



29/02/2018

Dear Commissioner Ashton

RE: The trial of the use of body-worn cameras (BWCs) by Victoria Police general duties members.

We write with regard to the proposed trial of BWCs by Victoria Police general duties members. We understand that the use of BWCs to collect evidence and statements at family violence incident scenes is being introduced as recommended by the Royal Commission into Family Violence.¹ The more wide-ranging use of BWCs will be trialed via use by general duties members across different policing contexts.

If implemented effectively, BWCs may contribute to accountability, increase community confidence in policing, and assist officers and the public by keeping record of interactions between police and community members. However, the effectiveness of BWCs is largely determined by the regulations governing their use, access to the footage, privacy safeguards, and rigorous monitoring and evaluation.

There are a number of serious and pressing issues with the proposed 2018 BWC trial.

This letter outlines a series of crucial accountability and oversight measures that must be implemented if the program is to achieve the objectives of enhancing safety for both officers and community members, and increasing police transparency and public confidence.

We, the undersigned organisations and agencies, call for:

- 1) clear and publicly available guidelines concerning data retention periods;
- 2) limits on discretionary use by officers and penalties for failure to activate;
- 3) breadth of access for victims, their lawyers and the public; and
- 4) rigorous evaluation prior to further expansion.

Key issues:

1) Access to BWC footage

The footage produced by BWCs must be available to people making complaints of police misconduct and their legal representatives.

Information provided to stakeholders to date indicates that footage obtained from BWCs will be accessible only by Victoria Police, unless the matter is referred to Professional Standards Command (PSC) or IBAC, where it will be accessible to those agencies for investigative purposes. Complainants of police misconduct will not be able to access the footage when making a complaint/through the complaints process.

¹ Royal Commission into Family Violence, *Final Report: Summary and Recommendations* (2016) 61.



If the BWC data is only available to police or IBAC investigators, then members of the community lose the opportunity to detail its content in the context of their claims. This opportunity is essential for ensuring procedural justice in the complaints process, achieving true accountability and meeting human rights benchmarks for a victim-centred process.

a) Access for victims of police misconduct and their legal representatives

“BWC programs must provide full footage access to the victims of suspected undue police violence and their families—allowing for an accountability baseline and setting victims’ rights as paramount.”²

To allow police investigators exclusive or easier access to BWC footage while investigating other police officers is a denial of procedural fairness, and risks further enshrining a system that locks complainants out of the investigation process. Where there are already concerns about the risk of collusion in a self-investigative complaints system,³ enabling complainants to access the same footage that is available to police and investigators is an essential baseline.

In order to effectively support complainants in the complaints process, and any subsequent litigation or criminal proceedings, BWC footage must be available to lawyers. In criminal proceedings, any BWC footage relating to the charge will be required to be made available to defendants and their legal representatives.⁴ However, as it stands in the proposed trial, when a member of the public wishes to make a complaint against a member of Victoria Police, neither the complainant nor their legal representatives will be able to access the footage.

Limiting access to BWC solely to police also reduces broader public faith in complaints findings. Even where an investigation finds a police officer to be innocent of wrongdoing, faith in the findings will be marred by the secrecy of the BWC footage. In New York City, the NYPD’s serial delay in releasing data to people making complaints has been found to erode public confidence in the system.⁵

² Chris Pagliarella, ‘Police Body-Worn Camera Footage: A Question of Access’, *Yale Law & Policy Review*, September 2016.

³ “In 2015, two African youth were stopped, questioned and capsicum sprayed by police when police mistakenly took one of them for a suspect. When they made a complaint to the local station about the police officers’ conduct, including in relation to excessive use of force and racial profiling, they were charged with a range of offences. Ultimately, the offences were withdrawn, when police admitted in Court to having colluded in making their statements.” Police Accountability Project, Flemington & Kensington Community Legal Centre, *Submission to the Inquiry into the external oversight of police corruption and misconduct in Victoria*, ‘Independent Investigation of Complaints against the Police Policy Briefing Paper’, 2017, Case Study, 11, https://www.parliament.vic.gov.au/images/Submission_42_Kensington_PAP_Redacted.pdf

⁴ *Criminal Procedure Act 2009* (Vic) s 41.

⁵ Donna Lieberman and Chris Dunn, ‘Body Cameras are Key for Police Accountability. We Can’t Let Them Erode Privacy Rights.’, *The Washington Post*, 1 June 2017.



When used effectively, video recordings can be relied on both by police and the public to assist in the resolution of misconduct complaints or proceedings. Provided that evidence of police action remains available as part of the public record, people worried about their perceived reliability may feel more inclined to make complaints when suspected misconduct takes place. Police may also take comfort in the fact that unmeritorious complaints will likely decrease with the increased availability of video evidence.

2) When should cameras be activated/de-activated: Limits on discretion

Body worn cameras will only improve transparency and accountability if there is certainty that they are activated during all critical encounters with members of the community.

Information from Victoria Police indicates that when police officers are on duty, the cameras will always be on standby, and will need to be switched on and recording whenever:

- the police officer is acting using police powers,
- the officer believes a crime is being committed, has been committed or is about to be committed, or
- the police officer is interacting with the public.

This issue has already arisen in matters involving BWCs coming before courts in Australia. In the Queensland Supreme Court case of *R v Cahill*⁶, the officer's BWC was switched off during the period where "consent" to a search was alleged to have been given. Where an incident is only partially recorded, or an officer has failed to activate the camera for an incident, questions will be raised about the notable absence of that footage.

a) Penalties for failing to activate BWCs

There must be a disciplinary penalty if members fail to record in encounters with the public in the instance that a person subsequently makes a complaint against them.

Video evidence can be crucial to affirming the claim of a member of the public or vindicating a police officer's account. A study of BWCs in Mesa, Arizona, found that allowing police officers discretion to activate *without consequences* led to a 42% reduction in footage.⁷ Queensland police officers have reported that BWCs were rarely used and sometimes left in storage.⁸ Allowing absolute discretion to

⁶ *R v Cahill* [2016] QSC 275.

⁷ Nancy La Vigne, 'Five Myths about Body Cameras', *The Washington Post*, 29 May 2015.

⁸ Sydney Criminal Lawyers, 'Police Body Cameras Rarely Used', 7 August 2017, <https://www.sydneycriminallawyers.com.au/blog/police-body-cameras-rarely-used/>.



activate BWCs leaves police officers without support for their claims while undermining transparency and accountability for the community.

As such, there must be a penalty if police officers fail to record encounters with the public in the instance that a person subsequently makes a complaint against them. As the New York Civil Liberties Union explains, the prospect of ‘possible discipline’ is not enough: there must be clear and meaningful penalties.⁹

3) Data retention

The retention period for any video data must be clearly and publicly articulated and should not be determined by officer discretion.

Clear information about the planned data retention period for the trial of BWCs has not been made available to stakeholders. Discussions at recent stakeholder workshops provided conflicting information about whether a uniform retention period is proposed for all footage across local area commands, or whether this will be ad hoc and vary between police stations – as is the case with CCTV footage.

a) Minimum data retention period

To ensure that BWCs support accountability and transparency, a reasonable retention period (suggested minimum 90 days) of *all* BWC material is required. Information given at the consultation workshop indicates that it will be the responsibility of the officer wearing the BWC to bookmark the footage as ‘of interest’. If footage is not bookmarked, it may be considered ‘inconsequential’ and subsequently not stored. This situation is not acceptable. A minimum 90-day retention period for all BWC material allows an adequate time frame for determination of ‘relevant material’, including via the initiation of a complaint.

The deletion of footage at the conclusion of a clear, mandatory retention period serves also to mitigate the resource burden of a BWC programme, and address the privacy concerns associated with longer-term storage.

b) Mandatory retention period for incidents

In addition to the mandatory minimum data retention period, a further retention period for BWC footage relating to ‘incidents’ is required, including for footage relating to a charge, a complaint, a use of force, or a significant interaction with the public.

4) Lack of legislative oversight and regulations

⁹ Johanna E Miller, *Written testimony of the New York Civil Liberties Union*, President’s Task Force on 21st Century Policing, Listening Session on Technology and Social Media, University of Cincinnati (31 January 2015).



Information provided by Victoria Police indicates that directions around the use of body worn cameras will be contained solely within Victoria Police policies. With the exception of changes to the *Surveillance Devices Act* and *Criminal Procedure Act* (which were required for the introduction of BWCs used for family violence incidents), there is no proposal for the creation or amendment of legislation specific to the general use of police BWCs.

This lack of legislative regulation governing the use of police body cameras raises serious concerns. Police policies can change and evolve without rigorous debate and parliamentary consideration, or the policies could foreseeably be withheld from the public under the guise of an exemption or exception to freedom of information laws. Even if all officers begin to wear BWCs, without adequate regulations from Parliament there are serious issues around encroachments on the civil liberties, the potential for misuse and the expansion of BWC far beyond the stated goals of accountability.

Victoria Police have for some years been using facial recognition software with no specific regulatory or legislative framework to guide its use.¹⁰ The combination of data from BWCs with the growing records of dashboard videos and CCTV footage, together with facial recognition technology poses potential risks to both privacy and civil rights, and warrants tight legislative regulation. In the absence of adequate government regulation, widespread use of BWCs poses numerous accountability and risks, and fails to safeguard both police members and the public. As a crucial accountability safeguard, it is essential that BWC implementation in Victoria does not outpace legislative regulations.

BWC regulations need to specify when and under what circumstances the cameras should be turned on and off, how and where the video data is to be stored, and how and under what circumstances it can be accessed for complaint, disciplinary or legal purposes by both police and the public. Fears of police selectively using their body cameras should be addressed by legislative safeguards that guarantee that BWCs will be used in a fair and uniform way.

5) Evidence and evaluation

Despite their use in a number of jurisdictions in Australia and internationally, the available research on BWCs remains very limited. To date, there have been few studies of police body-mounted cameras worldwide, and even fewer that include independent evaluation. As such, in the research surrounding BWCs, many of the claims by both advocates and critics of their use remain untested.

The fact that the available empirical data on BWC use is both limited and equivocal as to whether it improves interactions between police and the public or increases transparency¹¹ makes rigorous

¹⁰ Details of Victoria Police facial image database cited in Margot O'Neill and Amy Sherden, 'Facial Recognition: Privacy Advocates Raise Concern', *Lateline*, 24 February 2016, <http://www.abc.net.au/news/2015-09-09/national-facial-recognition-system/6761266>.

¹¹ Michael D White, *Police Officer Body-Worn Cameras: Assessing the Evidence* (Washington DC: Office of Community Oriented Policing Services, 2014) 6.



monitoring and evaluation of a Victorian BWC trial even more crucial to achieving the accountability goals of the program.

Other untested but serious concerns relate to the potential for BWC footage to be interpreted in favour of the police officers wearing them due to the phenomenon of ‘camera view bias’.¹² Further, the increase in guilty pleas in other jurisdictions since the introduction of BWCs has been treated uncritically as an advantage,¹³ even though it could reflect the failure to make footage accessible and therefore contestable.

In late 2013, Victoria Police conducted a trial of body-mounted cameras in Frankston. No community consultation or reference group was established as a part of this trial, and the results of any evaluation are still yet to be publicly released. It is essential that the proposed trial be rigorously evaluated, and the results of this evaluation, and that of the prior 2013 trial be made publicly available.

There should be no commitment to rolling out BWCs across the police force unless they are found to be an effective accountability mechanism after independent review, and a considerable consultation process with a range of community and legal agencies.

6) Privacy issues

Finally, the introduction of BWCs raises a host of privacy issues for both the community and Victoria Police members, with regards to access to, use and storage of footage.¹⁴ Legislative oversight and policy guidelines regulating BWC footage need to achieve a balance that enables both access for investigators and sufficient public access to protect victims’ rights, while also safeguarding police and citizens’ privacy rights.

We believe that police BWCs can augment police accountability and improve community interactions with and confidence in Victoria Police. However, critical to achieving this is the accompanying legislative regulation and oversight that will determine their effectiveness and the level of public confidence in the programme.

We urge you to ensure that the proposed trial and roll-out of BWCs is accompanied by clear legislative guidelines, that footage is made accessible to those who need it, that there are proper incentives for

¹² Emmeline Taylor, ‘Body-worn cameras are not a panacea for poor policing’, *The Conversation*, 27 October 2016.

¹³ See, for example, Peter Ryan, *Media Release: Body Worn Cameras Seeing Results across Queensland*, 3 August 2017.

¹⁴ Ali Winston, ‘With Evidence.com, Taser Looks to Cash in on Police Brutality Debate’, *Reveal News*, 9 May 2015, <http://www.revealnews.org/article/with-evidence-com-taser-looks-to-cash-in-on-police-brutality-debate/>; ‘FBI Investigates ‘Cloud’ Celebrity Picture Leaks’, *BBC News*, 2 September 2014, <http://www.bbc.com/news/technology-29011850>.



police officers to record interactions with the public and that any expansion of BWCs is based on evidence and rigorous evaluation.

Yours sincerely

Aboriginal Family Violence Prevention & Legal
Service Victoria (FVPLS Victoria)

Moonee Valley Legal Service

Barwon Adolescent Taskforce

Northern Community Legal Centre

Darebin Community Legal Centre

Pensinsula Community Legal Centre

Democracy in Colour

Smart Justice

Eastern Community Legal Centre

Smart Justice for Young People

Federation of Community Legal Centres

West Heidelberg Community Legal Service

Fitzroy Legal Service

WEst Justice

Flemington Kensington Community Legal
Centre

Whitelion

Gippsland Community Legal Service

Youth Affairs Council Victoria

Goulburn Valley Community Legal Centre

Youth Support and Advocacy Service (YSAS)

Human Rights Law Centre

Inner Eastern Local Learning & Employment
Network

Inner Melbourne Community Legal Services

Jesuit Social Services

Job Watch

Koori Youth Council

Loddon Campaspe Community Legal Centre

Level 3, 225 Bourke Street, Melbourne VIC 3000

Phone: (03) 9652 1500