



14 June 2018

Ms Laura Schultz
Justice Policy and Reform
Department of Justice NSW
GPO Box 6S
SYDNEY NSW 2001

Via email: policy@justice.nsw.gov.au

Dear Ms Schultz

Review of the *Surveillance Devices Amendment (Police Body-Worn Video) Act 2014* submission

I write to you on behalf of the Aboriginal Legal Service (NSW/ACT) Limited (**ALS**) and Redfern Legal Centre (**RLC**). We thank the Department of Justice for the opportunity to provide a joint submission in relation to the Review of the *Surveillance Device Amendment (Police Body-Worn Video) Act 2014* (NSW) (**the Act**) as per section 64 of the Act.

The ALS is the peak legal services provider to Aboriginal and Torres Strait Islander people in NSW and the ACT. We provide this submission based on our extensive involvement with, and representation of, clients who interact with the police and the criminal justice system. It is well documented that Aboriginal and Torres Strait Islander people are overrepresented in every aspect of the criminal justice system, both as victims and as offenders. In addition, while many efforts have been made to improve the relationship between Aboriginal and Torres Strait Islander people and police, there remains a strong perception by the former that the law is applied unfairly and that complaints about police practices are not taken seriously. Such perceptions have strong historical antecedents and are supported objectively by a significant body of evidence.¹ The perception of poor police practices needs to be addressed in order to improve the relationship between police and Aboriginal and Torres Strait Islander people. In keeping with this objective, the ALS considers this

¹ For example, Australian Law Reform Commission Report 133, *Pathways to Justice: Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2018) at p. 448.

submission an important opportunity to contribute constructively towards enhancing accountability and transparency for the benefit of all concerned, by the use of BWC's in contemporary policing practice in NSW.

RLC is an independent, non-profit, community-based legal organisation with a prominent profile in the Redfern area. RLC has a particular focus on human rights and social justice. Our specialist areas of work are tenancy, domestic violence, credit and debt, employment, discrimination and complaints about police and other government agencies. By working collaboratively with key partners, RLC specialist lawyers and advocates provide free advice, conduct case work, deliver community legal education and write publications and submissions. RLC works towards reforming our legal system for the benefit of the community.

RLC has a long history of acting for Aboriginal and Torres Strait Islander people including those who have been the subject of police misconduct. The systemic abuse of police powers towards members of Aboriginal and Torres Strait Islander communities was one of the major catalysis for the creation of RLC in 1977. In 2011, RLC created a state-wide, dedicated police misconduct practice. In 2015, the practice partnered with the University of NSW to create a student clinic. Since its inception, the practice has advised in more than 1900 police misconduct matters. Of those matters, more than 12% identified as Aboriginal or Torres Strait Islander.

The ALS and the RLC would also like to acknowledge the insightful contribution of Dr Emmeline Taylor in formulating this response, with whom we have consulted as a recognised expert in this field.

Should you require any further information, please do not hesitate to contact our Senior Law Reform and Policy Officer Julia Grix via julia.grix@alsnswact.org.au or 9213 4117.

Yours sincerely,



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1. Introduction

Police Body Worn Cameras (**BWCs**) were first trialled in Australia in 2007. In 2014, Police NSW announced an investment of over \$4 million in BWC technology to be provided to all frontline police officers following, what was described by the then Police and Emergency Services Minister as, the “very positive results” achieved by the use of this technology.² It is unclear what assessments of the previous trials had been undertaken, and by whom, to support the expansion of Police BWC’s in this way, as no published research was referred to at the time of this announcement.³ Nonetheless, the use of Police BWCs has fast become a common feature of contemporary policing throughout Australia as well as in jurisdictions around the world, including in the United States, the United Kingdom and the Netherlands.

In NSW, the then NSW Attorney-General and Minister for Justice set out the purpose of Police BWCs in the Second Reading Speech to amend the *Surveillance Devices Act 2007* (NSW):

The devices will operate as a modern day equivalent of a police notebook providing for a contemporaneous record of observations and events in the field. These reforms recognise that video recording devices are already broadly available and widely used in the community. The bill provides a structured and considered framework for the use of this twenty-first century technology in modern day policing.

...

*The use of body-worn video devices by police is a positive step forward in the prevention and investigation of crime. Their use will be beneficial for police, offenders and the community more broadly. The evidentiary value of the recordings may expedite investigations and prosecutions and could reduce the number of defended hearings. The general use of body-worn video could also lead to a reduction in assaults on, and complaints against, police officers as interactions with suspects and members of the public will be recorded.*⁴

In theory, the stated objectives of police operated BWCs, as set out above, are not controversial.⁵ However, it has become clear since the introduction of this technology that operational and legislative changes would improve the capacity of BWCs in NSW to achieve the outcomes sought by their use. In addition, given the complicated nature of the issues

² <https://www.nsw.gov.au/news-and-events/news/police-get-new-body-mounted-video-technology/>. Last accessed 10 June 2018.

³ Taylor E, “Body-worn cameras are not a panacea for poor policing” in *The Conversation*, 27 October 2016.

⁴ *Surveillance Devices Amendment (Police Body-Worn Video) Bill 2014*, Second Reading Speech, 22 October 2014.

⁵ It is noted however, that there exists some critique in the literature of the policing “problems” the use of BWCs is intended to address. For example, Palmer D, “The Mythical Properties of Police Body-Worn Cameras: A Solution in Search of a Problem”, *Surveillance and Society*, 14(1) 138 at140.

raised by the use of this technology, in combination with the rapid growth in its implementation, the lack of research supporting its efficacy and cost-efficiency is troubling.⁶ In sum, the use of this technology requires a complex balance of competing interests which, in our view, necessitates regular oversight, monitoring and evaluation, including subsequent reviews, in order to achieve its full potential. While it is beyond the scope of our submission to consider all of these issues in detail, we take this opportunity to focus on some of the most compelling concerns that have arisen in our work and for which we have formulated recommendations for the Department of Justice to consider as part of its Review.

2. Summary of recommendations

- (1) Continuous recording of all police operated body worn cameras should be mandated.
- (2) If continuous recording is not mandated, police discretion to activate body worn cameras is to be removed through the development of clear and robust activation guidelines.
- (3) Activation guidelines should be made publicly available.
- (4) Meaningful consequences for any breach of the activation guidelines should be introduced.
- (5) Clear provisions concerning access to body worn camera footage for police and for complainants of police misconduct should be introduced.
- (6) There should be rigorous ongoing monitoring of the implementation and use of police-operated body worn cameras and further reviews of its use conducted.

3. Police discretion to activate

Policies that govern the use of BWCs by police play a critical role in determining the extent to which transparency and police accountability can be achieved. However, there appears to be limited information publicly available regarding the exercise of police discretion to

⁶ Ariel B, Sutherland A, Henstock D, Young J, Drover P, Sykes J, Megicks S, Henderson R, “Contagious Accountability: A Global Multisite Randomised Controlled Trial on the Effect of Police Body-Worn Cameras on Citizens’ Complaints Against the Police”, *Journal of Criminal Justice and Behavior*, 44 293-316. See also, Taylor E, Op Cit 3 – wherein researchers describe the use of BWCs as “a massive world-wide uncontrolled social experiment taking place at a cost of billions of dollars”.

activate the recording function of BWCs in NSW.⁷ Anecdotally, our casework reflects inconsistency in the application of this discretion by police, resulting in a wide range of consequences for our clients. In our view, this is one of the most significant impediments limiting the potential of this technology to achieve greater fairness, transparency and accountability in policing in NSW.

Critics have argued, for example, that the fact that, “a camera can be switched off, or wilfully turned away from a police interaction with an assailant without consequence, cannot increase accountability or reduce poor policing practice”.⁸ There is also research to support the proposition that the excessive use of force by police may be reduced in circumstances where their discretion to activate the recording of a BWC is minimised.⁹ There are many cases in the public domain where police officers appear to have deliberately stopped recording during violent altercations with a member or members of the public. Recently, fatal incidents have generated widespread media coverage where the police involved failed to activate their BWC equipment at all. An example is the shooting of Justine Damond in 2017. This has raised speculation that, if not deliberately intended, this may have been the result of an oversight.¹⁰ These are some of the most familiar and compelling examples of the limitations of police-operated BWCs to improve police transparency and accountability while significant discretion resides with individual officers to activate their devices.

In addition, the autonomy of police to choose when to turn their cameras on and off not only undermines the potential safeguards posed by the use of BWCs against the excessive use of force, but also limits other potential benefits of this technology to capture the chronology of events in real time. The partial recording of incidents by BWCs has already arisen in the context of criminal litigation in Australia.¹¹ In our experience, the timing of activation has proven critical in cases and the interpretation of events in issue.

⁷ http://www.police.nsw.gov.au/_data/assets/file/0004/362992/English_BWV_DL_flyer_we_final.pdf Police NSW Media Release - last accessed 10 June 2018.

⁸ Taylor E, “Lights, camera, redaction ... Police-worn body cameras – Autonomy, discretion and accountability, *Surveillance and Society*, 14(1) 128 at 130.

⁹ Op cit 6.

¹⁰ <http://www.abc.net.au/news/2017-07-27/justine-damond-shooting-prompts-stricter-body-camera-rules/8747428> last accessed 10 June 2018.

¹¹ *R v Cahill* [2016] QSC 275.

Case study: Larry

Police attended Larry's home because of a concerned call from Larry's father. Larry told the police he was fine. Police told Larry to open the door, assuring him that they just needed to "sight him" and then they could leave. Larry says that once he opened the door, he was immediately grabbed by two police officers and told he was being apprehended under the Mental Health Act. Larry was confused and angry. Police took him to the ground and in that process, Larry assaulted one of the police officers. Larry was placed under arrest for assault.

On Larry's version of events, police may not have had reasonable grounds to apprehend him under section 22 of the Mental Health Act.

The body worn video was essential in Larry's criminal matter. If Larry wasn't being lawfully detained, he was entitled to defend himself. Police allege that they had extensive discussions with Larry before he opened the door. However, Larry disputes this. Unfortunately, the body worn video only starts at the time the police apprehend Larry, failing to capture those critical moments before Larry opens the door.

The use of visual technology in contemporary policing carries with it an inherent "camera bias" that must be acknowledged, as any such recording is generated from the perspective of the police officer upon whom the device is attached.¹² Continuous recording by police-operated BWCs cannot eliminate this bias, but, on balance, would go towards mitigating its impact on the evidence collected than the selective exercise of discretion as to what will and will not be recorded.

4. Continuous recording

The preferred recommendation of the ALS and RLC to minimise some of the problems identified above is that police-operated BWCs record continuously when police officers are in a public place, or at least during all interactions with members of the public. It is conceded however, that this raises significant privacy issues for police, victims, witnesses and informants, which is beyond the scope of this submission to address. Of particular concern is the potential impact on vulnerable individuals, including the homeless, who are at greater risk of privacy-related harms from recording devices remaining on at all times in public places. Other issues arising from continuous recording concern the storage of, and access to, data amassed on such a comparatively significant scale. However, in our view, on

¹² Much has been written on this topic. For example, Mateescu A, Rosenblat A and Boyd D, "Police body-Worn Cameras", *Data and Society*, 2015 at p.24-29.

balance, the use of this technology is better capable of achieving greater transparency and accountability through continuous recording, than recording at the discretion of police officers with limited guidance as to when to activate such devices and virtually no consequences for failing to activate them.

Case study: Peter

Peter was at a train station when he was approached by a police officer and given a move on direction. Peter made an offensive remark to the officer, at which time the officer grabbed him and pushed him with significant force against a fence. The officer held on to Peter by the collar and threatened to arrest Peter for offensive language, a fine-only offence. This part of the incident was captured on video by a member of the public.

Peter told his lawyer that he was assaulted by the officer. However, this was not captured in the footage. When Peter's lawyer tried to make arrangements to view the body-worn video footage, she was told that no footage existed because the police officer was unable to login to the BWC system at the start of his shift and as a result, did not take his camera with him.

It is important to acknowledge the specificity of the experience of Aboriginal and Torres Strait Islander people and their relationship with police. As referred to earlier, there is a strong perception by Aboriginal and Torres Strait Islander people that the law is applied unfairly and that complaints about police practices are not taken seriously. Such perceptions are founded on historical antecedents and are supported objectively by a significant body of evidence.¹³ In our view, removing the discretion of police to activate BWCs and providing, instead, for continuous recording is likely to improve transparency and accountability as “body-worn cameras provide an important means of documenting hitherto obfuscated interactions between the police and members of the public”.¹⁴ It is possible, for example, that continuous recording could lead to a reduction in racial profiling in the exercise of police powers, such as stop and searches.¹⁵ Enhancing transparency and accountability in this way has the potential to significantly improve policing practices,

¹³ For example, Australian Law Reform Commission Report 133, *Pathways to Justice: Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2018) at p. 448.

¹⁴ Op cit 8 at p.129

¹⁵ It is noted that the use of such cameras could also “produce other types of discrimination, such as being used to intimidate and record in certain localities and over-policed areas” which would require monitoring and review. *Ibid.*

influence police culture and, consequently, build confidence in the relationship between Aboriginal and Torres Strait Islander people and police.

In our view, continuous recording of BWCs has the potential to improve policing practices and restore community confidence in police.

5. Removing police discretion and developing meaningful activation guidelines and protocols

As an alternative to continuous recording, we recommend the development of meaningful and robust operational procedures and guidelines to regulate the activation of BWCs by police. Further, in the interests of transparency, we recommend that any and all regulatory material be made accessible to the public. In addition, we recommend consideration of a legislative requirement for activation in certain cases when reasonably practicable, such as for the exercise of a police power, including any search, direction or arrest/detention. Finally, it is important to note that the development of activation guidelines must be accompanied by the necessary training to enable and encourage police compliance.

Case study: Letisha

Letisha was driving along a Sydney street when she was pulled over for a random breath test. The breath test returned a negative reading but Letisha was asked to get out of her car. Letisha was concerned about what was going to happen next, so she pulled out her mobile phone and started filming. Letisha's phone was seized and the footage deleted by police.

Letisha's version of events in relation to the stop and search differ markedly from the police version of events. Unfortunately, there is no footage to corroborate either version of events.

6. Consequences for non-compliance

It should not be left to a victim of misconduct to draw attention to the failure of police to activate their devices. In addition to the development of activation guidelines, we further recommend NSW Police implement appropriate mechanisms to monitor the ongoing use of BWCs and that there be clear and meaningful consequences for failing to activate BWCs in accordance with the activation guidelines.

The New York Civil Liberties Union has argued that officers should face consequences for the failure to record; for example, building into disciplinary rules a presumption against an officer, which can be rebutted with proof of a mechanical malfunction, and/or a presumption against the reliability of evidence given by an officer in court proceedings where they have failed to record when required to do so.¹⁶ It is envisaged that such presumptions would motivate police to comply with suggested requirements for continuous recording under particular circumstances, not only by shining a light on non-compliance, but also by creating serious disincentives to switching-off, or failing to activate, the camera to avoid accountability. Further, we recommend consideration of the following as possible additional safeguards and consequences for failure to comply with the proposed activation guidelines:

1. Activation of BWC to be a condition to the lawful exercise of certain powers.
2. A failure to activate BWC in accordance with the activation guidelines be considered 'serious misconduct' for the purposes of section 10 of the *Law Enforcement Conduct Commission Act 2016*.

7. Access to data and retention

(1) Rules for viewing by police

Pursuant to Regulation 4(1)(c) of the *Surveillance Devices Regulation 2014* (NSW), BWC footage may be used for the purposes of any proceedings of a court or tribunal in which the NSW Police is a party or in which a member of NSW Police is called as a witness. Officers should not see the footage obtained from their BWC prior to filing their own report to avoid a situation where two seemingly independent evidentiary accounts – the officer's recollection of events and the BWC footage – are in fact based on, or influenced by one another. Such a practice would clearly diminish the evidentiary value of BWC footage in any such proceedings which, as stated previously, in itself contains an inherent "camera bias" that already reflects the perspective of the police officer who has activated the device.

(2) Rules for viewing by complainants

Pursuant to Regulation 4(1)(d) of the *Surveillance Devices Regulation 2014* (NSW), BWC footage may be used for the purposes of an investigation of a complaint against a member of NSW Police. The NSW Police Standard Operating Procedures for BWC video allow

¹⁶ New York Civil Liberties Union quoted in Mateescu A, Rosenblat A and Boyd D, "Police Body-Worn Cameras" in *Data and Society Research Institute* 2015 a5 p.12, footnote 83.

complainants and/or their legal representatives to view BWC video free of charge. However, it is our understanding that access to footage is routinely denied to complainants.

Inequality of access to information undermines transparency and accountability, and contributes further to the already significant power imbalance that exists between complainants and investigators. It is also likely that, unless complainants have access to the same information as complaints investigators, complainants will continue to be dissatisfied with complaint outcomes. If BWC footage is aimed, at least in part, towards improving police conduct and accountability, as well as restoring community confidence in police, then it must be accessible to all complainants.

We recommend appropriate amendments to relevant legislation and guidelines to make it clear that BWC footage is required to be disclosed to individuals who have made a formal complaint under part 8A of the *Police Act 1990* (NSW).

8. Need for further monitoring and review

As noted earlier, despite the rapid rise in the use of this technology by police in Australia and other jurisdictions throughout the world, surprisingly little research exists that assesses its impact. The results of the limited research available are equivocal at best, and the claims made by advocates and critics of BWCs remain largely untested. We recommend ongoing and rigorous monitoring of the implementation of this technology in NSW and, preferably, an independent evaluation of its use. It is critical that the implementation of this dynamic technology does not outpace legislative regulations and for this reason, we recommend a further review of police-operated BWCs by the Department of Justice in 12 months.

9. Conclusion

It is difficult to fully determine or predict the impact of the use of BWCs in the absence of conclusive evidence-based studies in NSW and elsewhere. The ALS and RLC have identified a number of concerns in this submission with regard to the implementation of this technology thus far, which provides the basis upon which we have formulated recommendations to be considered as part of this Review. This is far from an exhaustive list of concerns held about the use of this technology in contemporary policing and the work we consider that is yet to be done, both in evaluating its ability to achieve its objectives, as well as its impact on privacy and the broader social, legal and regulatory implications of its use.

It is also important to note that, while the new visibility provided by the use of this technology is likely to add a layer of transparency to contemporary policing, “true police

accountability is located in the way operational codes are observed, the practices of the relevant internal and external review bodies, and in the culture of every police organisation".¹⁷ Police operated BWCs are not a panacea for poor policing practice.¹⁸ The use of this technology must be subject to rigorous monitoring and reviews to ensure that, like all other police practices and procedures, it too is applied equally and without discrimination and that investigations about police misconduct are, and are seen to be, thorough, transparent and fair.

¹⁷ Sarre R, "Body-worn cameras will help reduce police use of force, but the problem runs much deeper", in *The Conversation*, 4 April 2018.

¹⁸ Op cit 3.