

Police Body Worn Video

Marbury Chambers' CPD
31 March 2019

Professor Murray Lee & Dr Carolyn McKay
University of Sydney Law School

IMAGE:

https://www.police.nsw.gov.au/data/assets/pdf_file/0008/586484/Updated_Brochure_BWV.pdf



THE UNIVERSITY OF
SYDNEY

Police Body Worn Video

■ Recent research

- Lee, M., Taylor, E., & Willis, M. (2018). Being held to account: Detainees' perceptions of police body-worn cameras. *Australian & New Zealand Journal of Criminology*. <https://doi.org/10.1177/0004865818781913>
- Taylor, E. & Lee, M. (2019) Points of View: Arrestees' Perspectives on Police Body-Worn Cameras and their Perceived Impact on Police–Citizen Interactions, *The British Journal of Criminology*, , azz007, <https://doi.org/10.1093/bjc/azz007>
- Taylor, E., Lee, M., Willis, M. & Gannoni, A. 2017. *Police detainee perspectives on police body-worn cameras*. Trends & issues in crime and criminal justice No. 537. Canberra: Australian Institute of Criminology. <https://aic.gov.au/publications/tandi/tandi537>

Legislation

- *Surveillance Devices Act 2007* (NSW)
- *Surveillance Devices Regulation 2014* (NSW)
- *NB Surveillance Devices Amendment (Statutory Review) Act 2018* not yet in force
- Statutory Review of the *Surveillance Devices Act 2007*, Report October 2018 see:
<https://www.parliament.nsw.gov.au/la/papers/DBAssets/taledpaper/webAttachments/74362/Stat%20Review%20Surveillance%20Devices%20Act%202007%20-%20Oct%202018.pdf>
- See also: *State Records Act 1998* (NSW); *Privacy and Personal Information Protection Act 1988* (NSW); *Government Information (Public Access) Act 2009* (NSW)

Surveillance Devices Act 2007 (NSW)

- **s 4: body-worn video** means equipment worn on the person of a police officer that is capable of recording visual images or sound or both.
- See exceptions for BWV from **ss 7-8** provided used in accordance with s 50A
- **ss 39-40** information from using a body-worn video = protected information

Surveillance Devices Act 2007 (NSW)

s 50A Police use of body-worn video

- (1) The use of body-worn video by a police officer is in accordance with this section if:
- (a) the **police officer is acting in the execution of his or her duty**, and
 - (b) the use of body-worn video is **overt**, and
 - (c) 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) Without limiting the ways in which the use of body-worn video may be overt for the purposes of subsection (1) (b), the use of **body-worn video is overt once the police officer informs** the person who is to be recorded of the use of body-worn video by the police officer.
- (3) The use of body-worn video by a police officer is also in accordance with this section if:
- (a) it is **inadvertent or unexpected**, or
 - (b) it is **incidental** to the use of body-worn video by the police officer in the circumstances set out in subsection (1).

Surveillance Devices Regulation 2014 (NSW)

- See *Surveillance Devices Act 2007* (NSW) s 40(4A)(c) BWV information may be used ‘for any purpose prescribed by the regulations’
- **Regulation 4 Use, communication or publication of police body-worn video**
 - (1) For the purposes of section 40 (4A) (c) of the Act, the information obtained from the use, in accordance with section 50A, of body-worn video equipment by a police officer may be used for the purposes of any one or more of the following:
 - (a) coronial proceedings under the Coroners Act 2009,
 - (b) an administrative decision made under an Act administered by the Minister for Police,
 - (c) any proceedings of a court or tribunal in which the NSW Police Force or the State is a party or in which a member of the NSW Police Force is called as a witness,
 - (d) the investigation of a complaint against, or the conduct of, a member of the NSW Police Force,
 - (e) the investigation of an alleged workplace injury to a member of the NSW Police Force.

Surveillance Devices Regulation 2014 (NSW)

Regulation 4 Use, communication or publication of police body-worn video (continued)

(2) The information may also be used for the purposes of a media production such as a television, radio or internet broadcast but only if:

(a) all content to be used in the media production must be approved by the NSW Police Force, and

(b) the body-worn video equipment from which the information was obtained was provided particularly for the purposes of the media production, and

(c) the use of the information is otherwise lawful and does not breach any guidelines issued by the Commissioner of Police for the purposes of this subclause.

(3) In this clause:

use of information includes publication and communication of the information.

BWV in Corrective Services NSW

- Prison officers trial body-worn camera technology
- Custodial Operations Policy and Procedures 13.12 Body-worn video
- <https://www.justice.nsw.gov.au/Pages/media-news/media-statements/2018/body-worn-cameras-trial.aspx>
- <https://www.correctiveservices.justice.nsw.gov.au/Documents/copp/body-worn-video.pdf>

Concerns?

Case Law

- *Voitenko t/as Access Party Hire v Zurich Australian Insurance Limited* [2016] NSWSC 324 - In determining whether the subpoena for production of recordings made by a listening device authorised under the *Surveillance Devices Act 2007* has a legitimate forensic purpose can only be determined when a decision of court has been made on the question as to the “interest of justice” under s 43 of the Act.
- *R v Dowd* [2018] NSWDC 459 – BWV recording used in evidence

Case Law

- *QFM v The Commissioner of Police* [2015] QDC 320 [4]-[5] – 16yo - The entire transaction, from [police officer's] point of view, was recorded on his body-worn camera. [17] BWV did not support police argument.
- *R v Cahill* [2016] QSC 275 – search without a warrant – drugs - partial recording by BWV
- *Marigliano v Queensland Police Service* [2016] QCAT 110 - use of body worn camera to record conversation of the applicant without his knowledge - lawful
- *Church v Commissioner of Police* [2015] QDC 259 – speeding offence - BWV evidence accepted – see also *Church v Commissioner of Police* [2016] QCA 78
- *ACP v Queensland Police Service (No 2)* [2017] QDC 293 – DV breach - BWV recording used in evidence
- *Harvey v Queensland Police Service* [2017] QDC 310 - The conduct was recorded by a camera in the triage and Officer Griffiths operated a body worn camera.[58]
- *R v Kairouz* [2017] QSC 270 – BWV used to confirm lawful search

Case Law

- *JLK v Queensland Police Service* [2018] QDC 128 - BWV evidence accepted
- *R v Mickelo* [2018] QCA 295 where footage from this second officer's bodyworn camera was tendered at trial – [24] the video recording was slightly different to what officer recalled – [55] As is apparent from the video recording, the appellant became increasingly aggressive. He was also bigger in size than both of the police officers. With the advantage of the video recording, the jury were able to consider the appellant's demeanour and his overall behaviour in the sequence of events prior to the attempt to handcuff him.
- *R v TF* [2018] QChC 26 – child – [40] The complainant's s 93A interview was recorded on a police body-worn camera.[21] I listened to and viewed that evidence. The quality of the audio and the video was poor. In parts, the voices were indistinct.
- *Crossman v Queensland Police Service* [2018] QDC 267 - whether 'covert' use of body-worn camera footage was unfair – appeal failed
- *Crime and Corruption Commission v Carless & Anor* [2019] QCAT 50 [9] The body worn camera shows the Second Respondent resisting police officers despite multiple warnings to stop resisting.
- *Queensland Police Service v Barbaro* [2019] QMC 1- BWV in evidence re consorting

Case Law

- *CERTAIN CHILDREN v MINISTER FOR FAMILIES AND CHILDREN & ORS* (NO 2) [2017] VSC 251 [418] – re detention of children - BWV footage captured the aftermath of capsicum spray being deployed, but the footage was not ‘illuminating’

Case Law

Inquest into the deaths of Wendy Murphy and Natalie McCormack [2016] NTLC 24

[232] It is time to take stock. To re-evaluate the strategies dealing with domestic violence in Aboriginal communities.

[234] There are two obvious areas where improvements could be made to the criminal justice system ... the use of body worn cameras by Police Officers and using the information recorded as evidence-in-chief in prosecutions...

Body Worn Cameras and the Evidence-in-Chief Initiative

[235] Police gave evidence that they are working on the introduction of body worn cameras and possible legislation (along the lines of that recently introduced into NSW and the ACT) to allow the use of evidence gathered to be tendered in court as evidence-in-chief.

[236] As has been apparent, the victim is sometimes willing to assist Police in the immediate aftermath of an assault. But as the months pass, things change. The circle of violence moves into the phases of the victim feeling guilty and then on to the good times again. The victim may also be dissuaded by the family and community from continuing to assist the system.

Case Law

- *Ebatarinja v Dunne* [2018] NTSC 66 – [6] What is evident from the Statement of Facts[3] and the body-worn video played to the Local Court and on appeal is that the offending occurred in the context of the aftermath of a difficult attempted apprehension by police of a vulnerable woman, BE at Larapinta Valley Camp.
- *The Queen v Layt* [2018] NTSC 36 – [5] argued the police evidence of admission is “tainted with impropriety” because the video record made on the body-worn cameras at the time the admissions were made has been destroyed, lost or is otherwise no longer available without reasonable explanation; and the evidence should therefore be excluded; [49] Counsel also suggests that the conduct of police in **not saving the footage** was so grossly negligent and incompetent that oral evidence of the admissions made by the accused should be excluded on public policy grounds. However, this is not a case which involved non-compliance with some positive obligation. There is no question of unlawful conduct here, and there is nothing sinister or otherwise improper about the nature of the non-compliance and the reasons for it in the circumstances. Nor was the failure to save the footage the product of a reckless disregard of the statutory provision. It was inadvertent and excusable in the circumstances. [50] On the other hand, the reception of the evidence [admission] would not be unfair to the accused given the circumstances in which the admissions are alleged to have been made; [78] failure to save BWV was not an impropriety

Thank You

murray.lee@sydney.edu.au

carolyn.mckay@sydney.edu.au