# THE POSITION OF ACCUSED PERSONS UNDER THE COMMON LAW SYSTEM IN AUSTRALIA (MORE PARTICULARLY IN NEW SOUTH WALES) AND THE CIVIL LAW SYSTEM IN FRANCE

BRON MCKILLOP*

## I INTRODUCTION

In comparing the position of accused persons in the present legal systems of common law Australia[1] and civil law France, it is necessary to appreciate the legal cultures in which those two systems have evolved. This involves some understanding of the historical developments and the consequent governmental and societal arrangements that have shaped those cultures. Examples of this may be found in the development of the jury in England (first as witnesses, then as judges of the facts, having significant responsibility as laypersons for the administration of justice, and also for orality in the legal system and the perceived need of exclusionary rules of evidence), and in the impact of the French Revolution from 1789 and the advent of Napoleon (downgrading the judicial power previously exercised by the *Parlements,* upgrading the legislative power with the resultant all-embracing Codes, and confirming the importance of a powerful prosecuting authority (*Ministère Public*) but also of an impartial judicial investigation (by a *juge d'instruction*)). Developments such as these have led to differing attitudes within the two legal systems to the relative importance of the trial as opposed to the investigation, to orality as opposed to the documentary, to openness as opposed to secrecy in proceedings, to methods of establishing guilt and more generally to differing attitudes to the relations between individuals and the state.

Matters such as these have resulted in identifiable, differentiating characteristics as between the two legal systems. One comparativist, Mirjan Damaška, has perceptively and instructively related modes of organisation of state authority in the two systems to criminal procedure in those systems. The organisation of state authority in the common law system he characterises as

* Law School, University of Sydney. I am indebted to Magalie Tréguer of Freshfields Bruckhaus Deringer, Paris, for keeping me updated on changes to French criminal procedure.

1 I will focus my attention on the legal system in the state of New South Wales (NSW) as representative of the common law system in Australia. It will soon become apparent that much of the relevant NSW law is now in statutory form, but this has generally been derived from the pre-existing common law.

coordinate, with mild ordering of authority through variably-trained, decentralised operatives including laypersons, flexible rules allowing for discretions and an informal and public style (incorporating orality), all aiming for particularised justice through operatives close to the life situations involved in cases being individually processed. The organisation in the civil law system is characterised as hierarchical, with centralised and rigidly-ordered authority, determinative rules, certainty of decision-making, professional operatives, official documentation, bureaucratic techniques and secrecy.[2] These modes of organisation of authority are then found to be reflected in the criminal procedures of the two systems. The same commentator, querying the common descriptions of legal proceedings in common law systems as 'adversarial' and in civil law systems as 'inquisitorial' has suggested, as more revealing, the labels 'party contest' for the common law system and 'official enquiry' for the civil law system.[3]

Accepting the labels 'party contest' and 'official enquiry' and the Damaškan notion of relating criminal procedure to types of state authority as appropriate for the Australian and French criminal justice systems respectively, we might then apply them to the processing of cases in the two criminal justice systems. This will reveal an essential difference between the two systems.

If the Australian system is understood as a contest between the prosecution and the defence – with a finding of guilty or not guilty as the outcome – then the focus of the system will be upon the trial. The evidence and the arguments for each side will be mustered for the trial court (judge and jury for the most serious offences, magistrate for the others). The investigation of the offence in question – which will be carried out by the police – will be preparatory to the trial, and the record of the investigation will not go before the court, but the oral evidence of witnesses whose statements were obtained during the investigation will, and it is on this (and any other evidence) that the court will resolve the contest between the parties. The evidence may or may not include evidence by the accused, or admissions made during the investigation to the police. The trial thus becomes – for the Australian system – the crucial phase of the procedure, and the accused's fate is determined by it. The truth in relation to the criminal events may or may not be revealed, that is not the object of the process.

Understanding the French system, on the other hand, as an official enquiry, places the focus of the system on the investigation. The investigation has the express objective of revealing the truth surrounding the events in question (*la manifestation de la verité*).[4] A suspect or defendant is regarded as a valuable source of information in the search for the truth, and is expected to, and generally does, cooperate with the investigators (and later the trial court) in that

2 Mirjan Damaška, 'Structures of Authority and Comparative Criminal Procedure' (1975) 84 *Yale Law Journal* 480, 483–523.

3 Mirjan Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1973) 121 *University of Pennsylvania Law Review* 506, 577.

4 This expression appears like a leitmotiv through the *Code de Procédure Pénale* ('*CPP*'), eg, arts 54 (investigation into flagrant offences), 81 (judicial investigation), 310 (hearing before the *cour d'assises*), 456 (hearing before the *tribunal correctionnel*).

endeavour.[5] The investigation is conducted by an investigating judge commissioned by a prosecutor (*procureur*), assisted by the judicial police,[6] for the most serious offences and by the judicial police supervised by a prosecutor for the less serious offences. The investigation is fully recorded in a dossier and if the case goes to a trial (or rather a hearing[7]) before a court of judgment the dossier will be available to the judges (although not to the nine jurors who sit with the three judges in the jury court (*cour d'assises*)). The hearing in the French criminal courts has been aptly likened to an 'audit' of the dossier.[8]

The conviction rate in the French criminal courts is around 95%,[9] so that if the conclusion drawn from the dossier is guilt and the case is sent to a hearing then a conviction is highly probable. It is in fact unlikely that a case would be sent to a hearing by a prosecutor if the dossier did not allow for a conclusion of guilt, so that an accused's fate is largely determined by the conclusions drawn from the dossier. It can thus be said that the investigation is the crucial phase in the French criminal justice system.

Important consequences, again relevant to our purposes, flow from the difference in focus between the two systems. The focus on the trial in the Australian system means that the system is based on oral evidence and that it essentially functions in public, while the focus on the investigation in the French system means that the system is based on documents and that it is essentially secret.[10]

Before looking more closely at the position of the accused in the two systems a brief sketch of the French criminal justice system and its different levels would be appropriate.[11] (I assume the same will not be necessary for the Australian system given the likely readership of this article.)

---

5 As to why this is so, see Jan Štephán, 'Possible Lessons from Continental Criminal Procedure' in Rothenberg (ed) *The Economics of Crime and Punishment* (1973) 190. It will be interesting to see if this culture of talking is affected by recently required cautioning of suspects, as to which see below.

6 There are two main police forces in France – the *police nationale* (policing the larger urban areas and the highways) and the *gendarmerie* (policing the smaller urban areas and the countryside). Both forces contain *police judiciaire* (judicial police) responsible for criminal investigations.

7 Or *audience*, as the French generally say, the word 'hearing' being more appropriate for this procedure than 'trial'.

8 Mirjan Damaška, *The Faces of Justice and State Authority* (1986) 195.

9 See Bron McKillop, 'What Can We Learn from the French Criminal Justice System?' (2002) 76 *Australian Law Journal* 49, fn 54.

10 Secrecy during an investigation is mandated by the *CPP* art 11.

11 I have elsewhere described in some detail the French criminal justice system and its different levels. See Bron McKillop, *Anatomy of a French Murder Case* (1997) and, in a shorter version under the same name, (1999) 45 *American Journal of Comparative Law* 527; Bron McKillop, 'Readings and Hearings in French Criminal Justice: Five Cases in the *Tribunal Correctionnel*' (1998) 46 *American Journal of Comparative Law* 757; Bron McKillop, 'Police Court Justice in France: Investigations and Hearings in Ten Cases in the *Tribunal de Police'* (2002) 24 *Sydney Law Review* 207. See also McKillop, above n 9. I should add that the above descriptions of and commentary upon the French criminal justice system derive mainly from attending hearings and reading dossiers off and on over a 15 year period, and discussions with French operatives of the system and academics.

### A Offences

- *Crimes*, punishable with imprisonment from 10 years to life.
- *Délits*, punishable with imprisonment for up to 10 years.
- *Contraventions*, of five classes, punishable with fines.

### B Criminal Courts

- *Cour d'assises*, deals with *crimes*, constituted by a President, two other judges and nine jurors (*jurés*), decisions against an accused to be by at least eight out of the 12; witnesses generally called but led through their evidence by the President.
- *Tribunal correctionnel*, deals with *délits* (or *crimes* treated as *délits* by a process known as 'correctionalisation'), constituted generally by three judges, sometimes one; witnesses generally not called except any civil party (or victim).
- *Tribunal de police,* constituted by a single judge; witnesses generally not called except any civil party (or victim).

### C Types of Investigation

- Judicial Investigation (*Instruction Criminelle*) for all *crimes* and some *délits* is conducted by an investigating judge, who is required to investigate both inculpatory and exculpatory matters. This judge also has powers to order detention (*détention provisoire*) of the defendant (*la mise en examen,* previously *l'inculpé*), searches and seizures, telephone interceptions, to interrogate the defendant and witnesses, to arrange confrontations of witnesses with the defendant and reconstructions of the alleged offence, to obtain reports from experts, to delegate investigative measures to the judicial police (under a *commission rogatoire*) including inquiries about the defendant's *personnalité* (as to which see later), and to cause the defendant to be remitted to the *cour d'assises* or the *tribunal correctionnel* for a hearing or to be discharged (c*lassé sans suite*). The investigation is fully recorded in the dossier by a *greffier* working with the investigating judge. The dossier is accessible only to the prosecutor and the lawyers (*avocats*) for the defendant and any civil party (as to whom see later), although in high profile cases it can 'leak'.[12]
- Investigation of Flagrant Offences (*Enquête de Flagrance*), for *crimes* and *délits* that are in the course of being, or have recently been, committed and often as a preliminary to a judicial investigation, conducted by the judicial police who have the power to detain suspects (and previously witnesses) under a *garde à vue* for up to 48 hours, and to search premises without consent. A prosecutor has special powers in relation to the investigation of a

12 The *Instruction Criminelle* is dealt with by arts 79–100 of the *CPP*.

flagrant offence, including requiring a witness to attend for questioning by the judicial police, and interrogating personally any suspect.[13]

- Preliminary Investigation (*Enquête Préliminaire*), for non-flagrant *délits* and *contraventions*, also conducted by the judicial police but with more limited powers in the absence of prosecutorial authorisation, but a suspect may be detained by the police under a *garde à vue* in some circumstances.[14]

Two further points about the French criminal justice system should be made. Although offences, criminal courts and types of investigation have been presented on three broadly correlated levels, the levels could readily be reduced to two by drawing a distinction between the top level (investigation by investigating judge, hearing in jury court) and the two lower levels (investigation by judicial police, hearing before judges alone). A similar distinction has been drawn in common law systems between a top level (jury trial, with crown prosecutor, defence counsel and due process) and a lower level (before magistrate, with police prosecutor, maybe a defence lawyer and scant due process),[15] although in common law systems the police carry out the investigation at both levels. The similarity of this distinction within the two systems is of course weakened by the absence of the investigating judge in common law systems, but it should be noted that the investigating judge in France now investigates less than 3% of all criminal cases,[16] and then with considerable assistance from the judicial police.

The other point is that as France is a party to the *European Convention on Human Rights*[17] the provisions of that Convention apply to the French legal system. More particularly article 6 of the Convention mandating the requirements for a fair trial apply to the criminal justice system. Reference will be made in what follows to some impacts of this Convention on the French system.

I can now consider the positions of accused persons in the Australian (primarily New South Welsh) and French criminal justice systems in relation to a number of key topics.

## II THE POSITION OF THE ACCUSED DURING THE INVESTIGATION

### A Detention and Interrogation

The two topics of detention and interrogation may conveniently be treated together as they are closely related, and both systems now provide for detention for the purposes of interrogation. It will be helpful to sketch the relevant law in both New South Wales and France before making comparisons.

13 The *Enquête de Flagrance* is dealt with by arts 53–74 of the *CPP*.

14 The *Enquête Préliminaire* is dealt with by arts 75–8 of the *CPP*.

15 See, eg, Doreen McBarnet, *Conviction: Law, the State and the Construction of Justice* (1981).

16 Ministère de la Justice, *Les Chiffres-clés de la Justice* (October 2002) 11, 17.

17 Opened for signature 4 November 1950, 213 UNTS 221 (entered into force on 3 September 1953).

### 1 *New South Wales*

A person may be arrested by a police officer in New South Wales if the officer suspects, with reasonable cause, that the person has committed an offence.[18] Prior to 1997 a person so arrested was required to be taken before a magistrate as soon as reasonably practicable to be dealt with according to law. The law did not allow detention for interrogation after arrest.[19] Since 1997[20] that person may be detained for an investigation period up to four hours, extendable – on the warrant of an authorised justice – to up to 12 hours, for the purposes of investigation, including the interrogation of that person.[21] Specified 'time outs' are not to be taken into account in determining the investigation period.[22]

As soon as practicable after a person comes into custody a custody manager must caution the person orally and in writing that the person 'does not have to say or do anything but that anything the person does say or do may be used in evidence'.[23] Any admission made without a prior caution would thus be obtained illegally and improperly,[24] and is likely to be excluded from evidence at any trial.[25] Since 1995 any admission made in the course of official questioning is, subject to some exceptions, inadmissible in evidence on a serious indictable offence unless recorded by audio or video.[26] No unfavourable inference is to be drawn at trial from the failure of an accused in New South Wales to answer one or more police questions and, further, evidence of such failure is not to be admitted if it can only be used to draw such an inference.[27] The custody manager must also inform the person detained that he or she has the right to communicate in confidence with a friend, relative or independent person, and must provide facilities for any consultation with such persons at the place of detention.[28] It should be added that a person under arrest but not detained for investigation under Part 10A of the *Crimes Act* and a person attending a police station voluntarily and being questioned by police who have formed the belief that there is sufficient evidence to establish that the person has committed an offence should, in both cases, be cautioned.[29]

---

18 *Crimes Act 1900* (NSW), s 353(2).

19 *Bales v Parmeter* (1935) 35 SR (NSW) 182; *Williams v The Queen* (1986) 161 CLR 278.

20 By virtue of the *Crimes Act Amendment (Detention after Arrest) Act 1997* (NSW) inserting a new Part 10A into the *Crimes Act 1900* (NSW).

21 In Victoria, by contrast, a person may be detained for investigation including interrogation for a 'reasonable time': *Crimes Act 1958* (Vic) s 464A.

22 *Crimes Act 1900* (NSW) ss 356C–L.

23 *Crimes Act 1900* (NSW) s 356M.

24 Under the *Evidence Act 1995* (NSW) s 139.

25 Pursuant to the *Evidence Act 1995* (NSW) s 138.

26 Originally under the *Crimes Act 1900* (NSW) s 424A, but now under the *Criminal Procedure Act 1986* (NSW) s 108. A 'serious indictable offence' refers to an indictable offence other than one that can be dealt with summarily without the consent of the accused.

27 *Evidence Act 1995* (NSW) s 89.

28 *Crimes Act 1900* (NSW) s 356N.

29 *Evidence Act 1995* (NSW) s 139 and the Police *Code of Practice for Custody, Rights, Investigation, Management and Evidence* ('*CRIME*') 48.

## 2 *France*

A suspect the subject of an *enquête de flagrance* or an *enquête préliminaire* can be required by the judicial police to attend at a police station under a *garde à vue* (a long-established French procedure[30]) for interrogation and while further investigations are carried out.[31] The period of detention is initially up to 24 hours, extendable on the authorisation of a prosecutor up to 48 hours.[32] There is no provision for 'time outs' within this period. During this period the suspect can be interrogated by the police. The police had never been obliged to caution the suspect that he or she was not obliged to answer their questions until they were required to do so by an amendment to the *Code de Procédure Pénale* art 63, by law (*Loi*) 2000-516 of 15 June 2000, aimed at strengthening the presumption of innocence in the French system. Any interrogation is to be recorded in writing and signed by the suspect and the interrogating officer(s). This results in a *procès-verbal* which goes into the dossier.

A person under a *garde à vue* is entitled to be examined by a doctor to see if that person is fit to be so detained,[33] is also now entitled to have a partner, relative, or employer telephoned,[34] and is entitled to be informed of these rights.[35] Everything that happens during the *garde à vue* (eg, the length of interrogation(s), rest periods, start and finish times of detention) is to be recorded in a *procès-verbal*.[36] Interrogations of minors detained under a *garde à vue* have, since 16 June 2001, been video recorded on a trial basis with a view to seeing if this practice should ultimately be extended to adults. The recording at this stage may only be consulted in the case of a dispute about what the minor said and before any hearing.[37] A suspect being interrogated by police but not detained under a *garde à vue* does not have to be cautioned.

If an investigating judge is commissioned by a prosecutor to investigate an offence, the judge can require the defendant to attend at the judge's office for interrogation. This may happen many times during an investigation as new evidence is obtained and the defendant's response is sought. The defendant is required to be notified on his or her first (formal) appearance before the investigating judge that interrogation can only then proceed with the defendant's consent, which consent is required to be given in the presence of the defendant's lawyer.[38] By virtue of the *Loi* of 15 June 2000 the judge is also now required to notify the defendant that he or she may make any declarations, be interrogated or

30 The *garde à vue* in more or less its present form has been in place since the enactment of the *CPP* in 1958, but the judicial police could 'secure' suspects in the nineteenth century: Adhemar Esmein, *A History of Continental Criminal Procedure, with Special Reference to France* (translated from the original French by John Simpson) (1913) 44.

31 *CPP* arts 63 and 77.

32 *CPP* art 63. Longer periods of detention are provided for terrorist, drug trafficking and organised crime offences.

33 *CPP* art 63-3.

34 *CPP* art 63-2, as amended by *Loi* 2000, 516.

35 *CPP* art 63-1.

36 *CPP* art 64.

37 Jean Pradel, *Procédure Pénale* (11th ed, 2002) [509].

38 *CPP* art 116.

remain silent.[39] The investigating judge does not appear to be required to caution the defendant on subsequent appearances before the judge, which may be many.[40] Defendants the subject of an investigation by an investigating judge have usually been kept in custody (*détention provisoire*) during the investigation for ready availability to the investigating judge.[41]

## 3 *Comparison*

Only since 1997 has the law in New South Wales allowed for detention of persons under arrest for the purposes of interrogation. Such detention under a *garde à vue* has long been an integral part of investigations by the French judicial police. Both initial and extended periods of detention are considerably longer in France than in New South Wales. A defendant in New South Wales has to be cautioned before any interrogation while under detention, which is in addition to the caution that has long been required when first arrested. The judicial police in France, on the other hand, have only very recently been required to caution a person detained under a *garde à vue.*

This difference between the two systems reflects an important difference in attitudes towards the right to silence. This right and its protection – through cautions and the prohibition on adverse inference or comment at trial – are well established in New South Wales and Australia, while in France, which has traditionally regarded a defendant as a necessary information source in revealing the truth, a caution has only lately been required and adverse inferences **(**from silence or prevarication by a defendant during a *garde à vue***)** are not prohibited and are very likely still to be drawn.

As to the recording of admissions, New South Wales now has a relatively satisfactory system of video or audio recording as a condition for admissibility into evidence. The French seem to have started down that road with juvenile defendants, but it will probably be some time before such recordings replace the *procès-verbaux* in dossiers in all cases. As to contact with other persons while in detention, a New South Welsh detainee may telephone in confidence a relative or other specified person and have that person attend at the police station for consultation. A French detainee may have a police officer telephone such a person, but that person cannot consult with the detainee at the police station.

Another noteworthy difference during the investigation of serious offences arises from the French use of an investigating judge. Such judges have become accustomed to maintaining defendants in custody for the purposes of the investigation, sometimes for years. An Australian defendant facing even serious charges would be more likely to be freed on bail. Although another judge must now concur in the 'provisional detention' of a French defendant, the investigating judge may well be able to persuade the other judge that the necessities of the investigation require continuing detention.

---

39 *CPP* art 116-4.

40 In my study of a French murder case published in McKillop, *Anatomy* (1977), above n 11, the accused was brought before the investigating judge eight times.

41 The *Loi* of 15 June 2000 now requires a *juge des libertés et de la détention* as well as the *juge d'instruction* to agree to such detention.

## B Search, Medical Examination and Bodily Sampling of Detained Persons

### 1 *New South Wales*

A person when arrested for any offence may be searched by the person effecting the arrest for any incriminating matter,[42] and when in lawful custody on any charge may be searched by any police officer, who may take anything found.[43] Identification particulars, including photographs and finger-prints, may be taken by the police of a person in lawful custody.[44] A medical examination by a doctor of a person in lawful custody may be carried out if there are reasonable grounds for believing that such examination will afford evidence of the offence alleged,[45] and **(**since 1997**)** in such an examination samples of blood, saliva and hair may be taken.[46]

The taking of samples is now regulated by the *Crimes (Forensic Procedures) Act 2000* (NSW), effective from 1 January 2001. This Act provides for intimate and non-intimate forensic procedures to be carried out on suspects, persons convicted of serious indictable offences and volunteers, and for the establishment of a DNA database in New South Wales, to be part of a projected national DNA database. Intimate forensic procedures include the examination of the genital and anal areas of the body and the taking of samples from them, and the taking of samples of blood and saliva. Non-intimate forensic procedures include the external examination of other parts of the body, taking samples of non-pubic hair and from under nails, and taking fingerprints and photographs.[47] Intimate and non-intimate forensic procedures may be carried out on adult suspects, both under arrest and not, with informed consent or by order of a magistrate, but non-intimate forensic procedures may be carried out on an adult suspect under arrest by order of a police officer of or above the rank of sergeant.[48]

### 2 *France*

The police investigating a flagrant *crime* or *délit* may search a suspect with or without consent and seize anything found, and if necessary and in appropriate circumstances they can require the suspect to undress for an external examination of the body.[49] For the purposes of a preliminary investigation the police require the written consent of the suspect for a personal search.[50] On authorisation by a prosecutor or an investigating judge, the police may take fingerprints and

42 *Crimes Act 1900* (NSW) s 352(1), (2).
43 *Crimes Act 1900* (NSW) s 353A(1).
44 *Crimes Act 1900* (NSW) s 353A(3).
45 *Crimes Act 1900* (NSW) s 353A(2).
46 *Crimes Act 1900* (NSW) s 353A(3A), overcoming the decision in *Fernando v Commissioner of Police* (1995) 78 A Crim R 64 against the taking of blood samples under s 353A(2).
47 The power to take fingerprints and photographs under this Act appears to duplicate the power under the *Crimes Act 1900* (NSW) s 353A(3).
48 *Crimes (Forensic Procedures) Act 2000* (NSW) ss 3 and 5.
49 The power to do this is said to be 'assimilated' to the *CPP* power in art 56 to search premises. See Pradel, above n 37, [405] and cases there cited.
50 *CPP* art 76.

photographs of suspects for the purposes of identification.[51] The police or a prosecutor may for the necessities of an investigation require a person detained under a *garde à vue* to undergo an examination by a doctor, and that examination – since the *Loi* of 15 June 2000 – may now be internal.[52] An investigating judge may also commission a doctor to examine a defendant for incriminating evidence.[53] There has been legislation in France since 1998 for the compilation of a DNA databank[54] from traces found at crime scenes, and samples from persons convicted of specified, relatively serious offences. Samples for DNA analysis may also be taken from suspects the subject of criminal investigation for the specified offences, but it is not clear from the legislation whether their consent is required. The better view seems to be that it is not and that provided there is authorisation by an investigating judge or a prosecutor, samples can be taken coercively if necessary. In practice consent is sought and 'systematically' obtained.[55]

### 3 *Comparison*

There are clear similarities between the law in New South Wales and France as regards the search of suspects and arrested persons. The police may generally make such searches and seize what is found. They may take fingerprints and photographs, and require medical examinations for incriminating evidence. The law in France, however, is more discriminating as between different levels of offence (the relevant law in New South Wales applying to any offence) and it provides for greater judicial or prosecutorial control over the police.

The approach to the taking of DNA samples in France appears to be more cautious than in New South Wales. Where the French have not made it explicit that DNA samples can be taken without consent, they can always be so taken in New South Wales, and for a non-intimate forensic procedure they can be taken on the order of a police sergeant.

## C Legal Assistance

### 1 *New South Wales*

A person who has been detained by the police for investigation after arrest has the right (and must be so informed) to communicate with a legal practitioner of his or her choice, to have that practitioner attend at the place of detention and consult in private with the person detained, and to have the practitioner present and giving advice during any interrogation or other investigative procedure

51 *CPP* art 78-3.
52 *CPP* art 63-5.
53 *CPP* art 81.
54 *CPP* arts 706–54.
55 Pradel, above n 37, [450]–[452].

involving that person.[56] The custody manager must ensure those rights can be exercised.[57] Any such legal services will be at the expense of the detainee.

In relation to a person under arrest but not detained for investigation under Part 10A of the *Crimes Act* and a person attending a police station voluntarily, the Police *Code of Practice for CRIME* obliges the police to allow such persons to obtain legal advice and legal assistance at any questioning by police.[58] This obligation is only enforceable, however, by way of a judicial discretion to exclude improperly obtained evidence, exercisable under section 138 of the *Evidence Act 1995* (NSW).

### 2 *France*

A defendant detained for the purposes of a *garde à vue* has recently become entitled to the services of a lawyer. Since 1993 this right arises after 20 hours from the beginning of the *garde à vue*, for a period not exceeding 30 minutes, and in conditions of confidentiality.[59] If the defendant could not obtain his or her own lawyer then a lawyer was to be assigned (at public expense)[60] by the leader of the local bar (the *bâtonnier*). As a result of the *Loi* of 15 June 2000 effective from 1 January 2001, the defendant can now consult with a lawyer at the beginning of the *garde à vue*, after the 20th hour and after the 36th hour if the *garde à vue* is prolonged beyond that time. The lawyer, however, is not entitled to be present while the defendant is being interrogated and is not entitled to see the record of the investigation to date, although he or she is entitled to be informed of the offence alleged against the defendant.[61]

As regards an investigation by an investigating judge, a defendant is entitled to have a lawyer present when attending before the judge for the purposes of the investigation, including when being interrogated by the judge.[62] The lawyer can be of the defendant's choice or assigned (at public expense) by the local *bâtonnier*. The lawyer is entitled to consult the dossier and, at his or her expense, have copies made of the contents.[63]

In my observation of the French system, lawyers, although given advance notice, do not always attend when their clients are before an investigating judge. When they do their function is limited to making suggestions as to additional matters that could be explored by the investigating judge for the benefit of the defendant.

---

56 *Crimes Act 1900* (NSW) s 356 N(1)–(3). The detainee must be given a reasonable opportunity to exercise these rights: *Pollard v The Queen* (1992) 1976 CLR 177.

57 *Crimes Act 1900* (NSW) s 356 N(5).

58 *Code of Practice for CRIME* 44, 52–3.

59 Pradel, above n 37.

60 By way of *aide juridictionnelle*, to be provided under *Loi* 1991-647 of 10 July 1991.

61 Pradel, above n 37.

62 *CPP* art 114.

63 Ibid.

### 3 *Comparison*

As to legal assistance during detention, this is available to a New South Welsh defendant from the outset of the detention and including during any interrogation, while a French defendant is only entitled to short visits from a lawyer while under a *garde à vue* and not to have the lawyer present during any interrogation. The French defendant, however, is entitled to publicly funded legal assistance. The French legal system has generally shown more concern that a lawyer will reduce the chances of a defendant talking than has the Australian system, and this concern has been particularly evident during the crucial investigation phase. The (limited) presence of a lawyer at the *garde à vue* (and the recent requirement of a caution) appear to have arisen from the French concern about the perception that the presumption of innocence is not sufficiently incorporated into their legal system. During an attendance before an investigating judge, however, a French defendant is entitled to have a lawyer present, although the lawyer, who anyway will not always attend, plays essentially an observer role, but may suggest potentially exculpatory lines of investigation.

## III THE ACCUSED AT TRIAL

### A The Accused as Witness

### 1 *New South Wales*

An accused in New South Wales may elect whether to give evidence or not. Evidence will be given from the witness box, on oath or affirmation, and the accused will be subject to cross-examination by the prosecution.[64] An accused may give evidence at trial in support of a defence that has never been suggested to the investigating police and not be subject to an adverse inference being drawn because of the right to silence operative during the investigation.[65] If on a trial for an indictable offence the accused fails to give evidence, section 20 of the *Evidence Act 1995* (NSW) restricts the comment that may be made on such failure. The prosecutor may not comment at all and any comment by the trial judge 'must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned'.[66]

Section 20 has recently been the subject of interpretation in the High Court, and the scope of judicial comment on the failure of an accused to give evidence –

64 The right to make an unsworn statement from the dock not subject to cross-examination was abolished in NSW in 1994.

65 *Petty v The Queen* (1991) 173 CLR 95, *Evidence Act* 1995 (NSW) s 89.

66 *Evidence Act 1995* (NSW) s 20(2). Similar restrictions apply in relation to the failure of a close relative of the accused to give evidence: s 20(3), (4). There is no such restriction under the section on comment by a co-accused.

previously acceptable at common law, including by the High Court[67] – appears to be being restricted now for New South Wales.[68]

### 2 *France*

An accused in France is invariably interrogated by the presiding judge. The interrogation is based on the *procès-verbaux* or depositions contained in the dossier which is in the hands of the presiding judge on the bench. In the *cour d'assises* this interrogation can be quite extensive and can range from very aggressive to benign. The object of the interrogation appears to be to put the prosecution case to the accused and seek his or her acceptance of it. He or she will be closely questioned about any conflicts between his or her statements and those of other witnesses, and about any consistencies in his or her own statements.

The accused is interrogated not only about the facts of the case, but also about his or her *personnalité*, or, broadly, character and personal history, including any prior convictions,[69] and in fact the latter interrogation is generally done first. If the accused is silent in the face of this interrogation (very rare and difficult to achieve), or prevaricates or tries to resile from previous statements, the presiding judge is likely to indicate that the court will draw the appropriate (adverse) inferences. This seems to be warranted by the *Code de Procédure Pénale* which allows the court to take into account in reaching its decision 'the impression made by the means of defence'.[70]

A considerably less extensive interrogation of the defendant, and generally only about the facts of the case, is conducted by the presiding judge in the *tribunal correctionnel*, but again the defendant generally responds. In the *tribunal de police* the judge will generally do no more than ask the defendant what he or she has to say about the charge and the defendant, or his lawyer, will generally at best proffer something in mitigation.

## B Legal Representation

### 1 *New South Wales*

At trial an accused is entitled 'to make full answer and defence by counsel'[71] but is not entitled to have this done at public expense.[72] Counsel is able to object to prosecution evidence, cross-examine prosecution witnesses, call and examine defence witnesses and make opening and closing addresses. Defence counsel is entitled to have the last word to the jury before the trial judge's summing up.[73]

---

67 See, eg, *Weissensteiner v The Queen* (1993) 178 CLR 217.

68 See *RPS v The Queen* (2000) 199 CLR 620, *Azzopardi v The Queen* (2001) 205 CLR 50, *Dyers v The Queen* (2002) 210 CLR 285. Unlike NSW, adverse comment is now permitted in the United Kingdom under the *Criminal Justice and Public Order Act 1994* (UK) ss 34–39.

69 I will look more closely at the place of *personnalité* in the French system later.

70 *CPP* art 353.

71 *Criminal Procedure Act* 1986 (NSW) s 95.

72 *Dietrich v The Queen* (1992) 177 CLR 292.

73 *Criminal Procedure Act 1986* (NSW) s 98.

### 2 *France*

At trial in the *cour d'assises* or the *tribunal correctionnel* the accused is entitled to be 'assisted' in his or her defence by a lawyer of his or her choice or one designated (at public expense) by the presiding judge.[74] In the *tribunal de police* the defendant is entitled to legal representation[75] but not to a lawyer assigned at public expense.

Although there are entitlements to legal representation, by virtue of the nature and functioning of the system such representation is less in scope and effect than in an adversarial system. As the presiding judge at a hearing does virtually all the interrogation of the witnesses (including the accused), the lawyers are reduced to suggesting, on invitation, any additional questions for the judge to ask and, more importantly, addressing the court after the evidence has been adduced or referred to. Addresses by defence lawyers will generally be directed to mitigation of penalty rather than to acquittal. In the *cour d'assises* they will often be lengthy, eloquent and quite passionate, seemingly for the benefit of the jurors. In the *tribunal correctionnel* they are much less so, and in the *tribunal de police* they are quite minimal.

## C Comparisons

At trial an accused in New South Wales is not obliged to give evidence and no adverse comment by the trial judge or prosecutor can be made about the failure to do so. An accused in France, however, is obliged to submit to interrogation by the presiding judge at a hearing and the purpose of such interrogation is generally to have the accused confirm the evidence of guilt contained in the dossier. A right to silence based on the privilege against self-incrimination is well entrenched in the law of New South Wales, both during the investigation and at trial, buttressed by a prohibition against the drawing of adverse inferences from the exercise of the right. The French prefer to use an accused as a source of information towards the manifestation of the truth. The accused in France cannot avoid being questioned both during the investigation and at trial, and adverse inferences will be drawn from unresponsiveness.

As to legal representation at trial, the lawyer for an accused in New South Wales plays a considerably more active role than his or her French counterpart. The lawyer in New South Wales can impact significantly on the evidence adduced to the court through cross-examination of the prosecution's witnesses, objecting to prosecution evidence and calling defence witnesses, while in France the adducing or revealing of evidence is in the hands of the presiding judge. The lawyer in New South Wales will normally be aiming primarily at an acquittal or a reduced level of liability to that charged, while the French lawyer will more likely be focused on mitigation of penalty through an address at the end of the

74 *CPP* arts 274, 417.
75 *CPP* art 536.

hearing. The French lawyer has a better opportunity of impacting on the outcome of criminal proceedings during the investigation than at the hearing.

## IV VICTIMS AND THE ACCUSED

### 1 *New South Wales*

Victims of crime in New South Wales are essentially treated as ordinary witnesses. They make statements to the police and give evidence at any trial, where they are subjected to cross-examination. If the accused pleads guilty the victim will not be further involved in the case, and may never even be informed by the authorities of what happens to the accused. Victims or their families may, however, make victim impact statements which can be used by a trial judge in the Supreme or District Courts for the purposes of sentencing.[76] Victims may also make application to an assessor and ultimately to a Victims Compensation Tribunal for compensation and other benefits (eg, counselling) in relation to injuries caused by the criminal acts, although such compensation in New South Wales is limited to crimes of violence and compensation is currently capped at $50 000.[77] Any compensation awarded is paid from state funds, but there is a right to recovery of any such payment from the accused, a right that yields very little, it seems.[78]

### 2 *France*

Victims in the French criminal justice system may play a significantly greater role. A victim in that system may, during an investigation or at the hearing, apply to be 'constituted' a *partie civile* (civil party) and may even cause a prosecutor to initiate criminal proceedings through an application to an investigating judge.[79] The range of potential civil parties is very wide, including the families of primary victims, those claiming interests through victims (eg, insurers, trade unions, employers) and various special interest groups (eg, returned servicemen, conservationists, anti-discrimination groups).[80] A civil party is entitled to legal representation during the investigation and at any hearing. Suggestions may be made as to avenues of investigation, particularly to any investigating judge.[81] At a hearing the civil party may seek to elicit evidence and make submissions relevant to liability and to sentence.

More importantly, the civil party may claim compensation (*dommages-intérêts*) in the criminal proceedings for loss and damage caused by the accused in the commission of the offence, relying on the evidence collected by those

76 Victim impact statements were originally provided for in NSW under the *Victims Rights Act 1996* (NSW) and now under the *Crimes (Sentencing Procedure) Act 1999* (NSW) div 2.

77 Under the *Victims Support and Rehabilitation Act 1996* (NSW).

78 See David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (3rd ed, 2001) 1455–6.

79 *CPP* arts 1, 2, 85.

80 Such latter groups have been listed recently in the *CPP* under arts 2-1 to 2-16.

81 *CPP* art 89-1.

investigating the offence and on any further evidence adduced at the trial.[82] In the *cour d'assises* any compensation is awarded by the judges alone.[83] The level of compensation is the same as in independent civil proceedings. Any compensation awarded is payable by the state which then can seek reimbursement from the accused. It appears that the state proceeds more vigorously towards reimbursement in France than in New South Wales.[84]

### 3 *Comparison*

The civil party system in France disadvantages an accused compared with an accused in New South Wales. The French accused is opposed by the prosecution, but may in addition be confronted by the victim of an offence, who may influence questions of liability and sentence and also pursue compensation. This can clearly add to the burden of defence, particularly as the range of civil parties on any one offence can be quite wide. And a French accused with means is very likely to have ultimately to pay any compensation awarded. An accused and defence lawyers in New South Wales would clearly not welcome a French-style civil party system, even if it could well be attractive to victims, enhancing their role in criminal proceedings.

## V EXPERTS AND THE ACCUSED

### 1 *New South Wales*

In common law systems experts are generally commissioned and called to give evidence by the parties on questions requiring expertise. They are expected to support the case of the party calling them and they thus become partisan. In a criminal justice context experts may be commissioned and called by the prosecution and the defence. As the prosecution is generally better resourced than the defence it is more able to access experts, many of whom anyway will be in government service, with the result that the prosecution will often be better positioned in the battle of the experts. On difficult or complex issues for expertise, more heat is likely to be generated than light in this battle.[85] In a jury trial it is the laypersons of the jury who will have to decide those issues and the winner of the battle. As some corrective to this situation the New South Wales Supreme and District Court Rules now contain a Code of Conduct for expert witnesses mandating that their paramount duty is to the Court and not to the

82 *CPP* arts 371 (*cour d'assises*), 418 (*tribunal correctionnel*), 536 (*tribunal de police*).

83 *CPP* art 371.

84 In the murder case I reported upon in McKillop, *Anatomy* (1997), above n 11, the 16 civil parties (the relatives and partner of the deceased) were awarded a total of 340 000 francs (then worth about $A 85 000). This was paid by the state which then sought reimbursement through the forced sale of the accused's house and car.

85 See George Humphrey, 'The Scientist as "Hired Champion"' (1987) 12 *Legal Science Bulletin* 269. A recent example of this battle may be found in *Velevski v The Queen* (2002) 76 ALJR 402.

person retaining the expert.[86] It will be interesting to see what impact this may have on expert partisanship in criminal cases.

### 2 *France*

The French criminal justice system, by contrast, deals with questions of expertise through court-appointed experts.[87] Lists of such experts are maintained by the *Cour de cassation* in Paris and by the 35 *cours d'appel* throughout France.[88] Persons qualified by training and experience in the various relevant disciplines may apply for appointment to those lists and, after screening as to character and standing in the discipline, may be appointed. Experts are remunerated for their work from public funds. The remuneration is relatively modest, but the social and professional prestige of an appointment is high. Any question of expertise that may arise during a criminal investigation is then referred to an appropriate expert on the list for investigation and report.[89] The reports are communicated to the parties who may request a complementary report or a report from another expert.[90] The objective is to have any issue of expertise resolved by the end of the investigation and before the case goes to a hearing.[91] In the *cour d'assises* at least, experts will be required to give oral evidence in support of their reports.[92] In exceptional circumstances experts not on the lists may be commissioned.[93]

### 3 *Comparison*

How do these differing systems for dealing with expert evidence impact upon an accused in each system? An Australian accused can be seen to be generally at a disadvantage in the battle of the experts. He or she is less well resourced and less well connected in obtaining expert opinion to match that of the prosecution. Unless he or she is on legal aid (which may not pay for the best experts) the expense of the expert will have to be met by the accused. The accused will also have to hope that his or her expert is personally more impressive to any jury than the prosecution's expert if the jury is out of its depth on the scientific or technical issues. At least, however, the accused should know that his or her expert will be pitching hard for a favourable result, and the prosecution's expert will have been cross-examined.

A French accused will know that any question of expertise will generally have been resolved before the case goes to a hearing, although if it is going to a

86 See sch K and pt 36 rule 13C of the Supreme Court Rules and sch 1 to pt 53 and Part 28 rule 9C of the District Court Rules. There is now provision also for court-appointed experts (pt 30 of the Supreme Court Rules and pt 28A of the District Court Rules), although these are unlikely to be used in criminal cases.

87 The provisions for 'expertise' are to be found in *CPP* arts 156 to 169-1.

88 *CPP* art 157.

89 *CPP* art 156.

90 *CPP* art 167.

91 Should an issue of expertise turn out at the hearing to be not so resolved, the presiding judge has the power to refer the issue for further expert investigation and report: *CPP* art 169. This rarely happens.

92 *CPP* art 168.

93 *CPP* art 157.

hearing it will normally have been resolved against the accused. There will be little opportunity for the defence to cross-examine the expert witness, and in fact any cross-examination is likely to be counter-productive so far as the presiding judge is concerned. The evidence of the expert will tend to be supportive of the law enforcement objectives of the prosecution and the judiciary with whom – and thanks to whom – the expert is working. But at least the accused will not have to pay for the expertise.[94]

Given the uncertainty of outcomes in our jury trials, contributed to by juries having to resolve battles between experts, an Australian accused may be relatively advantaged over his or her French counterpart as regards expert evidence. The Australian criminal justice system as a whole, however, could hardly be said to be advantaged as against the French; Australian juries have to grapple with battling experts while French courts have the benefit of answers to questions of expertise reached through relatively dispassionate processes of investigation.

## VI THE EXCLUSION OF EVIDENCE – ADMISSIONS

Common law systems are much more likely to exclude evidence in criminal trials than Continental European systems, particularly the French. Information gathered during a French investigation is recorded in a dossier. Dossiers are compiled by the judicial police, investigating judges and prosecutors, and are under the ultimate control of prosecutors. They are expected to contain relevant, reliable and properly obtained information. The contents of the dossier generally form the basis for judgment, even in the *cour d'assises* where witnesses are called. There may be some hearsay and lay opinion in the dossier but this it seems is not relied upon on crucial issues or is given little weight. Certainly there is no attempt to draw the fine distinctions in relation to the admissibility of hearsay, for example, that the common law has done. There is, however, one area to do with evidence with a significant impact on an accused and in which the rules and practices of the two systems typically differ. That area relates to admissions (or confessions[95]), which I will briefly examine.

94 For an indication of the pros and cons of the French system of expertise see Bron McKillop, 'Forensic Science in Inquisitorial Systems of Criminal Justice' (1995) 7 *Current Issues in Criminal Justice* 36.

95 The word 'admission' is now used in NSW evidence law to include a 'confession'. See *Evidence Act 1995* (NSW) pt 3.4 and the definition of 'admission' in the Dictionary. See also the *Criminal Procedure Act 1986* (NSW) s 108.

### 1 *New South Wales*

For some time now common law systems have looked closely at how confessions and admissions have been obtained for the purposes of their admissibility into evidence. In Australia at common law the 'basal principle' is that to be admissible a confession has to be shown to have been made voluntarily, in the exercise of a free choice.[96] There is also a discretion to exclude an otherwise admissible confession if, having regard to the circumstances in which it was made, it would be unfair to use it against an accused.[97] For a period in New South Wales there was also legislative provision for the exclusion of confessions induced by persons in authority.[98] In New South Wales the admissibility of 'admissions' is now regulated by the *Evidence Act 1995* (NSW). Admissions influenced by violent, oppressive, inhuman or degrading conduct, or made in circumstances in which it cannot be shown (by the prosecution) that the truth of the admission was unlikely to be adversely affected, are inadmissible.[99] The common law discretion to exclude for unfairness has also been included in the Act.[100] The Act further provides for the discretionary exclusion of admissions improperly obtained, such as without a preceding caution.[101] Also, it must be recalled that since 1995 admissions are not admissible into evidence, with certain exceptions, unless recorded by video or audio.[102]

### 2 *France*

There is very little legislation in France dealing with the admissibility of evidence at a hearing. The only mention of a confession (*aveu*), for example, as a means of proof in the *Code de Procédure Pénale* is that, in the context of the proof of *délits*, it is to be 'left to the free appreciation of the judges'.[103] The difference here with a common law system is not surprising if one bears in mind the centrality of the adversarial trial in a common law system, and hence the screening of and contention over the evidence being adduced, as opposed to the centrality of the investigation in the French system, which is concerned with compiling as complete and revelatory a dossier as possible – by or under the control or supervision of an investigating judge or prosecutor and with minimum input from the defence.

Confessions have long been regarded in the French system as of great importance for the manifestation of the truth ('*la reine des preuves*' – the queen of proofs). With suspects detainable over relatively long periods by the police

96 *McDermott v The King* (1948) 76 CLR 501, 511–12 (Dixon J).
97 *The King v Lee* (1950) 82 CLR 133.
98 *Crimes Act 1900* (NSW) s 410, repealed in 1995.
99 *Evidence Act 1995* (NSW) ss 84, 85.
100 *Evidence Act 1995* (NSW) s 90.
101 *Evidence Act 1995* (NSW) ss 138, 139. In the common law or non-*Evidence Act* jurisdictions of Australia (ie, all except the Commonwealth, NSW and Tasmania), illegally obtained confessions or admissions may be excluded under the discretion elaborated in *Bunning v Cross* (1978) 141 CLR 54. See, eg, *Cleland v The Queen* (1982) 151 CLR 1.
102 Originally under the *Crimes Act 1900* (NSW) s 424A, now under the *Criminal Procedure Act 1986* (NSW) s 108.
103 *CPP* art 428, concerned seemingly with weight rather than admissibility.

under a *garde à vue* without the benefit, until very recently, of a lawyer or of a caution, it is not surprising that confessions were forthcoming.[104] If a duly signed and counter-signed confession to the police becomes part of the dossier it is highly likely to be accepted by a court at a hearing, even if disputed by the accused. If there is a confession in the police papers sent to an investigating judge it will be difficult for a defendant to resile from it. If it is then confirmed or repeated to the judge the confession will be virtually unimpeachable at the hearing. There are said to be duties incumbent upon investigators in France, such as respect for personal dignity and privacy (from the European Convention on Human Rights, articles 3 and 8) and acting with propriety and honesty (*loyauté*) (from the case law *(jurisprudence*)).[105] If the dossier contains no traces of any breach of such duties, and is formally correct, it is very likely to be accepted as to its proofs at any hearing, including before the *cour d'assises*.

## VII *PERSONNALITÉ*

It is obligatory for a judge in France investigating a *crime* to make inquiries into the *personnalité* of the defendant,[106] as well as into the facts of the alleged *crime*. The French have a dictum: '*On juge l'homme, pas les faits*' (One judges the person, not (just) the facts). *Personnalité* refers to family history, education, work record, material situation, leisure interests, frequentations, criminal record and general character traits – particularly traits indicative of good or bad character. Such inquiries are generally made by the judicial police on commission from the investigating judge and the results go into the dossier. Also, as we have seen, the presiding judge in the *cour d'assises* usually commences the questioning of the accused on his or her *personnalité* – including seeking confirmation of the details of any criminal record – in front of the jury. This practice should be understood in the context of liability and sentence being dealt with together at the hearing.

Inquiries into a defendant's *personnalité* by a judge investigating a *délit* are optional[107] and seem rarely to be made. Prosecutors supervising police investigations of *délits* and *contraventions* do not seem to require or expect the police to inquire into *personnalité* but they always seek a record of any prior convictions for the dossier.

A common lawyer would generally regard such evidence of an accused's *personnalité* as irrelevant to liability, unduly prejudicial or both. Evidence of

104 The expression '*passage à tabac*' is readily understood in France as signifying coercive means used by the police to obtain confessions. The French police recently were condemned by the European Court of Human Rights for subjecting a person held under a *garde à vue* to beatings and hence 'inhuman or degrading treatment' contrary to art 3 of the European Convention on Human Rights in the case of *Tomasi v France* (1992) 241-A Eur Court HR (ser A).

105 See Pradel, above n 37, [392]–[400].

106 *CPP* art 81.

107 *CPP* art 81.

mere propensity[108] or tendency[109] is generally inadmissible (although sufficiently probative evidence of similar facts[110] or related events[111] does become admissible provided the probative value of the evidence substantially outweighs any prejudicial effect[112]). Bad character evidence, including evidence of prior convictions, cannot be adduced by the prosecution in New South Wales unless the accused adduces evidence of good character and so puts his or her character in issue.[113] Although the acceptance by the French of propensity and bad character evidence on liability may seem strange to common lawyers, acceptance of good character evidence should not, as it is accepted also in common law systems.[114] In fact there is some inconsistency in the common law allowing an accused to adduce evidence of good character on the issue of guilt but generally not allowing the prosecution to adduce evidence of bad character on that issue.

Another notable difference between the two systems in these regards is the common law's concern about evidence thought to be unduly prejudicial to an accused. It is juries that are thought likely to be prejudiced, not judges. It is somewhat paradoxical that the jury, vaunted by common lawyers as bringing the experience and discernment of a representative cross-section of society to the task of judging accused persons, is thought to have such difficulty in separating prejudice from probative value. The French position in this regard could also be seen as somewhat paradoxical, in that although it is the probative material that matters in the search for the truth as to the facts, the accused's character and personal history is also being taken into account, at least in the *cour d'assises*.

## VIII THE PRESUMPTION OF INNOCENCE

### 1 *New South Wales*

An accused in the adversarial system has the benefit of a presumption of innocence. This is of importance in relation to pre-trial matters such as prejudicial media reporting and entitlement to bail. It is usually invoked, however, in the context of the trial, but there it means no more, legally, than that the prosecution bears the burden of proving the guilt of the accused beyond reasonable doubt, and that the accused is entitled to an acquittal if the prosecution fails to adduce sufficient evidence to achieve this. The presumption does not operate in such a case to establish the accused's innocence, the position simply

108 *Makin v Attorney-General for NSW* [1894] AC 57.
109 *Evidence Act 1995* (NSW) s 97.
110 See, eg, *Pfennig v The Queen* (1995) 182 CLR 461.
111 *Evidence Act 1995* (NSW) s 98.
112 *Evidence Act 1995* (NSW) s 101.
113 *Evidence Act 1995* (NSW) s 110(2), (3). An accused who gives evidence may, in certain circumstances, be cross-examined as to character and credibility: *Evidence Act 1995* (NSW) s 104.
114 See, eg, *Evidence Act 1995* (NSW) s 110(1).

being that the accused has not been proved beyond reasonable doubt to be guilty, and cannot be tried again for the same offence.[115]

### 2 *France*

It is sometimes suggested, particularly by those from a common law system, that there is no presumption of innocence in the French criminal justice system, but rather a presumption of guilt. This is an understandable reaction by those observing French hearings, particularly in the lower courts, and if aware of the considerably higher conviction rates at hearings in France as opposed to trials in common law countries. But it is to misunderstand the nature of the French system. The prosecution there does not adduce evidence at the hearing, for the evidence is in the dossier, and – particularly in the lower courts – there it generally remains (although known to the court, the prosecutor and any defence lawyer). Oral evidence is called in the *cour d'assises* but it is basically a regurgitation of the depositions and reports in the dossier and it is adduced by the presiding judge, not the prosecutor. It could in that situation be said that the presiding judge had a responsibility to make public through the interrogation of witnesses the evidence of guilt contained in the dossier. But that does not remove the burden of establishing guilt from the investigators in the compilation of the dossier.

Talk of a presumption of innocence may be appropriate for a contest between the prosecution and the defence but less so for an enquiry into the truth of matters surrounding a criminal event. A leading French commentator has in fact referred to the presumption of innocence in the context of the procedures to which a defendant can be subjected during an investigation by both the police and an investigating judge, calling it 'in large measure a fiction'.[116] The same commentator also notes the functions and powers of judges, both investigatory and at trial (as opposed to those of the prosecutor) as a factor undermining the presumption of innocence in its application to the French system.[117]

Given this state of affairs it is perhaps surprising that France signed up to the European Convention on Human Rights, which in article 6 gives a right to a fair trial, seemingly based on an adversarial (with full civil rights) rather than an inquisitorial model, and providing in article 6(2) that: 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'. The insertion of a presumption of innocence into the French system has been taken further by *Loi* 2000-516 of 15 June 2000 which added a preliminary article to the *Code de Procédure Pénale* to the effect that every person suspected of or being prosecuted for an offence is presumed innocent unless or until his or

115 See *DPP v Shannon* [1975] AC 717, 772; *R v Darby* (1982) 56 ALJR 688, 692. For recent High Court judgments confirming the rule against double jeopardy see *Pearce v The Queen* (1998) 194 CLR 610 and *R v Carroll* (2002) 77 ALJR 157.

116 Pradel, above n 37, [377]. An earlier commentator, Jean Carbonnier, is there referred to as having argued there should be neither a presumption of innocence nor a presumption of guilt as regards a suspect (in the French system) but a position of juridical neutrality.

117 Ibid.

her guilt has been established.[118] The presumption has been sought to be further enhanced by that *Loi* through changes to the *garde à vue* (requiring the cautioning of a suspect, allowing the attendance of a lawyer), to the provisions for detention during a judicial investigation (requiring a second judge (a *juge des libertés et de la détention*) to agree to the need for such detention, and allowing indemnification for wrongful detention) and to the scope of pre-trial publicity (the creation of a *délit* of publishing an image of an unconvicted defendant in handcuffs or in provisional detention).

Although beneficial to the position of a suspect or an accused in the French system, it is hard to see that these changes will impact in any significant way on attitudes and practices traditionally associated with French law enforcement, particularly as regards the focus on a thorough investigation by police, judges and prosecutors with suspects as primary sources of information.

## IX CONCLUSION

The essential contrast between an accused in Australia (or more particularly in New South Wales) and an accused in France arises from the differing characteristics of the two criminal justice systems. The Australian system requires the prosecution to prove the guilt of the accused and the accused does not have to contribute to that endeavour. The accused can remain silent during any police interrogation and at trial and no adverse inference should be drawn from such silence. The accused is also entitled to full legal assistance during any interrogation and to active legal representation at trial, although in both cases not at public expense.

The French system, by contrast, regards an accused as an important source of information in arriving at the truth about the commission of a crime and it allows adverse inferences to be drawn against an accused who does not cooperate with the police and the judges (both during investigation and at hearings) in that endeavour. Legal assistance and representation have generally not been allowed to interfere with the use by the authorities of the accused as an information source. It will be apparent from the above that proving the guilt of an accused is done at a trial while the pursuit of the truth about a crime is essentially done during an investigation. This puts the focus of the Australian system as regards the determination of guilt or not on the trial but the focus of the French system on the investigation. The fate of an accused is thus largely being determined in different phases and at different stages of the two systems.

There are some other noteworthy contrasts between the positions of the accused in the two systems. An Australian accused need be little concerned with having to deal with the victim(s) of any crime, while a French accused will often have to deal not only with the prosecutor but also with a civil party seeking both

118 It should be noted that the French standard of proof of guilt has long been to the level of personal conviction (*intime conviction*), as required by *CPP* art 353, which is similar to the standard of beyond reasonable doubt in common law systems.

retribution and monetary compensation. As to questions of expertise, an Australian accused can commission his or her own expert(s) to do battle with the prosecution's experts while a French accused is generally obliged to accept the opinion(s) of court-appointed experts, which will generally be in support of the prosecution if a case is proceeding to a hearing. As to admissions (or confessions), an accused in Australia has more chance of having a dubious admission excluded from evidence (even with the current regime of electronic recording) than an accused in France, where if there is a confession in the dossier, including one made to the police, it will generally be accepted as reliable. Regarding material on *personnalité,* evidence of bad character (including prior convictions) or evidence that is more prejudicial than probative is generally not admissible against an accused in Australia, as well of course as evidence that is irrelevant to the issues before the court. An accused in France, at least in the *cour d'assises*, is in the relatively disadvantageous position of having his or her entire personal history, any prior convictions and any bad character traits exposed to the court (including the jurors) at the outset of the hearing. As this is done in the context of material on both liability and sentence being taken together at the hearing, an accused is unlikely to be hopeful about an acquittal. Finally, a presumption of innocence fits appropriately into Australian-type adversarial proceedings by focusing on the prosecution's burden to prove the guilt of the accused, failing which the 'not guilty' accused is acquitted. The presumption is however hardly appropriate to a system like the French in which guilt is essentially established through investigations carried out by the judicial police and investigating judges. Those investigators may be said to have a burden of establishing any guilt and at the hearing the presiding judge may be said to have the 'burden' of demonstrating that the investigation as recorded in the dossier has established the guilt of the accused. But this is not the same thing as the prosecutor having to lead evidence at a trial to prove the guilt of the accused. The changes effected by the 'presumption of innocence' *Loi* of 15 June 2000, such as the requirement of a caution by the police to a suspect held under a *garde à vue* and the right of a suspect to the attendance of a lawyer there, do not affect the basic structure or functioning of the French criminal justice system, in relation to which the presumption could justifiably be called a 'fiction'. But then there is perhaps something fictional about the presumption of innocence when applied to the adversarial system if, when the prosecution fails to 'rebut the presumption' by proving the accused guilty, the accused is not regarded as innocent.

So, are there procedures in the French system which could be beneficially adopted into the Australian system? Accepting the basic differences between the two systems that I have suggested, the answer would have to be generally negative. There are two areas, however, where systemic differences would not necessarily rule out adoptions, where efficiencies in the Australian system could be thereby enhanced and where there are already home-growing movements in those directions. The candidates for such adoption, as has been indicated above,

are a greater role for victims, including their legal representation, and the replacement of party-selected with court-appointed experts.[119]

119 For an examination of what we can learn from the French criminal justice system more generally, see McKillop, above n 9.