



Critical Policy - 5
JUSTICE REFORM - ADVANCED LEGAL SYSTEM

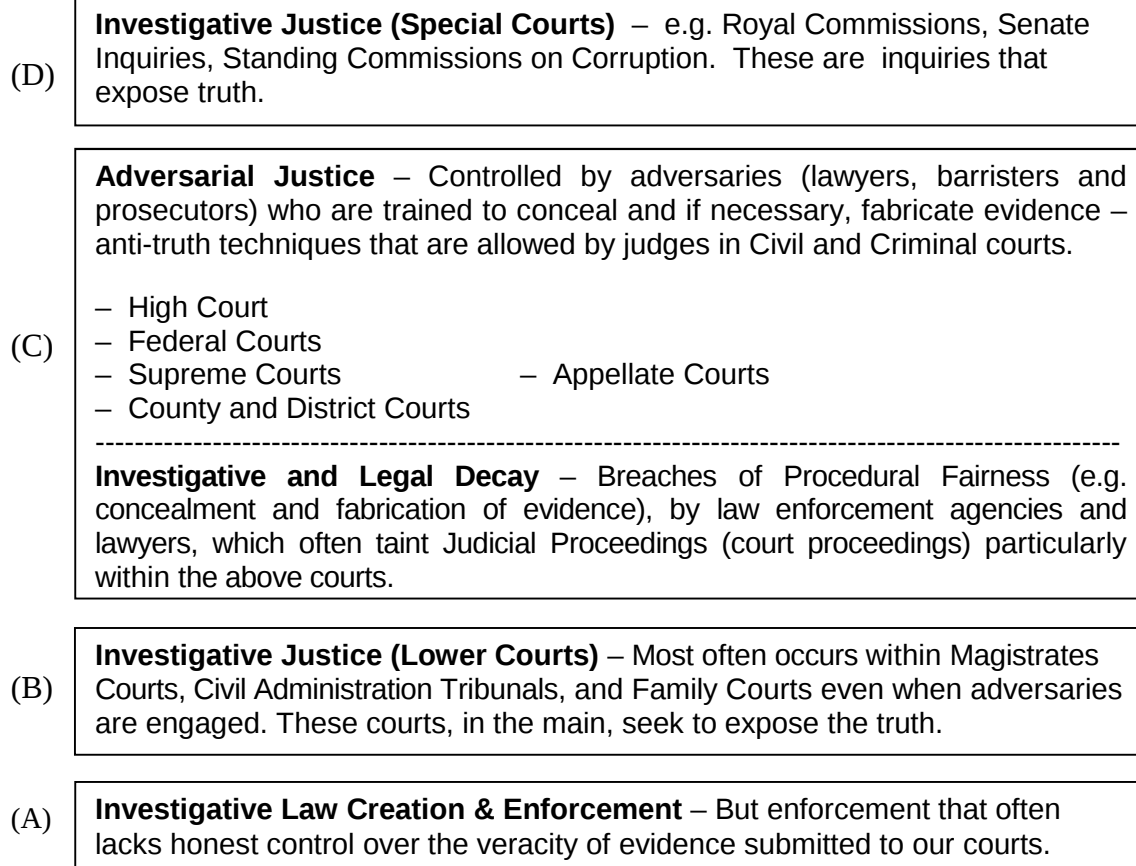
AUSTRALIAN LEGAL SYSTEM (Current)

The Federal Constitution of The Federal Party of Australia defines “Australian Legal System” in this manner:

“**Australian Legal System**” or “**Legal System**” means the conflicting dualism which initially embraces the investigative techniques required to create and enforce law, and then subjects its findings, in the main, to Judicial Proceedings within a predominantly Adversarial – not investigative – Justice System.

This diagram depicts that definition and more:

AUSTRALIAN LEGAL SYSTEM (Current)



For the sake of keeping an explanation as brief as possible, we have depicted the Australian Legal System diagrammatically, and divided it into four components. But before beginning an explanation of these components, there is a **four part premise** adopted by The Federal Party of Australia which needs to be emphasised:

1. Natural Justice and Procedural Fairness

Firstly, the Federal Party defines Natural Justice as follows:

“Natural Justice” means Justice afforded all Australians which is not restricted by cost, social status, or bias in whatever form; Justice which is absent of breaches of Procedural Fairness as it flows into and throughout Judicial Proceedings, and Justice which is intolerant of any adverse external influences capable of eroding the purity of human reason alone.

That’s our definition of Natural Justice; a term which embraces Procedural Fairness. And there are many members of the Australian Judiciary who would agree with us that Natural Justice should be the umbrella over our Legal System, beneath which, Procedural Fairness prior to, and within court proceedings, coexist.

Whereas another school of thought (not the Federal Party’s) says Natural Justice and Procedural Fairness are one and the same. We will get to a definition of the latter in a moment. And so, the Federal Party’s stance (premise) is that Natural Justice *is* the umbrella over the Australian Legal System and, in time, over an Advanced Legal System (defined shortly) in which the entire legal process in both systems starts with Procedural Fairness.

2. **Legal System and Justice System**

The second premise adopted by the Federal Party involves the terms, “Australian **Legal** System” and “Australian **Justice** System”. Again, these terms may be seen by some as interchangeable. We say that our Legal System is the umbrella over the whole legal process, only part of which is our Justice System, which comes into being when cases (matters) come before a court – not prior. And this is not semantics; it is simply a rule (premise used by the Federal Party) in its treatment of Justice Reform.

3. **Judicial Proceedings**

Thirdly, the term, “Judicial Proceedings”, is taken by the Federal Party to describe **all** court proceedings, not just the components known as hearings, trials or appeals. From the moment charges are laid or summonses, writs, or applications have been filed, these legal processes have entered Judicial Proceedings which may well extend to appellate courts.

4. **Adversarial**

And finally, the term, “adversarial” is not only describing the involvement of adversaries (lawyers, barristers and prosecutors) within our Legal System, but also alludes to the legal processes – often costly, unnecessary, and open to breaches of Procedural Fairness – engaged in by these legal practitioners in the lead up to, and throughout Judicial Proceedings.

Note that some words used solely or within phrases such as “Australian Justice System” are spelt with initial capital letters. This has been done to denote that many of these words and phrases have been defined in the Federal Constitution of The Federal Party of Australia.

With this four part premise now in mind, let’s start our brief description of the Australian Legal System from the foundations up.

(A) – Investigative Law Creation & Enforcement

Irrespective of the investigative techniques used to arrive at laws which are legislated by our Federal, State and Territory governments, there are often personal biases and attitudes which can adversely affect the creation of those laws. But, in essence, our investigative bodies which are drawn from academia, government agencies and our

courts, do a difficult but satisfactory job of keeping up with social demands in their everchanging forms.

And the enforcement of these laws through Federal, State and Territory police, the Australian Competition and Consumer Commission (ACCC), the Australian Securities and Investments Commission (ASIC), the Australian Taxation Office (ATO), Offices of Fair Trading (OFT), to name some, is carried out – putting aside some human weaknesses – with largely acceptable precision. Naturally, we all understand that there can be far tighter checks and balances... nonetheless, the machinery is large, **investigative**, and overwhelmingly needs to be recognised as servicing the needs of Australians. And these services are underpinned by men and women who are dedicated and vehemently proud to serve their nation.

However, it only takes a handful of rogues to tarnish the integrity of so many, and cause breakdowns in the delivery of Natural Justice.

The **Fundamental Breakdown** (i.e. Investigative and Legal Decay) in our predominantly adversarial Legal System lies within Procedural Fairness. And this is how the Federal Party defines that term within its Federal Constitution:

“**Procedural Fairness**” means the fairness of investigative techniques used by officers within the Australian Public Service, and the fairness of procedures adopted by the Legal Profession, the evolving results of which may initially precipitate Judicial Proceedings and then influence the outcome of those proceedings..

From the beginning of a criminal investigation to the point of criminal charges being laid [i.e. the commencement of Judicial (court) Proceedings] the opportunity to breach Procedural Fairness by:

- (a) concealing evidence;
- (b) destroying evidence;
- (c) fabricating evidence;
- (d) coercing key witnesses; and
- (e) engaging well-paid but biased expert witnesses

is an opportunity sometimes taken by law enforcement agencies against defendants (accused).

Note that the above breakdown, which too often occurs within Investigative component (A) becoming the foundation of component **(B) Investigative Justice (Lower Courts)** and component **(C) Adversarial Justice**, also applies (substantially) to **civil investigations** prior to these matters entering our courtrooms (i.e. commencement of Judicial Proceedings). And in the instance of these civil matters, the Applicant or Plaintiff (depending on which court) may not necessarily be the law enforcement division of a government agency such as the Australian Securities and Investments Commission (ASIC) or the Australian Competition and Consumer Commission (ACCC); the Applicant or Plaintiff may be a powerful corporation or individual trying to crush a smaller competitor.

The opportunity to abuse our adversarial Legal System by breaching Procedural Fairness is left far too open. A true investigative (i.e. hybrid inquisitorial) Advanced Legal System would close the door on 95% of these opportunities. (No system is perfect while those who administer it are human.)

(C) – Adversarial Justice

But the breakdown (adverse effects), flowing from the gravity of breaching Procedural

Fairness, occurs predominantly in that component of our adversarial Legal System known as **Adversarial Justice**, component (C). At this stage criminal and civil matters are now before our courts, not necessarily at the stage of trial; that could take some time within our Adversarial Justice System. Nonetheless, it's game on, and this is where skilled lawyers, barristers and prosecutors (all of them, adversaries) can strut their stuff with little or no regard for the law or human rights. This is where highly paid legal teams can determine the outcome of Judicial Proceedings through trial and beyond. This is where wealthy criminals buy their brand of justice and walk free; and where powerful government agencies or corporate high flyers achieve successful results irrespective of those they hurt, unlawfully.

So, this major breakdown is the negative within our Adversarial Justice System that can only be overcome by adopting the investigative courtroom techniques which largely silence adversaries as the judge, or judges, ask the questions, not the orators who are trained to manipulate witnesses and outcomes.

Of course, this major breakdown which occurs in our Adversarial **Justice** System is simply the onflow effect of the fundamental breakdown in our adversarial **Legal** System; that is, breaching Procedural Fairness prior to Judicial Proceedings. No positive, fair outcomes could ever flow through our courts from these initial breaches.

(B) – Investigative Justice (Lower Courts)

But let's get back to the investigative components in our predominantly adversarial Legal System. The fact that the greatest **potential** damage to Australians can occur within component (C), Adversarial Justice, does not mean that a high volume of cases in lower courts aren't given Investigative Justice. Magistrates and members adopt a no-nonsense approach to seeking the truth in their courts. Adversaries are often overridden as magistrates and members turn to witnesses and ask direct questions, allowing the answers to be given in narrative form; in effect, letting witnesses talk until the magistrate or members can weigh up what is fact and what isn't, without interference from manipulative adversaries.

It would be fair to say that component (B) of our adversarial Legal System is loaded with **Investigative Justice**, putting aside the potential for grave breaches of Procedural Fairness in the lead up to Judicial Proceedings; and it is this Investigative Justice – albeit within our lower courts – which is, in part, aligned with the Federal Party's definition in its Federal Constitution:

"Investigative Justice System" means the justice system advocated by the Organisation which embraces key elements of the European inquisitorial justice models: a system which would greatly reduce the necessity for legal practitioners during Judicial Proceedings; would require a substantial increase in the appointment of trained judges; would minimise the incarceration of innocent persons; would convincingly prevent the freeing of known criminals; would ensure the expedient handling of cases flowing through Australian civil and criminal courts; would demand that truth is sought; and would, by the nature of the justice system itself, deliver Natural Justice to all Australians without the impediment of high costs.

Naturally, this definition alludes to there being more to Investigative Justice than the truth-seeking techniques employed by magistrates, members, and some judges; and there is more, including the elimination of cost building legal tactics (e.g. written pleadings and discovery) leading up to trial. There is also no adversarial interference. And the term, "adversarial" doesn't just apply to adversaries who tend to control our major courts; the term also incorporates these highly lucrative legal manoeuvres as well. Premise number 4 defined "adversarial" earlier on.

(D) – Investigative Justice (Special Courts)

It could be said that in our predominantly adversarial Legal System there lies a form of Investigative Justice within certain courts that more closely emulates courtroom justice within the European inquisitorial legal systems.

Yet, for our diagram of the Australian Legal System to accurately depict the amount of true Investigative Justice currently available to Australians, component (D) should be proportionately down-sized. In the Federal President's address he briefly mentions the Justice Morling Royal Commission which overturned the findings of courts of appeal, including the High Court of Australia. He was one man; a judge hunting for the truth. There was no jury drowning in a sea of bewildering forensic evidence. No half-smart theatrics on the part of adversaries. No concealment or fabrication of evidence. No judge dozing off at the Bench. Just good old-fashioned questioning of lay and expert witnesses.

Millions of dollars that were poured into the prosecution of Lindy and Michael Chamberlain and millions more into the purses of defending lawyers and barristers could have been saved. Justice Morling arrived at the right conclusion first time around. Left to him at the outset, Lindy would never have been put behind bars.

The tragedy is that such Royal Commissions and similar inquiries (e.g. Senate Inquiries and Standing Commissions on Corruption) lie in the stratosphere of our Legal System, and come at a cost, not just in money but time. It takes years to bring it on; usually through the pressure of a ground swell of support from interest groups and the general public. But within Europe, this Investigative Justice is woven into everyday life – it's the norm.