

Statutory Review

**Provisions of the *Surveillance Devices Act 2007*
inserted by the *Surveillance Devices Amendment
(Police Body-Worn Video) Act 2014***

July 2020



THIS PAGE LEFT INTENTIONALLY BLANK

Table of Contents

1. Executive Summary	4
2. Recommendation	5
3. Statutory review	6
3.1 Conduct of the review	6
4. Overview of the statutory and operational framework	7
4.1 Current statutory framework	7
4.2 Current operational framework	8
5. Stakeholder submissions	9
6. Consideration of the impact of police body-worn video and any changes required to support its use	12
6.1 What has been the impact of police body-worn video?	12
6.2 Are there any operational or legislative changes required to support its ongoing use?	17
6.3 Conclusion	25

1. Executive Summary

This is a report on the statutory review (**the review**) of the provisions of the *Surveillance Devices Act 2007 (the Act)* inserted by the *Surveillance Devices Amendment (Police Body-Worn Video) Act 2014 (the police body-worn video provisions)*. This review was conducted on behalf of the Secretary of the NSW Department of Communities and Justice (**the Department**), in accordance with s.64 of the Act.

The police body-worn video provisions of the Act enable the overt use of body-worn video devices by police officers in NSW acting in the execution of their duty. The intent of police body-worn video is to improve community and officer safety and support investigations by allowing officers to record visual and audio evidence.

The police body-worn video provisions of the Act set out the requirements for the lawful use of police body-worn video (s.50A) and the purposes for which police body-worn video recording may be used (s.40). Police body-worn video recordings are included in the definition of “protected information” (s.39), meaning strict limitations (including criminal penalties) apply to the use, publication or communication of these recordings. Police body-worn video provisions under sections 7 and 8 of the Act enable the use of police body-worn video by providing exceptions to the prohibitions on the installation, use and maintenance of listening devices and optical surveillance devices.

A pilot operational phase for police body-worn video in NSW commenced in November 2015, and the full Phase 1 roll-out commenced on 21 November 2016. As of 28 February 2020, 4,878 devices have been rolled out in NSW. The impact of police body-worn video is not yet comprehensively known. Evaluations of police body-worn video in NSW conducted by Charles Sturt University (**CSU**)¹ have noted several encouraging indicative trends, including positive impacts on judicial processes due to the stronger evidentiary basis provided by police body-worn video, a de-escalation of the levels of aggression and assault by members of the public, and a reduction in the number of sustained complaints against members of the NSWPF. The review considers that further evaluation should be undertaken to validate these early trends.

This review considered submissions received from key stakeholders as part of the review, in consultation with the Body-Worn Video Implementation Committee. Overall, stakeholders advocated for greater transparency around the use of police body-worn video, as well as improved access to footage for complainants of police misconduct. This is consistent with the conclusion of the 2016 CSU evaluation that wider dissemination of the policies and protocols of police body-worn video would build public confidence and benefit community-police relations.

The review concludes that the Act does not require amendment, and that there are robust procedures in place guiding police officers (and the public) on how and when devices are expected to be used and the retention and destruction policies in place. The now publicly available NSWPF body-worn video standard operating procedures are annexed to this report.

¹ Charles Sturt University, *Draft Evaluation Report on the NSW Police Force Body-Worn Video Camera Implementation*, September 2016; and Charles Sturt University, *Report on Evaluation of the NSW Police Force Body-Worn Camera Phase 2 Implementation*, December 2019.

2. Recommendation

Recommendation 1

The Act continues to remain in force in its current terms.

3. Statutory review

3.1 Conduct of the review

The review was undertaken by the Department on behalf of the Secretary of the Department. Section 64 of the Act requires the review to be undertaken by the Secretary of the Department or delegate as soon as practicable after the period of 12 months from the operational commencement of the *Surveillance Devices Amendment (Police Body-Worn Video) Act 2014*. Section 64 states that:

- (1) The Secretary of the Department of Justice or delegate is to review the operation of the provisions of this Act inserted by the Surveillance Devices Amendment (Police Body-Worn Video) Act 2014.
- (2) The review is to be undertaken as soon as practicable after the period of 12 months from the operational commencement of that Act.
- (3) The Secretary or delegate is to prepare a report of the review under this section and furnish a copy of the report to the Minister as soon as practicable after the expiration of that 12-month period.
- (4) The Minister is to lay (or cause to be laid) a copy of any report furnished to the Minister under this section before both Houses of Parliament as soon as practicable after the Minister receives the report.

Operational commencement is considered to be the start of Phase 1 roll-out of police-body worn video devices on 21 November 2016.

Section 64 does not set out any requirements for the review, however the Second Reading speech of the then Attorney General introducing the police body-worn video provisions on 22 October 2014 noted that Government would “assess the impact of body-worn video and consider any necessary operational or legislative changes required to support its ongoing use”².

Submissions by key relevant stakeholders have been considered as part of the review. The stakeholders who provided a submission to the review are the Aboriginal Legal Service NSW/ACT (**ALS**) (joint submission with the Redfern Legal Centre (**RLC**)), the Information and Privacy Commission NSW (**IPC**), the Law Society of NSW (**Law Society**), Legal Aid NSW (**Legal Aid**), the NSW Police Force (**NSWPF**), the Office of the Director of Public Prosecutions (**ODPP**) and the Police Association of NSW (**PANSW**).

² Surveillance Devices Amendment (Police Body-Worn Video) Bill 2014, Second Reading speech, 22 October 2014: <https://www.parliament.nsw.gov.au/bill/files/1283/2R%20Surveillance%20Devices%20Amendment.pdf>

4. Overview of the statutory and operational framework

4.1 Current statutory framework

The requirements for the lawful use of police body-worn video are that the police officer must be acting in the execution of his or her duty, the use must be overt, and, if a private conversation is being recorded, the police officer must be in uniform or have provided evidence that he or she is a police officer to each party to the private conversation. The use of body-worn video by a police officer is also lawful if it is inadvertent or unexpected, or incidental to the lawful use of body-worn video (s.50A(3)).

Any information obtained from the lawful use of police body-worn video is included in the definition of “protected information” under s.39 of the Act. Consequently, the criminal offences of using, communicating or publishing protected information under s.40 apply to police body-worn video. The penalty for intentionally, knowingly or recklessly dealing with protected information is imprisonment for two years, which increases to seven years if the person had intent or was reckless as to whether it may endanger the health or safety of any person or prejudice the effective conduct of an investigation into a relevant offence (s.40(2)).

Exceptions apply to allow the disclosure of information already in the public domain, or for the purposes of lawful information sharing with a foreign jurisdiction or for the investigation of a complaint, among others. Section 40(4A) provides for further permitted uses of police body-worn video, including use in connection with the exercise of a law enforcement function by a member of the NSWPF, use in connection with education and training of members of the NSWPF or students of policing, or use for any purpose prescribed by the Surveillance Devices Regulation 2014 (**Regulations**). The Regulations (clause 4) provides that the following are also permitted uses:

- coronial proceedings under the *Coroners Act 2009*,
- an administrative decision made under an Act administered by the Minister for Police,
- 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,
- the investigation of a complaint against, or the conduct of, a member of the NSW Police Force, and
- the investigation of an alleged workplace injury to a member of the NSW Police Force.

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

- all content to be used in the media production must be approved by the NSW Police Force, and
- the body-worn video equipment from which the information was obtained was provided particularly for the purposes of the media production, and
- the use of the information is otherwise lawful and does not breach any guidelines issued by the Commissioner of Police.

Police body-worn video may also be communicated or published by a law enforcement officer with the consent of the chief officer of the law enforcement agency under s.40A(5).

4.2 Current operational framework

The Body-Worn Video Standard Operating Procedures (**BWV SOPs**) guide police in the lawful use of body-worn video cameras and provides advice to police on when it may not be appropriate to use body-worn video. The BWV SOPs, with sensitive information redacted, were published on the NSWPF website in July 2019.

The BWV SOPs set out the five guiding principles which provide the basis for proper use of BWV:

1. Body-Worn Video camera equipment will be used by NSW Police in the lawful execution of their duties. Police will use their judgment when deciding to use it and its use will be obvious and overt.
2. Body-Worn Video will be used by police to record events, incidents and evidence. There will be some instances where Body-Worn Video should not be used and some occasions when its use may not be appropriate.
3. Body-Worn Video supports conventional forms of evidence gathering; it does not replace them.
4. Body-Worn Video recordings will be securely processed and managed in accordance with relevant legislation, policy and procedures.
5. The NSWPF will provide general information to the community on the use of body-worn video by police.

The BWV SOPs set out the permitted and prohibited uses of police body-worn video, the processes for uploading and tagging footage, the review and audit of footage and the release of footage. They set out a number of circumstances in which police body-worn video should be used, including when exercising a police power, vehicle stops, when the use of force is anticipated, and when conducting intimate (strip) searches. The BWV SOPs also list a number of scenarios where police body-worn video should not be used, including covert recording, to record an entire shift (except where justified) or to record material that is not related to the execution of police duties. Guidance is also provided on when use of police body-worn video may not be appropriate, including professional conversations, when recording vulnerable members of the community or in circumstances where continuous recording would result in important information not being disclosed.

The BWV SOPs provide that police body-worn video footage can be tagged as either evidence, relevant to work, health and safety or relevant to a possible future complaint. Once footage is tagged, it is moved to secure storage and has archive, disposal and destruction protocols assigned in accordance with the *State Records Act 1998*.

The BWV SOPs also provide guidance on the process of using footage as evidence in legal proceedings. Guidance is also provided on information and records management, security processes, archiving and disposal.

5. Stakeholder views

5.1 Overview

Stakeholders were broadly supportive of the use of body-worn video by police and noted the advantages of recording police interaction with the public. The key concern of stakeholders was the lack of transparency around how and when police body-worn video should be used, policies governing retention and destruction of footage, and how members of the public can access footage.

Stakeholder views from the ALS, RLC, the IPC, the Law Society, Legal Aid, the ODPP and PANSW highlighting concerns with police body-worn video are set out by theme below. Input from NSWPF is set out in greater detail at Chapter 6. NSWPF provided advice to the Department to inform the review and was closely consulted in the development of this review report.

5.2 Police discretion to record

Several stakeholders expressed concerns about the breadth of the discretion police are afforded under s.50A of the Act to use body-worn video. Under this provision, use of police body-worn video is lawful when police are using it overtly while acting in the execution of their duty. The Law Society, Legal Aid, ALS and RLC consider that police should be required (by legislation or publicly available guidelines) to activate body-worn video in certain situations, for example when exercising a power under the *Law Enforcement (Powers and Responsibilities) Act 2002*.

ALS and RLC also observed that, at the time of writing its submissions, there was limited publicly available information regarding the exercise of police discretion to activate the recording function. Legal Aid submitted that the use of unpublished (at the time) SOPs does not contribute to transparency or accountability, and that the regulation of police body-worn video devices should be via statute, regulation and published guidelines.

The Law Society and Legal Aid also raised concerns that the requirement of “overt” recording is not comprehensively defined in the legislation, and that as a result police may believe they are excused from informing people that the device is recording. Section 50A(2) provides that informing people that they are being recorded is not the only example of “overt” recording. These stakeholders expect that police will make an announcement about the device on every occasion, not just “where practicable”, as it states in the publicly available police body-worn video pamphlet. The Law Society and Legal Aid also expressed concerns about a perceived lack of safeguards around how police body-worn video is used in the presence of vulnerable people.

ALS and RLC consider that police should be required to continuously record when in a public place, or at least during all interactions with members of the public. These stakeholders consider that there a number of benefits to mandating continuous recording, including:

- possible reduction in excessive use of force by police
- removal of the risk of inconsistent application of the discretion to record
- enabling capture of the full chronology of events in real time
- increased transparency and accountability
- improved police practices
- increased community confidence in police
- possible reduction in racial profiling in the exercise of police powers
- reduction of “camera bias” arising from the fact that encounters are recorded from the perspective of the police officer.

ALS and RLC acknowledge that continuous recording would raise significant privacy issues. The IPC in its submission agreed, noting that the discretionary use of police body-worn video is appropriate, particularly where the exercise of that discretion is supported by the NSWPF SOPs. The IPC notes that while the NSWPF is not required to comply with the information protection principles by virtue of s.27 of

the *Privacy and Personal Information Protection Act 1998*, a privacy protective approach should be taken by the NSWPF where possible.

ALS and RLC submitted an alternative proposal to remove police discretion to activate body-worn video through the development of robust and publicly available guidelines. ALS, RLC and Legal Aid also submitted that there should be clear and meaningful consequences for police who fail to activate the devices in accordance with the activation guidelines. Examples proposed by ALS and RLC include a rebuttable presumption against the reliability of evidence given by a police officer in court, and the inclusion of failure to activate the device in accordance with the guidelines as “serious misconduct” under s.10 of the *Law Enforcement Conduct Commission Act 2016*. The Law Society also submitted that police body-worn video devices should have the requisite capability to confirm whether the device was deactivated mid-incident.

5.3 Access to police body-worn video footage

One of the lawful uses of police body-worn footage is for the purposes of investigating a complaint against a member of the NSWPF, per Regulation 4(d) of the *Surveillance Devices Regulation 2014*. Several stakeholders observed that there are no clear provisions governing public access to body-worn video footage, in particular for complainants of police misconduct, as opposed to complainants in court proceedings, to whom relevant footage is provided as part of the Brief of Evidence.

ALS and RLC submitted that access to footage is routinely denied to complainants of police misconduct. These stakeholders submitted that inequality of access to police body-worn footage contributes to the power imbalance between complainants and investigators, and leads to dissatisfaction with complaint outcomes. ALS and RLC proposed amendments to legislation and guidelines to clarify that police body-worn video footage is required to be disclosed to individuals who have made a formal complaint under Part 8A of the *Police Act 1990*. Legal Aid submitted that there should be a presumption in the *Government Information (Public Access) Act 2009* (the **GIPA Act**) in favour of disclosure of data to persons who are the subjects of police body-worn video recordings, on the basis that the recording contains their personal information.

The IPC submitted that the objects of the GIPA Act may be better served by the SOPs recognising that the footage is the information of the individual and the reasons the footage should be made available to the person include the legislative presumption in favour of disclosure of information and the fact that the information is their personal information. The IPC submitted that there would be benefit in more clarity in the publicly available information about the requirements under the GIPA Act. The IPC submitted this may provide greater transparency around the decision-making process of police officers.

ODPP and Legal Aid submitted that they have experienced delays in the service of body-worn video footage as part of Briefs of Evidence. The Law Society noted that its members report that recordings are not always provided to the defence and in some cases a subpoena must be obtained in order to access the footage. ODPP considered that the delays may be due to uncertainty on the part of NSWPF about its obligation to include police body-worn video footage in the Brief of Evidence in matters where there is no requirement for an early entry of a guilty plea.

5.4 Use of police body-worn video footage

The Law Society and Legal Aid are concerned about the uses of body-worn video footage for purposes other than exercising a law enforcement function. Permitted uses include in connection with education and training of members of the NSWPF and for the purposes of a media production such as television, radio or internet broadcast. These stakeholders are particularly concerned about the possible use of body-worn video with biometric or facial recognition technologies, and submitted that use for this purpose should be prohibited under the Act.

These stakeholders also consider that any purposes for which the Government wishes to make the use, publication or communication of police body-worn video available should be set out in the Act and not the Regulations, so as to allow further scrutiny by Parliament.

The PANSW submitted that police officers who are identified in body-worn video footage are at risk when that footage is provided to the defence during court proceedings. The risk is that defendants may compile information on police officers (by recording the footage with their mobile phones, or using software to capture the content directly from the DVD, including software that may be capable of reversing pixilation) for the purposes of stalking, harassing or harming a police officer or their family, or to disrupt police operations including undercover and surveillance operations.

The PANSW has proposed that BWV footage containing identifiable images of police officers should not be provided to the defence, and that the accused should only be able to inspect the footage under supervision or other specified conditions. The PANSW proposes that the Act adopt a process similar to the sensitive evidence provisions in Part 2A of the *Criminal Procedure Act 1986 (CPA)*, which provide that a prosecuting authority is not required to give an accused person a copy of anything the prosecuting authority reasonably considers to be sensitive evidence, but must provide reasonable access to the evidence. Examples of sensitive evidence include a photograph of an alleged sexual assault victim that shows the person's genitalia or the person in a state of undress, images of child abuse material, or a photograph of a deceased person taken in connection with a post-mortem examination. A similar process applies regarding terrorism evidence, which includes material that advocates support for engaging in any terrorist acts or relates to planning terrorist acts. PANSW has submitted that sensitive evidence provisions could be introduced to the *Surveillance Devices Act 2007* to apply to footage containing identifiable images of police officers.

The PANSW submitted that a scheme to prohibit the defence possessing BWV footage is necessary as it considers the current safeguards in place - which rely on the police officer who recorded the footage marking it as requiring additional security considerations - to be insufficient to mitigate the risk to police officers.

PANSW notes it has received feedback from its members that seeking the return of a DVD containing BWV footage at the conclusions of proceedings is "frequently difficult", which enhances its concerns that the footage may be misused. PANSW emphasises that even where the DVD is returned, there is still a risk of misuse, for example, if the DVD is captured or copied by other means that are difficult to detect.

5.5 Retention and destruction of police body-worn video footage

Stakeholders support proper data management, storage and deletion and an adequate minimum retention period for police body-worn video footage.

Legal Aid and the Law Society submitted that there is a lack of clear policy on these practices. These stakeholders also considered that there are insufficient safeguards against the deletion of relevant footage, as it falls on the police officer who captured the footage to "tag" it as relevant (to, for example, an investigation) in order to prevent auto-deletion within six months. The Law Society and Legal Aid submitted that six months is not an adequate minimum retention period for untagged footage. These stakeholders propose the development of clear and publicly available guidelines on the retention and destruction of body-worn video footage, logging access to footage to prevent tampering, and periodic audits to ensure compliance with the *State Records Act 1998*.

5.6 Police body-worn video training

ALS, RLC and Legal Aid noted in their submissions the importance of training police in the use of body-worn video. Legal Aid submitted that there should be mandatory training for police officers, both when the devices are first rolled-out and in refresher training, covering police officer responsibilities, options available to police officers in the use of police body-worn video and reminders about appropriate diversion from the criminal justice system. Legal Aid noted in its submission the net-widening effect of police body-worn video, where police are more likely to arrest and charge in situations where they might otherwise have ignored or cautioned the person.

Legal Aid also submitted that officers involved in an incident should be required to log written reports and statements before reviewing the police body-worn video footage, to ensure that reports are based on the officers' memories and not on what has been recorded.

5.7 Evaluation of the effectiveness of police body-worn video

ALS and RLC propose rigorous ongoing monitoring and evaluation of police body-worn video, including an independent review and further review by the Department within 12 months. These stakeholders consider this to be necessary as they perceive there is limited evidence of the effectiveness of body-worn video.

Legal Aid also submitted that the statutory review should include consideration of the costs of the technology and data management, and whether the demonstrated benefits justify these costs.

6. Consideration of the impact of police body-worn video and any changes required to support its use

6.1 What has been the impact of police body-worn video?

There have been two evaluations of police body-worn video in NSW conducted by CSU. The preliminary evaluation (or Phase 1 evaluation) was conducted over a limited period of time at two Local Area Commands in the early stages of the roll-out of police body-worn video. As a result, early trends indicated by this study (including an increase in conviction rates for assault on police, reduction in sustained complaints against police officers) have yet to be validated, however some of these findings were echoed in CSU's second evaluation.

In December 2019, CSU finalised a report on the evaluation of police body-worn video (**CSU Phase 2 evaluation**). This report encompasses both quantitative metrics provided by NSWPF and qualitative surveys undertaken with the following stakeholder groups:

- 1,629 members of the public
- 811 NSWPF officers
- 23 NSWPF prosecutors
- 30 NSW Legal Aid and ALS lawyers (**members of the legal profession**)
- 24 NSW Local Magistrates
- 22 NSW Victims of Crime Advocacy Group Representatives (comprising both NSW Victims Advisory Board Members and Victims Advisory Group Representatives) (**victims of crime representatives**).

In addition to the surveys, interviews were also conducted with 30 NSWPF officers, 30 NSWPF Commanders and/or senior officers and 5 NSWPF Multicultural Board members.

The report found a number of indicative trends while also noting that a longitudinal framework is required to more adequately validate these trends.

The indicative trends are as follows (and are explored in more detail further below):

1. Positive endorsement of police body-worn video by surveyed members of the public, members of the legal profession, the judiciary, Multicultural Board members and victims of crime representatives;
2. Police body-worn video is contributing to a reduction in sustained complaints against members of the NSWPF;
3. Police body-worn video is contributing to an increase in successful NSWPF prosecutions where police body-worn video is present;
4. Police body-worn video is contributing to increased efficiency in the NSWPF prosecution process due to an increase in early guilty pleas;
5. NSWPF officers are observing improved behaviour by the public, including a de-escalation of the levels of aggression and assault;
6. NSWPF officers are observing that police body-worn video is contributing to an increase in confidence and security when attending violent incidents;
7. Positive endorsement of police body-worn video in supporting victims of crime in the judicial process;
8. Positive endorsement of the contribution of police body-worn video to NSWPF domestic violence prosecution cases;
9. NSWPF officer concerns with experienced inconsistency of SOPs related to the required presentation of police body-worn video evidence for prosecution and judicial proceedings; and
10. Concerns raised by NSWPF officers (noted only for completeness as these are outside of the remit of the statutory review) about technical issues with police body-worn video cameras, and a desire for police body-worn video to be used for DVEC.

6.1.1 Positive endorsement of the use of police body-worn video generally

87% of the members of the public surveyed by the CSU Phase 2 evaluation support the use of police body-worn video³. CSU received 904 comments from the surveyed members of the public.

CSU's analysis of these comments identified four common themes, being that police body-worn video:

- provides protection and safety for police and public
- provides increased accountability for police and public behaviour and actions
- footage could be manipulated by police due to the officer discretion
- should be mandatory equipment for all operational NSWPF officers at all times.

100% of NSWPF Commanders and/or senior officers interviewed and almost 80% of NSWPF officers surveyed also indicated positive endorsement of police body-worn video⁴. The (overall positive) views of other stakeholders surveyed are discussed further at 6.1.3 and 6.1.5 below.

6.1.2. Reduction in the number of sustained complaints against NSWPF officers

The CSU Phase 2 evaluation concludes that there has been a “marked reduction”⁵ in the number of sustained complaints against NSWPF officers, suggesting a “sustained trend”⁶.

CSU found the following “clear and strongly supported”⁷ themes emerging from the qualitative data (survey and interview comments), being that police body-worn video has had a positive impact on:

³ CSU Phase 2 evaluation (see fn 1) at p20.

⁴ Ibid.

⁵ CSU Phase 2 evaluation at p60.

⁶ CSU Phase 2 evaluation at p62. The data shows that in June 2018, 81 complaints were not sustained and 109 were sustained, compared to March 2019, where 92 complaints were not sustained and 81 were sustained.

⁷ CSU Phase 2 evaluation at p60.

- the efficiency of the complaint management process, including initial triaging;
- staff morale;
- staff resourcing of the complaint management process; and
- identifying and managing NSWPF officer training intervention and remediation.

CSU's analysis of its survey of NSWPF officers was that those surveyed believe police body-worn video protects NSWPF officers and provides evidence for training intervention, but there is a concern about the stress it may cause police officers due to the additional monitoring.

NSWPF Commanders and senior supervisors who responded to the survey identified the key positive impact of police body-worn video as being on the accountability and professional conduct of NSWPF officers, in particular by encouraging accurate and timely articulation of police powers. These officers also identified improved efficiency in the complaints triage process (including more timely decision-making processes to dismiss or investigate a complaint and significant investigation time savings which bring complaint matters to completion more quickly and therefore more justly) as being another key area of positive impact.

Outside of the CSU Phase 2 study, police body-worn video has also demonstrated its potential to be a useful evidentiary tool in investigating complaints against police. In at least one case, reported by the media in July 2018, police use of force captured by body-worn video reportedly resulted in a referral by a Magistrate to the Law Enforcement Conduct Commission (**LECC**), which investigates allegations of wrongdoing in the NSWPF. In another incident, LECC found that two police officers engaged in serious misconduct during a traffic stop in April 2019, based on footage from police body-worn video.

6.1.3. Impact of police body-worn video on the judicial process

The CSU Phase 2 evaluation identified competing (seemingly contradictory) themes emerging from surveys and interviews, being that police body-worn video can both streamline decision-making processes in court (due to the increase in quality of evidentiary material) and also cause delay (due to additional time needed for transcriptions, watching the footage in court, and the delay in the availability of footage to defence counsel).

Almost half⁸ of police officers surveyed believe that body-worn video does not reduce the time required to prepare Briefs of Evidence. Survey responses noted that it was time-consuming for police officers to burn the footage onto discs and to transcribe body-worn video recordings, both of which are the responsibility of the officer in charge. NSWPF advises this delay may be mitigated by the use of automated transcription technology, which is planned to be trialled by NSWPF in 2020.

NSWPF prosecutors who completed the survey noted that police body-worn video has increased timeframes for charge to court and increased workloads as prosecutors must view the footage as part of reviewing the brief. 68% of NSWPF prosecutors who completed the survey did not consider that the use of police body-worn video has had a positive impact on the streamlining of the legal process⁹.

The legal professionals who responded to the survey identified that they face difficulty in obtaining agreement to access footage and delays in obtaining, accessing and viewing footage, including after the Brief of Evidence is served.

The perspective of some of the NSWPF officers surveyed (in comments) was that there was some confusion amongst police officers as to whether the footage should be served on defence.

Magistrates also observed delays due to waiting for transcriptions and one comment noted that often the defendant and/or their legal representative has not viewed the footage until the morning of the hearing. This comment noted that if there was a better process to make that evidence available to the accused at an earlier time, it may result in less matters being listed for a defended hearing.

⁸ CSU Phase 2 Evaluation, Figure 15 at p37.

⁹ CSU Phase 2 Evaluation, Figure 7 at p24.

However, other aspects of the findings of the CSU Phase 2 evaluation report suggest that the sometimes unavoidable delays caused by police body-worn video may be offset in part by the overall stronger evidentiary quality provided by police body-worn video footage.

CSU's analysis of the survey reveals that the overwhelming majority¹⁰ of NSWPF prosecutors, members of the legal profession and victims of crime representatives surveyed agree that police body-worn video has led to an increase in the quality of evidentiary material for briefs of evidence. The CSU Phase 2 evaluation identifies the following "major areas of contribution"¹¹ to evidentiary material by police body-worn video, based on the surveys conducted:

- Reduces the opportunity for error of recall;
- Reduces trauma for victims of crime;
- Provides protection for victims of crime;
- Provides an independent reliable witness;
- Illustrates the situation in real time and the environment of crime; and
- Provides protection for decisions and actions of NSWPF officers.

The CSU Phase 2 evaluation also identifies a preliminary trend arising from NSWPF data which suggests an increase in the number of successful prosecutions where police body-worn video is tagged as evidence¹². CSU notes this preliminary trend offers "cautious optimism"¹³ for increased efficiency for the prosecution process, but that validation of this would need to be confirmed with more extensive monitoring of this trend over time.

The preliminary trend is reflected in the qualitative data collected through surveys and interviews. The majority of NSWPF prosecutors¹⁴ and members of the NSW legal profession¹⁵ surveyed have observed in their field-based experience a trend of increased guilty pleas. 72% of NSWPF Prosecutors surveyed agreed that police body-worn video is having a positive impact on the rate of successful prosecution. Some magistrates commented that they have observed earlier guilty pleas and the evidence is more definitive, meaning matters are shortened when footage is shown to an accused.

Other magistrates commented that police body-worn video can help distil the relevant issues and has reduced disputes about police interactions with members of the public, particularly concerning cautions and admissions or other statements made to police.

The surveys of NSWPF prosecutors and members of the legal profession (being defence counsel) revealed that police body-worn video footage is considered to be an advantage for both the prosecution and defence counsel¹⁶.

An example of how body-worn video has demonstrated its utility in legal matters can be found in the comments of Johnson J in the Supreme Court case of *Director of Public Prosecutions (NSW) v Merhi* [2019] NSWSC 1068. Johnson J noted¹⁷ that, prior to the introduction of police body-worn video, there would be "protracted defended hearings" in matters where persons were charged with offences such as

¹⁰ CSU Phase 2 Evaluation at p53.

¹¹ CSU Phase 2 Evaluation at p10.

¹² NSWPF data shows that 31% of cases with tagged police body-worn video footage result in successful prosecution compared to 28% of cases with no relevant tagged police body-worn video footage.

¹³ CSU Phase 2 Evaluation at p.48.

¹⁴ 58% of NSWPF prosecutors surveyed agreed there was a trending increasing in guilty pleas vs. not guilty pleas when police body-worn video is present (CSU Phase 2 Evaluation at p36)

¹⁵ 53.57% of NSW legal profession surveyed agreed there was a trending increasing in guilty pleas vs. not guilty pleas when police body-worn video is present (CSU Phase 2 Evaluation at p10).

¹⁶ 96.15% of NSWPF prosecutors surveyed considered that police body-worn video is an overall advantage to the prosecution process (CSU Phase 2 Evaluation, Figure 7, p24) and 83% of the NSW legal profession surveyed indicated that police body-worn video adds value to the hearing, while 73% of the NSW legal profession surveyed considered that police body-worn video provided an advantage to its clients (CSU Phase 2 Evaluation, Figure 17, p45).

¹⁷ At [37].

resisting arrest, and there would be “significant controversy as to what actually happened”. Johnson J noted that the fact that body-worn video provided actual video and audio recording of the whole incident meant that there will be a “significant reduction in areas of factual dispute” in such matters.

6.1.4. Impact on assaults on police

The CSU Phase 2 evaluation report survey of NSWPF officers found¹⁸ that the majority had observed no change in assaults on police incidents, 36% had observed a positive change, and just over 1% said they had observed a negative change. CSU’s analysis of the comments provided by surveyed NSWPF officers concluded that the plurality of comments (112 out of 338) observed that, whether or not there had been a reduction in assaults against police, the officers had observed the evidentiary benefit of police body-worn video when assaults occur¹⁹.

The CSU Phase 2 evaluation notes that the NSWPF data does show a reduction in the number of assaults against police. However CSU notes that this could be due to the limited period over which data has been gathered and the numerous additional factors which influence situations of assaults against police (e.g. including seasonal trends).

CSU considers that a longitudinal framework is required to more adequately validate the early indicative trends emerging from the survey which include an increase in compliant behaviour from members of the public²⁰, police body-worn video as a deterrence factor²¹ and police body-worn video increasing the level of confidence of police when attending violent incidents²².

6.1.5. Impacts on victims of crime

81% of the Victims of Crime Advocacy Group survey respondents identified the use of police body-worn video by NSWPF officers as an advantage for victims of crime²³. The rationale provided for this in comments from survey respondents was that police body-worn video:

- provides a form of protection for victims of crime in court hearings;
- captures evidence at a time when a victim may be unable to recall details of an incident; and
- reduces the potential for further victim trauma in recalling an incident for the court.

The majority²⁴ of the victims of crime representatives who responded to the survey also considered that police body-worn video is having a positive impact on relations between victims of crime and police.

CSU drew the following common themes identifying a positive influence of police body-worn video identified by the NSWPF officer survey and the Victims of Crime Advocacy Group Representatives survey:

¹⁸ 63% - CSU Phase 2 evaluation, Figure 21 at p54.

¹⁹ CSU Phase 2 Evaluation at pp 54-55. 93 comments were categorised as “no change observed”; 73 as “reduction in levels of aggression and assaults” and 110 as “not in an informed position to comment”.

²⁰ 57% of NSWPF officers surveyed identified experiencing an increase in compliant behaviour from members of the community – CSU Phase 2 Evaluation at p11.

²¹ 63% of NSWPF officers surveyed agreed that police body-worn video is a deterrent for potential offenders – – CSU Phase 2 Evaluation at p11.

²² 51% of NSWPF officers surveyed indicated that they felt more confident and secure attending violent incidents – – CSU Phase 2 Evaluation at p11.

²³ – CSU Phase 2 Evaluation at p72.

²⁴ 77% – CSU Phase 2 Evaluation at p9.

- Captures admissions at the scene;
- Establishes an accurate record of injuries and emotions at the incident;
- Establishes increased and accurate evidence which assists victims in court;
- Establishes evidence which assists in court when a victim retracts (ie if the victim wants to retract their statement in court, the footage can be played);
- Reduces stress and trauma for a victim having to recount details of the incident;
- Contributes to provision of evidence leading to potential increase in arrest rates;
- Enables an avenue for victims who are more prepared to talk to BWV than DVEC; and
- Contributes to changes of behaviour of offenders in some cases.

The “negative influence” themes identified by CSU in these surveys were that victims do not always want to be recorded, and the operational challenge of switching between MobiPol devices and body-worn video due to the requirements of NSWPF SOPs, which can add to the distress of victims if they are required to be recorded twice. This issue is being addressed through a recently completed trial of the use of body-worn video to take statements from domestic violence complainants.

6.1.6. Conclusions on the impact of police body-worn video

As noted by CSU in its evaluations, quantitative data at this stage does give rise to optimism about the impact of police body-worn video, in particular regarding its key aims of improving community and officer safety and supporting investigations. The qualitative data collected by CSU also supports this sense of optimism.

However, at this stage, these trends cannot be said to be completely validated. Therefore, NSWPF could consider whether (in addition to further tracking and monitoring it will undertake) further independent evaluations of the impact of body-worn video should be undertaken to assess whether it is achieving its intended aims.

6.2 Are any operational or legislative changes required to support its ongoing use?

The review answers this question by responding to the issues raised by the stakeholder submissions, outlined in Chapter 5, which are in some cases also reflected in the CSU Phase 2 evaluation, summarised earlier in this chapter.

6.2.1 Police discretion to record

Stakeholder submissions on this issue, as well as comments from members of the public surveyed in the CSU Phase 2 evaluation, largely stem from what was, at the time, a lack of transparency and publicly available information on the exercise of police discretion to activate the body-worn video recording function. A lack of transparency can cause the perception that police are inconsistently applying their discretion and selectively recording.

The use of body-worn video devices is intended to be incident-specific and at the officer’s discretion, in order to avoid breaches of privacy and the recording of confidential information. Removing police officer discretion to record by mandating continuous recording, as proposed by ALS and RLC, is not a practical solution. This is because constant recording:

- could unnecessarily capture confidential or identifying information, or capture the identity of undercover officers or informants;
- would result in inappropriate surveillance of police officers and breach their personal rights to privacy by recording private conversations or activity;
- would mean that private conversations of members of the public coming into incidental contact with police would always be recorded;

- would remove police discretion to assess when the use of body-worn video may be inappropriate, for example in particular interactions with vulnerable people, or where it would likely result in an individual withdrawing or objecting to police presence on private premises; and
- may unnecessarily record the NSWPF's operational tactics, conversations, strategy or equipment.

The IPC supports this conclusion, highlighting the significant privacy implications that may arise from constant recording, including the unnecessary capture of personal information of members of the public.

The now publicly available BWV SOPs set out the factors a police officer should take into account when deciding whether to activate the BWV camera, including community expectations, officer safety and protection and the need to capture evidence. The SOPs also list a number of circumstances in which police body-worn video should be used. The SOPs provide a significant amount of detail to the public and police on how the discretion should be exercised.

Given this, the review considers that it would be unnecessary to enshrine in legislation the specific circumstances in which police must use body-worn video. The review considers that the SOPs provide a significant amount of detail guiding both police and the public on how the discretion should be exercised. Police officers encounter varied and dynamic situations on a daily basis and it is often necessary for police to use their judgment and experience when deciding when it is appropriate to use body-worn video.

Police discretion to use body-worn video is particularly important in the context of vulnerable people, including children and young people, people with impaired intellectual or physical functioning, Aboriginal and Torres Strait Islander people and people who are of non-English speaking backgrounds. Guidance in the BWV SOPs requires police to inform vulnerable people that they are being recorded and emphasises the importance of proper communication about the device, including ensuring that a person understands the purpose and use of the police body-worn video camera. The BWV SOPs provide a number of circumstances in which it may not be appropriate to use police body-worn video, including interactions with vulnerable people. The BWV SOPs state that police may need to consider stopping recording until proper communication and understanding occurs. The BWV SOPs also state that police should ensure that evidence of a vulnerable person's understanding of police body-worn video is included in the recording, and that effort should be made to find a support person if required.

The BWV SOPs also provide greater detail on the meaning of "overt" use for the purposes of s.50A of the Act. The BWV SOPs state that members of the public will be advised they are being recorded either at the time of activating the recording, or if that is not practicable, as soon as is reasonably practicable after activating the recording. The BWV SOPs expand on the requirements under legislation by requiring the use of the device to be "obvious and overt". The BWV SOPs also provide further guidance on what is considered "overt", requiring the device to be used in a way that it can be seen and identified as a video and audio recording device, and not to be worn so that it is hidden, concealed or secreted. As noted by the IPC, this guidance aligns with notice requirements under the privacy legislation and adds transparency to the process of police recording and capturing of evidence.

As a result, this review does not consider it necessary to amend the definition of "overt", or provide an exhaustive list of examples of "overt use" in legislation, as suggested by the Law Society and Legal Aid. The publicly available SOPs achieve this aim. It is understandable why stakeholders expressed this concern, as, at the time of consultation, the only publicly available information on police body-worn video stated only that police will inform people they are being recorded "where practical". This could be understood to suggest that simply wearing the device constitutes overt recording, which is not the case.

Rather, where a police officer does not directly inform the person that they are being recorded, per the second reading speech introducing the police body-worn video provisions, other evidence must be relied upon to establish that the use of the body-worn video device is overt. This includes where a person has acknowledged the device or where there has been a general announcement about its use. This review considers that the BWV SOPs address stakeholder concerns about a lack of clarity about the meaning of "overt" use of police body-worn video.

The review also considers that the BWV SOPs address concerns expressed by stakeholders relating to lack of clarity around when police should be required to use the devices, and the lack of consequences for police who fail to activate the devices.

The BWV SOPs set out a number of situations in which police body-worn video should be used. This covers a very broad number of situations, including when exercising a police power or performing a police function, whenever the use of force is anticipated, crime and incident investigation, to capture evidence or record something of significance, and conversations with members of the public which may produce valuable information.

The BWV SOPs provide guidance around what is expected of a police officer when there is a recording disruption or if the police officer chooses to stop recording. Police officers are encouraged to include in the recording an explanation for switching off recording, and they may be required to explain a failure to record something of relevance to their supervisor or a court. The BWV SOPs provide that failing to tag material may lead to managerial or disciplinary action. Events recorded on the Computerised Operational Police System (COPS) are reviewed to ensure the appropriate activation of police body-worn video, and supervisors conduct dip samples (of a minimum of 1% of weekly uploads) for compliance with BWV SOPs. If the reason for the recording disruption is not included in the footage, police officers should supplement the footage with a written statement explaining the recording disruption. If the reason for failure to record requires further investigation, a statement may be sought from a suitably qualified expert. The LECC also has investigative powers to identify and deal with cases of misconduct and maladministration within the NSWPF.

The IPC is the only stakeholder who provided feedback to this review after the publication of the NSWPF SOPs. Its view is that the publication of the SOPs goes some way in providing transparency and information to the public about records management of police body-worn video and access to the footage. Such publication is consistent with the open access requirements of the GIPA Act and the Information Commissioner commends the transparent approach taken by the NSWPF in this regard.

Overall, the conclusion of this review is that the content of the BWV SOPs which guide police officers - and are now available to the public - address the concerns of stakeholders relating to the breadth of police discretion, the lack of publicly available information, the lack of clarity on the meaning of "overt" recording, and the lack of consequences for police who fail to activate the device.

6.2.2 Access to body-worn video footage

Release of police body-worn video footage may be sought under subpoena, under the direction of oversight agencies (LECC) or pursuant to the GIPA Act. The BWV SOPs provide that the Information Access and Subpoena Unit and Office of General Counsel facilitate the NSWPF response and provide advice regarding such requests.

Stakeholders have raised a concern that access to footage is rarely granted to complainants of police misconduct. Unlike parties to a charge or legal process, there is no formal process by which relevant police body-worn video footage must be provided to complainants. NSWPF advises that it considers each request on its merits and applies the provisions of the GIPA Act in determining a request.

Under the GIPA Act, a person who makes an access application for government information has a legally enforceable right to be provided access to the information unless there is an overriding public interest against disclosure of the information²⁵. Examples of where there would be public interest in favour of disclosure include, relevantly, where:

²⁵ *Government Information (Public Access) Act 2009* (the **GIPA Act**), s.9

- Disclosure could reasonably be expected to inform the public about the operations of agencies, and in particular, their policies and practices for dealing with members of the public;
- The information is personal information of the person to whom it is to be disclosed; and
- Disclosure could reasonably be expected to reveal or substantiate that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.

Legal Aid noted in its submission that there should be a presumption in the GIPA Act in favour of disclosure of data to persons who are the subjects of police body-worn video recordings, on the basis that the recording contains their personal information. As noted by the IPC in its submission, the GIPA Act is already facilitative of access in the terms proposed by Legal Aid, in that there is a presumption in favour of disclosure of government information under s.5, and an example of public interest in favour of disclosure is that the information is personal information of the person to whom it is to be disclosed.

There is an overriding public interest against disclosure of government information if there are public interest considerations against disclosure and, on balance, these considerations outweigh the public interest considerations in favour of disclosure. The GIPA Act provides an exhaustive and limited list of public interest considerations against disclosure and states that these are the only considerations that can be taken into account for this purpose. This includes a public interest consideration against the disclosure of information if disclosure of the information by any person could reasonably be expected to constitute a contravention of a provision of any other Act that prohibits the disclosure of information. Section 40 of the Act that prohibits disclosure of police body-worn video on the basis that it is “protected information”. However, the existence of this provision may be included in the balancing exercise of considerations for and against disclosure.

Other examples of where there would be a public interest against disclosure are, relevantly, where disclosure could reasonably be expected to have one or more of the following effects:²⁶

- Prejudice the effective exercise by an agency of the agency’s functions;
- Reveal or tend to reveal the identity of an informant or prejudice the future supply of information from an informant;
- Prejudice the prevention, detection or investigation of a contravention or possible contravention of the law or prejudice the enforcement of the law;
- Endanger, or prejudice any system or procedure for protecting, the life, health or safety of any person;
- Reveal false or unsubstantiated allegations about a person that are defamatory; and
- Reveal an individual’s personal information.

Relevantly, the SOPs provide that police officers should not record “images or conversations dealing with strategy, methodology, tactics and lines of enquiry or other case-related issues”. The Information Commissioner notes in the IPC submission to the review that where such information is caught by police body-worn video, there may be an overriding public interest against the disclosure of the information under the GIPA Act.

Further, an agency may refuse to deal with an access application for any of the reasons under s.60 of the GIPA Act (and no other reason), which include that dealing with the application would require an unreasonable and substantial diversion of the agency’s resources, or that the agency reasonably believes the applicant is a party to proceedings before a court and is able to apply to the court for that information.

NSWPF has advised that it is not always able to edit or pixilate footage to remove the above sensitive information, or in order to protect another person’s personal information, and this may tip the balance of considerations such that there is an overriding public interest against disclosure. NSWPF notes that the disclosure of the biometric data of police officers or other persons captured by body-worn video footage, including accomplices to an offence, is also a highly relevant consideration against release. Furthermore,

²⁶ GIPA Act s.14.

s.72 of the GIPA Act provides that an agency must provide access in the way requested by the applicant unless:

- To do so would interfere unreasonably with the operations of the agency or would result in the agency incurring unreasonable additional costs; or
- To do so would be detrimental to the proper preservation of the record; or
- To do so would involve an infringement of copyright; or
- There is an overriding public interest against disclosure of the information in the way requested by the applicant.

The NSWPF, like all other agencies, has a statutory obligation to consider the public interest considerations for and against disclosure and determine whether, on balance, the considerations against disclosure outweigh those in favour. The GIPA Act overrides any provision of another Act that prohibits the disclosure of information²⁷. This includes the provisions under the Act that prohibit disclosure of police body-worn video on the basis that it is “protected information”.

If the NSWPF agrees to provide access, it can determine the form of access, including providing a reasonable opportunity for a person to inspect the record, if there is an overriding public interest against providing the footage to the person²⁸.

A decision to refuse to provide access is a reviewable decision under the GIPA Act²⁹. The decision can be administratively reviewed by the NSW Civil and Administrative Tribunal, and there is a right of internal review. A person may also have the decision reviewed by the Information Commissioner. The Information Commissioner reviews the decisions of agencies and investigates complaints relating to public sector agencies, and may make a recommendation against a decision of an agency that there is an overriding public interest against disclosure of government information. The IPC may recommend that the agency reconsider the decision and make a new decision as if the original decision had not been made.

Stakeholder concerns regarding delays in serving body-worn video as part of a Brief of Evidence should be substantially addressed by the amendment made by NSWPF to the BWV SOPs following stakeholder consultation. There is now no ambiguity around the fact that footage must be provided in briefs of evidence in all matters where it is being used to support a charge or legal process. Previously, the SOPs only provided that in the event of a not guilty plea, relevant footage is to be included in the Brief of Evidence.

Further, the SOPs provide that even if body-worn video content is not being relied on as evidence, consideration must still be given to whether this material would affect the strength of the prosecution’s case, in which case it must be included in the brief of evidence, per s.62 of the CPA.

Delays may still occur as a result of the time it takes for the police officer in charge to burn the footage onto discs, transcribe the footage and arrange for any necessary editing of the footage to occur (ie if the footage contains “sensitive evidence” as defined under s.281B of the CPA. Such delays may be unavoidable in the early stages of implementation of the devices, however may be mitigated in the future through experience and, if considered appropriate, further operational changes by NSWPF to ensure procedural guidance for police officers remains clear and consistent.

6.2.3 Use of body-worn video footage

Permitted uses

The permitted uses of protected information (including police body-worn video) should be restricted, although not to the extent that it cannot be used for purposes unrelated to an investigation, as proposed by the Law Society and Legal Aid. For example, it is appropriate and consistent with the policy intent of

²⁷ GIPA Act s.11.

²⁸ GIPA Act s.72.

²⁹ GIPA Act s.80.

the legislation that BWV footage may be used for education and training purposes within the NSWPF, including students of policing. The information protection principles under the *Privacy and Personal Information Act 1998* apply to the NSWPF in connection with the exercise of its administrative and educative functions. The other non-investigation related permitted use is for media production (e.g. TV, radio or internet broadcast) if the content is approved by NSWPF and the use of the information is otherwise lawful and doesn't breach any guidelines issued by Commissioner of Police. Examples of situations in which the NSWPF may wish to use footage for this purpose includes for tracing wanted suspects, locating people who have escaped custody, and other public safety reasons.

The permitted uses of BWV footage set out in the Act are use in connection with the exercise of a law enforcement function by a member of the NSWPF and use in connection with education and training of members of the NSWPF. Other permitted uses are set out in the Surveillance Devices Regulation 2014. Section 40(4A)(c) provides that information obtained from the use of police body-worn video may also be used for any purpose prescribed by the regulations.

The purposes set out in the regulations are:

- coronial proceedings;
- an administrative decision made under an Act administered by the Minister for Police;
- any proceedings of a court or tribunal in which the NSWPF or State is a party or in which a member of the NSWPF is called as a witness;
- the investigation of a complaint against, or the conduct of, a member of the NSWPF;
- the investigation of an alleged workplace injury to a member of the NSWPF; and
- for the purposes of media production but only if the content is approved by the NSWPF and the use is otherwise lawful.

This review does not recommend extending the permitted uses of police body-worn video at this stage. However, any further uses which may be added to the regulation will still be subject to Parliamentary scrutiny, as regulations are a disallowable instrument.

Expanding permitted uses

NSWPF has proposed using police body-worn video for video statements, supplemented by a transcript of the video, instead of the requirement under the CPA for a one-page signed statement.

The CPA currently requires witness statements to be presented in the form of a written signed statement instead of an audio or video statement. Audio and video statements are currently able to be admitted, dispensing with the need for written statements, as part of evidence for victims of domestic violence. This Domestic Violence Evidence in Chief (**DVEC**) reform was introduced in part to reduce trauma for complainants in recounting evidence in front of offenders, and to reduce or eliminate intimidation on the part of the complainant to change their evidence.

Other advantages of dispensing with the requirement of written statements could apply more broadly to incidents recorded by police body-worn video. These advantages include:

- Reduced difficulty for victims in remembering details of incidents at a later court date, as recording could be played before any additional oral evidence given by the complainant.
- An increased ability of complainants to give an accurate account of what happened referable to the scene of the offence.
- Increased rates of early pleas of guilty.
- Time savings for victims in giving statements.

However, there are also disadvantages to NSWPF's proposal, including risks that the transcript would be more repetitious and less focused than a written statement, and questions asked by police in that context are not necessarily asked in a logical order which would present the evidence in the strongest possible way.

Further, based on the CSU Evaluation Survey of police officers, this option would not reduce the time to prepare Briefs of Evidence, as the time-consuming aspect of including body-worn video in Briefs of Evidence is the transcription, which is done by the officer in charge.

This proposal will be considered further by NSWPF and the Department of Communities and Justice as part of a consideration of the outcomes of a trial currently underway of the use of body-worn video to take statements from domestic violence complainants.

Possibility of misuse

PANSW submitted that police body-worn video footage containing identifiable images of police officers should not be provided to an accused or their legal representatives. It is noted that the definition of “personal information” under the GIPA Act excludes information about an individual that reveals nothing more than the fact that the person was engaged in the exercise of public functions. Therefore, as noted by the IPC in its submission, footage of police officers acting in their official functions on body-worn video cameras may not comprise personal information. However the IPC also notes that the physical appearance of individual police officers as depicted on police body-worn video footage may be determined to not fall within this exemption.

It is difficult to conclude that the risk to police arising from the possibility of defendants misusing footage outweighs the right of the accused and the defence to have access to relevant police body-worn video footage as part of a brief of evidence. A brief of evidence is required under s.62 of the CPA to contain all material that forms the basis of the prosecution’s case, all information that is reasonably capable of being relevant to the case and information that would affect the strength of the prosecution’s case. This conclusion is supported by the IPC in its submission. The IPC notes that this aligns with the rights of access enshrined in the GIPA Act and the PPIP Act. As noted by the IPC, there may be law enforcement and security reasons that footage with images of police officers not be released under the GIPA Act. It is open to NSWPF to consider these issues in the course of its balancing exercise under the GIPA Act. Further, it is already open to the prosecution to request the defence/accused to inspect material instead of providing a copy as part of the brief of evidence under s.64 of the CPA. If the defence agrees, the prosecution must serve a notice with a reasonable time and place at which the defence may inspect the footage and must allow the accused a reasonable opportunity to inspect the footage.

Protected information prohibitions under s.40 are robust, and target the potential misuse of police body-worn video envisaged by PANSW. It is unlawful for a person to intentionally, knowingly or recklessly use, communicate or publish protected information including BWV footage (s.40(1)). The penalty for such use of BWV footage is increased to seven years if the person intends that (or is reckless as to whether) the disclosure of the information endangers the health or safety of any person or prejudices the effective conduct of an investigation into a relevant offence (s.40(2)).

Further, the BWV SOPs provide that the caveat screen will warn the accused or legal representative that the footage is “protected information” under the Act, is subject to copyright and may only be used for the purposes of preparing a defence to the charge.

The current process is that the police officer who recorded the footage can mark the “PII/Security” checkbox if they consider the content contains sensitive material or requires additional security considerations. This will ensure that due consideration is given to whether the footage should be pixelated or edited before being provided to third parties. Further, the BWV SOPs provide that if an officer’s image has been, or may have been recorded, and that officer has concerns about their image being released, that officer must inform the officer in charge of the case if they want their image to be redacted prior to release.

6.2.4 Retention and destruction of footage

One of the five guiding principles under the BWV SOPs is that body-worn video recordings will be securely processed and managed in accordance with relevant legislation, policy and procedures. NSWPF has an auditable video management system to process and manage police body-worn video content.

The SOPs provide that, at the end of a shift, the device is to be returned to the docking station where uploading will begin automatically. Footage will remain on the local server until it is “tagged” by the user as content that is of evidentiary value, being content that is relevant to an investigation, disciplinary procedure, legal claim or complaint. Failing to tag material with such relevance may lead to managerial or disciplinary action. Untagged content will remain unclassified on the local server for a period of six months, when it will be automatically deleted. Police body-worn video footage can be tagged under three categories:

1. Evidence;
2. Work, Health & Safety – only to be used where the content is not already tagged as evidence and it relates to a work, health and safety issue that might be in the interests of the BWV user and/or the NSWPF to keep; or
3. Complaint – only to be used where the content is not already tagged as evidence and only where an officer believes that keeping such footage may assist in the investigation of a possible future complaint.

Once footage is tagged, it will be moved to a secure storage in the VIEW IMS database. Police body-worn video footage that is tagged has archive, disposal and destruction protocols assigned in accordance with the *State Records Act 1998 (SRA)* retention and disposal authorities (DA220, DA221 and GA28). These disposal authorities relate to specific offence types that govern the length of time records are required to be kept by the NSWPF. Once the file has reached the date applicable to its disposal authority classification, it will be permanently deleted from the system unless there is an operational or administrative reason for it to be retained.

The content is stored on a secure server as the master copy and cannot be altered or tampered with. Access to content on this server is recorded. Metadata for each content file, including the time and date of the recording and identification of the camera, is kept indefinitely.

Access to the open server is restricted to a select few technical administrators, and access to any file is recorded by the system. Files are hashed using a Secure Hash Algorithm when they are uploaded to the open server, which allows for identification of any file tampering by comparing the digital hash signature.

Police officers can only access body-worn video content that they have uploaded. Police supervisors and systems administrators can access police body-worn video content other than their own for quality review and audit purposes.

“Dip samples” of footage are randomly generated by the system for checking by supervisors on a weekly basis or on demand, with a recommended minimum of 1% of weekly uploads to be reviewed. Supervisors view this content (including tagged and untagged footage) for the purpose of conducting audits for compliance with police body-worn video training, procedures and proper standards of use. If relevant footage is not tagged, the supervisor is required to take steps to ensure it is tagged, so as to prevent auto-destruction of relevant material.

The retention period of six months for untagged footage does not violate the Functional Retention and Disposal Authority DA221 (as submitted by the Law Society and Legal Aid) because this type of footage is not captured by the protocols assigned in accordance with the SRA. Untagged footage is considered non-evidentiary as it does not fall within any of these three categories:

- Evidence;
- Work Health and Safety; or
- Complaint.

The processes in place are robust and provide sufficient safeguards against the destruction of material of relevance.

6.2.5 Police body-worn video training

Police body-worn video devices are only used by police who have undertaken the relevant training. This training covers legislation (in particular lawful use under s.50A and the offences under s.40), and practical use of the devices, including mandatory warnings, camera operation, downloading captured footage and the use of the body-worn video application.

NSWPF advises that there are many education and training resources available to police to reinforce body-worn video procedures and principles once formal training is complete, including scenario and functional training video guides, frequently asked questions and the SOPs.

Legal Aid's submission that police officers should be required to prepare their written reports on an incident before viewing the associated police body-worn video footage is inconsistent with both the purpose of police body-worn video as an evidentiary tool, and with NSWPF best practice, which is that officers view footage before making a statement. Reviewing footage allows police officers to remember an incident more clearly and provides a more accurate record than the individual's recollection.

6.2.6 Evaluation of police body-worn video

The NSWPF has committed to continue to monitor and track the usage and impact of police body-worn video as part of business as usual processes. As part of this ongoing process, NSWPF may consider whether it is appropriate or necessary to arrange further independent evaluations of police body-worn video, to supplement the previous evaluations undertaken by CSU.

6.4 Conclusion

The legislative framework set out in the Act appears to be effectively supporting the use of police body-worn video. Evaluations conducted by CSU also indicate that police body-worn video is meeting its intended purpose as an investigative and evidentiary tool that is beneficial to police and the community.

Increased transparency around the use of police body-worn video through the public release of the BWV SOPs should strengthen the effectiveness of police body-worn video and community trust in police.

Delays in the court process caused by the time taken to transcribe footage may be unavoidable in the still early stages of the implementation of police body-worn video. However, any delays in provision of the footage caused by ambiguous guidance to police officers should not occur, given the clear wording now in the police body-worn video SOPs. Delays may be mitigated in the future by the use of automated transcription technology. It is important that NSWPF ensures that procedural guidance for police officers on the provision of footage to the prosecution and defence remains clear and consistent.

Given the roll-out of police body-worn video has only recently completed in NSW, the review concludes that it is appropriate for NSWPF to consider whether its current data collection and monitoring could be supplemented by further independent evaluations of the impact of police body-worn video.