

Statutory review of the Police
Body-Worn Video provisions of
the *Surveillance Devices Act*
2007 (NSW)

Legal Aid NSW submission to the
Department of Justice

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Table of Contents

About Legal Aid NSW	2
Introduction	3
<i>The Surveillance Devices Act 2007</i> NSW.....	3
Accountability and the discretion to turn devices off / on	4
Service of BWV data in criminal proceedings	6
The destruction of data	6
Privacy protections.....	7
BWV and police exercise of discretion	7
Costs and benefits	8

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole

Authority, Drug Court and the Youth Drug and Alcohol Court.

The Criminal Indictable Section provides representation in trials, sentences and short matters listed at the Downing Centre District Court, complex committals in Local Courts throughout NSW, Supreme Court trials and sentence proceedings throughout NSW, fitness and special hearings in the District and Supreme Courts, and high risk offender matters in the Supreme Court.

Legal Aid NSW welcomes the opportunity to make a submission to the Department of Justice in response to its Statutory Review of the Police Body-Worn Video provisions of the *Surveillance Devices Act 2007* (NSW).

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Introduction

Generally, Legal Aid NSW supports the use by the NSW Police Force of body-worn video (BWV) devices. If appropriately used, they have the potential to improve the investigation and prosecution of crime and contribute to police accountability. However, we note that these benefits cannot be assumed and no evaluation of BWV in Australia has been published.¹ We suggest that an independent evaluation of the use to date of BWV in NSW should be conducted by the NSW Government to enable its impact to be ascertained. In the interim, we also suggest that the evaluation of the trial of BWV undertaken on behalf of the NSW Police Force in 2015/16 be made publicly available.

This submission identifies some concerns about the current regulatory regime and makes suggestions for change that are intended to ensure that the potential benefits of BWV are realised. Our main concerns relate to:

- 1) the discretion given to police officers regarding the use of BWV, and
- 2) access to BWV data for complainants alleging police misconduct.

We consider that legislative changes should be made to limit police officers' discretion regarding the use of BWV, and to ensure the appropriate retention, access and destruction of BWV data. Further details about these concerns and our proposals for change are below.

The Surveillance Devices Act 2007 (NSW)

Section 50A of the *Surveillance Devices Act 2007* (NSW) creates an exception for BWV to the general prohibition on the use of listening devices (in section 7) and optical surveillance devices (in section 8). The exception is available as long as:

- the police officer is acting in the execution of his or her duty, and
- the use of body-worn video is overt, and
- if the police officer is recording a private conversation, the police officer is in uniform or has provided evidence that he or she is a police officer to each party to the private conversation.²

¹ Emmeline Taylor 'Lights, camera, redaction ... police body-worn cameras: autonomy, discretion and accountability' (2016) 14(1) *Surveillance and Society* 128, 129. We note that while the Minister for Police indicated that the trial of BWV cameras was 'a great success' (The Hon Stuart Ayres MP, Minister for Police, *Continued Investment in Technology for Frontline Police* Media Release, 18 May 2014), the evaluation, conducted by Charles Sturt University, has not been published.

² *Surveillance Devices Act* section 50A(1).

The exception is also available if the use is inadvertent or unexpected, or is incidental to the use of body-worn video by the police officer in the circumstances set out above.³

Accountability and the discretion to turn devices off / on

One of the goals of the use of BWV devices is to reduce false complaints against police and to deter police misconduct by increasing accountability. There is evidence that the use of BWV devices can significantly reduce complaints against police.⁴ However, there are concerns that the effectiveness of BWV cameras in reducing police use of force may depend on whether police officers have discretion regarding when to turn the device on and off.

Research in other jurisdictions indicates that where police officers retain discretion to use the BWV device, only a proportion of incidents are recorded:

- in Phoenix, analysis of camera meta-data indicated that only 13.2 to 42.2 per cent of incidents were recorded,⁵ and
- in Denver, 'numerous incidents where officers punched or used stun guns on suspects were not recorded; less than half of the 45 use-of force incidents involving on-duty officers were recorded'.⁶

A meta-analysis of 10 multi-site, multi-national randomised controlled trials with eight police forces in six jurisdictions found that if officers turned their cameras on and off during their shift, the use of force by police increased. If the cameras were turned on for the whole shift, the use of force decreased.⁷ This effect was explained as follows:

Critically, researchers say these [positive] behaviour changes rely on cameras recording entire encounters, and officers issuing an early warning that the camera is on -- reminding all parties that the 'digital witness' is in play right from the start, and triggering the observer effect.

In fact, results from the same experiment, published earlier this year, suggest that police use-of-force and assaults on officers actually

³ *Surveillance Devices Act* section 50A(3).

⁴ Barak Ariel et al, 'The Effect of Police Body-Worn Cameras on Use of Force and Citizens' Complaints Against the Police: A Randomized Controlled Trial' (2015) 31(3) *Journal of Quantitative Criminology* 509.

⁵ Katz 2014 cited in Emmeline Taylor 'Lights, camera, redaction ... police body-worn cameras: autonomy, discretion and accountability' (2016) 14(1) *Surveillance and Society* 128 at 130.

⁶ Office of the Independent Monitor 2014 cited in Emmeline Taylor 'Lights, camera, redaction ... police body-worn cameras: autonomy, discretion and accountability' (2016) 14(1) *Surveillance and Society* 128 at 130.

⁷ Barak Ariel et al "Increases in police use of force in the presence of body-worn cameras are driven by officer discretion: a protocol based subgroup analysis of ten randomized experiments" (2016) 12 *Journal of Experimental Criminology* 453.

increase if a camera is switched on in the middle of an interaction, as this can be taken as an escalation of the situation by both officer and suspect.

"The jolt of issuing a verbal reminder of filming at the start of an encounter nudges everyone to think about their actions more consciously. This might mean that officers begin encounters with more awareness of rules of conduct, and members of the public are less inclined to respond aggressively," explained Ariel [the author of the study].⁸

We note that the NSW Police Force publication, *Body Worn Video*, indicates that 'examples of when police would use the camera include:

- when they would normally use their official notebook to record information
- to capture evidence or record something of relevance
- when exercising a police power'.

Legal Aid NSW considers that:

- police officers should be required by law to use the camera in the above situations
- justification should be required for failure to activate a BWV camera when an event occurs that should have been recorded
- the deliberate deactivation of a BWV camera in anticipation of an incident should be subject to disciplinary sanctions
- officers involved in an incident should be required to log written reports and statements before reviewing footage, to ensure that reports are based on the officers' memories and not on what has been recorded
- access to recorded footage should be logged to protect against tampering, editing or destruction of the recording, and
- there should be mandatory training for police officers regarding their responsibilities in relation to BWV.

However, a person's request not to be recorded should be respected where possible. There should also be regulations, or at least published guidelines, setting out safeguards for vulnerable people, including people with cognitive impairment and other disabilities, victims of sexual abuse, and Aboriginal and Torres Strait Islander persons.

Generally, we consider that the regulation of BWV devices should be via statute, regulation and published guidelines. The use of police Standard Operating Procedures, which are not published, does not contribute to transparency and accountability.

⁸ University of Cambridge "Use of body-worn cameras sees complaints against police 'virtually vanish', study finds" <http://www.cam.ac.uk/research/news/use-of-body-worn-cameras-sees-complaints-against-police-virtually-vanish-study-finds>.

Similarly, accountability is weakened if it is difficult for the public to access BWV data. There should be a presumption in the *Government Information (Public Access) Act 2009* (NSW) in favour of disclosure of data for persons who are the subjects of recordings, on the basis that such recording contains their personal information of the person. Further, disclosure of such information would be in the public interest, as it would be expected to inform the public about police practices for dealing with members of the public.

Service of BWV data in criminal proceedings

Legal Aid NSW considers that if relevant footage from BWV devices exists, the defence should be advised and it should be served in the brief of evidence. This would avoid unnecessary delays and the expense to the defence of having to obtain the material by subpoena.

The destruction of data

Legal Aid NSW acknowledges that the destruction of BWV data is necessary, both to reduce the costs of storage and to protect people from having their images retained indefinitely. However, it is important that BWV data is available to the people who have been recorded and wish to access that footage, particularly if they have concerns about police misconduct.

The Minister for Police has informed the Legislative Council that, currently, all BWV data is stored on the police network and, unless tagged for retention, is destroyed after six months.⁹

It is unclear whether this is consistent with the Functional Retention and Disposal Authority DA221. This Authority is approved under section 21(2)(c) of the *State Records Act 1998* (NSW) and applies to 'records documenting the function of Police investigations'. The Authority requires, for example, 'records relating to the investigation of trespass, offensive behaviour or language, criminal intent and other public order offences' to be retained for a minimum of 5 years, and then destroyed.¹⁰

Legal Aid NSW suggests that clarification is needed with regard to the destruction of BWV data. We consider that a period of six months is too short for data relating to incidents with potential evidentiary value or relating to a complaint, disciplinary procedures or investigation, or requested by or on behalf of the complainant. There should also be clear and publicly available guidelines on what constitutes an 'incident' for retention purposes,

⁹ Answer to Question 1248, Body-Worn Video Camera, from David Shoebridge MP to the Minister for Police, asked 17 November 2016 and answered 22 December 2016, published in *Questions and Answers Paper No. 90* (NSW Legislative Council)

¹⁰ State Archives and Records Authority of NSW Functional Retention and Disposal Authority DA221, 24.

and the retention period for ‘non-incidents’. A periodic audit would assist in determining the degree of compliance in each category.

Privacy protections

Announcement regarding use of BWV device

To ensure that members of the public are aware that they are being recorded, the *Surveillance Devices Act* should be amended to require officers to announce that a BWV camera is in use and that the person is being recorded (not only when a conversation is being recorded, as is presently the case).

Restrictions regarding use of BWV footage

Part 5 Division 1 of the Act provides insufficient privacy protection because it permits information obtained from BWV devices to be used ‘for any purpose prescribed by the regulations’ (section 40(4A)). The making of a regulation is not subject to the same level of Parliamentary scrutiny as legislation. Given the personal and potentially sensitive nature of the video footage captured by BWV devices, we do not consider that the delegation of legislative power to regulation is appropriate. Section 40(4A)(c) should be deleted, so that any extension to the power to use, communicate or publish BWV footage must be via an amendment to the Act and subject to appropriate Parliamentary scrutiny.

Section 40 could be further improved by prohibiting the use of BWV data in facial recognition databases for purposes not related to the incident, investigation or legal proceedings. As the Australia Law Reform Commission has outlined, there are concerns that biometric technologies enable extensive monitoring of the activities of individuals, without their knowledge or consent. The security of biometric systems can be compromised by those wishing to access the information for wrongful purposes. Finally, the accuracy and reliability of biometric systems are still unknown.¹¹ More recent research indicates that facial recognition technology still has a very high false positive rate.¹²

BWV and police exercise of discretion

Concerns have been raised that police officers whose every interaction is recorded may feel restricted in their exercise of discretion, and are less likely to ignore trivial infractions or to divert a potential offender from the criminal justice system.¹³ Studies regarding the

¹¹ Australian Law Reform Commission, *For your information: Australian privacy law and practice* (2008) Report 108, [9.71].

¹² Rebecca Hill ‘Zero arrests, 2 correct matches, no criminals: London cops’ facial recog tech slammed’ *The Register* 15 May 2018 https://www.theregister.co.uk/2018/05/15/met_police_slammed_inaccurate_facial_recognition/

¹³ Taylor 2016, 130.

use of BWV devices usually find that such use results in increased arrests.¹⁴ This could be a positive outcome, indicating that police are arresting and charging because they have better evidence of a crime having been committed. However, it could also indicate ‘net-widening’; that is, increased use of arrest and charge in situations where formerly a police officer might have ignored, cautioned or otherwise dealt with an infraction. It is paramount that the use of BWV does not inhibit the legal obligation to apply the principle of arrest as a measure of last resort in dealing with alleged offenders.¹⁵ Public order offences, such as offensive language, are more likely to be recorded by a BWV device than offences such as robbery, sexual assault or fraud. There is a risk that vigorous prosecution of such offences could result in increased criminalisation of people who use public spaces, including Aboriginal people, homeless people and young people.

Legal Aid NSW suggests that training regarding the use of BWV devices, both when they are first rolled out and in refresher training, should include information regarding the options available to police officers and reminders of the value of diversion from custody or the criminal justice system in appropriate circumstances.

Costs and benefits

Finally, BWV camera technology, data management and storage is costly, and there are risks that when resources are limited, proper data management, storage and deletion may not be prioritised.¹⁶ Legal Aid NSW suggests that the statutory review of the provisions should include consideration of the costs of the technology and data management, and whether the demonstrated benefits justify these costs.

¹⁴ Barak Ariel et al, ‘The Effect of Police Body-Worn Cameras on Use of Force and Citizens’ Complaints Against the Police: A Randomized Controlled Trial’ (2015) 31(3) *Journal of Quantitative Criminology* 509.

¹⁵ See *DPP v Carr* [2002] NSWSC 194; *DPP v Mathews – Hunter* [2014] NSWSC 843 (at [61]) per Fullerton J.

¹⁶ Alexandra Gannoni et al *Surveillance technologies and crime control: understanding police detainees’ perspectives on police body-worn video (BWV) and CCTV cameras* Report to the Criminology Research Advisory Council, October 2017, 13-14.