

The Digital Revolution: Body Worn Cameras and ‘Street’ Interviews

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Recently, there have been signs that the criminal justice system has finally embraced a long-promised digital revolution, integrating the use of technology to innovate the process (see, for example, the work of Transform Justice concerning defendants giving evidence via video link: <http://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf>). The notional aim behind this somewhat late revolution appears to be to improve the efficiency, economy and effectiveness of investigations and proceedings. Whether, in reality, this is the effect is a different question. A primary example is the proposed amendment of the Police and Criminal Evidence Act 1984 Codes of Practice (PACE 1984), which the Home Office have currently opened to consultation (<https://www.gov.uk/government/consultations/revising-pace-codes-c-h-e-and-f>, the consultation is open until 6th December 2017). This would enable police officers to carry out interviews with suspects away from the police station whilst wearing Body Worn Video Cameras (BWV). For the purposes of this article, the term ‘street’ is used as a generic term, which is anywhere outside of the police station. According to the Home Office, the Codes of Practice concerning police interviews require attention as they now need to reflect that ‘technology has moved on’ (<http://www.policeprofessional.com/news.aspx?id=30703>). According to the national lead of BWV, Andy Marsh, the use of cameras should lead to ‘swifter, fairer and, more importantly, cheaper justice’ (a telling choice of words), whilst the Policing and Fire Minister, Nick Hurd, stated that such changes should bring ‘greater efficiency to frontline policing.’ The quest for a more efficient criminal process is not new (see E. Johnston and T. Smith (2017) ‘The Early Guilty Plea Scheme and the Rising Wave of Managerialism’ CLJ 181(13) for a discussion of the desire for a more efficient court procedure); but Mr Marsh’s proclamation that things need to be done ‘cheaper’ is one of the first explicit admissions that money should drive the design of regulation of criminal justice. One might argue that it is optimistic to suggest that a complex and impactful process such as criminal justice can be more efficient and cheaper, whilst still delivering reliable and just results, which of course should be of paramount importance.

The police interview of a suspect is arguably the most crucial aspect of any investigation. The police station, as a hub for the investigation, houses the majority of the due process

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safeguards surrounding police interrogations. Should the police obtain a confession from the suspect, it reduces the amount of investigative work the police have to carry out and makes a successful prosecution more likely (see E. Cape *Defending Suspects at the Police Station*, 7th ed p.273). Baldwin and McConville found that a written admission from a suspect is ‘tantamount’ to a conviction; for the police, the importance of obtaining a confession cannot be understated. In the pre-PACE era, a number of significant and (eventually) high-profile confessions were falsified by the police (e.g. *inter alia* The Guildford Four, Birmingham Six, Judith Ward, and Stefan Kiszko). PACE, introduced in the wake of the Phillips Commission) overhauled the regulation of investigative practice and emphasized the importance of the due process rights of suspects through ‘fairness, openness and workability.’ Safeguards introduced to protect interviewees included access to legal advice (s.58); the requirement that a contemporaneous record of the interview should be made (Code of Practice C para 11.7); the interview should be audio-recorded (Code C para 11.7) or if this is impossible, that a written record of the interview must be made and the suspect given an opportunity to read it, highlight any inconsistencies and sign it as a true reflection of what has been said (Code C para 11.11).

PACE also created the role of the Custody Officer (CO, s.37), the effective gatekeeper to the criminal justice system. The CO is responsible for ensuring a suspect’s rights are respected and safety assured when being held in custody. The CO ‘shall determine whether he has before him sufficient evidence to charge’ a suspect (s.37(1)) and may authorise detention to enable them to make this determination. During the passage of PACE, the then Home Secretary, Douglas Hurd, noted that ‘necessary’ did not mean ‘desirable, convenient or a good idea’ The College of Policing states the detention is the ‘last resort’; however, the court has accepted that detention can be routinely authorized (*DPP v L* [1999] Crim L.R. 752), and both historic and recent research evidence suggests this is the case (for historic, see McKenzie (1990); for recent, see Dehaghani (2017)).

Whilst PACE was designed to combat miscarriages of justice concerning false confessions, there are plenty of post-PACE examples of failure to adhere to the law and the Codes. In *Davidson* [1988] Crim L.R. 442, the duration of custody was longer than necessary and considered by the court to be oppressive and therefore unlawful. The police misled the suspect in *Heron* ((1993) unreported) when they claimed the suspect had been recognized committing the offence by a witness; the court held that this was deceitful and ultimately, oppressive. In *Ridley* (1999) (unreported) a suspect was interrogated for three

hours in a persistent, aggressive and calculated manner which was designed to illicit a confession from the suspect, opposed to searching for the truth. This was described by the court as ‘deplorable.’ This represents a sample that is not necessarily representative of the problems in police interviews; but what is clear is that, in the pursuit of a confession, the police can step over the line of acceptable conduct. Notwithstanding the raft of safeguards designed to protect the suspect from such conduct, the risk remains real. One might therefore question whether the pursuit of ‘cheaper’ and quicker justice will mean the dilution or even abandonment of such safeguards

If the police wish to interrogate a person, the normal procedure envisaged by PACE would be to arrest them and convey them to a police station with appropriate facilities. The suspect will be brought before the CO, an assessment made regarding charge and the necessity of detention (almost certainly a ‘yes’ to the latter, research suggests). Once detained, they will (at some point) be interviewed. the proposed amendments highlighted above would not change this for suspects who do not wish to voluntarily cooperate with the police. For those willing to consent to engagement with the police, the amendments become more significant. They allow the physical (and symbolic) moving of the interview of voluntary suspects to some place other than the police station. This has a number of implications. First, it negates the role of the CO - designed to be an independent check on detention, but also responsible for recording the details of the investigation, and ensuring suspect’s rights are not breached. This sends the message that the police *can* (and possibly should) interview away from the scrutiny of the CO, although, research suggests significant problems with the CO as a safeguard generally. For example, Dehaghani suggested that detention may be routinely authorized for a number of reasons including:

1. Not wanting to question colleagues and grant detention;
2. Manpower shortages may mean detention is merely ‘rubber stamped’ and;
3. Institutional ties may bind him routinely authorize detention.

Dehaghani concludes that whilst detention is supposed to be necessary and a last resort, ‘in reality it is authorized automatically.’

A second concern with regard to moving voluntary interviews away from police stations is the impact on the right to legal advice. It seems unrealistic to suggest that a suspect on the street will have the confidence to say to a police officer, ‘I wish to exercise my right to legal advice and we can continue the interview after I have spoken to a solicitor.’ It is well

established that, despite the right to legal advice, police engage in ploys to reduce the effect of the provision. In a study from the early 1990s, Sanders found that in almost 43% of cases the rights were explained too quickly, incomprehensibly, or incompletely in order to confuse the suspect so he did not take up his legal right to advice. Other strategies included telling the suspect 'you'll have to wait in the cells until the lawyer gets here'; 'you're only going to be here a short time'; 'you don't have to make your mind up now, you can have one later'; or 'you don't have to have one' (see A. Sanders and L. Bridges 'Access to Legal Advice and Police Malpractice [1990] Crim LR 494). If such ploys are used in the police station there is arguably a greater danger that interviews in other locations might be legal advice marginalised more easily and frequently.

Officers may wish to convince the suspect to talk immediately, without the shield of this protection. A not fantastical hypothetical suggestions might read: 'we can get it over with or we can go to the station, request a lawyer but you'll be waiting hours.' Indeed, there is no guarantee that a duty lawyer will be able to attend an interview quickly or easily, away from a police centre.

Whilst the government have only issued a consultation regarding BWV, it is important to consider these theoretical problems that such a move could raise. One does not have to look too far afield to understand the impediments the use of use technology can have. In April this year, the BBC reported (<http://www.bbc.co.uk/news/uk-scotland-39730665>) that Scotland's BWV pilot was littered with some 300 issues; some of which centered on major malfunctions like the downloading of the video footage. The BBC report suggested that whilst the 'bulk' of the issues surrounded user error rather than an issue with the actual technology; it presents a problem of potentially asking pressurized and busy officers to understand what might be a technical or confusing system, whilst also (effectively) adopting the role of CO in a non-police station location. It is clear that the technology is not without its problems. The data obtained by the BBC indicates that at times the video simply is inoperable (see, in particular, p.14 here (http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/27_04_17_bwvc_fault_data.pdf)). The use of technology can obviously contribute to economic and efficiency objectives. The same BBC report stated that 'in 2014 early guilty pleas were obtained where the camera footage formed part of the evidence, allowing 697 officers to be on the streets rather than in the courts.' The allure of this obvious, yet the desire for 'cheap' and 'efficient' justice should not come at expense of due process protections afforded to suspects. There are a number of reasons why a suspect will enter an early guilty plea; for example, the carrot of a more lenient

sentence (which an innocent suspect might regret later on - see *R v on the application of the DPP) v Leicester Magistrates' Court* (Unreported, 9th February 2016)).

PACE undoubtedly cemented the notion that suspect-focused interrogation by police should be tied to the hub that is the police station, as the gateway to the system. Arrest represented the start of formal process, and the activation of a range of protective safeguards. In the era of police 'mega-centres', the police station as a hub has changed. This anchor for investigation remains, but the constraints of costs and geography mean that the process of arrest, conveyance, booking, detention and interview may seem costly for the police in terms of money and resources. Recent years have seen a continued trend of fewer arrests (despite a statistical rise in crime); the utilisation of the formal pre-charge bail system by police has diminished significantly since the changes ushered in by the Policing and Crime Act 2017. There appears to be a wholesale move away from engaging the 'formal' mechanisms of the PACE regulatory structure in favour of investigation based on informal, voluntary, and consensual interaction with suspects. The possibility of BWV interviews taking place on the street means the process starts the moment the police wish to speak to a person. Unlike at the police station, the due process safeguards afforded to interviewees (in the absence of any clear oversight or scrutiny) are highly susceptible to circumvention. It should also be noted that a suspect's voluntary engagement with the police does not mean there are no risks of abuse of power by the police. Indeed, by the very nature of their relationship, the police have power and authority, and may be able to persuade suspects to consensual interviews (contrary to the requirements of Code C).

Not only does this heighten the potential for a miscarriage of justice but as Cape suggests, 'in an era of austerity and limited police budgets, police officers may be *encouraged* to interview suspects away from police stations.' There is very little known about voluntary interviewing of suspects in locations other than the police station for obvious reasons. This lack of scrutiny raises the possibility of a 'shadow' investigative practice emerging. Whilst recorded arrests decline, who can say with any certainty whether voluntary investigative practices are on the rise? And how does one subject this to effective regulation? The desire for 'cheap justice' needs be balanced against the due process rights of the interviewee, and minimising the risks of abuse of power. In reality, such 'cheap justice' may well be the antithesis of actual justice. The Home Office would be wise to explore the enhancement of the protective provisions afforded to citizens who volunteer, rather than dismantling protection for savings of time and money. A first step might be to mandate clear recording of voluntary, BWV interviews at

other locations. After all, as the police might say to a suspect: if no crime has been committed, there is nothing to hide.