



Transcripts of indistinct audio recordings: **Time for reform**

COVERT RECORDINGS AND ASSOCIATED TRANSCRIPTS CAN PLAY A PIVOTAL ROLE IN CRIMINAL TRIALS YET PROBLEMS EXIST IN RELATION TO HOW COURTS DEAL WITH INDISTINCT RECORDINGS. PRINCIPLES GOVERNING THEIR ADMISSIBILITY ARE NOT INFORMED BY FORENSIC LINGUISTIC SCIENCE AND MAY COMPOUND PROBLEMS.

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SNAPSHOT

- Disputes about indistinct audio recordings and their associated transcripts sometimes arise in criminal trials.
- Current practices and legal safeguards are inadequate and may be counterproductive.
- Legal reform is urgently needed to ensure that transcripts are prepared by independent experts in forensic transcription.

Before the recent re-trial of Jason Roberts for the murder of Sergeant Gary Silk and Constable Rodney Miller, one of the pre-trial issues to be resolved was whether certain audio recordings of conversations between Roberts and others, made on listening devices and by telephone intercepts, should be excluded (*DPP v Roberts (Ruling No.4)*, (*Roberts*).¹ The accused sought to exclude evidence of selected conversations on the basis, inter alia, that the recordings were so inaudible or unintelligible that it would not be open to the jury to find that the words or sounds, contained in the recordings, were those claimed by the prosecution. Following “well settled” principles, transcripts of those audio recordings were also available and could be received by the court “not as evidence of the conversation, but rather as a means of assisting in the understanding of it”.²

The transcripts had been prepared by an external agency, then subjected to review and amendment by investigating detectives. The defence offered expert opinion from two forensic linguists from the United Kingdom that, in general, “transcripts should not be produced by anyone who might have an interest in the interpretation of the content of the recording. In particular, the participation of such police members necessarily involved the risk of cognitive bias due to their inside knowledge of facts about the investigation which might influence their interpretation of the sounds heard on the recordings”.³

Kaye J doubted that the transcripts prepared under police supervision should be admitted as a form of expert evidence and accepted that “transcripts are produced by way of human interpretation which necessarily may be fallible”.⁴ He placed “particularly limited weight” on the transcripts produced under police supervision.⁵ In order to rule on admissibility of the audio recordings and the content of the transcript, he listened personally to relevant parts of the audio, providing detailed decisions about the disputed passages.

While it is not appropriate here to further consider the details of this particular case, *Roberts* raised issues which have been matters of concern for forensic linguists for more than a decade.

The standard procedure for transcription of indistinct audio recordings

Incriminating exchanges which occur during a covert investigation may be vital to a prosecution case. Recordings of out-of-court conversations are the best evidence of the content of those conversations. On the principle that understanding spoken language requires only common knowledge, it is considered a matter for the jury to determine the content.⁶

However, due to the circumstances in which a recording has been made (background noise, poor recording conditions, overlapping speech, etc) it may be of poor quality, with a consequent difficulty in determining its content. In circumstances where an audio recording is indistinct, the established practice is for the jury to be assisted by transcripts prepared by, or with the assistance of, police investigators. The High Court established in *Butera v Director of Public Prosecution (Victoria)*⁷ (a case dealing with the translation of recordings of conversations in languages other than English), that a transcript may be received at trial: “not as evidence of the conversation or other sounds recorded but as a means of assisting in the perception and understanding of the evidence tendered by the playing of the tape”.⁸

Investigating police may be given the role of ad hoc expert in relation to the preparation of the transcription, on the grounds that they have listened to the material many times.⁹

In recognition that police transcripts might not always be fully reliable, trial procedure incorporates a number of safeguards to ensure jurors are not misled by a potentially inaccurate transcript. The defence is expected to check the transcript thoroughly and negotiate an agreed version with the prosecution. If agreement is not possible, the judge will listen personally. The judge will also instruct the jury that the evidence is the audio recording, and the transcript is provided only as assistance (an “aide memoire”); jurors should listen carefully, and if their own perception differs from the transcript, they should prefer their own interpretation.

The concerns of forensic linguists

Forensic linguists (and occasionally psychologists) have identified multiple serious problems with these established practices.¹⁰

In relation to developing and/or amending transcripts, police who are familiar with the case possess contextual information concerning the circumstances of the offending; this information can include matters that will not be admitted at trial. Yet this information is likely to result in transcriptions by police being influenced by what they expect to hear. This is not a conscious distortion but a “confirmation bias” that can influence what is heard in a way that favours the prosecution case. Even if transcripts are sent to external transcription services, any benefit of this independence is lost if police are permitted subsequently to amend the transcripts provided.

As mentioned, the law recognises that police transcripts are fallible, and safeguards exist to ensure the jury is not misled by an inaccurate transcript. The problem is that these safeguards rely on lawyers and judges checking the transcript against the audio. Strong scientific evidence, stretching back for many decades, shows that perception of indistinct audio is heavily influenced by a transcript. This means the very act of checking an audio recording while referring to a transcript is likely to “prime” listeners to hear the audio in line with the transcript. While this might seem unobjectionable – after all, it is the function of the transcript to make it easier to hear and understand the recording – the problem is that, if the transcript is not fully reliable, the priming may lead to a confident, but inaccurate, understanding of the evidence. This also gives de facto primacy to the transcript, which is inconsistent with legal principle. For similar reasons, the issuing of a warning to a jury, while it recognises the possibility of error in the transcript, is not effective.

The upshot is that, rather than remedying the problem, these safeguards may actually compound the effect of errors in the transcript. This is evident in criminal cases where a demonstrably misleading transcript had passed all the relevant safeguards and been provided as an “aide memoire” to help jurors understand crucial audio evidence.¹¹

Australian linguists and the call to action

Australian linguists’ deep concerns about the problems inherent in the transcription of indistinct audio, and the associated “safeguards” at trial, culminated in 2017 in a “call to action” letter, endorsed by all major Australian linguistics organisations, addressed to the Australasian Institute of Judicial Administration (AIJA). The AIJA forwarded the letter to the Council of Chief Justices, which in turn passed it on to the Judicial Council on Cultural Diversity (JCCD) which had successfully led other needed changes regarding language and the law.¹²

In late 2019, Chief Justice Kourakis and three other judges of the JCCD held a full-day consultation with linguists and representatives of police and prosecutors from around the country. At its conclusion, the judges acknowledged the validity of the linguists’ concerns and recommended further investigation. Since 2020, the Research Hub for Language in Forensic Evidence at the University of Melbourne has been investigating this issue.¹³

In October 2022 a workshop hosted by the authors (Professor Helen Fraser, director of the Research Hub for Language in Forensic Evidence, and Professor Marilyn McMahon, deputy dean of Deakin Law School) considered the generation of transcripts by police, the status of police as “ad hoc experts” and the use of transcripts in criminal trials to “assist” jurors to understand indistinct audio. The workshop was attended by judicial officers, legal scholars and senior forensic linguistics researchers from Australia and the UK. Interdisciplinary understanding was facilitated by several participants giving short presentations on relevant aspects of law and forensic linguistics. It was noted that current practice regarding transcription of indistinct audio sits uneasily with 21st century efforts to improve the quality of forensic evidence, an area where Victoria is showing particular leadership.¹⁴



The workshop concluded with general agreement that law reform should take place to ensure these issues are addressed and change occurs. The issue is currently being considered by the Forensic Evidence Working Group established by the Supreme Court of Victoria, chaired by the Hon Chris Maxwell.

The way forward

In recent years there has been increasing recognition of the problems inherent in police involvement in transcripts of indistinct recordings and, more importantly, of the fact that current safeguards employed at trial do not effectively address these problems, as they take insufficient account of well-established scientific findings about human speech perception. Simply adding expert forensic linguists called by prosecution and defence, in an adversarial process managed by lawyers and overseen by judges, is unlikely to solve all the problems.¹⁵

A better solution is to ensure all indistinct audio admitted as evidence is accompanied by a demonstrably reliable transcript produced via accountable, evidence-based methods designed and managed by experts in forensic linguistics – before commencement of the trial process. This could be achieved, for example, by establishing an independent service for transcription of indistinct audio in each state and territory.

This, or any viable solution, requires recognition that, to ensure jurors reach an accurate understanding of indistinct forensic audio, common knowledge is not enough. While understanding spoken language in everyday contexts is certainly a common skill, understanding the factors that affect perception of indistinct forensic audio requires detailed expertise in specialised branches of linguistic science – and reliably determining the content of such audio requires scientific methods.¹⁶

Finally, transcription is not the only problem with the legal handling of indistinct recordings. Other matters identified in the linguists' call to action as requiring reform included the translation of languages other than English, the attribution of utterances to particular speakers and the use of enhancing methods for poor quality recordings. In all these areas and more, critical review and reform of current outdated, non-standardised and unscientific legal practices is urgently required.

A short video using audio from real cases to demonstrate the problems discussed above is available at <https://blogs.unimelb.edu.au/language-forensics/legal/>. ■

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- [2021] VSC 778.
- Note 1 above, at [5].
- Note 1 above, at [15].
- Note 1 above, at [19].
- Note 1 above, at [20].
- R v Menzies* [1982] NZCA 19.
- Butera v Director of Public Prosecutions (Victoria)* (1987) 164 CLR 180.
- Note 7 above, at 187 (Mason CJ, Brennan, and Deane JJ).

- The concept of ad hoc expertise has been comprehensively critiqued by G Edmond and M San Roque, "Quasi-justice: Ad hoc expertise and identification evidence" (2009) 33 *Criminal Law Journal* 8.
- P French and H Fraser, "Why 'ad hoc experts' should not provide transcripts of indistinct forensic audio, and a proposal for a better approach" (2018) 42 *Criminal Law Journal*, 298; M Giroux, *Confirmation Bias for Degraded Forensic Audio Evidence*, PhD Thesis, Simon Fraser University (2022).
- Eg, *R v Murrell* (2001) 123 A Crim R 54; [2001] NSWCCA 179.
- Judicial Council on Cultural Diversity and Inclusion, 2022, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (2nd edn) <https://jcdi.org.au/publications>.
- H Fraser, "Introducing the research hub for language in forensic evidence" (2020) 32(11) *Judicial Officers' Bulletin*, 117.
- C Maxwell, "Preventing miscarriages of justice: The reliability of forensic evidence and the role of the trial judge as gatekeeper" (2019) 93 *Australian Law Journal*, 642; KN Ballantyne and L Wilson-Wilde, "Assessing the reliability and validity of forensic science – an industry perspective" (2020) 52(3) *Australian Journal of Forensic Sciences*, 275.
- H Fraser and Y Kinoshita, "Injustice arising from the unnoticed power of priming: How lawyers and even judges can be misled by unreliable transcripts of indistinct forensic audio" (2021) 45(3) *Criminal Law Journal*, 142.
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