

‘EVERY MOVE YOU MAKE ... EVERY WORD YOU SAY’:¹ REGULATING POLICE BODY WORN CAMERAS

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The death of Minneapolis man, George Floyd, at the hands (or, knee) of a police officer in May 2020 appears to have set a nation, indeed the world, alight with outrage at ongoing, systemic racism and brutality by police officers. Body worn camera (‘BWC’) footage from officers attending this incident provides strong evidence of the circumstances of Mr Floyd’s death. In this article, we draw on criminological research and analyses of legislation in Australia and a number of international jurisdictions, to argue there is a need for improved regulation of BWCs. Despite incurring the substantial cost of deploying this technology, governments are relinquishing control of it to law enforcement agencies who, in turn, draft policies that maximise police discretion and protection while minimising the consequences of non-compliance. For governments to realise their objectives for BWCs, we argue there is a need for greater regulation to ensure BWCs are utilised effectively.

I INTRODUCTION

‘I can’t breathe ... I’m about to die.’²

‘The footage from the body worn camera recorded both audio and video and is clearly the best objective evidence.’³

On 25 May 2020, a Minneapolis man, George Floyd, died as police officer, Derek Chauvin, used his knee to pin Floyd down at the neck. The complaint laid by the State of Minnesota indicates that body worn camera (‘BWC’) footage examined immediately after the event recorded Chauvin with: ‘his knee on Mr Floyd’s neck for 8 minutes and 46 seconds in total. Two minutes and 53 seconds

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1 The Police, ‘Every Breath You Take’ (compact disc, track 7 on Synchronicity, A&M Records, 1983).

2 State of Minnesota, ‘Amended Statement of Complaint’, Submission in *Minnesota v Chauvin* (Minn 4th Jud Dist Ct, No 27-CR-20-12646, 3 June 2020) 3.

3 *O’Shea v Northern Territory* [2018] NTSC 73, [17] (Luppino AsJ).

of this was after Mr Floyd was non-responsive. Police are trained that this type of restraint with a subject in a prone position is inherently dangerous'.⁴

Officer Chauvin was subsequently charged with one count of second-degree murder – unintentional – while committing a felony; one count of third-degree murder – perpetrating eminently dangerous act and evincing depraved mind; and one count of second-degree manslaughter – culpable negligence creating unreasonable risk.⁵ The third-degree murder charge was dismissed in October 2020.⁶ In this case, the video recording shows Mr Floyd's death and how the officers at the scene responded.⁷ The existence of this footage may be attributable to legislation introduced in 2019 after Minneapolis police were implicated in the death of Australian-born woman, Justine Ruszczyk Damond.⁸ Officers who responded to this incident were found to have switched their cameras on and off at various intervals. In February 2021 Minneapolis' BWC policy was further amended to remove officer discretion to turn their cameras on and off. In announcing these changes, Police Chief Medaria Arradondo said: 'We've seen as a community and as a police force, body camera footage increasingly plays a crucial role in understanding critical events in our community'.⁹

On 9 November 2019, seven months before George Floyd died, 19-year-old Kumanjayi Walker was shot dead by Constable Zachary Rolfe at Yuendumu, Northern Territory, Australia. Rolfe was charged with murder and has been committed to stand trial.¹⁰ Mr Walker is one of hundreds, indeed thousands, of First Nations people to be killed by police officers since the arrival of Europeans in Australia in the late 18th century. He is perhaps one of few, though, whose deaths, like George Floyd's, has been recorded on a police BWC. Rolfe's defence has suggested the footage will exonerate the officer, while the Crown has cautioned against drawing such a conclusion too early.¹¹ The BWC footage will contribute valuable evidence as to the events leading to Mr Walker's death.

BWCs, worn by officers, make visual recordings of what the wearer does, sees and hears in the execution of their duties.¹² Their potential utility is axiomatic.

4 *Minnesota v Chauvin* (Minn 4th Jud Dist Ct, No 27-CR-20-12646, 3 June 2020) 4.

5 *Ibid* 8.

6 'Charge over George Floyd Killing Dropped, but Derek Chauvin's Second-Degree Murder Charge Stands', *ABC News* (online, 23 October 2020) <<https://www.abc.net.au/news/2020-10-23/george-floyd-charge-dropped-derek-chauvin-murder-charge-stands/12805792>>.

7 *Minnesota v Chauvin* (Minn 4th Jud Dist Ct, No 27-CR-20-12646, 3 June 2020).

8 Minn Stat § 13.825 (2019).

9 'Former Police Officer Mohamed Noor Loses Appeal against Murder Conviction of Australian Justine Damond Ruszczyk', *ABC News* (online, 3 February 2021) <<https://www.abc.net.au/news/2021-02-03/mohamed-noor-loses-appeal-murder-justine-damond-ruszczyk/13117792>>.

10 Melissa Mackay, 'NT Police Officer Zachary Rolfe to Stand Trial for Shooting Death of Kumanjayi Walker', *ABC News* (online, 26 October 2020) <<https://www.abc.net.au/news/2020-10-26/nt-zachary-rolfe-murder-trial-kumanjayi-walker/12812480>>.

11 Stephanie Zillman and Mitchell Abram, 'Lawyers for Police Officer Charged with Murdering Kumanjayi Walker Apply to Move Proceedings to Darwin', *ABC News* (online, 12 December 2019) <<https://www.abc.net.au/news/2019-12-12/yuendumu-shooting-trial-zachary-rolfe-kumanjayi-walker/11790626>>.

12 A body worn camera ('BWC') is defined in Queensland as a device that is: (a) worn on clothing or otherwise secured on a person; and (b) designed to be used to (i) record images; or (ii) record images and sounds: *Police Powers and Responsibilities Act 2000* (Qld) s 609A(5).

Video footage of incidents may help to implicate officers, and exonerate them.¹³ This technology may affect the legitimacy of, and respect for, police officers given the increased transparency that comes with their use.¹⁴ The apparent objectivity that BWCs bring to police work has been recognised.¹⁵ A significant body of research demonstrates that these devices can effect change on policing, the public perception of police officers and the administration of criminal justice. These positive impacts, however, are contingent upon the devices being used correctly, both in terms of their technical use and in accordance with law and/or policy.

Given the promise in the *idea* of these cameras, it is not surprising that the technology is being adopted by police departments around the world with considerable enthusiasm and at considerable expense. An estimated 30,000 BWCs will be deployed throughout Australia by the middle of 2021.¹⁶ Tens of millions of dollars are being spent equipping the majority of officers with this technology. The primary reason for adopting these cameras is to gather evidence.¹⁷ Additional reasons provided by police services include ‘less time on paperwork ... less need for officers to use force, changing the behaviour of people at incidents, improved police conduct and professionalism, [and] fewer complaints against police’.¹⁸ In Victoria the reasons for using BWCs are ‘to give police the tools they need to

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- 13 Lucy Stone, ‘Queensland Police Cleared of Assault Thanks to Body-Worn Camera Footage’, *Brisbane Times* (online, 18 November 2018) <<https://www.brisbanetimes.com.au/national/queensland/queensland-police-cleared-of-assault-thanks-to-body-worn-camera-footage-20181118-p50grr.html>>.
- 14 Danielle Wallace et al, ‘Body-Worn Cameras as a Potential Source of Depolicing: Testing for Camera-Induced Passivity’ (2018) 56(3) *Criminology* 481, 482.
- 15 Bradley X Barbour, ‘Big Budget Productions with Limited Release: Video Retention Issues with Body-Worn Cameras’ (2017) 85(4) *Fordham Law Review* 1725, 1734.
- 16 South Australia: Paris Cowan, ‘SA Funds Tablets, Body-Worn Cameras for Police’, *IT News* (online, 17 June 2015) <<https://www.itnews.com.au/news/sa-funds-tablets-body-worn-cameras-for-police-405278>>; Australian Capital Territory: ‘Expanded Role for Body Worn Cameras’, *Australian Federal Police: ACT Policing* (Web Page) <<https://police.act.gov.au/about-us/expanded-role-body-worn-cameras>>; Tasmania: Medianet, ‘Australia’s Tasmania Police Joins the Axon Network; Rolls out 750 Axon Body Cameras’ (Media Release, 9 August 2018) <<https://www.medianet.com.au/releases/166342/>> (‘Tasmania Police’); Northern Territory: Medianet, ‘Northern Territory Police Deploys 820 Axon Body Cameras on Evidence.com in Australia’ (Media Release, 28 September 2016) <<https://www.medianet.com.au/releases/113517/>>; Western Australia: Michelle Roberts, ‘Body Worn Cameras to be Deployed to Frontline Officers’ (Media Statement, Government of Western Australia, 23 March 2019) <<https://www.mediastatements.wa.gov.au/Pages/McGowan/2019/03/Body-worn-cameras-to-be-deployed-to-frontline-officers.aspx>>; New South Wales: Josh Taylor, ‘NSW Police to Review whether Body-Worn Cameras Should Turn On Automatically’, *The Guardian* (online, 15 November 2019) <<https://www.theguardian.com/australia-news/2019/nov/15/nsw-police-to-review-whether-body-worn-cameras-should-turn-on-automatically>>; Queensland: Mark Ryan, ‘Body Worn Camera Boost for Police’ (Media Statement, The Queensland Cabinet and Ministerial Directory, 26 July 2019) <<http://statements.qld.gov.au/Statement/2019/7/26/body-worn-camera-boost-for-police>>; Victoria: Justin Hendry, ‘Victoria Police Completes Body-Worn Camera Rollout’ *IT News* (online, 11 December 2019) <<https://www.itnews.com.au/news/victoria-police-completes-body-worn-camera-rollout-535375>>.
- 17 ‘Why Are Police Using Body Worn Cameras?’, *Queensland Police* (Web Page, 7 November 2019) <<https://www.police.qld.gov.au/initiatives/body-worn-cameras>>. See also ‘Body Worn Video’, *NSW Police Force* (Online Brochure, 2018) <https://www.police.nsw.gov.au/_data/assets/pdf_file/0008/586484/Updated_Brochure_BWV.pdf>.
- 18 ‘Why Are Police Using Body Worn Cameras?’ (n 17).

keep the community safe, and improve responses to family violence incidents'.¹⁹ Announcing the deployment of BWCs for officers in Western Australia ('WA'), the Police Minister Michelle Roberts said they would 'provide greater transparency and greater protection to both police and members of the community'.²⁰ The Commissioner of Police in WA, Chris Dawson, noted the 'improved evidence gathering and accountability' capacity of the BWCs and further that '[i]t is crucial that the community has confidence in its police force and these devices are an important tool to increase that confidence'.²¹ While gathering evidence is a priority for police forces to use BWCs, it is also clear that governments are investing in this technology with a view to improving relationships between police officers and the public and seem particularly concerned with issues of accountability and public confidence in police forces.

The enthusiasm with which BWCs are being adopted is being matched by a significant body of research on this technology from disciplines like criminology and psychology. The research is inconclusive in terms of the benefits or otherwise of BWCs for policing (and public perceptions of police) but, as Ariel et al have noted, '[e]valuations of the use of BWCs simply cannot keep pace with the speed at which they are being deployed by police departments'.²² Notwithstanding the significant uptake of these devices in police forces around the globe, and the extensive criminological research into their use, there has been comparatively little attention paid to this technology by legal scholars and practitioners. The great cost of rolling out this technology for states and countries, coupled with the equivocal research findings regarding their use, makes their regulation (or lack thereof) worthy of further attention.

This article considers existing regulatory frameworks with respect to BWCs in Australia, with additional discussion of their uptake in Canada, New Zealand and some states in the United States. Part II provides a brief overview of the literature dealing with BWCs. This research is inconclusive in terms of BWCs' capacity to change police practices, or increase safety of police and the public, or increase public approval of police. The research consistently claims, however, that *how* this technology is regulated is crucial to its successful deployment. Part III of the article thus examines how BWCs are currently regulated in Australia. Extant legislation is largely limited to protecting police from allegations of invasion of privacy. Police departmental policies, guidelines and manuals are generally publicly available and more detailed than the legislation, but nevertheless tend to be drafted in highly permissive terms, giving officers considerable discretion as to how they use these cameras or, where discretion is limited, consequences of non-compliance are minimal. While not opposed to the use of this technology (indeed we argue that the potential benefits are considerable), the reliance on police to set the standards with

19 'Body Worn Cameras', *Victoria Police* (Web Page, 3 December 2019) <<https://www.police.vic.gov.au/body-worn-cameras>>.

20 Roberts (n 16).

21 Ibid.

22 Barak Ariel et al, 'The Deterrence Spectrum: Explaining Why Police Body-Worn Cameras "Work" Or "Backfire" in Aggressive Police–Public Encounters' (2018) 12(1) *Policing: A Journal of Policy and Practice* 6, 7 ('The Deterrence Spectrum').

respect to BWCs is concerning if governments are to achieve their objectives for introducing this technology in the first place. Part V considers the range of issues that we suggest should be incorporated in legislation. Ultimately, we argue that without appropriate regulation of their use, the potential of BWC technology – and the investments being made in them – will not be realised.

II WHAT THE RESEARCH SAYS ABOUT BWCS

It has only been a little over a decade since BWCs were tentatively tested in a number of jurisdictions in the United Kingdom and the United States.²³ In the relatively short time since those early trials, the adoption of BWCs by police forces across the globe has increased exponentially. This is despite research showing they have – to date – had minimal impact on officer or citizen behaviour, or attitudes towards police.²⁴ Nevertheless, BWCs ‘are here, and more are coming’.²⁵ The attraction of such technology lies primarily in the creation of an additional source of evidence, but also in the (largely unproven) expectation that they will improve relationships between the public and police due to the increased transparency that their use potentially brings to interactions between these groups.²⁶ Their use, both real and potential, has resulted in a substantial body of research developing across various disciplines. A very basic search of the term ‘body worn cameras’ in Google Scholar yields over 4,000 results.²⁷ It is well beyond the scope of this article to review so many articles. It is possible, however, to canvas the wide range of topics that scholars have addressed in the context of conducting research into police use of BWCs. The research covers, for example, rates of police use of force with and without BWCs;²⁸ public complaints and prosecution practices;²⁹ and perceptions of the justice system.³⁰ This research demonstrates positive outcomes associated with use of BWCs such as improved perceptions of police.³¹ Use of BWCs also appears to have a positive impact on public perceptions of procedural justice more

23 Barbour (n 15) 1731–2.

24 Cynthia Lum et al, ‘Research on Body-Worn Cameras: What We Know, What We Need to Know’ (2019) 18(1) *Criminology & Public Policy* 93.

25 Seth W Stoughton, ‘Police Body-Worn Cameras’ (2018) 96(5) *North Carolina Law Review* 1363, 1363.

26 Ibid 1378–99.

27 Searched 24 June 2021.

28 Ariel et al, ‘The Deterrence Spectrum’ (n 22); EC Hedberg, Charles M Katz and David E Choate, ‘Body-Worn Cameras and Citizen Interactions with Police Officers: Estimating Plausible Effects Given Varying Compliance Levels’ (2017) 34(4) *Justice Quarterly* 627.

29 Weston J Morrow, Charles M Katz and David E Choate, ‘Assessing the Impact of Police Body-Worn Cameras on Arresting, Prosecuting, and Convicting Suspects of Intimate Partner Violence’ (2016) 19(3) *Police Quarterly* 303; Catherine Owens, David Mann and Rory Mckenna, ‘The Essex Body Worn Video Trial: The Impact of Body Worn Video on Criminal Justice Outcomes of Domestic Abuse Incidents’ (Research Report, College of Policing, October 2014) <https://whatworks.college.police.uk/Research/Documents/BWV_Report.pdf>.

30 Michael D White, Natalie Todak and Janne E Gaub, ‘Assessing Citizen Perceptions of Body-Worn Cameras After Encounters with Police’ (2017) 40(4) *Policing: An International Journal of Police Strategies & Management* 689.

31 Wallace et al (n 14) 484.

generally. A study of the use of BWCs at routine traffic stops, for example, showed improved perceptions of procedural justice for those who were pulled over.³²

It also demonstrates, however, the potential for problems, particularly with respect to levels of police discretion when using this technology.³³ At the centre of the 2020 riots and protests over the death of George Floyd is the issue of systemic racism in police forces and, further, police accountability. The capacity for BWC use to improve responses to police misconduct is observed in the research. A study by Taylor and Lee, for example, indicates that those arrested by police believed this technology to be a deterrent to police misconduct during the arrest and were, therefore, supportive of the use of video recording as long as BWC policy was followed by the officer/s.³⁴ There is evidence that BWCs act as a deterrent to ‘illegal and undesirable behaviors’ by both police and those being recorded due to the heightened self-awareness that comes with knowing an encounter or incident is being recorded.³⁵ For all of the research that suggests positive outcomes for police and the public alike in using this technology, there is research indicating the opposite. Somewhat counterintuitively, there may be an increased use of force where cameras are activated during what may already be a tense situation.³⁶ A Cambridge University study found an increased aggression where cameras were switched on during an ‘already intense interaction’ (‘Turn off that camera’, ‘Don’t you turn this camera on me now!’).³⁷ Others have suggested there is a risk of depolicing associated with BWCs, whereby police will become more passive in executing their duties, fearing criticism associated with being recorded – although this risk has been shown to be minimal.³⁸ Ariel et al drew on deterrence theory to develop a BWC ‘deterrence spectrum’ to reflect this range of police officer responses in complying (or not) with BWC policy. They found that ‘[m]inimal deterrence is inversely related to strong discretion’.³⁹ In other words, the more discretion they had with respect to the use of BWCs, the less they complied with policy. The authors concluded that ‘there is great peril in broad discretionary powers, when it comes to BWCs’.⁴⁰

Adding further complexity to BWC evidence and formation of policy, is that the act of recording an event or individual is but one aspect of the use of BWCs. Interpreting footage is another. ‘Camera perspective bias’ may affect a viewer’s

32 Mustafa Demir et al, ‘Body Worn Cameras, Procedural Justice, and Police Legitimacy: A Controlled Experimental Evaluation of Traffic Stops’ (2020) 37(1) *Justice Quarterly* 53.

33 Wallace et al (n 14).

34 Emmeline Taylor and Murray Lee, ‘Points of View: Arrestees’ Perspectives on Police Body-Worn Cameras and Their Perceived Impact on Police–Citizen Interactions’ (2019) 59(4) *British Journal of Criminology* 958.

35 Demir et al (n 32) 58.

36 Ibid 59; Ariel et al, ‘The Deterrence Spectrum’ (n 22) 14–16.

37 J Sykes et al, ‘Road to Implementation: A Multisite Randomized Controlled Trial on Body Worn Videos’ (Conference Paper, International Conference on Evidence Based Policing, July 2015), cited in Ariel et al, ‘The Deterrence Spectrum’ (n 22) 16. See also Barak Ariel et al, ‘Report: Increases in Police Use of Force in the Presence of Body-Worn Cameras are Driven by Officer Discretion: A Protocol-Based Subgroup Analysis of Ten Randomized Experiments’ (2016) 12(3) *Journal of Experimental Criminology* 453.

38 Wallace et al (n 14).

39 Ariel et al, ‘The Deterrence Spectrum’ (n 22) 14.

40 Ibid 15.

perception of the actual footage.⁴¹ A study by Sommers showed that interpretations of video footage by members of the public were affected by their pre-existing attitudes towards police generally.⁴² Those with positive attitudes towards police were more likely to interpret police to be behaving appropriately in a video than those who reported pre-existing negative attitudes towards police.⁴³ A similar study assessed mock jurors' responses to BWC footage and found that mock jurors were more likely to acquit a defendant charged with resisting arrest after viewing BWC footage compared to when details of the arrest were transcribed or absent.⁴⁴ Both studies suggest issues with how footage might be interpreted subjectively which calls into question the extent to which it may be the best evidence and, further, adds to the need for clear terms for their use in the field and in courtrooms.

The extant literature on BWCs is inconclusive in many respects. Governments are spending a fortune rolling out this technology in a largely 'non-evidence-based' environment.⁴⁵ Evidence-based reports such as those of Sommers and Saulnier demonstrate policymakers' lack of reliance on evidence-based research before making decisions regarding BWC implementation. What researchers are clear on, though, is that to achieve the objectives that each of the states and territories have announced (which are far broader in scope than simply obtaining the best evidence), it is imperative that their use is controlled appropriately. The design and implementation of suitable regulatory frameworks for BWCs are vital to their successful implementation.⁴⁶ Objectives that aim to improve relations between police and public, to protect both or to enhance credibility of police forces, will be frustrated by poor policies and poor execution of policy.⁴⁷ Legislation that addresses key aspects of BWC usage, and the required judicial oversight and enforcement, rather than police departmental enforcement will improve the chances of governments achieving the objectives they have for introducing them.

III REGULATING BWCS IN AUSTRALIA – CURRENT APPROACH

This Part considers what regulations and policies currently govern the use of BWCs in Australian states and, for comparison, Part IV also considers the use of BWCs in a selection of international jurisdictions. This is by no means a

41 Jocelyn Simonson, 'Beyond Body Cameras: Defending a Robust Right to Record the Police' (2016) 104(6) *Georgetown Law Journal* 1559, 1566; Boivin et al, 'The Body-Worn Camera Perspective Bias' (2017) 13(1) *Journal of Experimental Criminology* 125.

42 Roseanna Sommers, 'Will Putting Cameras on Police Reduce Polarization?' (2016) 125(5) *Yale Law Journal* 1304, 1318–23; Stoughton (n 25) 1405–8.

43 Sommers (n 42) 1318–23.

44 Alana Saulnier, Kelly C Burke and Bette L Bottoms, 'The Effects of Body-Worn Camera Footage and Eyewitness Race on Jurors' Perceptions of Police Use of Force' (2019) 37(6) *Behavioral Sciences & The Law* 732.

45 Sommers (n 42); *ibid*.

46 Michael D White and Henry F Fradella, 'The Intersection of Law, Policy, and Police Body-Worn Cameras: An Exploration of Critical Issues' (2018) 96(5) *North Carolina Law Review* 1579; Kristine Hamann, 'Police Body-Worn Cameras: The Prosecutors' Perspective' (2018) 33(2) *Criminal Justice* 17.

47 Barbour (n 15).

comprehensive comparative study but it does establish that, to date, regulation of BWCs has focused on empowering police to use this technology; to develop and enforce their own guidelines and policies; and to protect them from the risks of recording conversations that might otherwise breach privacy legislation. This limited regulation, we argue, fails to adequately protect police and citizens where the guidelines or manuals or policies are vague and/or the primary source of controlling the use of BWCs. Nor does this method of control facilitate the realisation of the potential benefits these cameras could bring to the administration of criminal justice.

A Queensland

There are 7,700 BWCs currently available to police in Queensland.⁴⁸ Their use is governed by the *Police Powers and Responsibilities Act 2000* (Qld) (*PPRA*). The Domestic and Family Violence Protection and Another Act Amendment Bill 2015 (Qld) amended the *PPRA* in 2015 to ‘remove any doubt about the lawfulness of the use of body-worn cameras’.⁴⁹ The reform addressed the use of BWCs and made such use lawful even where it was ‘inadvertent ... unexpected; or incidental to use while acting in the performance of the officer’s duties’.⁵⁰ The reforms did not address the admissibility of BWC footage or any general police powers with respect to covert recordings and the need for surveillance warrants.⁵¹ The *PPRA* does not prescribe any mandatory requirements for when BWCs must be worn or activated. Instead, section 609A is limited to making it lawful for a police officer to use a BWC to record images or sounds while the officer is ‘acting in the performance of [their] duties’.⁵² When introducing amendments to the *PPRA* to address the issue of enforcing BWC use, the Hon Shannon Fentiman MP said:

Police officers are under a statutory obligation to comply with directions and orders given to them by the commissioner under section 4.9 of the *Police Service Administration Act 1990*. The commissioner requires all members of the Police Service to be familiar with the contents of the manual and to comply with the contents of the manual so that their duties are discharged lawfully, ethically and efficiently.⁵³

The manual Ms Fentiman refers to, which governs the use of BWCs by Queensland police officers, is the Digital Electronic Recording of Interviews and Evidence (‘DERIE’) Manual.⁵⁴ While Ms Fentiman asserts that police would be required to comply with contents of this manual, those contents provide little in terms of the lawful, ethical and efficient use of BWCs. The DERIE manual states, for example, that officers should record any exercise of a police power (for

48 Ryan (n 16).

49 Queensland, *Parliamentary Debates*, Legislative Assembly, 29 October 2015, 2589 (SM Fentiman) (‘29 October 2015 *Parliamentary Debates*’).

50 Domestic and Family Violence Protection and Another Act Amendment Bill 2015 (Qld) cl 20(2).

51 Queensland, ‘29 October 2015 *Parliamentary Debates*’ (n 49) 2591.

52 *Police Powers and Responsibilities Act 2000* (Qld) s 609A.

53 Queensland, *Parliamentary Debates*, Legislative Assembly, 3 December 2015, 3213 (SM Fentiman) (‘3 December 2015 *Parliamentary Debates*’).

54 Queensland Police Service, ‘Digital Electronic Recording of Interviews and Evidence (DERIE) Manual’ (Manual Issue No 20, effective 26 March 2021) <<https://www.police.qld.gov.au/qps-corporate-documents/operational-policies/derie-manual>>.

example, giving a move on direction, arresting someone or issuing a warrant), or any use of force, when recording ‘might assist in providing a record of evidence’ and when the ‘officer believes the interaction should be recorded’.⁵⁵ While the manual establishes a practice that is suggestive of limited discretion in that officers are expected to record exercises of power and use of force, words and phrases like ‘should’, ‘might’ and ‘reasonably believes’ suggest a significant degree of ambiguity and discretion. The camera, for example, must record ‘as soon as practicable after an officer reasonably believes they may ... exercise a police power under legislation’ or ‘apply a use of force’ unless it’s ‘impractical’ to do so.⁵⁶ ‘Impractical’ is not defined in the manual or elsewhere. Ms Fentiman continued:

A failure by police to comply with the Queensland Police Service policy *may* make that officer liable to disciplinary action under section 7.4 of the *Police Service Administration Act 1990*. The disciplinary sanctions that a police officer *may* face through the police discipline process range from cautioning or reprimand to dismissal from the service. This range of disciplinary sanctions allows the severity of the disciplinary sanction to be commensurate and reflective of the seriousness of each individual matter.⁵⁷

These remarks make it clear that, even at the time of drafting these legislative amendments, the government was prepared to give the police considerable control over these cameras. The permissive, as opposed to mandatory, nature of this control is concerning. While there is scope to sanction officers who behave inappropriately, phrases like ‘may make the officer liable’ and ‘disciplinary sanctions that a police officer may face ...’ are insufficient in light of the risks of BWC misuse and even misconduct (as outlined in the literature above).

A 2018 review of BWCs conducted by Queensland’s Crime and Corruption Commission reported that the most common reasons for a camera not being activated, or being deactivated during the recording of an incident, included: equipment malfunction; officers incorrectly believing that the incident did not require the activation of BWC; officers believing that the BWC had been activated when in fact it had not; BWCs being accidentally deactivated as a result of a bump or other physical contact during an appropriate use of force; and sudden escalation of an incident resulting in the officer failing to activate their BWC.⁵⁸ Case law provides further evidence of reasons why officers may choose not to activate their cameras. In *R v Cubby* (‘*Cubby*’), for example, an officer gave evidence that, when, in the company of four other officers, he had forced entry into a defendant’s unit and had not activated his camera:⁵⁹ [A]t the time he gained entry for the tactical reason of not making himself a target due to the light on the device. He also said because of the limited battery life and storage space he used the recorder sparingly.⁶⁰

55 Ibid s 4.4.

56 Ibid.

57 Queensland, ‘3 December 2015 *Parliamentary Debates*’ (n 53) 3213 (SM Fentiman) (emphasis added).

58 Crime and Corruption Commission (Qld), ‘Prevention in Focus: Body Worn Cameras – Their Role in Complaint Resolution’ (Report, November 2018) 5 <<https://www.ccc.qld.gov.au/sites/default/files/Docs/Publications/CCC/Prevention-in-Focus-Body-worn-cameras-2018.pdf>>.

59 [2018] QDCPR 28, [7] (Lynch DCJ). Police were attending the premises in relation to the defendant’s alleged failure to report as per his bail conditions.

60 Ibid [21].

In this case the officer appears to have been concerned for his safety (not wanting to make himself a target) and yet, at the same time, worried about the battery life of the camera and thus wanting to use the device ‘sparingly’. Failing to record an incident where five officers force their way into a premises, with an apparent fear for their safety, seems to be contrary to the DERIE manual.

In a 2016 case, *R v Cahill*, the Queensland Supreme Court considered the lawfulness of a police search of a vehicle.⁶¹ The arresting officer’s camera was on when she approached the vehicle. It was turned off when she returned to her vehicle to do a licence check. The suspect’s car was subsequently searched and a small amount of methylamphetamine and drug-related paraphernalia were found. The camera was turned back on in time for the officer to inform the suspect of his rights and for further questioning.⁶² The crucial consent given by the defendant for the search of his car was not recorded. The officer gave evidence that consent was given. The defendant denied giving consent. At trial the officer gave evidence that her failure to record the consent to the search was due to her ‘inexperience’.⁶³ In both of these cases the use (or lack thereof) of the BWC was not a decisive issue for the court. In each instance, however, such an outcome confirms the significant discretion officers have with respect to the use of this technology. It was also the case that, even though the officers had access to this technology that could have helped at these trials, the court in both instances had to revert to the traditional oral and written testimonies of the witnesses. Each matter, therefore, became another case of the word of the police officer against that of the defendants. In both cases the police won.

B New South Wales

In New South Wales (‘NSW’) there are over 5,000 body worn videos (as BWCs are referred to in that state) in operation as at July 2019.⁶⁴ The use of these cameras is regulated by the *Surveillance Devices Act 2007* (NSW) (‘*SDANSW*’).⁶⁵ Pursuant to section 50A(1) of the *SDANSW*, the use of BWC by a police officer is lawful 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.⁶⁶

61 *R v Cahill* [2016] QSC 275.

62 *Ibid* [6]–[8] (Lyons J).

63 *Ibid* [18].

64 Taylor (n 16).

65 A body worn video is defined as ‘equipment worn on the person of a police officer that is capable of recording visual images or sound or both’: *Surveillance Devices Act 2007* (NSW) s 4 (definition of ‘body-worn video’). See also Callum Christodoulou, Helen Paterson and Richard Kemp, ‘Body-Worn Cameras: Evidence-Base and Implications’ (2019) 31(4) *Current Issues in Criminal Justice* 513. For consistency we refer to the cameras as BWCs.

66 *Surveillance Devices Act 2007* (NSW) s 50A(1).

The use of BWC is overt once the police officer informs the person who is to be recorded.⁶⁷ The use of BWC by an officer will also be lawful 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).⁶⁸

The use of the technology received judicial approval in *Director of Public Prosecutions (NSW) v Merhi* ('Merhi') where Johnson J said:

In the past, protracted defended hearings would sometimes take place in the Local Court where persons were charged with offences such as resisting a police officer in the execution of his or her duty. Evidence would be called from a number of persons who would give oral evidence about incidents which were often fluid and dynamic, with allegations of assault, pushing, shoving, swearing and other related activities. There would often be significant controversy as to what actually happened. The fact that Sergeant Simmons was wearing a camera which recorded the event meant that a Court hearing the proceedings has an actual video and audio recording of the whole incident. That, of course, is not the only evidence. Oral evidence may bear upon these matters as well, but there will be a significant reduction in areas of factual dispute in circumstances such as this.⁶⁹

Opinions like Johnson J's provide further support for the use of BWCs in terms of improving the efficiency with which criminal matters can be heard and dealt with. In *Merhi* it was fortunate that the incident was recorded because it did not have to be. Like Queensland's *PPRA*, the *SDANSW* does not set out circumstances in which the use of a BWC is mandatory. Instead, Standard Operating Procedures ('SOPs') have been drafted.⁷⁰ The SOP document provides guidance on when use of BWCs may not be appropriate. Decisions as to when to activate their BWC are left to officers.⁷¹

Police officers may use their BWC when they would normally use their official notebook to record information; to capture evidence or record something of relevance; and when exercising a police power. Pursuant to section 39(d) of the *SDANSW*, the footage is classified as 'protected information' and, accordingly, the SOP instructs that footage is to be securely stored, archived and disposed of in accordance with the *State Records Act 1998* (NSW) retention and disposal authorities.⁷² Officers are required to download footage onto a database where it will be archived. Officers are not permitted to copy, use or disclose the information for non-official purposes. Rather, footage is only meant to be used: in court as evidence; for investigation, including complaints against police; as training

67 Ibid s 50A(2).

68 Ibid s 50A(3).

69 [2019] NSWSC 1068, [37].

70 New South Wales Police Force, 'Body-Worn Video Camera Standard Operating Procedure' (Manual, 1 July 2019) <https://www.police.nsw.gov.au/_data/assets/pdf_file/0003/644457/5601_-_Body-Worn_video_camera_Standard_Operating_Procedures.pdf>.

71 Ibid 4.

72 Ibid.

material for police; or as otherwise allowed by regulations.⁷³ Any illegal use of the footage is an offence.⁷⁴

C Victoria

As at December 2019, there were 9,000 BWC devices available to the Victorian Police Force.⁷⁵ The use of BWCs in Victoria is regulated by the *Surveillance Devices Act 1999* (Vic) (*SDAV*).⁷⁶ BWC footage is defined as ‘protected information’ under the *SDAV*.⁷⁷ Only authorised officers have access to the footage.⁷⁸ The limits of this approach to regulating BWCs were highlighted in a recent Victorian case where access to BWC footage to pursue a civil action was denied by the County Court pursuant to this provision that makes such footage ‘protected information’.⁷⁹ According to a Victorian Police media release, police will activate the camera when they believe recording is necessary to capture an incident or interaction with the public and when they are exercising a police power.⁸⁰ Officers do not have to tell members of the public when they are turning on the camera, but citizens can ask for confirmation that a recording is taking place.⁸¹ If a recording is not made, or if the camera is stopped prematurely, the officer must make a note outlining the circumstances. Compliance with this policy is monitored by the professional standards unit.⁸² Information about police use of BWCs in Victoria is found on the Victoria Police website which explains, for example, that data recorded on the cameras is ‘always retained and unaltered’; police have considerable discretion to ‘edit or redact BWC footage when preparing evidence for a hearing before a court’; courts can request editing as part of legal proceedings; how access to BWC footage by legal representatives and members of the public is governed; and retention of footage.⁸³

D South Australia

Like other states, South Australia’s *Surveillance Devices Act 2016* (SA) (*SDASA*) contains no specific reference to BWCs but the definition of ‘surveillance

73 *Surveillance Devices Regulation 2014* (NSW) s 4.

74 *Surveillance Devices Act 2007* (NSW) ss 39(d), 40.

75 Hendry (n 16).

76 *Surveillance Devices Act 1999* (Vic) s 3(1) (definition of ‘body-worn camera’).

77 *Surveillance Devices Act 1999* (Vic) s 30D(ab).

78 ‘Body Worn Cameras’ (n 19).

79 Cameron Houston, ‘Police Camera Ruling “Denies Courts Critical Evidence”’, *The Age* (online, 4 October 2020) <<https://www.theage.com.au/national/victoria/police-camera-ruling-denies-courts-critical-evidence-20201004-p561wk.html>>. See also Karl Quinn, ‘I Asked to See the PSO Footage of Me. What I Got Was Kafka’s *The Trial*’, *The Age* (online, 12 October 2020) <<https://www.theage.com.au/national/victoria/for-their-eyes-only-body-camera-ruling-has-shades-of-kafka-s-the-trial-20201012-p5648s.html>>.

80 ‘Ballarat Body-Worn Camera Pilot Rolling Out Statewide’, *Premier of Victoria* (Web Page, 30 August 2018) <<https://www.premier.vic.gov.au/ballarat-body-worn-camera-pilot-rolling-out-statewide/>>.

81 ‘Body Worn Cameras’ (n 19).

82 Farrah Tomazin, ‘Call for Overhaul: Police Can Deactivate Body Cameras, Edit Footage’, *The Age* (online, 10 November 2019) <<https://www.theage.com.au/national/victoria/call-for-overhaul-police-can-deactivate-body-cameras-edit-footage-20191108-p538vg.html>>.

83 ‘Body Worn Cameras’ (n 19).

device' is arguably wide enough to cover BWCs in that it includes 'a listening device; or an optical surveillance device' or a combination of both.⁸⁴ Whatever reference there is to surveillance devices is primarily focused on establishing police powers to use such devices. The legislation makes it lawful for a police officer to use a listening device for the purpose of recording any words spoken by or to, or within the hearing of, the officer during activities carried out in the course of the officer's duties.⁸⁵ It is also lawful for a police officer to install, use or maintain an optical surveillance device to record any activity carried out in a public place in the course of the officer's duties.⁸⁶ Section 9 of the *SDASA* provides for the ability of police officers to communicate, publish and use recordings obtained via listening and optical devices, during a relevant investigation or during the course of a relevant action or proceeding or as directed by a court.

Unlike other states, however, we were unable to locate policy directives, manuals or guidelines. Similarly, we were unable to locate any departmental media releases about the use of BWCs in South Australia other than a recent release with respect to the announcement of a trial of BWCs in a youth training centre.⁸⁷ A press article from 2015 referred to a government announcement that \$13 million was being budgeted for the introduction of BWCs in the state following a trial of the devices in 2013.⁸⁸

E Tasmania

Approximately 750 BWCs have been deployed across Tasmania.⁸⁹ The use of BWCs in Tasmania is governed by the *Police Powers (Surveillance Devices) Act 2006* (Tas) ('*PPSDA*') and the *Listening Devices Act 1991* (Tas) ('*LDA*'). BWCs are not specifically referred to in either Act. The definition of 'personal camera' in the *PPSDA*, however, extends to BWCs.⁹⁰ The lawful use of a personal camera is set out in section 44A of the *PPSDA* and covers similar areas of use as other states do in their legislation, namely that the officer is on duty, the use of the camera is overt, the officer has informed the other party of the camera use and the 'circumstances are such that the person being recorded ought reasonably to be expected to be aware that the private conversation is being recorded'.⁹¹ Under section 32 of the *PPSDA* 'protected information' includes information obtained by the use of a personal camera, in accordance with section 44A, by a police officer, and various offences are recognised in the *PPSDA* for the unlawful use

84 *Surveillance Devices Act 2016* (SA) s 3 (definition of 'surveillance device').

85 *Ibid* s 4(2)(e).

86 *Ibid* s 5(4)(d).

87 Department of Human Services (SA), 'Adelaide Youth Training Centre to Trial Body Worn Cameras' (Media Release, 25 February 2020) <<https://dhs.sa.gov.au/latest-news/media-releases-2020/adelaide-youth-training-centre-to-trial-body-worn-cameras>>.

88 Cowan (n 16).

89 'Body Worn Cameras', *Tasmania Police* (Web Page) <<https://www.police.tas.gov.au/about-us/body-worn-cameras/>>.

90 *Police Powers (Surveillance Devices) Act 2006* (Tas) s 3 (definition of 'personal camera').

91 *Ibid* s 44A.

of that protected information.⁹² Sections 33(3)–(4) of the *PPSDA* deal with the circumstances where police officers can lawfully use protected information and includes, inter alia, the investigation and prosecution of offences.

Apart from the legislation that regulates the lawfulness or otherwise of police use of cameras and listening devices, there is no legislation in Tasmania that specifically governs police use of BWCs. Instead, the ‘Tasmania Police Body Worn Camera Policy’⁹³ and the ‘Tasmania Police Body Worn Camera Guidelines’⁹⁴ set out the policy and procedures for their use. Pursuant to these policy documents, officers ‘must’ activate the camera before and during any situation where they are exercising power in connection with the performance of their duty ‘unless there is a genuine reason not to do so’.⁹⁵ Officers have broad discretion to use the cameras where, for example, ‘it *may* assist in providing a record of evidence in respect of the commission of an offence, or where a member *believes* an offence is about to be or likely to be committed’;⁹⁶ or where they believe a recording ‘*may* be of some future evidentiary value’.⁹⁷ Additional general instructions are drafted in even more permissive terms than the above. When contact with members of the public occurs, for example, officers ‘*should* commence recording at the earliest possible opportunity’; ideally this ‘*should* involve activation of recording shortly before arriving on scene’;⁹⁸ and officers ‘*should* record the justification’ for not recording or stopping recording ‘in their police notebook, tablet or other record of the incident, *as necessary*’.⁹⁹

F Western Australia

Approximately 4,000 BWCs will be deployed across WA by June 2021.¹⁰⁰ There is no specific reference to BWCs in the *Surveillance Devices Act 1988* (WA) (*SDAWA*). Rather, the state relies on existing provisions contained within the *SDAWA* that provide for the lawful use of BWCs by a police officer, including the installation, use and maintenance of various devices for the purposes of carrying out criminal investigations.¹⁰¹ Like Tasmania, WA’s legislation governs the use of ‘listening device[s]’¹⁰² and ‘optical surveillance device[s]’.¹⁰³

92 Ibid s 32.

93 Department of Police, Fire and Emergency Management (Tas), ‘Tasmania Police: Body Worn Camera Policy’ (Policy Document, 2018) <<https://www.police.tas.gov.au/uploads/BWC-Policy-v14122018.pdf>> (‘Tasmania Police: BWC Policy’).

94 Department of Police, Fire and Emergency Management (Tas), ‘Tasmania Police: Body Worn Camera Guidelines’ (Guideline Document, 2018) <<https://www.police.tas.gov.au/uploads/BWC-Guidelines-v14122018.pdf>>.

95 Ibid 5 [6.2.1].

96 Ibid 5 [6.2.2] (emphasis added).

97 Ibid 5 [6.2.3] (emphasis added).

98 Ibid 5 [8.2] (emphasis added).

99 Ibid 6 [8.3] (emphasis added).

100 Roberts (n 16).

101 *Surveillance Devices Act 1988* (WA) ss 5(3)(a)–(b), 6(3)(b)(i)–(ii).

102 Ibid s 3 (definition of ‘listening device’).

103 Ibid s 3 (definition of ‘optical surveillance device’).

Aside from these provisions, finding information about WA's BWC policy or procedure proved challenging. It appears that wearing the device is mandatory; and that officers will be required to self-activate the camera when attending 'incidents including family violence complaints' and 'physical or hostile' situations. The technology will back-capture about 30 seconds of vision and will automatically activate as soon as an officer draws their firearm (but not a taser). Officers will not be able to alter or delete recorded vision and the video will be stored using secure cloud-based technology.¹⁰⁴ Police Commissioner Chris Dawson has indicated plans to add automatically starting cameras when tasers are drawn and, further, that 'he was working with the Director of Public Prosecutions and the courts to enable interviews and statements recorded on the cameras to be used in court, rather than transferring them into written statements'.¹⁰⁵

IV INTERNATIONAL APPROACHES

The above overview of Australian states demonstrates the dearth of legislation governing BWCs. It is apparent that, for the moment at least, Australian states are content to allow the policing of BWCs to be an internal matter for police departments, so long as the police are empowered in legislation to use this technology. Looking overseas, it would appear that other common law countries are adopting similar approaches. Again, there is not the scope in this article to consider every jurisdiction and we acknowledge that, particularly in the United States, many states may have different approaches to those we consider in this article. Our approach here, however, is to consider a selection of international jurisdictions that are adopting various practices for the regulation of BWCs.

In the United States, there appears to be a trend in legislation across a number of jurisdictions that insists that law enforcement agencies establish guidelines, policies and procedures for the use of BWCs but otherwise, like Australia, gives those agencies the authority to draft and enforce said guidelines.¹⁰⁶ Notably, on 9 June 2020, the New York State Senate passed Senate Bill S 8493 – the 'New York State Police Body-Worn Cameras Program'.¹⁰⁷ The Bill represents a departure from the reliance upon police departments to establish their own guidelines and instead sets out when BWCs will record events, the investigation of failures to record, and the preservation of recordings. The purpose of the program is to 'increase accountability and evidence for law enforcement and the residents of the state by

104 Gabrielle Knowles, 'WA Police Body Cameras to Automatically Record When Gun Is Drawn in Australian First', *The West Australian* (online, 23 March 2019) <<https://thewest.com.au/news/wa/wa-police-body-cameras-to-automatically-record-when-gun-is-drawn-in-australian-first-ng-b881142958z>>.

105 Ibid.

106 See, eg, *Law Enforcement Officer-Worn Body Camera Act*, 50 Ill Comp Stat 706/10-20 (2020); Tex Occ Code § 1701.655 (2019); Fla Stat ch 943 (2019).

107 For a summary of the Assembly and Senate votes, see 'S08493 Summary', *New York State Assembly* (9 June 2020) <https://www.nyasassembly.gov/leg/?default_fld=&leg_video=&bn=S08493&term=2019&Summary=Y&Floor%26nbspVotes=Y&Text=Y>; 'Senate Bill S8493', *The New York State Senate* (9 June 2020) <<https://www.nysenate.gov/legislation/bills/2019/s8493>>.

providing body-worn cameras to all state police officers while on patrol'.¹⁰⁸ Section 234(2) provides, *inter alia*, that cameras shall record:

- (a) immediately before an officer exits a patrol vehicle to interact with a person or situation, even if there is a dash camera inside such vehicle which might also be recording the interaction;
- (b) all uses of force, including any physical aggression and use of a non-lethal or lethal weapon;
- (c) all arrests and summonses;
- (d) all interactions with people suspected of criminal activity;
- (e) all searches of persons and property;
- (f) any call to a crime in progress;
- (g) investigative actions where there are interactions with members of the public;
- (h) any interaction with an emotionally disturbed person; and
- (i) any instances where officers feel any imminent danger or the need to document their time on duty.¹⁰⁹

The legislation gives the State's Attorney General power to 'investigate any instance where body cameras fail to record an event pursuant to this section'.¹¹⁰ The original Bill required the Attorney General to investigate failures to record¹¹¹ but the state ultimately settled on a more discretionary power by stipulating the attorney general 'may investigate' such failings.¹¹² Officers may use their discretion to not record certain sensitive encounters or when a member of the public asks the officer to switch the camera off.¹¹³ Finally, police 'shall preserve recordings' and maintain equipment in accordance with this legislation.¹¹⁴

Canada and New Zealand have not adopted BWCs nearly as widely as the other previously mentioned jurisdictions. Canada's Office of the Privacy Commission released a comprehensive guide for the use of BWCs in February 2015 but the country does not appear to have adopted BWCs in any significant way.¹¹⁵ Calls from the public for a widespread introduction of BWCs appear to be growing, particularly in the aftermath of the death of a young woman who fell 24 storeys from her apartment balcony while in the presence of police. The incident was not recorded on any BWC device.¹¹⁶ A petition that was started after this incident has

108 New York State Assembly, 'Assembly Passes Legislation to Require Body Cameras for All New York State Police Officers' (News Release, 9 June 2020) <<https://nyassembly.gov/Press/files/20200609b.php>>.

109 New York State Police Body-Worn Cameras Program, NY S 8493 (2020) § 234(2).

110 *Ibid* § 234(3) (emphasis added).

111 New York State Police Body-Worn Cameras Program, NY Assembly 8674 (2019) § 234(3).

112 New York State Police Body-Worn Cameras Program, NY S 8493 (2020) § 234(3).

113 *Ibid* § 234(4).

114 *Ibid* § 234(5).

115 Office of the Privacy Commissioner (Canada), 'Guidance for the Use of Body-Worn Cameras by Law Enforcement Authorities' (Guidance Document, February 2015) <https://www.priv.gc.ca/en/privacy-topics/surveillance/police-and-public-safety/gd_bwc_201502/>.

116 Madeline McNair, Thomas Daigle and Albert Leung, 'Demands Grow for Police in Canada to Wear Body Cameras', *CBC* (online, 6 June 2020) <<https://www.cbc.ca/news/canada/police-body-cameras-canada-1.5600852>>.

over 100,000 signatures.¹¹⁷ In a review of police use of BWCs in Canada, Canadian scholar, Erick Laming, attributes the ‘slow’ uptake of BWCs in Canada to police rather than government, noting that police in that country have been reluctant to implement BWCs due to the significant costs associated with the technology and a dearth of research in Canada indicating a need for them.¹¹⁸ New Zealand recently suspended a review of BWCs on the basis that the existing research fails to demonstrate a clear benefit for their implementation, and the associated cost of implementing this technology led them to prioritise other policing activities.¹¹⁹

V PROPOSALS FOR REGULATION OF BWCs

The preceding Parts of this article have demonstrated the possibilities for the use of this technology in light of the extant research on the topic. Existing case law indicates support for video recordings that will provide courts with the best evidence available. The limited regulation of BWCs and the considerable power police have to decide when and how this technology will be used has also been demonstrated. The final section of this article will present proposals for what appropriate regulation of BWCs might look like. The task of drafting legislation is a complex one. Finding the balance between regulating BWCs to enable the possibilities of the technology to be realised, and minimising the risks of misuse and/or harm to citizens and officers, and giving officers the requisite freedom to do their jobs, we identify a range of areas in which formal regulation, in the form of legislation, is desirable. The various guidelines and policies that we have been able to access for this article provide detailed instructions as to how this technology might be used. We do not argue with much of what the guides cover. The way many guidelines are presently drafted makes the execution of the policies inherently uncertain. The discretion is far too extensive. Failure to comply with provisions that are uncertain and often determined by the officers themselves makes it highly likely that there will be no – or at least minor – consequences for police failures to follow the guidelines. What legislation would provide that the current guidelines do not, thus, can be summed up in three words – certainty, compulsion and consequences.

A ACLU – Model Legislation

The American Civil Liberties Union (‘ACLU’) has drafted a model Act for the regulation of BWCs in the United States.¹²⁰ This model Act covers very similar matters to the guidelines and policies considered above. The model Act covers,

117 Ibid.

118 Erick Laming, ‘Police Use of Body Worn Cameras’ (2019) 20(2) *Police Practice & Research* 201.

119 Andrea Vance, ‘New Zealand Police Halt Review into Adopting Body Cameras’, *Stuff* (online, 6 May 2019) <<https://www.stuff.co.nz/national/crime/112448221/new-zealand-police-halt-review-into-adopting-body-cameras>>.

120 American Civil Liberties Union, ‘A Model Act for Regulating the Use of Wearable Body Cameras by Law Enforcement’ (Model Act, October 2020) <<https://www.aclu.org/other/model-act-regulating-use-wearable-body-cameras-law-enforcement>>.

for example, who can wear a BWC, when it should be activated and deactivated, notifying subjects that recording is taking place, and asking potential victims of crime, building occupants, and those reporting a crime if they want the officer to stop recording. The Act sets out suggested requirements for the retention of footage (six months) generally but ‘no less than three (3) years’¹²¹ where the footage captures police use of force, events around felony-level offences, events where a complaint has subsequently been made, or in situations where the officer believes the footage ‘has evidentiary or exculpatory value’.¹²² During the retention period, members of the public who meet certain requirements are permitted to view or inspect the video footage, and the Act also sets out other suggested requirements for the distribution of footage.¹²³ The provisions are certain. The word ‘may’ is used only once. Crucially, the Act addresses the consequences for breaches of the requirements. Section 1(u) says:

Should any law enforcement officer, employee or agent fail to adhere to the recording or retention requirements contained in this chapter, intentionally interfere with a body camera’s ability to accurately capture video footage, or otherwise manipulate the video footage captured by a body camera during or after its operation:

1. Appropriate disciplinary action shall be taken against the individual officer, employee or agent;
2. A rebuttable evidentiary presumption shall be adopted in favor of criminal defendants who reasonably assert that exculpatory evidence was destroyed or not captured; and
3. A rebuttable evidentiary presumption shall be adopted on behalf of civil plaintiffs suing the government, a law enforcement agency and/or law enforcement officers for damages based on police misconduct who reasonably assert that evidence supporting their claim was destroyed or not captured.¹²⁴

B Use of BWCs in the Field

The failure of Mohamed Noor and his fellow officer to record their interaction with Justine Ruszczuk Damond complicated that matter considerably. While BWC research confirms video footage will not necessarily offer a foolproof record of the event in question, it does provide additional evidence that would be likely to assist the court. The case law considered above has already noted this. In the cases where footage was missing, as in *Cubby* and *R v Cahill*, the courts were limited to oral and written testimonies of witnesses. Complicated guidelines about when and where to start recording lack the certainty required to ensure officers will be recording events at the requisite time. In the same way that any legislation containing penal provisions can include defences or excuses, provisions could be drafted to account for instances where recordings were not made. If we accept that BWC footage captures real-time evidence of a quality that supersedes the taking of a formal written statement, one way to ensure police accountability during investigations is to mandate the use of BWCs during the evidence gathering

121 Ibid s 1(j)(2).

122 Ibid ss 1(j)(2)(A)–(C).

123 Ibid ss 1(j)(1)–(2), (k).

124 Ibid s 1(u).

processes, in particular during the taking of evidence from witnesses, and that the footage be produced in court in lieu of a formal written statement. The benefit that mandatory recording provisions would bring arguably outweighs arguments about officers needing discretion to record or not. Similarly, relying on technological advances that ensure recording commences automatically upon an officer drawing their weapon (gun and/or taser) would be insufficient. There is still a need for greater certainty with respect to recording events where an officer has not drawn a weapon as the above case law suggests.

C Use of BWC Footage in Court Proceedings

Recording interactions with vulnerable witnesses which can subsequently be used in court, is one example of where BWC footage may be useful in a situation where an officer has not necessarily drawn a weapon to automatically commence recording. With appropriate regulation in place, the potential for these devices to be used in court proceedings (both civil and criminal) could be considerably increased. Here the potential of BWCs is not just about police accountability, but also about access to justice more broadly. Video recordings, for example, may be preferable to typewritten witness statements, or even used as evidence-in-chief, in court. The 2016 Victorian Royal Commission into Family Violence recommended trialling the use of cameras to gather victim statements regarding allegations of family violence for use in court.¹²⁵ Such a trial subsequently commenced in some Victorian courts in October 2018 with BWCs used to take ‘digitally recorded evidence in chief’ (‘DREC’) statements from alleged victims of family violence.¹²⁶ A review of the trial program in February 2020 recommended continuing with it for a further period to enable better assessment of outcomes.¹²⁷ As at April 2021, the trial was still continuing.¹²⁸ Regulation needs to include the range of circumstances in which individuals and their needs must be considered carefully. Vulnerable people who are subjected to recording, such as children, sexual assault complainants, and domestic violence complainants, should be given careful consideration in terms of the potential impact recordings may have on them, over and above whatever event they may have witnessed or been subjected to.¹²⁹ Notwithstanding the potential benefits of using BWCs in this way, caution has also been urged in light of the research that has demonstrated issues with interpretation of footage. Douglas and Goodmark note, for example, that this

125 *Royal Commission into Family Violence: Summary and Recommendations* (Report, March 2016) 26 <https://www.parliament.vic.gov.au/file_uploads/1a_RFV_112ppA4_SummaryRecommendations.WEB_DXQyLhqv.pdf>.

126 ‘Digitally Recorded Evidence-in-Chief’, *Victoria Police* (Web Page, 27 April 2021) <<https://www.police.vic.gov.au/digitally-recorded-evidence-chief>>.

127 Jude McCulloch et al, ‘Victoria Police Trial of Digitally Recorded Evidence in Chief: Family Violence’ (Final Evaluation Report Version No 2, 14 February 2020), <<https://apo.org.au/sites/default/files/resource-files/2020-09/apo-nid308007.pdf>>.

128 ‘Digitally Recorded Evidence-in-Chief’ (n 126).

129 Kyle J Maury, ‘Police Body-Worn Camera Policy: Balancing the Tension between Privacy and Public Access in State Laws’ (2016) 92(1) *Notre Dame Law Review* 479, 495.

technology may carry unintended consequences.¹³⁰ Recorded footage taken in the aftermath of a family violence incident might misrepresent the parties involved. An alleged perpetrator, for example, may appear calm and measured by the time police arrive, while an alleged victim may still be upset or in fear. Footage may ‘present obstacles to victims’ later claims for protection orders and diminish their credibility in court hearings’.¹³¹ While BWCs offer opportunities for complainants and victims of violence to participate in the criminal justice system, they also carry risks that will need to be carefully accounted for if such footage is to be used subsequently in court.

Challenges associated with interpreting footage, however, should not preclude BWC footage from being used for this purpose. The existing use of vulnerable witness provisions means that courts are already experienced in the use of recordings as evidence-in-chief.¹³² There are potential benefits that the use of footage may bring, for example, with respect to First Nations peoples and others who are known to be vulnerable in their contact with the criminal justice system and who have, for centuries, had to deal with the preparation of written statements by police officers and oral evidence of officers recalling events in court. This technology may well overcome issues associated with these written statements and oral evidence. The use of BWC footage would reduce, perhaps even eliminate, contamination of vulnerable witness evidence and lessen the likelihood of confusion as to how a witness’ evidence was obtained or received.

One of the more complex issues for any legislation is the retention of BWC footage. Here, there are two further issues: the discretion to retain or destroy footage, and how long footage should be stored. The Northern Territory case of *R v Layt*¹³³ provides an example of the issues raised by police officer interpretation and application of the existing retention policy. Layt was charged with one count of unlawfully causing serious harm¹³⁴ following an altercation with a man in Layt’s front yard.¹³⁵ Police alleged Mr Layt admitted to pushing and punching the complainant. Mr Layt contested the admissibility of evidence relating to these admissions on a number of bases, namely that he was not cautioned prior to making the admissions as required by law and that video recordings of the admissions were ‘destroyed, lost or ... otherwise no longer available without reasonable explanation’.¹³⁶ All four officers who attended the scene had BWCs fitted.¹³⁷ The officer in charge of the investigation recorded conversations with the complainant and his wife and the accused’s partner, but not the admissions allegedly made by

130 Heather Douglas and Leigh Goodmark, ‘Beware the Unintended Consequences of Police-Worn Body Cameras’, *The Conversation* (online, 29 September 2015) <<https://theconversation.com/beware-the-unintended-consequences-of-police-worn-body-cameras-47882>>.

131 *Ibid.*

132 See, eg, *Evidence Act 1977* (Qld) s 93A.

133 [2018] NTSC 36.

134 *Criminal Code Act 1983* (NT) s 181.

135 *R v Layt* [2018] NTSC 36.

136 *Ibid* [5] (Grant CJ).

137 *Ibid* [39](a).

the accused.¹³⁸ The other three officers each gave evidence at the hearing that they had not saved their footage for various reasons:

(e) Constable Byrnes gave evidence that he did not save the footage from the evening because he did not think it was required. At that time, he thought it was an assault matter rather than a matter which would proceed by way of indictment. In addition, he was on extended leave between July and November 2017.

(f) Constable Goldsmith gave evidence that he did not save the footage because he was not notified that his statement and any evidence in his possession was required for a prosecution file until the upgrade of the charge in November 2017. By that time the footage had been automatically deleted. Prior to that time he was unaware that any charges had been brought in relation to the incident. The attendance on the evening in question had been his only involvement in the matter.

(g) Constable Bruton gave evidence that she did not save the footage because at the time she finished her shift the following morning her understanding was there had been no formal complaint and the matter was an open investigation. She was not required to provide a statement until November 2017, and received no information concerning the investigation between the night in question and that time. Constable Bruton's general procedure at that time was to save the footage in cases involving arrest or use of force. Neither situation had presented on the night in question.¹³⁹

Two things are apparent from this evidence. First the officers made their own decisions as to the interpretation of the policy and application of it. They each admit to deleting footage because they did not think it was required and, in the case of Constable Bruton because her 'general procedure at that time' was to only save footage in certain cases of arrest or use of force.¹⁴⁰ The matter raises further issues of the retention of the footage which, as is explained in the decision, had changed from a default period of 110 days at the time of this incident, to 365 days at the time of the hearing.¹⁴¹ The discretion afforded to police in this case resulted in crucial evidence being destroyed. Ultimately, the court decided that there was no misconduct or impropriety on the part of the officers involved. This was, in our view and going only by what is referred to in the decision, the right decision. The policy sanctioned such actions by the officers: to record or not record, to delete footage, to interpret the policy for themselves and to develop their own strategies for carrying out the policy. The question is, though, whether this is acceptable in light of the objectives of introducing the technology?

While there is legislation in each Australian jurisdiction with respect to retention and preservation of evidence generally, this tends to be limited.¹⁴² Even in the United States, where there is comparatively more legislation governing retention and preservation of evidence, the retention of BWC footage is a cause for concern.¹⁴³ Barbour argues that states of the United States 'should move quickly'¹⁴⁴ to impose statutory time frames for retaining footage to avoid situations like the

138 Ibid [39](c).

139 Ibid [39](e)–(g).

140 Ibid [39](g).

141 Ibid [39](d).

142 See, eg, *State Records Act 1998* (NSW); *Privacy and Personal Information Protection Act 1998* (NSW); *Government Information (Public Access) Act 2009* (NSW).

143 Barbour (n 15).

144 Ibid 1725.

one in Albuquerque, New Mexico where ‘wide discretion’¹⁴⁵ gave officers the power to decide to retain footage or delete it at the end of their shift. This discretion resulted in video being lost or destroyed in 10 out of 59 cases in the study.¹⁴⁶

VI CONCLUSION

Our objective with this article was a relatively simple one. In circumstances where police are under increased scrutiny in relation to their conduct (and misconduct) *and* governments are spending significant sums of money rolling out BWCs with a view to (among other things) improving police accountability, we enquired as to what the existing procedures for regulating these cameras in Australia are. We found that existing legislation is limited; that police departments have considerable power to draft their own policies; that officers are afforded considerable discretion to interpret and apply these policies; and, where they fall short, enforcement procedures are drafted broadly to maximise discretion and minimise penalties for officers.

BWCs are by no means a panacea for police to protect themselves against the public or from allegations of misconduct. Nor are they a panacea for the public to be protected from police misconduct, or even brutality. The fact that George Floyd died while being recorded by four officers wearing BWCs – after legislative reforms had been introduced to mandate the use of BWCs – proves this. But effective regulation in the form of legislative reform would be a start. Police officers claiming that they thought they did not have to record an interaction or incident, or keep the footage, or claiming that they did not have the resources to do so, may well be depriving courts of the best evidence available to them. This is arguably different and makes the stakes much higher, than, for example, police use of firearms, capsicum spray or even police vehicles, none of which provide evidence for a court or are implemented with the objective of improving police accountability and relationships between police and the public.

We acknowledge the mere fact that there is a lack of legislation does not necessarily mean there is a problem. Neither, however, will the mere positioning of a BWC on a police officer’s chest and vague directions about how it is to be used guarantee that the broader objectives for their introduction will be met. There is still work that needs to be done in terms of researching the effectiveness of this technology. Does it reduce guilty pleas? Does it improve relationships between police and the public? Does it reduce police misconduct? There is a role for lawyers and legal scholars to contribute to this work by, for example, considering how best to maximise the opportunities this technology provides for the administration of justice while still ensuring police have sufficient scope to execute their duties.

145 Ibid 1740–2.

146 Ibid.