

SVENSON
BARRISTERS



Police Body Worn Cameras

[E. TANYA.KAMIL@VICBAR.COM.AU](mailto:E.TANYA.KAMIL@VICBAR.COM.AU)

PH. 0432 658 326

What is a Body Worn Camera?



- A Body Worn Camera (BWC) is a portable camera worn by frontline police and PSO's ('officers') which are intended to capture video recorded interactions with members of the public.

- BWC's were introduced after the Andrews Labour Government introduced the Public Safety Package in the *2016-17 Victorian Budget*.

The investment is expected to improve responses to Family Violence incidents and directly address the recommendations made by the Family Violence Royal Commission. – Recommendation 58.

- Recent amendments to the *Surveillance Devices Act 1999* (Vic) now provide a legislative authority for officers to **overtly** record a person or activity using a BWC without consent.

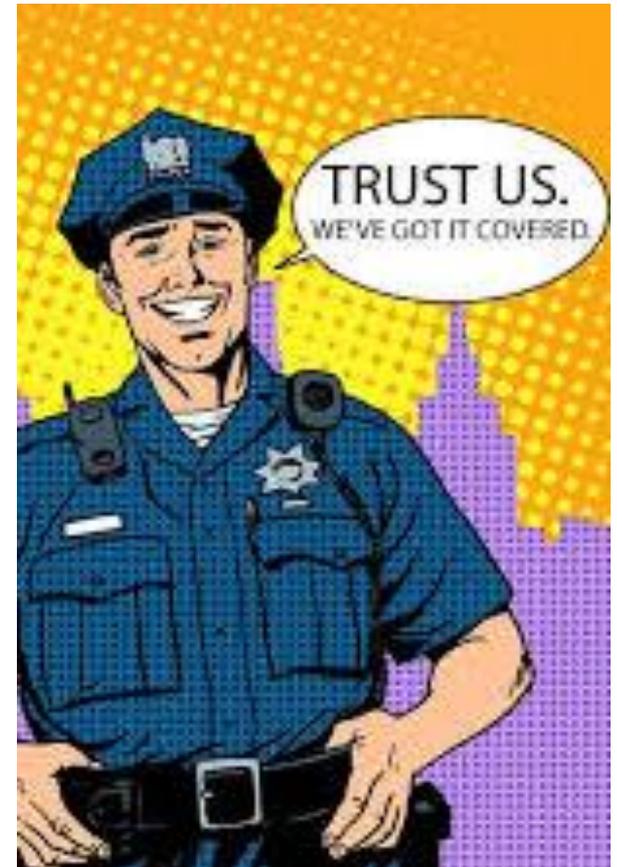
Intentions

The use of BWC is intended to support a range of general policing purposes including:

- Reliable evidence gathering by officers
- Decrease in the number of police complaints
- Video evidence of decisions made
- Additional evidential source for police
- Collection of statements and evidence from FV incident scenes (DREC – more on this later)

Advantages of BWC support:

- Idea of transparency with interactions between officers and the community
- Greater accountability for officers



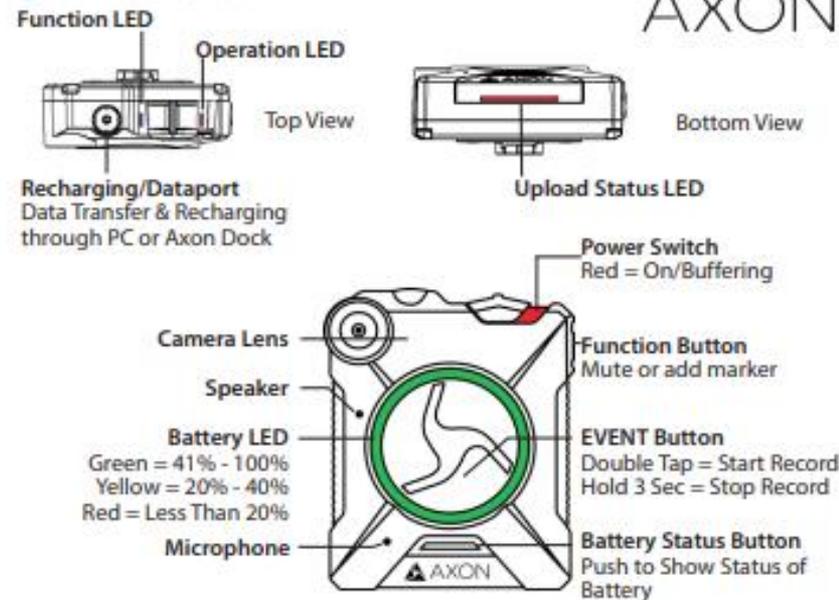
Axon Body 2

The current BWC being used by Victoria Police is the Axon Body 2

Features worth noting

- 1080P HD video recording
- Audio prompts that BWC is recording two every two minutes
- Blinking red light signalling recording in progress
- Stealth Mode – No visible lights or sounds (unable to determine if recording or not)
- Configurable Pre-event buffer – currently appears to be 30 seconds meaning no audio for 30 seconds prior to activating BWC
- Optional mute/add marker function

Quick Reference





Surveillance Devices Act 1999 (Vic)

Governing Legislation s 6 Private Conversations'

Surveillance Devices Act 1999
(Vic)

The starting point for the use of
body worn cameras can be
found in sections 6 of the Act.

Part 2—Regulation of installation, use and maintenance of surveillance devices

6 Regulation of installation, use and maintenance of listening devices

- (1) Subject to subsection (2), a person must not knowingly install, use or maintain a listening device to overhear, record, monitor or listen to a private conversation to which the person is not a party, without the express or implied consent of each party to the conversation.

S. 6(1)
amended by
No. 26/2004
s. 7(a).

Penalty: In the case of a natural person, level 7 imprisonment (2 years maximum) or a level 7 fine (240 penalty units maximum) or both;

In the case of a body corporate,
1200 penalty units.

Note

Section 32A applies to an offence against this subsection.

Note to s. 6(1)
inserted by
No. 13/2013
s. 42(1).

S 6(1) makes it a criminal offence to use a **listening device** in the way described **unless** the person is

- A **party** to the **private conversation** (means a person by or to whom words are spoken in the course of the conversation: s 3) or
- With the express or implied consent of each party to that private conversation

Listening device as per the definition found in s 3 of the Act would include a BWC.

Exception 1: s 6(2)(c)

The most relevant provisions that apply which are without warrant or other legislative power are found in subsections (c) and (d).

(c) would better apply to instances where stealth mode is active.

(2) Subsection (1) does not apply to—

- (c) the use of a listening device by a law enforcement officer to monitor or record a private conversation to which he or she is not a party if—
 - (i) at least one party to the conversation consents to the monitoring or recording; and
 - (ii) the law enforcement officer is acting in the course of his or her duty; and
 - (iii) the law enforcement officer reasonably believes that it is necessary to monitor or record the conversation for the protection of any person's safety; or

S 6(2)(c) provides an exception to the offence in s 6(1) in instances where:

- i) One party consents. Read expansively, can include for example:
 - Another officer speaking with a **party**
 - Any **party** who has consented either expressly or impliedly**AND**
- ii) The officer is acting in the course of his/her duty (self explanatory)
AND
- iii) The officer reasonably believes it is necessary to monitor or record the conversation for the protection of any person's safety

It would appear that this last element is an objective exercise by the officer with emphasis on any person's safety including that of their own or even party not physically present (e.g. an AFM who has left to attend the police station)

Exception 2: s 6(2)(d) & s 6(3)

(d) Would better apply to incidents of scenarios falling outside the scope of subsection (c).

(2) Subsection (1) does not apply to—

- (d) the overt 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 and the recording of a private conversation to which the officer is not a party is inadvertent, unexpected or incidental to that use; or
- (3) For the purposes of subsection (2)(d) and (e), a police officer, an ambulance officer, a prescribed person or a person belonging to a prescribed class of persons is not required to inform a person that the person is being recorded with a body-worn camera or a tablet computer.

S 6(2)(d) also works as an exception to s 6(1). For example, in the absence of any other indication of overt use, a BWC in **stealth mode** will fall outside the scope of this exemption.

A point of contention may involve whether **overt** use is satisfied by way of a BWC displaying a blinking red light for the duration of the recording and an audible tone every two minutes of recording.

Nowadays more than ever, officers have many pieces of different coloured equipment and it may be open to argue that the ordinary reasonable person may not even be aware that they are being recorded. It would be no more onerous for police to advise they are recording.

Furthermore complicating this, we see that in s 6(3), officers are also not required to inform a person that they are being recorded with a BWC. However, legislation does not exempt officers when asked by a member of the public with whom they are interacting, whether they are being recorded or not.

Exception 2 s6(2)(d) & s6(3) cont...



One would expect that with the idea of BWC's being a tool for transparency and accountability, the better practice for officers would be to advise when they are recording or when asked.

Without circumstances where officers are **overtly** recording **or** the recording falls into one of the exceptions available such as consent of at least one party, the recording would be in contravention of s 6(1) and would render the recording a criminal offence and not admissible.

More on the ***inadvertent, unexpected or incidental*** element later in s 7(2)(d)...

Governing Legislation s7 Private Activity

Surveillance Devices Act 1999
(Vic)

Similar to s6 but s7 substitutes private activity in place of private conversation and surveillance device in place of listening device.

Similar exemptions as to those found in s6(c) & (d).

7 Regulation of installation, use and maintenance of optical surveillance devices

(1) Subject to subsection (2), a person must not knowingly install, use or maintain an optical surveillance device to record visually or observe a private activity to which the person is not a party, without the express or implied consent of each party to the activity.

Penalty: In the case of a natural person, level 7 imprisonment (2 years maximum) or a level 7 fine (240 penalty units maximum) or both;

In the case of a body corporate, 1200 penalty units.

Note

Section 32A applies to an offence against this subsection.

S 7(1) also makes it a criminal offence to use a **surveillance device** in the way described **unless** the person is:

- A **party** to the **private activity** (means a person who takes part in the activity: s 3) or
- With the express or implied consent of each party to that **private activity**

Surveillance device as per the definition found in s 3 of the Act would include a BWC.

Exception 1: s7(2)(c) Private Activity

Surveillance Devices Act 1999
(Vic)

Applies when on premises
whether it be private homes,
workplaces ect...

Takeaway point here is it does
not require the parties consent
who are involved in the private
activity but the occupiers
authorisation.

(2) Subsection (1) does not apply to—

- (c) the installation, use or maintenance of an optical surveillance device by a law enforcement officer in the performance of his or her duty on premises if—
 - (i) an occupier of the premises authorises that installation, use or maintenance; and
 - (ii) the installation, use or maintenance is reasonably necessary for the protection of any person's lawful interests; or

S 7(2)(c) provides an exception in instances where officers using a BWC in the performance of their duties on **premises** do so with:

- i. Authorisation from an occupier AND
- ii. It is reasonably necessary for the protection of any persons lawful interests.

Premises has been defined in s 3 of the Act to include land, building or vehicle, or part of a building or vehicle and any place whether built on or not whether it be within Victoria or not.

In this instance without obtaining both authorisation from an occupier AND the use being reasonably necessary for the protection of any persons lawful interests, officers won't have the protection of this exception to s 7(1).

Exception 2: s7(d) & s7(3) Private Activity

Surveillance Devices Act 1999
(Vic)

(2) Subsection (1) does not apply to—

(d) the overt 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 and the recording of a private activity to which the officer is not a party is inadvertent, unexpected or incidental to that use; or

(3) For the purposes of subsection (2)(d) and (e), a police officer, an ambulance officer, a prescribed person or a person belonging to a prescribed class of persons is not required to inform a person that the person is being recorded with a body-worn camera or a tablet computer.

S 7(2)(d) works to exclude criminal responsibility in instances where:

- i. Officers use a BWC in the performance of their duties, are not a party to a private activity and do so in a way which is inadvertent unexpected or incidental to that use.

Again a similar argument is relevant here in terms of **overt** use of a BWC.

Additionally a point of contention when s 7(2)(d) or s 6(2)(d) are applicable includes the express terminology used being: ***inadvertent, unexpected or incidental to that use.***

Parliament intended for Victoria Police to use BWC's to gather evidence but also to record events involving conflict, physical dispute and violence so that there is an indisputable record of what occurred, not for matters falling outside of the exemptions.



Basic principles

Why Police Want To Record...

- Pursuant to the Crimes Act 1958 s 464H(1) admissions made to an **investigating official** by a person who was suspected or ought reasonably to have been suspected of committing an indictable offence are inadmissible unless the admissions were tape recorded or confirmed on tape.
- This also includes a **suspect** not currently under arrest but sufficient information to justify arrest exists: *R v Vollmer* [1996] 1 VR 95 at 118.
- **Investigating official** means a police officer or person appointed by or under an Act (other than a police officer or person who is engaged in covert investigations under the orders of a superior) whose function or duties include functions or duties in respect of the prevention or investigation of offences.
- As such PSO's who are appointed pursuant to the *Police Regulation Act 1958* s 118B would confirm their position as **investigating officials** who have a function to prevent offences.
- There are also exceptional circumstances where the reception of illegally obtained evidence can still be admissible but is outside the scope of this presentation.



Relevant Police Policies

Chief Commissioner Instruction CCI 06/19 Body Worn Camera Deployment

CCI 02/19 Body Worn Camera Family Violence Trial

BWC Operational Guidelines

VPM Interviews and statements

VPMG Recording of operational duties

VPMP Information use, handling and storage

VPMP Appropriate use of information

Where a conflict exists between CCI's and VPM's, CCI's take precedence.

NB neither is binding law despite reflecting law but rather guiding policy for officers.

When To Start A BWC Recording – BWC Activation Framework



10. Members should start a BWC recording when:
- Exercising a legislated or common law power and the recording would assist in collecting evidence, or
 - Any other occasion when the member believes a recording is necessary:
 - To capture an incident occurring, likely to occur, which has occurred, or
 - That would provide transparency of a public interaction or police activity.
11. The operational policing environment is dynamic and there will be situations when the decision to start the BWC will be unclear. If doubt exists, members should start the BWC recording and later categorise the footage in line with **BWC Operational Guidelines**.

When Not To Start A BWC Recording

12. Members must not record in the following circumstances:

- Outside their police duties or functions
- To covertly record conversations with other members of Victoria Police in line with **VPMG Portable Recording Devices**
- During a full or intrusive body search (as defined in **VPM Searches of a person**)
- When they are engaged in private conversations or briefings

13. Members should not record in the following circumstances:

- Where a reasonable expectation of privacy exists (e.g. changing rooms, toilets etc.) unless the exercise of the police power, duty or function outweighs the privacy/human right being limited
- Within a police station where CCTV is operating, unless the member believes there is a genuine operational need
- While taking crime reports and/or an admissible written statement from a victim/witness, unless the member believes the report may be false
- When undertaking community engagement activities unless there is an operational necessity.

14. BWC must not be used as an alternative to the appropriate formal interviewing and processing of a suspect in custody for an indictable offence as outlined in **VPM Interviews and statements**.

15. Members should not continuously record throughout the duration of their shift.

16. When asked by a member of the public to start or stop a BWC recording, members should balance that request against the BWC Activation Framework.

Now To Discuss “Inadvertent, Unexpected Or Incidental”

- A specific example that may be relevant to some participants attending involves the express terminology used in s 6(2)(d) and s 7(2)(d) ***inadvertent, unexpected or incidental to that use***.
- Recently I was asked about the use of BWC's by police in an ED hospital setting where police attend with a patient in their custody, colloquially referred to as 'under arrest' for the purposes of the patient/suspect seeking medical treatment. (E.g. police dog bite during arrest)
- We now know sections 6 and 7 work to prohibit officers from recording **private conversations** or **private activities** with a BWC unless exceptions apply.
- When specifically dealing with sections 6(2)(d) and 7(2)(d), and overt use, it was not parliament's intention to have an instance where police are recording **private conversations** relating to medical care and/or **private activities** relating to medical procedures. Clear privacy issues develop here as police would ordinarily need consent or warrant to request similar information for their investigation.
- Instead the intention in hospital and like settings is to record incidents involving threats and/or violence against staff so as to capture evidence. (Issue here is that once e.g. a threat to kill is made, activating a BWC afterwards would not capture that evidence (30s buffer no audio) however having a rolling recording still needs to fall within exceptions).
- Police have a legislated duty to preserve the peace, protect life and property, prevent the commission of offences, detecting apprehending offenders and helping those in need of assistance: s 9 *Victoria Police Act 2013*.
- The primary purpose and duty in the above-mentioned example involves attending for security purposes so the offender does not escape lawful custody, communicate with co-accused's, destroy evidence ect...

Inadvertent, Unexpected Or Incidental

- So it would indeed be an remarkable but doomed argument to suggest that recordings obtained from a BWC by sitting with a patient for extended periods of time in a hospital where police are **not a party, without permission** from either **party** or an occupier for private activities can be said to be either **inadvertent, unexpected or incidental** to their duty.
- The main purpose is for the hospital to provide medical care and police to provide a security function not questioning and further investigation at this point.
- Aside from it being inappropriate in most instances, police are generally prohibited by their own policies and procedures from questioning a suspect whilst they are at hospital receiving medical treatment.
- For one, it can be improper where an accused is given medication or treatment which may affect reliability of admissions.
- Secondly, multiple interviews like part questioning at an ED and then further questioning at a police station may also create admissibility issues in terms of either or both interviews being excluded at court: *Pollard v The Queen* (1992) 176 CLR 177.
- Thirdly, if police are seeking to contravene sections 6(1) and or 7(1) unless exceptions apply, police are not just gathering inadmissible evidence which may be excluded by s 138 but are committing a criminal offence.
- **In instances where police do fall into the exceptions the prosecution may still encounter a s 90, s 135 or s 137 arguments where the admission captured is excluded in circumstances above.**

Protected Information

Any information recorded on a BWC by police or PSO's acting in the course of their duties is also referred to as **protected information**.

As protected information, BWC footage is not available to the public through a FOI request.



Protected Information



30D What is protected information?

In this Division—

protected information means—

- (ab) any 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; or



It's also worth noting the express prohibition on the use, communication or publication of protected information in s30E (1) & (2) which creates a summary and indictable offence respectively. For our purposes noting this is sufficient.

30E Prohibition on use, communication or publication of protected information

(4) Subsections (1) and (2) do not apply to—

- (a) the use, communication or publication of—
 - (i) any information that has been disclosed in proceedings in open court; or
 - (ii) any information that has entered the public domain; or
- (b) the use or communication of protected information by a person who believes on reasonable grounds that the use or communication is necessary to help prevent or reduce the risk of serious violence to a person or substantial damage to property; or



Narrow reasons excluding criminal liability in subsections (1) & (2)

Permitted Uses



30F Permitted use of local protected information

(4) In this section—

local protected information means—

- (c) any 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; or
- (d) any information obtained from the use of a body-worn camera or a tablet computer by a prescribed person, or a person belonging to a prescribed class of persons, acting in the course of the person's duties in the prescribed circumstances.

Section 30F(1) of the Surveillance Devices Act provides for express circumstances when local protected information can be used such as:

- Defined Prescribed Purposes (Reg 11 SDR 2016)
- Investigations
- Brief checking
- Relevant proceedings (s3 – Definitions)
- Complaints
- Training
- Auditing

E.g. Allowing complainant to view footage to resolve a complaint.

Current Issues

German v State of Victoria [2020] VCC 1517 (25 September 2020)

Context:

The Plaintiff brings claims of false imprisonment, battery and assault. It was alleged that during the MRC riots (2015), prison officers kicked the Plaintiff, struck the Plaintiff with baton, handcuffed Plaintiff and was thrown on the ground after a corrections dog had bitten the Plaintiff.

Issue: Whether the BWC footage depicting images relevant to the civil proceeding could be inspected

Outcome: Section 30E of the SDA prevents the inspection of BWC footage in civil proceedings

Specific Uses of BWC In The Family Violence Context





New Developments In Evidence (DREC)

Amendments to the *Criminal Procedure Act 2009* now allow for DREC (Digitally recorded evidence in Chief) statement to be taken.

S 367 CPA now provides that a witness may give evidence-in-chief (wholly or partly) in form of an audio or audio-visual recording.

DREC statements – can only be taken by members who have been specifically trained and authorised for this task who are prescribed persons.



Physical And Emotional Injury – Distress Evidence

A principal benefit of Body Worn Cameras is that they record initial disclosures and potentially primary aggressor behaviour.

They have the potential to gather physical and emotional injury evidence when police arrive at a scene like physical trauma such as red marks, swelling or other injuries.

An example of where this may be of particular use to police will be at hospital where the impact of the victims injuries will have the most substantial effect against the accused in criminal proceedings.

Another principal advantage is the reduction of re-traumatising the victim and only having them explain their story once.

DREC evidence

DREC evidence is subject to provisions listed in the *Criminal Procedure Act 2009 (Vic)* Part 8.2 Divisions 5 & 7B.

- *Division 5--Use of recorded evidence-in-chief of children and cognitively impaired witnesses in sexual offence, assault and family violence matters*

Division 5 deals with the use of recorded evidence-in-chief of children and cognitively impaired witnesses in sexual offence, assault and family violence matters.

Division 7B deals with the use of recorded evidence-in-chief of complainant in family violence offence proceedings.

- *Division 7B--Use of recorded evidence-in-chief of complainant in family violence offence proceedings*



Arrest and custody

In Custody Footage – S 464



A member taking a suspect into custody must state the reason for arrest (if arrested), provide a formal caution and rights to the suspect and allow them to exercise these rights if practicable.

If a member fails to capture the caution and rights on BWC, this footage and admissions will very likely be deemed inadmissible at court.

To reduce likelihood of footage being inadmissible, police are expected to give a caution and rights after recording otherwise include a reasons for omission.

A copy of the BWC footage containing caution/rights/confession or admissions for an indictable offence must be provided to the suspect within 7 days.

If a BWC is used to capture evidence, then the evidence will generally form part of the prosecution case and must be disclosed to defence subject to legislative exceptions.

Disclosure Obligations

Common practice will be for police informants to request an email address from a suspect in order to serve the BWC footage via a link. Police will also need to seek consent from the suspect so that they may serve BWC recording in this way. This will generally be done during a DEC interview for clarity, however, issues arise whereby a no comment interview is made.

It will require a forensic decision on a practitioners behalf what advice they provide their clients with respect to this.

If the informant is unable to obtain an email address and consent, they may then be required to burn the footage to serve prior to the suspects release, however this presents further practical issues if the footage requires redaction/editing whilst the suspect is held in custody.

Clearly s 464A – reasonable time provision applies and whilst police may be able to redact/edit footage alongside other purposes provided for in s 464A(4) it may not be permissible to allow for a suspect to be held in custody whilst this alone is completed.

Failure to provide within 7 days may render the footage inadmissible.

Transcripts can be sought in instances where matters are proceeding to contested hearing or committal proceedings or direct indictment to County or Supreme Court.

BWC footage must be disclosed for all offences whether a preliminary brief matter or full brief: s 39 CPA.



Critical incidents

S 82 of the Victoria Police Act

Describes a critical incident as:

- An incident involving the discharge of a firearm by a member on duty (not including the destruction of animals) OR
- An incident involving a MOPF on duty which:
 - Results in the death or serious injury of a person AND
 - Involves use of force OR
 - The use of a motor vehicle OR
 - The death/injury is of a person in custody

Members involved in a critical incident will have the opportunity to view the BWC footage prior to making a statement or being interviewed as per para 33 CCI 06/19 Body worn camera deployment.

Demonstration: Racine County Sheriff, Wisconsin, Christopher Schmaling

Insight From Other Jurisdictions

BWC Auto-triggering technologies (United States)

New technology allows the automatic activation of one or more BWC when certain actions are taken by an officer, including:

- When an officer pulls a weapon from a holster
- When a cruiser drives over a certain speed
- When a cruiser runs with lights or sirens
- When multiple BWC are close in proximity to an activated BWC



Source: Reporter Adam Rogan, The Journal Times, <https://www.youtube.com/watch?v=-RMr9ryDtPA&t=116s>.

SVENSON
BARRISTERS



Thoughts, Comments,
Questions...

[E. TANYA.KAMIL@VICBAR.COM.AU](mailto:E.TANYA.KAMIL@VICBAR.COM.AU)

PH. 0432 658 326