented in the courtroom. Jurors, in earlier history, were locals that knew the accused. That would hinder decision making in the jury and moving forward to today, and how the improvement has been made for a fair trial and system.

Along with those two characteristics, another important one, is the accused right to remain silent. Growing up in the United States, one is taught that the right to remain silent is also known as their Miranda rights. Police officers have to mirandize someone upon arrest, informing them of their right to an attorney, and of course the right to remain silent. Like the United States, Australia also has adopted the right to remain silent. In *The Accused Right to Silence: No Doesn't Mean No* by Lee Streeter it is stated that the current caution being used is "too tied to the common law wording". It is not required to caution someone upon arrest, but informing someone of their right to remain silent is important for the accused. By being aware of this

right, someone under arrest may want to stay silent until a lawyer is present to defend him or her.

The right to remain silent may be exercised not only in a court hearing but in an investigation. However, the Australian criminal justice system does require a videotaped recording of any interviews the accused was involved in. During these interviews if a confession or admission was made then it is valid in court. Since the accused has a right to remain silent, they can exercise that right with the police officer that is interviewing him or her. Also, by refusing to answer any questions, the accused has the power to stop that interview. Police officers will end the interview, if the accused does not want to speak. In sum, the right to remain silent is a right that not everyone knows they have so in today's society having an officer tell someone under arrest that the option to remain silent is available, is essential especially in a fair trial.

During the 1900's there was also lack of representation. Although one has the right to remain silent, without representation, there would be no way for the defendant to remain silent while arguing their innocence. Having this problem, could potentially cause someone to be wrongfully convicted like Edwin Withers, previously mentioned. That lack of voice is something that is not a problem now but a major improvement from how it used to be. Up until 1961, between a quarter and a third of defendants remained unrepresented. Having that right of representation is something that makes or breaks a case. Views on this matter were expressed in 1916 when the Melbourne Age reproduced a story written by an ex-convict in New York. To sum it up, the

story opens up some truth about being involved in a criminal trial. If someone had the funds to afford a lawyer they were more than likely going to be acquitted (Shibboleth Authentication Request, 2018). This is where the injustice is and how the adversarial system is a better way of operating not only for officials in Australia but also for the citizens of the country. Learning about how the Australian adversarial system has come to be over the years is like looking at a long timeline with a lot of changes, but because the adversarial system is a system based on fairness and equal opportunity for both parties, that is why this type of system has been adopted by other countries like the United States and Canada. By looking at these characteristics it is clear to see how the Australian criminal justice system has evolved and made changes throughout the years. The history behind the adversarial system is important because that is where the beginning of today's system began.

This history highlights key points and characteristics of how a fair trial began or how rules of evidence compare from then to the present day. Of course there are other components to the Adversarial system, and other key characteristics that have contributed to shaping the system to what it is. Although, the key characteristics have changed, they stem from the roots of the colonial period. Without the history of changes law reforms, the system today might not be what it is. Having past cases shed light on injustices has sparked that change. Influences from all over the world spark this change. These characteristics of the Australian adversarial system are what make it so successful today. This is also why the Australian criminal justice system has been successful thus far, by having a system with steps involving

arrests, and investigations that lead to a court hearing. Overall, the Adversarial system has been a big influential factor to Australia. References Macquarie Street. (2017, November 03). Adversarial system.