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Covert recordings used as evidence in criminal trials: concerns of Australian linguists

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Procedures for using covert recordings as evidence in criminal trials have developed over 30 years. However, some key aspects have only recently come to the attention of academic experts in linguistic science. This paper outlines the concerns of two peak organisations representing Australian linguists in relation to: transcription of indistinct speech, translation of material in languages other than English, attribution of utterances to speakers, and enhancing of poor quality audio. Resolution of these concerns might be amenable to collaborative research similar to that which has yielded valued improvements in procedures for receiving overt evidence in languages other than English.

Introduction

This short paper aims to raise awareness of concerns[1] expressed by two peak organisations[2] representing Australian linguists (here defined as specialists in the scientific study of language and speech, rather than in particular languages). These concerns relate to the handling of covert recordings used as evidence in criminal trials. In the linguists' belief, they cannot be effectively resolved by either linguists or lawyers independently, but require interdisciplinary collaboration.

Covert recordings

Covert recordings are conversations captured without the knowledge of one or more of the participants. They potentially provide powerful forensic evidence, allowing the court to hear admissions that would not be made overtly. If legally obtained, they may be admitted as a "document" under s 48(1) of the *Evidence Act* 1995.

A major difficulty, however, is that secretly recorded audio is often of poor quality, making even English hard to understand. Additionally, covert recordings may feature speech wholly or partly in one or more languages other than English. Under either or both of these circumstances, a jury requires assistance to understand the content of the evidence.

Such assistance may be provided in one or both of two forms. Section 48(1)(c) of the *Evidence Act* allows for provision of a transcript, subject to general admissibility rules,[3] as well as the specific principles established by

1 H Fraser, "Thirty years is long enough: it is time to create a process that ensures covert recordings used as evidence in court are interpreted reliably and fairly" (2018) 27 *JJA* 95.

2 The Australian Linguistic Society (ALS) and the Applied Linguistics Association of Australia (ALAA).

3 *Evidence Act* 1995, ss 135, 136 and 137 where relevant.

the High Court ruling in *Butera v DPP (Vic)*.[4] Additionally an "enhanced" version of the audio may be admitted as a "copy" of the "document" under s 48(1)(b) of the *Evidence Act*.[5]

The problem

While these legal principles are well established in law, the concept of a recording being a document, and practices based on it, raise concerns from the point of view of linguistic science. Linguists have noted issues relating to four main areas. These are summarised briefly here and covered in greater depth in the works referred to.

Translation of material in languages other than English

Butera is authority that a jury may be assisted by "transcripts" (really translations) of conversations featuring foreign languages, provided by translators deemed to be experts on the basis of their knowledge of the relevant language.[6] It offered little guidance as to the exact nature of the "transcripts", nor of the expertise required to create reliable translations of forensic audio. Perhaps, at that time, questions such as these were considered matters of common knowledge, to be dealt with on a case by case basis.

Since then, however, linguists have been able to offer the law many useful, though sometimes counter-intuitive, insights regarding translating and interpreting, showing limitations of common knowledge in relation to these topics.[7] These insights have, via close collaboration between linguists and the law, resulted in valuable changes in procedures for receiving overt evidence from speakers of languages other than English.[8]

The issues raised by interpreting or translating covert recordings are even more problematic, and counter-intuitive, than those of overt evidence, especially when the recording is indistinct. However, they have so far received far less attention.

Examples of concerns felt by linguists are: poor distinction between a transcript and a translation; lack of clear guidelines as to what expert qualifications are relevant to the specific task of translating forensic evidence (as opposed to general translation);[9] and the common practice of translators working in close collaboration with investigators.[10]

Transcription of indistinct English material

The *Butera* ruling regarding the use of "transcripts" of foreign language material from covert recordings has been extended to allow transcripts of indistinct English to be provided as assistance to juries.[11] Transcripts by detectives from the case are commonly used for this purpose, presumably because these detectives are able to understand indistinct covert recordings that are unintelligible to others. Admission has been facilitated by giving police transcribers the status of "ad hoc expert" on the basis that their ability derives from listening to the audio many times, giving them a form of "specialised knowledge" in the sense required by the *Evidence Act*, s 79.[12]

Of course, the risk is recognised that a jury might simply read a potentially inaccurate police transcript and accept it on face value. This risk is mitigated, first, via the expectation that the defence will check the transcript carefully, and, second, via a judicial direction that the jury should use the transcript only as an "aide memoire",[13] being sure to listen carefully to the recording and reach their own interpretation of what is said.

All these practices, though familiar and routine to lawyers, are problematic from the point of view of linguistic science, for two sets of reasons.[14]

First, creating a reliable transcript of indistinct audio is a specialised task, requiring real, not "ad hoc", expertise. Listening many times is necessary, but far from sufficient. What gives detectives the appearance of special ability is not the fact they have listened many times, but the fact they have background information and expectations about the case. While such background may sometimes give police reliable insight about parts of an indistinct

4 *Butera v DPP (Vic)* (1987) 164 CLR 180. See *R v Cassar* [1999] NSWSC 436 at [7] for a summary of the uses to which a transcript may be put.

5 *Eastman v R* (1997) 76 FCR 9 at 112; *R v Giovannone* (2002) 140 A Crim R 1 at [56]–[59].

6 *Butera*, above n 4, at 188; ss 76, 79 *Evidence Act*.

7 See for example: S Hale and L Stern, "Interpreter quality and working conditions: comparing Australian and international courts of justice" (2011) 23 *JOB* 75; D Eades, *Sociolinguistics and the legal process*, Multilingual Matters, 2010; M Cooke, "Anglo/Aboriginal communication in the criminal justice process: a collective responsibility" (2009) 19 *JJA* 26.

8 See for example: R French, "One justice — many voices", Presentation to the *Language and the Law Conference*, Darwin, 2015, at www.hcourt.gov.au/publications/speeches/current/speeches-by-chief-justice-french-ac, accessed 20/6/2018; Judicial Council for Cultural Diversity, *Recommended national standards for working with interpreters in courts and tribunals*, 2017 at http://jccd.org.au/publications, accessed 20/6/2018.

9 The National Association for the Accreditation of Translators and Interpreters (NAATI) currently offers no qualifications specifically related to covert recordings.

10 See for example: DW Gilbert, "Electronic surveillance and systemic deficiencies in language capability: implications for Australia's courts and national security" in D Caruso and Z Wang (eds), *Proof in modern litigation: evidence law and forensic science perspectives*, Barr Smith Press, Adelaide, 2017.

11 See for example: *R v Cassar*, above n 4, at [7]; *Eastman v R,* above n 5, at 112–113; *R v O'Neill* [2001] VSCA 227 at [13]; [86].

12 *Butera*, above n 4, at 188. The ad hoc expert must have specialised experience beyond that which the jury could itself acquire: *R v Nasrallah* [2015] NSWCCA 188 at [41].

13 *Eastman v R*, above n 5, at 113; *R v Cassar*, above n 4 at [7](e).

14 H Fraser, "Transcription of indistinct covert recordings used as evidence in criminal trials" in H Selby and I Freckelton (eds), *Expert evidence*, Thomson Reuters, 2015.

recording, it is a double-edged sword,[15] which may mislead detectives as easily as assist them — as has been found in a number of cases.[16]

Further, it is unrealistic to expect that all relevant inaccuracies in a police transcript will be detected by defence teams, by juries following the "aide memoire" instruction, or even during judicial evaluation of its potential to be more prejudicial than probative. Indeed, cases are known of significant inaccuracy in police transcripts remaining unnoticed throughout a trial.[17]

This is because viewing a transcript while listening to indistinct audio is liable to "prime" listeners to hear in line with the transcript even when it is manifestly inaccurate.[18] Priming is a fascinating and complex phenomenon that goes beyond the "suggestibility" familiar in legal contexts,[19] in ways that cannot be fully appreciated without audio examples.[20] Importantly, priming affects all listeners, and, since it operates beyond the level of conscious control, cannot be avoided by an effort of personal intention. Managing priming effectively requires expertise in specialised branches of linguistic science.

Speaker attribution and identification

Transcripts, whether by translators or by "ad hoc experts", give an opinion about more than just the content of the conversation captured in a covert recording. They also attribute specific utterances to specific speakers, who may then be identified by comparing voices in the recording with voices known via other recordings or personal interaction with speakers.

Here, too, current law[21] allows for opinions about speaker identity to be provided by "ad hoc experts", typically translators or police transcribers, and again this causes concern to linguists. For multi-speaker conversations, reliably attributing utterances to particular speakers is hard even in clear recordings, and far more so in indistinct recordings. Both utterance attribution and voice comparison are areas where non-experts are known to express opinions in which confidence correlates poorly with accuracy.[22] Indeed, the science of forensic speaker comparison[23] is still not fully developed. This means that, as with other areas mentioned here, providing responsible evidence requires expertise of a very high level, currently held by only a few Australian linguists.

"Enhancing" of indistinct audio

It has become common practice to admit "enhanced" versions of indistinct covert recordings for the jury's consideration, as enhancing has been held to be "the aural equivalent of the use of a magnifying glass to enhance an individual's capacity to perceive the relevant record".[24]

"Enhancing" is a much misunderstood topic. Despite its portrayal by the entertainment industry, there is currently no scientific process that can reliably make unintelligible audio intelligible, and misleading results cannot be reliably detected simply by listening.[25] Possibilities even for improving the objective clarity of indistinct audio are limited. Nevertheless, due to widespread but misplaced belief in its efficacy, provision of "enhanced" audio has the potential to increase the credibility of an inaccurate transcript.[26]

The solution

It is suggested that solutions not be implemented by the law without full consultation of linguists. This is because some apparently obvious solutions are not optimal from the point of view of linguistic science. For example, problems of priming by an unreliable transcript are not resolved by admitting indistinct covert recordings without a transcript. This retains the likelihood of priming by suggestions arising from contextual information a jury might absorb (by intention or otherwise) during the trial, or by verbal suggestions offered by prosecution or defence counsel as to what words or phrases might or might not be heard. Nor is it advisable to have covert

15 H Fraser "Admission of indistinct covert recordings as evidence in criminal trials: problems and solutions from the perspective of forensic phonetics", District Court of NSW seminar, 14 March 2018, Sydney, at forensictranscription.com.au/judcom, accessed 20/6/2018.

16 *R v Dunn* (2012) 15 DCLR(NSW) 144; *R v Vandergulik (No1)* [2008] VSC 407; *R v Hall* [2001] NSWSC 827.

17 *R v Murrell* (2001) 123 A Crim R 54; H Fraser, "How interpretation of indistinct covert recordings can lead to wrongful conviction: a case study and recommendations for reform" in R Levy, M O'Brien, S Rice, P Ridge and M Thornton (eds), *New directions for law in Australia: essays in contemporary law reform*, ANU Press, Canberra, 2017.

18 H Fraser, "'Assisting' listeners to hear words that aren't there: dangers in using police transcripts of indistinct covert recordings" (2018) 50 *Australian Journal of Forensic Sciences* 129; and see similar points in *R v Dunn*, above n 16.

19 A M Ridley, F Gabbert and DJ La Rooy, *Suggestibility in legal contexts: psychological research and forensic implications*, Wiley-Blackwell, 2013.

20 Specially prepared examples are provided at forensictranscription.com.au, accessed 2/7/2018.

21 See for example: *R v Leung* (1999) 47 NSWLR 405 at [44]–[48]; *Li v R* (2003) 139 A Crim R 281 at [40]–[42]; *Nguyen v R* [2017] NSWCCA 4; *R v Phan* (2017) 128 SASR 142; *R v Madigan* [2005] NSWCCA 170.

22 J Kreiman and D Sidtis, *Foundations of voice studies: an interdisciplinary approach to voice production and perception*, Wiley Blackwell, Oxford, 2011, Ch 7 offers a useful summary of well-established research.

23 See for example: P Foulkes and P French, "Forensic speaker comparison: a linguistic-acoustic perspective" in PM Tiersma and LM Solan (eds), *The Oxford handbook of language and law*, OUP, 2012; P Rose, *Forensic speaker identification*, Taylor & Francis, 2002.

24 *R v Giovannone*, above n 5, at [58].

25 H Fraser, "'Enhancing' forensic audio: false beliefs and their effect in criminal trials" (2018) *Australian Journal of Forensic Sciences*, at www.tandfonline.com/doi/full/10.1080/00450618.2018.1491115, accessed 12/7/2018.

26 See video of multimedia presentation to Australian Academy of Forensic Sciences, Melbourne, at forensictranscription.com.au/tag/talks, accessed 20/6/2018.

recordings evaluated by the judge. While this can be effective, at the cost of considerable judicial time,[27] it is not guaranteed to provide a reliable outcome.[28]

Perhaps surprisingly, linguists are not advocating that each trial should involve linguistics experts appearing for prosecution and defence. Even if there were enough experts with appropriate high-level qualifications in forensic linguistics willing to take on the work, common misconceptions about the nature of language[29] make an adversarial approach unsuitable for establishing reliable interpretation of covert recordings.

For these and other reasons, the linguists' recommendation is that all covert recordings to be used as evidence in court should be accompanied by a reliable transcript and/or translation, produced according to standard, evidence-based practices administered by accredited professionals — much in the way DNA evidence is provided.[30]

Exactly how such processes should be developed and administered is a matter for collaborative discussion and research involving law, law enforcement and linguistics — of the kind that has proven so successful in relation to other aspects of language and the law.[31]

27 See *R v Dunn*, *R v Vandergulik*, *R v Hall*, above n 16.

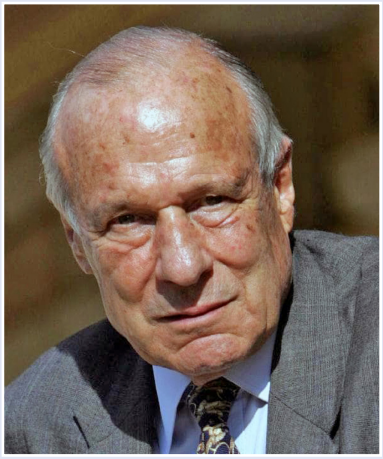
28 See Fraser above n 14; Fraser above n 17.

29 See for example LM Solan, J Ainsworth and RW Shuy (eds), *Speaking of language and law: conversations on the work of Peter Tiersma*, OUP, 2015.

30 Above, Fraser n 1 for further discussion.

31 Above nn 7, 8.

Vale Sir Laurence Street AC, KCMG, QC, first President of the Judicial Commission



Sir Laurence Street, former Chief Justice of NSW (1974–1988) and the Judicial Commission's first President, has died aged 91.

Sir Laurence regarded the Commission's establishment as a victory for the judiciary and a bastion of the independence of the courts. He reflected in 2008 that its establishment was the outcome of the "most public and deep battle he had fought".[1]

The battle lines were drawn in September 1986 when then Attorney General Terry Sheahan AO circulated to heads of jurisdiction the plan for a judicial commission as part of a justice reform package. The original plan, made in response to a perceived crisis in public confidence in the judiciary, was for the Commission to be part of the Attorney General's Department. Sir Laurence saw this as putting the constitutional arrangement between the executive and the courts back several centuries before the *Act of Settlement* 1701 when judges were appointed and dismissed at the royal pleasure. Sir Laurence and the Supreme Court justices issued a public statement on 30 September 1986 opposing the draft Judicial Officers Bill, condemning the extraordinary haste with which it was drafted, the lack of consultation and attack on judicial independence. Ultimately, Sir Laurence negotiated amendments to the Bill which saw the Commission entirely separated from the executive government with its own budget and reporting directly to Parliament. The education and sentencing functions of the Commission, which the judges had found acceptable, became the nascent Commission's key focus. Sir Laurence led the Commission in its formative phase until his retirement from the bench in November 1988. Sir Laurence then launched a successful mediation and ADR practice.

A State Funeral was held for Sir Laurence at the Sydney Opera House on 5 July 2018.

1 K Lumley, "From controversy to credibility: 20 years of the Judicial Commission of NSW" (2007) 19 *JOB* 73 at 74.