

DEPARTMENT OF CONSERVATION AND LAND MANAGEMENT
Wildlife Protection Section

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Branch Managers

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Subject: Administrative Instruction 64

The attached admin instruction deals with the conduct of field officers during interviews with suspected offenders who are believed to have contravened legislation administered by CALM.

Would you please ensure that the instruction is distributed for all officers designated under section 45 of the CALM Act to note.


for Syd Shea
EXECUTIVE DIRECTOR

15 July 1997

DEPARTMENT OF CONSERVATION AND LAND MANAGEMENT

ADMINISTRATIVE INSTRUCTION 64

ELECTRONIC RECORDING OF INTERVIEWS

Introduction

This Administrative Instruction details the Departmental standard applicable to the use of electronic recording devices when dealing with law enforcement situations and people who have, or are suspected of having, committed an offence under legislation administered by the Department of Conservation and Land Management.

Background

It is an offence under the *Listening Devices Act 1978* as amended for a person to use any listening device to overhear, record, monitor or listen to any private conversation to which he is not a party; or, except in certain cases, communicate or publish the substance or meaning of any private conversation overheard, recorded, monitored or listened to by the use of any listening device, whether he was a party to the private conversation or not, without the consent of the parties to the private conversation.

Section 4(2) of the Act, however, allows a person who was a party to a private conversation to communicate or publish the substance or meaning of the private conversation which he has recorded by means of a listening device if the communication or publication is no more than is reasonably necessary in the public interest or in the course of his duty or for the protection of his lawful interests.

Listening devices include a wide range of electronic devices which are generally not widely available to agencies other than authorised officers within the police service, Customs and Commonwealth security organisations. Note that the interception of telecommunications is illegal under the *Telecommunications (Interception) Act 1979*. Electronic devices used to record interviews to which a CALM officer is a party are generally limited to audio tape recorders and video tape cameras.

Admissibility as evidence

For many years photographs have been admissible as evidence, subject to certain conditions. Whilst there appears to be no difference in principle between a photograph and a tape recording, tape recorded conversations are not admissible in every case.

Recorded conversations may be admitted into evidence, provided that:

- the authenticity and accuracy of the recording can be proved and the voices recorded properly identified;
 - the evidence is relevant and otherwise admissible;
 - the tape recording is a complete record of the conversation; and
 - the recording was made voluntarily or not otherwise in circumstances which would result in discretionary exclusion.
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Even when these conditions have been met, however, such evidence will be regarded with some caution and assessed in the light of all of the circumstances of each case. The Court may decline to admit a tape recording of a conversation as evidence if it was obtained in a manner which was unfair to the defendant.

The admission of tape-recordings into evidence is a daily feature of criminal trials. As a general rule, the Crown is able to establish who made the recording, the machine on which it was made, that the recorded conversations were heard as well as recorded and that the recording is accurate

In recent years the use of videos and tape recordings by law enforcement agencies has reduced community concerns about methods of obtaining evidence. However, "confessional" interviews require a caution and consent by the suspect to the use of videos and tape recorders to become admissible against the accused.

In addition to the legal considerations in terms of the admissibility of video and tape recordings as evidence, the moral, ethical, political and practical implications of the method used by staff to obtain electronically recorded evidence for presentation in Court must be taken into account.

Guidelines

The following guidelines shall apply to the video and tape recording of conversations with suspected offenders. Such conversations would normally take the form of an interview. To avoid the possibility of discretionary exclusion of a recording as evidence on the grounds of unfairness, the suspect needs to have the belief that he is being questioned in relation to an alleged breach of legislation.

It should also be noted that the selective use of tape recordings and videos reduces the value of that evidence by raising doubts about the reliability of evidence in the unrecorded period/s. It could be open to suggestions that the interview was preceded by inducement or compulsion to make recorded admissions. This gives rise to real questions of unfairness. Consequently the balance that a recorded interview would have provided is lost. Selective use of tape recordings leaves the way open to questions of improper conduct in obtaining subsequently recorded admissions and dramatically weakens the protection to both suspect and investigating officers that a fully recorded interview carries.

Overt recording

Tape recording interviews with suspects may be appropriate under certain circumstances. In the event that a suspect agrees to come into a location where recording facilities exist or can be established, or is arrested, the interview may be electronically recorded. In most cases encountered by CALM staff the above process will be impractical.

Field interviews are the most common form of interview conducted by CALM staff. The field officer must establish control, usually in an external and sometimes hostile environment, with limited information at his disposal (walk up start). The production of a tape recorder or video camera may result in a loss of cooperation from the suspect or cause a loss of control of the situation. Consequently the following shall apply:

Tape recorders and video cameras may not be used to record interviews unless in the judgement of the field officer it is justifiable and safe to do so.

If this recording medium is used the electronic recorder operator must be a party to the conversation and communication or publication of the conversation must be no more than is reasonably necessary in the public interest or in the course of the officer's duty or for the protection of the officer's lawful interests. In addition to a caution issued once it is apparent to the field officer that the person may have committed an offence, at the end of the interview the alleged offender should be invited to confirm that the interview has been provided in the exercise of their free will by indicating that no threats have been made or inducements offered.

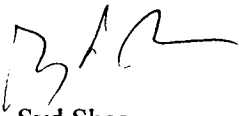
Taking statements or making contemporaneous notes of the conversation at the time or shortly afterwards remains an acceptable standard for offences under CALM legislation. In all cases, the principles for taking statements or records of interview, as specified in the manual "Gathering and Presentation of Evidence", apply. It should be noted that records of interview and statements, where individual questions and answers are recorded verbatim, are preferable to making notes of the content of the conversation after the interview is completed by the officer relying on recollections of what was said.

Covert recording

Recordings derived from the use of concealed tape or video recorders to record conversations to which an officer is a party, whilst not illegal, may be excluded as inadmissible evidence on the grounds of unfairness and have the potential to create an undesirable image for CALM and its field officers. If a tape is used to produce a transcript, then the tape will need to be produced in Court, thereby becoming public knowledge. Concealing the fact that notes were derived from a concealed tape could be disastrous to a case and the officer's reputation if discovered during cross examination. Consequently, the following guideline shall apply:

CALM staff shall not use an electronic device to record any conversation with a person without that person's knowledge or a private conversation to which he is not a party.

The guidelines outlined above set a standard for the conduct of CALM field officers when dealing with law enforcement matters and guard the interests of both CALM staff and persons who are the subject of inquiries for offences under CALM's legislation.



Syd Shea
EXECUTIVE DIRECTOR

30 June 1997