



Précis Paper

Interpreting Indistinct Covert Recordings

Expert in forensic phonetics Dr Helen Fraser discusses how our current practice of inaccurately interpreting indistinct covert recordings can lead to wrongful convictions, and perversions of justice more generally

Discussion Includes

- What is forensic phonetics?
- How are covert recordings treated as evidence in criminal proceedings?
- Priming: the power of transcripts
- Does the defence get a say?
- Finding a solution
- Advice for practitioners

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Interpreting Indistinct Covert Recordings

1. In this edition of BenchTV, Dr Helen Fraser (Director, Forensic Phonetics Australia, Armidale) and Corinne Deall (Solicitor, AR Conolly & Company Lawyers, Sydney) discuss how misinterpretation of indistinct covert recordings can lead to miscarriages of justice, and the reform that needs to take place to ensure that such recordings as are used as evidence in court are interpreted reliably.

What is forensic phonetics?

2. Phonetics is the science of speech.
3. Forensic phonetics is this very same science, but employed for the purposes of evaluating evidence used in court, which is typically in the form of covert recordings (e.g. bugging).
4. Covert recordings can be collected in any way. These days, probably the most common way is by telephone intercept. Basically, any recording whereby the person does not know they are being recorded is a covert recording.
5. Of course, a lot of these recordings will be found inadmissible by the court. But legally obtained covert recordings can be used as evidence in court.

How are covert recordings treated as evidence in criminal proceedings?

6. Covert recordings have two very different uses:
 - *investigative use*: usually police and investigators use them during the course of investigating a crime. They can be incredibly powerful sources of information
 - *evidentiary use*: this use comes into play after a charge is made and the trial is set to commence
7. Parties to a trial can request to use them as evidence.
8. A big issue with covert recordings is concerned with whether they are clear or indistinct. Many are clear and easily able to be understood. But many are not, because of the way in which they are recorded – that is, secretly.
9. When the audio is very indistinct, there are many different processes in place to deal with it. The two key things that have to be determined are:
 - firstly, who is speaking
 - secondly, what is being said

10. In determining who is speaking, it is often the case that there is more than one person speaking, which also has to be determined. And if a particular utterance is incriminating, it is extremely important to identify which of the speakers is responsible for it.
11. So the two things that need to be determined specifically are firstly who is speaking in general, and secondly who is uttering each particular piece of speech.
12. Sometimes, if the recording contains speech in a foreign language, a translation is necessary.
13. It is a common misconception that an otherwise unintelligible recording can be simply run through a machine, which is then capable of spitting back a clear and intelligible version of that recording. Unfortunately, this is not the case in reality. Our capability to enhance indistinct recordings is very limited.
14. At trial, a jury is typically provided with a transcript to accompany any indistinct recordings for their assistance. Usually, a detective working on the case writes the transcripts (i.e. the prosecution), which is, of course, a big problem.
15. The law recognises the trouble and controversy that lies in the police writing transcripts for evidence used to determine the guilt of an accused.
16. The judge has a duty to caution the jury that they should not just read the transcript – they must listen to the audio, and they can use the transcript to assist them in hearing what is being said in the audio, but they must listen carefully and reach their own opinion as to who is speaking and what they are saying.

The power of transcripts

17. Does the reading of a transcript affect what a jury will hear?
18. What is well known in the world of phonetics science but not so well known in the wider world is this: *if a person is listening to an indistinct audio with a transcript in front of them, that transcript will massively affect what that person hears.*
19. This phenomenon is called 'priming'. Priming is when the transcript is in fact doing far more than just assisting us in hearing - it is pretty much creating what we hear - without us knowing it.

An example

20. Please refer to the accompanying video production, in which is contained an audio example with the following instructions:
 - the first playing is to be listened 'cold'
 - the second playing is to be listened with the suggestion: '*I shot the prick*'

- the third playing is to be listened with the suggestion: '*I can't breathe*'
21. So the question is: how can we know which is right? How could a jury determine which one they thought was the correct interpretation?
 22. Several things happen to make it clear to a person that they are being primed. The first is when the person hears a recording without any suggestion, which gives the person the experience of hearing it as completely unintelligible.
 23. The second is when the person hears it with two possible transcripts, which gives the person an experience that causes them to doubt their perception.
 24. But most often when indistinct recordings are played in Court, the transcript is provided first, so the jury is already primed before they even get a chance to hear the recording, and typically, only one transcript is provided.
 25. In this way, the jury is not provided with the different experiences that permit them to consider other alternatives, which usually leads to an ill-considered confirmation on their part of the transcript as reliable and accurate. This can happen even when the transcript is manifestly inaccurate.
 26. In the High Court case of *Butera v Director of Public Prosecutions (Vic)* [1987] HCA 58, approaches to indistinct audio transcripts were considered. *Butera* was more so a translation case than a transcription case, because not only were the recordings of poor quality, they were in multiple foreign languages.
 27. The issue in this case was whether the jury could have a transcript, or whether the translator would have to give their evidence orally. The latter would place a big demand on the jury to the extent that its members would have to process a lot of oral, out-of-context material without any written material to refer to.
 28. The High Court in this case upheld the trial judge's decision to allow the jury to have a copy of the transcript. Since the decision, allowing juries access to transcripts of covert recordings has rapidly become common practice.
 29. It seems entirely reasonable for a jury have access to transcripts. The problem is that only vague indications are given as to the *nature* of the transcript. But the nature of a transcript is extremely important.

Does the defence get a say?

30. Are discussions held between the prosecution and the defence on how the transcript is to be written before it is admitted? The answer, in short, is yes.

31. As in any trial, the prosecution provides their material to the defence for scrutiny. If the defence disagrees with any part of the police transcript, then it is able - in fact encouraged - to raise it with the prosecution, and then both sides are expected to reach a mutual decision as to what the best version of the transcript might be.
32. The problem is that police transcripts are very rarely challenged, because police are considered to be ad hoc experts.
33. In order to submit a transcript - which is opinion evidence - the police have to be given the status of 'ad hoc expert'.
34. The law since *Butera* deems an ad hoc expert to be someone who, while not having formal training or qualifications in a particular area of expertise, has acquired expertise based on particular experience in an area, such as by listening to tape recordings which are substantially unintelligible to anybody who has not played them repeatedly. The definition is misguided. But many people who work in the criminal law do not see how wrong it is for the law to make the assumption that it does.
35. Usually some degree of priming is naturally implied in the defence's process of challenging a transcript. This is because typically the defence reads the transcripts, and then checks them against the audio, at which point the defence has been, albeit inadvertently, primed, and (most usually) will, as a consequence, deem the transcripts to be sufficiently accurate. Then the transcripts might be handed over to the accused for scrutiny.
36. Listening to a recording over and over again certainly does not make the listener an expert.
37. Listening many times is necessary but not sufficient in creating a good transcript of indistinct audio. The practice of listening many times is usually to increase the confidence by which a person claims to have heard something for the first time in the way that they did. Sometimes it makes a person change their mind, but for the most part, it just serves to reinforce what the person first heard.
38. Transcribing indistinct audio is extremely difficult. To be done well, there needs to be genuine and independent expertise.

Finding a solution

39. The reason why our current process is a problem is that often the audio is taken to be direct evidence, and is often used to bolster circumstantial evidence. So audio recordings can play a large role in deciding the final verdict in some cases.
40. They play a larger role than is properly recognised because they happen to be a form of evidence particularly powerful in their persuasive influence on a jury. A strong risk for justice to be perverted is thus created.

41. For a long time, people thought that the best solution was to have indistinct audio transcribed (or at least checked) by an expert.
42. Firstly, there are not nearly enough experts to perform such a mammoth task - it is simply too vast. The small number of people who actually specialise in transcription in the already narrow discipline of forensic phonetics cannot be dreamt of matching the sheer number of cases that involve covert recordings.
43. Secondly, with the way the law is at the moment, a judge is most likely to allow a jury to listen to both the police and the expert's evidence, and to be of the opinion that such a matter is for the jury to determine. It really matters to the jury then which version is heard first, or which version might fit their impression of how the case is so far evolving.
44. Dr Fraser thinks we just have to completely get away from this adversarial use of indistinct audio recordings, and look more at having the audio provided from the very start with a reliable transcript so that lawyers and juries alike do not see any transcript until it has been confirmed as reliable, which is what we do with DNA and other kinds of properly handled forensic evidence.
45. Essentially, analysis of speech should be handled by independent professionals before it has a chance of being admitted and coming before a jury.

Advice for practitioners

46. In the absence of any foreseeable change to our current troubled system, what can advocates do to guard against potential miscarriages of justice in this area?
47. There is no doubt that big changes are required to occur in this area. At this stage, it is very unclear as to how such changes might come about.
48. Linguists in Australia have recently been calling for action by the judiciary to really consider how dealing with transcripts of indistinct audios can be changed. But even if the judiciary accepts the linguists' 'call to action' (which they are indeed in the process of doing), it will take a long time for any changes to be implemented.
49. In the meantime, we must learn how best to deal with the current system. It is important for defence lawyers to be reminded that police transcripts can often be wrong, and that they should really be scrutinised in finer detail than that which has become usual.
50. Obtaining their own expert is currently available to the defence. But this can be costly, and not always necessary.

51. Dr Fraser suggests the first step be to ask someone unrelated to the case to listen to the audio, and if that person can hear very little, or nothing at all, then it demonstrates that the transcript will have a major effect on a person's comprehension of it.
52. It is an unfortunate thing if all of this responsibility only falls on the defence. It seems reasonable to expect the prosecution to provide expert evaluation of the audio to the defence if the defence decides not to accept the version of the transcript with which they are provided. Otherwise the police version becomes by default the origin from which all subsequent inquiry must flow, which automatically puts the defence on the back foot.
53. Unfortunately, it is impossible to know how many wrongful convictions have eventuated as a result of a mis-transcription. Dr Fraser is nevertheless personally aware of a number of cases in which inaccurate transcripts have been used to assist juries without the inaccuracy coming to anyone's attention.
54. Dr Fraser only sees a tiny fraction of the cases that involve indistinct covert recordings, so it would be an astonishing thing if there were not more cases out there in which some form of injustice had been incurred as a result of a mis-transcribed indistinct covert recording.
55. There is a concern that engaging independent professionals rather than detectives would be far too costly. To that, Dr Helen says nonsense - it would be an *even more* costly exercise to remedy a mis-transcription, or an injustice arising out of a mis-transcription, than it would be to engage a professional in the first instance. It would be far better to have a streamlined system capable of invariably producing reliable outcomes upon which the Court could depend to not give rise to error and thus further expense.
56. The most important thing that can be done in the push for change in this area is to make people aware of how bad the current system really is. Once we have agreed that change is necessary, the hardest thing to do is then figure out how to bring about the change.
57. It is especially difficult when the challenge involves overturning High Court decisions. What we really need is systemic reform.
58. Dr Fraser has been on the hunt for a model of reform that would fit this description. The closest she could find was that which was used to reform the practice of 'verballing'.
59. Laws against verablling were introduced so that we now have recorded police interviews. These changes were initially heavily resisted, and similar forecasts were made in relation to how expensive they would turn out to be.
60. But no one is arguing against its merit now. Everyone agrees it is only a positive thing - the prosecution just as much as the defence – because it affords the police an opportunity to

employ very effective interviewing techniques, a record of which makes for incredibly compelling evidence.

61. In a way, the practice of police transcribing indistinct audio recordings is a type of verballing, to the extent that the police have the opportunity to make it seem as though someone is saying something, which in fact they are not.
62. When change inevitably occurs, however long it might take, it will happen quickly, and the system will be far better (and probably cheaper) for it.
63. Judges are starting to see that something serious has to be done to address the problem. Their power to affect change, however, is limited.
64. But Dr Fraser believes it can be done – together with the cooperation of judicial officers, law enforcement professionals, and linguistic experts – it is only a question of how long it will take.

BIOGRAPHY

Dr Helen Fraser

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Dr Helen Fraser is Director of Forensic Phonetics Australia, and Adjunct Associate Professor at the University of New England, NSW. A major strand of her research over the past two decades has investigated problems and solutions related to transcription of indistinct covert recordings used as evidence in criminal trials. Recently she has led a Call to Action from peak linguistics organisations to the Australian judiciary, asking for review and reform of legal practices for handling covert recordings in light of well-established findings of the language sciences. For additional information, visit forensictranscription.com.au.

Corinne Deall

Solicitor, AR Conolly and Company Lawyers, Sydney

Corinne is a solicitor of AR Conolly and Company Lawyers with extensive advocacy experience in the NSW Civil and Administrative Tribunal. She graduated with a Bachelor of Laws with Honours from Macquarie University. Corinne is passionate about commercial litigation and has a particular interest in corporate insolvency.

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