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Inaccurate recording of accused person's statements

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1. In New South Wales, in order for an accused person's statements to be admissible in criminal proceedings, section 281 of the Criminal Procedure Act 1986 (NSW) *generally* requires those statements to have been electronically recorded by the investigating official, and for a copy of the recording to be available to the court.

2. Section 281 provides that
   (a) investigating officials (which are defined in the section to include **police officers**),
   (b) who suspected or could have **reasonably** suspected
   (c) that an **accused person**
   (d) committed an **indictable offence** (or an indictable offence which can be dealt with summarily)
   (e) are to make a **video and/or audio recording of any admission** by the accused person, if
   (f) the admission was made **during questioning in connection with the investigation of the commission or possible commission of an offence**, and
   (g) **the admission is to tendered as evidence in subsequent proceedings**.

3. In the context of section 281, "admission" has the same meaning as the definition of "admission" in the Evidence Act 1995 (NSW)[1], namely: "a previous representation that is:

   (a) made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding), and
   (b) adverse to the person's interest in the outcome of the proceeding."

4. If an admission is not recorded in the manner prescribed by section 281, the admission will *generally* be inadmissible.

5. However, section 281 also envisages circumstances in which electronic recording may not be possible. As Smart AJ said in **R v Reid** [**1999] NSWCCA 258** at [65]:

   > "Police officers attending a crime scene frequently ask those present what happened and the responses of those present often determine the future course of police investigations. An accused may make important admissions at the scene in such circumstances. The police officers may not have a pocket audio tape recorder with them."

6. "R**easonable excuse**" for failing to record, in sub-section 281(4), includes (without limitation):
   (a) **mechanical failure** of the tape-recording device;
   (b) the **refusal of a person being questioned** to have the questioning electronically recorded; or

[11] See R v Horton (1998) 45 NSWLR 426, per Wood CJ at CL (Sully and Ireland JJ agreeing) at 434.

(c) the **lack of availability of recording equipment** within a period in which it would be reasonable to detain the person.

Note: In NSW, the maximum investigation period is **4 hours** unless extended by a detention warrant: s 356D Crimes Act 1900.

7. In view of this, if an accused makes an admission that is not capable of being electronically recorded, the section allows investigating officials to carry out a **second interview** with the accused, specifically in relation to the making and terms of the admission: s 281(2)(a)(ii).[2]

8. A refusal by the accused to have this second interview recorded constitutes a "reasonable excuse" for why a tape-recording could not be made.

9. I will shortly discuss a number of cases where section 281 and its predecessor provisions have been applied and interpreted by superior courts in NSW.

History of the Audio Visual Recording of Interviews with Suspects in NSW

10. First, however, I will discuss the history behind this important provision.

11. NSW Police introduced it's audio-visual program, Electronic Recording of Interviews with Suspected Persons (ERISP), in 1991. It was not given any legislative bite until 1995, when a general reform

[2] See also R v LMW [1999] NSWSC 1128 at [21]; R v Reid [1999] NSWCCA 258 at [67] et seq.

of the laws of evidence made the electronic recording a prerequisite for the admissibility of confessional evidence in more serious cases.

12. Although the section clearly applies to indictable offences, other than ones that can be dealt with summarily without the consent of the accused, in practice, however, the seriousness of the offence is not very important, as police routinely use ERISP to record all formal interviews.

13. Police interrogation in NSW had long been controversial because of claims of inducement of false confessions, fabrication of confessions ('verballing'), and even torture. There was also concern about the impact false allegations had on public confidence in the police and the delay in the criminal justice process.

14. Historically there had been a heavy dependence on confessional evidence in NSW prosecutions. A study of NSW District Court cases in 1979 found 96.6% of sampled cases contained confessions. (Stevenson, a study of evidence presented to the District Court in NSW, Bureau of Crime Statistics and Research, 1979).

15. In the same 1979 study 50% of court trial time in which witnesses were giving evidence related to determining the admissibility and veracity of confessions.

16. As Gibbs J said in **Driscoll v R (1977) 137 CLR 517** at 539:

> "It is very common for an accused person to deny that he made an oral confession which police witnesses swear that he

made. **The accused has an obvious motive to claim that police testimony of this kind is false**. On the other hand it would be unreal to imagine that every police officer in every case is too scrupulous to succumb to the temptation to attempt to secure the conviction of a person whom he believes to be guilty by saying that he has confessed to the crime with which he is charged when in fact he has not done so."

17. The consequent dispute among parties, in turn, "contributed to the duration of criminal proceedings, and to consequently unacceptable delays…in bringing criminal cases to finality."[3]

18. Negative publicity concerning the nature of police interviews – commonly referred to as "verbals", and increased scrutiny of confessional material adduced by police, led to a reduction in the number of convictions and a consequent diminution in public confidence in the administration of justice.[4]

19. A 1984 report of the Criminal Law Review Division of the NSW Attorney-General's Department described the "process by which evidence of this type is currently given and the manner in which disputes are resolved [as] **utterly unsatisfactory**."[5]

20. In response to calls from eminent judges around the world for the introduction of electronic recording of police interviews[6], and for the modernisation of police force generally, **in 1983** the NSW Attorney-

[3] Criminal Law Review Division, *The Use of Electronic Equipment to Record Police Interviews*, (June 1984) at 1.2.
[4] Ibid., at 1.6 – 1.10.
[5] Ibid., at 1.1 (emphasis added).
[6] Ibid., at 1.5.

General empanelled a Consultative Committee "to enquire into the feasibility of using electronic equipment to record interviews between Police and suspected persons".[7]

21. The 1984 report of the Criminal Law Review Division ultimately concluded that **interviews should be electronically recorded, and that confessional material should not be admitted as evidence in criminal proceedings unless it was in electronically-recorded form**[8], for the following reasons:

    (a) **Court time**, currently taken up in resolving disputes over confessional evidence, **would be saved**, thus reducing unnecessary delays;
    (b) By ensuring that evidence of police questioning is more reliable, **police will be protected from unjustified attacks** on the truth of their evidence;
    (c) Legislation introducing a system of electronic recording could **redefine and clarify the rights and obligations of parties**;
    (d) The **cost** of introducing such a system would be **offset by the increased efficiency of courts**; and
    (e) The introduction of such a system would **improve public confidence** in the administration of criminal justice in New South Wales.

22. These conclusions would later form the basis of the current legislation in NSW.

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[7] Ibid., (Introduction).
[8] Criminal Law Review Division, *The Use of Electronic Equipment to Record Police Interviews*, (June 1984), p.i.

23. On the strength of the Division's second report (into the "feasibility of electronic recording…and to examine the relevant technical, procedural, legal and cost issues"), published in 1986, the NSW Police Force introduced a system for electronic recording of interviews.[9]

24. However, **it wasn't until 1995 that legislation was enacted, making the electronic recording of police interviews compulsory**.

25. Not at all coincidentally, the insertion of section 424A into the Crimes Act 1900 in 1995 (being the predecessor to section 281 Criminal Procedure Act 1986), was cognate with the establishment of a Royal Commission into the NSW Police Service on 13 May 1994, and the subsequent enactment of the Police Integrity Commission Act 1996. According to the Royal Commissioner, verballing became "an art form within certain sections of the NSW Police Force". (Wood 1996: 40).

26. In the second reading speech of the Police Integrity Commission Act 1996, the Shadow Attorney-General, the Hon. Paul Lynch, made the following observations:

> "**The move towards electronic recording of interviews was, to a large extent, forced on the Police Service because of the widespread practice of verballing**. The most terrifying thing about it is that it is not just a series of isolated acts; there has

[9] New South Wales, *Parliamentary Debates*, Legislative Council, 24 May 1995, 117 (The Hon. J. W. Shaw, Attorney General and Minister for Industrial Relations).

> developed an institutionalised culture that is conducive to corruption and, by definition, almost inimical to opposing corruption… **I suspect that those of us who have been rendered cynical over the years are very pleasantly surprised that some impact has been made upon the problem**."[10]

27. NSW police cars are now fitted with audio visual recorders and tasers also have recorders in them.

Cases

28. I turn now to discuss the ways in which section 281 and its predecessor provisions have been interpreted and applied by superior courts in NSW.

29. In **R v Horton (1998) 45 NSWLR 426**, evidence of a lie told to police by the accused was admitted, not as evidence "showing a consciousness of guilt, and as such amounting to an implied admission of guilt" but as evidence that the defence of intoxication could not be relied on by the accused to deny the formation of intent.[11]

30. On appeal, however, the NSW Court of Criminal Appeal unanimously ruled that this "evidence should not have been received"[12]. The court held that, because the "implied admission of guilt" (that the deceased "fell on his knife"[13]) was made to police

[10] New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 June 1996, 2752 (Paul Lynch).
[11] (1998) 45 NSWLR 426 at 430.
[12] Ibid. at 439.
[13] Ibid. at 428.

officers prior to the accused being formally cautioned[14], and "was not adopted in the subsequent electronically recorded interview"[15], the prosecution had failed to establish a reasonable excuse for why a tape-recording of the admission could not be provided to the court.[16]

31. Similarly, in **R v Reid** [**1999] NSWCCA 258** the NSW Court of Criminal Appeal held that the accused made "untrue exculpatory statements…as evidencing a consciousness of guilt", however these statements were not electronically recorded by the investigating police. As in Horton, because these statements were neither confirmed nor denied by the accused in a subsequent ERISP, the court held that the evidence was wrongly admitted.[17]

32. In **R v Schiavini [1999] NSWCCA 165**, the NSW Court of Criminal Appeal unanimously held that evidence of an admission during official questioning, which connected the accused with the offences alleged, was wrongly admitted notwithstanding the accused's refusal to have the questioning electronically recorded.[18]

33. The court held that "[it] is conceivable that a person being interviewed may be prepared to be interviewed by way of audio recording but not by way of video recording"[19], and therefore, after the accused refused the offer to record the interview by "audio and

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[14] Ibid. at 439.
[15] Ibid. at 432.
[16] Ibid. at 432, 439.
[17] [1999] NSWCCA 258, per Smart JA at [63]. By way of a footnote, both Spigelman CJ ([1999] NSWCCA 258 at [7]) and Smart AJ ([1999] NSWCCA 258 at [70]) (with whom James J agreed) reconciled the importance of the evidence adduced contrary to the policy with the failure of trial counsel to object to the evidence, and granted leave under section 4 Criminal Appeal Rules to appeal the trial judge's decision to allow the evidence.
[18] [1999] NSWCCA 165 at [24].
[19] Ibid. at [17].

visual recording", the interviewing officer should then have explained "the alternative forms of 'tape recording' available" and offered to record the interview **either** by audio-recording or video-recording.[20]

34. As a consequence of this failure, the prosecution was again unable to establish a reasonable excuse for why a tape-recording of the admission could not be provided to the court.[21]

35. In **R v LMW [1999] NSWSC 1128**, the NSW Supreme Court held that section 281's predecessor (section 474A Crimes Act 1900) did not apply to an unrecorded admission that was made to police at a time when the accused was **not yet a suspect** (and the accused had, therefore, yet to be formally cautioned), because the accused later refused to participate in an interview. [22]

36. In **LMW**, the admission was permitted into evidence because the accused's refusal to participate in a later interview constituted a reasonable excuse for the prosecution's inability to provide a tape-recording of the admission.

37. More recent cases, including a number of cases heard by the High court of Australia, have been concerned with whether the relevant admissions were made **during official questioning**.

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[20] Ibid.
[21] Whilst not directly relevant to this point, a subsequent interview was recorded by way of ERISP, however the making and terms of the earlier admission were not discussed during that subsequent interview.
[22] R v LMW [1999] NSWSC 1128 at [13], [14], [44].

38. In **Nicholls v R, Coates v R [2005] HCA 1; 219 CLR 196**, the majority of the High Court held that statements made by the accused "during a break in a recorded interview" were inadmissible, for reason that the prosecution was unable to provide a reasonable excuse for not have electronically-recorded the alleged admissions.

39. In **Kelly v R [2004] HCA 12 ; 218 CLR** 216, for example, admissions made by the accused "about half an hour after a video-recorded interview had ceased and without any further questions having been asked" were held by the majority (3:2) of the High Court to have been inadmissible.[23]

40. Similarly, in **Carr v Western Australia [2007] HCA 47; 232 CLR 138**, the accused made admissions to police officers after the culmination of a formal interview.

41. However, unlike in Kelly, those admissions *were* audio- and video-recorded by the police, but contrary to the knowledge of the accused. The majority of the High court dismissed the appeal, and held that the evidence of the admissions was admissible as it fell outside the ambit of the provision.[24]

42. As in **LMW**, discussed earlier, the accused in **R v Naa [2009] NSWSC 851** made admissions to police *before* being formally cautioned. Unlike in **LMW**, however, the accused in **Naa** later submitted to an ERISP.

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[23] [2004] HCA 12, per Gleeson CJ, Hayne and Heydon JJ at [54].
[24] [2007] HCA 47, per Gummow, Heydon and Crennan JJ at [78].

43. The NSW Supreme Court held that the statements made by the accused were admissions within the meaning of section 281[25], however the court held that section 281 did not apply to the statements because:

> "The conversation between [Constable McCarthy] and the accused could not be further from an interrogation of a suspect by a police officer, even an informal one at the scene of a crime… This was negotiation not interrogation."[26]

44. In **Naa**, Howie J reiterated the test to be applied when determining whether admissions were made during "official questioning, which his Honour had earlier stated in **R v Sharp [2003] NSWSC 1117 ; 143 A Crim R 344** at [20] (emphasis added):

> "if the police officer did not foresee that a response might be given to the statement or question made to the suspect **but ought to have done so**, the conversation would amount to 'official questioning'."

45. If an admission is made by a person, before that person is suspected in relation to an indictable offence, it is incumbent upon the investigating officials **to take all possible steps to procure an electronic recording of the admission, and to do so during official questioning**.

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[25] [2009] NSWSC 851 at [37].
[26] [2009] NSWSC 851 at [79].

46. If the person refuses to allow the electronic recording of an interview, that is sufficient to discharge the onus on the investigating officials.

Schedule 1

281 Admissions by suspects

(1) This section applies to an admission:
  (a) that was made by an accused person who, at the time when the admission was made, was or could reasonably have been suspected by an investigating official of having committed an offence, and
  (b) that was made in the course of official questioning, and
  (c) that relates to an indictable offence, other than an indictable offence that can be dealt with summarily without the consent of the accused person.

(2) Evidence of an admission to which this section applies is not admissible unless:
  (a) there is available to the court:
    (i) a tape recording made by an investigating official of the interview in the course of which the admission was made, or
    (ii) if the prosecution establishes that there was a reasonable excuse as to why a tape recording referred to in subparagraph (i) could not be made, a tape recording of an interview with the person who made the admission, being an interview about the making and terms of the admission in the course of which the person states that he or she made an admission in those terms, or
  (b) the prosecution establishes that there was a reasonable excuse as to why a tape recording referred to in paragraph (a) could not be made.

(3) The hearsay rule and the opinion rule (within the meaning of the *Evidence Act 1995*) do not prevent a tape recording from being admitted and used in proceedings before the court as mentioned in subsection (2).

(4) In this section:

investigating official means:

  (a) a police officer (other than a police officer who is engaged in covert investigations under the orders of a superior), or
  (b) a person appointed by or under an Act (other than a person who is engaged in covert investigations under the orders of a superior) whose functions include functions in respect of

the prevention or investigation of offences prescribed by the regulations.

official questioning means questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence.

reasonable excuse includes:

(a) a mechanical failure, or
(b) the refusal of a person being questioned to have the questioning electronically recorded, or
(c) the lack of availability of recording equipment within a period in which it would be reasonable to detain the person being questioned.

tape recording includes:

(a) audio recording, or
(b) video recording, or
(c) a video recording accompanied by a separately but contemporaneously recorded audio recording.