



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: DHrgCrim/PCD/HRC1528717

29 May 2018

Mr Andrew Cappie-Wood
Secretary
Department of Justice
GPO Box 6
SYDNEY NSW 2001

By email: laura.schultz@justice.nsw.gov.au

Dear Mr Cappie-Wood,

Surveillance Devices Act 2007 – police body-worn video provisions

Thank you for the opportunity to provide a submission relating to the statutory 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 Law Society's Criminal Law, Privacy and Data Law, and Human Rights Committees have contributed to this submission.

The Law Society supports the use of police body-worn videos as a means to enhance police accountability and also as a significant measure for reducing hearing backlogs (both in relation to encouraging appropriate early guilty pleas and the withdrawal of charges). We further support the roll out of police body-worn videos to all Local Area Commands in NSW.

We note that an evaluation of the police body-worn video implementation in two Local Area Commands in 2015/2016 was conducted by Charles Sturt University and commissioned by the NSW Police Force¹. Unfortunately, we have not been able to access a copy of the evaluation, which we understand requires the permission of the NSW Police Force.

Use of body-worn video

The Act requires that the use of the device is overt. Section 50A(2) states that:

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.

However, the NSW Police Force flyer, *Body Worn Video*² states that:

Where practical, police will advise people they are speaking with that they are being recorded [emphasis added].

¹ <https://researchoutput.csu.edu.au/en/publications/evaluation-of-nswpf-body-worn-video-camera-implementation>

² http://www.police.nsw.gov.au/_data/assets/file/0004/362992/English_BWV_DL_flyer_web_final.pdf

We are concerned that police may regard the overt wearing of the device as sufficient and that they are excused from telling people that they have turned it on because it was not practical to do so. Although inadvertent use is excused (section 50A(3)(a)), that is different to it being *impractical* to tell people and particularly, where the Act does require the overt use of the device, not simply the overt display of the device.

We submit that police should be required to make a lawful announcement such as stating to the individuals involved, "You are being filmed." There should be further considerations provided in the legislation in respect of vulnerable individuals, including Indigenous and homeless people, and people who appear to have cognitive capacity issues.

The NSW Police flyer states that:

Police will activate the record function of the camera at their discretion.

We submit that the legislation should be more explicit about when body-worn video must be used. In our view, it should be a requirement for police to activate the record function when exercising a power under the *Law Enforcement (Powers and Responsibilities) Act 2002* (arrest, conducting a search, giving directions etc).

From a practical and an integrity/transparency perspective, we suggest that the "device" have the requisite capability to confirm whether the body-worn video was deactivated mid-incident.

Our members report that recordings are not always provided to the defence either as part of a brief of evidence or by way of disclosure. To obtain the footage a subpoena must in some instances be obtained. There may of course be times where the defence solicitor is unaware that footage even exists. The Law Society is unaware if a standard direction exists within the NSW Police Force for the use of footage on a brief and accepts the footage may not be evidence of an offence. It is highly likely however that it would in most instances be disclosable. A standard direction should be developed within the NSW Police Force to ensure the material is routinely disclosed and to avoid the unnecessary costs of seeking the issue of a subpoena.

As noted above, the Law Society supports the roll out of police body-worn video across NSW. We seek to be consulted on the development of supporting materials or variation of current police practices that would be associated with this broader implementation.

Additional purposes for which information obtained from police body-worn video may be used

The Law Society is concerned that section 40(4A)(c) is a very broad regulation making power. This section allows the Minister to set out in delegated legislation additional purposes for which information obtained from police body-worn video may be used, published or communicated.

We note that the making of a regulation is not subject to the same level of Parliamentary scrutiny as legislation. Given the personal, and potentially sensitive, nature of the video footage captured by police body-worn video, the Law Society does not consider that the delegation of legislative power to regulation is appropriate in this instance. The Law Society suggests that section 40(4A)(c) be amended to remove the reference to regulations; and that any additional purposes for which the Government wishes to make the use, publication or communication of police body-worn video available, be considered for inclusion in the Act and subject to appropriate Parliamentary scrutiny.

We consider that use of body-worn video footage should be prohibited for purposes unrelated to investigation of the relevant incident. We strongly submit that body-worn video footage should not be used in conjunction with facial recognition technology.

Retention and destruction practices

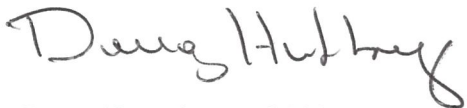
The Law Society understands that the primary instrument relevant to the retention and destruction of body-worn video footage is a disposal and retention authority made under the *State Records Act 1998*. However, there is a lack of clear policy on these practices, and we understand that in practice, if police deem that the footage is not relevant to an incident, then the police do not retain body-worn video footage. In our view, this process does not include satisfactory safeguards, and there should be an adequate minimum retention period for all body-worn video footage.

Further, we suggest that the management of body-worn video footage be periodically audited to ensure compliance with best practice as required under the *State Records Act 1998*.

We would be grateful for the opportunity to review the draft statutory review report.

The Law Society contact for this matter is Rachel Geare, Senior Policy Lawyer, who can be reached on (02) 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,



Doug Humphreys OAM
President