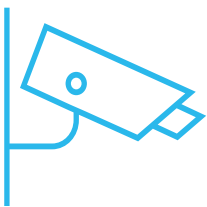


Opportunity for reform: body-worn cameras as a police accountability mechanism



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October 2021

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Acknowledgements

The author would like to thank Fiona Patten, Andrew Shears, Jeremy King, Dr Niro Kandasamy (Australian Catholic University), Dr Nicholas Barry (La Trobe University) and Dr Damon Alexander (Swinburne University of Technology) for their assistance in developing this paper.

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Executive Summary

This report analyses the inadequate internal guidelines governing body-worn camera (BWC) use by Victoria Police.

Victoria Police has a continuing problem with misconduct, including practices of racial profiling. Despite Victoria Police's efforts to educate members on appropriate policing in response to allegations of racial profiling, misconduct continues.

BWC technologies are lauded for their ability to deter police misconduct, and to create transparency and accountability when misconduct occurs. However, internal guidelines written and administered by Victoria Police are incompatible with notions of deterrence, transparency and accountability:

- Victoria Police's implementation of broad discretion guidelines concerning BWC activation inhibits the devices from executing their full deterrence potential.
- Victoria Police control public access to BWC recordings and limit transparency by denying access to footage, even that depicting misconduct by officers.
- The Surveillance Devices Act 1999 (Vic) does not permit BWC footage to be used by the public in civil proceedings, preventing Victoria Police from being held legally accountable for misconduct.

Legislative reform presents an opportunity for appropriate BWC use to be enforced, rather than just internally encouraged by Victoria Police. Thus, it is recommended:

1. Legislation outlining guidelines applicable to BWC use by Victoria Police be introduced, addressing activation/deactivation of cameras, retention and editing of footage, and public access to recordings
2. The *Surveillance Devices Act 1999 (Vic)* be reformed to permit use, communication or publication of BWC footage in civil trials

Glossary

Abbreviations:

BWC/s: Body-worn camera/s

IBAC: Independent Broad-based Anti-Corruption Commission

The Act: Surveillance Devices Act 1999 (Vic)

The Framework: Body Worn Camera Activation Framework

NSW: New South Wales

Vic: Victoria

UK: United Kingdom

USA: United States of America

1. Introduction

Despite growing pressure, Victoria Police remains ‘riddled with egregious and systematic abuses’ (Butler 2018, p. 704). There is particular concern about Victoria Police’s aggressive approaches towards ethnic minority communities, including practices of racial profiling. BWCs are commended as a policing tool for their ability to deter such misconduct.

BWCs refer to a range of small recording devices attached to police uniforms designed to collect audio and visual evidence of police officers’ interactions with the public (Letourneau 2025, p. 442; King & Lee 2020, p. 22).¹ With adoption by police departments across the world, BWCs have come to represent notions of transparency and accountability (Taylor & Lee 2019, p. 958).

Although Victoria Police have completed a BWC technology rollout, deterrence, transparency and accountability for misconduct and abuse has not been achieved. In the absence of adequate legislation, Victoria Police have been afforded almost complete control of BWC devices and recordings.

a) Method:

This report was developed through review of existing scholarly literature to understand the advantages of BWC technology in policing contexts, particularly in limiting misconduct. Information from Victorian legal experts was compiled to evaluate the consequences of current guidelines governing BWC use by Victoria Police. Analysis of existing policies from other jurisdictions was undertaken to form recommendations for future Victorian legislative reform.

¹ Also see: Victoria Police 2021, ‘Body worn cameras’, reviewed 25 June, viewed 22 August 2021 <<https://www.police.vic.gov.au/body-worn-cameras>>

1. Police racial profiling

‘In a modern society ... the Force [is] seen as a professional defence against crime and disorder, ... as a community service, to be called upon for help in circumstances of danger, threat and uncertainty.’
(Fitzgerald 1989, p. 218, in IBAC 2018, p. 1).

a) Definitions and effects:

The police are granted significant powers to search, detain and use force against individuals to ensure officers effectively complete their policing duties (IBAC 2018, p. 1). The extent of powers afforded to police increases the risk of abuse (Porter & Prenzler 2016, pp. 73-74, in Butler 2018, p. 702).

Police racial profiling refers to police either consciously or unconsciously factoring race and ethnicity into decisions to treat a person as suspicious (Hopkins 2020, p. 209). According to the Police Accountability Project, racial profiling ‘occurs when police stop, question, search or detain a person because of their race’.²

This form of racial discrimination carries serious consequences for both the police and the public (Police Accountability Project). As a breach of human rights, racial profiling contributes to victims’ feelings of isolation, alienation and detachment, and has a significant impact on mental, physical and social health (Police Accountability

² See: Police Accountability Project, ‘Racial Profiling’, accessed 26 August <<https://www.policeaccountability.org.au/issues-and-cases/racial-profiling/>>

Project). The police are key actors in forming and reinforcing ‘politics of belonging’ (Weber 2018, p. 6). By disproportionately targeting groups of ethnic minority background, police are identifying them as threatening, a message which may be absorbed by witnesses to police-public encounters (Weber 2018, p. 6). Police racial profiling generates distrust among minority communities who may hesitate or avoid reporting crimes or seeking help from the police, contributing to inefficient and unsuccessful policing (Police Accountability Project).

b) In Victoria Police:

Victoria Police publicly recognise the importance of public cooperation in underpinning police legitimacy (Victoria Police Submission 52 2018, p. 6, in IBAC 2018, p. 1). Whilst the *Victoria Police Act 2013* defines misconduct, it does not mention racial profiling or racially-motivated police misconduct (IBAC 2018, p. 60). IBAC considers incivility, human rights violations, excessive use of force and racism to be examples of ‘police wrongdoing’ (O’Byrne 2016, p. 1, in IBAC 2018, p. 61).

Police in Australia originated to privilege the demands of white settlers against indigenous populations (Weber 2020). This history shapes modern policing practices in Victoria (Weber 2020). Although police racial profiling is often portrayed as an issue of individual officers’ attitudes towards minorities, the discriminatory practice reflects the State’s attitudes towards ethnic minority communities (Haile-Michael & Issa 2015, p. 11). Examples of Victoria Police operations indicate the existence of institutional racism (Phillips 2013).

For instance, Operation Molto was conducted by Flemington police station from 5th February to 3rd March 2006 (Hopkins 2020, p. 211). Organised by Sergeant Nick Konstantinidis, the operational orders included:

‘The as yet, unidentified suspects for these serious offences are primarily young African males who either live or from time to time attend the Flemington Public Housing Estate’

(Outline of Police Evidence 2010, p. 16, in Hopkins 2020, p. 211).

Field contact records identified African males from Flemington as “suspects”, and considered activities including gathering in groups, “loitering”, being nervous, or wearing “gangster” clothing as suspicious (Hopkins 2020, pp. 213-214). By the beginning of the operation in February 2006, there were already numerous complaints from targeted groups of over-policing, excessive force and brutality by Flemington police (Hopkins 2020, p. 212). Many youths of African origin claim they were stopped and searched repeatedly by the police prior to, during and after Operation Molto (Hopkins 2020, p. 212).

c) Haile-Michael & Ors v Konstantinidis (2010) case:

The Haile-Michael & Ors v Konstantinidis (2010) case, first lodged with the Human Rights Commission in 2008 and settled in the federal court in 2013, alleged racial profiling practiced by Victoria Police (Chadwick 2013). The six applicants of African descent claim they were victims of assault and use of excessive force by Victoria Police in Flemington and North Melbourne from 2005 to 2009 (Chadwick 2013; Haile-Michael & Issa 2015, p.15). The case sought to hold Victoria Police and the State of Victoria responsible for failing to prevent racial discrimination (Chadwick 2013).

This case was the first Australian litigation to provide evidence of ‘systemic racial profiling’ by a police force, detailing how Victoria Police utilise racial profiling as an operational practice with authorisation from police leadership (Hopkins 2020, p. 210).

As part of court proceedings, Law Enforcement Assistance Program (LEAP) data was analysed to find that between 1st January 2005 and 31st December 2008, of 14-19 year-olds in Flemington and North Melbourne, those of African or Middle Eastern origin were overrepresented 1.8 times in police interactions and 1.6 times in detention and questionings (Hopkins 2020, p. 218). This analysis also realised that from 2006 to 2009, people of African origin in Flemington and North Melbourne, despite having lower rates of crime, were 2.5 times more likely to be stopped than other groups (Police Accountability Project).

Despite officially denying allegations of racial discrimination, Victoria Police settled in the Federal Court of Australia in 2013, provoking a ‘number of unprecedented changes’ to the organisation (Hopkins 2020, p. 221). Victoria Police agreed to hold a six-month inquiry into policing practices to produce yearly reports detailing an action plan (Haile-Michael & Issa 2015, p. 10).

d) ‘Equality is not the same’:

Victoria Police’s inquiry as required by the Haile-Michael case settlement conditions was praised by applicant Daniel Haile-Michael as a ‘monumental event’ (Chadwick 2013). In 2013, Victoria Police published their three-year action plan (2014-2017), titled ‘Equality is not the same’ (Haile-Michael & Issa 2015, p. 10). In this report, Victoria Police admit that ‘it is incumbent on [them] to be explicit in [their] zero tolerance of [racism and racial profiling] and to demonstrate this commitment through action’ (2013, p. 2). Collected via community consultation, the report specifies improvements concerning cross cultural training, communication and respect and field contact policy (Victoria Police 2013).

Victoria Police pledged to implement cross cultural training for officers, addressing human rights principles, unconscious bias, respectful cultural communication and community engagement to prevent mistrust amongst minority communities (Victoria

Police 2013, p. 31, 43). Community feedback emphasised the often rude, aggressive and interrogative approach of Victoria Police in interactions with minority communities (Victoria Police 2013, p. 26). Victoria Police pledged to implement a Community Engagement Strategy to improve policing practices (Victoria Police 2013, p. 24).

Victoria Police revised field contact policy and processes, including definitions of “reasonable suspicion” (Victoria Police 2013, p. 7). Since 2015, modifications to field contact policy have determined that “reasonable grounds” for suspicion cannot be ‘based solely on a person’s location within an area with a high incidence of crime’ (Victoria Police 2016b, p. 3, in Hopkins 2020, p. 221).

The production of the ‘Equality is not the same’ report and annual follow-up reports (2014-2020) indicates Victoria Police’s awareness of their responsibility to prevent racial profiling.

e) Victoria Police racial profiling since 2013:

In 2015, Victoria Police officially announced a “zero tolerance” policy towards racial profiling (Green 2015). Despite Victoria Police’s stated commitment to preventing the practice, according to the lead lawyer in the Haile-Michael case, allegations of police racial profiling continue (Hopkins in Lewis 2017). Maki Issa, one of the applicants to the Haile-Michael (2010) case, states ‘this is a very deep-rooted issue ... you’d be very naïve to even think it would have stopped’ (Issa in Lewis 2017).

Daniel Haile-Michael and Maki Issa (2015) have conducted interviews with young African-Australians in Victoria to understand experiences of police racial profiling since the 2013 Federal Court settlement. The interview responses indicated perceptions of over-policing, through common stop-and-searches and excessively interrogative approaches by Victoria Police (Haile-Michael & Issa 2015, p. 12).

Interviewees also reported experiences of under-policing, where citizens are undermined or ignored by police when seeking assistance or attempting to report crimes (Haile-Michael & Issa 2015, p. 12). Police approaches to ethnic minorities continue to perpetuate an 'underlying assumption of guilt' (Haile-Michael & Issa 2015, p. 13). As a result, participants adopted adaptive behaviour contributing to social isolation, including avoiding large public gatherings (Haile-Michael & Issa 2015, p. 14).

African-Australians' experiences of police racial profiling experienced in Victoria reflect complaints of other minority communities, particularly Muslims (Phillips 2013). In a 2019 case that has 'renewed anger about racial profiling by Victoria police [*sic*]', a man was forcefully attacked and had his arm broken when he was arrested by Victoria Police (Davey 2019). According to his lawyer, the man of Greek background was reportedly targeted for his Middle Eastern looking appearance, as Victoria Police mistook the man for a suspect they were pursuing (King, in Davey 2019). Whilst there is no official data detailing the proportions of ethnic minorities stopped-and-searched by Victoria Police,³ compiling anecdotal information indicates police racial profiling continues, despite Victoria Police's stated commitment to preventing the practice (Haile-Michael & Issa 2015, p. 21).

³ As part of the Haile-Michael & Ors v Konstantinidis (2010) 2013 settlement conditions, Victoria Police agreed to undertake a six-month receipting trial in which they would record information about the citizens they approached for stop-and-searches. This was to gain data surrounding proportions of police targeting of minority groups. However, in this receipting trial Victoria Police neglected to record ethnicity, meaning the trial produced no statistical data concerning police racial profiling.

See: Lewis, D 2017. 'Victoria Police should face new case over racial profiling of African men, lawyer says', *ABC News*, 5 May, viewed 17 August 2021
<<https://www.abc.net.au/news/2017-05-05/victoria-police-should-face-second-discrimination-case-lawyer/8496348>>

2. Body-worn cameras

a) Theoretical advantages and disadvantages:

Deterrence

When employed as a policing tool, BWCs are anticipated to deter intensification of hostility amongst the parties involved in police-public interactions (Ariel et al. 2018, p. 14). Deterrence theory refers to the adaptation of behaviour based on the self-awareness that such conduct is being viewed and assessed by others (Ariel et al. 2018, p. 14). BWCs, by recording interactions, are believed to have a deterrence effect on both the police and the public, potentially preventing escalation of violence and police abuse of power (Ariel et al. 2018, p. 14).

A study of the Mesa Police Department in Arizona, USA, recorded a 75 per cent decrease in instances of use of force and a 48 per cent reduction in complaints of misconduct by camera officers (Ready & Young 2015, p. 447). This reduction was interpreted as a result of increased caution amongst officers equipped with BWCs, who conducted significantly less arrests and stop-and searches than non-camera officers (Ready & Young 2015, p. 454).

Similarly, the Phoenix Police Department in Arizona, USA reported a 22 per cent decrease in citizen complaints with BWC implementation (Katz et al. 2014, in Laming 2019, p. 205). Another study recorded data from a 12-month period of over 1000 officer shifts where BWC technologies were employed (Ariel et al. 2015). Citizen complaints reduced from 24 instances in the 12-months before the trial to three instances during the trial, while use of force instances decreased from 67 to just 25 (Ariel et al. 2015, p. 524).

Additionally, the deterrence effect potentially modifies citizens' behaviour in police encounters. A trial conducted by the Aberdeen Police Department in the UK reported 62 assaults against non-camera officers, yet just one assault against a camera officer (ODS Consulting in Laming 2019, p. 206).

BWCs are considered uniquely positioned for deterrence compared to other camera technologies. The proximity of visibility of BWCs in police-public encounters are thought to have an almost certain self-awareness effect compared to technologies such as closed-circuit television (CCTV) (Ariel et al. 2018, p.10).

Judicial evidence

BWC technologies are anticipated to benefit the judicial process through the provision of accurate evidence (Zamoff 2019). There exists concern, particularly among criminal justice activists, about the assumed infallibility of BWC footage (Narwal 2020). Judgement of BWC footage remains influenced by the perspective, framing and comprehensiveness of the recording, as well as viewers' implicit biases (Fan 2018, p. 1662). Of filed civil cases in the US federal court system, one third of BWC footage presented was incomplete, meaning the entirety of the encounter was not recorded or was obstructed by the physicality of such interactions (Zamoff 2019, p.36).

However, BWC footage is undoubtedly considered more reliable than alternative forms of evidence, particularly competing eyewitness testimonies 'fraught with self-interest, emotion, and all the frailties of memory and perception' (Zamoff 2019, p.16). As a form of video evidence, BWC footage has the comparative potential to more accurately portray the degree of force used and the reactions of citizen subjects in cases of alleged police abuse (Zamoff 2019, p. 15).

As a single, concrete form of evidence, BWC footage also has the potential to maximise the efficiency of court proceedings (Zamoff 2019, p. 17). Availability of

BWC footage typically accelerates judges' rulings, reducing the average length of proceedings by approximately 50 per cent (Zamoff 2019, p. 51). Victoria Police Superintendent Jason Kelly has stated BWCs provide "better and more efficient justice outcomes by streamlining evidence gathering and corroboration" (Kelly 2020, in Houston 2020).

Privacy

Finally, privacy concerns remain at the forefront of criticism of BWCs as a surveillance technology. BWCs have proliferated as the preferred technology-led solution for police misconduct and abuse (Fan 2018, p. 1657). There is specific anxiety concerning police recording via BWCs of particularly vulnerable communities who are already heavily monitored and over-policed (Fan 2018, p. 1665).

b) Attitudes towards body-worn cameras:

Research of attitudes towards BWC technology remain divergent (McCulloch et al. 2019). Some police officers are concerned that BWCs could threaten their reputations by providing concrete proof of misconduct (Gaub et al. 2016 & Katz et al. 2015, in McCulloch 2019, p. 11). However, other research indicates that some police approach BWCs as a positive means of enhancing policing (Jennings et al. 2015 & Ready & Young 2015, in McCulloch 2019, p. 11). In the study of the Mesa Police Department, assigned camera officers were more likely than non-camera counterparts to report that BWCs were helpful in interactions with the public (Ready & Young 2015, p. 454).

An Australian survey of police detainees found a majority of participants expressed support for BWCs as an avenue for improving police accountability by enforcing police adherence to procedural guidelines (Taylor & Lee 2019, p. 968). However,

police upholding citizens' right to privacy and informing subjects that the BWC is recording were essential to detainee support (Taylor & Lee 2019, p. 971).

c) Introduction of body-worn cameras in Victoria:

Numerous factors prompt international police adoption of BWCs. Introduction of BWCs to policing reflects the general embrace of surveillance technology as an investigative tool (King & Lee 2020, p. 22). In order to enhance legitimacy and public confidence in the police, some departments adopt BWC technology as a mechanism to maximise transparency (Letourneau 2015, p. 445).

Alternatively, Victoria Police initially trialled BWC technology in 2017 as a tool to enhance policing of family violence matters (King & Lee 2020, p. 23). The initial introduction of BWC technology was funded by the Victorian Government's Public Safety Package as part of the 2016-17 state budget (Victoria Police 2021). This was in response to recommendation 58 from the 2016 Royal Commission into Family Violence (Houston & Mills 2021).

It is estimated more than 8000 BWCs have been deployed by the Victorian Government,⁴ worn by frontline police officers, protective services officers (PSOs) and Ambulance Victoria paramedics (Houston & Mills 2021).

⁴ Full deployment remains unconfirmed. Planned rollout of 11,000 body-worn cameras was reportedly completed by Victoria Police in 2019. See: Victoria Police 2021, 'Body worn cameras', reviewed 25 June, accessed 22 August 2021 <<https://www.police.vic.gov.au/body-worn-cameras>>

3. Body-worn cameras as a police accountability mechanism

“[T]echnology is a tool, not a policy solution”
(Miller 2019, p. 149).

BWC technology is not a panacea for problems of modern policing (Blewer & Behlau 2021). The introduction of BWCs as a police accountability mechanism must be accompanied by appropriate guidelines enforced by legislative reform.

Legislation governing use of the technology should address concerns of police discretion, citizen privacy, editing and retention of footage (Berdjjs 2016, p. 2).

Discretionary principles are embedded into processes including charging, arresting, investigating and reporting to account for the unpredictability of police work (Taylor & Lee 2019, p. 968). In a policing context, discretion refers to the broad powers of decision-making given to officers concerning their approaches police procedures (Hirby 2015, in Ariel et al. 2016, p.457). The adoption of new technologies into established police cultures influences which agencies are allocated control of guidelines of use and penalties for misuse (Ready & Young 2015, p.448). The sustained strength of police discretion is likely why comprehensive legislative guidelines governing police utilisation of BWC technology is lacking (Taylor & Lee 2019, p. 968).

Currently, Victoria Police have almost total control of BWC use (King & Lee 2020, p. 22). Although it is generally agreed BWCs will play an increasingly significant role in police accountability, regulation is still often given to the police (Blewer & Behlau 2021). Use of BWCs by Victoria Police is currently regulated by the *Body Worn Camera Activation Framework* (“*The Framework*”), and the *Victoria Police Manual*,

rather than state government legislation (Victoria Police Chief Commissioner's Instructions CCI 02/18 2018, in King & Lee 2020, p. 23). Due to lack of legislative oversight, there is mounting concern amongst Victorian lawyers relating to potential BWC misuse by Victoria Police (Willingham 2019).

a) Discretion of activation/deactivation:

The principal issue of police discretion is the activation/deactivation of BWCs. The Framework designates that Victoria Police officers are expected to activate BWCs when:

- i) 'Police officers are exercising a legislated or common law power and the recording would assist in collecting evidence: or
- ii) Any other occasion when the police officer believes a recording necessary:
 - a) To capture an incident occurring, likely to occur, which has occurred; or
 - b) That would provide transparency of a public interaction or police activity'

(Victoria Police Chief Commissioner's Instructions CCI 02/18 2018, in King & Lee 2020, p. 23).

Victoria Police state that officers are required to activate BWCs:

'...when they believe recording is necessary to capture an incident or interaction with the public and when they are exercising a police power.'
(2021)

Victoria Police officers are, thus, given almost complete discretion concerning activation/deactivation of BWCs (King & Lee 2020, p. 23).

Alternatively, the Metropolitan Police Department of the District of Columbia (Washington D.C, USA) has a publicly available 'Body-worn Camera Program' listing over 30 specific situations where officers must activate their BWCs (General Order-SPT-302.13, sV.3-4, pp. 7-9). This document also indicates six instances appropriate for deactivation (General Order-SPT-302.13, sV.11.a, pp. 11-12). These more detailed instructions, compared to Victoria Police guidelines, limit officer discretion concerning BWC activation/deactivation.

Data suggests BWCs are more effective deterrence and transparency tools when police discretion regarding camera activation/deactivation is limited. A 2015 study of the Phoenix Police Department discovered that between 20 and 29 per cent of incidents that should have been captured by BWCs actually were (Taylor 2016). A study of the Mesa Police Department found that allowing officers discretion without ramifications resulted in a 42 per cent decrease in the overall amount of footage (Federation of Community Legal Centres (Victoria) 2018). Another US study established that use of force instances decreased with high compliance of BWC activation guidelines (Ariel et al. 2016, p. 459). Additionally, use of force rates increased by 71 per cent when officers were afforded complete discretion in BWC activation/deactivation (Ariel et al. 2016, p. 459).

In instances of BWC activation failure or premature deactivation, Victoria Police officers are expected to make a notation describing the circumstances through a police diary, Initial Action Pad, Electronic Patrol Duty Return Form, or on a BWC recording prior to deactivation (Victoria Police Chief Commissioner's Instructions CCI 02/18 2018, in King & Lee 2020, p. 23). Failure to activate or notation of early deactivation are predominantly investigated internally, either by the professional standards unit or via internal inquiry by a superior officer (King & Lee 2020, p. 23;

Tomazin 2019). This reflects the wider investigative rights afforded to Victoria Police (Butler 2018, p. 703).⁵

While there is potential for punishment, Victoria Police has never pursued action against an officer for BWC misuse (Willingham 2019). Victorian Minister for Transport Infrastructure, Jacinta Allen, affirms that officers face discipline for not following guidelines, (Willingham 2019). Still, the Victorian Government has afforded Victoria Police almost complete responsibility for managing potential BWC guideline violations committed by their officers (Tomazin 2019).

It is believed mid-interaction activation - enabled by broad officer discretion policies – inflames citizen hostility towards officers, thus prompting more aggressive and forceful police responses (Ariel et al. 2018, p. 16). BWC researcher Barak Ariel recommends officers perform verbal reminders of the presence and activation of BWCs at the beginning of police-citizen encounters (Ariel et al. 2016, p. 461). Verbalised BWC activation functions as an ‘important ecological factor cue that inhibits criminal conduct’ (Ariel et al. 2018, p. 18). According to Victoria Police (2021), officers are not required to inform citizens when they activate BWCs.

Additionally, for BWCs to effectuate deterrence, there must be a blanket guarantee of meaningful discipline for failure to capture complete footage in all cases where a complaint is lodged by the public (Federation of Community Legal Centres (Victoria) 2018). Absolute accountability can only be achieved when the enforcement of disciplinary action for BWC breaches is removed from the organisation the technology seeks to hold responsible. Instructions guiding use of BWCs by Victoria Police would be better addressed through legislative reform. To maximise amounts

⁵ According to the Law Institute of Victoria, up to 90 per cent of complaints, and according to the Police Accountability Project, approximately 97 per cent of complaints, are internally investigated by Victoria Police, including serious breaches of human rights. See: Butler, S.O.B 2018, ‘Policing the police: Independent investigations for Victoria’, *The University of New South Wales Law Journal*, vol. 41, no. 3

of footage captured by police, reasons for activation/deactivation require specification. Appropriate reasons for deactivation should protect the privacy of police informants, victims of sexual abuse and child victims (Ariel et al. 2018, p. 18). Ultimately, legislative reform should recognise that conditions governing BWC use, rather than the technology itself, more effectively deter police misconduct.

b) Retention of footage:

Retention concerns the storage periods of BWC footage. Victoria Police (2021) affirm they retain 'non-evidentiary footage' for a period of 90 days, and other footage for periods 'determined by legislation'. However, there is a lack of transparency surrounding consistency of retention periods between Victorian police departments (Federation of Community Legal Centres (Victoria) 2018).

There is a current legislative absence concerning retention of footage and disciplinary action for failure to comply with retention requirements (King & Lee 2020, p. 24). Despite Victorian guidelines outlining that footage should be retained for a minimum of 90 days and queued to be deleted thereafter, the decision of retention/deletion often sits with an individual officer (King & Lee 2020, p. 24). It remains the responsibility of individual officers to bookmark BWC footage as "of interest", or footage could be loaded for disposal (Federation of Community Legal Centres (Victoria) 2018).

An indiscriminate minimum retention period of 90 days for all footage would allow adequate assessment of relevancy of recordings (Federation of Community Legal Centres (Victoria) 2018). Longer retention periods are recommended for footage relating to criminal charges, citizen complaints against officers and use of force instances (Federation of Community Legal Centres (Victoria) 2018). Footage irrelevant to such instances should then be deleted after the compulsory 90-day retention period (Federation of Community Legal Centres (Victoria) 2018). There

should be publicly available and specifically determined guidelines for Victoria Police BWC footage retention periods, preferably addressed through state legislation (Federation of Community Legal Centres (Victoria) 2018).

c) Editing of footage:

An additional concern is officer discretion relating to the editing of footage.

According to Victoria Police guidelines, officers can edit footage:

‘... when preparing evidence for a hearing before a court, where absolutely necessary or required by law’.

(Victoria Police 2021)

Minister for Transport Infrastructure, Jacinta Allen, assures that BWC footage is only edited in accordance with court orders (Willingham 2019). However, there is no legislation detailing requirements and guideline enforcement remains the responsibility of Victoria Police (Willingham 2019).

d) Public access to footage:

Public access to BWC footage is an important factor underpinning police transparency, a ‘component of building and maintaining trust between the police and the community’ (Tausch 2019, p. 374).

Currently, the *Surveillance Devices Act 1999 (Vic)* (“the Act”) defines BWC footage captured by a Victoria Police as ‘Protected Information’ (*Surveillance Devices Act 1999 (Vic)* s30D(ab), p. 70). Thus, Victoria Police BWC footage is not accessible through a Freedom of Information request. According to Victoria Police, a party lodging a complaint against an officer can request to view relevant BWC footage at

their local police station; however, access can be denied.⁶ There is a lack of legislation governing reasons for denying public access to BWC footage or investigating legitimacy of denials (King & Lee 2020, p. 24).

Police access to BWC footage can benefit police accountability by capturing examples of effective and ineffective policing in police-public interactions. Police access to this footage allows it to be utilised for educational training purposes, such as teaching techniques for de-escalation. Police access to BWC footage can proactively address police accountability (Sacharoff & Lustbader 2017, p. 285). However, the secrecy surrounding BWC recordings of alleged misconduct and prioritising police access likely significantly undermines public trust in Victoria Police (Federation of Community Legal Centres (Victoria) 2018).

‘The community is supposed to have faith that police will be held to account [by BWC footage] ... Yet at the same time, the government has given that organisation almost absolute control over the footage.’
(King, in Australian Lawyers Alliance 2020)

The Federation of Community Legal Centres (2018) advocates for an ‘accountability baseline’, whereby victims of alleged Victoria Police misconduct should have access to complete footage. Lawyers should be granted access when requested to guide clients through the complaints process (Federation of Community Legal Centres (Victoria) 2018). This would develop a ‘victim-centred process’ encouraging police accountability (Federation of Community Legal Centres (Victoria) 2018).

There are benefits to allowing police access to BWC footage, but there is potential for greater transparency if public access is granted in reasonable circumstances.

⁶ According to Victoria Police, ‘there may be circumstances where [citizen access to BWC footage] will not be permitted, such as when the exposure of that footage may be put *[sic]* someone in danger, present a risk to witnesses or a risk of evidence being destroyed’. See: Victoria Police 2021, ‘Body worn cameras’, reviewed 25 June, accessed 22 August 2021 <<https://www.police.vic.gov.au/body-worn-cameras>>

Considering there is currently no guaranteed access for complainants of police misconduct, the system requires reform. Implementing legislative oversight would establish adequate access for complainants and police alike, whilst protecting the privacy rights of those present in BWC recordings (Federation of Community Legal Centres (Victoria) 2018).

e) Appropriate legislation concerning public access:

Legislation from US jurisdictions regarding public access to police BWC footage can enrich potential Victorian reform.

North Carolina legislation heavily restricts public access to BWC footage, establishing that BWC '[r]ecordings are not public records' (GS 132-1, in Emory 2019, p. 489). North Carolina requires the person seeking disclosure or release of relevant BWC recordings to demonstrate that there is public interest in the footage not being withheld (Emory 2019, p. 492). If a person is wanting to file a suit against a police officer for misconduct or excessive use of force, General Statutes 132-1.4A requires they request access via a police department, who like Victoria Police, are allowed almost complete discretion to deny access (Emory 2019, p. 492). Otherwise, individuals can request disclosure or release of footage from a superior court (GS 132-1.4A(d)(f), in Emory 2019, p. 492). These procedural barriers are particularly difficult to navigate for those without access to legal representation, preventing the realisation of police transparency (Emory 2019, p. 493; Miller 2019, p. 151).

Alternatively, pre-2018 laws in Washington allowed the release of footage to requesters, even those not directly involved in the footage, including onlookers who contacted emergency services (Miller 2019, p. 150). For footage that wasn't released upon request, most was made publicly available via upload to police YouTube channels (Fan 2018, p. 1666). Whilst this increased transparency of police

activities, the broadness of access has negatively impacted vulnerable people whose sensitive experiences, such as domestic abuse or sexual assault, were available for public viewing (Fan 2018, p. 1666). While increased police transparency is required in Victoria, Washington's broad BWC footage disclosure laws serve as a 'cautionary tale' of failing to protect citizen's privacy rights (Fan 2018, p. 1666).

Middling the disclosure spectrum is California. The California Public Records Act (1968) demands public records be publicly available for inspection (Legislative Counsel's Digest, AB 740 Ch. 960 2018). Assembly Bill 748 (2018) amended S6254 of the Government Code, establishes that recordings should be either withheld or released based on what best serves the public interest. AB 459 (2017) establishes that the California Public Records Act does not require footage from sensitive investigations be disclosed, such as that relating to rape and sexual assault, child abuse or domestic violence. AB 459 (2017) also demands that police agencies demonstrate the public interest in withholding such footage rather than releasing it.

Legislation regarding public access should remove the definition of BWC footage as 'Protected Information' as is currently defined by the Act, allowing access to footage for those that request it and are related to the footage – either as individuals featuring in the recording or as their legal representatives. Further legislative amendments should then specify instances in which disclosure or release of footage would not best serve the public interest, such as in sensitive crimes of domestic or sexual abuse, crimes of child abuse and crimes involving police informants. It should be included that it is the responsibility of Victoria Police agencies to justify their withholding based on the reasons for non-disclosure stated as not serving the public interest. This approach would withdraw the ability of Victoria Police to deny access to footage without legislative oversight. Proposed legislative reform would help protect privacy rights of particularly vulnerable people, whilst still enabling BWC footage to be disclosed or released if requested by

relevant parties. Legislative reform as suggested in this past section would arrange for BWC footage to be used for police transparency purposes.

4. Body-worn camera footage in civil trials in Victoria

a) *Surveillance Devices Act 1999 (Vic) and Regulations:*

The *Surveillance Devices Act 1999 (Vic) and Regulations* define BWC footage as 'protected information' (*Surveillance Devices Act 1999 (Vic) s30D(ab)*, p. 70).

Legislation concerning BWCs was introduced to the Act by the Justice Legislation Amendment (Body-worn Cameras and Other Matters) Act 2017, known as "the 2017 Act" (*German v State of Victoria (2020) VCC 1517*, p. 3). The stated purpose of this amendment was 'to extend restrictions on the use, communication, and publication of information' recorded by BWCs (*Justice Legislation Amendment Act 2017 s1A(ii)*, in *German v State of Victoria (2020) VCC 1517*, p. 3).

Section 30F permits the use of local protected information in the following circumstances:

- (1) 'Local protected information may be used, communicated or published if it is necessary to do so for any of the following purposes –
 - (a) the investigation of an offence;
 - (b) the making of a decision whether or not to bring a relevant proceeding in respect of an offence;
 - (c) a relevant proceeding in respect of an offence;
 - (d) an investigation of a complaint against, or the conduct of, a public officer within the meaning of this Act or a public officer within the meaning of a corresponding law;
 - (e) the making of a decision in relation to the appointment, reappointment, term of appointment, termination or retirement of a person referred to in paragraph (d);
 - (f) the keeping of records and the making of reports by a law

enforcement agency in accordance with the obligations imposed by Division 2;

(g) an inspection by the Victorian Inspectorate under section 30P;

(ga) an inspection by the Commonwealth Ombudsman under a provision of a corresponding law that corresponds to section 30P;

(h) An investigation under *the Privacy and Data Protection Act 2014* or the law of a participating jurisdiction or of the Commonwealth concerning the privacy of personal information.

(1A) Without limiting subsection (1), local protected information obtained from the use of a body-worn camera or a tablet computer by a police officer or an ambulance officer acting in the course of the officer's duty may be used, communicated or published for –

(a) the education and training of police officers or ambulance officers as the case requires; or

(b) any prescribed purpose.'

(Surveillance Devices Act 1999 and Regulations, s30F, pp. 73-75).

b) German v State of Victoria (2020):

On 25th September 2020, the Victorian County Court ruled in the German v State of Victoria case (Yeung 2020). The plaintiff was requesting access to BWC footage, which allegedly demonstrated police misconduct, to present as evidence in a civil trial against Victoria Police (German v State of Victoria (2020) VCC 1517, p. 1).

The State of Victoria had declined access to the footage citing that reckless use is a criminal offence under S30E of the Act (German v State of Victoria (2020) VCC 1517, p. 1). Judge Davis interpreted that the Act, despite accounting for use and disclosure for criminal, disciplinary, coronial proceedings, police educational purposes and in family violence matters, it is not permitted in civil trials in Victoria

(German v State of Victoria (2020) VCC 1517, p. 3). Judge Davis stated that the wording of the Act aligned with its purpose to restrict use of BWC footage, and that had the government intended for it to be accessed in civil proceedings it would have been specifically included (German v State of Victoria (2020) VCC 1517, p. 4, 8).

c) Implications:

Victorian legislation authorising use, communication and publication of BWC recordings remains restrictive (King & Lee 2020, p. 23). Martin Pakula, the Attorney-General at the time of the 2017 Act, stated it 'ensures there are adequate protections against the unauthorised disclosure of the footage captured by the [body-worn] cameras' (Pakula 2017, in German v State of Victoria (2020) VCC 1517, p. 4). Though there is uncertainty concerning the proposed infallibility of BWC footage, this restriction is denying crucial visual evidence of police behaviour from being disclosed to judges, juries and courts in civil matters (Yeung 2020).

Upon the German v State of Victoria ruling, Judge Davis acknowledged 'the difficulties which this prohibition may cause for plaintiffs in civil proceedings' (Houston & Mills 2021). Restricting the use of footage in civil cases predominantly burdens the public, as civil proceedings are the judicial avenue for the public to launch lawsuits alleging police misconduct or excessive use of force.

A victim of a 2017 assault by guards at Port Phillip Prison is demanding access to BWC footage to support his claim for damages against the responsible security company (Baker 2021). However, the plaintiff and his legal team remain restricted from access to the footage concerning the assault (Baker 2021).

Alternatively, in criminal cases Victoria Police are able to substantiate criminal charges against citizens utilising BWC footage. Thus, the restriction from accessing

BWC footage in civil cases creates ‘an inconsistent situation where courts, judges and juries can access BWC footage in criminal matters, but not in civil matters’ (Yeung 2020).

An additional inequality lies in the penalties for reckless disclosure of BWC footage, including during civil proceedings. According to s30E(a) of the Act, criminal penalties apply to unlawful use, communication or publication of BWC footage, including up to two years imprisonment (Surveillance Devices Act 1999 (Vic) and Regulations, S30E(1), p. 71). Importantly, there are no legislative sanctions regarding punishment for Victoria Police officers for BWC misuse (King & Lee 2020, p. 23).

BWC are lauded for recording instances where misconduct by the police and public occur. BWCs capture the exact kind of evidence which should be available in civil matters alleging police misconduct (Houston 2020). Authorisation to use BWC footage in civil cases brought against the police would ‘help vindicate disenfranchised members of society whose claims of police abuse have long been met with scepticism’ (Sacharoff & Lustbader 2017, p. 288).

The inability to use BWC footage captured by Victoria police in civil proceedings generates a disparity as other police recordings, including those captured by CCTV, police cell, police station lobby and police van cameras, are permitted to be utilised in criminal and civil proceedings alike (Yeung 2020).

The largely police dominated and internally investigated complaints system, alongside the inability to present BWC footage as evidence of police misconduct in civil trials, means the public remain obstructed from pursuing genuine action against Victoria Police. Currently, unless a citizen is charged with a crime captured by BWC footage, ‘nobody outside of Victoria Police, including a judge, is ever to see the footage’ (King in Houston & Mills 2021).

Although BWCs capture police misconduct, these devices are not currently enabled for police accountability because police access is prioritised over that of the public. Without adequate legislation governing use of BWC footage, the potential for police accountability is going ‘largely unrealised’ (Sacharoff & Lustbader 2017, p. 269). Equality of access to BWC footage for criminal and civil matters can be achieved if the needs of both law enforcement and police accountability are balanced by Victorian Government legislation.

d) *Surveillance Devices Regulation (NSW) 2014:*

‘Without legislative change, the cameras will remain a device for police purposes only.’

(King & Lee 2020, p. 25).

The *German v State of Victoria* ruling and omissions in the Act have brought about demands for reform of laws outlining BWC footage use (Houston 2020). Lawyers have called upon previous Attorney-General, Jill Hennessy, and current Attorney-General, Jaclyn Symes, to urgently reform the Act and relevant legislation (Houston 2020, Houston & Mills 2021). Symes has flagged potential reform and ensured that the Victorian Government has communicated with key stakeholders, stating ‘it is important that relevant evidence is available in appropriate circumstances’ (in Houston & Mills 2021).

Liberty Victoria President, Julian Burnside QC, supports reform, declaring ‘[i]f this is the law, then it is wrong’ (in Houston 2020). Gregor Husper, Principle Solicitor of the Police Accountability Project, expresses that BWC footage is currently ‘completely useless to members of the public wanting to allege misconduct by the police’ (in Houston 2020).

Jeremy King, police misconduct lawyer at Robinson Gill and Victorian President of the Australian Lawyers Alliance, states ‘the fact that police officers cannot be compelled to release footage from body-worn cameras in civil proceedings completely undermines [the] potential benefit [of scrutinising police behaviour]’ (in Australian Lawyers Alliance 2020). Reforming the Act to enable use of BWC footage in civil proceedings would benefit the cause of police accountability.

Since the contentious *German v State of Victoria* case ruling, changes to the Act concerning use of BWC footage should be introduced via legislative amendments. An appropriate example is the NSW *Surveillance Devices Regulation 2014*, which encompasses civil litigation as well as other instances where use of BWC footage is authorised (King 2021). This regulation permits:

4. ‘Use, communication or publication of police body-worn video
 - (1) For the purposes of section 40(4A)(c) of the Act, the information obtained from the use, in accordance with section 50A, of body-worn video equipment by a police officer may be used for the purposes on any one of the following –
 - (c) Any proceedings of a court or tribunal in which the NSW Police Force or the State is a party or in which a member of the NSW Police Force is called as a witness,’
(Surveillance Devices Regulation 2014 (NSW)).

To permit BWC footage to be used in civil proceedings in Victoria would greatly benefit police accountability by allowing members of the public to substantiate claims of alleged police brutality. The Victorian Government should pursue reform, as the Attorney-General has flagged (Houston & Mills 2021). This reform should be modelled after that introduced to NSW by the *Surveillance Devices Regulation 2014*.

e) Future for public access:

As visual evidence, BWC footage has a particular ability to produce emotional reactions amongst viewers (Saulnier et al. 2019). Viewing BWC footage, as opposed to reading transcripts or police reports, produces moral outrage, leading to perceptions of decreased officer credibility and police use of force justifiability, and increased officer culpability (Saulnier et al. 2019, pp. 740-742).




Other forms of visual footage, including mobile phone camera recordings and CCTV, capture misconduct and excessive use of force by Victoria Police. CCTV footage of the 2018 arrest of a disability pensioner showed Victoria Police beating the victim with batons, spraying him with capsicum spray and a high-pressure water hose (Davey 2018). Victoria Police assistant commissioner, Luke Cornelius, admitted he 'was very concerned by what the vision depicted' and was unsure the case would have received so much attention had CCTV footage not been available (in Davey 2018). A violent September 2021 arrest by Victoria Police at Flinders Street Station received media attention when mobile phone footage was captured by a bystander (ABC News 2021).

With adequate BWC policy guaranteeing strict activation and public access to BWC footage in reasonable circumstances, Victoria will not have to rely on infrequent footage from non-BWC technology to have transparency of police misconduct. Increased access would allow supported media coverage of instances of Victoria Police misconduct, enhancing public conversations about police excessive use of force and racial profiling.

5. Conclusion

Victoria Police has stated in the 'Equality is not the same' reports that they oppose racial discrimination in policing. However, their past efforts of cross-cultural training and community consultation have been inadequate in preventing police use of force against vulnerable communities. There is an existing 'issue with Victoria Police not improving or changing [with] consistent examples of police misconduct and police brutality [that are] not going away' (King in Davey 2019).

Victoria Police have completed a roll-out of BWC technology, which is celebrated for its ability to deter such misconduct. However, Victoria Police guidelines do not currently ensure BWCs have a deterrence effect, which requires:

	BWCs are worn by an officer
	BWCs are activated during all critical encounters
	The public are fully informed of BWC presence and activation at the beginning of a police interaction

(Ariel et al. 2016, p. 456).

Targeted legislation should replace internal guidelines governing BWC use to effect deterrence and transparency. Public access to footage is an important factor underpinning police transparency and will likely become central to generating public pressure against Victoria Police misconduct and racial profiling.

To demonstrate an active commitment to erasing police racial profiling, Victoria Police should accept such legislative change to enforce appropriate BWC use and public access. Reform of BWC guidelines will enforce, rather than just encourage, appropriate BWC use.

Legislative reform of the Act to enable BWC footage to be used in civil proceedings is crucial to achieving police accountability. Victoria Police cannot completely prevent misconduct, such as excessive use of force and racial profiling, until BWC footage can be presented to substantiate allegations of such misconduct. Complete accountability requires that Victoria Police members be penalised for misbehaviour externally, for instance by the courts, rather than facing potential internal punishment.

a) Limitations:

The scope of this report limits its ability to fully demonstrate the extent of racial profiling in Victoria. Racial and ethnic minorities are non-homogenous, and do not experience police racial profiling in identical ways. This report does not discuss racial profiling of Indigenous populations, or those in regional Victoria.

This report's recommendations are also limited by scope. Full police transparency and accountability, as well as appropriate BWC use by Victoria Police can only be completely ensured with oversight from an independent organisation, such as a strengthened IBAC.

6. Recommendations:

1

Introduction of legislation to replace the current internal Victoria Police guidelines regulating BWC use, including:

- Firm and expanded instructions on appropriate conditions for BWC activation/deactivation (including requirements for vocalised confirmation of activation)
- 90-day minimum retention period for all BWC footage, with extended period for footage pertaining to incidents of misconduct, citizen complaints or court proceedings
- Editing conducted only when required by court order
- Blanket guarantee of access when requested by subjects of footage or legal representatives
- Denial of access permitted when not in the public interest, including when recordings show police informants, child victims of abuse, victims of sexual exploitation and naked victims
- Responsibility of Victoria Police members to justify the legitimacy of denials
- Establishment of specified penalties for Victoria Police members who fail to meet requirements outlined in legislation

2

Legislative reform of the *Surveillance Devices Act 1999 (Vic)*, including:

- Immediate permission for use, communication and publication of local protected information outlined in s30F1 in civil proceedings, encompassed by wording mirroring that of the *Surveillance Devices Regulation 2014 (NSW)*
- Eventual revision of designation of BWC footage as ‘protected information’ – enabling media access to footage when it best serves the public interest

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