

# Crimes (Surveillance Devices) Body-worn Cameras Guidelines 2022

## Disallowable Instrument DI2022-9

made under the

**Crimes (Surveillance Devices) Act 2010, s43C (Body-worn Cameras—Guidelines)**

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### 1. Name of Instrument

The instrument is the *Crimes (Surveillance Devices) Body-worn Cameras Guidelines 2022*.

### 2. Commencement

This instrument commences on the commencement of the Act, section 43C.

### 3. Guidelines

Following consultation with the director-general, I make the guidelines set out in schedule 1 about the use of body-worn cameras by police officers.

### 4. Definitions

In these guidelines:

**BWC** means body-worn camera.

*Note* See the Act, s 43A for the definition of **body-worn camera**.

**Conducted Electrical Weapon** or **CEW** has the same meaning as in the Act, section 43B (8).

*Note* See the Legislation Act, s dictionary, pt 1 for the definition of **police officer**.

**use** of a body-worn camera, means operating a BWC to make a recording, continue a recording, or recommence a recording.

Neil Gaughan

Chief Police Officer

Date 8 February 2022

## **Schedule 1 - Body-worn cameras Guidelines 2022**

### **1. Purpose**

The purpose of these guidelines is to:

- (a) provide guidance on the use of body-worn cameras by police officers in the performance of their duties and ensure that the use of BWCs:
  - Promotes the accountability of police officers and members of the community;
  - Promotes and protects the safety of police officers and members of the community;
  - Allows for the timely and reliable collection of audio and visually recorded evidence; and
  - Is done in accordance with the principles of human rights; and
- (b) assist the ACT community in understanding their rights and how:
  - Police use BWCs in the performance of their duties in accordance with section 43B of the Act;
  - BWC recordings can be used, stored, disposed of and accessed; and
  - BWCs are used in a manner consistent with *Human Rights Act 2004* (ACT).

### **2. Scope**

These guidelines apply to all police officers performing policing functions in the ACT.

### **3. Principles and Governance**

ACT Policing's use of BWCs and BWC recordings are managed in accordance with these guidelines, AFP's policies/governance and the relevant legislation, as listed below:

AFP Better Practice Guide (BPG) – Body Worn Cameras (ACT Policing)

AFP Commissioner's Order on Operational Safety (CO3)

AFP Commissioner's Order on Professional Standards (CO2)

*Archives Act 1983* (Cth)

*Australian Federal Police Act 1979* (Cth)

*Crimes (Surveillance Devices) Act 2010* (ACT)

*Evidence Act 2011* (ACT)

*Freedom of Information Act 1982* (Cth)

*Freedom of Information Act 2016* (ACT)

*Human Rights Act 2004* (ACT)

*Listening Devices Act 1992* (ACT)

*Privacy Act 1988* (Cth)

*Surveillance Devices 2004* (Cth)

## 4. Use of a BWC

### *Circumstances of Use*

- 4.1. Section 43A of the Act defines a BWC and provides that its use must be approved, in writing, by the chief police officer. Police officers using approved BWCs will be trained in the use of BWCs.
- 4.2. ACT Policing will take reasonable steps to ensure that each BWC functions as intended, and that the use of each BWC is appropriately recorded against the relevant police officer.
- 4.3. Section 43B(1) of the Act states that a police officer may use a BWC in the course of the officer's duties.
- 4.4. Section 43B(2) of the Act requires that a police officer who is wearing a BWC must 'use' the BWC when dealing with a member of the public in the course of the officer's duties and the use must be overt, which is further detailed at Part 4.10-4.18.
- 4.5. To avoid doubt, section 43B of the Act, and by extension these guidelines, do not permit the use of a BWC as a surveillance device to undertake general surveillance or tracking, or for purposes ancillary or incidental to general surveillance or tracking. Use of a BWC, or recordings taken by a BWC, for such purposes must be authorised by a warrant (for example, a surveillance device warrant), and will be subject to ACT and Commonwealth laws and governance, including but not limited to the *Human Rights Act 2004* (ACT) and the Intergovernmental Agreement on Identity-Matching Services.
- 4.6. When using a BWC pursuant to section 43B(1) or (2) of the Act, a police officer must ensure, as far as practicable, that the audio and video functions of the BWC are not obstructed, and the BWC is positioned to optimise the capture of recordings and the purpose for which the BWC is being used.

### *When must a police officer use a BWC?*

- 4.7. Dealing with a member of the public in the course of the officer's duties is referenced through the examples below. This is purposefully broad to capture the standard circumstances of a police officer performing their duties and ensure BWC use is as intended by the Act. The requirement under section 43B(2) is subject to exceptions outlined in section 43B(3) of the Act, relating to practicability, safety, and privacy, which are further detailed in Part 5 of these guidelines.
- 4.8. The following provide examples of situations where a police officer must use their BWC when dealing with a member of the public in the course of the officer's duties, in accordance with section 43B(2), unless an exception applies:
  - (a) A use of force incident, where firearm has been drawn or a CEW is drawn and armed;
  - (b) Any other use of force incident;
  - (c) When engaging with a member of the public regarding an investigation in public, or a place open to the public;
  - (d) When engaging with a person regarding an investigation in a private residence or private space;  
or

- (e) When otherwise interacting with a member or members of the public in the course of the officer's duties, including but not limited to:
  - i. Traffic stops;
  - ii. Serving processes including summons and orders;
  - iii. Exercising a police power, including arrest, search (person and property) and seizure.

*When may a police officer choose to use a BWC?*

- 4.9. A police officer may choose to use their BWC where not otherwise required by 43B(2) of the Act, where they consider its use reasonable, necessary and proportionate to achieve one or more of the purposes of these guidelines. In choosing to use their BWC, a police officer should consider the following:
- (a) Purpose and anticipated use of the recording;
  - (b) A person's reasonable expectation of privacy in respect of the subject or place that may be recorded;
  - (c) Safety of other police officers and people present;
  - (d) Whether any legislative or legal limitations prohibit the recording of the incident;
  - (e) Operational and evidential value of the recording; and
  - (f) Value of accountability in the circumstances.

*Overt Use of a BWC*

- 4.10. Under section 43B(4) of the Act, the use of a BWC by a police officer must be overt.
- 4.11. Covert use of a BWC by a police officer may be otherwise authorised by law. Covert use of a BWC refers to purposefully concealing the BWC so a person is unaware that a police officer is wearing and/or using a BWC. This use would only be permitted by warrant or emergency authorisation (for instance, under the *Surveillance Devices Act 2004* (Cth)).
- 4.12. Section 43B(5) of the Act provides the use of a BWC need not be overt if the camera is used when a police officer draws or uses a firearm or CEW, or overt use of the camera could cause or increase a risk to a person's safety.
- 4.13. Whether use of a BWC is considered overt depends on all the circumstances. Generally, the use of a BWC may be considered overt where:
- (a) The BWC is worn in such a way that is plainly visible to the person being recorded, and the recording (both video and audio) is not obstructed; and
  - (b) A police officer announces the use of the BWC as soon as reasonably practicable after commencing dealing with a person in the course of the officer's duties, in a language that is readily understood by that person.
- 4.14. However, a police officer is not expected to announce the use of a BWC where it would not be reasonably practicable in the circumstances to do so. The following provide examples of such situations, where announcing the use of a BWC may not be considered reasonably practicable in the circumstances:

- (a) The officer is in a crowded public place, including responding to a specific incident or engaging with specific people, and it would not be reasonably practicable to inform every individual present who may come into the view of the BWC; or
  - (b) Another officer involved in the interaction has announced that police officers in attendance are using BWCs.
- 4.15. When an officer has not announced the use of a BWC in accordance with Part 4.14, the officer must announce its use as soon as it becomes reasonably practicable to do so, and if requested to do so by a member of the public.
- 4.16. Under section 43B(5) of the Act, the use of the BWC need not be overt if:
- (a) the BWC is used when a police officer (including another police officer in their vicinity) draws their firearm or arms a CEW; or
  - (b) Overt use of the BWC could cause or increase a risk to the safety of the officer or another person. For example, a situation may include (but is not limited to) police responding to an individual who is experiencing a mental health crisis and exhibiting dangerous and violent behaviours, which would be exacerbated with the announcement of BWC use, risking the safety of officers and the individual.
- 4.17. Per section 43B(6) of the Act, a police officer will not be considered to be in breach of these guidelines for incidental and inadvertent use of the BWC. Examples of situations involving incidental or inadvertent use may include:
- (a) Accidentally and unintentionally knocking the activation button; or
  - (b) A technical fault causes the BWC to activate independent of the officer's actions or intention.
- 4.18. Where an officer becomes aware of incidental or inadvertent use they will, as soon as reasonably practicable, cease use.

### *Ceasing Use*

- 4.19. A police officer may cease to use a BWC when dealing with a member of the public if:
- (a) An exception outlined in s 43B(3) of the Act, explained in Part 5, applies; or
  - (b) The interaction is no longer occurring in the course of the officer's duties.
- 4.20. Before ceasing use of a BWC, a police officer must consider all the circumstances at hand to determine whether or not to cease use.
- 4.21. Before ceasing use of a BWC, or as soon as reasonably practicable after ceasing use of a BWC, a police officer should record the reason(s) for ceasing use of a BWC. This may be done through contemporaneous written notes by the officer, or by making a verbal statement that is captured by a BWC recording. The reason(s) for ceasing use may be disclosed to a member of the public by the police officer, or in accordance with Part 6 or Part 7 of these guidelines.
- 4.22. A member of the public may ask a police officer whether a BWC is in use, whether a police officer has ceased use of a BWC, and the reason for ceasing use of a BWC. If asked, a police officer may provide the reason for ceasing use of the BWC (in accordance with these guidelines).

## 5. Exceptions to Use

- 5.1. In accordance with section 43B(2) of the Act, a police officer must use their BWC when dealing with a member of the public in the course of their duties. However, section 43B(3) provides exceptions where its use is otherwise not required.
- 5.2. Where a police officer is dealing with a member of the public and any of the exceptions exist, the requirement in section 43B(2) of the Act to use the BWC does not apply. If, during the course of dealing with a person, the circumstances of exception exists for only part of the period of interaction, section 43B(2) applies when those exceptions do not exist, requiring the use of the BWC in accordance with these guidelines.
- 5.3. A police officer must consider whether it is reasonable, necessary and proportionate in the circumstances to not use a BWC, in accordance with one or more of the exceptions.

### *Practicability*

- 5.4. Section 43B(3)(a) of the Act provides that a police officer is not required to use their BWC when dealing with a member of the public in the course of their duties, if it 'is not reasonably practicable' to do so.
- 5.5. The following provide examples of situations in which it may not be reasonably practicable or feasible in the circumstances for a police officer to use their BWC:
  - (a) Attending court, the ACT Legislative Assembly, or Commonwealth Parliament, where recording is otherwise prohibited by law, unless responding to an incident that is occurring on the premises;
  - (b) A conversation with a member of the public not directly related to discharging the officer's duties. An example of this situation could include (but is not limited to) a person asking for directions or the officer is paying for petrol;
  - (c) During a routine report that is being recorded in another way, for example a statement or Digital Record of Interview;
  - (d) A police officer is at a community engagement event (for example, at a school or festival) where they are interacting with a large number of people in a high traffic environment and recording would unnecessarily limit human rights (for example, the right to privacy) and is not proportionate in the circumstances to achieve an intended purpose outlined in Part 1 of these guidelines; or
  - (e) A situation escalates in a rapid and unexpected way that does not allow for the police officer to use their BWC. In these circumstances the police officer must use BWC as soon as reasonably practicable, unless another exception applies.

### *Risk to Safety*

- 5.6. Section 43B(3)(b) of the Act provides that a police officer is not required to use their BWC when dealing with a member of the public in the course of their duties, if doing so 'could cause or increase a risk to a person's safety'.

- 5.7. The following provide examples of situations in which using a BWC could cause or increase a risk to a person's safety:
- (a) A member of the public is seeking to talk to a police officer without being recorded through BWC because the person holds a reasonable belief that, if they are recorded talking to the police officer, they will be at risk of harm or retaliation;
  - (b) Police are responding to a violent situation or mental health incident and BWC use may escalate the situation and increase the risk of injury or harm to the person involved, for example, situations involving hostages or self-harm; or
  - (c) The use of a BWC may cause or increase the risk to an officer's or individual's safety as they are unable to physically activate the BWC, for example, holding onto an individual to stop them falling from a height.

### *Privacy*

- 5.8. Section 43B(3)(c) of the Act provides that a police officer is not required to use a BWC when dealing with a member of the public in the course of their duties, if it 'would unreasonably limit a person's privacy'.
- 5.9. When determining whether or not use of a BWC would unreasonably limit a person's privacy, a police officer should consider the following:
- (a) Location of the interaction;
  - (b) Age of the person;
  - (c) Mental and physical wellbeing of the person;
  - (d) Cultural and religious sensitivities;
  - (e) Purpose of the recording; and
  - (f) If a request to not use a BWC is made.
- 5.10. The following provide examples of situations in which use of a BWC may unreasonably limit a person's privacy:
- (a) The interaction is occurring in a bathroom or change room;
  - (b) The interaction is occurring in a medical facility where private patient information is being discussed or displayed;
  - (c) The interaction is occurring in a religious venue where individuals are engaging in religious practices;
  - (d) The interaction involves a child or young person under the age of 18 years old;
  - (e) Police are responding to a mental health incident and the patient's private clinical condition is being discussed;
  - (f) The recording would capture nudity or sexual activity;
  - (g) Recording the interaction would breach legal professional privilege, medical privilege, or journalistic privilege; or

- (h) When engaging with a witness or victim who is in a particularly heightened state of vulnerability and the witness or victim has indicated they do not want to be recorded.
- 5.11. A police officer, having considered a person's right to privacy, may choose to use a BWC where its use is reasonable, necessary and proportionate to achieving one or more of the purposes of these guidelines (see Part 1 of these guidelines). An example of such a situation could include (but is not limited to) a person in a medical facility actively threatening violence and police use their BWC while using force to restrain that person, noting the BWC may capture personal information of individuals within the facility (including the person being restrained).

## 6. Recordings

### *Storage*

- 6.1. At the conclusion of their shift, a police officer wearing a BWC must ensure that any recordings captured by the BWC are uploaded in a timely manner.
- 6.2. A police officer who has used their BWC, must, within 90 days of when the recording occurred, ensure that all relevant recordings are appropriately and accurately labelled and classified.
- 6.3. A police officer who is unable to categorise recordings they have captured within 90 days (for example, due to unexpected and extended leave of absence or technical faults), should do so or arrange for it to occur as soon as reasonably practicable.
- 6.4. BWC recordings captured by ACT Policing must be securely stored by the AFP as a Commonwealth document and is subject to the retention periods determined in the *Archives Act 1983* (Cth).
- 6.5. BWC recordings stored by the AFP as a Commonwealth document is maintained as per the *Archives Act 1983* (Cth), in a manner capable of audit.
- 6.6. BWC recordings cannot be destroyed unless an exception contained within section 24(2) of the *Archives Act 1983* (Cth), including anything done:
  - (a) As required by an Australian law;
  - (b) With the permission of the Archives or in accordance with a practice or procedure approved by the Archives;
  - (c) In accordance with a normal administrative practice, other than a practice of a Department or authority of the Commonwealth of which the Archives has notified the Department or authority that it disapproves; or
  - (d) For the purpose of placing Commonwealth records that are not in the custody of the Commonwealth or of a Commonwealth institution in the custody of the Commonwealth or of a Commonwealth institution that is entitled to custody of the record.
- 6.7. A police officer may mark a BWC recording for deletion as deemed necessary, consistent with the relevant legislation and governance (see Part 3 of these guidelines). For example:
  - (a) Where a recording taken, made in a manner consistent with the Act and guidelines, was subsequently found to not have evidentiary value;
  - (b) Where recordings were captured accidentally or inadvertently;



(c) Where the recordings fail to realise a purpose of these guidelines (see Part 1 of these guidelines) – an example of a purpose of these guidelines includes being for the purpose of collecting evidence relating to a police officer’s everyday duties.

6.8. All recordings marked for deletion are reviewed by ACT Policing storage administrators prior to any deletion taking effect, and any deletion is done in accordance with the relevant legislation and governance (see Part 3 of these guidelines).

#### *Access - Police*

6.9. A police officer may access and view recordings made by their BWC in the course of the officer’s duties.

6.10. Access or viewing by other police officers or AFP employees to BWC recordings they did not record themselves, is based on the need-to-know principle and must only occur when there is an official AFP requirement to access or view the recordings.

6.11. Access to BWC recordings on AFP storage systems is only permitted by persons who have been authorised to use or access the system and only to the extent that such authorisation permits. The use of the AFP storage systems must be in connection with, or relevant to, the execution or functions of police duties.

6.12. A police officer or AFP employee may, in connection with the execution of their duties or functions, view, access or otherwise use BWC recordings when:

- (a) Labelling and classifying material for archiving, retention and destruction purposes;
- (b) The recordings will or are likely to assist in a criminal investigation or proceeding;
- (c) Reviewing or investigating a use of force incident;
- (d) The recordings will or are likely to assist in a professional standards investigations or another review of a police officer's actions or conduct;
- (e) Determining whether the recordings should be released under the *Freedom of Information Act 1982* (Cth); or
- (f) The access, viewing, or release of the recordings are otherwise authorised by law or by a court, including by the provisions contained within the *Evidence Act 2011* (ACT).

6.13. A police officer or other AFP employee must not access, release or distribute BWC recordings unless appropriately authorised to do so by the relevant governance (see Part 3 of these guidelines). Inappropriate access or use of the AFP storage system or BWC recordings may constitute a breach of AFP professional standards and will be dealt with under Part V of the *Australian Federal Police Act 1979* (Cth).

6.14. BWC recordings may be provided in relation to legal proceedings, to all parties and/or their legal representatives.

6.15. BWC recordings may be provided to other government agencies, third parties or media, and is done in accordance with the relevant governance (Part 3).

- 6.16. BWC recordings may be used by ACT Policing or the AFP for the purposes of education or training, however this use is restricted and requires consideration/approvals as per the Better Practice Guide (BPG – Part 3).

### *Access - Public*

- 6.17. If a person wishes to view or obtain BWC recordings captured by a police officer in the ACT they may submit a request to access that recordings under the following legislative provisions:
- (a) *Australian Federal Police Act 1979* (Cth), s 60A;
  - (b) *Freedom of Information Act 1982* (Cth); or
  - (c) *Privacy Act 1988* (Cth) and Australian Privacy Principle 12.
- 6.18. When deciding whether to release BWC recordings under the legislation listed in Part 6.17 (either in its entirety or a redacted form), the AFP may consider the following principles to ensure decisions relating to release of recordings are reasonable, necessary and proportionate:
- (a) Reasonableness of the request;
  - (b) Whether releasing or redacting the recordings would be unnecessarily onerous on police resources;
  - (c) Whether releasing the recordings would or could prejudice an ongoing investigation; and
  - (d) Impact on the human rights of all the people recorded.
- 6.19. In releasing BWC recordings in accordance with relevant legislation, police officers or AFP employees may redact aspects of the recordings (audio or visual) to ensure its release does not unreasonably limit the human rights (including the right to privacy) of other persons in the recordings, where this redaction would not impact the intended purpose of release.
- 6.20. For example, redaction of recordings may include (but is not limited to), pixelating the faces of bystanders who have no involvement in the incident recorded in order to provide evidence in legal proceedings, but not redacting the background noise (including bystander conversations) where this would limit the audio of the incident and impact the evidential benefit of the entire audio for these proceedings.
- 6.21. Further information regarding how to request a copy of recordings or to submit a freedom information request is available on the AFP's website.

## **7. Complaints**

- 7.1. If a person considers that a police officer has used or failed to use their BWC in contravention of these guidelines and the Act, they may submit a complaint via the AFP website, in writing, by phone, or by attending a police station.
- 7.2. In accordance with the *Australian Federal Police Act 1979* (Cth) and internal AFP governance and policies:
- a) The AFP will take into account all legislative requirements relating to police conduct, when determining whether to accept a complaint or if a complaint is established; and

- b) Generally, members of the public are able to request access to BWC recordings of themselves, or BWC recordings relevant to a complaint they have made or may make. Such recordings may be released in accordance with law and Part 6 of these guidelines.
- 7.3. ACT Policing must provide data in the annual report each year regarding any use of BWCs inconsistent with this guideline and the Act, including but not limited to data on any substantiated complaints.
- 7.4. ACT Policing will seek to review complaints regarding BWC use to ensure that these amendments are being implemented effectively and identify any areas for improvement.

## **8. Human Rights**

- 8.1. These guidelines have been developed in consideration of the *Human Rights Act 2004* (ACT).
- 8.2. As detailed in these guidelines, a decision to use or not use a BWC must be reasonable, necessary and proportionate in the circumstances, on consideration of the requirements under the Act and the human rights of persons impacted by BWC use.
- 8.3. The use of BWCs when dealing with members of the public, as well as the storage, access and use of the recordings, can constitute a reasonable, necessary and proportionate limitation to a person's human rights.
- 8.4. The use of, or decisions not to use, BWCs by police officers, in accordance with these guidelines and the Act, promotes the following rights:
  - a) Section 10 – protection from torture and cruel, inhuman or degrading treatment;
  - b) Section 18 – liberty and security of person; and
  - c) Section 22 – rights in criminal proceedings.
- 8.5. These guidelines promote the above human rights through improved accountability and transparency in police interactions with members of the community, by providing an accurate and detailed record of events and decision making processes by police in the performance of their duties.
- 8.6. Additionally, BWC recordings can provide evidence that assists all parties in criminal proceedings, including a defendant, supporting a person's right in criminal proceedings.
- 8.7. The use of, or decisions not to use, BWCs by police officers, in accordance with these guidelines and the Act, can engage and limit the following rights:
  - a) Section 12 – Privacy and reputation.
- 8.8. Police use of a BWC can be reasonably expected to limit a person's privacy in some circumstances by recording their actions and/or conversations, including in the privacy of their own home.
- 8.9. These guidelines clarify the circumstances in which police may or must use BWCs to ensure that any limitation on the right to privacy arising from the use of BWCs will be reasonable, necessary and proportionate in the circumstances, avoiding disproportionate or arbitrary limitations.

- 8.10. The limitation of the right to an individuals' privacy in some circumstances is proportionate to the benefits of using BWCs, including improvements in evidence-gathering, community safety, and accountability and transparency.
- 8.11. If a person considers that a police officer's use of a BWC has unreasonably interfered with or limited their human rights, they may submit a complaint in writing, by phone, via website, or by attending the relevant office, to the following:
- a) ACT Ombudsman;
  - b) Office of the Australian Information Commissioner; and
  - c) AFP (in accordance with Part 7).