
Thirty Years Is Long Enough: It Is Time to Create a Process That Ensures Covert Recordings Used as Evidence in Court Are Interpreted Reliably

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This article outlines a number of serious problems arising from the handling within the legal process of covert recordings used as evidence in criminal trials. These problems relate specifically to four key areas, namely: translation of material in languages other than English, transcription of indistinct English, attribution of utterances to speakers and “enhancing” of poor quality audio. The paper traces the problems back to the landmark High Court judgment of Butera 1987, and attributes them to insufficient understanding within the judiciary of well-established but counterintuitive findings of linguistic science regarding factors that affect the reliable interpretation of recorded speech. Several possible solutions to the problems are canvassed, and it is recommended that the most promising way forward is via enhanced communication and collaboration between law, law enforcement and linguistic science.

I. INTRODUCTION

Covert recordings are now obtained on behalf of police for nearly every major crime. In addition to their considerable value during investigations, they can provide powerful evidence in court, allowing the trier of fact (typically a jury) to hear admissions that would not be made overtly. Of course the value of the evidence contained in a recording depends crucially on reliable determination of what is being said, and who is saying it. Error in either of these creates a substantial risk of miscarriage of justice.

When the recording is of good quality, the conversation is conducted in clearly enunciated English, and the speakers are identifiable via incontrovertible external evidence, determining what is being said and who is saying it is relatively straightforward. Unfortunately many of the covert recordings that appear in court do not meet these criteria. Some¹ feature speech in languages other than English. Many are of poor quality, making even English indistinct. External evidence regarding the identity of speakers is often absent or circumstantial. A single recording may suffer from all of the above issues, and more.

In recordings like these, determining what is being said, and who is saying it, is far from easy. According to law, responsibility for making this determination rests with the jury. Since this constitutes a significant burden, the law has instituted a range of practices, many stemming from *Butera 1987*,² to assist juries with covert recordings.

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¹ Ideally, statistics should be provided here, but I have been unable to find any resources that enable quantification of cases involving covert recordings of various kinds. The observations here are based on personal experience backed up by discussion with many individuals at all levels of law and law enforcement (see Acknowledgments).

² *Butera v DPP (Vic)* (1987) 164 CLR 180; G Edmond and M San Roque, “Quasi-justice: Ad Hoc Expertise and Identification Evidence” (2009) 33 Crim LJ 8.



The problem is that, though these practices have been developed with care and good intention, and have become widely accepted within the law, they do not work well. As discussed below, they are inefficient: wasteful of time both in and out of court. More importantly, they are ineffective: not capable of ensuring the jury reaches a reliable interpretation of what is said, and who is saying it. A number of cases of substantial injustice have already come to light.³ It is certain there are others yet to be discovered, and, if things continue as they are, more still to happen.

The present paper begins the process of improving this situation. It starts by presenting some background to the current practices for the legal handling of covert recordings, then identifies a number of problems with these practices, as seen from the perspective of linguistics, the science of language, and its major subdiscipline, phonetics, the science of speech. Finally it outlines the direction in which solutions may be sought. While the paper stands in its own right, it also serves as background supporting a call to action delivered to the judiciary by several academic organisations representing Australian linguists (here defined as experts in linguistics, not as speakers of multiple languages) on 8 December 2017, anniversary of the *Butera v DPP (Vic) (Butera)* judgment.

II. BACKGROUND

Many of the practices governing admission and use of covert recordings take their lead from the landmark High Court judgment in *Butera*. This related to a drugs case involving evidence in the form of poor quality covert recordings featuring some English, but mainly in multiple foreign languages, for which translations were obtained. Judges in the original trial⁴ and subsequent appeal⁵ had ruled that “transcripts” of the translations could be provided as an “aide-memoire” to assist the jury in their evaluation of the evidence.

This evidently marked a break with legal tradition: previously, translations had been given, and discussed under examination and cross-examination, only orally, with the jury expected to reach an evaluation of the evidence based on their memory of the testimony. Ultimately the High Court upheld the trial judge’s ruling, the main consideration being that provision of a transcript is merely a convenience to the jury in recalling the detail of the oral testimony. As a result, it is now standard practice to provide transcripts of all covert recordings, whether in English or other language(s).

Of course there is no intention here to comment on the validity of any of the judicial rulings in this particular drugs case, or of any other individual case. Nor is there any reason for linguists to be concerned by the general principle that evidence about the content of covert recordings should be provided to juries in written form.

The problems, from the point of view of linguistic science, arise from the commentary made in explanation and support of the substantive ruling.

III. THE PROBLEM

While the *Butera* ruling gave clear legal authority for providing a transcript as an “aide-memoire” to assist a jury in evaluating evidence contained in a covert recording, it was far less explicit regarding the nature of the transcript, or what form it should take, or how it should be prepared and validated under various circumstances, or how it should be used by the jury. It did however incorporate a number of comments, suggestions, assumptions and presuppositions, which have, in conjunction with subsequent rulings (to be mentioned), as well as the *Evidence Act 1995* Cth, coalesced into standard judicial practice governing many aspects relating to the admission and use of covert recordings and transcripts in courts around the

³ H Fraser, “How Interpretation of Indistinct Covert Recordings Can Lead to Wrongful Conviction: A Case Study and Recommendations for Reform” in R Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, Canberra, 2017).

⁴ *R v Narula* [1987] VR 670; [1987] VicRp 56.

⁵ *R v Narula* [1987] VR 661; [1987] VicRp 55.

country. These judicial practices naturally guide related practices for handling covert recordings at all levels of law and law enforcement.

The problem is that the practices have been developed with very little input from linguistics. This is because, in general, speech and language are considered by the law to be matters of common knowledge, about which a jury can reach its own determination, and lawyers can make authoritative judgments regarding factors liable to affect that determination. Of course, linguists can be called as expert witnesses, at the discretion of lawyers, in relation to particular matters (most commonly speaker identification). However, this happens in a small minority of cases, and where it does, the expert witness (rightly) knows little about the case as a whole, or about how his or her evidence is handled within the trial. Consequently linguists, even those (few) with an interest in forensics, have until recently known little or nothing about how covert recordings are handled in those (many) cases where it is not considered necessary to take advice from an expert in linguistics.

The result is that the practices that have developed within the law are highly anomalous from the point of view of linguistic science. The next sections briefly review significant problems in four key areas: translation of foreign languages, transcription of indistinct English, identification of speakers and “enhancement” of poor quality audio.

A. Translation of Languages Other than English

Butera remains the key Australian authority governing the handling of covert recordings that contain foreign language material. It is hard to know from the published judgments exactly what the *Butera* recordings and transcripts were like (though they were clearly very indistinct, with uncertainty in some parts even as to which language was being spoken), or what issues might have been raised about their translation had linguistics experts been consulted at the time.

What is sure is that any expert in linguistics who reads the *Butera* ruling will feel a sense of alarm – not just for the views it expresses, but for its lack of attention to crucial questions that necessarily affect the reliability of any translation.⁶ Yet this document remains the key authority governing standard practice for handling covert recordings incorporating material in languages other than English.

Now, as then, “transcripts” are provided by translators deemed to be “experts” on the grounds that they speak the relevant language. This glosses over a distinction considered crucial in linguistics, between ability to speak a language, which is open to (nearly) anyone, and genuine expertise in the language, which is conferred by advanced academic study both of linguistics and of the language in question. It is widely recognised within linguistics, though unfortunately not always by the law,⁷ that making reliable judgments about evidence involving foreign languages requires genuine expertise. Indeed, translating (of written materials) and interpreting (of real-time spoken communication) constitute a specialised subdiscipline of linguistic science.⁸

Some matters regarding the complexity of translating and interpreting languages other than English in legal contexts have recently been brought to the attention of the judiciary,⁹ and been influential in deciding cases¹⁰ that will now be used as important precedents to improve the reliability of witness translation (ie, interpreting non-English material used in overt settings, such as witnesses giving evidence in court).

⁶ A few relevant concerns were expressed by the one dissenting judge (Gaudron J at 42–45), but evidently not shared by the majority.

⁷ See for example D Eades et al, “Linguistic Identification in the Determination of Nationality: A Preliminary Report” (2003) 2 *Language Policy* 179.

⁸ Consider the curriculum offered by, for example, the University of New South Wales Discipline of Interpreting and Translation <<https://hal.arts.unsw.edu.au/disciplines/interpreting-and-translation/study/>>.

⁹ For example, S Hale, “Interpreter Quality and Working Conditions: Comparing Australian and International Courts of Justice” (2012) 9 *Judicial Officers Bulletin* 75; R French, *One Justice – Many Voices* (Language and Law Conference, Darwin, 2015).

¹⁰ For example, *Gibson v Western Australia* (2017) 51 WAR 199; [2017] WASCA 141.

However, forensic translation (ie, rendering into English of non-English material in covert recordings used as forensic evidence), though related, is a very different topic, and has not yet attracted the same kind of attention. This is despite the fact that the issues surrounding forensic translation are even more complex than those of witness translation. Ensuring reliability requires not just high-level expertise in relevant branches of linguistics, but also the following of a closely controlled process designed to manage bias and other factors known to affect the reliability of all forms of forensic evidence.¹¹ Without control of both the expertise and the process, there is a high risk that a translation will be misleading in ways that cannot be readily cured within the trial proceedings.

While it is increasingly expected by the courts that forensic translators will have some form of accreditation, through a body such as the National Accreditation Authority for Translators and Interpreters (NAATI), this is not in itself enough to ensure relevant expertise. NAATI offers a wide range of accreditations, some at low levels that would not be recognised by academic linguists as conferring relevant “expertise”, and none specifically on translation of covert recordings, which occupies a grey area between translating and interpreting, and requires skills beyond those normally covered in either stream.¹² Finally, the fact that someone has a NAATI qualification does not in itself ensure they are appropriately independent of the investigation, a key factor in avoiding unconscious bias – and in fact forensic translators often do work extremely closely with investigators.

A particular problem is the near-universal practice of translators going straight from the recording to the English “transcript”, never producing a real transcript in the original language. This seems to be encouraged on grounds that the jury cannot use a transcript in the original language, but it glosses over many substantial issues both in transcription (especially where the audio is of poor quality – see next section) and of translation itself.¹³ In addition, it strongly encourages the trier of fact to read the entire “transcript”, even English portions, as a text, rather than properly evaluating the audio itself.

B. Transcription of Indistinct English

Although the *Butera* recordings evidently contained little English, the judgment made a number of revealing comments about what was evidently contemporary practice with regard to the transcription of English in poor quality covert recordings. These comments have since been consolidated, via a number of subsequent judgments,¹⁴ into the standard practice adopted by Australian courts in admitting indistinct English recordings, which happens around the country on a weekly basis.

While some of the larger crime agencies include dedicated transcription teams, in the regular police forces, transcription of covert recordings to be used as evidence in court is arranged on a case-by-case basis. Where the audio is clear, transcription may be done by an independent agency. However, when, as often happens, the recording is less than clear, the transcript is typically provided by one or more detectives working on the case.

To enable police to provide a transcript as opinion evidence, they are given the status of “ad hoc expert”, on the grounds that they have gained a form of “specialised knowledge” (in the sense of s 79 of the *Evidence Act 1995*) through listening to the audio many times. To ensure juries do not simply accept the transcript on face value, the judge is required to direct them to the effect that the transcript is provided only as an “aide-memoire”:¹⁵ they can use it as assistance, but must review the audio carefully and reach their own conclusions as to its contents.

¹¹ See for example DA Harris, *Failed Evidence: Why Law Enforcement Resists Science* (NYU Press, New York, 2012).

¹² 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 & Forensic Science Perspectives* (Barr Smith Press, Adelaide, 2017).

¹³ See Gilbert, n 12, for detailed examples.

¹⁴ For example, *R v Cassar* [1999] NSWSC 436; *Eastman v The Queen* (1997) 76 FCR 9; *R v O’Neill* [2001] VSCA 227.

¹⁵ For background on why this odd term is used, and how misleading it is, see 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).

Again, while these concepts have evidently become entirely normal to lawyers,¹⁶ they are highly problematic from the point of view of linguistic science.

Preparing a reliable transcript of unclear or indistinct audio is a specialised task in which police have no relevant expertise, even “ad hoc”.¹⁷ For this and other reasons, police transcripts are frequently inaccurate or misleading. Further, it is likely that significant errors will go undetected even by careful listeners. This is due to the fact that a transcript “primes” perception of those who listen to indistinct audio with its “assistance”, even when it is manifestly wrong.¹⁸

The fascinating phenomenon of priming is hard to appreciate from written explanation alone.¹⁹ However, it certainly affects not just juries but also defendants, lawyers and even judges.²⁰ This renders unrealistic the concept that the jury will use the transcript only as an “aide-memoire”, and places an unfair burden on the defendant to demonstrate the police transcript is wrong, as opposed to giving the prosecution the duty to provide reasonable demonstration that their interpretation is right. The effect is that erroneous police transcripts are seldom challenged appropriately.²¹

Most alarmingly of all, even on the very rare occasion when significant error in a police transcript is detected and successfully appealed,²² there are no consequences beyond the individual case, either for the process as a whole,²³ or for the individual detective.

For example, the “ad hoc expert” whose transcripts were found to have been misleading by the NSW Court of Criminal Appeal in *R v Murrell (Murrell)* has provided transcripts in at least two subsequent murder trials, with no specific duty on the prosecution (despite the general duty of fairness) to disclose his previous poor track record.²⁴

C. Speaker Identification

Most of the focus in discussing forensic transcription is on the content (what is said). However, a transcript also attributes individual utterances to particular speakers (who said it). In principle, attribution of utterances and identification of speakers are very different tasks, but they are often conflated in current practice. Again, this stems from *Butera*. Though the identity of the speakers in the *Butera* recordings seems not to have been at issue, the High Court made approving comments about contemporary speaker identification practice. These comments, in combination with numerous subsequent rulings,²⁵ give authority for the very common practice of allowing speaker identification evidence to be given by an “ad hoc expert”, typically a translator or police transcriber deemed (inappropriately, from the perspective of linguistic science) to have “specialised knowledge” deriving from familiarity with the voices in the recording.

¹⁶ Though see CS Fishman, “Recordings, Transcripts, and Translations as Evidence” (2006) 81 *Washington Law Review* 473.

¹⁷ Edmond and San Roque, n 2; H Fraser, “Real Forensic Experts Should Pay More Attention to the Dangers Posed by ‘Ad Hoc Experts’ (Guest Editorial)” (2018) 50 *Australian Journal of Forensic Sciences* 125.

¹⁸ H Fraser and B Stevenson, “The Power and Persistence of Contextual Priming: More Risks in Using Police Transcripts to Aid Jurors’ Perception of Poor Quality Covert Recordings” (2014) 18 *International Journal of Evidence and Proof* 205.

¹⁹ Though for an especially compelling finding, do see 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.

²⁰ Readers are encouraged to watch H Fraser, “Transcription and Interpretation of Indistinct Covert Recordings Used as Evidence in Court” (Presentation at National Judicial College of Australia, Canberra, 2017) <<https://forensictranscription.com.au/video-of-njca-talk/>>.

²¹ For a troubling case study, see H Fraser, “Forensic Transcription: How Confident False Beliefs about Language and Speech Threaten the Right to a Fair Trial in Australia” (in press) *Australian Journal of Linguistics*.

²² For example, *R v Murrell* (2001) 123 A Crim R 54; [2001] NSWCCA 179.

²³ *R v Murrell* (2001) 123 A Crim R 54; [2001] NSWCCA 179 is certainly cited as a precedent, but to my knowledge, only once in relation to the reliability of the transcript, and that in rather special circumstances: see *R v Hall* [2001] NSWSC 827, [26].

²⁴ Fraser, n 17.

²⁵ For example, *Tran v The Queen* [2016] VSCA 79; *R v Phan* (2017) 128 SASR 142; [2017] SASCFC 70; *R v Madigan* [2005] NSWCCA 170.

None of these rulings, even the most recent, makes any comment suggesting awareness of the complexities of speaker identification raised by the extensive research literature²⁶ – despite the fact that courts hear from genuine expert witnesses about speaker identification more than any other branch of forensic linguistics.

Phonetic science makes clear that, despite having the apparent benefit of a recording, an “ad hoc expert” undertaking speaker identification is essentially an ear witness. Ear witness evidence is well known to be substantially less reliable than eyewitness evidence²⁷ – and the unreliability of eyewitness testimony is now known to be the source of the majority of wrongful convictions overturned by DNA evidence.²⁸

Even if a genuine forensic phonetics expert is called to assist with speaker identification, as happens increasingly but still rarely relative to the large number of cases featuring covert recordings, the starting point for the expert evaluation is the police opinion, and it remains a matter for the jury (themselves essentially ear witnesses in this context) to decide whether they prefer the opinion of the “ad hoc” or the genuine expert.

In short, voice recognition by “ad hoc experts” is inevitably unreliable, yet inevitably compelling to a jury. Judicial directions requiring juries to use an ad hoc expert’s opinion only as a guide, and to reach their own conclusion as to who is producing each utterance in a covert recording, are incapable of overcoming this unreliability.²⁹

The likelihood of a jury being unfairly influenced by an unreliable “ad hoc expert” is increased even further when, as commonly happens, the speaker identity assumed by police, though officially an “opinion”, is set out as part of the “statement of facts”, embedded into the transcript, and presupposed as the basis for interpreting other evidence in the case (see further comments in Part III E).

D. Enhancing

Though evidently not an issue in *Butera*, it has now become common practice, following subsequent appeal rulings,³⁰ for poor quality recordings to be accompanied by one or more “enhanced” versions purporting to make the contents easier to hear. The “enhancing” is typically done, not by a phonetician but by an audio engineer, who can be deemed an “expert” on the most minimal of qualification.³¹ Again it is left to the jury to review the audio and decide for themselves whether they find the “enhancing” helpful, and again, this raises alarm in genuine experts in relevant branches of linguistic science.

“Enhancing” is a vague term covering a wide range of techniques validly used to make good audio sound better, typically for the entertainment industry. None of these techniques can reliably make unintelligible audio intelligible. Unfortunately, however, due to the influence of “Crime Scene Investigation” shows in popular media, the general public are highly susceptible to the false belief that “enhancing” makes audio objectively “clearer”. Thus, in many cases the real effect of “enhancing” audio is to enhance the credibility of a transcript – even when that transcript is manifestly misleading.

These kinds of false beliefs seem to be prevalent among the judiciary as well as the general public. In *R v Giovannone*, for example, the reason for admitting the enhanced version was given via the judge’s opinion that what was done was “the aural equivalent of the use of a magnifying glass to enhance an individual’s capacity to perceive the relevant record”. This is straightforwardly false³² – but the ruling

²⁶ 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, Oxford, 2012); P Rose, *Forensic Speaker Identification* (Taylor & Francis, 2002); F Nolan, *The Phonetic Bases of Speaker Recognition* (CUP, Cambridge, 1983).

²⁷ See the especially useful summary of ear witness research in J Kreiman and D Sidtis, *Foundations of Voice Studies: An Interdisciplinary Approach to Voice Production and Perception* (Wiley Blackwell, Oxford, 2011).

²⁸ See The Innocence Project: innocenceproject.org.

²⁹ AJ Wistrich, C Guthrie and JJ Rachlinkski, “Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding” (2005) 153 *University of Pennsylvania Law Review* 1251.

³⁰ For example, *R v Giovannone* (2002) 140 A Crim R 1; [2002] NSWCCA 323.

³¹ Fraser, n 21.

³² Fraser H, “Enhancing Forensic Audio: False Beliefs and Their Effect in Criminal Trials” (in press) *Australian Journal of Forensic Sciences*.

has been used as a precedent in many cases, allowing admission of “enhanced” audio with virtually no scrutiny.

E. Linguistics Is a Science

All these problems, and more, are caused by confusion between ability to use language and speech, and expertise in analysing and evaluating language and speech used as evidence in court (see Part III A above). This confusion reflects widespread misunderstanding about the nature of linguistics as the science of language and speech (an importantly different kind of science from the “hard” sciences, but certainly a body of systematised knowledge developed through methods of critical observation and experimentation).

Perhaps the most damaging misunderstanding is the idea that linguistics merely adds technical detail to common knowledge about language and speech. In fact, many findings of linguistic science overturn ideas widely but wrongly accepted as “facts” even by high-level experts in other fields, and show common knowledge to be largely a system of confident false beliefs.³³ The upshot is that there are often two roles required of forensic linguists: providing expert analysis and managing confident false beliefs in those using the analysis. Unfortunately they are not always given the opportunity to perform both roles effectively.

This is a situation familiar to linguists in many areas of practical application,³⁴ nowhere more so than the law.³⁵ Covert recordings provide another instance of the same problem, the effect of which is made worse still by the fact that, even when their content is extremely difficult to interpret, covert recordings are considered by the law to be “direct” evidence, to be used as validation of “circumstantial” evidence, in ways that fit patterns known to contribute to wrongful conviction.³⁶

IV. THE SOLUTION

Over the past 15 years, various avenues to a solution for problems in handling covert recordings have been canvassed. It is now clear that the only way to improve the situation is to change the concept that interpretation of evidence in a covert recording is a matter of “common knowledge”, to be carried out by juries with the “assistance” of transcripts and other aids whose admission and use are regulated only by lawyers. All the problematic practices of law and law enforcement with regard to covert recordings are driven by this contingency, and will not change until it does.

Of course, it is a cornerstone of the law that evaluation of evidence is ultimately up to the jury. However, for covert recordings, expert guidance is needed to ensure the jury’s evaluation is reliable – exactly as it is for many other kinds of evidence, such as fingerprints, blood spatter or DNA.

The difference that makes this analogy hard to see is that, whereas other kinds of scientific evidence are opaque without the interpretation of experts, speech evidence can be confidently interpreted by anyone. The problem of course is that the confident interpretation reached might well be wrong – a problem greatly exacerbated by the well-known fact that judgments about language and speech show surprisingly low correlation between confidence and accuracy.³⁷

³³ Fraser, n 21.

³⁴ See, eg, L Bauer and P Trudgill, *Language Myths* (ePenguin, 1998); N Niedzielski and DR Preston, *Folk Linguistics* (Mouton, 2003).

³⁵ See, eg, D Eades, *Sociolinguistics and the Legal Process* (Multilingual Matters, 2010); M Coulthard and A Johnson (eds), *The Routledge Handbook of Forensic Linguistics* (Routledge, 2010); PM Tiersma and LM Solan (eds), *The Oxford Handbook of Language and Law* (OUP, 2012).

³⁶ JB Gould et al, *Predicting Erroneous Convictions: A Social Science Approach to Miscarriages of Justice* (National Institute of Justice, Washington, DC, 2012).

³⁷ Readers are urged to experience this personally via the specially prepared multimedia demonstrations linked from forensictranscription.com.au.

For DNA evidence, the idea that guidance from genuine experts should be withheld from juries, or given in conjunction with an “alternative” opinion from an “ad hoc expert” – along with an exhortation to the jury that it is a matter solely for them to make up their own mind which opinion they prefer – is absurd. Unfortunately, it is just such an untenable proposition that is accepted as standard practice with language and speech evidence.

The question now is how to move from the current bad situation to a better one.

A. What Not to Do

On raising these issues, the most common advice from lawyers is to wait for an appeal case that can provide a new precedent to supersede *Butera*. This may well be the right process when a particular practice has simply become outdated in some aspect (as indeed was the situation with *Butera* itself, with respect to the withholding of written versions of translators’ evidence). However, it is clearly not viable in the current situation.

For one thing, as shown in Part III B above, even where there is a relevant case, it is not necessarily used effectively in subsequent cases. For another, current legal practice regarding covert recordings relies, not just on one, but on a plethora of precedents (only a few of which have been mentioned above). Further, common practice includes aspects that are not the direct result of a specific higher court ruling, but rather have emerged through legal and law enforcement culture evolved in response to judicial practices which have become standard since *Butera*.

Thus even were a relevant precedent (such as *Murrell*) to be used in later judgments, it might not be applied in a way that makes sense from the point of view of linguistic science. Examples are seen in the United Kingdom, where two appeal court rulings³⁸ have been influential on the admission of language and speech evidence, but not always in a good way.

Another common assumption is that improving the current situation involves having all transcripts of covert recordings prepared or reviewed by high-level experts in linguistic science. This is emphatically not what is being suggested here. One reason (of several) is that there are not nearly enough genuine experts in the relevant highly specialised branches of linguistics³⁹ to undertake the work – even if all were to make themselves available as expert witnesses, which is extremely unlikely. This leaves a vacuum liable to be filled by self-declared experts, giving the courts the fraught task of deciding who is or is not appropriately qualified to offer reliable advice about evidence contained in covert recordings.⁴⁰

As discussed briefly below, in the current situation, the recommended role for experts is not to provide individual transcripts, but to be involved in designing and monitoring a process for ensuring that a reliable transcript is available to accompany every covert recording used as evidence in court. Again it is worth pointing out that this is entirely in line with DNA evidence: we do not expect high-level experts to do each analysis, but to design effective methods, then implement reliable processes to ensure the methods are followed properly by independent, trained professionals, accredited as to their proficiency.

B. A Better Way

The most important thing is that developing the solution should be a collaborative effort involving appropriate representatives from law, law enforcement and relevant branches of linguistics. Having said that, it is essential that the judiciary itself take carriage of the process of implementing a better system, and understand it well enough to administer the judicial side of it to good effect. We are fortunate to have an excellent recent model in the process used by the Judicial Council for Cultural Diversity (JCCD) to develop the *Recommended Standards for Working with Interpreters in Courts and Tribunals*⁴¹ – though

³⁸ *R v Anthony O’Doherty* [2002] NICA 20; *R v Flynn* [2008] EWCA Crim 970.

³⁹ H Fraser, “Transcription of Indistinct Forensic Recordings: Problems and Solutions from the Perspective of Phonetic Science” (2014) 1 *Language and Law* 5.

⁴⁰ See G Edmond, “What Lawyers Should Know about the Forensic Sciences” (2015) 36 *Adelaide Law Review* 33.

⁴¹ Judicial Council for Cultural Diversity, *Recommended Standards for Working with Interpreters in Courts and Tribunals* (2017) <<http://jccd.org.au/publications/>>.

this document of course refers to interpreting overt witness evidence, not covert forensic evidence, which is the related but significantly different issue under consideration here (see Part III A above for discussion of the distinction).

As with development of the JCCD standards, the first step in the process of creating better practices for handling covert recordings used as evidence in criminal trials is to facilitate two-way education, in which linguists learn from judges about relevant aspects of the legal process,⁴² and lawyers learn from linguists about aspects of language and speech relevant to their use as evidence in court.

It is then necessary for law, law enforcement and linguistics to collaborate in designing a system that ensures all covert recordings are handled via uniform, evidence-based practices, carried out by accredited professionals operating independently of investigators. One proposal for how this might work is underway, taking into account best practice used with covert recordings in the larger, more responsible law enforcement agencies, some of which have indicated in-principle support regarding the need for overall reform. Perhaps publicity will bring forth other proposals for evaluation.

C. The Cost

A common reaction to this suggestion is “It will never happen; change on this scale is too expensive for the authorities even to consider”.

However, while current practice may seem cheap when considering only the time required of detectives and translators to prepare transcripts, consideration of the bigger picture shows the real costs are extremely high – without even mentioning the cost in human suffering when miscarriages of justice occur.⁴³

One of the most expensive unsuccessful prosecutions ever run in Australia⁴⁴ involved ineffectual argument, spanning 11 years and 2 trials, in which the major issue was whether the word “heroin” had been used in six short indistinct utterances captured within hundreds of hours of covert recordings. The most conservative estimate I have found of the cost of this case to taxpayers is \$25 million.

Following appropriate practice would have demonstrated right at the start that the utterances were unintelligible (with a status similar to that of a smudged fingerprint, or of inconclusive DNA analysis). At the same time it might well have offered advice as to how to obtain more useful evidence from the extensive language and speech samples collected on behalf of police (after all, whether someone does or does not utter the word “heroin” – or “heroin” – is hardly, in itself, a reliable indicator either of guilt or of innocence).

Although this is an extreme example, many covert recording cases waste considerable time arguing ineffectually about ultimately undecidable issues, sometimes at the expense of pursuing more useful lines of inquiry. Even where the content of the audio is decidable, many trials waste hours and days of court time playing hard-to-hear audio for the jury – then expect them to spend yet more time in the jury room evaluating multiple versions of the audio against multiple transcripts to “reach their own opinion”. A streamlined system with a clear decision-making strategy leading (in most cases) to a single reliable and agreed transcript would certainly be far more efficient.

It is worth pointing out that the proposed changes are not all to the benefit of the defence. The whole situation is rather similar⁴⁵ to the “verballing” that was exposed during the 1990s, via (very expensive) Royal Commissions, High Court rulings and other events.⁴⁶ This exposure resulted in the move from evidence about suspects’ admissions requiring only police notes, to requiring an electronically recorded

⁴² The legal context is very different from contexts in which linguistic research is typically carried out, and requires adapting existing concepts and practices of linguistic science, not simply “applying” them – Fraser, n 21.

⁴³ See Fraser, n 21.

⁴⁴ “Heroin Accused Win 11-year Court Battle”, *The Age*, 14 October 2000, 8–9.

⁴⁵ H Fraser, “Covert Recordings as Evidence in Court: The Return of Police ‘Verballing’?”, *The Conversation* (2013) 1 <<https://theconversation.com/covert-recordings-as-evidence-in-court-the-return-of-police-verballing-14072>>.

⁴⁶ For example, *McKinney v The Queen* [1999] HCA 6; JRT Wood, *Royal Commission into the New South Wales Police Service, Volume 1: Corruption* (Government of NSW, Sydney, 1997).

interview conducted under controlled conditions – a change initially resisted, on grounds of cost, reduction of police powers, and other considerations, but now valued by all involved in any sphere of law and law enforcement as an efficient and effective means of attaining certainty about verbal admissions.⁴⁷ Similar universally valued changes have been made in relation to forensic pathology, notably in Canada but slowly happening also in Australia.⁴⁸

None of this, of course, is to suggest there will not be substantial costs in making the required changes in the handling of covert recordings used as evidence in court. Indeed the changes will involve major upheaval, since the current problematic practices have, over 30 years, become deeply embedded in all areas of law and law enforcement. However, it is certain that ultimately the costs of running a streamlined, accountable system will be less, and the outcomes more reliable, than the current system.

The important thing in embarking on major change is to be sure, before beginning the inevitable upheaval, that it will be done well. That requires a collaborative process like the one outlined above, with full engagement of all relevant parties, and most particularly of the judiciary.

V. CONCLUSION

Just as DNA evidence needs to be handled via processes developed in consultation with experts in the biological sciences, so language and speech evidence needs to be handled via processes developed in consultation with experts in the linguistic sciences. A critical difficulty in bringing about this equal treatment is that, where effective processes for handling DNA evidence were able to be written on a clean slate, effective processes for handling covert recordings must be written on a slate containing 30 years' worth of ill-advised but highly entrenched practice. This has put the onus of proof on linguistics to show current practices are ineffective, where it should have been on the *Butera* (and other) judges to show the practices their judgments upheld were effective.

Linguistics has risen to the challenge of learning enough about the legal process to provide apt and compelling evidence,⁴⁹ demonstrating problems with the handling of covert recordings that threaten the right to a fair trial in Australia. It is now time for the judiciary to take the baton. The best way forward may not be immediately clear, but if the legal system has mechanisms whereby judicial rulings can create problems as serious as those discussed above, it must also have mechanisms whereby those problems can be solved. Surely the combined efforts of senior scholars of law, law enforcement and linguistics are well capable of arriving at a viable solution.

As in many voyages into uncharted Territory, the discovery of the way must be preceded by the will to find it.

⁴⁷ T Green, "The Future of Investigative Interviewing: Lessons for Australia" (2012) 44 *Australian Journal of Forensic Sciences* 31.

⁴⁸ S Cordner, "Forensic Pathology and Miscarriages of Justice" (2012) 8 *Forensic Science Medicine and Pathology* 316.

⁴⁹ Only a small proportion of which has been canvassed above – please review extended treatments in the references.