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CHAPTER 10: RECORDING OF POLICE INTERVIEWS

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10.1 Introduction

The recording of interviews by the police is not expressly part of the (non-exhaustive) remit of the Post-Corroborator Safeguards Review. The extent to which interviews are recorded was, however, suggested from within the Reference Group as an appropriate topic for the Review's consideration during the course of the Review's work, and Lord Bonython asked the expert group to address this issue as part of its report. Given the stage at which this issue was raised, this chapter is, in comparison to other parts of this report, a relatively brief analysis.

10.2 The concern giving rise to the inclusion of this topic

In Scotland, there is no general published guidance on when police interviews should be recorded, either in audio or visual form.¹ Although the ACPOS *Manual of Guidance on Solicitor Access*,² published in the light of *Cadder v HM Advocate*,³ contains detailed guidance on the issue of access to a solicitor, it does not directly address the question of how the interview should be conducted, including how it should be recorded (audio, visually, or in writing). The expert group has been advised that there are no strict rules on this matter.

It has been suggested to the expert group by a criminal defence practitioner that, as a consequence, only interviews conducted by CID officers are audio (or visually) recorded, and that recording is otherwise carried out in notebook form, often in a dedicated interview room where recording facilities are available. While we are not in a position to give an authoritative account of practice in this area, that is not of direct relevance to the question of what is desirable as a matter of principle, although it may – as explained below – be relevant to the question of what recommendations might usefully be made.

10.3 Some further background: the work of the CPT

The Committee for the Prevention of Torture has, in its work examining the conditions in which persons are detained across Europe,⁴ consistently pressed for electronic recording of police interviews.⁵ It has previously expressed concern about the extent to which police interviews are

¹ There is, however, a UK-wide *Code of Practice for the Video Recording with Sound of Interviews of Persons Detained under Section 41 of, or Schedule 7 to, the Terrorism Act 2000 and Post-Charge Questioning of Persons Authorised under Sections 22 or 23 of the Counter-Terrorism Act 2008* (2012).

² ACPOS, *Manual of Guidance on Solicitor Access*, version 1.2 (2011).

³ [2010] UKSC 43.

⁴ Under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987).

⁵ See A Birtles, "The European Committee for the Prevention of Torture and the electronic recording of police interviews with suspects" (2001) 1 HRLR 67.

recorded in Scotland. In 2005, the Committee for the Prevention of Torture published a report following a 2003 visit to the UK and Isle of Man. In recommendations relating to Scotland – where, notably, it expressed concern about the lack of any right of access to legal assistance during a police interview⁶ – it added:⁷

... the Committee welcomes the fact that, in Scotland, all Criminal Investigation Department interviews are now audio recorded and that police forces are working towards the audio recording of all interviews; **it can only encourage the authorities to have this done at the earliest opportunity.** Further, the CPT has been informed that individual police forces may introduce video recording of interviews if they have the resources to do so.

The Government's response stated, however, that it considered "existing practices with regard to the tape recording of interviews should continue to be observed".⁸ A further CPT report published in 2014 did not make any reference to the recording of interviews.⁹

10.4 Practice in England and Wales

In England and Wales, a code (Code E) issued under the Police and Criminal Evidence Act 1984 requires that audio recording be used at police stations in respect of any interview with a person cautioned in respect of any indictable offence, including an offence triable either way.¹⁰ (An offence triable either way is one which can be tried either with a jury in the Crown Court or without a jury in the magistrates' court.) The custody officer may authorise the interviewer not to audio record the interview in limited circumstances: where equipment has failed or is unavailable,¹¹ or if it is "clear from the outset there will not be a prosecution".¹²

The limitation of the requirement of audio recording to offences which are indictable or triable either way means, broadly speaking, that interviewing is not required in respect of offences for which the maximum sentence is six months' imprisonment or less, that being the maximum sentence which can be imposed by a magistrates' court.¹³

⁶ *Report to the United Kingdom Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the United Kingdom and the Isle of Man from 12 May to 23 May 2003*, CPT/Inf (2005) 1 para 53.

⁷ Para 59, emphasis in original.

⁸ *Response of the United Kingdom Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the United Kingdom and the Isle of Man from 12 May to 23 May 2003*, CPT/Inf (2005) 2 para 146.

⁹ *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 28 September 2012*, CPT/Inf (2014) 11.

¹⁰ PACE Code E para 3.1. The Crown Prosecution Service's Legal Guidance Manual includes a section on "Tape Recorded Interviews", available at http://www.cps.gov.uk/legal/s_to_u/tape_recorded_interviews/.

¹¹ Code E para 3.3(a): cases where recording is "not reasonably practicable because of equipment failure or the unavailability of a suitable interview room or recording equipment and the authorising officer considers, on reasonable grounds, that the interview should not be delayed".

¹² Code E para 3.3(b). For cases where the interviewee refuses to go into or remain in a suitable interview room, see s 3.4.

¹³ Powers of Criminal Courts (Sentencing) Act 2000 s 78.

The Code of Practice may (along with others) be traced back to the report of the Royal Commission on Criminal Procedure in 1981.¹⁴ The Commission set out the problem which it faced in respect of the recording of interviews as follows:¹⁵

The frequency of challenges to the police record of interviews is said to make it essential to have some sort of independently validated record in order, in the eyes of some, to prevent the police from fabricating confessions or damaging statements, or, in the eyes of others, to prevent those who have in fact made admissions subsequently retracting them. It is the 'verbals' which give rise to most concern, that is the remarks which are attributed to the suspect in the police officer's subsequent note of the interview but which the suspect is not prepared to endorse by making a written statement under caution. Indeed it is argued by the Circuit Judges that the present methods of recording interviews are themselves the cause of a substantial number of acquittals of apparently guilty defendants. Many of our witnesses also point to the waste of court time caused by disputes about statement evidence.

This language represents particular concerns and practices that existed around the time of the Commission's work, rather than any kind of universal analysis about the advantages and disadvantages of recording interviews. Nevertheless, it demonstrates that recording of interviews is a practice which can potentially be of benefit to all parties in the criminal justice system. The Scottish courts have acknowledged that the absence of audio or video recording may place the finder of fact at "a huge disadvantage" when drawing conclusions regarding the suspect's answers.¹⁶ As the Commission noted, recording gives rise to concerns of cost,¹⁷ although it might be hoped that modern technology has reduced those somewhat (at least in relation to recording itself, but not necessarily summation or transcription).

The Commission was able to draw upon an empirical research study which had been carried out to assist its work, along with other empirical work on English practice, to establish the manner in which police interviews took place and the extent to which the accuracy of statements was challenged. It noted that the amount of court time spent on challenges to statements "[did] not seem to be as great as is supposed",¹⁸ but regarded such challenges as an undesirability which could be avoided by improving police practice in recording statements.¹⁹ It made a variety of recommendations relating to the improvement of written note taking and discussed the advantages and disadvantages of tape recording (referring to an experiment which the Scottish police had carried out in this regard).²⁰

After reviewing a number of other issues relating to police questioning, the Commission recommended that there should be a code of practice, which would "provide strengthened

¹⁴ *The Royal Commission on Criminal Procedure: Report* (Cmnd 8092: 1981). On the Codes of Practice more generally, see M Maguire, "Regulating the police station", in M McConville and G Wilson (eds), *The Handbook of the Criminal Justice Process* (2002) 75 at 80-81.

¹⁵ *The Royal Commission on Criminal Procedure: Report* (n 14) para 4.2.

¹⁶ *Beattie v HM Advocate* 2009 JC 144 at para 83.

¹⁷ *The Royal Commission on Criminal Procedure: Report* (n 14) para 4.2.

¹⁸ Para 4.7.

¹⁹ Para 4.9.

²⁰ Para 4.17.

safeguards to the suspect and clear and workable guidelines for the police”.²¹ “The sort of provisions we have in mind should take realistic account of the pressures upon the police and upon suspects and should, therefore, have some degree of flexibility built into them, but exercise of that flexibility should be only upon reasonable grounds and should be accountable.”²²

10.5 The PACE Codes of Practice: the legal framework

Section 60 of the Police and Criminal Evidence Act 1984 requires the Secretary of State to issue a code of practice in connection with the tape-recording of police interviews, while section 60A empowers the Secretary of State to issue an additional code of practice for visual recording (which has been done).²³ More generally, section 66(1) of the Police and Criminal Evidence Act 1984 (as amended) provides as follows:

The Secretary of State shall issue codes of practice in connection with –

- (a) the exercise by police officers of statutory powers –
 - (i) to search a person without first arresting him;
 - (ii) to search a vehicle without making an arrest; or
 - (iii) to arrest a person;
- (b) the detention, treatment, questioning and identification of persons by police officers;
- (c) searches of premises by police officers; and
- (d) the seizure of property found by police officers on police premises.

Section 67 contains provisions relevant to the making of the Codes of Practice, requiring the Secretary of State to consult certain specified bodies before issuing a code or a revision thereof, and requiring that, in order for the Secretary of State to bring a code into force, a draft of the necessary statutory instrument must be laid before Parliament and approved by a resolution of each House.

10.6 Analysis

The advantages of audio or visual recording are relatively clear and uncontroversial. Such recording will provide a more accurate record of the interview than note taking, and avoids unnecessary dispute about what was said, something which may avoid not just disputes at the trial but prevent unnecessary trials taking place. As the Royal Commission on Criminal Procedure suggested, it is a safeguard both for the police and for the suspect. Against this, of course, the resource implications inherent in the recording of interviews are potentially significant: even if modern technology allows for a recording to be produced with relative ease, transcription of significant numbers of interviews is time consuming and expensive.

²¹ Para 4.109.

²² Para 4.111.

²³ PACE Code F. There is no requirement to visually record any interview, but para 3.1 sets out a list of cases in which it might be appropriate to do so.

In addition, it should be recognised that any process for the recording of interviews will have disadvantages as well as benefits, and it would be dangerous to assume that any one approach is wholly beneficial. As one author puts it, “the creation of the electronic record itself can introduce bias”.²⁴ The manner in which a recording is produced or presented can significantly alter the viewer’s perception of it. For example, it is natural to think that a video recording might present the “unvarnished truth”, with the advantage of being able to assess the suspect’s demeanour in response to questions. However, there are inherent problems. Most obviously, a video recording cannot demonstrate what has happened off-camera prior to the interview.²⁵ Secondly, it is well known that demeanour when answering questions may in fact be a misleading guide to the truth of the answers offered,²⁶ particularly in the stress of the police interview room.²⁷ Furthermore, research on the use of videotaped confession evidence suggests that bias and inaccuracy may be introduced by camera perspective, depending on whether the camera is trained on the suspect or the interviewer, or whether a dual camera approach is used.²⁸ Even where an interview is audio or visually recorded, reliance will at various stages of the criminal justice process necessarily be placed on written records of interviews (whether full transcripts or summaries),²⁹ and these may themselves be prone to significant error.³⁰

None of these reasons are, in themselves, reasons *not* to audio or visually record interviews. They do, however, suggest that care should be taken in establishing the procedures which should be used for the recording of interviews and the way in which the material which is produced is used thereafter. In England and Wales, this function is fulfilled by the relevant PACE codes of practice. The guidance in these codes goes well beyond a simple statement of when recording should take place.

There could be considerable benefits in similar codes of practice being drawn up for Scotland in terms of clarifying procedure and helping to maintain public confidence in the investigative process. That need not involve the Review prescribing the content of any such code in detail. If the principle of a code were accepted, its content would be a matter for the Cabinet Secretary for Justice following discussions with Police Scotland and other interested parties, subject to any specific requirements of consultation which might be prescribed by legislation. Such discussions would, in particular, have to take into account issues of costs and resource constraints on which the expert group has no relevant information. Similar codes might potentially be developed in other areas, particularly in respect of detention itself.

²⁴ D Simon, *In Doubt: The Psychology of the Criminal Justice Process* (2012) 143.

²⁵ See M McConville, “Videotaping interrogations: police behaviour on and off camera” [1992] Crim LR 532.

²⁶ See e.g. Simon, *In Doubt* (n 24) ch 5.

²⁷ A Ashworth and M Redmayne, *The Criminal Process*, 4th edn (2010) 96.

²⁸ See e.g. G D Lassiter and others, “Evidence of the camera perspective bias in authentic videotaped interrogations: implications for emerging reform in the criminal justice system” (2009) 14 *Legal and Criminological Psychology* 157; C J Snyder and others, “Videotaped interrogations and confessions: does a dual-camera approach yield unbiased and accurate evaluations?” (2009) 27 *Behavioral Sciences and the Law* 451.

²⁹ Cf the Crown Prosecution Service’s guidance at n 10 above, which contains “listening policies” setting out when Crown Prosecutors should listen to the tape of an interview and when they may rely on written material without doing so.

³⁰ See e.g. J Bedward and J Baldwin, “Summarising tape recordings of police interviews” [1991] Crim LR 671; *Report of the Royal Commission on Criminal Justice* (Cm 2263: 1993) paras 3.73-3.80.

Two specific points as to the content of a code may be worth noting here. First, PACE Code E draws the dividing line at offences which are triable only summarily, with anything more serious than that requiring that an interview must be audio recorded. The structure of Scots criminal law does not lend itself to such a simple distinction being drawn, but that would not prevent a code of practice being drafted so as to give reasonably clear guidance on when audio or visual recording would be appropriate.³¹

Secondly, the question arises as to whether breach of the code should result in any evidence obtained thereby being inadmissible. In principle, such an approach seems unnecessary³² and could lead to disproportionate results in the event of minor breaches. It would be open to the courts to take into account any breach of the code in applying the general test of fairness applicable to the admissibility of confession evidence.

10.7 Issues for consideration

It is suggested that the Review should consider whether:

- (a) a statutory duty, analogous to section 60 of the Police and Criminal Evidence Act 1984, should be placed on the Scottish Ministers to issue a code of practice relating to the recording of interviews of suspects by the police;
- (b) it would be appropriate, in cases where the terms of such a code of practice are not followed, that the admissibility of such statements should continue to be subject to the common law test of fairness;
- (c) there are any matters within the scope of the Review, not elsewhere covered in this report, which should similarly be addressed by way of a code of practice, particularly the detention, treatment and questioning of persons by police officers.

³¹ In a different context, see the *Lord Advocate's Guidelines to the Chief Constable on the Reporting to Procurators Fiscal of Offences Alleged to Have Been Committed by Children* (March 2014): the first category of offences which should be reported is those "which require by law to be prosecuted on indictment or which are so serious as normally to give rise to solemn proceedings or the instructions of the Lord Advocate in the public interest"; explanatory notes then provide a list of "common areas of offending" which are likely to fall under this heading. This is not presented here as a suggestion as to where the dividing line should be drawn for any requirement to record interviews in audio or visual form, but simply as an example of how the task of identifying a threshold of seriousness can be approached.

³² It is not taken in England: see I H Dennis, *The Law of Evidence*, 5th edn (2013) paras 8-015–8-016.