

POLICE PANOPTICON:

Zooming in on the use of body worn cameras by Victoria Police officers

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Acknowledgment

This report was written in Naarm.

We acknowledge the Traditional Custodians of the Country on which we live and work. We pay our respects to Elders past and present. We recognise their continuing connection to the land and waters, and thank them for protecting the coastline and its ecosystems since time immemorial. We acknowledge that sovereignty was never ceded and that this always was, and always will be, Aboriginal land.

We have given considerable attention to the issue of Aboriginal deaths in custody while under police care. Last year marked the 30th anniversary of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). Despite this passage of time, few of the recommendations have been implemented, with over 400 deaths of Aboriginal and Torres Strait Islander people in custody since the findings were released in 1991. We stand in solidarity with Aboriginal and Torres Strait Islander people across this land and join the chorus of voices calling on the Australian Government to implement all the recommendations of the RCIADIC.

About this Report

This report was written by Samantha Varghese, Ovi Rajasinghe, Mahnoor Sikandar, Kiara Wagner, and Katherine Schofield as members of Liberty Victoria's Rights Advocacy Project ('RAP'). RAP is a community of lawyers and activists working to advance human rights in Australia. RAP works across a range of issues including criminal justice reform, equality, government accountability and refugee and asylum seeker rights.

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Executive Summary

Every day, police officers across Victoria record thousands of hours of footage of people at their most vulnerable, and sometimes, at their most violent. We should care about what happens to this footage. We should care, too, about why police officers sometimes choose *not* to film. This report addresses the pressing issues that arise in the context of the rapid expansion of body worn camera (BWC) usage in Victoria and around the world.

BWCs are portable devices used by Victoria Police to capture audio and video recordings of interactions between officers and the public. BWCs were introduced in Victoria in 2018, heralded as a mechanism to increase police accountability and transparency. The extent to which BWCs have realised these goals is open to question.

Part One of this Report contextualises the role of BWCs within Victoria and internationally. Part Two outlines the nature of BWCs and the intended goals of their use. Part Three examines issues with the Victoria Police BWC policy. We have identified activation, disclosure, and enforcement as key issues to explore. Part Four concludes the Report, with Part Five providing comprehensive recommendations for the reform of both legislative and policy materials. The acceptance and implementation of these recommendations will assist the realisation of the benefits of BWCs to both the community and police.

It is important to contextualise our work among relevant and pressing issues. While our project proposes reform in the area of police BWCs, we wish to emphasise the ongoing need for funding and resources to be redirected from policing and into the community, prioritising social housing, education, employment, health services, and support programs. We also want to highlight that our calls for reform do not indicate support for the use of BWCs in policing. Rather, our project recognises the reality that in Victoria¹ (as elsewhere²) police BWCs are here to stay, and so legal safeguards need to be implemented to ensure that BWC and subsequent footage is used in a transparent manner.

1 Jeremy King and Peggy Lee, 'Body Worn Cameras: The All-Seeing Eye?' [2020] Law Institute Journal [30].

2 Michael D. White and Aili Malm, *Cops, Cameras, and Crisis* (New York University Press 2020) 16.

PART ONE: Context/Purpose

The normalisation of surveillance is a key feature of the 21st century. While the resultant loss of privacy might seem like an acceptable price to pay for the convenience and connection that technology brings to our personal lives, we need to be especially vigilant when it comes to the use of technology by authorities. The adoption of technology in the criminal justice system is rapid and expanding, with new and improved devices being developed all the time.³ BWCs are being introduced into police agencies' arsenals all over the world. It is crucial that protections are in place to prevent the misuse of BWCs, to ensure that footage is not used to undermine justice, and to improve police accountability.

BWCs are portable devices used by the police to capture audio and video recordings of interactions between officers and the public. BWCs are increasingly being adopted by police agencies, due to their purported ability to enhance transparency and accountability, to assist in evidence gathering, and to reduce use of force and complaints against officers.⁴ Globally, the uptake of BWCs by law enforcement reached a tipping point in the wake of the policing crisis in the United States. The Obama Administration moved to implement police BWC programs in response to calls for police accountability from the Black Lives Matter (**BLM**) movement, which rose to prominence in 2014 after the killings of Michael Brown and Eric Garner at the hands of police. In the wake of these deaths, BWCs were heralded as a way to enhance transparency and accountability in police encounters with the public.⁵ In 2020, there was a resurgence of the movement following the murder of George Floyd, who died after a police officer knelt on his neck for over nine minutes, while ignoring Floyd's repeated cries that he could not breathe.

In Australia, the justifications for police BWCs have been varied, with the focus being on 'enhancing crime prevention and law enforcement outcomes (less offending, increased prosecution, and guilty pleas)'.⁶ However, police accountability has also been a reason cited by police leaders and politicians, particularly in Victoria, where the largest rollout of the BWC technology in the country has recently been completed. The need for police accountability is important in Australia due to the over-policing of minority communities.⁷ Indigenous people in particular are overrepresented in the criminal justice system due, in part, to the adoption of discriminatory police practices.⁸

Within Victoria, as part of the 2016-17 Budget, the State Government announced a Public Safety Package valued at \$596 million.⁹ A primary component of the Public Safety Package was investment in technology for Victoria Police, with a particular focus on BWCs for all frontline operational police officers and protective services officers. A key driver behind the decision to implement police BWCs across the State was the 2016 Victorian Royal Commission into Family Violence (**RCFV**), which recommended that Victoria Police trial and evaluate the 'use of [BWCs] to collect statements and other evidence from family violence incident scenes'.¹⁰ Doing so could spare victims 'the trauma associated with giving evidence in court'¹¹, as well as

3 One example of the move toward technology-facilitated policing is the controversial practice of computerised facial recognition, which the Australian Human Rights Commission has warned should not be used for law enforcement in Australia without legal safeguards in place: Australian Human Rights Commission *Human Rights and Technology* (Final Report: Summary, 2021) 7.

4 White and Malm (n 2) 8.

5 Ibid.

6 Darren Palmer, 'The Mythical Properties of Police Body-Worn Cameras: A Solution in the Search of a Problem' (2016) 14(1) *Surveillance and Society*, 140.

7 Michele Grossman, 'Re-thinking "Vulnerability" in the Context of "Diversity": Cross-cultural Reform in Policing Education and Training in Australia' in Nicole L. Asquith, Isabelle Bartkowiak-Théron, and Karl A. Roberts (eds), *Policing Encounters with Vulnerability* (Cham, Switzerland: Palgrave Macmillan, 2017) 119.

8 Melanie Schwartz, 'Redressing Indigenous Over-Representation in the Criminal Justice System with Justice Reinvestment' [2013] 118 (September/October) *Precedent* 39.

9 Getting it Done, Department of Treasury and Finance, Victorian Government, *Victorian Budget 16/17 overview* (April, 2016), 24.

10 Royal Commission into Family Violence: *Summary and Recommendations* (Report, March 2016) 61.

11 Royal Commission into Family Violence: *Report and Recommendations* (Report, March 2016) vol. 3, 106.

‘assist with investigations and encourage guilty pleas’,¹² resulting in speedier and improved justice outcomes for victims and witnesses. In addition, the courts would have access to ‘higher-quality evidence’¹³ and the use of BWCs in this context was said to potentially result in ‘greater confidence that offenders are held to account’.¹⁴

Following the RCFV’s recommendation, in October 2018, BWC trials commenced in Ballarat and Epping. Prior to these trials, the *Justice Legislation (Body-worn Cameras and Other Matters) Act 2017* (Vic) was passed to support the rollout of the technology and the *Surveillance Devices Act 1999* (Vic) was amended in November 2017 to include BWCs. In August 2018, the Victorian Government passed the *Justice Legislation Amendment (Family Violence Protection and Other Matters) 2018* (Vic), which amended the *Criminal Procedure Act 2009* (Vic) to permit the digital recording of evidence-in-chief from family violence victims and the use of pre-recorded evidence-in-chief in family violence proceedings. After the Ballarat and Epping trials were deemed a success, full deployment of BWCs commenced. State-wide rollout of BWCs has now been completed. While the impetus for the introduction of police BWCs in Victoria was the RCFV, with the aim of improving and streamlining the justice process in family violence matters, the devices were always intended to be used by officers in the course of carrying out other operational duties. Outside the context of family violence, statements justifying the rollout of BWCs by the Minister for Police and Victoria Police officials focussed on community safety, improvements in evidence-gathering, and justice outcomes, as well as transparency and accountability regarding police interactions with the public.¹⁵ For example, there has been recent reporting of an incident involving Constable Zachary Rolfe in Alice Springs in January 2018 where BWC footage was turned on for part of the incident. The presiding magistrate found the BWC footage captured by a police officer showed no evidence substantiating the charges of assault towards police officers. It was further

held that police had fabricated evidence in light of the footage. This demonstrates the potential for body worn footage to improve evidence-gathering and achieve just outcomes.¹⁶

It is in the best interest of Victoria Police to promote such measures as ‘the quality of policing is the product of its effectiveness and legitimacy’.¹⁷ However, within Victoria, recent examples of misconduct have undermined police legitimacy and renewed calls for increased transparency.¹⁸ These include the 2019 raid of Hares & Hyenas — an LGBTIQ bookshop in Fitzroy Melbourne — in which an innocent man was seriously injured by police officers.¹⁹ Another incident in 2020 involved a Noongar man working in construction, who stated that two police officers ‘spear tackled him to the ground’²⁰ while he was riding his bike to work, causing an injury to his arm for which he was later taken to hospital. The man further claimed that, in addition to the assault, he was racially vilified by police officers while lying injured on the ground.²¹ In both cases, police officers present on the scene did not activate their BWCs, despite internal policy and guidelines requiring them to do so.

The lack of BWC footage in incidents like the above, where accusations of misconduct and brutality have been made against members of Victoria Police, undermine any stated ability of BWCs to increase police accountability. This calls into question claims by police

12 Ibid.

13 Ibid.

14 Ibid.

15 Premier of Victoria, ‘Ballarat Body-Worn Camera Pilot Rolling Out State-wide’ (Media Release, 30 August 2018) <<https://www.premier.vic.gov.au/ballarat-body-worn-camera-pilot-rolling-out-statewide/>>.

16 Jano Gibson and Melissa Macka, ‘Constable Zachary Rolfe likely ‘deliberately banged’ Aboriginal man’s head, judge found before Yeundemu shooting’ *ABC News* (online, 18 March 2022) <<https://www.abc.net.au/news/2022-03-18/constable-zachary-rolfe-malcolm-ryder/100914706>>.

17 United Nations Office on Drugs and Crime *Handbook on Police Accountability, Oversight and Integrity* (2011) 17 <https://www.unodc.org/pdf/criminal_justice/Handbook_on_Police_Accountability_Oversight_and_Integrity.pdf>

18 See for example (although not related to BWCs) the Royal Commission into the Management of Police Informants following the revelation that prominent criminal defence barrister, Nicola Gobbo, acted as a police informant.

19 Damian McIver, ‘Melbourne Police Break Man’s Arm in Mistaken Arrest at Fitzroy’s Hares & Hyenas Bookshop’ *ABC News* (online, 12 May 2019) <<https://www.abc.net.au/news/2019-05-12/melbourne-police-break-mans-arm-hares-and-hyenas-fitzroy-raid/11105106>>.

20 Timna Jacks, ‘Aboriginal Man Accuses Police of Violent Assault and Racist Abuse’ *The Age* (online, 4 September 2020) <<http://www.theage.com.au/national/victoria/aboriginal-man-accuses-police-of-violent-assault-and-racist-abuse-20200904-p55si9.html>>.

21 Ibid.

leadership that greater accountability and transparency is what is being sought.

The need for increased police accountability and transparency in Victoria was made all the more clear by the COVID-19 pandemic, during which Melbourne was subject to 262 days of lockdown between March 2020 and October 2021 – the longest time spent in lockdown of any city globally. During this time, reports of heavy-handed policing arose online and throughout the media, with concerns that culturally diverse and low-income groups were bearing the brunt of these hard-line responses.²² These issues have highlighted the need for urgent reform on police BWCs and it is being increasingly recognised by politicians in Victoria that change is necessary, with a report into BWCs as an police accountability mechanism being released by Reason Party MP Fiona Patten in October 2021,²³ and Greens MP Tim Read raising current issues with BWC operation in Parliament.²⁴ This increased attention suggests that now is the opportune time to engage with lawmakers and other key stakeholders to enact meaningful change in this area.

In June 2022, the Victorian Auditor-General's Office (**VAGO**) tabled its independent assurance report, 'Managing Body-Worn Cameras' in Parliament (**VAGO report**).²⁵ The VAGO report examined how Victoria Police uses and governs BWCs, including how it uses and protects

the BWC footage recordings. Its findings and recommendations shed light on Victoria Police's internal processes around capturing footage, monitoring compliance with activation standards, use of the footage in complaints, supervision and oversight processes, and internal training. VAGO consulted with Victoria Police on the recommendations made in the report and annexed Victoria Police's response to the report and recommendations. Victoria Police rejected two of the eight recommendations in the VAGO report. Specifically, Victoria Police rejected the recommendation that it establish a 'policy for regularly and consistently reviewing audit logs to reduce the risk of mishandling of [BWC footage]'.²⁶ In rejecting the recommendation, Victoria Police asserted it was not needed since the VAGO report did not identify any instances of BWC footage mishandling. This response reflects Victoria Police's attitude towards its own internal processes and the risk of blind spots arising when institutions set their own standards and also police them. Currently, Victoria Police decides how BWCs are used, including when they are activated and deactivated, how BWC footage is edited and retained, and how compliance with BWC guidelines is monitored. This is concerning, especially given the recent attitudes highlighted in the VAGO report.

Therefore, and as discussed in this Report, there is an urgent need for legislative reform with respect to BWCs to ensure that the accountability mechanisms of BWCs can be realised.

22 'Australia: Harsh Police Response During Covid-19' *Human Rights Watch* (online, 24 September 2020) <<https://www.hrw.org/news/2020/09/24/australia-harsh-police-response-during-covid-19>>; Damien Cave, 'What Lockdown 2.0 Looks Like: Harsher Rules, Deeper Confusion' *The New York Times* (online, 4 August 2020) <<https://www.nytimes.com/2020/08/04/world/australia/coronavirus-melbourne-lockdown.html>>; Jarni Blakkarly, 'Concerns Police Using Coronavirus Powers to Target Marginalised Communities in Australia' *SBS News* (online, 12 April 2020) <<https://www.sbs.com.au/news/concerns-police-using-coronavirus-powers-to-target-marginalised-communities-in-australia/548a6a66-1482-41eb-abfd-b018965a549c>>.

23 Ruby Hogan and Fiona Patten, 'Opportunity for Reform: body-worn cameras as a police accountability mechanism' (Parliamentary Intern Report, October 2021).

24 Parliament of Victoria, *Parliamentary Debates: Legislative Assembly*, Questions on Notice 5944, 20 May 2021 (Tim Read) <<https://www.parliament.vic.gov.au/assembly/questions-on-notice/questions-database/details/53/5441>>; Parliament of Victoria, *Parliamentary Debates: Legislative Assembly*, Questions on Notice 5708, 3 March 2021 (Tim Read) <<https://www.parliament.vic.gov.au/assembly/questions-on-notice/questions-database/details/53/564>>

25 Victorian Auditor-General's Office, 'Managing body-worn cameras' (Report, 8 June 2022).

26 Ibid, 31.

PART TWO:

Body Worn Cameras

Advocates assert that BWCs are a crucial accountability measure for promoting transparency in police interactions with the public that have the potential to reduce instances of police misconduct and brutality.²⁷ Despite these claims, the results from research into the effects of BWCs on reducing police misconduct is mixed.²⁸ Nevertheless, in many jurisdictions the introduction of BWCs to policing is grounded in the perception that both police officers and citizens will be deterred from engaging in bad behaviour when being knowingly recorded and that any subsequent police misconduct that does occur will be caught on camera and duly punished. However, while BWCs can be ‘promoted to enhance accountability, [the devices can also be] positioned politically in ways that detract from accountability’.²⁹

In Victoria, instead of specific legislation, the activation and use of BWCs and BWC footage by police officers is almost solely governed by the Victoria Police Manual (**VPM**),³⁰ which was most recently varied in December 2020. The VPM ‘sets the behavioural, operational and administrative standards for the organisation’.³¹ The VPM section on BWCs states that BWCs offer a significant benefit to Victoria Police and the public by ‘enhancing police and community interactions by promoting transparency, accountability and safety for both members and the community’.³² These intentions were also emphasised by police leadership and politicians when announcing the rollout of BWCs across Victoria.³³

While the VPM is issued with the authority of the Chief Commissioner, making a police officer’s failure to comply with its instructions a breach of discipline,³⁴ there is no transparency surrounding how breaches of BWC policy are handled and what disciplinary measures are taken. Without such transparency, any claims that BWCs increase police accountability must be treated with caution. Instead, any benefits of BWC technology are at risk of belonging to police alone, who decide whether to activate or cease recording, to retain or delete footage, and to disclose in evidentiary briefs footage obtained by BWCs. This situation is clearly one-sided; when police are the sole arbiters of what is recorded and who gets to view the footage, other beneficiaries of the footage – such as the courts, independent oversight bodies, and the community – can be denied access to relevant BWC evidence.

As shown by the local incidents outlined above³⁵ and the BLM movement globally, policing institutions are facing pressure to improve police practices and deal with misconduct. The United Nations Office on Drugs and Crime (**UNODC**) argues that police scandals lead to ‘a need for the police to regain moral authority by improving their integrity and re-establishing public confidence, resulting in major changes in police accountability structures with the acceptance of stricter external scrutiny’.³⁶ The Victorian rollout of police BWCs is an example of police leadership introducing a measure purporting to increase accountability, however such technology will not improve the issue ‘without significant broader changes to

27 White and Malm (n 2) 8; Ronald J. Coleman, ‘Police Body Cameras: Go Big Or Go Home?’ (2020) 68(5) *Buffalo Law Review*, 1363.

28 White and Malm (n 2) 36.

29 Palmer (n 6) 141.

30 Victoria Police, ‘Body worn cameras’ *Victoria Police Manual* (2020).

31 Victoria Police, ‘Procedures and legislation’ (Web Page, 7 July 2021) <<https://www.police.vic.gov.au/procedures-and-legislation>>.

32 Victoria Police (n 30) [‘Context’].

33 Premier of Victoria (n 15).

34 *Victoria Police Act 2013* (Vic) s 60; Victoria Police (n 30).

35 Damian McIver, ‘Melbourne Police Break Man’s Arm in Mistaken Arrest at Fitzroy’s Hares & Hyenas Bookshop’ *ABC News* (online, 12 May 2019) <<https://www.abc.net.au/news/2019-05-12/melbourne-police-break-mans-arm-hares-and-hyenas-fitzroy-raid/11105106>>, Timna Jacks, ‘Aboriginal Man Accuses Police of Violent Assault and Racist Abuse’ *The Age* (online, 4 September 2020) <<http://www.theage.com.au/national/victoria/aboriginal-man-accuses-police-of-violent-assault-and-racist-abuse-20200904-p55si9.html>>.

36 UNODC (n 17) 8.

police accountability regimes and practices'.³⁷ There are concerns that while BWCs may 'give the veneer of transparency',³⁸ they do not make police more accountable and could, in fact, be counterproductive to accountability in policing.

Currently, there is no external oversight of police use of BWCs and how breaches of policy are managed, as well as significant issues with disclosure of BWC footage in evidentiary briefs. Internal oversight mechanisms have been criticised on the grounds that they are 'less credible from the standpoint of citizens'³⁹ and compromised by the fact that internal discipline is opaque, as well as 'limited in scope and tend[s] to concentrate only on reactive (punitive) measures, as opposed to proactive (preventive) measures'.⁴⁰ The 2018 'Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria' found that the Independent Broad-Based Anti-Corruption Commission (IBAC) should investigate complaints about serious police misconduct rather than referring them to Victoria Police for investigation⁴¹. Meeting the level of accountability expected of police is not just a matter of introducing BWCs into their practice; it requires 'policy and procedural frameworks, appropriate codes of conduct, and ultimately internal and external oversight and feedback to extend this transparency to produce the level of accountability [...] promised by police organisations themselves'.⁴²

The following Part of this report identifies issues present in current Victoria Police BWC policy and practice, specifically regarding activation, disclosure and enforcement, and concludes with recommendations for reform to ensure that the devices are used in a way that promotes, instead of undermines, accountability and transparency in policing. To inform our analysis, in the early stages of this project, a survey was distributed to criminal defence practitioners across Victoria

to gain information about Victoria Police's current use of BWCs and BWC footage.⁴³ Whilst not generalisable due to the small sample size (62 participants), survey data revealed issues related to the availability of footage, disclosure, and the current practice of police officers. The survey also sought input from criminal defence practitioners about how the current BWC framework could be enhanced. Relevant findings are referred to throughout the report.

ABC NEWS



Victoria Police rejects Auditor-General's call for closer scrutiny of body-worn camera footage

By [Andrea Nierhoff](#)

Posted Wed 8 Jun 2022 at 6:57pm, updated Wed 8 Jun 2022 at 7:08pm



One of the Victoria Police body-worn cameras issued to police offices in 2019. (Supplied: Victoria Police)

Victoria Police has pushed back at suggestions more oversight is needed around officers' use of body-worn cameras, after an audit warned trust in the force would be eroded without closer scrutiny of the footage.

Image: abc.net.au - composited from multiple screen captures to show relevant details.

37 Palmer (n 6) 143.

38 Murray Lee, Emmeline Taylor and Matthew Willis, 'Being Held to Account: Detainees' Perceptions of Police Body-Worn Cameras' (2019) 52(2) *Journal of Criminology* 187.

39 UNODC (n 17) 24.

40 Ibid 14.

41 Independent Broad-Based Anti-Corruption Commission, *Inquiry into the external oversight of police corruption and misconduct in Victoria* (Report, September 2018).

42 Lee, Taylor and Willis (n 38) 188.

43 Rights Advocacy Project, 'Body Worn Camera Project' (Survey, 11 April 2020).

PART THREE:

Issues and Areas for Reform

Activation

BWCs have the potential to increase the legitimacy of the exercise of police powers, reduce complaints, decrease the use of force, and improve the outcomes of criminal investigations.⁴⁴ However, the extent to which these benefits are realised in practice hinges on BWC activation – when, where, and how BWCs are turned on and off.⁴⁵ This section will refer to the ‘activation framework’, as termed by the VPM, to describe the current policy for BWC activation.⁴⁶

Through conducting a systematic review, Lum et al found that BWCs may not substantially reduce police officers’ use of force, arrest activities, and other measured behaviours because of the inconsistencies in their use.⁴⁷ Consequently, it is crucial that the activation framework appropriately prescribes and conditions the exercise of officer discretion when using BWCs.

This section maps out the current activation framework employed by Victoria Police, as stated in the VPM. It will identify issues with the current framework to highlight areas in need of reform. Finally, we offer recommendations to reform the current BWC activation framework.

Current framework

Victoria Police Manual: Activation

Section 3 of the VPM sets out the BWC activation framework. The scope of the VPM extends to members who are issued a BWC, work unit managers who manage the devices and members responding to or investigating critical incidents.⁴⁸ The policy acknowledges technical and practical limitations, but proposes that BWCs are expected to record the majority of operational incidents during a shift.⁴⁹ Recording is required where the member is exercising legislative or common law powers or to capture an incident currently occurring, likely to occur, or which has already occurred.⁵⁰ Section 3.2 lists specific examples of public interactions that fall under these heads.⁵¹ Section 3.3 recommends BWC activation where the member believes it is necessary and where it would assist with providing transparency or collecting evidence.⁵² Activation is also recommended where it is not possible to make written notes.⁵³

Victoria Police Manual: Deactivation

The VPM outlines when a member should deactivate or not start a BWC recording. Section 3.4 instructs that a member should only stop recording when: an interaction ceases, an incident is resolved or ended, a supervisor gives directions to deactivate pursuant to the policy, or a member in charge of a critical incident response gives directions to deactivate.⁵⁴

44 Ben R. Martain and Vincent Harinam, ‘Linking body worn camera activation with complaints: The promise of metadata’ (2020) 0(0) *Australian & New Zealand Journal of Criminology* 1, 2.

45 Emmeline Taylor, ‘Lights, Camera, Redaction ... Police Body-Worn Cameras: Autonomy, Discretion and Accountability’ (2016) 14(1) *Surveillance & Society* 128, 129; Bryce Clayton Newell and Ruben Greidanus, ‘Officer Discretion and the Choice to Record: Officer Attitudes towards Body-Worn Camera Activation’ (2018) 96(5) 1525, 1532.

46 Victoria Police (n 30) 3.

47 Cynthia Lum et al, ‘Body-worn Cameras’ Effects on Police Officers and Citizen Behavior: A Systematic Review’ (2020) 16(3) *Campbell Systematic Reviews* 1, 2.

48 Victoria Police (n 30) 2.

49 Ibid 3 [3.1].

50 Ibid [3.2].

51 Ibid; For example, the arrest/detention of person/s for any offence, vehicle interceptions or checkpoint/RBT sites and person/property/premises search conducted with or without a warrant.

52 Ibid [3.3].

53 Ibid [3.3].

54 Ibid [3.4].

Section 3.5 provides that BWCs must not be activated outside a member's police duties or functions, when conducting an indictable offence interview, to covertly record conversations with other members of Victoria Police, during a 'strip search', or while engaged in a private conversation.⁵⁵ Additionally, BWCs should not be activated where a reasonable expectation of privacy exists, inside a police station where CCTV is operating, while taking crime reports and/or admissible written statements, or while undertaking community engagement activities.⁵⁶ When an officer is asked by a member of the public to stop recording, they are to balance the request against the activation framework, the context of the incident, and involvement of the member of the public.⁵⁷

Where the activation framework applies but a recording is either not made or is incomplete, the officer must record the circumstances in the unit's Electronic Patrol Duty Return Form, Initial Action Pad, official diary, or on the recording itself prior to deactivation.⁵⁸ The record must include sufficient detail to later account for the omission and identify the supervisor who directed the action.⁵⁹

Issues with current framework

Police officer discretion – results from the survey

The discretion afforded to police officers when operating BWCs may undermine the devices' contribution to police accountability. Discretion may be a necessary incident of the unpredictable nature of policing, however the scope of discretion should be tempered in a meaningful way to preserve the value of BWCs.⁶⁰ This position was supported by our survey data, with the majority of respondents favouring mandatory recording during any public interaction or when responding to incidents which require intervention and potential use of force.⁶¹ The 2020 amendments to the VPM went some way to address these views by

clearly articulating the circumstances in which BWC activation is required or recommended.

The VPM accommodates the exercise of individual officer judgement for BWC activation in instances where activation is recommended⁶² or privacy concerns are enlivened.⁶³ The ensuing sections of this Report will explore issues that materialise as a consequence of officer discretion, which include: officers forgetting to resume recording during a public interaction, immediate and unexpected events that are not captured, officers deliberately failing to activate, and camera activation escalating a situation.⁶⁴

Failures to effectively activate BWCs

The VAGO report found that officers activated their BWC in 83.4% of the instances where the activation framework required them to be activated, according to data reviewed in March 2021.⁶⁵ The report emphasised that the 16.4% of interactions that were left unrecorded, and the absence of such footage, could result in weaker evidence for investigations and prosecutions, reduced transparency in complaint investigations, and reputational damage to Victoria Police.⁶⁶ It must be noted that this data analysis does not include instances when BWCs were turned off, contrary to the activation framework, in effect giving an incomplete picture of whether the activation framework is followed. Notably, and concerningly, Victoria Police was not able to present this data itself. This compliance rate was determined by the VAGO report, using a comparison of BWC footage with other Victoria Police data.⁶⁷

Failures to effectively activate BWCs may be attributed to unintentional or intentional police officer behaviour. An inevitable incident to the spontaneous nature of policing is that a police officer may forget to activate or resume a BWC recording during a public interaction.⁶⁸ It is difficult to both account for this reality and provide measures to reduce the potential

55 Ibid [3.5].

56 Ibid.

57 Ibid.

58 Ibid [3.6].

59 Ibid.

60 Newell and Greidanus (n 45) 1550.

61 Rights Advocacy Project (n 43) Question 17.

62 Victoria Police (n 30) 3 [3.3].

63 Ibid [3.5].

64 Taylor (n 45) 130.

65 VAGO (n 25), 13.

66 Ibid.

67 Ibid.

68 Taylor (n 453) 130.

for police officers to abuse their discretion and misuse BWCs.⁶⁹ It is necessary to balance the risk of footage manipulation against the need to retain some discretion in BWC use.

The risk of police officers manipulating recordings by choosing when and what to film affects the availability, impartiality, and quality of footage.⁷⁰ It effectively affords police officers an ability to ‘edit on the fly’.⁷¹ The potential for police officers to wilfully deactivate BWCs to avoid capturing misconduct without consequence cannot increase accountability or reduce poor policing practices.⁷² There have been multiple cases in which police officers appeared to have deliberately stopped recording during violent confrontations.⁷³ For example, the Victorian Children’s Commissioner Liana Buchanan was unable to fully examine allegations of police brutality against young people at the Grevillea Youth Justice Unit because ‘body-worn cameras were not operative during the time of the alleged assaults’.⁷⁴ IBAC’s ‘Operation Rous’ investigation, which looked at two critical incidents at Port Phillip Prison, revealed further instances of police officers intentionally failing to activate their BWCs and interfering with footage to avoid capturing evidence. A police officer was found to cover the lens and cough whenever force was applied to the prisoner.⁷⁵ Although not all failures to activate can be attributed

to deliberate manipulation, these examples speak to the potential to mask misconduct.⁷⁶

Factors against continuous recording

An effective activation framework that balances the interests of accountability, privacy, and data management, is essential to realising the benefits of BWCs. We acknowledge the limitations of a policy that requires continuous recording during a shift. An always-on policy risks unjustifiably intruding on citizen privacy and results in excessive data collection.⁷⁷ The sheer volume of data would hamper the ability to access footage, which would undermine the evidentiary benefits BWCs offer.⁷⁸ Further, privacy-oriented objections are exacerbated given that police officers have access to private spaces.⁷⁹ Unnecessary intrusions may strain the police-public relationship by intimidating citizens and breaching trust, particularly within over-policed communities.⁸⁰ Discretion has been necessarily built into the activation framework to allow officers to stop recording ‘where a reasonable expectation of privacy exists’.⁸¹ Protecting the rights of those who interact with police officers precludes a policy of continuous activation and supports the retention of confined discretion within the framework.

Citizen responses to BWC activation

BWCs may escalate incidents between the police and the public.⁸² This risk is heightened when police officers interact with individuals with mental health conditions, who are under the influence of drugs or alcohol, or are particularly vulnerable.⁸³ The inconsistent results produced in studies relating the use of force to BWCs may be due to the potentially aggravating effect of BWCs.⁸⁴ The presence of

69 Rights Advocacy Project (n 43) Question 6; Survey respondents shared anecdotal experiences of officers delaying BWC activation, covering part of the lens, and prematurely stopping recording to hide part of an interaction.

70 Taylor (n 45) 129.

71 Ibid.

72 Ibid 130.

73 Emmeline Taylor, ‘Body-Worn Cameras Are Not a Panacea for Poor Policing’ *The Conversation* (online, 27 October 2016) <<https://theconversation.com/body-worn-cameras-are-not-a-panacea-for-poor-policing-67242>>.

74 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>>.

75 Independent Broad-Based Anti-Corruption Commission, *Special Report on Corrections* (Report, June 2021) 34.

76 Julian R. Murphy, ‘Is it Recording - Racial Bias, Police Accountability, and the Body-Worn Camera Activation Policies of the Ten Largest Metropolitan Police Departments in the USA’ (2019) 9(1) *Columbia Journal of Race and Law* 141, 167.

77 See Rights Advocacy Project (n 43) Question 17.

78 Taylor (n 45) 130.

79 Ibid 131.

80 Ibid.

81 Victoria Police (n 30) 3 [3.5].

82 Barak Ariel et al, ‘Wearing Body Cameras Increases Assaults Against Officers and Does Not Reduce Police Use of Force: Results from a Global Multi-Site Experiment’ (2016) 13(6) *European Journal of Criminology* 744, 754.

83 Taylor (n 45) 130.

84 Ariel et al (n 82) 752.

BWCs may risk deterring members of the public from interacting or cooperating with police.⁸⁵ However, such findings may be softened with the adequate notification of the BWC recording, including how citizens can access footage.

The public reception of BWCs may be improved if citizens are made aware of when they are being recorded and provided with an opportunity to respond. The inadequacy of current practices of BWC notification is reflected in our survey data, with most respondents reporting that their clients were rarely notified when BWCs were activated or that notification was inferred by clients as a result of police officers activating the BWC and a red flashing light appearing.⁸⁶ Relying on non-verbal communication is inadequate as not all citizens can be assumed to notice or understand these signals to mean that their interaction is being recorded.⁸⁷

The proper notification of BWC activation may function to de-escalate an incident. Notification would ensure members of the public are made aware that they are being recorded, thus allowing the deterrent effect of BWCs to extend to those interacting with police officers.⁸⁸ It also provides the opportunity for members of the public to indicate where they have concerns regarding their privacy which, in turn, can inform the officer's exercise of discretion. Accordingly, verbal notification of activation of BWCs would better accommodate the privacy and other concerns associated with BWCs and reduce the potentially aggravating effect of BWCs.⁸⁹

BWC training policy

Police officers who view BWC technology as useful are more likely to effectively use the device.⁹⁰ This was supported in an American study, which found that higher levels of activation occurred amongst police officers who voluntarily wore BWCs, as opposed to those who were compulsory assigned

them.⁹¹ Studies have also shown that police officers are more likely to activate their cameras as they become more accustomed to having them as part of their daily routine.⁹² Accordingly, adequate BWC training that emphasises the operational benefits of BWCs can facilitate the positive reception and implementation of BWCs.⁹³

Activation and enforcement

Implementing an activation policy influences police officer behaviour in itself, but requires monitoring and enforcement to be effective.⁹⁴ The need to clearly define the consequences for a failure to activate where the activation framework applies will be considered in more detail in Part Four.⁹⁵

85 Newell and Greidanus (n 45) 1558.

86 Rights Advocacy Project (n 43) Question 15.

87 Ibid Question 14.

88 Ariel et al (n 82) 461.

89 Ibid.

90 Jacob T. N. Young and Justin T. Ready, 'A Longitudinal Analysis of the Relationship between Administrative Policy, Technological Preferences, and Body-Worn Camera Activation among Police Officers' (2016) 12(1) *Policing* 27, 31.

91 Ibid 27; Volunteers activated their BWC in 67.4% of incidents whereas compulsory assigned officers activated theirs in 51.4% of incidents.

92 Newell and Greidanus (n 43) 1567; Martain and Harinam (n 45) 12; This is corroborated by empirical research, which shows a gradual increase in activation over the course of the study.

93 A Freedom of Information request was submitted to Victoria Police seeking access to BWC training materials, however the request was later revised due to the scope and associated procedural delays.

94 Young and Ready (n 90) 30.

95 Rights Advocacy Project (n 43) Question 18.

Disclosure and Retention

Footage of police misconduct is an effective accountability mechanism, as it can provide evidence of the interaction. This can improve access to justice for individuals seeking redress against Victoria Police, as well as defendants in criminal proceedings. It is therefore essential that individuals have access to BWC footage, including the raw footage of an incident.

This section outlines how the current framework affects Victoria Police's disclosure obligations and identifies issues with the current framework. Finally, we offer recommendations to reform the current BWC disclosure framework.

Current framework

Victoria Police Manual

Section 9.3 of the VPM requires that BWC footage is included in a brief of evidence and referred to in the Statement of Alleged Facts in the Preliminary Brief. It must be disclosed in accordance with Victoria Police's usual process of disclosure.⁹⁶ This means it is referred to in the Statement of Alleged Facts in the Preliminary Brief and listed on the Exhibit List, attributed to the police officer who was wearing the BWC. It may be redacted by the informant or a prosecutor in each matter.⁹⁷ BWC footage that has been disclosed in a brief of evidence must be retained until the expiration of the appeal period for the matter.

Section 8.2 of the VPM outlines how BWC footage is uploaded and stored in the digital evidence management system (DEMS). BWC footage can be reviewed, edited, and redacted from the original copy by any Victoria Police member who has been provided access to, and requires the use of, that footage.⁹⁸ The original recording is maintained and cannot be edited. Every alteration or redaction creates a new file copy.

The time between recording of BWC footage and deletion depends on the nature of the recorded incident. According to Victoria Police's policy,

'non-evidentiary' footage is stored for a minimum of 90 days, after which time it may be deleted.⁹⁹ Once the footage has been deleted, it cannot be retrieved.¹⁰⁰ However, the metadata attached to the file is retained indefinitely.¹⁰¹ The metadata includes information about the officer using the BWC, how the BWC footage is categorised, whether it was shared, the number of times it was viewed and whether it was edited (referred to as 'audit logs').¹⁰² Notably, the storage and retention requirements for BWC footage are contained in Victoria Police policy, rather than in legislation. This means that Victoria Police have unfettered discretion to determine and alter the storage and retention requirements, which significantly reduces the accountability mechanism of BWCs.

Criminal Procedure Act

As part of brief disclosure requirements, BWC footage must be included in a brief of evidence in accordance with the *Criminal Procedure Act*.¹⁰³ Section 39 *Criminal Procedure Act* provides the circumstances in which the brief of evidence must be served. Given the importance of BWC footage to the early resolution of matters, it is imperative that the footage be made available as early as possible.

Issues with current framework

Availability of BWC footage in criminal briefs – results from the survey

Proper disclosure of evidence is crucial to ensuring an individual's right to a fair trial.¹⁰⁴ Given the nature and quality of BWC footage as an evidentiary reference point, prosecuting authorities must disclose this class of evidence in a consistent and transparent manner.

The majority of our survey respondents indicated that the availability of BWC footage made the resolution of matters easier.¹⁰⁵ This emphasises the importance of BWC footage in maintaining an efficient justice system. Similarly, the absence of BWC footage delays

⁹⁶ Victoria Police (n 30) 9 [9.3].

⁹⁷ Where there is a legitimate claim for public interest immunity.

⁹⁸ Ibid 8 [8.2].

⁹⁹ Victoria Police, 'Body worn cameras' (Web Page, 25 June 2021) <<https://www.police.vic.gov.au/body-worn-cameras>>.

¹⁰⁰ King and Lee (n 1).

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ *Criminal Procedure Act 2009* (Vic) s 41(1).

¹⁰⁴ *Roberts v The Queen* (2020) 60 VR 431.

¹⁰⁵ Rights Advocacy Project (n 43) Question 16.

the resolution of criminal matters and is thus contrary to the interests of justice.

Our survey indicated that the availability of BWC footage is indicated inconsistently in preliminary briefs.¹⁰⁶ Furthermore, disclosure requests to Victoria Police are often met with resistance or subject to long delays.¹⁰⁷ Notably, if the delay exceeds the 90-day time limit, the original file could be deleted even though the request for disclosure was received within time. Therefore, it is important that any BWC disclosure framework clearly defines disclosure obligations to ensure legal practitioners have early access to all relevant evidence in the matter. It is also vital that any BWC disclosure framework creates a cultural change and promotes timely and complete disclosure of BWC footage.

Selective editing and storage

Some survey respondents stated that they had received BWC footage that appeared to be incomplete. The inclusion of incomplete BWC footage is undesirable on the basis that it deprives criminal defendants of their right to access all relevant information and hampers the ability of both prosecution and defence lawyers to construct their case. Incomplete BWC footage due to a delay in activation may be addressed by more robust activation and enforcement policies or frameworks. However, the power of Victoria Police to edit footage must be addressed in order to enhance the accountability that BWCs have the potential to realise.

The discretion to classify BWC footage as either 'evidentiary' (to be retained) or 'non-evidentiary' (may be loaded for disposal after the 90-day retention period) resides with individual officers.¹⁰⁸ The tight timeframes for retention of BWC footage may create practical difficulties for legal practitioners as the deletion of this footage is the destruction of potentially vital evidence. It has also been reported that parties have experienced issues accessing raw footage of an incident and are often only provided with

an edited version.¹⁰⁹ Furthermore, there is a reported lack of transparency of retention times between Victoria Police departments.¹¹⁰ These issues should be addressed in or ameliorated by Victoria Police's disclosure framework.

The VAGO report found that, although the Victoria Police audit logs accurately collected data on when BWC footage was accessed, Victoria Police does not actively monitor these logs.¹¹¹ Therefore, Victoria Police cannot ensure that officers are complying with the editing and retention requirements in the VPM.

The VPM is the primary regulatory framework governing how BWC footage is stored, retained, and edited. The absence of a specific legislative framework regulating disclosure of BWC footage means that Victoria Police has significant discretion in the editing and storage or deletion of BWC footage. Lack of independent oversight significantly diminishes the potential of BWCs to enhance the accountability of police.

Availability of BWC footage in civil proceedings

The use, communication, and publication of BWC footage is regulated by the *Surveillance Devices Act*.¹¹² In accordance with s 30E, it is a criminal offence to use, communicate, or publish BWC footage in circumstances that are not expressly permitted by the Act. Section 30F describes specific circumstances in which the disclosure of BWC footage is permitted.

The recent decision in *German v the State of Victoria*¹¹³ (*German*) prohibited the use of BWC footage in civil proceedings. *German* concerned an action for false imprisonment, battery, and assault against the State of Victoria.¹¹⁴ In pursuing his claim, the plaintiff sought discovery of the BWC footage of two prison officers relevant to the

106 Ibid Question 5 - 8.

107 Ibid Question 11.

108 Hogan and Patten (n 23) 21.

109 Richard Willingham, 'Call for Overhaul of Regulation Governing Use of Police Body Cameras in Victoria' *ABC News* (online, 11 November 2019) <<https://www.abc.net.au/news/2019-11-11/call-for-overhaul-of-regulation-governing-use-of-police-body-cam/11691530>>.

110 Hogan and Patten (n 23) 21.

111 VAGO (n 25), 16.

112 Body worn footage is 'protected information' pursuant to s 30D(ab) *Surveillance Devices Act 1999* (Vic).

113 *German v State of Victoria* [2020] VCC 1517, [1].

114 Ibid.

alleged assault.¹¹⁵ The Court held that the highly prescriptive nature of the *Surveillance Devices Act 1999* (Vic) meant that disclosure of BWC footage in civil proceedings was prohibited.¹¹⁶ The Court held that it was immaterial that the footage was relevant to the matter.¹¹⁷ In her closing remarks, Judge Davis noted ‘the difficulties which this prohibition may cause for plaintiffs in civil proceedings’.¹¹⁸ The prohibition on the use of BWC footage in civil proceedings does not apply if the footage has been previously played in open court during criminal proceedings. This approach to disclosure was a notable departure from how other police recordings such as CCTV from police cells or police car recordings are disclosed.¹¹⁹

German had serious implications for victims of police misconduct. If an individual bringing a civil claim against the State of Victoria for police misconduct cannot discover footage of the incident, this adversely affects the prospects of success of their case. Furthermore, *German* prevented police tort lawyers from accessing BWC footage. This limited the capacity of lawyers to provide comprehensive legal advice about the strengths and weaknesses of a prospective claim. Consequently, victims may have been less likely to bring proceedings against the State of Victoria, significantly limiting the accountability potential of BWCs. This is seriously problematic in light of the fact that civil litigation is one of the few options for recourse for those who have experienced police misconduct.¹²⁰ An example of the implications of *German* for plaintiffs is the recent case of a prisoner who was assaulted by prison guards in his cell. The guards were wearing BWCs for the duration of the assault, however the plaintiff was unable to access footage of the assault due to the *German* ruling.¹²¹

German highlighted the inconsistent approach to the disclosure of BWC footage between civil and criminal proceedings. BWC footage is regularly disclosed and relied upon as evidence in criminal matters. This inconsistency allows police to use BWCs as an evidence-gathering tool whilst avoiding the potential accountability BWCs may bring.

Following the decision in *German*, police accountability advocates in Victoria strongly pushed for changes to the *Surveillance Devices Act 1999* (Vic) which would allow for disclosure of BWC footage in civil proceedings. In December 2021, Attorney-General Jaclyn Symes amended the Surveillance Devices Regulations 2016 (Vic). In a statement, Ms Symes said, “Body-worn camera footage can be a crucial piece of evidence to hold those who do the wrong thing to account and exonerate the innocent. ...We know the overwhelming majority of frontline workers do an amazing job every single day – keeping us safe and saving lives – but when things do go wrong, everybody should be able to access the evidence they need to get justice, regardless of what sort of legal action they are a party to”.¹²²

Following the amendments, a ‘prescribed purpose’ for the use of BWC footage now includes “civil proceedings in which Victoria Police or the State is a party, or a police officer is called, or has been called, as a witness”.¹²³ This is a positive step in addressing the issues arising out of *German*, however, the full scope and efficacy of these amendments remains unclear until tested in a court proceeding. We hope this is the first step in ensuring that the accountability mechanism of BWCs is realised.

Police accountability advocates have proposed that a more victim-centred approach to accessibility of BWC footage in police misconduct cases would be to allow a victim and their lawyers

115 Ibid [2].

116 Ibid [19].

117 Ibid [30].

118 Ibid [33].

119 Hogan and Patten (n 23) 21.

120 Although IBAC has the power to investigate complaints of police misconduct, its powers are limited and often complaints are referred back to Victoria Police for internal investigation. Issues and criticisms of the IBAC system are beyond the scope of this report.

121 Richard Baker, ‘Prisoner Bashed by Guards Unable to Access Body-Camera Footage’ *The Age* (online, 5 September 2021) <<https://www.theage.com.au/national/victoria/prisoner-bashed-by-guards-unable-to-access-body-camera-footage-20210831-p58nit.html>>.

122 Tammy Mills and Cameron Houston, ‘Police body camera footage allowed in Victorian civil lawsuits’ *The Age* (online, 21 December 2021) <<https://www.theage.com.au/politics/victoria/police-body-camera-footage-allowed-in-victorian-civil-lawsuits-20211221-p59j8j.html>>

123 s 11(1)(d) of the *Surveillance Devices Regulations 2016* (Vic).

access to the entire BWC footage.¹²⁴ They have referred to this as an ‘accountability baseline’.¹²⁵


Exceptions

It is important to note here that there could be legitimate reasons for not disclosing or for editing BWC footage. This would include cases where public interest immunity is involved and could include cases where BWC footage or parts thereof might prejudice an ongoing investigation. These circumstances would of course need to be limited, to ensure the accountability mechanisms of BWC are enhanced.

ABC NEWSQU≡

Video of fatal shooting of Kumanjayi Walker by NT police officer Zachary Rolfe shown at murder trial

By [Melissa Mackay](#) and [Jano Gibson](#)
Posted Thu 10 Feb 2022 at 7:39pm, updated Fri 18 Feb 2022 at 10:30am



Body-worn camera footage played in the murder trial of NT police officer Zachary Rolfe shows the fatal shooting of Yuendumu teenager Kumanjayi Walker during an attempted arrest.

Image: abc.net.au - composited from multiple screen captures to show relevant details.

Enforcement

It is essential that an effective and efficient process is developed to encourage and enforce police officer compliance with the VPM. For ease, this section will refer to the processes and procedures that realise this goal as an ‘enforcement framework’. That is, a set of policies, procedures, and laws that combine to encourage police officer compliance explicitly and implicitly with the VPM.

An effective enforcement framework is vital for many reasons. It can improve safety outcomes for police officers and civilians, as well as provide a means by which gaps in training or knowledge are identified and remediated. This increases the accountability of police officers, which has the corollary effect of increasing public trust in police, improving internal police culture, and upholding the rule of law.

An effective enforcement framework is one that ensures meaningful discipline for officers who fail to comply with the BWC activation requirements, disclosure requirements, or any other obligation pursuant to the VPM.¹²⁶ An enforcement framework that is external to Victoria Police would be most effective in ensuring that the accountability mechanism of BWCs is achieved.¹²⁷

This Part outlines the current Victoria Police enforcement framework in relation to BWCs. It elucidates the deficiencies of the current enforcement framework and the rationales underlying our proposal for reform. Finally, this Part expounds our recommendations for the implementation of an effective enforcement framework in relation to the use of BWCs by Victoria Police.

We note that compliance (or lack thereof) with the VPM, as it relates to BWCs, is one element of the much broader issue of realising the effective, consistent, and transparent discipline of police officers for misconduct. It is beyond the scope of this Report to address this issue comprehensively. As such, we have confined our recommendations to an enforcement framework in relation to BWCs only. We view this work as consistent with the efforts of other advocacy

¹²⁴ Hogan and Patten (n 23) 21.

¹²⁵ Ibid.

¹²⁶ Hogan and Patten (n 23) 21.

¹²⁷ Ibid.

groups seeking to improve police discipline and enforcement frameworks more generally.¹²⁸

Current framework

The current enforcement framework

Generally, disciplinary action against a police officer can arise in four ways:

- a member of the public makes a complaint to Victoria Police regarding the conduct of an officer;¹²⁹
- a member of the public complains to IBAC;¹³⁰
- a police officer is subject to internal disciplinary proceedings as a result of their senior officer or another member of Victoria Police identifying their misconduct; or
- a police officer is subject to internal police disciplinary proceedings identified by legal proceedings into wrongdoing.¹³¹

Statutory regime

The VPM, as it relates to BWCs, is a 'Chief Commissioner's Instruction' (**CCI**) within the meaning of the *Victoria Police Act 2013* (Vic).¹³² Police personnel are required to comply with the CCIs. A failure to comply with a CCI may amount to a breach of discipline.¹³³

If a Victorian police officer is alleged to have failed to comply with the BWC policy, the Chief Commissioner has discretion to investigate the allegation and subsequent discretion to charge officers for the breach.¹³⁴ It is not

necessary for an inquiry into a breach of discipline to be open to the public.¹³⁵

Victoria Police Manual

The VPM provides very limited guidance in relation to the discipline or enforcement of police officers who breach it. It provides that 'a member is required to advise their supervisor where they have failed to comply with the Activation Framework.'¹³⁶ Where non-compliance with the VPM is identified, it may be resolved by the process outlined below.

In addition, or as an alternative to the statutory framework outlined above, the VPM also contains an internal complaints and disciplinary process. Where a police officer does not comply with a 'policy rule' (such as those rules contained within the VPM), the officer may be subject to management or disciplinary action.¹³⁷ Management and disciplinary processes include a determination by the Local Professional Standards Committee, issuance of an Admonishment Notice, or Management Intervention. The disciplinary action that a police officer is subject to will depend upon their employment classification and the severity of the misconduct.¹³⁸

Victoria Police have implemented Local Professional Standards Committees (**LPSCs**) in every command.¹³⁹ LPSCs employ a professional standards discipline approach which is focused on "rehabilitation, restorative justice and performance management."¹⁴⁰ If a LPSC determines that an officer has breached discipline or a policy rule, several disciplinary actions are available. These include:

- Where a police officer is reasonably believed to have committed a breach of discipline, the officer may be transferred to other duties, directed to take accrued leave, or suspended with pay.¹⁴¹

128 See, for example, the Police Accountability Project at <https://www.policeaccountability.org.au/> and Australian Lawyers Alliance at <https://www.lawyersalliance.com.au/tags/police-powers>

129 Victoria Police, 'Compliments and complaints' (Web Page, 25 January 2021) <<https://www.police.vic.gov.au/compliments-and-complaints>>.

130 Ibid; Independent Broad-Based Anti-Corruption Commission, 'What can you report?' *Reporting Corruption* (Web Page, 2020) <<https://www.ibac.vic.gov.au/reporting-corruption/what-can-you-complain-about>>.

131 Independent Broad-Based Anti-Corruption Commission Committee, *Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria* (Final Report, September 2018) 55.

132 *Victoria Police Act 2013* (Vic), ss 3(1) and 60; see also the *Victoria Police Manual*.

133 Ibid ss 61 and 125.

134 Ibid, ss 126 and 127.

135 *Victoria Police Regulations 2014* (Vic) s 51(3).

136 Victoria Police (n 30) 2 [1.2].

137 Victoria Police, 'Policy Rules' *Victoria Police Manual* (2018) 1.

138 Victoria Police, 'Discipline Action' *Victoria Police Manual* (2018) 1.

139 Victoria Police, 'Local Professional Standards Committees' *Victoria Police Manual* (2018) 1.

140 Ibid.

141 Ibid.

- If a police officer is charged with a breach of discipline, the officer may be transferred to other duties, directed to take accrued leave, or suspended with or without pay.¹⁴² These actions may also be taken against an officer who is reasonably believed to have committed, or who is charged with, a criminal offence punishable by imprisonment.¹⁴³

Alternatives to formal disciplinary processes for more minor misconduct include the issuing of an ‘Admonishment Notice’,¹⁴⁴ or the police officer being subject to Management Intervention.¹⁴⁵ An ‘Admonishment Notice’ may be issued where a police officer commits a breach of discipline and is separate from the performance management system.¹⁴⁶ The issue of an Admonishment Notice does not prevent further disciplinary action being taken, however, if further action is taken, the original Admonishment Notice will be withdrawn.¹⁴⁷

Management Intervention (**MIM**) is employed where an officer is the subject of communication and customer service complaints or performance management matters.¹⁴⁸ In MIM, a ‘resolution officer’ attempts a ‘resolution technique’ to resolve the complaint. This may include:

- an apology.
- meeting with the complainant.
- explanation of Victoria Police policies, procedures, or training.
- referral to a specialist service.
- workplace guidance; or
- no action.¹⁴⁹

A resolution officer may also admonish the officer, change the duties of the officer by agreement, change the duties of the officer by direction, or transfer the officer. These actions

are only available after all developmental or welfare issues have been exhausted.¹⁵⁰

In summary, an officer who fails to comply with the VPM may be subject to formal disciplinary processes, receive an admonishment notice, or be subject to MIM. The ways in which non-compliance is identified and the consistency with which these enforcement frameworks are applied is opaque at best. This is discussed further in the next section.

Issues with current framework

Enforcement of BWC policy - results from the survey

The deficiencies in Victoria Police’s current system for transparently receiving and resolving complaints against police, and disciplining police, are widely recognised.¹⁵¹ Disciplinary proceedings against police by police are complex, slow,¹⁵² inefficient, biased, applied unequally,¹⁵³ and lack transparency.¹⁵⁴ The punitive and sanctions-based approach to police discipline within police forces is ineffective in modifying the behaviour of officers.¹⁵⁵

These deficiencies were also identified by respondents to our survey. Over 50% of survey respondents had received BWC footage in which the respondents perceived Victoria police officers were acting outside their lawful police powers.¹⁵⁶ However, information regarding the number of police officers subject to performance management or disciplinary processes following such misconduct is unavailable. A separate Freedom of Information request submitted to Victoria Police for release of these figures was denied. Further, over

¹⁴² Ibid 3.

¹⁴³ Ibid 3-4.

¹⁴⁴ Ibid 2.

¹⁴⁵ Victoria Police, ‘Management Intervention and Local Management Resolution’ *Victoria Police Manual* (2018) 1-2.

¹⁴⁶ Victoria Police, ‘Admonishment Notices’ *Victoria Police Manual* (2018) 1.

¹⁴⁷ Ibid 2.

¹⁴⁸ Ibid 2.

¹⁴⁹ Ibid 5.

¹⁵⁰ Ibid 6.

¹⁵¹ Office of Police Integrity Victoria, *A Fair and Effective Victoria Police Discipline System* (Report, October 2007) 11 <https://www.ibac.vic.gov.au/docs/default-source/reports/opi-report-a-fair-and-effective-victoria-police-discipline-system---oct-2007.pdf?sfvrsn=f8596175_8>.

¹⁵² Darrel W. Stephens, ‘Some Thoughts on Improving Police Discipline’ (2019) *Police Leadership* 3.

¹⁵³ Ibid 2.

¹⁵⁴ Ibid 3.

¹⁵⁵ Christopher Harris and Robert Worden, ‘The Effect of Sanctions on Police Misconduct’ (2014) 60(8) *Crime & Delinquency* 1258, 1281; Office of Police Integrity Victoria (n 151) 11.

¹⁵⁶ Rights Advocacy Project (n 43) Question 13.

96% of survey respondents agreed that police officers should be subject to disciplinary measures where members fail to activate their BWC whilst exercising a police power.¹⁵⁷ However, as the preceding section illustrates, the nature, availability, and consistency of such disciplinary measures is ambiguous at best.

These observations demonstrate that the current Victoria Police enforcement framework for identifying and resolving instances of non-compliance with the VPM fails to subject officers to adequate supervision and oversight, lacks transparency and consistency, and provides unfettered discretion to officers and their supervisors.

Lack of supervision and oversight

The VPM does not ensure supervision and oversight of police use of BWCs. This means that there are few, if any, opportunities to identify misuse of BWCs or failure to adhere to the VPM. It is trite to say that if non-compliance is not identified, no performance management processes can occur, nor disciplinary proceedings take place.

The VPM states that '[a] supervisor is responsible for monitoring the use of BWC during their shift.'¹⁵⁸ However, there is no specified process in the VPM for the review of BWC use and footage by supervisors. Following a Freedom of Information request to Victoria Police, we have ascertained that monitoring by supervisors is conducted monthly.¹⁵⁹ When reviewing footage, the supervisor randomly selects and reviews three pieces of footage for each subordinate. Supervisors are to review BWC footage to ensure compliance with activation and deactivation guidelines, compliance with the operational guidelines, and to ensure that the footage has been properly categorised. The VAGO report noted the significant burden that is placed on supervisors

who are to manually review footage.¹⁶⁰ Although it appears that the reviews by supervisors are regular and structured, the review process is determined entirely by internal Victoria Police policy that is not available to the public without a Freedom of Information request. The issue of unfettered discretion is discussed further below.

The VPM also fails to provide any process for centralised review or oversight. In particular, the review of BWC compliance is isolated within teams or command structures. BWC guidelines compliance is not reported to senior levels of command, except in critical incidents such as when an officer discharges their firearm.¹⁶¹

There are no prescribed benchmarks for BWC compliance, so there is a risk that consistent poor BWC compliance may not be reported to senior command.¹⁶² This means that it is unlikely that Victoria Police (as an organisation) is able to assess compliance with the VPM across the entire Victorian force, and thus, does not have any means to identify or remediate systemic issues. This issue was noted in the VAGO report.¹⁶³

Further, the current enforcement framework is almost an entirely internal process within Victoria Police (with the exception of IBAC oversight). This means that any reluctance to identify, and act upon, misconduct within Victoria Police results in such misconduct going unchecked. It is essential that an external enforcement framework is implemented to ensure that misconduct can be identified and responded to appropriately.

Following a Freedom of Information request, Victoria Police advised that there is no discrete document detailing any disciplinary action following identification of non-compliance during the course of the reviews. The absence of this document may imply that the compliance review is not being undertaken as required by the BWC Operational Guidelines.

The concern about lack of supervision and oversight of BWC use does not relate to the punishment of officers for non-compliance.

157 Ibid Question 18.

158 Victoria Police (n 30) [2].

159 The FOI request was submitted in March 2021, but revised and resubmitted in June 2021 upon advice from the FOI division that the request entailed a substantial and unreasonable diversion of police resources. Requested documents were disclosed in February 2022, however limited to between June 2019 and May 2021 as per the revised request. Follow-up attempts were made to inquire into the scope of the disclosure, however contact with the FOI office has been unsuccessful.

160 VAGO (n 25)t, 14.

161 Ibid.

162 Ibid.

163 Ibid.

Rather, we are concerned that having no formal process to identify non-compliance with the VPM means that deficiencies in training or knowledge gaps regarding the use of BWCs cannot be identified. Police officers who appear to have engaged in systemic or deliberate misconduct cannot be identified for disciplinary or performance management processes before significant harm occurs. Without a framework that provides opportunities for ongoing training and performance management, issues that arise from the misuse of BWCs are likely to become entrenched and systemic. Notably, Victoria Police does not provide continuous or refresher training on BWC use to ensure officers remain updated on any guideline changes.¹⁶⁴

In addition, an effective enforcement framework has the potential to improve both police officer and civilian safety by increasing the proportion of police interactions with the public that are recorded. This will have the benefit of capturing instances of assault or abuse of police by members of the public, and police misconduct or brutality toward members of the public.

Further, the absence of any external enforcement framework means that cultural change is unlikely to occur within Victoria Police. Our recommendations below aim to address this issue by creating a legislative framework that encourages compliance with BWC policy and thus will result in a culture of increased willingness to comply with the policy.

Lack of transparency and consistency

A corollary issue with the current VPM and enforcement framework is that there is a lack of transparency and consistency regarding the identification and resolution of disciplinary breaches. This deficiency is damaging for both individual police officers and for the perception of Victoria Police within the Victorian community.

The VAGO report was unable to properly assess the efficacy of Victoria Police's monitoring and compliance regime.¹⁶⁵ The VAGO report indicates the interviews with staff found that compliance monitoring tasks were completed inconsistently.¹⁶⁶

Where there is a lack of transparency regarding disciplinary proceedings, the public can have little confidence in such proceedings.¹⁶⁷ If public perception is that police disciplinary proceedings are biased, inconsistent, or ineffective, the public will have little confidence in police adhering to their own rules and policies.¹⁶⁸ This is likely to diminish Victoria Police's standing and authority within the Victorian community and in turn, hamper the efforts of police. An effective enforcement framework may thus promote individual officer accountability, and a culture of accountability, through the existence of disciplinary or performance management processes, an increase in the availability of BWC footage for use in proceedings against criminal accused and police accused of misconduct, encourage police reflection on professional (mis)conduct through creation of audio-visual records of police behaviour and conduct, and encourage public confidence in police.¹⁶⁹

Similarly, if disciplinary proceedings are applied inconsistently, individual police officers suffer.¹⁷⁰ Those officers subject to disciplinary proceedings are likely to believe that they are experiencing harsher treatment than others.¹⁷¹ Officers may be more willing to disregard rules and policies if they believe that they are unlikely to be subject to disciplinary proceedings,¹⁷² and it may also mean that officers who engage in misconduct are less willing to activate their BWCs in order to avoid accountability mechanisms. Alternatively, officers may feel disempowered and repressed in their role if they believe that they are subject to punitive and inflexible discipline.¹⁷³ This results in poor policing outcomes.¹⁷⁴ If police officers fail to comply with Victoria Police policies consistently, officer morale and camaraderie is likely to be diminished.

A lack of public confidence in police disciplinary processes and the confidence of police in

164 Ibid, 27.

165 Ibid, 13.

166 Ibid.

167 UNODC (n 17) 18.

168 Ibid.

169 Harris and Worden (n 155) 1258, 1259.

170 Darrel W. Stephens, 'Police Discipline: A Case for Change' *New Perspectives on Policing* (June 2011) 5-9.

171 Ibid 7.

172 Ibid 6.

173 Ibid.

174 Office of Police Integrity Victoria (n 151) 21.

such processes can be remediated by the implementation of legislative provisions to determine the discipline of police. Such enforcement frameworks would also further promote transparency by being publicly accessible and easily comprehensible.

Discretion

A significant problem with the current enforcement framework is the unfettered discretion given to police officers and their supervisors. It has been widely noted that discretion is an essential aspect of the role of police officers. However, too much discretion in disciplinary proceedings both produces and exacerbates the issues already identified above.

The VPM explicitly gives discretion to individual officers to advise their supervisor where they have failed to comply with the activation framework. This gives rise to two significant problems. Firstly, it is unlikely that an individual will report their own non-compliance to their supervisor. Secondly, relying on individual officers to report their non-compliance with the VPM does not account for officers who are unaware of their non-compliance with the policy. For such officers, additional training and supervision is required. However, perversely, there is no means through which they can be identified to receive such additional training and supervision. The current system is thus likely to entrench training deficiencies and make behavioural change more difficult over time.

The unfettered discretion of police officers in relation to discipline and enforcement for breaches of the VPM diminishes public trust in police. The police and courts depend upon public cooperation for their effectiveness. Transparency, openness to (external) scrutiny, integrity, and public confidence and legitimacy are mutually reinforcing qualities.¹⁷⁵ As such, the increased trust of the public in police through an improved enforcement framework will have the additional benefit of increasing the efficacy of policing through an increase in the public perception of the legitimacy of police.

Modification of the VPM, and the introduction of a legislative regime, to create a bounded discretion for supervisors in identifying and responding

to non-compliance with the VPM would ensure consistent and fair disciplinary and enforcement processes and increase public trust in police.

THE AGE

National Victoria Crime

Aboriginal man accuses police of violent assault and racist abuse

September 4, 2020 – 7.02pm

An Aboriginal man says police officers threw him off his bicycle, pinned him to the ground and called him a "black c---" while he was riding to work at dawn without his bike lights on.

Korey Penny, who works on Melbourne's Metro Tunnel project, said he wanted Victoria Police to be held accountable for the incident that hospitalised him, which he said would never have happened to "white guy in a suit".



The Australian Workers Union, which represents tunnellers on the rail project, has referred the matter to anti-corruption investigators.

Image: theage.com.au - composited from multiple screen captures to show relevant details.

175 UNODC (n 17) 9.

PART FOUR: Conclusion

The introduction and widespread use of BWCs by Victoria Police, and police around the world, has the potential to greatly improve the accountability of police, the evidence available in civil and criminal proceedings, the safety of police and the public, and the public perception of the legitimacy of police. However, as this Report has identified, the current policy governing the use of BWCs, and the actual use of BWCs, by Victoria Police has raised serious concerns. The policy fails to provide adequate guidance for the activation of BWCs. The policy fails to provide adequate guidance for the disclosure of BWC footage. The policy fails to provide any substantive enforcement or disciplinary measures for failures to comply with the policy. These deficiencies are significant and dangerous. It is essential that the recommendations proposed by this Report are seriously considered — and adopted — by the legislature and by Victoria Police.

PART FIVE:

Recommendations

1. Activation

1.1 Amendments to the Criminal Procedure Act 2009 (Vic)

Insert provision under Part 8.2 Witnesses, Division 7C

1. Definitions:

- a. “Tamper” means to intentionally damage, disable, dislodge, or obstruct the sight or sound or otherwise impair functionality of the BWC or to intentionally damage, delete, or fail to upload some or all portions of the video and audio.

2. Victoria Police members are required to activate their body worn cameras when:

- a. Exercising legislated or common law powers, including but not limited to:
 - i. the arrest/detention of person/s for any offence, including exercising family violence holding powers.
 - ii. vehicle interceptions or checkpoint/random breath testing sites.
 - iii. person/property/premises search conducted with or without warrant (also see section 3.5 for limitations).
 - iv. attending private premises to request a preliminary breath test or abate residential noise.
 - v. issuing infringement notices.
 - vi. in car briefings.
 - vii. process service, e.g., serving a summons, intervention order or Family Violence Safety Notice; or
 - viii. interactions with the public where a Field Contact Report is required (or would be).
 - ix. inspections of premises in accordance with the *Liquor Control Reform Act 1998*, *Firearms Act 1996*, *Sex Work Act 1994*, or *Second-hand Dealers Act 1989*; or
 - x. engagement in a formal enquiry or enforcement action with an individual (a ‘targeted interaction’) such as asking for name and address or requesting information about behaviour or presence at a location (as described in 2.1 ‘Interactions with the Public’ guideline, Victoria Police Manual).
- b. To capture an incident occurring, likely to occur or which has occurred, including but not limited to:
 - i. attendance at an ESTA task, e-Task, or station task resulting in a public contact.
 - ii. a police pursuit or vehicle interdiction where it is safe to do so, or the deployment of vehicle immobilising devices (excludes vehicles fitted with ANPR and ICV system).
 - iii. being approached/hailed by the public in need of police assistance.
 - iv. observations of and attendance to the public in need of assistance.
 - v. during public order events as directed by the Police Commander.

3. Members should only stop a recording when:
 - a. an interaction ceases.
 - b. an incident is resolved or otherwise ends.
 - c. directed to stop by a supervisor.
 - d. directed to stop by a member in charge of a critical incident response.
4. When subsection (2) applies, but a recording is either not made, is stopped prematurely or muted, the member must record the circumstances in such a way to:
 - i. provide enough detail to later account for the omission; and
 - ii. identify the supervisor who directed the action (if applicable).

1.2 Amendments to the Victoria Police Manual

Insert after 3.3 (to become 3.4): When verbal notification of recording must be given:

- Members must point to their camera and notify all present individuals subject to that incident that the body worn camera is active and the footage can be accessed by both parties for legal proceedings.

Edit 3.1

- Current provision: While acknowledging there are some technical and practical limitations, the expectation is that a member wearing a BWC will be recording operational incidents for their shift.
 - Recommended provision: While acknowledging there are some technical and practical limitations, the expectation is that a member wearing a BWC will be recording all operational incidents for their shift.
- Current provision: A member must commence recording once a decision is made that the circumstances meet the criteria below and where practicable before the activity/interaction occurs for example prior to attending an incident when developing operational plans or tactics.
 - Recommended provision: A member must commence recording once a decision is made that the circumstances meet the criteria below before the activity/interaction occurs for example prior to attending an incident when developing operational plans or tactics.

Delete 3.1

- The BWC has a pre-set 30 second, video only buffer which captures footage, when in standby mode, prior to the device being started.¹⁷⁶

¹⁷⁶ Delete the 30 second pre-set video only buffer, so both video and audio are captured when in standby mode prior to the device being started.

2. Retention

2.1 Amendments to Criminal Procedure Act 2009 (Vic)

Insert provision under Part 8.2 Witnesses, Division 7C

Victoria Police members must comply with the following retention requirements relating to body worn camera footage:

- a. Individual Victoria Police members are responsible at the end of each shift for:
 - i. Uploading body worn camera footage to Victoria Police's BWC footage management system.
 - ii. reviewing, categorising, and adding metadata to their BWC footage within one month of uploading the footage.
 - iii. creating a redacted copy from their original BWC footage.
 - iv. organising immediate access to the BWC footage for clients and/or lawyers; and
 - v. providing access to their footage to another member for a legitimate business need.
- b. Individual Victoria Police members are responsible at the end of each shift for:
 - i. reviewing and categorising footage if the member wearing the BWC is unable.
 - ii. reviewing the appropriate redaction of BWC footage; and
 - iii. authorising the sharing of another member's footage for a legitimate business need.
- c. All body worn camera footage must be retained for:
 - i. 1 year in all situations.
 - ii. 7 years where the footage is disclosed or produced in a criminal or civil proceeding, or the footage may be relevant to a complaint against Police; or
 - iii. A longer period by order of a Court.
- d. Where footage is redacted:
 - i. Original master copies of all redacted footage must be retained for the same period as all redacted versions of the footage; and
 - ii. A log of all redactions made must be kept and must be disclosable on request in a criminal proceeding.

2A. Editing

2A.1 Amendments to Criminal Procedure Act 2009 (Vic)

Insert provision under Part 8.2 Witnesses, Division 7C

1. Once footage has been uploaded onto Victoria police's internal system, the footage must be edited within one month.
2. Footage must only be edited consistently with the purposes of the activation framework.
3. All edits must be tracked including timestamps and reasons for edits recorded and disclosable upon request.
4. Where footage is edited, an original master version of the footage must be retained and made available to parties to the proceeding upon request.¹⁷⁷
5. In the instance a challenge arises to the disclosed edited footage, a special hearing will determine the lawful scope of the edits.
 - a. Note that s 464JB of the Crimes Act 1958 (Vic) gives Magistrates the power to direct editing of footage.
6. Where an incident takes place that:
 - a. gives rise to charges relating to assaulting police or resisting police; or
 - b. may give rise to charges relating to assaulting police or resisting police.

The officers involved must have no access to the footage once docked, and a police officer not involved with the relevant incident is to be appointed Informant, with supervision from a manager.¹⁷⁸

7. Where an incident involving use of force that leads to:
 - a. detention or arrest; or
 - b. a formal or informal complaint being registered.

The incident must lead to automatic flagging with a supervisor, with the officers involved in the incident to have no access to the footage once docked.

2A.2 Amendments to Victoria Police Manual

Edit 8.2

- Current provision: 'reviewing, categorising and adding metadata to their BWC footage within one month of uploading the footage'.
 - Recommended provision: 'reviewing, categorising and adding metadata to their BWC footage upon uploading the footage'.

Other amendments including disclosure recommendations to be included in section 9.3 the VPM and section 8.2 of the VPM to reflect statutory amendments.

¹⁷⁷ Subject to claims for public interest immunity.

¹⁷⁸ This might be more appropriate for VPM as it is an internal process.

3. Disclosure: Preliminary brief of evidence ¹⁷⁹

3.1 Criminal Procedure Act 2009 (Vic)

Insert provision under Part 3.2, Division 2

1. The preliminary Brief of Evidence must outline the availability of body worn footage.
2. The preliminary Brief of Evidence must outline whether access to body worn footage is available to be viewed at court at first mention or via a legal representative.
3. BWC footage must be available as part of the preliminary Brief of Evidence for remand matters. Failure to include access to BWC footage at this stage will create a rebuttable presumption of inadmissibility of police witness evidence.
4. Where BWC footage is included as part of the preliminary Brief of Evidence, and the BWC footage to be tendered as evidence has been edited, the original (unedited) master version of the BWC footage must also be included in the Brief of Evidence.

3.2 Amendment to the Victoria Police Manual

Insert 9.3

1. All relevant BWC footage forming part of the brief of evidence must be available at the first hearing, including where there is a remand hearing.
2. The preliminary Brief of Evidence must include a password/token enabling the legal practitioner to view the relevant BWC footage on the online portal. If, for whatever reason, the footage is not available to view in the online portal, a USB with the BWC footage must be provided with the preliminary Brief of Evidence.

¹⁷⁹ Recommendations to be included in section 9.3 the VPM.

4. Enforcement: Effect on admissibility of evidence

4.1 Evidence Act 2008 (Vic)

Insert provision as section 33(2)

1. If a police officer fails to comply with Victoria Police's activation or disclosure policies, evidence that is introduced by the Prosecution relating to the period of time in which the breach occurred is presumed to be improperly obtained.

Insert provision as s139A

Body-worn camera footage

1. For the purposes of section 138(1)(a), evidence of an incident is taken to be obtained improperly if an officer –
 - a. Tampered¹⁸⁰ with body worn cameras or body worn camera footage in relation to the incident; or
 - b. Fails to activate their body worn camera before or during the incident as required by activation policy¹⁸¹; or
 - c. Fails to adhere to retention requirements¹⁸² in relation to the incident; or
 - d. Fails to disclose¹⁸³ all body worn footage relevant to the incident.
2. For the purposes of section 138(1)(b), any representations sought to be relied on in a prosecution related to an incident that was not recorded due to a failure of Victoria Police members to comply with Victoria Police's activation or retention policies is taken to be obtained in consequence of an impropriety.
3. For the purposes of section 138(3), the court may consider the following factors in determining whether the officer was able to comply with body worn camera and footage requirements:
 - a. Situations where Victoria Police members (or the accused, or members of the public) are in imminent serious danger and do not have time to activate their body worn cameras before responding to the serious danger; or
 - b. Major failure of technology that is not caused by Victoria Police members; or
 - c. Any other matters deemed to be relevant under Part 8.2 Witnesses, Division 7C: Criminal Procedure Act 2009 (Vic).

180 Insert definition: As referred to in Part 8.2 Witnesses, Division 7C; Criminal Procedure Act.

181 Ibid.

182 Ibid.

183 Ibid.

5. Policy reform

Victoria Police Training procedures

- Victoria Police should develop rigorous, ongoing training to inform officers of the operation and policy objectives of BWCs to improve their reception and activation.
- The training program should include the following fundamentals:
 - How and where to wear BWCs.
 - BWC activation, retention and disclosure policies set out in the VPM and Victoria Police Act 2013 (Vic) (if amended).
 - The appropriate exercise of officer discretion, including how to balance the necessity to record against legitimate privacy concerns in high stress situations.
 - The evidentiary consequences for a breach of BWC policy; and
 - The civil and criminal liability arising from a breach of BWC policy.
- Supervisors should periodically review BWC footage to:
 - Monitor compliance with BWC policy.
 - Provide feedback to individual officers; and
 - Update the training program to address common failures.
- A period of no more than six months should be left between the review and retraining of officers on the use of BWCs.
- Victoria Police should provide data (in their annual report, or elsewhere) about breaches of body worn camera policy, including statistics about disciplinary proceedings that resulted from those breaches. Specifically:
 1. How many breaches of the policy were recorded.
 2. A breakdown of what type of breach (activation? retention? disclosure?).
 3. What proportion of detected breaches led to disciplinary action?
 4. A breakdown of the outcomes of disciplinary action (fines? suspension? counselling?).
- Victoria Police should also provide information about how it is training their members relating to the policy, particularly where members have breached the policy.