

EVALUATING THE RELATIONSHIP BETWEEN BODY-WORN CAMERAS AND  
MORE ACCOUNTABLE OR EFFECTIVE POLICING IN SOUTH AFRICA: A  
CRITICAL EXAMINATION OF THEORY, POLICY, AND PRACTICE FROM AN  
INTERNATIONAL HUMAN RIGHTS LAW PERSPECTIVE

by

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## SUMMARY

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EVALUATING THE RELATIONSHIP BETWEEN BODY-WORN CAMERAS AND  
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RIGHTS LAW PERSPECTIVE

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### SUMMARY OF THESIS

Police agencies adopt innovative technologies to prevent crime and improve police effectiveness. However, much remains unknown about how and why these technologies are adopted and, more so, the impact they have. Much of the scholarship on this topic is from Europe and the United States (US). This study draws heavily from this scholarship to critically explore approaches on how best to evaluate the relationship between body-worn cameras (BWCs) and more accountable or effective policing using human rights-compliant evidenced-based approaches from a South African context to advance theory, policy and practice in evaluating the impact of the BWCS on accountability for police use of force.

The study highlights the two problematic issues. The first is the endemic violence in South Africa, for which the police are a significant contributor under an ineffective police accountability system. The second is a promising technology - the body-worn

camera (BWC) - whose value proposition has the potential to lead to more accountable policing. The study critically examines the BWC value proposition by reviewing BWC evaluations mainly from the UK and the US and finds that some of the evaluation assumptions and findings are not transferrable and relate more to the context in which they were undertaken.

Chapters 2 and 3 provide a historical, institutional, organisational, and legal context of policing in South Africa, forming the foundation to explore a more practical and effective approach to evaluate the relationship between BWCs and more accountable policing. The findings from these two chapters are that South Africa provides a unique context to evaluate the BWC value proposition regarding police accountability and police use of force compared to the US and the UK. Unlike the UK and the US, South Africa has both a progressive legal and institutional framework and high levels of police violence, thus offering an excellent opportunity to undertake a more effective evaluation of the relationship between BWCs and more accountable policing with adequate statistical power.

The thesis then moves from analysing contextual, theoretical, legal, and institutional frameworks to addressing one of the study's research questions: how could a more contextually sensitive and applied trial be designed to evaluate the potential impact of BWCs upon South African police accountability? From the analysis, the thesis concludes that a human rights-based, evidence-based evaluation of the impact of BWCs upon police accountability processes would be a more appropriate means of trialling the technology in South Africa than any of the methods used in trialling the technology in the US or the UK, which instead rely upon a set of assumptions about behaviour-change in police organisations and hence measure the impact of the technology on officer conduct.

Drawing from these analyses, Chapter 5 curates an evaluation framework that outlines impact indicators and mechanisms for controlling confounding factors to enhance robust causal inferences and incorporate context-specific factors in considering an effective evaluation methodology in South Africa.

In conclusion, the thesis asserts that BWCs provide a real opportunity for more accountable policing. The analyses and evaluation framework provided in the thesis offer a starting point for building a knowledge base of why and how SAPS and IPID, working collaboratively with the Information Regulator, can integrate and implement a BWC program that upholds human rights to enhance police accountability and effectiveness. The study also highlights the importance of tracking the usage of BWCs to determine whether they achieve the intended objective.



## RESEARCH OUTPUTS

### Journal articles

"The role of Commissions of Inquiry in Pursuing Accountability for Violations of the Right to Life: The Motlanthe Commission in Zimbabwe". The draft article is currently being considered for publication in the Comparative and International Law Journal of Southern Africa.

### Conference presentations

Co-presented with Dr Thomas Probert at The Institute for Security Studies (ISS) Evidence Based Policing Conference (5 November 2021). Title of presentation: *Adoption of BWCs in South Africa – an opportunity for collaborative research.*

### Reports

Co-authored a report on South Africa's Police Use of Lethal Force and Accountability for a report titled *Towards a Lethal Force Monitor: South Africa and Kenya Report* (I authored the report for South Africa and made an oral presentation on 7 July 2021).

### Policy Briefs

Basimanyane, Dorcas, and Dumisani Gandhi. 2019. Striking a balance between CCTV surveillance and the digital right to privacy in South Africa: Considerations for the Information Regulator. Cape Town: APCOF.

## LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
ACLU	American Civil Liberties Union
ANC	African National Congress
ANPR	Automated Number Plate Recognition
APCOF	African Policing Civilian Oversight Forum
BLM	Black Lives Matter
BWC	Body-worn Camera
BWV	Body-Worn Video
CCTV	Closed Circuit Television
CSPS	Civilian Secretariat for Policing Service
CPF	Community Police Forum
CPSI	Centre for Public Service Innovation
DPCI	Directorate for Priority Crime Investigation
DPSA	Department of Public Service and Administration
FOI	Freedom of Information
GPS	Global Positioning System
HRPTP	Human Rights Police Training Program
ICCPR	International Covenant on Civil and Political Rights
IHRL	International Human Rights Law
IOPC	Independent Office for Police Conduct
IPCC	Independent Police Complaints Commission
IPID	Independent Police Investigative Directorate
MPS	Metropolitan Police Service

NDP	National Development Plan
NDPP	National Director of Public Prosecutions
NPA	National Prosecuting Authority
OECD	Organization for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
OPD	Orlando Police Department
PCoP	Parliamentary Portfolio Committee on Police
PERF	Police Executive Research Forum
PONI	Police Ombudsman for Northern Ireland
POP	Public Order Policing
POPI Act	Protection of Personal Information Act
RTMC	Road Transport Management Corporation
SAP	South African Police
SAPS	South African Police Service
SDGs	Sustainable Development Goals
SOP	Standard Operating Procedure
TRT	Tactical Response Team
UNODC	United Nations Office on Drugs and Crime
US	United States of America
UK	United Kingdom

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## **DECLARATION**

I declare that the thesis, which I hereby submit for the degree Doctor of Philosophy in Freedom from Violence in Africa at the University of Pretoria, is my own work and has not previously been submitted by me for a degree at this or any other tertiary institution.

## **ETHICS STATEMENT**

The author, whose name appears on the title page of this thesis, has obtained, for the research described in this work, the applicable research ethics approval.

The author declares that s/he has observed the ethical standards required in terms of the University of Pretoria's Code of Ethics for Researchers and the Policy guidelines for responsible research.

Signature

*Dumisani Gandhi*

November 2022

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## Chapter 1: Introduction

Although technological innovations have a long history in law enforcement reform, there is often a dearth of knowledge about how and why specific innovations are adopted. Significantly, the relationship between the outcomes of using such technologies measured against the purposes for which they were acquired is often unknown. However, in the context of a crisis of legitimacy in law enforcement occasioned by high-profile, officer-involved uses of force in controversial and invisible circumstances, that sentiment may not be true regarding one particular technology, body-worn cameras (BWCs). The relationship between body-worn cameras and improved policing outcomes has been the subject of significant public debate, research, and evaluation over the past two decades. Much of this research and scholarly debate originates from a global North evidence base, predominantly the United Kingdom (UK) and the United States of America (US).

Despite the considerable attention on BWCs from the public, scholars and law enforcement practitioners, the evidence of the impact of BWCs on transparency and accountability for police misconduct and in particular the use of force and public complaints is mixed and sometimes contradictory. However, more significantly, evaluations of the technology's impact on improving police accountability are limited. This thesis seeks to contribute to the advancement of theory, policy, and practice in evaluating the relationship between BWCs and police accountability and to identify effective impact measures and the analytic and implementation strategies of the technology in a South African context.

### 1.2 Problem Statement

Despite the existence of processes and institutional mechanisms for internal discipline management and external police oversight coupled with a vibrant civil society and research community, South African police agencies are mired in a legitimacy crisis characterised by lack of public trust and confidence in policing.<sup>1</sup> This is compounded by the widespread unnecessary and excessive police use of force and the public

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<sup>1</sup> National Planning Commission. 2011. *National Development Plan - Our future - make it work*. [http://www.poa.gov.za/news/Pages/National\\_Development\\_Plan.aspx](http://www.poa.gov.za/news/Pages/National_Development_Plan.aspx). Also see Ivkovic, Sanja Kurtinjak, Andri Saueman, Andrew Faull, Michael E. Meyer, and Gareth Newman. 2020. *Police Integrity in South Africa*. New York: Routledge.

perception that law enforcement officials are not being held accountable for acts of misconduct, including flagrant human rights violations.<sup>2</sup>

In the context of this legitimacy crisis, the availability and accessibility of new technologies, especially information communication technologies, has been identified as providing potential for preventing and combating crime and, lately, strengthening police transparency and accountability.<sup>3</sup> The technologies include computers; drones; mobile tablet technology; facial recognition technology; BWCs, smartphones, portable data terminals, Global Positioning System (GPS), automated number plate recognition (ANPR), social media like Facebook and Twitter, fixed in-car data devices, crime data analysis software and fingerprint scanning technology to mention a few. Although the range and types of technologies available to law enforcement have increased, the history of evaluating the efficacy of such technologies is shorter and, in specific contexts, is non-existent. This thesis aims to explore the relationship between BWCs and more accountable policing in a South African context.

### 1.2.1 Police accountability in South Africa

Although it is generally acknowledged that the core mandate of law enforcement is the prevention and investigation of crime and the preservation of public order and security, police accountability is a critical element of law enforcement and determines whether the police succeed in achieving their mandate.<sup>4</sup> There is widespread agreement among different sectors of South Africa that the country endures a huge burden of violence that has left its population feeling unprotected and unsafe, and mistrustful of law enforcement.<sup>5</sup> Inevitably, this has put into focus a fundamental question regarding

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<sup>2</sup> Hornberger, Julia. 2011. *Policing and Human Rights: the Meaning of Everyday Violence and Justice in the Everyday Policing in Johannesburg*. Abingdon: Routledge.. Also refer to Egwu, Patrick. 2021. "South African Police Are Undertrained, Uncontrolled, and Deadly." *Foreign Policy*. May 31, 2021. <https://foreignpolicy.com/2021/05/31/southafrica-police-brutality-julies/>.

<sup>3</sup> Byrnes, James, and Gary Marx. 2011. "Technological Innovations in Crime Prevention and Policing. A Review of the Research and implementation and Impact." *Jaagang* 3 (20): 17-40. <https://www.ncjrs.gov/pdffiles1/nij/238011.pdf>. Also refer to SAPS (Technical Management Services). 2018. "Digital Policing and Specific Projects." [https://pmg.org.za/files/180523TMS\\_Digital\\_Policing\\_Projects.pdf](https://pmg.org.za/files/180523TMS_Digital_Policing_Projects.pdf).

<sup>4</sup> Walker, S. (2007, May). Police Accountability: Current Issues and Research Needs. Retrieved January 2021, from <https://www.ojp.gov/pdffiles1/nij/grants/218583.pdf>, p. 5.

<sup>5</sup> Statistics South Africa. 2017. *Victims of Crime Survey 2016-2017*. <https://www.statssa.gov.za/publications/P0341/P03412016.pdf>. Also refer to Stone, Kelly E.

the South African law enforcement agencies and their role in preventing violent crime and ensuring the safety and security of the South African population. However, what is of greater concern is the widespread violence perpetrated by the police themselves on members of the public and suspected offenders during arrest and detention, in the context of policing assemblies and in custodial settings. This poses a potentially serious threat to positive community-police relations, which are necessary for police effectiveness in ensuring public safety and security.

A review of reports and analyses from both internal and external police oversight mechanisms, such as South Africa's police oversight body, the Independent Police Investigative Directorate (IPID), ad hoc investigative bodies such as commissions of inquiry, the South Africa's National Planning Commission, members of the public, the media, the courts, and academic criminologists suggests that South African police agencies have serious challenges in fulfilling their legal mandate to protect individuals and communities. The relationship between SAPS' frontline officers and the public is characterised by violence (in both directions), distrust and even hostility, which undermines the effectiveness and legitimacy of the police.<sup>6</sup>

As illustrated in Figure 1 below, in five financial years beginning in 2015-2016, IPID received an average of 5,930 cases for investigation in all categories of serious allegations of police misconduct.<sup>7</sup> As shown, the top three alleged offences, namely, assault, complaints of discharge of firearm and deaths as a result of police action, are high and involve police-citizen encounters that are probably the leading determinants of negative public perceptions regarding the legitimacy of law enforcement officers.

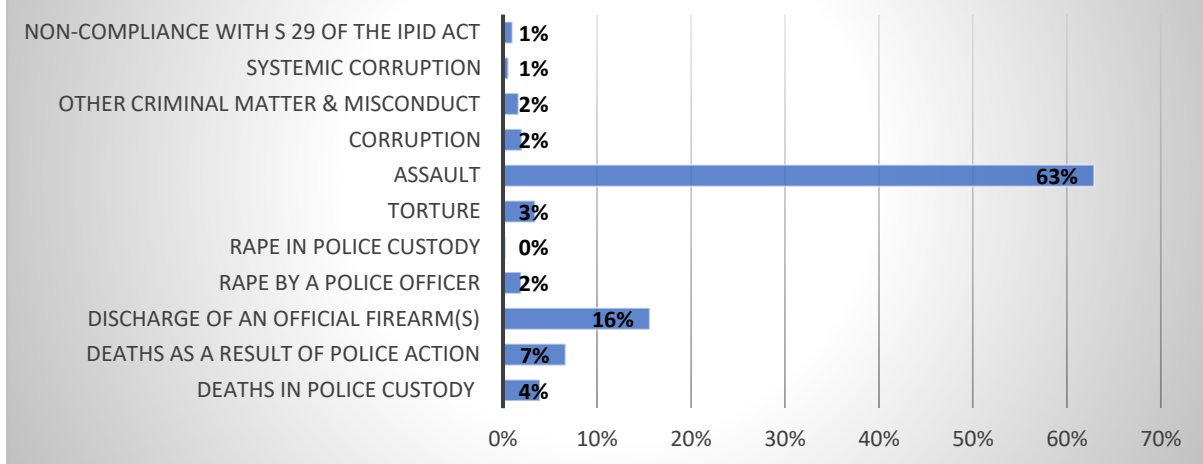
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2017. "Smart Policing and the Use of Body Camera technology: Unpacking South Africa's Tenuous Commitment to Transparency." *Policing* (Oxford University Press) 12 (1): 109-115. <https://academic.oup.com/policing/article-abstract/12/1/109/4555523>.

<sup>6</sup> Mabunda, Dumisani Quiet. 2014. "*The Challenges in Establishing Partnership Policing in Soshanguve.*" *Matsers diss.*, University of South Africa. <http://uir.unisa.ac.za/handle/10500/18575>.

<sup>7</sup> Compiled from IPID Annual Reports from year 2015-2016 to 2019-2020. IPID's annual reports can be retrieved here: <http://www.ipid.gov.za/node/12>.

**Figure 1: Average percentage intake per misconduct category:  
2015/16 -2019/20**



The six years from year 2015-2016 saw a total of 3,721 people dying at the hands of police, at an average of 620 a year, mostly due to deadly force using service firearms. Such killings include death in circumstances where suspects are fleeing from the police or where suspects are brandishing knives, and, even, in some instances, police officers inadvertently killing suspects with warning shots.

The Marikana Commission of Inquiry<sup>8</sup> investigated one of the most egregious examples of police excesses in which SAPS officers killed forty-four protesting miners at Marikana in August 2012. Similarly, the *Khayelitsha Commission of Inquiry into Police Inefficiency and a Breakdown in Relations Between SAPS and the Community of Khayelitsha* (2014)<sup>9</sup> also illustrates the inefficiencies of SAPS and the deep distrust that exists between certain communities and the police. The inefficiencies identified by the Khayelitsha Commission included the lack of visible policing, unlawful arrests, the poor quality of investigation of crimes reported to the police and such cases being

<sup>8</sup> Farlam Commission of Inquiry (Marikana Commission) was appointed in September 2012 to investigate matters of public, national, and international concern arising out of the tragic incidents at the Lonmin Mine in Marikana in the North West Province of South Africa from Saturday 11 August to Thursday 16 August 2012 which led to the deaths of approximately 44 people, more than 70 persons being injured, approximately 250 people being arrested and significant damage or destruction of property.

<sup>9</sup> This was an independent commission of inquiry proclaimed by the Premier of the Western Cape Province in August 2012 to investigate complaints by civil society organisations and community members in Khayelitsha into allegations of SAPS inefficiency at three police stations as well as the breakdown or relations between SAPS and communities at the three police stations.

withdrawn or struck off the court roll because of incomplete investigations or because of dockets not being brought to court, and a failure to deal with vigilantism and vengeance attacks by members of the community on perceived criminals.<sup>10</sup> The Commission also found significant disappointment and distrust by Khayelitsha community members about the external police complaints system:

Complaints against members of SAPS in Khayelitsha have not been dealt with thoroughly, fairly or promptly, by either SAPS or IPID (and its predecessor the ICD) – and there is a worrying pattern whereby most complaints are found to be unsubstantiated after very little investigation even where the complaints are very serious and involve injury to a member of the public caused by a SAPS member.<sup>11</sup>

A recent survey of South African police officer knowledge, attitudes and expectations regarding police integrity found that a sizeable proportion of the respondents were uncertain about SAPS rules regarding the lawful use of force. For example, almost a third were uncertain whether shooting an unarmed stranger in the back was a violation of SAPS rules. A third were uncertain whether striking a handcuffed man in the kidneys was against SAPS rules.<sup>12</sup> Further, the survey found significant signs of police culture of secrecy with up to 40% officers saying most of officers would not report even the most serious case of misconduct by a fellow officer.<sup>13</sup> These findings are consistent with the findings of the Farlam (Marikana) and Khayelitsha Commissions of Inquiry cited above and point to some of the challenges that would face attempts to hold them to account.

While the collection of data on police misconduct is robust, the performance indicators on IPID's investigations and information management reveal a story of poor performance and, worse still, the credibility of IPID's performance data has been questioned and found wanting. The most important indicator of success is the quick investigation that reaches a finding which IPID technically refers to as taking an

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<sup>10</sup> Khayelitsha Commission, p. xxiv.

<sup>11</sup> Khayelitsha Commission, p. xxv.

<sup>12</sup> Ivkovich, S. K., Sauerman, A., Faull, A., Meyer, M. E., & Newman, G. (2020, August 19). Police Integrity In South Africa: Key Research Findings. Retrieved from <https://beta.documentcloud.org/documents/20490389-2020-08-19-police-integrity-booklet>, p. 2.

<sup>13</sup> Ivkovich, Police Integrity In South Africa, p. 2.

investigation to “decision-ready status”.<sup>14</sup> Except for the year 2015-2016, when 69% of IPID investigations reached a decision-ready status, the next four years averaged 42%.<sup>15</sup> The reasons cited by IPID for failure to meet targets included unexpectedly high intakes, constrained resources, travelling long distances in vast provinces<sup>16</sup> as well as delays in obtaining critical evidence in the form of technical reports such as post-mortems, toxicology reports, DNA, ballistic and histology reports.<sup>17</sup>

The manner in which IPID's reaches a decision to close investigations also provides another opportunity to measure its performance in increasing police accountability. Ideally, IPID should reach a finding in most of the cases it investigates, and these are expected to result in a conviction, an acquittal, or an unsubstantiated charge just to mention a few examples of outcomes. IPID has at least fifteen criteria for closing investigations. Of interest for this thesis are four such reasons, namely acquittal, conviction (criminal or disciplinary), declined, and unsubstantiated. According to the IPID Standard Operating Procedures (IPID SOPs), “acquitted” means where a suspected offending officer has been found not guilty of a criminal offence and discharged or has not been found guilty of departmental misconduct.<sup>18</sup> When a case is “declined” it means a decision has been taken by the National Prosecuting Authority (NPA), SAPS or MPS not to institute disciplinary or criminal proceedings against a member.<sup>19</sup> “Unsubstantiated” is not explained, but it is assumed in this thesis to mean that there is none or insufficient evidence to determine that the alleged misconduct happened.

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<sup>14</sup> A decision-ready case means an investigation where an investigator has conducted quality investigations and obtained all the necessary evidence to either refer the case to the NPA for decision or make a recommendation to SAPS or MPS or make a policy related recommendation or a general recommendation on both active and backlog cases.

<sup>15</sup> Figure arrived at by calculating the average percentage of decision ready cases for years 2016/2017 to 2019/2020 from IPID Annual Reports. See IPID Annual Reports at <http://www.ipid.gov.za/node/12>.

<sup>16</sup> Independent Police Investigative Directorate (IPID). 2019. *Annual Report 2018-2019*. <http://www.ipid.gov.za/node/12>, p. 28.

<sup>17</sup> IPID. 2018. *Annual Report 2017-2018*, <http://www.ipid.gov.za/node/12>, p. 28; IPID, Annual Report 2018-2019.

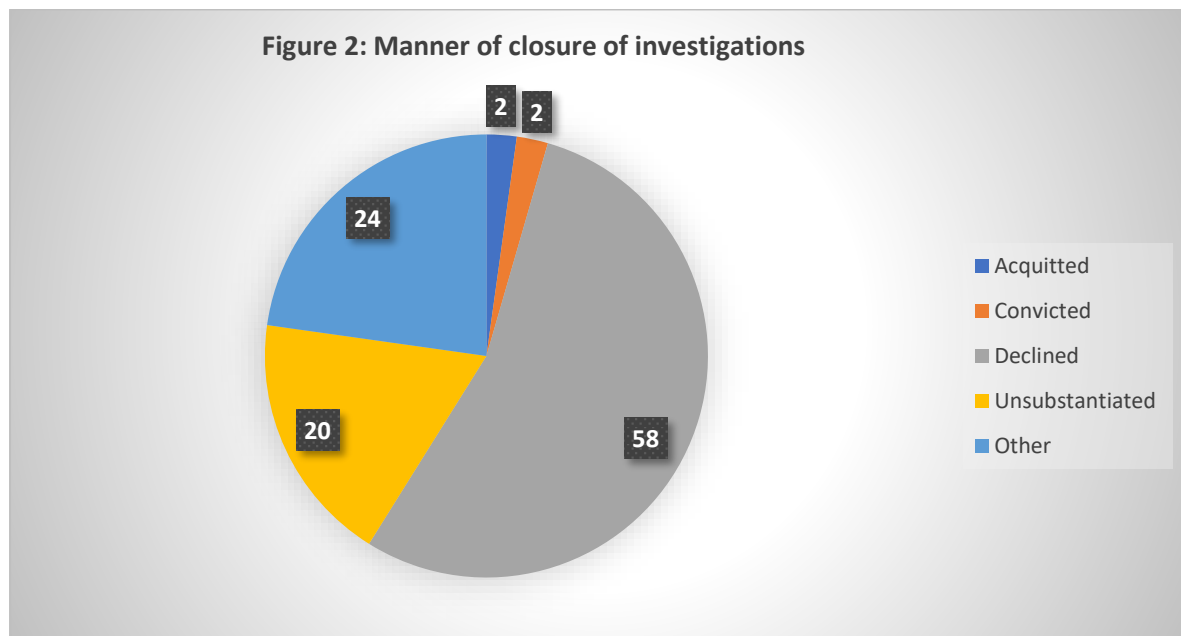
<sup>18</sup> IPID. 2019. "Investigative and Firearm Related Standard Operating Procedures Relating." *GroundUp*. March 25.

[https://www.groundup.org.za/media/uploads/documents/2019\\_SIGNED\\_IPID\\_SOPS.pdf](https://www.groundup.org.za/media/uploads/documents/2019_SIGNED_IPID_SOPS.pdf), p. 6.

<sup>19</sup> IPID, Investigative and Firearm Related SOPs, p. 9.



Figure 2 below presents IPID's data on the manner of closure over six years beginning in the year 2015-2016 based on the four categories identified above.<sup>20</sup> As shown, in the five years, a total of 17,579 investigations were closed, of which 75% of the cases were in the four categories identified above. Notably, only 4% were either acquittals (2%) or convictions (2%), illustrating an incredibly low conviction and completion rate. Further analysis shows that 58% of cases are closed because the NPA has declined to prosecute, while 20% are unsubstantiated. IPID's performance reports do not reflect on the implications of such data on the organisation's effectiveness in holding law enforcement officials to account, and that being the case, it is open to diverse interpretation.



If the purpose of IPID is to ensure police accountability, then 78% cases (13,737) over six years being declined by the NPA or unsubstantiated by IPID should be an area of great concern for police accountability. Similar concerns were raised during the Khayelitsha Commission in which serious complaints against SAPS officers including attempted murder, assault with intent to cause grievous bodily harm, common assault and discharge of firearm were closed as “unsubstantiated.”<sup>21</sup> The Institute for Security

<sup>20</sup> For similar analysis from 2012-2020 see Newman, Gareth. 2021. *SA police failures demand urgent reform before it's too late*. Pretoria. <https://issafrica.org/iss-today/sa-police-failures-demand-urgent-reform-before-its-too-late>.

<sup>21</sup> Khayelitsha Commission of Inquiry, p. 417.

Studies (ISS) also raised the same issues after its analysis found that the IPID closed 95% of cases over seven years since 2013 without any action.<sup>22</sup>

The NPA does not automatically provide reasons for declining to prosecute and it is not clear whether IPID is provided with reasons for each declined case.<sup>23</sup> There could be varied explanations for the NPA declining to prosecute. Bruce proffers four compelling possible reasons in which he argues that it is either because IPID refers cases to the NPA when there is no prima facie case or that the NPA might have a more stringent criteria for selecting cases for prosecution. They might focus on cases with the best chance of returning a verdict, or the cases referred to the NPA involve a poor quality investigation, or the NPA has a high case-load and therefore prioritises a certain category of cases, excluding what might be considered minor cases such as assault (incidentally the category with the majority of complaints to IPID) or alternatively, because of a bias in favour of the police.<sup>24</sup> It is difficult without access to the NPA's rationale for declining to determine which reason is the more compelling.

However, findings by *Viewfinder*, an investigative journalism project, points to the first and third of Bruce's suggested reasons as being the most persuasive. According to *Viewfinder*, there is evidence that since 2016, IPID moved inadequately investigated case files on deaths as a result of police action from "active" to "completed" to inflate performance figures.<sup>25</sup> As a result, the NPA would send them back to the IPID with queries. At IPID, such dockets would not be reopened and "reactivated" to reflect investigations were still outstanding. Hence the claim by *Viewfinder* that the affected relatives of victims receive no justice and alleged perpetrators within the SAPS/MPS

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<sup>22</sup> Naido, Ediwn. 2020. "Big payouts, little sanction in SAPS wrongful arrest cases." *Sunday Independent*, October 18. <https://www.iol.co.za/sundayindependent/news/big-payouts-little-sanction-in-saps-wrongful-arrest-cases-09b45ef6-df6c-44bb-a5f0-360a92a7450e>.

<sup>23</sup> Bruce, David. 2020. "Are South Africa's Cops Accountable? Results of Independent Police Investigative Directorate Investigations." *APCOF*. February. <http://apcof.org/wp-content/uploads/025-aresouthafricascopsaccountable-resultsofindependentpoliceinvestigativedirectorateinvestigations-davidbruce.pdf>, p. 38. Also see Muntingh, Lukas, and Gwenaelle Dereymaeker. 2013. *Understanding Impunity in the South African Law Enforcement Agencies*. Cape Town: Community Law Centre, University of the Western Cape, 59. <https://acjr.org.za/resource-centre/understanding-impunity-in-the-south-african-law-enforcement-agencies>, p. 31.

<sup>24</sup> Bruce, *Are South Africa's Cops Accountable?*, p. 38.

<sup>25</sup> Knoetze, Daneel. 2019. *IPID's cover-up of police brutality in SA*. October 7. <https://viewfinder.org.za/kill-the-files/>.



are not held accountable for such deaths. This echoes the findings of the Khayelitsha Commission and the ISS position cited above. Assuming that the main reason prosecutors do not proceed to trial is the inadequate quality and quantity of the evidence available, then this could reflect a damning indictment of IPID's investigations. One could also question IPID's use of the NPA's decision as a reason for automatically closing an investigation.

Therefore, unless there is transparency about why cases that are declined by the NPA are not reinvestigated and how this is communicated to complaints or victims, it is not possible to see how this process can bring closure for those affected and ensure accountability within the South African police. This buttresses the claim by the ISS that the accountability system has broken down to the extent that victims of wrongful arrests are not reporting complaints to the police or IPID and prefer the courts because they believe they will get something concrete.<sup>26</sup> The use of BWCs to enhance police accountability in South Africa will be deployed under such conditions. The next sections explain what BWCs are and what they do to give an idea of how they would work in South Africa.

### 1.2.2 BWC Technology

Body-worn cameras are small digital video cameras that can be worn on a police officer's uniform or jacket (on the shoulder or chest area), or on eyeglasses depending on the desired view. In a law enforcement setting, the purpose of using BWCs is to document and create a record of police-public encounters from the officer's perspective, which can be stored and reviewed for evidentiary purposes in disciplinary hearings, handling complaints or criminal justice proceedings. An increasing number of police departments in the United States<sup>27</sup> and the United Kingdom<sup>28</sup> have adopted BWCs as a tool for increasing transparency and accountability within policing and to reduce violence in police-public encounters in order to build trust between the police

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<sup>26</sup> Knoetze, *IPID's cover-up of police brutality in SA*

<sup>27</sup> Merola, Linda, Cynthia Lum, Christopher S. Koper, and Amber Scherer. 2016. "Body Worn Cameras and the Courts: A National Survey of State Prosecutors." Centre for Evidence-Based Crime Policy, George Mason University. <https://cebcp.org/wp-content/technology/BWCProsecutors.pdf>.

<sup>28</sup> Vincent, James. 2016. *22,000 London police to be issued body cameras*. October 2. <https://www.theverge.com/2016/10/17/13303520/uk-police-body-camera>.

and communities, which in turn is believed to enhance the effectiveness and legitimacy of the police.

BWCs can clearly capture most of activities at a reasonable distance both during the day and at night with additional enhancing features such as a visible flashlight and infrared night vision technology to enhance picture quality. The BWCs also have the capability to record audio and video simultaneously in a time-synchronised manner.<sup>29</sup> Depending on the type, BWCs storage can either be through memory cards or an internal storage system which is downloaded, and the data is stored in a cloud-based system at the end of each shift.

To ensure transparency and accountability, BWCs have features that make it difficult to alter or manipulate. For example, they make it impossible to edit or delete footage, and they do not overwrite recorded footage before it is transferred for storage. Some have encryption capabilities to ensure that data cannot be manipulated even when the BWC is lost.<sup>30</sup> BWCs also keep a log which includes the device serial numbers, device events such as when it is switched on and off, charged, starts and stops recording and the remaining storage capacity, all of which can be used to audit user activity to help understand why certain actions were taken and by whom. These are specifications that any police agency procuring the BWCs would need to specify in advance when selecting for procurement the BWC that has the capability of meeting their needs in the context in which they operate.

The operationalisation of BWC programmes requires other support systems such as a server for the secure storage of recorded material. For many programmes, after every shift, each officer must transfer the data to the server. In most of the literature accessed for this research, the preference is for BWCs with rechargeable batteries and each battery should last enough time to finish a shift.

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<sup>29</sup> National Institute of Justice. n.d. *Operating Characteristics and Functionality Descriptions of Body Worn Cameras*. <https://www.nij.gov/topics/law-enforcement/exhibits/Pages/body-worn-camera-operating-characteristics.aspx>.

<sup>30</sup> Seldon, Andrew. 2017. *Body-worn cameras to surge?* April. <http://www.securitysa.com/7901r>.

### 1.2.3 The debate on BWCs in South African law enforcement

The original debate on the utility of BWCs in South Africa is traceable to increased reports of gross police misconduct, including excessive use of deadly force by law enforcement officials in high-profile cases such as the killings of protesting mineworkers at Marikana in 2012.<sup>31</sup> By May 2018 the issue had gathered momentum to the extent that South Africa's parliamentary Portfolio Committee on Police (PCoP) gave SAPS an ultimatum to equip frontline police officers with body-worn cameras by August 2018 and report back to the Committee.<sup>32</sup> However, the parliamentarians viewed BWCs as a protection mechanism for police officers and the urgency was because five police officers and an off-duty soldier had been killed at Ngcobo police station in the Eastern Cape Province in February of 2018.<sup>33</sup> Barring any knowledge about SAPS' state of preparedness, the short time frame and purpose for launching BWCs may be a reflection of the South African Parliament's underestimating the enormity of the task of setting up the BWC programme and the purpose for which BWCs can be deployed.

It is not clear whether BWCs have been officially piloted in SAPS and the MPS. Outside of these agencies, there are at least two recorded cases of BWC pilot trials, both undertaken in Cape Town, but the official status and results of those trials are not publicly available. The first was a small BWC non-experimental pilot Smart Policing Project by the Western Cape Department of Community Safety and Western Cape Provincial Traffic Department was undertaken on traffic police officers in 2014 in collaboration with the African Policing and Civilian Oversight Forum (APCOF).<sup>34</sup> The SAPS and Metropolitan Police Service in Cape Town declined participation in the pilots.<sup>35</sup> The other was carried out by the City of Cape Town's Central City

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<sup>31</sup> Perkins, Gráinne. 2015. *South Africa mulls body cameras to improve police accountability, safety*. October 16. <https://theconversation.com/south-africa-mulls-body-cameras-to-improve-police-accountability-safety-47286>.

<sup>32</sup> Parliamentary Portfolio Committee on Policing (PPCoP). 2018. ATC180509: Report of the Portfolio Committee on Police on the 2018/19 Budget Vote 23, Annual Performance Plan (App) of the Department of Police (Saps), dated 9 May 2018. May 9. <https://pmg.org.za/taled-committee-report/3331/>.

<sup>33</sup> PPCoP, ATC180509: Report of the Portfolio Committee on Police.

<sup>34</sup> Bruce, David, and Sean Tait. 2015. *A 'Third Umpire' for Policing in South Africa: Applying Body Cameras in the Western Cape*. Igarape Institute. [http://apcof.org/wp-content/uploads/2016/12/AE-14\\_SMART-POLICING1.pdf](http://apcof.org/wp-content/uploads/2016/12/AE-14_SMART-POLICING1.pdf).

<sup>35</sup> Perkins, *South Africa mulls body cameras*.

Improvement District (CCID)<sup>36</sup> in 2015 which was reportedly “so successful” in behaviour modification, complaints handling and accountability that the system was rolled out to all CCID public safety officers on duty in 2016.<sup>37</sup> The discussions regarding these were top-down discussions by safety and security officials with no discernible public debate regarding the costs or efficacy of the technology.

A notable feature of the BWC debate is that there are divergent motives for adopting the technology. Among policymakers, and in line with their fiduciary responsibilities, the belief is that technology has a multiplier effect, that is, a means by which the SAPS can do more with less, given the budget cuts for government departments.<sup>38</sup> Also, the policymakers contend that the use of BWCs by frontline police officers would “enhance security and complement the conduct by (sic) police and members of the public.”<sup>39</sup> The argument makes sense given the mounting civil claims emanating from inappropriate and unlawful police actions, but the argument is not as simple as it appears. The policymakers’ rationale for adopting BWCs appears to rely on the belief of indirect effects of BWCs, that is to say, more accountability leads to behaviour change and a reduction in civil claims. However, the more direct impact of BWCs in which the technology is viewed as providing better evidence with which to investigate public complaints might actually result in more civil claims and potentially more claims against the public purse.

Although SAPS undertook due diligence processes regarding BWC adoption, the agency has not yet rolled out BWCs due to legal bottlenecks. In SAPS’s update in parliament, the law enforcement agency stated that it had received legal advice that “police are prohibited from recording communications of another without permission.”<sup>40</sup> The legal advice recommended the drafting of “specific legislation

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<sup>36</sup> The CCID is a public-private partnership not-for-profit organisation established in 2000 with a vision to fight crime and create a safe, clean, and urban environment. The CCID has a Safety and Security Division that has 70 patrol officers.

<https://www.capetownccid.org/about-ccid/about-us>

<sup>37</sup> Dordley, Lucinda. 2018. *Traffic officers wear video cameras*. Cape Town, October 11. <https://www.capetownetc.com/news/traffic-officers-wear-video-cameras/>.

<sup>38</sup> PPCoP. 2017. *Seven Measures to Improve SAPS' Record on Human Rights-centred Policing*. April 20. <https://www.parliament.gov.za/press-releases/seven-measures-improve-saps-record-human-rights-centred-policing>.

<sup>39</sup> PPCoP, *Seven Measures to Improve*.

<sup>40</sup> SAPS (TMS), Digital Policing and Specific Projects, Slide 31.

regulating the use of body-worn cameras by law enforcement officials and the admissibility in a court of law of evidence derived therefrom.”<sup>41</sup> In January 2018, the Department of Justice advised SAPS that it would amend the Regulation of Interception of Communications and Provision of Communication-Related Information Act (RICA)<sup>42</sup> to allow the use of cameras.<sup>43</sup> However, as shall be discussed in this thesis, this legal advice appeared to be misplaced in that it seems that BWCs were viewed as a covert tool for intercepting communications in which case it would be governed by laws related to secret intelligence information gathering. This point will be discussed fully in Chapter 3 below.

Outside the proceedings of the PCoP, BWCs have not been a significant subject of public debate regarding their suitability as a mechanism for effective and accountable policing. The media have primarily limited their reporting on BWCs to proceedings in Parliament and have not raised the issue of BWCs as a matter of public interest or one that could improve police effectiveness and accountability. There is limited, if any, debate in civil society.

SAPS' officers' reaction to being filmed in action by members of the public was also used to question SAPS' commitment to transparency and accountability. Kelly E. Stone argues that BWCs can only succeed if deployed in an institutional environment that is conducive to their effectiveness. She cites SAPS officers and their superiors' reaction to being recorded by citizens through mobile phones as a pointer that SAPS is averse to being held accountable for potentially unlawful actions. Stone provides the example of a SAPS officer who reacted by grabbing and smashing the mobile phones to destroy the evidence.<sup>44</sup>

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<sup>41</sup> SAPS (TMS), *Digital Policing and Specific Projects*, p. 34.

<sup>42</sup> South Africa's Constitutional Court declared that RICA was unconstitutional to the extent that it failed to protect the right to privacy, freedom of expression, the rights to access the courts and legal privileged. Refer to *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others*. 2021. (CCT 278 of 2019) [2021] ZACC 3 (Constitutional Court of South Africa, February 4).

<sup>43</sup> *AmaBhungane and Another v Minister of Justice*, para. 31.

<sup>44</sup> Stone, *Smart Policing*, p. 112.

SAPS officers tend to arrest those who record them in action on charges of "riotous behaviour"<sup>45</sup> or "police interference" and demanding that they delete the videos.<sup>46</sup> Stone argues that if SAPS are so intolerant to being recorded, they certainly will have a similar response to the use of body-worn cameras. While this is true, SAPS' officer attitude to being recorded could change once BWCs are part of SAPS' official equipment and officers are trained in using them guided by policies and regulations on why and how to use the technology.

Notwithstanding these debates, on March 29, 2021, South Africa's Road Traffic Management Corporation (RTMC) officially unveiled a BWC project targeted for use by traffic police officers to be rolled out over the coming three to five years. According to the RTMC, South Africa's BWC project aims to fight corruption by helping to gather evidence and improve conviction rates for traffic law offenders.<sup>47</sup> Notably, the RTMC BWC project focuses narrowly on one type of police misconduct and one that could be considered petty corruption on South Africa's public roads. While fighting traffic police corruption is a pertinent issue, other types of police misconduct by the traffic officers and other frontline police officers in SAPS and the Municipal Police Service (MPS) in London also require attention.

Nevertheless, the rollout of BWCs among traffic officers evidently shows that BWCs are on the cusp of being mainstreamed into law enforcement in South Africa but with limited information on the utility and impact of the technology.

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<sup>45</sup> Grebe, Eduard. 2016. "I was jailed for filming a police arrest." *News24*, January 8. <https://www.news24.com/SouthAfrica/News/i-was-jailed-for-filming-a-police-assault-journalist-20160108>.

<sup>46</sup> Mitchley, Alex. 2014. "Police brutality caught on camera (warning – graphic)." *The Citizen*, March 7. <https://citizen.co.za/news/south-africa/139939/police-brutality-caught-camera/>. Also refer to 702. 2015. *Cases of SAPS criminality and misconduct call their credibility into question*. March 12. <http://www.702.co.za/articles/2045/cases-of-saps-criminality-and-misconduct-call-their-credibility-into-question>, and Grebe, I was jailed for filming a police arrest.

<sup>47</sup> SA News. 2021. *Body cameras to strengthen law enforcement*. March 29. <https://www.sanews.gov.za/south-africa/body-cameras-strengthen-law-enforcement>.



### 1.3 Research focus

This thesis aims to advance theory and practice in evaluating technological innovation within law enforcement to improve police transparency and accountability. The main research question for the thesis is: how should the impact of BWCs on police accountability be evaluated in a South African context?

The thesis is underpinned by two main assumptions. It proceeds from an overall assumption that if South African frontline police officers were more frequently or more effectively held accountable for unlawful uses of force, there could be a reduction in the incidence of unnecessary and excessive force by law enforcement, which in turn could enhance police effectiveness.

The second assumption is that the adoption of new technologies or tactics in law enforcement, particularly policy-impacting innovations such as BWCs, should be based on the evidence of their efficacy in achieving specific law enforcement objectives and how they can be effectively utilised.

The thesis is structured on the basis of four sub-questions as follows:

- What is the historical, social, and cultural context of law enforcement relevant to the understanding of police practice, including the use of force in South Africa?
- What is the legal framework and the institutional mechanisms relevant to the use of force and police accountability in South Africa?
- What would be the required technical, legal, institutional, and organisational arrangements to ensure that the deployment of BWCs enhances police accountability?
- How should the impact of a policy intervention such as body-worn cameras be implemented and evaluated? What should be the data analysis strategy?

### 1.4 Theoretical and conceptual framework

The two main assumptions of this thesis regarding police accountability and effectiveness in Section 1.3 above form an essential conceptual and theoretical framework against which the main argument in this thesis is framed. Although the legal

context of South African law enforcement will be discussed in detail in Chapter 3, the South African Constitution provides a useful starting point on the country's expectations of law enforcement.

According to the South African Constitution, law enforcement should be based on promoting "good relations between the police and the community."<sup>48</sup> This is elaborated on in the South African Police Service Act 68 of 1995 (SAPS Act), which envisages the co-production of peace and security in which the SAPS is expected to "ensure cooperation between the Service and the communities it serves in the combating of crime;<sup>49</sup> reflect respect for victims of crime and an understanding of their needs"<sup>50</sup> and "ensure effective civilian supervision over the service".<sup>51</sup> The *2016 White Paper on Policing* adds more normative expectations by stating that the mandate of the police should be "executed within a rights-based and victim-centred context" and that this community-centred approach should be "underpinned by integrity and accountability".<sup>52</sup>

#### **1.4.1 The nexus between peace and security, human rights, and development**

The aspirations outlined above are part of a broader national and international development agenda that links peace and security, human rights, and development. The detail of what these linkages mean and how they relate to law enforcement is outlined in several policy documents that include, among others, at national level, South Africa's *National Crime Prevention Strategy*,<sup>53</sup> the *National Development Plan*, the *2016 White Paper on Safety and Security*<sup>54</sup> and at an international level, in the Sustainable Development Goals (SDG), in particular Goal 16 of the SDGs.

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<sup>48</sup> s206 (3) (c) Constitution of the Republic of South Africa

<sup>49</sup> South African Police Service Act 68 of 1995, Preamble, para (c)

<sup>50</sup> SAPS Act 68, para (d).

<sup>51</sup> SAPS Act 68, para (e).

<sup>52</sup> Nhleko, Nathi & Sotyu, M. M. 2016. "Foreword in Civilian Secretariat for Police. White Paper on Policing." *Civilian Secretariat for Police Service*.

[http://www.policesecretariat.gov.za/downloads/bills/2016\\_White\\_Paper\\_on\\_Policing.pdf](http://www.policesecretariat.gov.za/downloads/bills/2016_White_Paper_on_Policing.pdf).

<sup>53</sup> See <https://www.gov.za/documents/national-crime-prevention-strategy-summary>

<sup>54</sup> Civilian Secretariat for Police. 2016. "2016 White Paper on Safety and Security."

<https://www.saps.gov.za>.

[https://www.saps.gov.za/resource\\_centre/nscs/white\\_papersafer.pdf](https://www.saps.gov.za/resource_centre/nscs/white_papersafer.pdf).



These national and international frameworks recognise that, in the absence of peace, stability, human rights and effective governance based on the rule of law, there can be no hope for sustainable development.<sup>55</sup> SDG Goal 16 and Chapter 12 of South Africa's *National Development Plan (NDP)* are similarly couched, and they single out the criminal justice system and in particular the judiciary and the police as the key institutions that are key to achieving this goal.

Both the NDP and SDGs not only outline what the end goal should be, but they also identify elements of how the goal can be achieved and the principles that should guide its achievement. Chapter 12 of the NDP refers to “building safer communities” while SDG 16 refers to promoting “peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.”<sup>56</sup> The development of effective and accountable institutions at all levels is presented as both part of the goal and target of SDG 16.<sup>57</sup>

In the South African context, the SDG targets and indicators regarding peace and security resonate with the objective set out in Chapter 12 of the NDP which envisions that:

In 2030, people living in South Africa feel safe at home, at school and at work, and they enjoy a community life free of fear. Women walk freely in the streets and children play safely outside. The police service is well-resourced and professional, staffed by highly skilled officers who value their work, serve the community, safeguard lives and property without discrimination, protect the peaceful against violence, and respect the rights to equality and justice.<sup>58</sup>

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<sup>55</sup> United Nations. 2015. Goal 16: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels. <https://sdgs.un.org/goals/goal16>; National Planning Commission, *National Development Plan* p. 386. Also see National Crime Prevention Strategy: Summary at <https://www.gov.za/documents/national-crime-prevention-strategy-summary>

<sup>56</sup> United Nations. 2018. Peace, Justice, and Strong Institutions: Why They Matter. <https://www.un.org/sustainabledevelopment/wp-content/uploads/2018/09/Goal-16.pdf>.

<sup>57</sup> Refer to Target 16.6, United Nations. Goal 16: Promote peaceful

<sup>58</sup> National Planning Commission, *National Development Plan*, p. 386.

This vision reflects the broad nature of the planned reforms, which includes both the outcomes and the required inputs to achieve those outcomes and in theory, this is where innovations such as BWCs are expected to impact. As observed in South Africa's *Sustainable Development Goals: Country Report 2019* as in the SDGs, the success of reforms relating to peace and security are dependent on other broader reforms. These include a participatory system of governance based on the rule of law in which the public service is efficient, effective, and developmental in its orientation, with low levels of corruption and bribery in a diverse and a non-discriminatory, socially cohesive society.<sup>59</sup>

South Africa's vision is premised on the notion that a professional police service is essential for a strong criminal justice system. The NDP proposes linking the police code of conduct and a code of professional police practice to promotions and disciplinary action regulations to incentivise professionalism.<sup>60</sup> The below sections provide an analysis of what effective and accountable institutions entail.

#### 1.4.2 Police effectiveness

One of the targets of police reforms is that policing institutions should be effective. Thus, developing effective institutions is an intermediate objective to promoting peaceful and inclusive societies for sustainable development. Police effectiveness refers to the extent to which policing achieves its proper, officially sanctioned goals to keep people safe and reduce crime.<sup>61</sup> In the South African context, this means the ability of law enforcement prevent, combat, and investigate crime, maintain peace and protect and secure the safety of citizens and their property as stated in the country's constitution.<sup>62</sup>

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<sup>59</sup> Statistics South Africa (Statssa). (2019). *Sustainable Development Goals (SDGs): Country Report 2019 - South Africa*. Pretoria: Statistics South Africa. Retrieved from [http://www.statssa.gov.za/MDG/SDGs\\_Country\\_Report\\_2019\\_South\\_Africa.pdf](http://www.statssa.gov.za/MDG/SDGs_Country_Report_2019_South_Africa.pdf), pp. 213-215.

<sup>60</sup> Statssa, *Sustainable Development Goals*

<sup>61</sup> Her Majesty's Inspectorate of Constabulary (HMIC). 2017. *PEEL: Police effectiveness 2016: An inspection of the Metropolitan Police Service*. London: HMIC.

<https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/peel-police-effectiveness-2016-metropolitan.pdf>, p. 7. Also see Cordner, Gary. 2020. "A Practical Approach to Evidence-Based Policing." *European Law Enforcement Research Bulletin* 20: 53-71.

<sup>62</sup> Refer to: <https://www.saps.gov.za/about/about.php>

Based on the definition and the goals of policing, it is understandable why police effectiveness has primarily been measured in terms of traditional, often instrumental approaches to police performance based strictly on inputs, activities and outputs of police work.<sup>63</sup> "Effectiveness" in this traditional sense is narrowly based on the impact of police operations on output indicators such as crime rates, the number of arrests and fines, clearance rates and response times.<sup>64</sup> As Cordner observes, the focus on outputs is understandable but insufficient because outputs, such as the number of arrests may or may not produce the outcome that really matters which is the reduction in crime.<sup>65</sup> South Africa's *2016 White Paper on Safety and Security* appears to recognise this idea of effectiveness as it emphasises knowledge-based approaches in which "interventions and programmes employed must be based on demonstrated and proven results."<sup>66</sup>

Police effectiveness is also linked to legitimacy. As observed by Bottoms and Tankebe, an unavoidable feature of legitimacy is that every power-holder "who seeks to prove he possesses the right to govern has to satisfy, or try to satisfy, or pretend to satisfy the needs of the members of the community."<sup>67</sup> In a policing context, police effectiveness could take the form of a utilitarian or a normative concept. The utilitarian sense of police effectiveness is perceived as one that is directly linked to legitimacy, or as Tankebe<sup>68</sup> puts it, "a shortcut to legitimation" where police seek to be tough on crime and criminals in the hope that citizens will see their exercise of power as actually right".<sup>69</sup> However, from a normative perspective, the legitimating potential of police

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<sup>63</sup> Maslov, Anton. 2015. "Measuring the Performance of the Police: The Public Perspective ." Public Safety Canada. <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2015-r034/2015-r034-en.pdf>, p. 8.

<sup>64</sup> Maslov, Measuring the Performance, p. 8.

<sup>65</sup> Cordner, A Practical Approach.

<sup>66</sup> Civilian Secretariat for Police. 2016. "2016 White Paper on Policing." [http://www.policesecretariat.gov.za/downloads/bills/2016\\_White\\_Paper\\_on\\_Policing.pdf](http://www.policesecretariat.gov.za/downloads/bills/2016_White_Paper_on_Policing.pdf), p. 12; Also refer to SDG 16 target 16.1 highlights the need for the police to use evidence to measure the effectiveness of their activities.

<sup>67</sup> Bottoms, Anthony, and Justice Tankebe. 2012. "Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Crminal Justice." *Journal of Criminal Law and Crminology*, p. 187.

<sup>68</sup> Bottoms, Beyond Procedural Justice.

<sup>69</sup> Tankebe, Justice. 2008. "Police Effectiveness and police trustworthiness in Ghana: An Empirical Appraisal." *Criminology and Criminal Justice* (Sage Publications) 82: 185-202. <https://journals.sagepub.com/doi/pdf/10.1177/1748895808088994>, p. 188; Bottoms, Beyond Procedural Justice, p. 147.

effectiveness exists only to the extent that it is achieved in a manner that citizens acknowledge as respectful of their dignity and their right to fair and humane treatment.<sup>70</sup>

A normative perspective of police effectiveness, unlike the utilitarian approach, does not only depend on what the police do, but it also depends on the experience of citizens among whom such actions are taken. As Bottoms and Tankebe argue, while effectiveness and legitimacy are interdependent and organically interactive, police effectiveness is a necessary but insufficient condition of legitimacy.<sup>71</sup>

Therefore, an effective policing institution pursues ends that are stipulated in law or prescribed by society, but also, its effectiveness and legitimacy will be assessed through the citizens' felt experience about the fairness of the way police exercise their authority.

### **1.4.3 Police accountability**

The final attribute of policing that this thesis focuses on is linked to the target in SDG 16 of developing “effective, accountable and transparent institutions at all levels”.<sup>72</sup> Accountability can be defined as “a relationship between an actor and a forum, in which the actor has an obligation to explain and justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.”<sup>73</sup> When applied to a policing context, the United Nations Office on Drugs and Crime (UNODC) defines police accountability as “a system of internal and external checks and balances aimed at ensuring that police carry out their duties properly and are held responsible if they fail to do so.”<sup>74</sup> The UNODC definition locates accountability within an institution where it implies a conglomeration of systems and processes that

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<sup>70</sup> Tankebe, *Police Effectiveness*, p. 188.

<sup>71</sup> Bottoms, *Beyond Procedural Justice*, p. 147.

<sup>72</sup> Refer to Target 16.6 of SDG 16 at <https://sdgs.un.org/goals/goal16>.

<sup>73</sup> Bovens, Mark. 2006. "Analysing and Assessing Public Accountability. A Conceptual Framework." *European Governance Papers*, January 16: 1-37. <http://www.connex-network.org/eurogov/pdf/egp-connex-C-06-01.pdf>. pp. 1-37, p. 3.

<sup>74</sup> OHCHR/UNODC. 2011. *Handbook on Police Accountability, Oversight and Integrity*. New York: United Nations.

[https://www.unodc.org/pdf/criminal\\_justice/Handbook\\_on\\_police\\_Accountability\\_Oversight\\_and\\_Integrity.pdf](https://www.unodc.org/pdf/criminal_justice/Handbook_on_police_Accountability_Oversight_and_Integrity.pdf), p. iv.

together ensure that police officers and law enforcement agencies are held answerable for their actions. However, both entail the idea of evaluating the actions of a specific actor and holding them answerable for their actions and possible consequences of their conduct.

As a principle of governance, all institutions should be held accountable but as explained above, the nature of police powers, in particular the use of force, provides more justification for why citizens should have a legitimate interest in overseeing police use of force in order to avoid the arbitrary use of such powers.<sup>75</sup> Police accountability has links with respect for the rule of law, police legitimacy and police effectiveness although not so obvious with the latter.

The link between police accountability and police effectiveness derives from the fact that law enforcement agencies with systems of internal and external checks and balances enhance the ability of officers to work together effectively in an environment in which they can trust their supervisors to make ethical decisions and where fellow officers put the needs of the agency and the public ahead of personal, potentially corrupt, interests.<sup>76</sup> Law enforcement officials that violate rules lose public trust and credibility which makes effective policing difficult because communities are less likely to cooperate with the police if they do not trust them. Thus, accountability is a critical factor in police effectiveness. This proposition is further elaborated on in the next section which focuses on the link between police use of force and police legitimacy and procedural justice.

#### **1.4.4 Police use of force, legitimacy, and procedural justice**

Although police legitimacy has been discussed in section 1.4.2 above in terms of how it relates to police effectiveness, it is a much broader concept of what is expected of law enforcement agencies. The South African constitution, the NDP, the *National Crime Prevention Strategy* and the *2016 White Paper on Safety and Security* envisage

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<sup>75</sup> Coudert, Fanny, Dennies Butin, and Daniel Le Metayer. 2015. "Body-worn cameras for police accountability: Opportunities and risks." *Computer Law & Security Review* (Elsevier) 31 (6).

<sup>76</sup> PowerDMS. 2020. *Importance of Accountability in Law Enforcement*. December 22. <https://www.powerdms.com/why-powerdms/law-enforcement/importance-of-accountability-in-law-enforcement>.

peace and security as a public good co-produced by the police and the communities they serve. This approach to policing conforms to one of the long-standing principles of modern policing introduced by the British Home Secretary Sir Robert Peel in 1829.<sup>77</sup> Peel advanced the idea that “The ability of the police to perform their duties is dependent upon public approval of police existence, actions, behaviour and the ability of the police to secure and maintain public respect.”<sup>78</sup> The modern-day incarnation of the principle is that the ability of law enforcement to fight crime effectively depends on the public’s perception of the legitimacy of the actions of police officers.

Scholarly literature has historically identified issues such as age, race, class, subjective experiences with officers and type of neighbourhood in which individuals reside as predictors of public attitude towards police. However, more recent research has found that the high-profile cases of police misconduct, including the inappropriate (real or perceived) use of force by law enforcement can adversely affect the relationship between the police the communities they serve.<sup>79</sup> As the most visible arm of state authority with the mandate to maintain public safety and security, the police are granted extraordinary powers of arrest and detention and the use of force (including deadly force), which they can use lawfully to interfere with the rights of citizens including, when necessary, depriving someone of life.<sup>80</sup> Thus, the use of force

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<sup>77</sup> Sir Robert Peel was the Home Secretary for the United Kingdom in 1823 and 1829.

<sup>78</sup> See The Peelian Principles, <https://thecrimepreventionwebsite.com/police-crime-prevention-service---a-short-history/744/the-peelian-principles/>.

<sup>79</sup> Weitzer, Ronald. 2002. "Incidents of Police Misconduct and Public Opinion." *Journal of Criminal Justice* 30: 397-408.

[https://www.researchgate.net/publication/222721814\\_Incidents\\_of\\_Police\\_Misconduct\\_and\\_Public\\_Opinion](https://www.researchgate.net/publication/222721814_Incidents_of_Police_Misconduct_and_Public_Opinion), p. 398. Also refer to Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services (HMICFRS). 2021. *Disproportionate Use of Police Powers: A spotlight on stop and search and the use of force*. London: HMICFRS.

<https://www.justiceinspectores.gov.uk/hmicfrs/wp-content/uploads/disproportionate-use-of-police-powers-spotlight-on-stop-search-and-use-of-force.pdf>, p. 11.

<sup>80</sup> Henstock, Darren, and Barak Ariel. 2017. "Testing the Effects of Police Body-worn Cameras on Use of Force During Arrests: A Randomised Controlled Trial in a large British police force." *European Journal of Criminology* 14 (6):

<https://journals.sagepub.com/doi/abs/10.1177/1477370816686120>, p. 723. Also refer to Bayley, David H. 2010. "Foreword." In *Police Use of Force: A Global Perspective*, Joseph B. Kuhns and Johannes Knutsson, eds, xiii-xiv. Santa Barbara: Paeger, p. xiii; Coudert *et al.*, Body-worn Cameras for Police Accountability, p. 755; Ready, Justin T., and Jacob T. N. Young. 2015. "The Impact of On-officer Video Cameras on Police-citizen Contacts: Findings from a controlled experiment in Mesa, AZ." *Journal of Experimental Criminology* (Springer) 11: 445-458. <https://link.springer.com/article/10.1007/s11292-015-9237-8>, p. 446.



is an inherent part of policing and as Henstock & Ariel put it, “police work is inevitably about the application of force, when needed”.<sup>81</sup> This places the police in a context of an ever-present controversy and in some cases, civil litigation and friction with the communities they are supposed to serve.<sup>82</sup>

The idea of police legitimacy has varied over time and continues to evolve. It combines elements from various disciplines such as philosophy, criminology, psychology and political science.<sup>83</sup> From a predominantly criminological and psychological perspective, a legitimate authority exists when people “believe that the decisions made, and rules enacted by that authority or institution are in some way ‘right’ or ‘proper’ and ought to be followed.”<sup>84</sup> This idea finds expression in the concept of procedural justice which is the dominant theoretical approach to legitimacy. As it applies to policing, procedural justice has two elements: the quality of decision-making and quality of treatment, which in turn have two sub-components each and the associated treatment of citizens by police officers in face-to-face encounters. A schematic of these elements is illustrated in Table 1 below.<sup>85</sup>

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<sup>81</sup> Henstock and Ariel, Testing the Effects of Police Body-worn Cameras, p. 723. Also refer to May, David A., and James E. Headley. 2008. *Reasonable Use of Force*. New York: Peter Lang., p. 4 and Manning, Peter K. 1980. "Violence and the Police Role." *The Annals of the American Academy of Political & Social Science* (Sage Publications, I) 452: 135-136. <https://www.jstor.org/stable/pdf/1042767.pdf?refreqid=excelsior%3A18f41ce3d2d0c625ebf2718607f73c94>.

<sup>82</sup> Ready *et al.*, The Impact of On-officer Video Cameras, p. 446.

<sup>83</sup> Bottoms and Tankebe, Beyond Procedural Justice, p. 124.

<sup>84</sup> *Ibid.*

<sup>85</sup> McCluskey, John D., Shellie E. Solomon Craig D. Uchida, Alese Wooditch, Christine Connor, and Lauren Revier. 2017. *Assessing the effects of body-worn cameras on procedural justice in the Los Angeles Police Department*. <http://bwctta.com/sites/default/files/Files/Resources/1%20Procedural%20Justice%20CRIM%20%2010%2017%202017.pdf>, p. 2.

**Table 1: Components of procedurally just policing.**

Element	Sub-element	Associated behaviour
Quality of decision-making	Participation	Officer allowing citizen input into encounter by actively listening to information provided. Asks him/her questions
	Neutrality	Officer displays decision-making rooted in law and community concerns and not personal characteristics of citizens
Quality of treatment	Dignity and respect	Officer displays positive body language. Addresses citizens with respectful language Reflects positive social status for citizens
	Trustworthy motives	Officer displays care and concern for example, assisting citizens through advice, referrals and responding to inquiries

Legitimacy, in this sense, focuses on winning the hearts and minds<sup>86</sup> of citizens through the implementation of rules produced by power-holders.

However, there is new thinking regarding the idea of the power holders, in this case, law enforcement officials, being the only producers of rules that citizens have to abide by as the basis of determining the legitimacy of institutions.<sup>87</sup> In what they call a dialogic approach to legitimacy, Bottoms and Tankebe do not seek to "jettison" the original idea. However, they advance a new theoretical perspective in which *legitimacy* is defined as "the recognition of the right to govern."<sup>88</sup> Unlike the older notion of procedural justice, it goes beyond merely justifying political power but also,

<sup>86</sup> Hough, Mike, Jonathan Jackson, and Ben Bradford. 2013. *Legitimacy, Trust and Compliance: An Empirical Test of Procedural Justice Theory using the European Social Survey*. March 17.

<https://poseidon01.ssrn.com/delivery.php?ID=7661140271191240681260910210871030240410360540410600670890801091241191261270820220650301030980201180290430810270641041130820960170690860120440911040750850941221180640130871161041120770820900890011000860660941260.>, p. 3.

<sup>87</sup> Bottoms and Tankebe, *Beyond Procedural Justice*, p. 124.

<sup>88</sup> Bottoms and Tankebe, *Beyond Procedural Justice*, p. 125.



it justifies obedience of the governed. Bottoms and Tankebe identify three elements of this new understanding of legitimacy as follows:

1. Emphasis on the normative character of legitimacy; that is, legitimacy is to be found where there is a positive *recognition* by citizens of the powerholder's *moral right* to exercise that power.
2. Incorporates the view that discussions of legitimacy must embrace both those who exercise power and those who are expected to obey; and,
3. Legitimacy is seen as necessarily conditional or defeasible.<sup>89</sup>

Thus, legitimacy encapsulates the key elements and attributes of institutional authority identified in SDG 16 and its targets: the inclusiveness and participatory nature of legitimacy and the contingency of such legitimacy on it being acceptable to those who exercise power and to those who are expected to obey. As Bottoms and Tankebe argue, legitimacy in this sense is "conditional".<sup>90</sup> They argue, for example, that it might be that at first, citizens might happily recognise a power-holder but if it becomes clear that the power-holder is abusing that power, the public's recognition of his/her right to rule will be withdrawn.

The application of this point on the police as an institution and the use of force is best captured by Kuhns & Knutsson who argue that:

When used legitimately, respectfully, consistently, and lawfully, police use of force is a fundamental and necessary aspect of living in a safe and healthy society, regardless of the form of government, culture, or society. But when police use of force is considered illegitimate, disrespectful or unlawful, real or perceived, it can quickly erode the confidence of citizens in their government, increase crime and violence and generate wider dissent and dissatisfaction across communities and countries.<sup>91</sup>

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<sup>89</sup> Bottoms and Tankebe, *Beyond Procedural Justice*, p. 125.

<sup>90</sup> *Ibid.*

<sup>91</sup> Kuhns, John B., and Johannes Knutsson. 2010. "Introduction." In *Police Use of Force: A Global Perspective*, by Joseph B. Kuhns and Johannes Knutsson, 3-5. Santa Barbara: Praeger, p. 3.

Thus, the citizens' considerations are central in what Bottoms and Tankebe describe as a "dialogical"<sup>92</sup> approach to determining legitimacy. The citizens are not there to merely obey the commands of power-holders but to influence and shape the policies and rules enforced on them by power-holders.

#### **1.4.5 Accountability, police legitimacy and police use of force**

According to May and Headley, police use of force means "any expression of force that is intended to produce specific law enforcement-related results".<sup>93</sup> Such force ranges from the most minimal such as uniformed police presence and at the most extreme, the use of physical force including lethal force to achieve the same objectives. The use of force by police is guided by norms and principles that will be discussed in greater detail in Chapter 3, but, as pointed out in the earlier sections, the police have the powers to use force, including lethal force, in the pursuit of a legitimate law enforcement objective and with the overall objective being to protect life.

Researchers on policing argue that many police activities could erode public trust in law enforcement agencies, but the greatest threat to police legitimacy comes from the questionable use of force.<sup>94</sup> This makes the challenge of taking appropriate decisions regarding the use of force the most critical challenge confronting law enforcement agencies. However, as observed by Manning, the use of force is so central to police that every encounter between police and citizens has an ever-present potential for violence.<sup>95</sup> When applied to the dialogical perspective on legitimacy, the police should not have to use force if their legitimacy is accepted because citizens would oblige to their commands. However, where the police must use force, it should be acceptable to citizens under the specific circumstances of each use of such force; otherwise, the legitimacy of the police as an institution would be undermined.

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<sup>92</sup> Bottoms and Tankebe, *Beyond Procedural Justice*, p. 149.

<sup>93</sup> May and Headley, *Reasonable Use of Force*, p. 136.

<sup>94</sup> Terril, William, and Eugene A. Paoline. 2010. "Non-lethal Force by Police in the United States: The various lenses Through Which Appropriateness Is Examined." In *Police Use of Force: A Global Perspective*, by Joseph Kuhns and Johannes Knutsson, 6-13. Santa Barbara: Praeger, pp. 6-7. Also refer to Kuhns and Knutsson, Introduction, p. 3.

<sup>95</sup> Manning, *Violence and the Police Role*, p. 137.

#### 1.4.6 Perspectives on evaluating police use of force

While police use of force can erode public trust and legitimacy in law enforcement organisations, there are different perspectives about what constitutes appropriate use of force, and this has implications for police legitimacy. According to Terrill and Paoline, there are four perspectives on police use of force that impact perceptions of police legitimacy: the public perspective, legal perspective, organisational perspective, and officer perspective.

The public perspective is mainly reflected in public surveys<sup>96</sup> and anecdotal information, and most citizens who are "victims" of forceful encounters with the police believe the force used was excessive, meaning that the force was more than that the required to subdue a citizen.<sup>97</sup> This is particularly true where the outcomes are bad for the individual member of the public. Media coverage can also drive public perceptions, including recordings from smartphones depicting police use of force in police-public encounters. Typically, citizens have a generally low tolerance for any amount of force used by the police. From this perspective, what matters is citizens' perception, and this can, just as any other factor, negatively affect trust and legitimacy in policing.

The legal perspective will be dealt with in greater detail in the next chapter. In brief, it focuses on the normative rules for understanding police use of force. The main criticism of the legal perspective is that it is activated after the fact when violence has already occurred and is subject to contestation. The importance of the legal perspective lies in that the police must act within the limits of the law, and if they do, the expectation is that their treatment of citizens will be fair and respectful.

The organisational perspective is based on the use of force training and departmental use of force policies and regulations. Organisational perspectives are not homogeneous to every policing jurisdiction, let alone a precinct or police station. Even within one police jurisdiction, the policies on the use of force can differ from one police

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<sup>96</sup> In the South African context, this is done through surveys such as the Victims of Crime Survey conducted by Statistics South Africa and Afrobarometer.

<sup>97</sup> Ariel, Barak, William A. Farrar, and Alex Sutherland. 2015. "The Effect of Police Body-Worn Cameras on Use of Force and Citizen Complaints Against the Police: A Randomised Controlled Trial." *Journal of Quantitative Criminology* (Springer) 31, p. 511.

station to another. In the US, these policies are expressed in the form of the force continuum. The force continuum is a ranking of varying levels of force and resistance in terms of severity with the express purpose of offering officers some guidance on how to respond to specific forms of resistance.<sup>98</sup> In such situations, appropriate force may be viewed as the kind of force that may not result in a financial burden or bring undue negative attention to the police. However, as Terryl and Paoline observe, from an administrative perspective, "the emphasis is not always on establishing good practice, but rather on avoiding lawsuits."<sup>99</sup>

Finally, Terryl and Paoline describe the street officer perspective as the perspective of police officers who are at the coalface of use of force as they are the ones that engage in force tactics during police-public encounters.<sup>100</sup> They have their own perspective about what is and what is not the appropriate level of force given the varying situations in which it happens. Unlike all the other perspectives, the street-level perspective must consider all other perspectives. According to Terryl and Paoline, "street-level Officers must consider the legal parameters and organisational policies in utilising force, as well as social ramifications of their actions in terms of public perceptions and therefore this perspective is more interconnected with the others."<sup>101</sup>

These four perspectives illustrate that there is always a likelihood of disagreement and tensions regarding the perception of police use of force about any use of force incident. The legal perspective is the more stable of them all, even though legal interpretations can vary. However, the key observation for this thesis is that it may not be possible to achieve an equilibrium of these four perspectives. This is particularly true because of the subjective nature on the public perspective which can be triggered even where police lawfully use force. But this is why police accountability is important because if the officers involved in alleged acts of misconduct involving abuse of force are held accountable in a transparent process, then the public angst and mistrust against the

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<sup>98</sup> Terril, William, and Eugene A. Paoline. 2010. "Non-lethal Force by Police in the United States: The various lenses Through Which Appropriateness Is Examined." In *Police Use of Force: A Global Perspective*, by Joseph Kuhns and Johannes Knutsson, 6-13. Santa Barbara: Praeger, p. 11.

<sup>99</sup> Terril and Paoline, *Non-lethal Force by Police*, p. 11.

<sup>100</sup> Terril and Paoline, *Non-lethal Force by Police*, p. 11.

<sup>101</sup> Terril and Paoline, *Non-lethal Force by Police*, p. 10.

police may be tampered down. Without accountability for police use of force, it is difficult to ensure community trust in law enforcement and police legitimacy.

### 1.5 Significance of research

This study is of great significance in the current context of law enforcement. Governments and their security agencies and agents, including the police, face greater international and domestic public scrutiny and mounting demands for increased accountability which are often not matched by available human and financial resources. Therefore, more than ever before, governments seek to innovate, and technologies such as BWCs provide a way to respond to these challenges.

The research will contribute to the increased use of evidence in South African public policy and operational responses to issues of safety and security and crime prevention and police legitimacy which is not very evident in current police practice. There is a lot of research regarding trends in, and public attitudes to, crime, safety, and security but it is not clear how findings from such research are used to improve policing and enhancing the safety and security of the population.<sup>102</sup>

In practice, the findings of this research provide a contextualised legal, policy, institutional and organisational analysis to guide the adoption and deployment of body-worn cameras to improve accountability in South African law enforcement. The thesis also provides a guiding template for assessing the BWC value proposition before a large-scale roll out of the technology.

### 1.6 Research limitations

The main limitation of this study is that it would have been ideal to undertake a practical evaluation in South Africa, but the idea was curtailed by the realisation that SAPS was not going to adopt BWCs within the timeframe of the study and that there were no compelling methodologies to replicate the study in a South African context. The study was also limited by its reliance on a review of literature in English only, principally from the UK and US, regarding a technology that has diffused globally. Thus, the thesis

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<sup>102</sup> Newman, Gareth, and Brian Rappert. 2018. "Policing for Impact: Is South Africa ready for Evidence-Based policing?" *South African Crime Quarterly*, 7-16.

may have missed insights from reviews emerging from contexts beyond these two countries. In addition, over the four years, police accountability and technology are two subjects that have seen phenomenal developments in terms of norm-setting and research which generated new insights that may not all be reflected in this thesis. Nevertheless, this thesis is more of a theory-based study, and the questions raised regarding the theories underpinning the deployment of BWCs in law enforcement are still valid.

## 1.7 Approaches to evaluating technological innovation in law enforcement

Although police practices have long benefited from technological innovations to improve internal organisational outputs and outcomes, it is the current phase and pace of new technological innovations such as BWCs that has heightened optimism on the potential of these technologies to increase not only the efficiency but also, effectiveness and accountability in policing. However, as scholars observe, a lot remains to be known about why and how law enforcement agencies select technologies and how those technologies are used, and whether new technologies actually improve policing for both the agency and the communities that are served by law enforcement agencies.<sup>103</sup> In broad terms, there are two approaches to the adoption of technology within law enforcement, the policy-led or non-evidence led and evidenced-based approaches.

### 1.7.1 Policy-led technological adoption

According to Byrne and Marx, rational policy development suggests that research and evaluation should determine policy.<sup>104</sup> Therefore, when an innovation has theorised benefits, particularly an innovation with the potential for far-reaching financial, policy

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<sup>103</sup> Strom, Kevin. 2016. *Research on the Impact of Technology on Policing Strategy in the 21st Century*. Washington, DC: National Institute for Justice.

<https://www.ojp.gov/pdffiles1/nij/grants/251140.pdf>.

<sup>104</sup> Byrne and Marx, *Technological Innovations in Crime Prevention and Policing*, p. 28;

Walker, Samuel. 2007. *Police Accountability: Current Issues and Research Needs*. May..

<https://www.ojp.gov/pdffiles1/nij/grants/218583.pdf>;

Walker, Richard M., Gene A. Brewer, M. Jin Lee, Nicolai Petrovsk, and Arjen van Witteloostuijn. 2018. "Best Practice Recommendations for Replicating Experiments in Public Administration." *Journal of Public Administration Research And Theory* (Oxford University Press) 609–626, p. 28.

and social impacts such as BWCs, there should ideally be evaluation processes of its intended and unintended impacts before its adoption as an accepted practice. However, law enforcement agencies do not have a long history of evaluating the effectiveness or impact of new technological innovations.<sup>105</sup> Therefore, the tradition with regards to technological adoption in policing seems to have been that policy leads evidence rather than the other way round.

Police practitioner organisations, such as the Police Executive Research Forum (PERF), acknowledge that in some cases, especially in the US, there is a fascination with the new and with technology, which has led to the rapid spread of electronic monitoring technologies in policing.<sup>106</sup> Several scholars<sup>107</sup> have argued that the adoption of unproven technologies is driven by three “ahistorical, anti-empirical” fallacies namely, the *fallacy of novelty*, the *vanguard fallacy*, and the fallacy of *intuitive appeal* or *surface plausibility*.<sup>108</sup> The *fallacy of novelty* is described as the assumption that everything new is invariably better than the old while the *vanguard fallacy* refers to the assumption that if leading players are doing it, it must be the way to go. The *fallacy of intuitive appeal/surface plausibility* refers to when a policy is adopted based on commonsensical impulse that it “sure seems it might work.”<sup>109</sup> This resonates with Tanner and Meyer's postulation that, in policing, some technologies are appropriated based on a “utopian narrative” that portrays them as magic solutions. This creates “a gap between the imagined outcomes and the actual and often unexpected” outcomes that arise during the daily usage of the technologies by the police.<sup>110</sup>

Although some of these fallacies appear simplistic, they could be drivers for technological adoptions by public institutions and need to be considered. However, decisions to adopt happen in a context that may include the fact that public institutions

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<sup>105</sup> Custers, Bart, and Bas Vergouw. 2015. "Promising Policing Technologies: Experiences, obstacles and police needs regarding law enforcement technologies." *Computer Law and Security Review* (31), p. 525.

<sup>106</sup> Byrne and Marx, *Technological Innovations in Crime Prevention and Policing*, p. 29.

<sup>107</sup> Byrne and Marx, *Technological Innovations in Crime Prevention and Policing*. Also refer to Tanner, Samuel, and Michael Meyer. 2015. "Police work and the new 'security devices': A tale from the beat." *Security Dialogue* (Sage) 46 (4): 384-400.

<sup>108</sup> Byrne and Marx, *Technological Innovations in Crime Prevention and Policing*. p. 29.

<sup>109</sup> Byrne and Marx, *Technological Innovations in Crime Prevention and Policing*, p. 29.

<sup>110</sup> Tanner and Meyer, *Police work and the new 'security devices'*, p. 385.



like police services, are under severe public pressure, not only from citizens and policy makers to increase the quantity and quality of services which are measurable and assessable<sup>111</sup> but also from vendors marketing new technological innovations with “miraculous enhancements” that are oversold for their potential to improve public services.<sup>112</sup> That pressure can lead to adoptions of innovative technologies without adequate assessment as to the feasibility of the technologies’ value proposition.

### 1.7.2 Evidence-based technological adoption

While the technological acquisitions in law enforcement may rely on a romantic faith in technologies, in the academic world, so too do they on evaluations which are central to evidence-based approaches to adapting innovations. As observed by Samuel Nunn and Kenna Quinet, it is through evaluations that faith in technologies is validated.<sup>113</sup> In the field of policing, this thinking is ventilated in standards of evidence policy-making under the banner of evidence-based policing.

Perhaps the most well-known definition of evidence based (EBP) policing is encapsulated in Lawrence Sherman articulation that “police practices should be based on scientific evidence about what works best”.<sup>114</sup> Sherman identified two dimensions of EBP’s research orientation in policing. The first focused on the use of results of scientifically rigorous evaluations of law enforcement tactics and strategies to guide decisions, and the second, on generating and applying analytic knowledge derived from an agency’s analysis of its own internal issues and crime problems.<sup>115</sup> Such evaluations exclude purely descriptive literature and claims of effectiveness based on good intentions. The idea of EBP is implicated in the values and ethics of democratic

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<sup>111</sup> Tanner and Meyer, Police work and the new 'security devices', p. 385.

<sup>112</sup> Nunn, Samuel, and Kenna Quinet. 2002. "Evaluating the Effects of Information Technology on Problem-Oriented Policing: IF it doesn't fit, we must quit." *Evaluation Review* 26 (1): 81-108, p. 81. Also refer to Wheatley, Mike. 2015. "Are the cops being cheated on cloud costs?" *Silicone Angle*. September 9. <https://siliconangle.com/2015/09/09/are-the-cops-being-cheated-on-cloud-costs/>.

<sup>113</sup> Nunn and Quinet, Evaluating the Effects of Information Technology, p. 81.

<sup>114</sup> Lum, Cynthia, and Christopher S. Koper. 2014. "Evidence-Based Policing." In *Encyclopedia of Criminology and Criminal Justice*, by Gerben Bruinsma and David Weisburd (eds), 1426–1437. New York: Springer, p. 1427. Also see Walker, Samuel. 2007. *Police Accountability*, p. 7.

<sup>115</sup> Lum and Koper, Evidence-Based Policing, p. 1427.



governance, particularly of accountability and reducing harm, which are much more associated with sectors such as public health and medicines.

According to Lum and Koper, the advantage of adopting EBP approaches is that the police deploy “strategies and tactics that have been shown to reduce crime, increase legitimacy, reduce internal problems, address community concerns, or reduce fear. In the same vein, EPB approaches also ensure that practices and policies that are considered harmful or ineffective can be discarded or questioned, potentially saving law enforcement agencies time, money, frustration and blame.<sup>116</sup> However, as observed above, evaluations in policing do not have a long history as few law enforcement agencies undertake regular evaluations of the efficacy of the technologies that they use and when they do, there are no follow-up assessments of fade-out effects.<sup>117</sup>

These contradictions are ironic given that public administration, to which law enforcement belongs, is considered an interdisciplinary social science field or a “design science” that emphasises applied research in which theory translates into practice through devising courses of action designed to change existing outcomes into preferred ones.<sup>118</sup> Evaluating innovations ensures that the idea behind the innovation is more important than the innovation itself.<sup>119</sup>

A detailed literature review and critical analysis of the evaluation approaches used to evaluate the impact of BWCs in law enforcement will be provided in Chapter 4 of the thesis.

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<sup>116</sup> Lum and Koper, *Evidence-Based Policing*, p. 1428.

<sup>117</sup> Custers and Vergouw, *Promising Policing Technologies*.

<sup>118</sup> Walker *et al.*, *Best Practice Recommendations for Replicating Experiments*, p. 609; Also see James, O., Jilke, S., & Ryzin, G. V. (2017). Chapter 1: Introduction. *Experiments in Public Management Research: Challenges and Contributions*, by Oliver James, Sebastian Jilke and Gregg Van Ryzin. (eds). Cambridge: Cambridge University Press, p. 8.

<sup>119</sup> Alberti, Adrian; Bertuci, Guido. 2006. "Replicating Innovations in Governance: An Overview." In *Innovations in Governance and Public Administration: Replicating What Works*, by United Nations, 1-21. New York: United Nations, p. 15.

## 1.8 Methodology and thesis outline

The methodological approach used in this thesis combines doctrinal legal analysis, qualitative document analysis and empirical legal analysis. This thesis is an exploratory, interdisciplinary theoretical study of the interaction between technology, the law and law enforcement agencies in specific contexts and how these relationships can be evaluated to improve respect for individual human rights and reduce violence. Thus, the focus of the thesis goes beyond the legal aspects of police institutions to the impact of institutional practices of law enforcement agencies and their social, economic, and ethical significance in society. To this extent, the thesis analysed various sources of law in relation to law enforcement and police accountability.

The thesis used the doctrinal research methodology to describe and analyse international, regional, and domestic laws (treaties, constitutional principles, statutes, cases, and regulations). The doctrinal research method was suitable for this thesis because it is used in legal research to compose a descriptive and detailed analysis of legal rules found in primary sources. This approach aims to gather, organise, and describe the law, provide commentary on the sources used and then identify and describe the underlying theme or system and how each source of law is connected.<sup>120</sup> In this thesis, this methodology was predominantly used in Chapter 3 to identify and analyse relevant international and regional treaties, soft law instruments, and South African domestic law relating to the functions and role of law enforcement organisations in society.

The thesis also relied on qualitative document analysis to analyse reports and other sources literature to inform the critical analysis of theory, policy, and practice in how organisations adopt and use technological innovations. Qualitative document analysis consists of analysing various types of documents, including books, newspaper articles, academic journal articles, institutional reports, photographs, videos and film.<sup>121</sup> As observed by Morgan Hani, the advantage of qualitative document analysis when

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<sup>120</sup> Maurer School of Law. n.d. "Legal Dissertation: Research and Writing Guide." <https://law.indiana.libguides.com/dissertationguide#:~:text=Doctrinal%20legal%20research%20methodology%2C%20also,%2C%20statutes%2C%20or%20regulations.>

<sup>121</sup> Morgan, Hani. 2022. "Conducting a Qualitative Document Analysis." *The Qualitative Report* 27 (1): 64-77. Accessed September 23, 2022, p. 64.

analysing pre-existing texts is that it allows the researcher to conduct studies that were otherwise not possible to complete.<sup>122</sup> In this thesis, this method was predominantly used in Chapters 1, 2 and 4 to provide a contextual analysis of the policing context in South Africa and how BWCs have been used and evaluated in South Africa and internationally.

The empirical legal research method was used to analyse primary and secondary information generated by SAPS and IPID in the form of annual reports, strategic frameworks and plans, and policies. For comparative purposes, the researcher also accessed similar and relevant reports by international law enforcement organisations to advance arguments on the theoretical and practical choices available in a local context.

Beyond analysing these internal documents, the thesis also relied on an analysis of research outputs by academic criminologists including ethnographers, reports of relevant commissions of inquiry into law enforcement that reveal the internal and external context of South African policing. The thesis also relied on analysing reports from the media – both anecdotal and analytic and reports from thinktanks such as the Institute for Security Studies (ISS) and public perception survey data from statutory and non-statutory bodies regarding relevant aspects of law enforcement in South Africa.

This thesis is structured as follows. This introductory chapter is followed by two pairs of interrelated chapters. Chapters 2 and 3 focus on two types of contexts. Chapter 2 focuses on the non-legal context while Chapter 3 focuses on the legal context of law enforcement in South Africa. Both chapters seek to outline the key issues that determine and guide the role of law enforcement in South Africa, in particular the use of force and how these factors could potentially shape the use of police BWCs to enhance police efficiency and/or accountability.

Chapters 4 and 5 provide an analysis of the theories of change associated with BWCs and accountability and how they might be measured in a South African context.

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<sup>122</sup> Ibid.

Chapter 4 expands on the literature review by outlining the circumstances under which BWCs might be thought of as potentially making a difference in relation to police accountability and providing a critical analysis of how these have hitherto been theorised, exploring the possibility of other plausible, countervailing theories and what that might imply for evaluating BWCs in a South African context. Chapter 5 builds on the analyses in Chapter 4 and takes consideration of the two contexts in Chapters 2 and 3 to outline what the priorities for evaluating the impact of BWCs on more accountable policing in South Africa in terms of the questions that should be asked, how BWCs should be used and the kinds of outcomes that should be measured in relation to police effectiveness and accountability.

Chapter 6 is the concluding chapter, which discusses the findings of the study with recommendations, and concludes the thesis.

## Chapter 2: Internal Context of Policing in South Africa

This chapter focuses on the social and historical context of South African law enforcement and how it relates to police practice and in particular, police use of force. As illustrated in the preceding chapter, law enforcement agencies and their agents are expected to be transparent, accountable, and effective and to uphold the rule of law. However, law enforcement is not merely about what is expected and what works in preventing and investigating crime, but also, it is about who the police are and what the police actually do in practice in a specific context. This is often shaped by what is expected of police officers and the institutional contexts and socio-political settings that condition their work and how they respond to them are also crucial factors. An understanding of this context in South Africa is of relevance because it constitutes the setting in which a policy and practice-impacting technology such as BWCs will be expected to improve aspects of law enforcement. As scholars have observed, the success of technological innovations in solving social challenges depends not only on the intrinsic qualities and capabilities of the technology itself but could also depend on non-technological fixes like the socio-economic and cultural context in which they are deployed.<sup>1</sup>

### 2.1. Transformation from police force to police service

It is widely recognised that the establishment and existence of many police forces in Africa, including South Africa, trace their history from laws and practices which originate from past colonial experiences of the continent in which there were no independent oversight mechanisms and no respect for human rights and the rule of

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<sup>1</sup> Koper, Christopher S., Cynthia Lum, James J. Willis, Daniel Woods, and Julie Hibdon. 2015. Realising the Potential of technology in Policing: A multisite study of the Social, Organisational, and Behavioural Aspects of implementing Policing Technologies. National Institute of Justice. [https://www.researchgate.net/publication/278026001\\_Realizing\\_the\\_Potential\\_of\\_Technology\\_in\\_Policing\\_A\\_Multi-Site\\_Study\\_of\\_the\\_Social\\_Organizational\\_and\\_Behavioral\\_Aspects\\_of\\_Policing\\_Technologies](https://www.researchgate.net/publication/278026001_Realizing_the_Potential_of_Technology_in_Policing_A_Multi-Site_Study_of_the_Social_Organizational_and_Behavioral_Aspects_of_Policing_Technologies); Also see Grossmith, Lynne, Catherine Owens, David Mann Will Finn, Tom Davies, and Laura Baik. 2015. *Police, Camera, Evidence: London's Cluster Randomised Controlled Trial of Body-Worn Video*. November. Accessed June 26, 2018. <http://whatworks.college.police.uk/Research/Pages/Pyblished.aspx>.

law.<sup>2</sup> Therefore, a contemporary understanding of police legitimacy and accountability in South Africa cannot be complete without referring to apartheid colonial policing and its ongoing transformation to post-apartheid democratic policing. The two eras were characterised by diametrically opposite policing philosophies and approaches that have not yet been completely disentangled in practice. An analysis of literature on South African policing regarding respect for human rights, the rule of law and police use of force in both apartheid and post-apartheid periods suggests arrested progress and, in some cases regression, into old apartheid ways of using force within policing.<sup>3</sup>

Until 1994, the use of excessive force by the South African Police (SAP) was an indispensable part of the police strategy to subdue and achieve social control, especially among the black population.<sup>4</sup> SAP policing was characterised by a complete disregard for human rights, the arbitrary use of force, detention without trial, torture and wide discretionary powers to shoot to kill as a way of quelling unrest by the black population, especially in the townships.<sup>5</sup> Policing philosophy and strategies took a military posture which, as explained by Hornberger, meant mainstreaming a culture of "secrecy, violence, and terror" including a "counter-insurgency role" in neighbouring countries such as Angola, Mozambique, Namibia and Zimbabwe using "military methods and equipment".<sup>6</sup> All these strategies were facilitated by an array of permissive rules and a protective legal system which created a sense of impunity for perpetrators within the police force.

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<sup>2</sup> Refer to African Commission on Human and Peoples' Rights (ACHPR), 103a Resolution on Police Reform, Accountability and Civilian Police Oversight in Africa - ACHPR/Res.103a(XXXX)06. 29<sup>th</sup> November 2006.

<sup>3</sup> Hornberger, Julia. 2011. *Policing and Human Rights: the Meaning of Everyday Violence and Justice in the Everyday Policing in Johannesburg*. Abingdon: Routledge, p. 28. Also see National Planning Commission. 2011. *National Development Plan - Our future - make it work*. Accessed April 13, 2018. [http://www.poa.gov.za/news/Pages/National Development Plan.aspx](http://www.poa.gov.za/news/Pages/National%20Development%20Plan.aspx); Mistry, Duxita, Anthony Minnaar, Jean Redpath, and Jabu Dlamini. 2001. *The Use of Force by Members of the South African Police Service: Case Studies from 7 Policing Areas in Gauteng*. September. Accessed July 24, 2018.

[https://www.gov.za/sites/default/files/gcis\\_document/201409/force0.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/force0.pdf).

<sup>4</sup> Mabunda, Dumisani Quiet. 2014. "The Challenges in Establishing Partnership Policing in Soshanguve." Masters diss., September. University of South Africa, p.1. Also refer to Hornberger, Policing and Human Rights, pp. 25-26, National Planning Commission. (2011) and National Planning Commission, *National Development Plan*, p. 393.

<sup>5</sup> Mistry *et al.*, *The Use of Force by Members of the South African Police Service*, p. 1. Also see Hornberger, *Policing and Human Rights*, p. 28.

<sup>6</sup> Hornberger, *Policing and Human Rights*, pp. 25–26.

The key goal of transforming apartheid policing was to "demilitarise the police, moving it away from its history of brutality" towards a civilian-oriented service policing approach.<sup>7</sup> Hence, the South African Police changed to South African Police Service (SAPS), and military ranks were abolished, including changing police insignia and branding. The *National Crime Prevention Strategy*, the NDP, and the *2016 White Paper on Safety and Security* all sought to address how to transform South African law enforcement into a legitimate service for all South Africans. All these were symbolic but important signals of transforming into a legitimate police service.

## 2.2 Policing Context in South Africa

### 2.2.1 Current policing context external to the police – structural violence

This section assesses the contextual factors external to, but impacting on, policing in South Africa. As observed in the introductory chapter, there is extensive information indicating that law enforcement in South Africa happens in a social, economic, and political context characterised by high levels of structural and physical violence.<sup>8</sup> South Africa has an enormous burden of violence that has left its population feeling unprotected and unsafe. Some structural factors contributing to this environment include high unemployment rates and the exclusion of a large population from the formal economy who live in informal urban settlements or remote rural areas with limited or no access to social services because of persisting apartheid spatial settlement patterns. As a result, there are high levels of inequality and poverty.<sup>9</sup> To a

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<sup>7</sup> Civilian Secretariat for Police. 2016. "2016 White Paper on Policing."

<http://www.policeseecretariat.gov.za>. Accessed November 19, 2019.

[http://www.policeseecretariat.gov.za/downloads/bills/2016\\_White\\_Paper\\_on\\_Policing.pdf](http://www.policeseecretariat.gov.za/downloads/bills/2016_White_Paper_on_Policing.pdf).

Also see National Planning Commission, *National Development Plan*, p. 54; Hornberger, *Policing and Human Rights*; Mistry, D. et al., *The Use of Force by Members of the South African Police Service*; Steinberg, Jonny. 2017. "Policing During and After Apartheid." In *Police in Africa: The Street Level View*, by Jan Beek, Mirco Gopfert, Olly Owen and Jonny Steinberg, 61-77. London: Hurst & Company.

<sup>8</sup> The detailed extent of such structural violence is clearly enunciated in South Africa's National Planning Commission's Diagnostic Report and the National Development Plan (2012).

<sup>9</sup> National Planning Commission. 2011. *Diagnostic Overview*. Pretoria: National Planning Commission. Accessed February 23, 2019.

<https://www.nationalplanningcommission.org.za/assets/Documents/diagnostic-overview.pdf>, p. 9.



large extent, these challenges form part of the legacy of apartheid, but after 25 years of independence, South Africa has struggled to improve the lives of the majority of the population.

It is this structural context that provides the backdrop in which policing occurs and police-public relationships are shaped. The widespread public discontentment with the socio-economic situation has led to persistent protests which often turn violent and require police intervention. Commentators have described South Africa as the “protest capital of the world” because of the high rates of public protests in the country.<sup>10</sup> In 2004-2005, the country averaged 6,000 protests at an average of 15 protests a day and that number significantly increased by 2015 with the more recent protests increasingly becoming violent and disruptive.<sup>11</sup> The SAPS has to manage such protests to maintain order, safeguard lives, and protect property and the actions they take have a significant impact on public-police relations.

### 2.2.2 Physical violence

South Africa also has high levels of physical violence. Although the homicide rate, the most reliable indicator of violence in society, has significantly declined from the high levels of 67 per 100,000 in the last decade of apartheid,<sup>12</sup> it still remains high compared to the global average. According to the World Health Organisation’s latest statistics, South Africa’s homicide rate per 100,000 population at 35.9 in 2022 is six times the global average of six per 100,000.<sup>13</sup> During SAPS’ announcement of the crime statistics for 2021-2022, an average of 71 murders were being committed every day.<sup>14</sup>

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<sup>10</sup> Rodrigues, Christopher. 2010. “Black boers’ and other revolutionary songs.” *Mail and Guardian*. April 5. <https://thoughtleader.co.za/on-revolutionary-songs/>. Also see Bianco, Silvia. 2013. “South Africa: The ‘Protest Capital of the World’.” *The South African*. June 20. <https://www.thesouthafrican.com/news/south-africa-the-protest-capital-of-the-world/>.

<sup>11</sup> Visagie, Justin, Ivan Turok, and Sharlene Swatz. 2021. *What lies behind social unrest in South Africa, and what might be done about it*. August 18. <https://theconversation.com/what-lies-behind-social-unrest-in-south-africa-and-what-might-be-done-about-it-166130>.

<sup>12</sup> Davis, Rebecca. 2019. “Murder rates in 2019 are much lower than 1994, even if it doesn’t feel that way.” *Daily Maverick*. April 26. <https://www.dailymaverick.co.za/article/2019-04-26-murder-rates-in-2019-are-much-lower-than-1994-even-if-it-doesnt-feel-that-way/>.

<sup>13</sup> World Health Organisation. 2022. *Estimates of rate of homicides (per 100 000 population)*. <https://www.who.int/data/gho/data/indicators/indicator-details/GHO/estimates-of-rates-of-homicides-per-100-000-population>.

<sup>14</sup> Business Day. 2022. *71 people murdered in South Africa every day – these are the worst areas*. August 19. <https://businesstech.co.za/news/government/618357/71-people->



South Africa also has a vigilantism problem resulting from deficient state legitimacy. Deficient state legitimacy in **South Africa is characterised by situations** where state law enforcement is absent, particularly in poor communities, thus encouraging citizens to take responsibility of their own crime prevention by engaging in banishing and intimidating alleged crime suspects and their families, destroying their property and sometimes killing them.<sup>15</sup> But the high prevalence of vigilantism can also be seen as a sign of citizens' lack of respect for human rights, the rule of law and due process as envisaged in SDG 16 target 16.3, particularly indicator 16.3.1.<sup>16</sup> According to the Institute for Security Studies, at least two people die daily in South Africa as a result of vigilantism, with at least 846 deaths directly linked to this form of violence per SAPS' analysis of crime statistics for the year 2017/18.<sup>17</sup> As observed in the Khayelitsha Commission report, communities and individuals in Khayelitsha resort to vigilantism and revenge attacks because of lack of trust in police amid high levels of crime as well as perceptions of police ineffectiveness in protecting them and solving crimes.<sup>18</sup> Despite the ubiquity of this phenomenon, SAPS does not seem to have reliable statistics on it, nor do they have a clear strategy to quell this kind of violence except to condemn such actions publicly.<sup>19</sup>

While citizens are responsible for most of the violence, the police are also a significant

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murdered-in-south-africa-every-day-these-are-the-worst-areas/#:~:text=INSTALL-71%20people%20murdered%20in%20South%20Africa%20every,these%20are%20the%20worst%20areas&text=The%20South%20African%20.

<sup>15</sup> Super, Gail. 2016. "Volatile Sovereignty: Governing Crime Through Community in Khayelitsha." *Law and Society Review* 50 (2), pp. 452-453 and p. 461. Also refer to The Khayelitsha Commission of Inquiry into Allegations of Police Inefficiency in Khayelitsha. 2014. *Towards a Safer Khayelitsha: The Report of the Commission of Inquiry Into Allegations of Police Inefficiency and a Breakdown in Relations Between SAPS and the Community in Khayelitsha*. Cape Town: The Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown.

[http://www.khayelitshacommission.org.za/images/towards\\_khaye\\_docs/Khayelitsha\\_Commission\\_Report\\_WEB\\_FULL\\_TEXT\\_C.pdf](http://www.khayelitshacommission.org.za/images/towards_khaye_docs/Khayelitsha_Commission_Report_WEB_FULL_TEXT_C.pdf), p. 105 and Nel, Mary. 2016. "Crime as Punishment: A Legal Perspective on Vigilantism in South Africa." PhD Diss., *University of Stellenbosch*. p. 9.

<sup>16</sup> SDG Indicator 16.3.1: Proportion of victims of violence in the previous 12 months who reported their victimisation to competent authorities or other officially recognised conflict resolution mechanisms.

<sup>17</sup> Lancaster, Lizette. 2019. "Is mob violence out of control in South Africa?" *Daily Maverick*, March 19. Accessed March 27, 2019. <https://www.dailymaverick.co.za/article/2019-03-05-is-mob-violence-out-of-control-in-south-africa/>.

<sup>18</sup> Khayelitsha Commission, *Towards a Safer Khayelitsha*, p. 139.

<sup>19</sup> Nel, Mary, 2016. *Crime as Punishment*, p. 2.

contributor to violence in South African society. The table below shows the number of cases relating to unnecessary and excessive use of force<sup>20</sup> lodged with the Independent Police Investigative Directorate (IPID) against the police for investigation over six years from year 2012-2013.

**Table 2: IPID Complaints intake: 2012/13 – 2017/18**

Complaint Intake	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018
Death as a result of police action	431	390	396	366	394	436
Complaint of discharge of official firearm	670	429	940	864	1,640	677
Torture	50	78	145	145	173	217
Assault	4,131	3,916	3,711	3,509	3,827	3,661

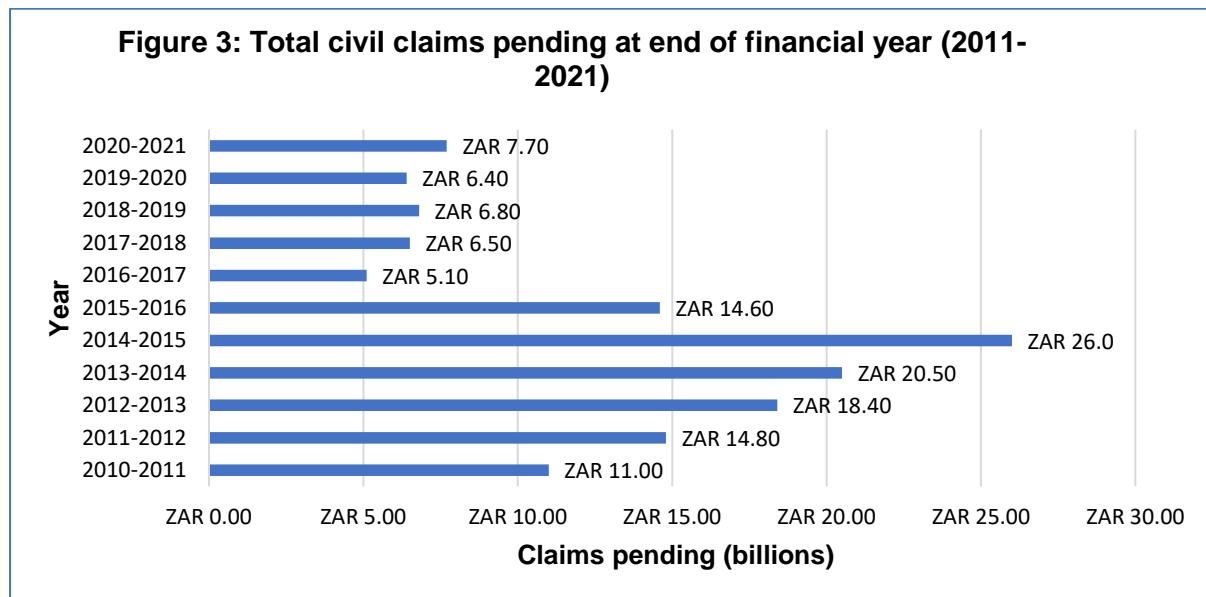
A notable feature of these figures is the consistency of the use of common assault by the police showing it as their dominant method of coercion. As reporting police misconduct is a voluntary exercise, there are likely to be many more cases of inappropriate use of force by the police that are not included in these statistics.

Partly as a result of the alleged unlawful use of force by the police, SAPS faces mounting bills emanating from civil claims by aggrieved members of the public mainly due to unlawful arrests and detentions.<sup>21</sup> Figure 4 below shows the annual value of pending civil claims against the police as captured at the end of each financial year for the ten years from 2011 to 2021. It represents a pending liabilities at the end of each financial year. As can be seen in the chart, SAPS' contingency liabilities have

<sup>20</sup> The statistics selected in this thesis narrowly focus on cases of use of force in the pursuit of legitimate law enforcement objectives as opposed to general violence involving deliberate criminally negligent police actions which are also included as complaints IPID reports.

<sup>21</sup>Parliamentary Portfolio Committee on Police (PPCoP). 2017. *Seven Measures to Improve SAPS' Record on Human Rights-centred Policing*. April 20. Accessed June 23, 2018. <https://www.parliament.gov.za/press-releases/seven-measures-improve-saps-record-human-rights-centred-policing>.

decreased over the decade and plateaued at an average of between six and seven billion rands in the last four years.



The amounts shown represent the total claims based on letters of demand and not necessarily what SAPS pays in final settlements. However, according to the then chairperson of the parliamentary Portfolio Committee on Police (PCoP) in 2017, the increase in new incidents leading to civil claims against the SAPS is largely attributed to unlawful arrests and detention, collisions, assaults and shooting incidents.<sup>22</sup> After the Marikana killings by SAPS in 2012, the PCoP estimated the value of litigation claims by 652 litigants at R1,171 billion.<sup>23</sup> The significance of these claims is not just their value, which are a great concern for policy makers but also, an indication of the extent to which community-police relations are antagonistic, and where many individuals feel aggrieved by police abuse of authority and unlawful use of force.

### 2.2.3 Violence against police officers

South Africa is also characterised by significant levels of violence against police, which illustrates that contrary to high level policy statements regarding community policing and the promotion of mutually beneficial relations with communities and citizens, SAPS police officers are potentially locked in a life-and-death battle with the

<sup>22</sup> PPCoP, *Seven Measures to Improve SAPS*.

<sup>23</sup> PPCoP, *Seven Measures to Improve SAPS*.

communities they are supposed to serve.<sup>24</sup> As observed by Faull, the deaths of police officers is an issue that is etched in the identity of South African police officers and one that adds “an uncomfortable weight to any shift.”<sup>25</sup>

Indeed, among the recommendations of the Marikana Commission of Inquiry in the context of policing assemblies was that,

The propensity in South Africa presently, for the carrying of sharp instruments and firearms and the associated violence even in service delivery protests require strict enforcement of the laws prohibiting such conduct.<sup>26</sup>

The danger of carrying such weapons by members of the public during protests is exacerbated by the fact that law enforcement officials in the Public Order Policing (POP) Units are ill-equipped to deal with such situations. As the Marikana Commission of Inquiry observed, evidence showed that “the measures at the disposal of POP are completely inadequate for purposes of dealing with crowds armed as they were, with sharp weapons and firearms at Marikana.”<sup>27</sup> By “completely inadequate” the Marikana Commission was referring to the fact that law enforcement officers were armed with automatic rifles (R5 rifles) that were used to kill the majority of the 34 miners that lost their lives at Marikana.<sup>28</sup>

There is also significant law enforcement mortality resulting, among other causes, from targeted killings by members of the public. Figure 4 below<sup>29</sup> traces the number of

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<sup>24</sup> Refer to Faull, Andrew. 2018. *Police Work and Identity: A South African Ethnography*. London & New York: Routledge, p. 37. Also see Steinberg, Jonny. 2008. *Thin Blue: The Unwritten Rules of Policing South Africa*. Johannesburg & Cape Town: Jonathan Ball Publishers. Kindle.

<sup>25</sup> Faull, *Police Work and Identity*, p. 38.

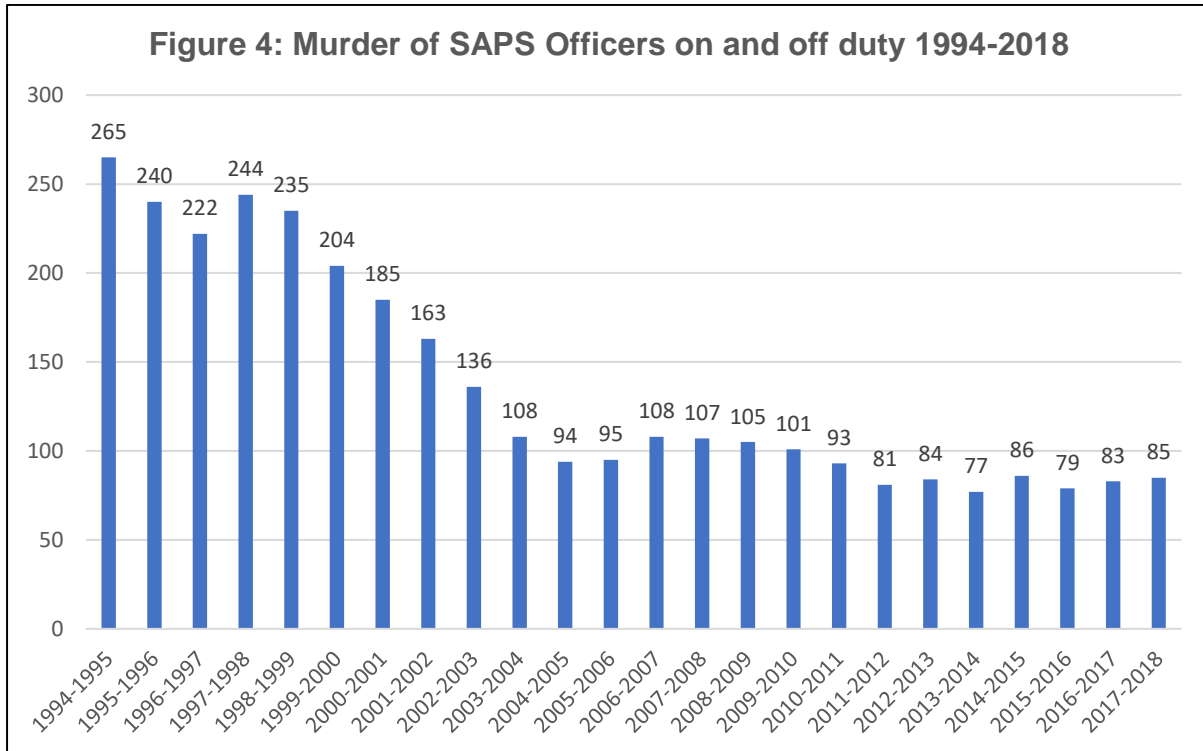
<sup>26</sup> Marikana Commission of Inquiry. 2015. Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at The Lonmin Mine in Marikana, in the North West Province. Marikana Commission. [https://justice.gov.za/comm-mrk/docs/20150710-gg38978\\_gen699\\_3\\_MarikanaReport.pdf](https://justice.gov.za/comm-mrk/docs/20150710-gg38978_gen699_3_MarikanaReport.pdf), p. 547.

<sup>27</sup> Marikana Commission of Inquiry. 2015. Report on Matters of Public, National and International Concern, p. 547.

<sup>28</sup> The Marikana Commission of Inquiry recommended a total ban of the use of automatic rifles in crowd management by SAPS. Refer to Recommendation B (1), p. 547 of Marikana Commission Inquiry Report.

<sup>29</sup> Faull, Andrew. 2018. *A surprising way to save lives of police*. November 18. Accessed <https://www.iss.org/crimelab/iss-today/a-surprising-way-to-save-lives-of-police>.

police murders of police officers since 1994 and shows that there has been a big drop in police killings, but, as Tammy Petersen observes, South Africa is still a dangerous place to be a police officer.<sup>30</sup>



Using the graph above, Andrew Faull makes the same point saying the police murder rate in 1993 was 120/100,000 police population compared to 19 per 100,000 police population in 2017-2018. It can be argued that these trends are an illustration of the evolving role of police and their relationship with the population. The transitional period immediately before and after 1993-1994 was highly volatile with the outgoing government using brutal militaristic tactics which made the police an enemy of the people and therefore created a feeling among the populace that law enforcement officials were a legitimate target for attack.<sup>31</sup> However, it is still a great concern that up to 2014, 46% of police killings happened when officers were attending to complaints – a sign that there is considerable antagonism to law enforcement officials and a lack of respect for the authority conferred on police officers by the law.

<sup>30</sup> Petersen, Tammy. 2017. *Big Drop on Police Killings, but SA still relatively dangerous for cops*. June 28. <https://mg.co.za/article/2017-06-28-big-drop-in-cop-killings-but-sa-still-relatively-dangerous-for-cops>.

<sup>31</sup> Petersen, *Big Drop on Police Killings*.

Nineteen murders of police officers per 100,000 population is an improvement on police safety but it is still a significantly high number in terms of deadly threats to police officers considering the lack of accurate data and that this statistic excludes non-fatal but serious injuries to police officers.<sup>32</sup> Cano's report on the use of lethal force in South Africa based on available data from the SAPS and IPID annual reports for the year 2017-2018, found that the police intentionally killed 390 individuals using lethal force compared to 28 police officers murdered by civilians.<sup>33</sup> The ratio of civilians killed to police officers murdered translates to 12.6 civilians per police officer, which, as Cano argues, is above the maximum acceptable threshold of ten suggesting that police kill more people than is justified by consideration of police safety in the face of deadly attack threats based on the principle of proportionality.<sup>34</sup> However, Cano concedes that the data may not be accurate because not all cases of wounded victims are reported since the only cases that are likely to be recorded are those in which a complaint has been lodged.<sup>35</sup>

Thus, the frequency of the use of lethal force between police officers and members of the public may be higher. However, as illustrated in the Khayelitsha Commission report, South African police officers fear some sections of the communities they police and that has an impact on policing tactics and the use of force.<sup>36</sup>

Criminologists posit that police-public violence can be a vicious cycle in which public violence against the police could, in turn, trigger violence by members of the police.<sup>37</sup> According to Buttle, fearful police officers are dangerous because they are prone to making mistakes that would lead them into using unnecessary and/or excessive force in police-public encounters. Therefore, fear of violence influences a police officer's

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<sup>32</sup> Cano, Ignacio. 2021. *The Use of Lethal Force by the Police in South Africa*. July. Accessed August 29, 2021. <https://apcof.org/wp-content/uploads/use-of-lethal-force-by-the-police-in-south-africa-.pdf>, p. 18.

<sup>33</sup> Cano, *The Use of Lethal Force*, see p. 15 and 17.

<sup>34</sup> Cano, *The Use of Lethal Force*, p. 18.

<sup>35</sup> Cano, *The Use of Lethal Force*, p. 18.

<sup>36</sup> Khayelitsha Commission. (2014). *Towards a Safer Khayelitsha*, p. 299.

<sup>37</sup> Bruce, Robert David. 2000. "The Management of the Use of Force in the South African Police Service." Masters Diss., University of Witwatersrand, p. 7.

street view regarding the use of force.<sup>38</sup> It stands to reason, therefore, that any intervention that seeks to deal with the use of force in an environment with low levels of police legitimacy must not only consider police officers' training or equipment but also, the violence perpetrated against the police.

Grainne Perkins' research on police responses to the perception of risk of harm or death due to the physical act of violence could explain why the police are on edge in certain jurisdictions than others. She argues that police responses, including the use of force, stem from police's understanding of the social context in which danger is experienced and perceived.<sup>39</sup> Under such circumstances, as Perkins observes, danger is understood as "both the possibility (of occurrence) and a state of being (in the moment), where someone is vulnerable to injury or death."<sup>40</sup> The inevitability of imminent death in police officers' psyche is made vivid by a SAPS officer, Sergeant Legodi in which he is quoted as saying: "It might be your last day and you want to look good when you die. . . . I don't think I will ever be old. It can happen anytime, any day, a shot in the back – over."<sup>41</sup>

Thus, the external social and historical context to policing illustrates that South African society has an endemic culture of violence that is driven by a lack of respect for human rights and the rule of law and in some instances fuelled by SAPS' perceived lack of legitimacy. As shown above, the context reflects a vicious cycle of violence where law enforcement officials are perpetrators and targets of violence.

#### 2.2.4 Police corruption and politicisation of law enforcement

A related moderating factor that might impact the effective deployment of BWCs to enhance accountability within SAPS is corruption in the higher echelons of the law enforcement agency and its susceptibility to politicisations through executive

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<sup>38</sup> Buttle, John W. 2010. "Officer Safety and Public Safety: Training the Police to Use Force in the United Kingdom." In *Police Use of Force: A Global Perspective*, by Joseph B. Kuhns and Johannes Knuttsson, 32-42. Santa Barbara: Praeger.

<sup>39</sup> Perkins, Grainne. 2018. "Danger and Death: Organisational and Occupational Responses to the Murder of Police in South Africa - a Case Study." PhD diss., University of Cape Town, p. 23.

<sup>40</sup> Perkins, Danger and Death, p. 26.

<sup>41</sup> Hornberger, *Policing and Human Rights*, p. 48.



interference and politicisation of senior leadership appointments, which have undermined its performance and effectiveness and withered South African public trust in policing. According to an Afrobarometer report, from 2011 to 2021, South African public trust in the police halved from 49% to 26%.<sup>42</sup>

This thesis may not do justice to the full extent of politicisation and scandal that has been evidenced in SAPS. However, it is important to illustrate how such corruption and politicisation has eroded public confidence and trust in policing and how this might moderate the potential impact of using BWCs within the law enforcement agency to enhance accountability. As Mike Pothier observes, one way of illustrating corruption within SAPS is to highlight the number of senior leaders within SAPS been suspected of, tried for lack of probity and other serious crimes and improprieties.<sup>43</sup> The trend started with National Police Commissioner Jackie Selebi, who was appointed in 2000. In 2010, Selebi was suspended and subsequently convicted of corruption and money laundering for his association with the notorious criminal Glenn Agliotti and sentenced to 15 years in prison.

Although he was not criminally charged, Selebi's replacement, Bheki Cele took office in 2009 but by 2011, an investigation by the Public Protector, Thuli Madonsela, found Cele's involvement and conduct in the R1,67 billion leasing of SAPS office accommodation to be "improper, unlawful" and that it "amounted to maladministration."<sup>44</sup> President Zuma suspended him in 2011 following a recommendation by a Board of Inquiry investigation, which also found him unfit to hold office. In 2013, Cele was finally dismissed, and despite this damning finding, he returned to a more powerful position as Minister of Police in 2018.<sup>45</sup>

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<sup>42</sup> Afrobarometer. 2021. *South Africans' trust in police drops to new low, Afrobarometer survey finds*. Accessed August 6, 2023. <https://www.afrobarometer.org/articles/south-africans-trust-police-drops-new-low-afrobarometer-survey-finds/#:~:text=survey%20finds%20%E2%80%93%2>

<sup>43</sup> Pothier, Mike. 2021. *Leadership Crises in the SA Police Service*. Vol. Briefing Paper 528. August. <http://www.cplo.org.za/wp-content/uploads/2021/08/BP-528-Leadership-Crises-in-the-SAPolice-Service-by-Mike-Pothier.pdf>.

<sup>44</sup> Sapa. 2011. *Cele guilty of improper conduct in R500 million deal*. February. Accessed August 6, 2023. <https://www.iol.co.za/sundayindependent/news/cele-guilty-of-improper-conduct-in-r500m-deal-1031863>.

<sup>45</sup> Ibid.



Cele's successor, Riah Phiyega, occupied the office in 2012 and was suspended in October 2015 following recommendations of the Farlam Commission to investigate her fitness to hold office after the Marikana killings of striking miners in August 2012. In 2016, a board Inquiry headed by Judge Cornelis Claasen found Phiyega not fit to hold office and recommended her dismissal. Phiyega was also found guilty of perjury during the Marikana Commission of Inquiry into the killings of striking miners.<sup>46</sup>

However, Phahlane was soon charged with fraud and corruption in 2018 and dismissed from the SAPS in 2020, and his case is still on the court roll. Khehla Sitole succeeded Phahlane in 2017, but scandals soon followed him like others before him. He vacated office on 31 March 2022 after a "mutual agreement in the best interests of the country" following a scathing High Court judgement that found that he and his deputies, Francinah Vuma and Lebeoana Tsumane, had placed the interests of the party (African National Congress) over the country when they thwarted an IPID investigation into the attempted procurement of a communications interception Grabber at an inflated price in 2017.<sup>47</sup> During his tenure, Sitole fired his deputy, Bonang Mgwenya, on allegations of fraud, corruption, money laundering and theft.<sup>48</sup>

While corruption within the ranks of SAPS has damaged the agency's image, it is the politicisation of the appointments of senior leaders has had a more corrosive effect on corruption and maladministration within SAPS. By law, it is the constitutional prerogative of the President to appoint national police commissioners.<sup>49</sup> The national police commissioners, in turn, are responsible for appointing the next tier of command, such as heads of various SAPS directorates and administrative staff. With the

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<sup>46</sup> Mashego, Abram. 2016. *EXCLUSIVE: Full report into Phiyega's fitness to hold office.* News24.com. December 23. <https://www.news24.com/citypress/news/exclusive-full-report-into-phiyeegas-fitness-to-hold-office-20161223>.

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<sup>48</sup> Petrus, Theodore. 2021. *OPINION: Police Criminality and Corruption puts South Africans at risk.* March 10. Accessed August 7, 2023. <https://www.news24.com/news24/opinions/columnists/guestcolumn/opinion-police-criminality-and-corruption-put-south-africans-at-risk-20210309#:~:text=OPINION%20%7C%20Police%20criminality%20and%20corruption%20put%20South%20Africans%20at%20risk,-10%20Mar%2020>.

<sup>49</sup> Constitution of the Republic of South Africa, 1996 (Act No 108 of 1996), sec. 216, 217 and 218.

concurrency of provincial executives, appoint provincial police commissioners.<sup>50</sup> However, as Pothier observes, the tradition has been that the political decision-making behind the appointments determines who gets the job of national commissioner. Thus, "the approach and agenda of the appointee – and any pressure they might be subjected to – determines how they carry out their leadership task and how they choose to apply police resources."<sup>51</sup>

Pothier further argues that in such appointment processes, if a National Commissioner has been appointed due primarily to political considerations, it stands to reason that the same considerations will also influence his or her down-the-line appointments.<sup>52</sup> According to Gareth Newman, the six national commissioners appointed by Zuma also hired people they favoured into top-level positions without subjecting them to the required assessments and vetting processes.<sup>53</sup> For example, Richard Mdluli is reported to have made 250 dodgy appointments in crime intelligence, 23 of whom were close friends and family members with no policing experience and at least 15 people with criminal records.<sup>54</sup> Similarly, Phahlane made 55 appointments during his short stint as National Police Commissioner, just as did Berning Ntlemeza when he was appointed head of the SAPS' Directorate for Priority Crime Investigation.<sup>55</sup>

The net effect of such layers of political and nepotistic appointments means that there is a substantial cohort of functionaries who are unfit for the job that are embedded in South Africa's law enforcement agencies whose loyalty is to their political principals and whose role is not to protect and serve ordinary South Africans. It is plausible that political appointees whose mandate is to protect corrupt, politically appointed principals might seek to undermine the use of technologies such as BWCs to enhance transparency and accountability within SAPS.

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<sup>50</sup> Pothier, Mike. 2021. *Leadership Crises in the SA Police Service*, p. 2.

<sup>51</sup> Afrobarometer. 2021. *South Africans' trust in police drops to new low, Afrobarometer survey finds*, p. 3.

<sup>52</sup> Pothier, Mike. 2021. *Leadership Crises in the SA Police Service*, p. 2.

<sup>53</sup> Newman, Gareth. 2018. *How to free South Africa's police after state capture*. March 6. <https://issafrica.org/iss-today/how-to-free-south-africas-police-after-state-capture>.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

In the early post-apartheid years, such appointments were used as part of the transformation of SAPS in line with the ruling African National Congress (ANC) party's strategy to appoint party members as a way of ensuring that people who shared the principles and vision of the governing party were positioned to drive the process of transformation.<sup>56</sup>

However, at the turn of the century, this appointment procedure increasingly became an instrument for the executive to deal with internal ANC party factional fights and more so during the leadership of President Zuma from 2009 to 2018, appointments (and dismissals) were weakened and used to aid and abet grand corruption in what is now termed state capture.

The State capturers did not just focus on SAPS but all key criminal justice agencies, including SAPS' Crime Intelligence Division, the Directorate for Priority Crime Investigation (the Hawks), the National Prosecuting Authority, and, to a lesser extent, the IPID. According to the Institute for Security Studies and Corruption Watch, the manipulation of these agencies ensured impunity for members of the executive (including the President and his family) and other critical political allies involved in state capture while intimidating and coercing opponents and cowering opponents within the criminal justice system.<sup>57</sup>

For example, as soon as President Zuma came into power, he appointed Richard Mdluli to the powerful position of Head of SAPS' Crime Intelligence Division. Mdluli was allegedly used in this position to spy on Zuma's political adversaries and was seen as untouchable due to his association with the President.<sup>58</sup> Corruption Watch's timeline of Richard Mdluli's life makes for incredible reading and illustrates that he was scandalous, corrupt, and entangled in serious crimes and, therefore, unfit for the role of Crime Intelligence head.<sup>59</sup>

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<sup>56</sup> Institute for Security Studies and Corruption Watch. 2019. *State capture and the political manipulation of criminal justice agencies*, p. 12.

<sup>57</sup> *Ibid.*, p. 3.

<sup>58</sup> *Ibid.*

<sup>59</sup> Corruption Watch. 2012. *Richard Mdluli: A Comprehensive Timeline*. July 3. <https://www.corruptionwatch.org.za/richard-mdluli-a-comprehensive-timeline/>.

Similarly, despite a court judgement that he was “dishonest”, “dishonourable” and “lacking integrity and honour”,<sup>60</sup> then acting head of the Hawks, Berning Ntlemeza, was appointed permanently to the position and in turn, he appointed various people into critical positions in the Hawks despite evidence that some were, like him, not suitable. In this position, Ntlemeza sought to investigate and undermine Pravin Gordhan, then Finance Minister and opponent of state capture, for his alleged role while still serving as the South African Revenue Authority (SARS) commissioner in setting up the so-called rogue unit. Ntlemeza was also at the forefront of investigating Gordhan for re-employing Ivan Pillay after the latter's early retirement.<sup>61</sup>

Political appointees with law enforcement agencies also protected each other to maintain a stranglehold on these agencies to protect their political handlers and allow corruption to persist with impunity. For example, Ntlemeza fired the Gauteng provincial head of Hawks, Shadreck Sibiyi, allegedly for investigating allegations of murder by the head of crime intelligence, Richard Mdluli, for his role in the murder of his ex-girlfriend's husband.<sup>62</sup> Ntlemeza cleared Mdluli at the first inquest of the murder, but the Supreme Court of Appeals reinstated the murder charges.<sup>63</sup> Similarly, another appointee of President Zuma's, Nomgcobo Jiba, as Acting National Director of Public Prosecutions (NDPP) in 2011<sup>64</sup> and allowed the withdrawal of charges against the now former crime intelligence head, Richard Mdluli and defied an order by the Supreme Court of Appeal to hand over all documents and material that formed the basis of the decision to withdraw corruption charges against President Zuma.<sup>65</sup>

The examples of corruption and politicisation of law enforcement agencies given

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<sup>60</sup> Huffpost. 2017. "Who Is Mthandazo Berning Ntlemeza, The Man Who May Now No Longer Lead The Hawks?" *Huffpost*. March 17. Accessed August 17, 2023. [https://www.huffingtonpost.co.uk/entry/who-is-mthandazo-berning-ntlemeza-the-man-who-may-now-no-longer\\_uk\\_5c7e9ed3e4b078abc6c19a61](https://www.huffingtonpost.co.uk/entry/who-is-mthandazo-berning-ntlemeza-the-man-who-may-now-no-longer_uk_5c7e9ed3e4b078abc6c19a61). Also refer to Institute for Security Studies and Corruption Watch. 2019. *State capture and the political manipulation of criminal justice agencies*, p. 20.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> This was after a Supreme Court of Appeal judgement that the appointment of Menzi Simelane, another NDPP appointee of President Zuma was declared invalid as a result of which he was placed on special leave pending his appeal to the Constitutional Court.

<sup>65</sup> Corruption Watch. 2020. *Jiba timeline: Where did it all go wrong*. September 10. Accessed August 13 2023. <https://www.corruptionwatch.org.za/jiba-timeline-where-did-it-all-go-wrong/>.

above are only an illustrative but exhaustive description of the many examples of politicisation of law enforcement that bred corruption, undermined accountability, and caused maladministration that undermined the mandate of these institutions in delivering a functional and effective criminal justice system. In part, these examples constitute the setting in which BWCs are presented as a potentially helpful innovation to enhance the accountability and effectiveness of law enforcement, and it should be a consideration in how the technology is deployed and evaluated. This setting is anti-transparency and against accountability, with a significant cohort of personnel appointed into critical positions that are not fit for positions in law enforcement and whose duty and loyalty is to their handlers and principals rather than to serve and protect the South African public.

### 2.3 Policing context internal to SAPS

This section looks at the contextual factors internal to policing that could have a bearing on the successful roll-out of new technologies within the SAPS using police culture as the main framework for assessing these factors. This approach acknowledges that law enforcement is not just about what is publicly expected of law enforcement but also, how the police view themselves and more importantly what they do in practice as they execute their duties. Police culture is appropriate because it provides the best avenue for understanding the internal policing dynamics of SAPS in respect of current policing practices and how they measure up to expectations of police accountability and effectiveness as discussed in the preceding chapter. Such is the significance of police culture in police reform that there is an old adage that, "organisational culture eats policy for lunch",<sup>66</sup> meaning that a police institution can make progressive rules and policies "but if policies conflict with existing culture, they will not be institutionalised, and behaviour will not change."<sup>67</sup> The thesis distinguishes between police organisational and occupational culture.

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<sup>66</sup> President's Task Force on 21st Century Policing . 2015. *Final Report of the President's Task Force on 21st Century Policing*. Washington, DC: Office of Community Oriented Policing Services, p. 11

<sup>67</sup> President's Task Force on 21st Century Policing, *Final Report of the President's Task Force*, p. 11.

### 2.3.1 General features of police organisational/occupational culture

Police culture is a complex and contested concept and may refer to varying things depending on perspective.<sup>68</sup> The focus of this thesis is not to historicise and theorise this concept but to provide the working definition or understanding of the concept on the basis of which this thesis will proceed. Dempsey and Forst provide a useful entry point to discussing police culture, which they view as a subculture of the larger culture of the society the police also live in. In general, culture is defined as patterns of human activity or the way of life for a society whose key features are its values, norms and institutions.<sup>69</sup> According to Dempsey and Forst, “values” comprise ideas about what is important in life while “norms” have to do with expectations of how people will behave in different situations and “institutions” consist of the structures of a society within which values and norms are transmitted.<sup>70</sup> Police culture in this sense is a subculture of societal culture, meaning that it is the culture of a specific group (the police) with distinct sets of values, attitudes and behaviour, and beliefs that differentiate them from a larger culture of which they are part.<sup>71</sup>

Dempsey and Forst, and Terrill provide two variations of the definition of police culture. Both emphasise the two related elements that distinguish (with some overlaps) police organisational culture and police occupational culture. According to Dempsey and Forst, police culture comprises the shared norms, values, goals, career patterns, lifestyles, and occupational structures that are different from those that are held by the rest of society.<sup>72</sup> However, Terrill takes a more occupational perspective, defining police culture as “the dominant set of attitudes and values shared by officers who collectively cope with the strains of their work environment, including how these elements shape their behaviour”.<sup>73</sup> Both definitions subsume elements of both

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<sup>68</sup> Ingram, Jason R., William Terrill, and Eugene Paoline. 2018. "Police Culture and Officer Behaviour: Application of a Multilevel Framework: Police Culture and Officer Behaviour." *Criminology* 56 (4): 780-811, p. 780; Terril, William, Eugene A. Paoline, Eugene A Paolne, and Peter K. Manning. 2003. "Police Culture and Coercion." *Criminology* 41, p. 1003.

<sup>69</sup> Dempsey, J. S., and Forst, I. S. (2008). *An Introduction to Policing* (4th ed.). Belmont: Thompson Wadsworth, p. 147.

<sup>70</sup> Dempsey and Forst, *An Introduction to Policing*, p. 47.

<sup>71</sup> Dempsey and Forst, *An Introduction to Policing*, p. 47.

<sup>72</sup> Dempsey and Forst, *An Introduction to Policing*, p. 47.

<sup>73</sup> Terril *et al.*, *Police Culture and Coercion*, p.1006.

organisational and occupational culture hence, as often is the case, the terms are sometimes used interchangeably.<sup>74</sup>

According to Terrill, the difference between organisational and occupational culture arises from how police officers view and respond to two working environments - the organisational and occupational workspaces and the methods they use to cope with the pressure and uncertainties created in these two work settings. The organisational environment comprises an interaction between frontline police officers and superiors and includes a resentment for bureaucratic rules, which Terrill describes as the "unpredictability of supervisory oversight and ambiguity of the police role."<sup>75</sup>

The occupational environment comprises police-public interactions; has an ever-present potential for physical danger combined with the unique coercive authority that the police have through their powers of arrest and detention, including the use of force.<sup>76</sup> This creates uncertainties, tensions and anxiety for frontline police officers that is relieved through the shared attitudes and values which constitute police occupational culture and which police officers are socialised into when they enter the police force.

Thus, while organisational culture relates to the formal and public responses of the police organisation to formal institutional demands and societal expectations, occupational culture, develops, as observed by Perkins, out of police officers' response to official structures and orders (that is, interactions with supervisors) and interactions with citizens.<sup>77</sup> In other words, organisational culture is the formal, top-down structure driven by police management while occupational culture is the informal, bottom-up process driven by frontline officers.<sup>78</sup> Thus, on the one hand, police officers have to deal with an often adversarial and unpredictable citizenry, and on the other, with a hostile, even tyrannical and unpredictable bureaucracy.

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<sup>74</sup> Ingram *et al.*, Police Culture and officer behaviour, p. 780.

<sup>75</sup> Terrill *et al.*, Police Culture and coercion, p. 1005.

<sup>76</sup> Terrill *et al.*, Police Culture and coercion, p. 1005.

<sup>77</sup> Perkins, Danger and Death, p. 31; Ingram *et al.*, Police Culture and Officer Behaviour, p. 781.

<sup>78</sup> Perkins, Danger and Death, p. 31.



These uncertainties produce two defining characteristics of police culture: social isolation and group loyalty/clannishness. This disposition also brings out several attitudinal and behavioural dimensions which, among others, generally include a negative attitude towards citizens by both law enforcement organisations and individual officers in the form of a “us versus them” outlook to their work, and a negative attitude towards supervisors by police officers largely because of supervisors’ focus on procedural rules and regulations. Police culture is also characterised by secrecy and resistance to public accountability usually in reaction to supervisory restrictions to which officers adopt a “lay-low/cover-your-ass attitude where officers avoid situations where negative evaluations might follow from supervisors.”<sup>79</sup> As Faull observes, there is a broader range of other related attitudes and personality traits arising out of these organisational and occupational uncertainties which include a sense of mission, cynicism, pessimism, a conservative outlook, machismo, racism, sexism, pragmatism and suspicion.<sup>80</sup>

While the scholarly literature on police organisational and occupational culture is established and remains relevant, some scholars have argued this approach may be lagging behind new developments in policing.<sup>81</sup> Andrew Faull’s analysis of police culture goes beyond perceiving it as merely a universally recognised attribute of law enforcement agencies and their agents to a more nuanced analysis that disentangles aggregate cultural influences from individual, attitudinal influences on officer behaviour through incorporating the broader context of policing that shapes culture and constrains officer behaviours. In the South African context, Faull contends that police officers’ perspectives about themselves and their profession is entangled in the overlap of SAPS’ organisational culture and the local contexts in which they work and this in turn shapes their personal identity and how they practice their profession.<sup>82</sup>

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<sup>79</sup> Dempsey and Forst, *An Introduction to Policing*, p. 147; Terrill *et al.*, Manning, P. K., *Police Culture and coercion*, pp. 1006-7).

<sup>80</sup> Faull, *Police Work and Identity*, p. 4.

<sup>81</sup> Cockcroft, Tom. 2012. *Police culture: Themes and concepts*. Routledge; Faull, *Police Work and Identity*, p. 5.

<sup>82</sup> Faull, *Police Work and Identity*, p. 57.



Thus, Faull focuses on police officers' identities and how they relate to police culture and practice.<sup>83</sup> This approach, as Faull puts it, probes police officers'.

[s]ense of self and self-worth as they strive to secure ontological security in a risk-saturated, identity-fluid context, two decades after South Africa's first democratic election. It describes their attitudes and performances of occupational identities and duties – often as forceful coercers of the poor and jealous admirers of the better-off – and locates these within individual life narratives.<sup>84</sup>

While traditional conceptualisations of police culture tend to describe group attitudes and behaviours, in relation to police officer identities, the approach Faull examines is how individual cultural attitudes are related to a variety of behaviours.

As shall be illustrated below, these attitudes occur at both organisational and occupational level. According to Ivkovic *et al*, characteristics such as secrecy and resistance to public accountability are detrimental to notions of police transparency, accountability, and effectiveness, as was discussed in the introductory chapter. For example, at organisational level, when police misconduct is revealed, police agencies with strong codes of silence tend to blame “a few bad apples” and deny organisational complicity.<sup>85</sup>

The culture of resistance to public accountability is said to create peer pressure among officers that pushes them to abide by informal organisational norms and tolerate misconduct in silence. Because of these attitudes and behaviours, frontline police officers are seen as having a negative perception of both citizens and supervisors, resent procedural guidelines, reject all rules except that which involves crime-fighting and tend to value aggressive tactics and selectively performing their law enforcement duties.<sup>86</sup>

### 2.5.2 SAPS Organisational Culture

This section identifies and analyses SAPS' own specific organisational culture as it is manifested within the organisation. SAPS's current organisational culture cannot be

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<sup>83</sup> Faull, *Police Work and Identity*, p. 57.

<sup>84</sup> Faull, *Police Work and Identity*, p. 57.

<sup>85</sup> Ivkovic *et al.*, *Police Integrity in South Africa*, p. 178.

<sup>86</sup> Terrill *et al.*, *Police Culture and coercion*, p. 1007.

fully understood outside its previous incarnation's history, attitudes, and values as SAP. The requirements for reforming and transforming SAPS organisational culture post-1994 into democratic policing included, among other things, a review of standing orders governing day-to-day police conduct,<sup>87</sup> revamping training curricula, regulations regarding the use of force, affirmative action to ensure that the composition of the police force reflected the population demographics of South Africa and specific training on human rights.<sup>88</sup> However, analysis of a growing body of ethnographic research, media reports and reports from thinktanks on SAPS, as well as the National Planning Commission's Diagnostic Report and National Development Plan,<sup>89</sup> as well as outcomes from Commissions of Inquiry on SAPS reveals a huge chasm between the aspirational vision of South African policing and reality of the SAPS' role in South Africa.

According to Ivkovic *et al.*, the transformation of law enforcement post-apartheid was fraught with several strategic errors that helped entrench a culture of secrecy and abuse of authority that has persisted to this day.<sup>90</sup> Such errors included the recruitment of a significantly high number of functionally illiterate officers, an eighth of whom had criminal records, and allowing apartheid-era police officers to remain employed in law enforcement. The extensive recruitment of new officers in the early years of the new police service without stringent screening and security checks also meant that by 2000, as many as 14,600 police officers were facing criminal charges ranging from murder, rape, armed robbery, assault, theft and bribery and reckless driving.<sup>91</sup> Ivkovic *et al* go so far as to argue that both the state and SAPS' failure to sanction apartheid police officers responsible for abuses may have weakened the organisation's ability to deter subsequent abuses.<sup>92</sup> This officer may have continued with their old habits and passed them to new recruits. Thus, there was always going to be residual unwanted practices from SAP in SAPS.

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<sup>87</sup> SAPS Code of Conduct can be found here: <https://www.saps.gov.za/about/conduct.php>

<sup>88</sup> Faull, Andrew. 2018. *Police Work and Identity: A South African Ethnography*. London & New York: Routledge, p. 16. Also refer to Hornberger, *Policing and Human Rights*, p. 43.

<sup>89</sup> National Planning Commission (2011). *Diagnostic Overview*. Pretoria: Retrieved National Planning Commission. Retrieved February 23, 2019, from <https://www.nationalplanningcommission.org.za/assets/Documents/diagnostic-overview.pdf>

<sup>90</sup> Ivkovic *et al.*, *Police Integrity in South Africa*, p. 182.

<sup>91</sup> Ivkovic *et al.*, *Police Integrity in South Africa*, p. 182.

<sup>92</sup> Ivkovic *et al.*, *Police Integrity in South Africa*, p. 184.

One of the very first signs of the continuation of old habits was the resistance by SAPS to embrace human rights as the guide to policing practice. Ethnographic research by Julia Hornberger cites the slow, almost resistant, attitude to the introduction by the SAPS Legal Services of the Human Rights Police Training Program (HRPTP) as an example of the slow pace of transformation.<sup>93</sup> An evaluation at the end of the training programme revealed limited success with just over 21,000 out of the targeted 100,000 police officers having been trained. The reasons identified for the limited success of the programme included lack of SAPS institutional commitment to human rights, misconceptions about human rights, failure to recognise the importance and benefits of human rights for policing.<sup>94</sup> As a result, the training programme was not given priority and did not achieve the expected results.

The research by Hornberger and the NDP detail evidence that the SAPS continues to hold on to the apartheid-era paramilitary culture and posture in policing. While apartheid policing's modus operandi was permissive of blatant violence without accountability, the new culture relegated the old unbridled violent policing tactics backstage and created a veneer of respect for transparency, accountability, human rights, and the rule of law to the frontstage. This conceptualisation will be further elaborated on below. For example, the NDP points to SAPS' implementation of military principles in the performance of law enforcement duties. Although such behaviour should not be elevated to the level of homogeneity, evidence on SAPS' deployment of Public Order Policing (POP) Units, the Tactical Response Unit (TRU) and anecdotal evidence from frontline policing operations projects an organisational culture that has no respect for the rule of law and access to justice, does not respect human rights and lacking transparency and accountability.<sup>95</sup> Often, this has involved excessive use of force and firearms in resolving problems, an approach which, as observed in the NDP, has not endeared the SAPS to communities or improved police performance.<sup>96</sup>

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<sup>93</sup> Hornberger, *Policing and Human Rights*, p. 55.

<sup>94</sup> Hornberger, *Policing and Human Rights*, pp. 71-72.

<sup>95</sup> Marikana Commission of Inquiry, *Report on Matters of Public, National and International Concern*, p. 347. Also refer to Ivkovic *et al.*, *Police Integrity in South Africa*, p. 183.

<sup>96</sup> National Planning Commission, *National Development Plan*, p. 387.

The various commissions of inquiry into SAPS operations have given insights into policing culture regarding human rights and the rule of law which would otherwise not be publicly available considering the secretive nature of police organisational culture. Television footage entered as evidence at the Marikana Commission after SAPS officers had shot, killed, and injured the striking miners, showed police officers grouped around the dead and wounded and not providing any medical assistance.<sup>97</sup> The evidence provided shows that SAPS had not included first-aid arrangements in the SAPS plan to deal with the strikers. In fact, the damning finding from the Marikana Commission of Inquiry was that with the recognition of the likelihood of the use of force SAPS brought mortuary vans to the scene on the day of the killings of the miners instead of plans to avoid injuries and save lives.<sup>98</sup>

Similarly, in the #FeesMustFall student protests, SAPS' officers used stun grenades and indiscriminately fired rubber bullets at close range, causing injuries among students and non-participants alike.<sup>99</sup> Thus, in dealing with the miners' strike at Marikana in August 2012 and protesting students in the #FeesMustFall Campaign in October 2016, SAPS sought to confront and escalate rather than de-escalate tensions with the protesters in contradiction to SAPS' policies and rules in Section 3 (2) of its Standing Order (General) 251 which calls for proactive conflict resolution to prevent an escalation into violent confrontation in situations of protest.<sup>100</sup>

Cumulative data compiled from IPID's annual reports regarding the use of deadly force during the management of gatherings in the past five years from 2015-2016, shows that police officers killed 57 people in circumstances of crowd management, 52 of

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<sup>97</sup> Marikana Commission of Inquiry, *Report on Matters of Public, National and International Concern*, p. 264.

<sup>98</sup> Marikana Commission of Inquiry, *Report on Matters of Public, National and International Concern*, pp. 360 – 361.

<sup>99</sup> Rayner, Mary, and Laurel Baldwin-Ragaven. 2017. *A Double-Harm: Misuse of Force and Barriers to Necessary Healthcare Services*. Johannesburg: Socio-economic Rights Institute of South Africa, 1-83. Accessed March 6, 2019. [https://seri-sa.org/images/A\\_Double\\_Harm\\_Wits\\_Report\\_FINAL.pdf](https://seri-sa.org/images/A_Double_Harm_Wits_Report_FINAL.pdf), p. 1.

<sup>100</sup> Marikana Commission of Inquiry, *Report on Matters of Public, National and International Concern*, p. 349.

whom were shot with a service firearm.<sup>101</sup> Hence the criticism in the Marikana Commission Report of police use of inappropriate (military) equipment in the form of the R5 rifles which according to expert witnesses, were “guaranteed deadly” and should not have been used in a law enforcement setting.<sup>102</sup> The police did not use less-lethal and more appropriate equipment for dispersing crowds such as teargas and water cannons.

SAPS organisational culture also exhibits elements of the culture of secrecy which is against the transparency that is encouraged under international law and South Africa’s own domestic law. This is shown by SAPS’ falsification of performance through deceit in what analysts have dubbed “data performance deceptions.” Ivkovic *et al* point the fact that SAPS manipulates performance figures through its performance management system for measuring its accomplishments versus targets. For example, the authors cite the fact that SAPS’ performance matrix showed that three Khayelitsha police stations were performing well in terms of reported crimes and police activities, but the Khayelitsha Commission of Inquiry exposed the performance of those stations as abysmal.<sup>103</sup>

The culture of secrecy not only includes organisational and occupational but also, at the institutional, policy level. For example, the Minister of Police and top SAPS management in the Western Cape Province of South Africa were vehemently opposed to the work of the Khayelitsha Commission of Inquiry. The Minister sought relief from the courts to block the work of the commission and police managers had to be subpoenaed to cooperate with the Khayelitsha Commission of Inquiry all in an effort to keep a veil on the operations of police officers in Khayelitsha.<sup>104</sup>

Similarly, the reaction to the Marikana incident by the senior hierarchy within SAPS was not reflective of the level of transparency and accountability. In his address to

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<sup>101</sup> The data was compiled from IPID Annual Reports from 2016 to 2020 using a simple count of deaths as a result of police action in circumstances of crowd management. IPID Annual Reports can be found here: <http://www.ipid.gov.za/node/12>

<sup>102</sup> Marikana Commission of Inquiry, *Report on Matters of Public, National and International Concern*, p. 355.

<sup>103</sup> Ivkovic *et al.*, *Police Integrity in South Africa*, p. 183

<sup>104</sup> Ivkovic *et al.*, *Police Integrity in South Africa*, p. 186.

police officers, the Minister of Police was quoted as having said; “We are not going to allow anybody to run amok in the country, to want to turn South Africa into a banana republic. It would be painful, and it is painful that in the process life is lost but we are a professional force and we must keep to that,” adding; “we are confident that what you have done you did it in trying to ensure that the rule of law reigns in South Africa.”<sup>105</sup> The invocation of police professionalism in both statements after an incident of patent disregard for the SAPS’ legislative mandate, its policies and regulations illustrates institutional failure in upholding the principles of transparency and accountability espoused under international and domestic law.

The proceedings of commissions of inquiry have also laid bare SAPS deliberately opaque posture, lacking in transparency avoiding accountability as illustrated by the performance of SAPS officials at the Marikana Commission.<sup>106</sup> The Commission found that in the aftermath of the Marikana Mine shootings, SAPS’ senior leadership held a special retreat to tailor a version of events that would exonerate the organisation and the officers of any wrongdoing in the deaths of the miners.<sup>107</sup> This was evidenced by lack of cooperation with the inquiry by senior SAPS management, obfuscation of facts in the sworn statement by police officers to conceal information relevant to the Commission's investigations. For example, SAPS pleaded that its officers shot the striking miners in self-defence but attempted to hide evidence that showed scenes where the police shot at surrendering miners.<sup>108</sup> SAPS also did not disclose the existence of a video recording of Brigadier Callitz's briefing to a SAPS parade on August 18 after the Marikana incident and at the same event, Brig. Callitz reportedly barred a journalist from recording the event and instructed police officers to confiscate

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<sup>105</sup> Marikana Commission of Inquiry, *Report on Matters of Public, National and International Concern*, p. 390.

<sup>106</sup> Masuku, Themba. 2004. "Numbers that Count: National Monitoring of Police Conduct." *SA Crime Quarterly*, June, 8 ed.: 5-10; Newman, Gareth. 2018. *Public trust must be SA police's top priority*. May 9. <https://www.dailymaverick.co.za/article/2018-05-09-public-trust-must-be-sa-polices-top-priority/>; Zondo, Nomzamo, and Maanda Makwarela. 2018. "The legacy of Marikana: Accountability urgent to prevent another atrocity." *Daily Maverick*. August 15. Accessed March 19, 2019. <https://www.dailymaverick.co.za/article/2018-08-15-the-legacy-of-marikana-accountability-urgent-to-prevent-another-atrocity/>.

<sup>107</sup> Marikana Commission of Inquiry, *Report on Matters of Public, National and International*, p. 402.

<sup>108</sup> Zondo and Makwarela, *The legacy of Marikana; Marikana Commission of Inquiry, Report on Matters of Public, National and International Concern; Ivkovic et al., Police Integrity in South Africa*, p. 186.



the journalist's camera and delete footage if necessary in actions that reflected SAPS' aversion to transparency.

SAPS' culture of clannishness and secrecy has also been revealed in the organisation's attempt to frustrate and interfere with IPID's investigations. For example, the combination of a general lack of independent investigative expertise in South Africa combined with the fact that IPID is under-resourced both in terms of human and financial resources<sup>109</sup> forces the oversight body to rely on SAPS investigative expertise, the very same organization that they are supposed to investigate. As a result, the feeling of common loyalty among serving and ex-serving police officers, there are challenges in getting investigations completed.

In some instances, IPID faced serious challenges to its independence through attempts to interfere with its investigations. For example, SAPS investigators who were being investigated by IPID initiated counter investigations against IPID investigators including arguing that the IPID investigators did not have powers of investigating as defined in the Criminal Procedure Act.<sup>110</sup> In one such incident, IPID initiated two criminal cases against former National Police Commissioner Khomotso Phahlane, who in turn compiled a team comprising SAPS members with allegations of murder and torture levelled against them by IPID to counter investigate.<sup>111</sup> The then IPID Director received death threats and there were threats of intimidation to IPID investigators and witnesses in the two cases.<sup>112</sup> The IPID had to approach the High Court which ruled in favour of IPID arguing that no member of the SAPS may be involved in any investigation in which the member has a personal, financial or any other interest.<sup>113</sup> These factors are important when evaluating the potential impact of BWCs in a South African context.

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<sup>109</sup> IPID Annual Report 2017/2018. <http://www.ipid.gov.za/node/12>, p. 11.

<sup>110</sup> IPID Annual Report 2017/2018, p. 11.

<sup>111</sup> Parliamentary Portfolio Committee on Police (PPCoP). 2017. *Alleged SAPS interference with IPID investigations: SAPS & IPID briefing*. May 16. <https://pmg.org.za/committee-meeting/24372/>.

<sup>112</sup> PPCoP, *Alleged SAPS interference with IPID investigations*.

<sup>113</sup> Adams & Adams. 2018. *High Court orders police to stop counter-investigations against IPID*. June 29. <https://www.lexology.com/library/detail.aspx?g=408acd31-9f9b-43f6-a682-aa79e6eb2145>.



As stated above, one of the defining dimension of police organisational culture is negative attitude towards citizens. Although the South African Constitution, the *National Crime Prevention Strategy*, the *2016 White Paper on Safety and Security* and the NDP and supporting legislation envisage effective policing as one that is community-oriented, responsive, and procedurally just, SAPS practices are not illustrative of this approach. For example, SAPS is legally obliged to set up Community Policing Forums (CPFs).<sup>114</sup> CPFs are composed of SAPS and community representatives and engage in participatory partnership in the co-production of peace and security within a defined policing area. Although embraced publicly and existing in different types and varying in performance, CPFs as indicators of community-oriented policing do not seem to be sufficiently embedded in SAPS' policing practices.

During the proceedings of the Khayelitsha Commission of Inquiry, it was found that there was a breakdown in relations between the Khayelitsha Community and SAPS members stationed at three Khayelitsha police stations.<sup>115</sup> One type of evidence produced was the dysfunctional nature of Community Policing Forums and the high levels of mistrust between citizens of Khayelitsha as reflected in witness statements by community participants in such forums. Similarly, in Soshanguve and Makwhibidung Village (Tzaneen), CPFs exist but were found to be ineffective due to poor coordinative management, a lack of trust and confidence in the police by the community and the failure by the police to provide feedback on cases reported by the community.<sup>116</sup> In some cases CPFs are seen as lacking credibility especially where the broader community see them as SAPS gatekeepers, lacking in transparency and not focused on holding SAPS to account.<sup>117</sup>

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<sup>114</sup> Section 18 (1) of the SAPS Act requires the establishment Community Police Forums (CPFs) at both area and provincial levels.

<sup>115</sup> Khayelitsha Commission, *Towards a Safer Khayelitsha*, p. XXV.

<sup>116</sup> Mabunda, *The Challenges in Establishing Partnership Policing*, p. 98; Malatji, Modjadji Madintshi. 2016. An evaluation of the effectiveness of Community Policing Forums in Makhwibidung village under Greater Tzaneen Municipality in Limpopo Province. Masters diss. Univesity of Limpopo. Polokwane.

[http://ulspace.ul.ac.za/bitstream/handle/10386/1813/malatjie\\_mm\\_2016.pdf?sequence=1&isAllowed=y](http://ulspace.ul.ac.za/bitstream/handle/10386/1813/malatjie_mm_2016.pdf?sequence=1&isAllowed=y), p. 72.

<sup>117</sup> Mdayi, Thumeka. 2011. *Report on the functionality of the CPFs in the Western Cape Province*. Community Safety, Cape Town: Western Cape Government, 1-204.

[https://www.saferspaces.org.za/uploads/files/report\\_on\\_the\\_state\\_of\\_readiness\\_of\\_cpfs\\_final2.pdf](https://www.saferspaces.org.za/uploads/files/report_on_the_state_of_readiness_of_cpfs_final2.pdf), p. 6.

Witness testimonies<sup>118</sup> by members of the community during the Khayelitsha Commission of Inquiry also showed that the Khayelitsha community did not trust SAPS because of its unresponsive nature, lack of respect for citizens, dismissing complaints against SAPS officers with little or no investigation, and discriminatory application of the law against the LGBTI community and foreign nationals.<sup>119</sup> As a result, citizens resorted to taking the law into their own hands, resulting in the aggrieved hiring gangs to avenge wrongs visited upon them through vigilante or revenge killings.<sup>120</sup> The lack of trust in SAPS by the Khayelitsha Community confirm the more generalised findings of the 2018 *Afrobarometer* survey which found that more than half of South African citizens have very low levels of trust in the police.<sup>121</sup>

There is no doubt that some of the issues discussed in this section are not representative of the whole of SAPS. However, they illustrate that SAPS' organisational culture does not live up to the expectations of law enforcement in post-apartheid South Africa and poses a clear and present danger on the potential success of a SAPS BWC programme. The institutional and organisational culture is characterised by resistance to transparency and accountability, a lack of respect for human rights and the rule of law, and generally seems to condone violence.

### 2.5.3 SAPS occupational culture

As noted above, the values, norms and attitudes of police occupational culture are acquired and reinforced in settings where police managers and supervisors cannot enforce organisational policies in real-time. In these settings, police officers use their discretion, based on training, organisational policies, and regulations, to make decisions in encounters with citizens that could be resolved peacefully or potentially escalate into a violent confrontation. This is where the application of the law, policies and regulations happens and provides the setting for police officers' street view perspective in terms of use of force and the application of the law. The pressure for

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<sup>118</sup> Khayelitsha Commission, *Towards a Safer Khayelitsha*, pp. 75-84.

<sup>119</sup> Khayelitsha Commission, *Towards a Safer Khayelitsha*, p. 428.

<sup>120</sup> Khayelitsha Commission, *Towards a Safer Khayelitsha*, p. 91.

<sup>121</sup> Afrobarometer. 2018. *Summary of Results for South Africa 2018*.

[http://afrobarometer.org/sites/default/files/publications/Summary%20of%20results/saf\\_r7\\_sor\\_13112018.pdf](http://afrobarometer.org/sites/default/files/publications/Summary%20of%20results/saf_r7_sor_13112018.pdf), p. 33.

the officer is to deal with police organisational expectations, the public expectations on the use of force, and the police officers' concerns for their own safety. In order to cope with this environment, a pattern of attitudes and behaviours develop that constitute the occupational culture of the police.

Like organisational culture, occupational culture exhibits the same characteristics such as secrecy, group loyalty by individuals and groups of frontline police officers. At the occupational level, the code of silence means a shared understanding among officers that they neither report each other for acts of misconduct nor cooperate with investigations against fellow colleagues.<sup>122</sup>

From the examples of SAPS police culture traits discussed above, it appears that in high-profile, centrally coordinated and controversial incidents such as managing assemblies or violent incidents, organisational and occupational culture merge into one wherein supervisors and their superiors defend the actions of frontline police officers regardless of the gravity of violations. This convergence is exemplified by senior management, including the Minister of Police defending patently unlawful police actions and aiding SAPS in resisting accountability, as illustrated in the preceding section. In such instances, SAPS occupational culture is coordinated with organisational culture. However, in certain circumstances SAPS projects a public image of respecting the rule of law and human rights during the organisation's interaction with the rest of the criminal justice system institutions (that is, National Prosecuting Authority and the judiciary) but behind the scenes at the occupational level, continues to implement violent and unlawful policing tactics.

Hornberger uses the analogy of "front stage" and "backstage" policing to describe this culture, what she labels as SAPS' schizophrenic culture on the use of force.<sup>123</sup> In this analogy, "front stage policing" is used to describe policing that offers a sense of belonging to the new South Africa, which upholds the new professional police integrity, the amendment and tightening of rules that delegitimise the past and herald the present. This is policing that is based on the rule of law and respect for human rights.

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<sup>122</sup> Afrobarometer. *Summary of Results for South Africa 2018*.

<sup>123</sup> Hornberger, *Policing and Human Rights*, p. 125.

Simultaneously, SAPS practices "backstage" policing, that is, policing characterised by "unbridled use of violence, allows police to perform in a way that allows them the illusion of efficiency and potency in their crime fighting. It allows them to use arbitrary powers based on quick arrests, unnecessary and excessive use of force, disregarding people's privacy, and dignity."<sup>124</sup> This version of violent authority allows police to project a veneer of efficiency by avoiding the otherwise laborious procedures and lengthy bureaucratic efforts of using the rule of law and due process. It constitutes an unmediated street officer's perspective on the use of force.<sup>125</sup>

According to Hornberger, most police officers are uncomfortable in front stage policing because they believe it is impossible to carry out policing without recourse to backstage policing tactics. These two types of policing co-exist in a tense but necessary interdependence. The tension and contradiction between these two types of policing can be illustrated by comments from two police officers illustrating the coexistence of two contradictory kinds of practice within the SAPS. Inspector Pruis is quoted as saying, "No, no. These days we don't use such violence anymore; it is too dangerous. If you don't want to risk your future, you don't do that kind of stuff. These days we don't take risks anymore."<sup>126</sup> In contrast, another SAPS officer says, "They mess around with you, and you give him a beating.... Don't be naive, that's normal."<sup>127</sup>

Ethnographic research on SAPS indicates that the existence of backstage policing is more of the norm in SAPS and reinforced by a police perspective that sees citizens as a threat and a disdain for the rules of law enforcement that are based on the rule of law.<sup>128</sup> As a result of these attitudes, some police officers are quoted as saying they felt that criminals have more rights than them and that the South African constitution hindered their work. There is a hint of nostalgia about apartheid policing, with some of the officers quoted as saying, "In the early years, we had great success. But now

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<sup>124</sup> Hornberger, *Policing and Human Rights*, p.125.

<sup>125</sup> For examples see Faull, *Police Work and Identity*, p. 58.

<sup>126</sup> Faull, *Police Work and Identity*, p. 102.

<sup>127</sup> Faull, *Police Work and Identity*, p. 58, p.101.

<sup>128</sup> Mistry *et al.*, *The Use of Force by Members of the South African Police Service*. Also refer to Faull, Andrew. 2017. "Fighting for Respect: Violence, masculinity and legitimacy in the South African Police Service." In *Police in Africa: The Street Perspective*, by Jan Beek, Micro Copfert, Olly Owen and Jonny Steinberg (eds), 171-189. London: Hurst & Company.

criminals have human rights. If arrested, he immediately gets hold of his lawyer. Now you need to investigate more thoroughly. It has to stand up in court, but the community demands immediate results."<sup>129</sup> According to Hornberger, police officers felt that lawyers and magistrates (front stage institutions) treated them as if they were on trial and not the alleged offenders. As a result, they said they have tended to take a hands-off approach and, in other instances, even allowing suspects to flee instead of apprehending them for fear of getting into trouble.

Officers with a military training background argued that the demilitarisation of the police after 1994 had been SAPS' downfall. They cited what they called a lack of respect shown to them by members of the public as an example of the deterioration of SAPS.<sup>130</sup> Police officers also confessed that the unnecessary use of force in SAPS exists and is tacitly approved, with one officer saying: "[O]therwise non-compliant civilians would suddenly obey their instructions after a slap on the side of the face."<sup>131</sup> Similarly, police officers at Nyanga Police Station in Cape Town told ethnographic researcher Andrew Faull, that SAPS' Tactical Response Team was "respected" because "if they have suspects they torture them, and the person gives up everything. It's good."<sup>132</sup> This cavalier attitude to the use of torture in policing suggests that SAPS officers' idea of police effectiveness is that being feared by citizens equals respect, and to earn this kind of respect, they have to instil fear in citizens and that the use of violence is the default strategy to achieve this objective.

Secrecy by nature is antithetical to transparency and accountability, and yet, it is as much a part of police organisational culture as it is of police occupational culture. Often described as the "blue wall of silence" or the "blue curtain",<sup>133</sup> or *esprit de corps*,<sup>134</sup> police secrecy constitutes a hindrance to the building of accountable, transparent, and responsive institutions as envisaged in SDG 16 target 16.6. Such secrecy is a traditional attribute of policing in general and is as prevalent in South Africa as in other

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<sup>129</sup> Mistry *et al.*, *The Use of Force by Members of the South African Police Service*, p. 43.

<sup>130</sup> Mistry *et al.*, *The Use of Force by Members of the South African Police Service*, p. 44.

<sup>131</sup> Faull, *Fighting for Respect*, p. 178.

<sup>132</sup> Faull, *Fighting for Respect*, p. 175.

<sup>133</sup> Dempsey, John S., and Linda S. Forst. 2008. *An Introduction to Policing*. 4th. Belmont: Thompson Wadsworth, p. 150.

<sup>134</sup> Mistry, D. *et al.*, *The Use of Force by Members of the South African Police Service*, p. 16.

jurisdictions. According to Dempsey and Forst, this aspect of police culture is part of the broader "clannishness, secrecy, and isolation from those not in the [police] group".<sup>135</sup>

At the occupational level, it is manifested through how police officers protect each other and even refuse to aid superior officers or other law enforcement officials in investigating wrongdoing by other officers. For example, Faull cites a SAPS officer who had heard and knew about two separate search operations at drug houses by one group of officers which yielded nothing, but the officers involved stole the suspects' money and shared it. When internal investigators interviewed him about the two cases, he told them he knew nothing about them.<sup>136</sup> Similarly, after an orgy of violence meted against suspects following the lead of his captain, Constable Jali ventured to tell Faull that he did not agree with his captain's violent approach but was not going to complicate his life by making a fuss of it, adding, he would put his head down and get on with what was expected of him.<sup>137</sup>

However, a survey of police officers by Ivkovic *et al* found that the culture of secrecy may depend on the gravity of the offence involved. Ivkovic and colleagues surveyed SAPS police officers and found that the officers would adhere to the code of silence and would not report most cases of misconduct regardless of severity.<sup>138</sup> This would include cases such as acceptance of gratuities, verbal abuse, use of excessive force on detainees, kickbacks, falsification of official reports and failure to execute an arrest warrant. The only exception cited by the respondents were cases involving the most serious forms of misconduct such as theft from crime scene, accepting a bribe and abusing deadly force.<sup>139</sup>

Faull also describes how suspects were "slapped and punched and sworn at" at Cape Town Central Police Station in the presence of other police officers who did not intervene despite CCTV's presence.<sup>140</sup> The fact that police officers ignored that they

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<sup>135</sup> Dempsey and Forst, *An Introduction to Policing*, p. 147.

<sup>136</sup> Faull, *Police Work and Identity*, p. 179.

<sup>137</sup> Ivkovic, *Police Integrity in South Africa*, p. 50.

<sup>138</sup> Ivkovic, *Police Integrity in South Africa*, p. 204.

<sup>139</sup> Ivkovic, *Police Integrity in South Africa*, p. 204.

<sup>140</sup> Faull, *Fighting for Respect*, p. 177.

were being recorded engaging in potential acts of misconduct meant that their actions were occupationally and organisationally acceptable. Perhaps a quote by a SAPS officer, Inspector Marais, aptly captures this aspect of occupational culture:

. . . there are things you never talk about. What happens on the shift stays on the shift; what happens in the station stays in the station. It always stays inside with the police or on the shift. It's got nothing to do with the outside. Nothing. Nothing. Nothing.<sup>141</sup>

This secrecy is seen as a face-saving backstage police occupational culture tactic to ensure that the image of SAPS is not tainted.

Perhaps a foretaste of what the impact of the secretive nature of SAPS occupational culture could be to the presence of BWCs is the reaction of law enforcement officials to being recorded by mobile phones owned and operated by citizens. According to Stone, once aware of being recorded by members of the public, SAPS officers have tended to react aggressively, exhibiting hostile behaviour on whoever was recording.<sup>142</sup> The officers requested members of the public to stop recording, and in some cases, they smashed and shattered the phone to stop the recording or detain those recording on charges of interfering with police work.<sup>143</sup> Even after laying charges of damage to property and common assault with the police using the footage as evidence, no action was taken against the officer.<sup>144</sup> Notably, there is a difference in the reaction to CCTV presumably because the police station has control of the footage, but public recordings by members of the public could potentially go viral and threaten officers' job security which is a critical contributory factor to the culture of silence. These kinds of officers would more likely resist the adoption of BWCs considering that the recordings will be subject to review and result in possible sanction where there is misconduct.

As discussed in the preceding chapter, the generally violent nature of South African

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<sup>141</sup> Faull, Andrew. 2010. *Behind the Badge: The Untold Stories of South Africa's Police Service Members*. Cape Town: Zebra Press. p. XVII.

<sup>142</sup> Stone, Kelly E. 2017. "Smart Policing and the Use of Body Camera technology: Unpacking South Africa's Tenuous Commitment to Transparency." *Policing*, 12 (1), p. 112.

<sup>143</sup> Stone, Smart Policing, p. 112.

<sup>144</sup> Stone, Smart Policing, pp. 109-115.



society and violence by the police have been described as mutually reinforcing.<sup>145</sup> This is prevalent among politicians and citizens alike. Andrew Faull cites two examples where SAPS police officers undermined the criminal justice system to which they belong by joining members of the community in using retributive justice to solve local assault cases. Faull also highlights similar attitudes wherein parents use police officers to discipline their children over petty cases of domestic indiscipline.<sup>146</sup> What this means is that sections of South African society instinctively buy in to the notion of coercion by violence and fear especially when it is not directed at them.

## 2.6 Conclusion

This chapter focused on the internal and non-legal external context of law enforcement in South Africa because such a context is likely to have a dulling effect on the potential impact of a BWC programme. The overarching factor is that the potential impact of BWCs on police accountability, police efficiency and police legitimacy must be viewed in the context of a broader law enforcement reform agenda and police practice. In this broad agenda, some of the widely held theories and assumptions about police legitimacy and effectiveness and how they relate to police accountability are challenged actual policing practices and require further refinement on how they interrelate.

Ethnographic research by Ivkovic *et al* and Hornberger suggest that the first potential impediment to a successful BWC programme might emanate from a failure to transform from apartheid paramilitary style policing to a more human rights-oriented policing. That failure has entrenched a culture of impunity and lack of transparency and accountability for unlawful uses of force. Ivkovic *et al* argue that the retention of officers from the apartheid SAP in the new SAPS and failure to sanction and hold them accountable for police excesses and violations during apartheid meant that the old ways of policing seamlessly transferred into SAPS. This was also exacerbated by the massive recruitment of functionally illiterate recruits and a significant number of convicted criminals due to lack of stringent screening and security checks. This is

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<sup>145</sup> Faull, *Fighting for Respect*, p. 180. Also refer to Khayelitsha Commission, *Towards a Safer Khayelitsha*, p. 299.

<sup>146</sup> Faull, *Fighting for Respect*, p. 180.

reinforced by Hornberger's research which found that SAPS as an organisation resisted the incorporation of human rights into law enforcement training resulting in a few of its officers completing the human rights courses.

The failure to transform and transition from apartheid policing practices was exacerbated by a police culture that at the institutional, organisational, and occupational levels tacitly approves the unlawful use of force as part of SAPS' modus operandi. However, with SAPS having outwardly adopted democratic policing practices to police by consent, respect the rule of law and uphold individual human rights, this has meant that South African law enforcement developed a schizophrenic system of policing, described by Hornberger as backstage and frontstage policing. Backstage policing meant that law enforcement officials are more comfortable in continuing to use unbridled violence as a means of coercion against members of the public during arrest and detention, in custodial settings and in the context of assemblies but simultaneously struggling with frontstage policing tactics in which they are expected to comply with the law and rules and regulations governing their profession during their engagements with external oversight bodies and other institutions of the criminal justice system.

The tensions between backstage and frontstage policing have created an organisational and occupational culture that poses challenges to the potential use of BWCs to increase police accountability. Police culture is a global phenomenon in law enforcement agencies characterised by clannishness, secrecy, and an antagonistic relationship with members of the community. At the organisational level and at institutional level, the Minister of Police and SAPS have been found wanting. Over the past two decades, SAPS has exhibited its secrecy and aversion to transparency and accountability through falsifying performance failures through the manipulation of performance data, refusal to cooperate with or worse still, blocking external investigations of gross police misconduct, condoning the violent abuse of law enforcement powers by Ministers of Police, contriving to obfuscate and deceive commissions of inquiry into SAPS' officer misconduct, intimidating journalists to avoid bad publicity and having a generally adversarial relationship with members of the public.

An organisational culture that upholds transparency and accountability ensures that supervisors operate as the first line of ensuring discipline and the adherence to laws, policies, and regulations, in particular the use of force. However, in the South African context, at critical moments, organisational and occupational culture are blurred because frontline police officers are protected by the organisation in suspected cases of misconduct as illustrated above. However, police officers are secretive. As shown by Ivkovic *et al*, this is where there is a strong code of silence – an unwritten and shared rule that police officers do not report each other and do not testify against each other during investigation. Thus, police officers use backstage policing tactics, but these are never reported even by those officers that do not agree with such tactics.

It is within this context that provides the backdrop in which BWCs are presented as a solution to enhance police accountability, trust and respect between communities and the police. It is feasible to see the potential of BWCs in making visible what happens in backstage policing and eliminating the blur between backstage and frontstage policing and thus making it more likely to ensure accountability for actions that happen outside the gaze of supervisors and oversight bodies. The question is whether the remnants of apartheid policing culture and the current code of silence and clannishness can be broken by BWC technology in a context where both the frontline officers, their supervisors and sometimes the executive, generally operate in cahoots to undermine transparency and accountability. The issues raised might create the idea that using BWCs in such a context will be futile because the technology's potential impact will be neutralised. Or, alternatively, could BWCs provide that fillip which South African law enforcement needs to reform, improve its relations with the policed, improve its image?

These questions lead back to the main research question of this thesis, that is, how can the relationship between BWCs and police more accountable policing or effectiveness be evaluated? What this chapter illustrates is that any such evaluation must envisage the possible impact of the socio-historical, organisational, and occupational cultural factors discussed above.

## Chapter 3: The Legal Context of Policing in South Africa

### Introduction

This chapter focuses on the second aspect of the context of law enforcement in South Africa – the legal context. As illustrated in the previous chapter, the context internal to policing imposes pressures on policing practices that inform how the police currently are and perceive themselves to be accountable which may be critical when rolling out BWCs. Likewise, the legal context and the norms and standards that it imposes on policing practice exert institutional regulatory and policy pressures on law enforcement agencies and police officers that are also vital to understanding how the police operate and which have a bearing on the impact of technological innovations such as BWCs. On a day-to-day basis, law enforcement officials straddle these two contexts, and it is the focus of this chapter to examine the legal context and its relevance to the relationship between BWCs and more accountable policing.

As illustrated in the introductory chapter, law enforcement agencies and their agents play an essential role in society by serving the community, protecting individuals from violence, enforcing justice, and ensuring the rights of people. To achieve these objectives, they are granted powers of arrest and detention, entry, search and seizure, and the use of force and firearms including, potentially lethal force to enable them to undertake this responsibility.<sup>1</sup> Thus, law enforcement officers are empowered to interfere with individual human rights to achieve law enforcement objectives.

However, as observed by Christof Heyns, “the extensive powers vested in the police can be easily abused in any society, and the protectors can become violators of rights. It is thus in everyone’s interests that the powers granted to the police are the subject of constant vigilance.”<sup>2</sup> According to Heyns, law enforcement officials are a significant source of lethal violence and may contribute an estimated 1 in every 25 homicides

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<sup>1</sup> Geneva Academy (2016), *Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council*. Geneva. Academy of International Humanitarian Law and Human Rights, p. 3.

<sup>2</sup> Heyns, Christof. 2014. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/26/36, para. 23.

globally, sometimes in conformity with the law but in others not,<sup>3</sup> and this trend persists.<sup>4</sup> To address this paradox, the police need proper guidelines on the use of force and appropriate mechanisms for accountability to be in place. The following sections discuss these guidelines and their implications the exercise police powers and how the impact of BWCs on police accountability would be evaluated in this context.

### 3.1 International legal context

While the national laws of any country are the first point of reference in defining the principles and rules governing law enforcement, international human rights law provides the overarching framework for the law of law enforcement which governs the limits of police powers.<sup>5</sup> Thus, international human rights law, which is included in treaties or recognised by customary international law and general principles, provides an important benchmark against which South African law governing the powers of law enforcement and police use of force can be evaluated. It is therefore important for law enforcement officials and citizens alike to understand the extent of police powers and the limitations on those powers as prescribed under the law because it is an essential part of how to hold police officers accountable for wrongdoing.

South Africa is a State Party to several international and regional human rights treaties and instruments which recognise fundamental human rights relevant to the conduct of law enforcement officers. These include the 1966 International Covenant on Civil and Political Rights (ICCPR); the 1984 Convention Against Torture (CAT); and the 1981 African Charter on Human and Peoples' Rights. These treaties provide a framework for the conduct of law enforcement, including the use of force. By ratifying these treaties, South Africa assumed obligations to promote “universal respect for, and

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<sup>3</sup> Heyns, Christof. 2014. Report of the Special Rapporteur on extrajudicial, para. 24. Also refer to Geneva Declaration Secretariat. (2011). *Global Burden of Armed Violence 2011*. Retrieved from <http://www.genevadeclaration.org/measurability/global-burden-of-armed-violence/global-burden-of-armed-violence-2011.html>, p. 78.

<sup>4</sup> UNODC. (2019). Global Study on Homicide. Vienna.

<https://www.unodc.org/documents/data-and-analysis/gsh/Booklet1.pdf>, p. 60. Also see

<sup>5</sup> Casey-Maslen, S., & Connolly, S. (2017). *Police Use of Force Under International Law*. Cambridge: Cambridge University Press, p. 79.

observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>6</sup>

States Parties that ratify international treaties assume obligations under international law to respect, protect and fulfil each human right. This has implications for law enforcement at strategic, operational, and tactical levels before, during and after the use of force.<sup>7</sup> According to the Office of the High Commissioner for Human Rights (OHCHR) and the United Nations Office on Drugs and Crime (UNODC) this means that states, and hence their agencies and agents, have the following responsibilities:

. . . a duty to respect human rights, i.e., they must refrain from unduly interfering with or curtailing the enjoyment of human rights. They are obliged to take reasonable and effective measures to protect persons within their jurisdiction against actions by third parties, including non-State actors that threaten their human rights, including their life, limb and property. They must fulfil human rights, that is, they must take positive action to facilitate the enjoyment of basic human rights, through adopting appropriate legislative, budgetary, judicial, promotional, and other measures. They must make sure that people know about their rights and can indeed enjoy them and seek redress when their right(s) have been violated.<sup>8</sup>

These obligations are couched in terms of two components of each right – the substantive element, and the procedural element. The substantive element focuses on pre-emptive, pro-active actions to avoid rights violations. Article 2(1) of the ICCPR obliges States parties to undertake to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind.” Further, Article 2(2) obliges that States Parties to the ICCPR undertake “to take necessary steps in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant.”

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<sup>6</sup> ICCPR, Article 2 (1). Also see Article 55 (c), Charter of the United Nations; and Article 1 of the African Charter on Human and Peoples’ Rights.

<sup>7</sup> OHCHR/UNODC (2017), Resource Book on the Use of Force and Firearms in Law Enforcement. New York, p. 16.

<sup>8</sup> OHCHR/UNODC, Resource Book on the Use of Force and Firearms, p. 15. Also refer to UN HRCtee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant. [CCPR/C/21/Rev.1/Add.13] (Adopted on 29 March 2004) or Office of the High Commissioner for Human Rights, International Human Rights Law. <https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx>

The second component is a responsive and more procedural element which requires proper investigation and accountability where there is reason to believe a violation of a human right(s) has occurred, or allegations of a violation have been made. In this respect, Article 2 (3) of the ICCPR states that each State party undertakes “[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”<sup>9</sup>

According to the Human Rights Committee’s General Comment 31, the obligations under Article 2 of the ICCPR are binding on every state as whole which means “all branches of government (executive, legislative, judicial), and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State Party.”<sup>10</sup> As a critical component of the criminal justice system of the State, law enforcement agencies are therefore legally bound to respect, protect and fulfil human rights outlined in the ICCPR. This entails legal obligations within policing institutions at “strategic, operational and tactical levels, and before, during and after the exercise of police powers including the use of force.”<sup>11</sup>

It is against this background that this chapter seeks to explore the legal context of policing in South Africa as it relates to the powers of law enforcement officials and how such powers intersect with human rights.

### 3.1.1 Key human rights implicated by law enforcement powers

The fundamental human rights that are most affected by police powers are the rights to life, to freedom from torture, cruel, inhuman, and degrading treatment, to liberty and security of person, and to privacy. The State’s duty to respect, protect and fulfil applies to these rights and the standards for meeting this obligation are outlined below.

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<sup>9</sup> The right to a remedy is also covered under Article 8 of the Universal Declaration of Human Rights (UDHR) which states: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

<sup>10</sup> UN HRCttee, General Comment No. 31, para. 4.

<sup>11</sup> UNODC, Resource Book on the Use of Force, page 16.



### 3.1.1.1 *The right to life*

The right to life is protected under Article 6 (1) of the ICCPR which provides that “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”<sup>12</sup> The content of this right is elaborated in soft law instruments and in particular the United Nations Human Rights Committee’s *General Comment No. 36 on the right to life* (UN Human Rights Committee General Comment No. 36) and General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4) (hereafter ACHPR General Comment No. 3), which states that,

The right to life is the supreme right from which no derogation is permitted, even in situations of armed conflict and other public emergencies that threaten the life of the nation. The right to life has crucial importance both for individuals and for society as a whole. It is most precious for its own sake as a right that inheres in every human being, but it also constitutes a fundamental right, the effective protection of which is the prerequisite for the enjoyment of all other human rights and the content of which can be informed by other human rights.<sup>13</sup>

Although the right to life’s prohibition of the arbitrary deprivation of life is a well-established norm under international customary law, the jury is still out regarding its status as a peremptory norm of international law. A peremptory norm of international law (*jus cogens*) “is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”<sup>14</sup> However, scholars such as Casey-Maslen,<sup>15</sup> Probert and Heyns,<sup>16</sup> and

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<sup>12</sup> Also see Article 4 of the African Charter on Human and Peoples’ Rights (ACHPR) which states that “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.” It is also protected under Article 3 of the Universal Declaration of Human Rights (UDHR).

<sup>13</sup> UN HRCtee, General Comment No. 36 Article 6: right to life. (3 Sept. 2019). [CCPR/C/GC/36].

<sup>14</sup> Fifth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur. A/CN.4/747, (3 June 2022), para. 40.

<sup>15</sup> Casey-Maslen, Stuart. 2021. *The Right to Life under International Law: An Interpretative Manual*. Cambridge: Cambridge University Press, p. 17.

<sup>16</sup> Heyns, Christof, and Thomas Probert. 2017. “Casting Fresh Light on the Supreme Right: The African Commission’s General Comment No. 3 on the Right to Life.” In *The Pursuit of a Brave New World in International Law: Essays in Honour of John Dugard*, edited by Max du Plessis Tiyanjana Maluwa and Dire Tladi, 45-72. Leiden/Boston: Brill Nijhoff, p. 6.

the International Law Commission (ILC) Special Rapporteur on peremptory norms of general international law (*jus cogens*), Dire Tladi<sup>17</sup> have noted that although it is often argued that the right to life is not absolute, there is some support that the prohibition on arbitrary killings may be considered peremptory. This argument is underpinned by the fact that most arguments underlying the classification of *jus cogens* apply equally, if not more so, to the prohibition of “extra-legal” killings.<sup>18</sup> The UN Human Rights Committee and the African Commission on Human and Peoples’ Rights also recognises the peremptory character of the right not to be arbitrarily deprived of life. According to the ACHPR General Comment No. 3, the right not to be arbitrarily deprived of one’s life “is recognised as part of customary international law and the general principles of law, and is also recognised as a *jus cogens* norm, universally binding at all times.”<sup>19</sup> It is on this basis that the States parties’ obligation to respect the right to life is founded.

As with all other human rights, States Parties to international human rights treaties are obliged to respect and protect the right to life. The State’s duty to respect life also means obligations on the State, its agencies and agents and those whose conduct is attributable to the State to refrain from engaging in conduct resulting in arbitrary deprivation of life.”<sup>20</sup> To ensure the right to life entails that States parties are obliged to exercise due diligence to protect the right to life of individuals against deprivations caused by persons and entities whose conduct is not attributable to the State.<sup>21</sup> The State’s duty to protect also means the obligation to ensure the right to life of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control.<sup>22</sup>

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<sup>17</sup> Tladi, Dire. 2019. Fourth report on peremptory norms of general international law (*jus cogens*). A/CN.4/727, (9 August 2019), para. 128.

<sup>18</sup> Heyns and Probert. Casting Fresh Light on the Supreme Right., p. 49.

<sup>19</sup> ACHPR General Comment No. 3, para. 5. Also see UN HRCttee, General Comment No. 24, General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant [CPR/C/21/Rev.1/Add.6].

<sup>20</sup> UN HRCttee, General Comment No. 36, para. 7. Also see Minnesota Protocol, para. 8(a).

<sup>21</sup> HRCttee, General Comment No. 36, para. 7.

<sup>22</sup> HRCttee, General Comment No. 36, para. 63.

The duty to protect the right to life imposes positive obligations on States parties “to take all necessary measures to prevent arbitrary deprivation of life by their law enforcement officials, including soldiers charged with law enforcement missions.”<sup>23</sup> These include both legal and practical measures. With respect to legal measures, Article 6(1) of the ICCPR provides for the protection of the right to life by law which entails an obligation on States parties to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats, including from threats emanating from private persons and entities.”<sup>24</sup>

However, international law recognises that the right to life is not absolute, and this has implications for protecting the right to life by law. As the Human Rights Committee observed, by requiring that deprivations must not be arbitrary, Article 6(1) implicitly recognises that some deprivations of life may be non-arbitrary.<sup>25</sup> However, such exceptions have a strict interpretation. In such cases, the duty to protect the right to life by law “requires that any substantive ground for deprivation of life must be prescribed by law and must be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.”<sup>26</sup> Such law must “strictly control and limit the circumstances in which a person may be deprived of his or her life by [authorities of the State] and States parties must ensure full compliance with the relevant legal provisions.”<sup>27</sup> This means that “a deprivation of life, as a rule, is arbitrary if it is inconsistent with international law or domestic law.”<sup>28</sup> Further, deprivation of life authorised under domestic law is non-arbitrary only to the extent that domestic law complies with international law because it is possible that a deprivation of life may be authorised by domestic law and still be arbitrary.<sup>29</sup>

The duty to protect life also places responsibility on States for killings by non-state actors where the State “approves, supports, acquiesces in those acts or if it fails to exercise due diligence to prevent such killings or to ensure proper investigation or

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<sup>23</sup> HRCttee, General Comment No. 36, para 13.

<sup>24</sup> HRCttee, General Comment No. 36, para. 18.

<sup>25</sup> HRCttee, General Comment No. 36, para. 10.

<sup>26</sup> HRCttee, General Comment No. 36, para. 19.

<sup>27</sup> HRCttee, General Comment No. 36, para. 19

<sup>28</sup> HRCttee, General Comment No. 36, para. 12.

<sup>29</sup> HRCttee, General Comment No. 36, para. 12

accountability.”<sup>30</sup> Similarly, according to ACHPR’s General Comment No. 3, States Parties have an obligation to “protect individuals from violations or threats at the hands of other private individuals or entities, including corporations.”<sup>31</sup> International law also impose State responsibility “for those deaths where the authorities knew or ought to have known of an immediate threat and failed to take measures that might have been expected to avoid those deaths.”<sup>32</sup>

There are three United Nations soft-law instruments that set out the conditions under which force may be used by law enforcement officials and the requirements for accountability: the 1979 Code of Conduct for Law Enforcement (hereafter the 1990 Basic Principles),<sup>33</sup> the 1990 Basic Principles on the Use of Firearms by Law Enforcement Officials (hereafter the 1990 Basic Principles),<sup>34</sup> and the United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement.<sup>35</sup> Further elaboration to these rules can be found in the 2014 report of the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions (hereafter 2014 Report of the UN Special Rapporteur). The standards set out in these soft-law instruments form a critical basis for any accountability process after potentially unlawful uses of force by law enforcement officials.

According to these soft law instruments, the duty to respect also requires States Parties to control the use of lethal force by law enforcement officials. The 1990 Basic Principles stipulate that, “Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials”<sup>36</sup> and that “arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law.”<sup>37</sup>

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<sup>30</sup> HRCtee, General Comment No. 36, para. 9.

<sup>31</sup> HRCtee, General Comment No. 36, para. 38.

<sup>32</sup> HRCtee, General Comment No. 36, para. 38.

<sup>33</sup> The 1979 Code of Conduct for Law Enforcement (1979 Code of Conduct). Adopted by the UN General Assembly Resolution 34/169 of December 1979.

<sup>34</sup> The 1990 Basic Principles on the Use of Firearms by Law Enforcement Officials (1990 Basic Principles). Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

<sup>35</sup> For use of force in custodial settings also refer to the United Nations Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules)

<sup>36</sup> 1990 Basic Principles, Principle 1.

<sup>37</sup> 1990 Basic Principles, Principle 7.

According to the Human Rights Committee, the use of lethal force by States for law enforcement purposes is considered “an extreme measure” and the “intentional taking of life by any means is permissible only if it is strictly necessary in order to protect life from an imminent threat.”<sup>38</sup> In custodial settings, States parties assume a heightened responsibility to protect lives of individuals deprived of their liberty by the State through arrest, detention or imprisonment.<sup>39</sup>

The second aspect of the State’s duty to respect life, which is triggered when there are alleged or actual cases of extrajudicial killings, is to investigate potentially unlawful death, ensure accountability and remedy violations.<sup>40</sup> The duty to investigate gives effect to Article 2 (3) of the ICCPR which obliges states to ensure the right to an enforceable, full and effective remedy<sup>41</sup> determined by a competent authority for victims of arbitrary deprivations of life and their dependants. The duty to investigate obliges States parties “where they know or should have known of potentially unlawful deprivations of life, to investigate and, where appropriate, prosecute the perpetrators of such incidents, including incidents involving allegations of excessive use of force with lethal consequences.”<sup>42</sup> Investigations into potentially unlawful deaths are seen as an essential part of upholding the right to life to prevent recurrence and impunity.<sup>43</sup> According to the Human Rights Committee, “a failure by the State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.”<sup>44</sup>

The international standards on investigations of suspicious deaths are outlined in the Minnesota Protocol on the Investigation of Potentially Unlawful Death (hereafter “the Minnesota Protocol”). The Minnesota Protocol stipulates that international law requires that investigations must be prompt, effective and thorough, independent and impartial

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<sup>38</sup> UN HRCttee, General Comment No. 36, para. 12.

<sup>39</sup> UN HRCttee, General Comment No. 36, para. 25.

<sup>40</sup> OHCHR. 2017. Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016). New York/Geneva., para. 8(c); ACHPR General Comment No. 3, para. 15.

<sup>41</sup> According to the UN Human Rights Committee, the right to an effective and enforceable remedy means that family members of victims of unlawful death have the right to equal and effective access to justice; to adequate, effective, and prompt reparation.

<sup>42</sup> UN HRCttee, General Comment No. 36, para. 27

<sup>43</sup> UN Human Rights Committee, General Comment No. 31, para. 18

<sup>44</sup> UN HRCttee General Comment No. 31, para. 15.

and transparent.<sup>45</sup> Notably, the Minnesota Protocol classifies any death apparently caused by a law enforcement official, whether or not perceived as lawful, as a potentially unlawful death that is subject to such an investigation.<sup>46</sup> Thus, it is foreseeable that the use of BWCs is likely to have the effect of increasing the proportion of cases that are ordinarily classified as justified homicides being investigated.

According to both the UN HRCtee General Comment 36 and the ACHPR's General Comment 3, the aim of the investigations should always be to ensure that "those responsible are brought to justice, promote accountability and prevent impunity and drawing necessary lessons for revising practices with a view to avoiding repeated violations."<sup>47</sup> Where an investigation reveals evidence that a death was caused unlawfully, the State must ensure that identified perpetrators are prosecuted and where appropriate, punished through a judicial process."<sup>48</sup> This perspective adds a nuance on how to select success indicators of investigations and a distinction must be made between lawful and unlawful uses of force. This distinction is a crucial factor in indicator selection when it comes to evaluating police use of force and it will be elaborated on below.

### *3.1.1.2 The right to freedom from torture*

The right to freedom from torture is arguably one of the most violated human rights in public police encounters. As noted above, freedom from torture,<sup>49</sup> other cruel, inhuman, or degrading treatment or punishment is the provision that is mostly used to deal with the non-fatal excessive use of force by law enforcement. This right is

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<sup>45</sup> Minnesota Protocol, para. 22; ACHPR General Comment No. 3, para. 15.

<sup>46</sup> Minnesota Protocol, para. 2(c).

<sup>47</sup> UN HRCtee, General Comment 36: The Right to Life (Article 6) (3 September 2019) [CCPR/C/GC/36] (HRC General Comment no. 3), para 27; Also refer ACHPR General Comment 3, paras 17, 18 and 19.

<sup>48</sup> Minnesota Protocol, para 8 (c); Also refer to Human Rights Committee, General Comment No. 36, para 28; See ACHPR General Comment 3, paras 17, 18 and 19.

<sup>49</sup> Article 1 of The Convention Against Torture (CAT) defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."



protected under Article 7 of the ICCPR which provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”<sup>50</sup> Under the ACHPR, prohibition of torture is expressed in terms of both the positive affirmation of the right linked to human dignity and a negative, prohibitive sense. Article 5 of the ACHPR states that “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”

While the prohibition of torture’s status as a peremptory norm is already well-established, the United Nations Convention Against Torture (UNCAT) elaborates on the actions that States must take to prevent and punish torture.<sup>51</sup> As with other rights, States Parties have a duty to respect and protect the right to freedom from torture. The duty to respect obliges States, the agencies, and agents to refrain from violating this right. To protect this right, the CAT enjoins States Parties to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction,”<sup>52</sup> and such measures must include ensuring the criminalisation of “all acts of torture under its criminal law” and making sure these offences are “punishable by appropriate penalties which take into account their grave nature.”<sup>53</sup> The CAT also stipulates that “Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature”.<sup>54</sup> Both the CAT in Article 2 (2) and the Robben Island Guidelines in Part C stipulate the prohibition of torture as an absolute right for which no derogations whatsoever are lawful.<sup>55</sup>

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<sup>50</sup> Also protected in Article 5 of the UDHR states that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

<sup>51</sup> Refer to ACHPR’s Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines).

<sup>52</sup> CAT, Article 2 (1).

<sup>53</sup> CAT, Article 4 (1). Also refer to Part C of the Robben Island Guidelines.

<sup>54</sup> CAT, Article 4 (1).

<sup>55</sup> Also refer to para 10 (a) of OHCHR’s Istanbul Protocol which states that, “No exceptions, including war, may be invoked as justification for torture.”



The Optional Protocol to the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) which South Africa ratified in March 2019, reinforces the State's duty to protect the human rights of people deprived of their liberty in places of detention by preventing torture. To achieve this, the OPCAT establishes "a system of regular visits undertaken by independent international and national bodies" to places of detention "in order to prevent torture and other cruel, inhuman or degrading treatment or punishment."<sup>56</sup> At the international level, this function is carried out by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (SPT).

At the national level, the OPCAT obliges States Parties to establish national preventive mechanisms (NPMs) for the prevention of torture through a system of regular visits to places of detention in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.<sup>57</sup> According to the OPCAT, States Parties shall guarantee the functional independence of NPMs<sup>58</sup> whose visits can be announced or are impromptu and undertaken "with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment."<sup>59</sup>

The use of force and incidents of torture happen in the context of effecting arrests, in detention and in the management of assemblies, often involving the use of less lethal weapons. As Casey-Maslen and Connolly observe, "less-lethal weapons are used to facilitate safe arrest of a dangerous suspect, to disarm or prevent an armed individual firing or using a weapon, to dissuade violence, or to disperse violent protesters."<sup>60</sup> Such weapons, include, among others, the police baton, tasers, stun grenades, rubber and plastic bullets, tear gas, water cannon, acoustic weapons and malodorants.<sup>61</sup>

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<sup>56</sup> Article 1, OHCHR, Optional Protocol to the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199.

<sup>57</sup> OHCHR, OPCAT.

<sup>58</sup> OHCHR, OPCAT, Article 18.

<sup>59</sup> OHCHR, OPCAT, Article 4.

<sup>60</sup> Casey-Maslen and Connolly, *Police Use of Force Under International Law*, p. 143.

<sup>61</sup> Casey-Maslen and Connolly *Police Use of Force Under International Law*, p. 144.

The use of such weapons in law enforcement is also regulated in Principles 2 and 3 of the 1990 Basic Principles. In line with the State duty to respect, the 1990 Basic Principles call on governments to,

develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. These should include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests, and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.<sup>62</sup>

Thus, the call to use of less-lethal weapons is not only meant to replace the use of firearms in certain circumstances but in general, to reduce risk of loss of life and the number and extent of injuries inflicted during the use of force for law enforcement purposes. While the 1990 Basic Principles endorse less-lethal weapons over firearms, Principle 3 cautions against the indiscriminate use of less-lethal weapons. Specifically, it stipulates that the “development and deployment of non-lethal incapacitating weapons should be carefully evaluated in order to minimise the risk of endangering uninvolved persons, and the use of such weapons should be carefully controlled.”<sup>63</sup>

However, it is the *UN Human Rights Guidance on Less-Lethal Weapons in Law Enforcement* (the 2020 UN Human Rights Guidance) that provides a comprehensive and detailed guidance on when and how to use less lethal weapons in accordance with international law.<sup>64</sup> The 2020 UN Human Rights Guidance stipulates that the State and its agents and companies that manufacture weapons for law enforcement to ensure that less-lethal weapons and related equipment intended for law enforcement “shall be designed and produced to meet legitimate law enforcement objectives and to comply with international human rights law.”<sup>65</sup>

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<sup>62</sup> 1990 Basic Principles, Principle 1.

<sup>63</sup> 1990 Basic Principles, Principle 3.

<sup>64</sup> OHCHR. 2019. *United Nations Guidance on Less-Lethal Weapons in Law Enforcement*. October 25. [https://www.ohchr.org/Documents/HRBodies/CCPR/LLW\\_Guidance.pdf](https://www.ohchr.org/Documents/HRBodies/CCPR/LLW_Guidance.pdf).

<sup>65</sup> OHCHR. 2020. *United Nations Guidance on Less-Lethal Weapons*, para 4.1.1.

The 2020 UN Guidance also obliges States to subject less-lethal weapons to a legal review and test. If the weapons' designated, expected or intended use "does not comply with the rules governing law enforcement" or present "undue risk of loss of life or serious injury to anyone, including suspects, bystanders or law enforcement officials themselves" they "shall not be authorised for procurement, deployment and use."<sup>66</sup>

States and law enforcement agencies are also required to "monitor the use and effects of less-lethal weapons and related equipment" including the "contextual circumstances of use" and that the results of such monitoring "should be made public in accordance with transparency requirements."<sup>67</sup> Monitoring also requires the State and law enforcement agencies to cooperate with the monitoring of the use and effects of less-lethal weapons by external monitoring bodies.<sup>68</sup> To enhance monitoring, the 2020 UN Human Rights Guidance also implore States to consider "the use of BWCs (or other suitable recording equipment) when less lethal weapons are being used."<sup>69</sup>

Relatedly, States are also encouraged to be transparent about the regulation of the use of less-lethal weapons and related equipment which includes the "risks resulting from the use of such weapons or equipment" and where possible to consult the public prior to procurement of new types of less-lethal weapons" and transparency about the types of weapons at their disposal.<sup>70</sup>

The 2020 UN Human Rights Guidance also requires that law enforcement officials be trained on the lawful use of force based on the applicable human rights principles and standards. Among other things, such training should include a focus on "how less-lethal weapons may offer a safer and effective alternative to firearms; and on which individuals or groups may be especially vulnerable to the use of certain less-lethal weapons."<sup>71</sup> Notably, the UN Guidance also identifies an inexhaustive list of weapons and related equipment that are considered unlawful because they violate international

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<sup>66</sup> OHCHR. 2020. United Nations Guidance on Less-Lethal Weapons, para. 4.2.3.

<sup>67</sup> OHCHR. 2020. United Nations Guidance on Less-Lethal Weapons, para. 4.3.2.

<sup>68</sup> OHCHR. 2020. United Nations Guidance on Less-Lethal Weapons, para. 4.3.5.

<sup>69</sup> OHCHR. 2020. United Nations Guidance on Less-Lethal Weapons, para. 4.3.3.

<sup>70</sup> OHCHR. 2020. United Nations Guidance on Less-Lethal Weapons, para. 4.4.1.

<sup>71</sup> OHCHR. 2020. United Nations Guidance on Less-Lethal Weapons, para. 4.5.1.

human rights law.<sup>72</sup> Weapons such as metal chains (shackles), leg or wrist irons, thumbscrews, spiked or electrified instruments of restraint, and weighted instruments of restraint are considered to be “inherently degrading or unnecessarily painful and should not be used in law enforcement.”<sup>73</sup> Thus far, these guidelines protect the substantive element of rights and emphasise the precautionary and preventative steps that states must take to avoid harm.

The guidelines also set out the steps that must be taken by States to protect the procedural element of the rights in question. In terms of upstream activities, the guidance provides that the state and law enforcement should cooperate with the monitoring of the use and effects of all less-lethal weapons and related equipment by external monitoring bodies including international organisations and civil society organisations.<sup>74</sup> Where there are reasonable grounds that an act of torture has been committed or where an individual alleges torture, the CAT obliges States Parties to ensure that competent authorities institute a prompt and impartial investigation<sup>75</sup> and ensure that individuals have the right to complain and have their complaint examined by competent authorities.<sup>76</sup> Where such an investigation establishes that an act of torture appears to have been committed, States Parties must ensure that the alleged offender or offenders is/are subject to criminal proceedings and where there are well founded allegations of other forms of cruel, inhuman or degrading treatment and punishment, the alleged offenders shall be subjected to criminal or other appropriate proceedings.<sup>77</sup>

States Parties are also obliged to ensure that victims of acts of torture or their dependents, in cases where victims die as a result of torture, must have an “enforceable right to fair and adequate compensation including the means for as full

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<sup>72</sup> OHCHR. 2020. United Nations Guidance on Less-Lethal Weapons, paras. 5.1 and 5.2.

<sup>73</sup> OHCHR. 2020. United Nations Guidance on Less-Lethal Weapons, para. 5.2.

<sup>74</sup> OHCHR. 2020. United Nations Guidance on Less-Lethal Weapons, para. 4.3.5.

<sup>75</sup> See CAT, Article 12. Also refer to Istanbul Protocol, para. 10 (h).

<sup>76</sup> Para 17 of the Robben Island Guidelines obligates States to establish “readily accessible and independent” complaints mechanisms to which people can bring allegations of torture and that such complaints are investigate by competent authorities. Also see CAT, Article 13.

African Commission on Human and Peoples’ Rights (ACHPR), Luanda Guidelines on the Conditions of Arrest, Police Custody and Pretrial Detention in Africa (adopted May 2014), para 20 (b); and Istanbul Protocol, para 10 (h).

<sup>77</sup> Istanbul Protocol, para 10 (j).

rehabilitation as possible.”<sup>78</sup> This must be reflected in States’ national legal systems. States parties are also enjoined to ban the use of any evidence obtained through acts of torture.<sup>79</sup>

### *3.1.1.3 The right to liberty and security of person*

The right to liberty and security of person is a fundamental human rights which is recognised under international law and is one of the most frequently interfered with in policing. This right is protected under Article 9 (1) of the ICCPR<sup>80</sup> which states that “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

The right to liberty and security of person is not an absolute right as it is recognised that sometimes a deprivation of this right can be justified, for example, for purposes of enforcing the rule of law.<sup>81</sup> What this right entails is that, ordinarily, people living in a democratic society have a basic right to move about freely and without interference, their freedom to do so can be forfeited under specific circumstances prescribed in law through arrest or detention. The term “arrest” is defined as “any apprehension of a person that commences a deprivation of liberty”<sup>82</sup> while “detention” is defined as “the deprivation of liberty that begins with the arrest and continues in time from apprehension until release.”<sup>83</sup>

The element of this right that refers to the right to “security of person” illustrates that the standards outlined under international human rights law are interrelated. As observed by the Human Rights Committee, “The right to personal security may be considered broader to the extent that it also addresses injuries that are not life-

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<sup>78</sup> CAT, Article 14. Also refer to ACHPR General Comment No. 4, para. 33.

<sup>79</sup> CAT, Article 15.

<sup>80</sup> Article 6 of the ACHPR states that, “Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”

<sup>81</sup> UN HRCttee, General Comment 35, para 10; also refer to Part 1, Section 2, Luanda Guidelines.

<sup>82</sup> UN HRCttee, General Comment 35, para 13.

<sup>83</sup> UN HRCttee, General Comment 35.

threatening.”<sup>84</sup> But the Human Rights Committee goes further to state that “[e]xtreme forms of arbitrary detentions that are themselves life threatening violate the right to personal liberty and personal security as well as the right to protection of life, in particular enforced disappearances.”<sup>85</sup>

The reference to “arbitrariness” of arrest or detention provides the protective element of this right which is what triggers State duty to protect. If an arrest or detention is arbitrary, it means that the law has not been followed when making that arrest and that a set of key human rights have not been observed. Article 9 (2) and (3) of the ICCPR outline the conditions that are characteristic of a person under arbitrary arrest or detention. The same rights are elaborated in the form of the *United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment* (UN Body of Principles) and at the African regional level, in the ACHPR’s *The Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa* (the Luanda Guidelines).<sup>86</sup>

According to the *Luanda Guidelines*, for an arrest not to be arbitrary, such an arrest should be based on “grounds and procedures established by the law”, and such law must be consistent with international standards.<sup>87</sup> The guidelines also set out procedural guarantees for an arrest which stipulate that an arrest “shall only be carried out by police or by other competent authorities authorised by the state for this purpose” on the basis of a warrant or reasonable grounds to suspect that a person has committed an offence or is about to commit an arrestable offence.”<sup>88</sup> The guidelines also stipulate that the arrest must not be carried out on the basis of any discrimination of any kind.<sup>89</sup> However, according to the UN Body of Principles “any measures applied under the law and designed to protect the rights and special status of women,

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<sup>84</sup> UN HRCttee, General Comment 35, para 55.

<sup>85</sup> UN HRCttee, General Comment 35, para 55.

<sup>86</sup> The UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment were adopted by General Assembly resolution 43/173 of 9 December 1988. Refer to: <https://www.ohchr.org/Documents/ProfessionalInterest/bodyprinciples.pdf>

<sup>87</sup> ACHPR, Luanda Guidelines, para 2 (a).

<sup>88</sup> ACHPR, Luanda Guidelines, para. 3 (a).

<sup>89</sup> ACHPR, Luanda Guidelines, para. 2 (b).

especially pregnant women and nursing mothers, children and juveniles, aged and sick or handicapped persons shall not be deemed to be discriminatory.”<sup>90</sup>

The procedural guarantees also require the arresting official to identify themselves clearly, the unit they belong to, and show their identity card which visibly displays their name rank and identity number.<sup>91</sup> At the time of arrest, the suspect must be informed of their rights, which include among others, being informed of the reasons for his/her arrest or any charges against him/her at the time of arrest,<sup>92</sup> the right of access to a lawyer,<sup>93</sup> the right to promptly access family members or any other person or institution of choice,<sup>94</sup> the right to be promptly brought to trial within a reasonable time before a judge or be released<sup>95</sup> and the right to have the lawfulness of his/her arrest determined by a competent court.<sup>96</sup> Often, and as illustrated in the introductory chapter, these are procedures that happen “backstage” and create controversy during investigations. The presence of BWCs is theorised to make these hitherto invisible scenes visible.

Law enforcement officials also have the authority to use force in specific situations in order to achieve a legitimate law enforcement objective<sup>97</sup> and this is where the risk of human rights violations happen. Whether the arrest or detention is arbitrary or not and whether or not the use of force is legitimate must be “interpreted broadly to include elements of appropriateness, injustice, lack of predictability and due process of law as well as elements of reasonableness, necessity and proportionality.”<sup>98</sup> These elements shall be further expounded in the sections below but they already illustrate how BWCs can potentially aid in determining whether law enforcement officials consistently follow the rules and guidelines of their profession in practice.

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<sup>90</sup> The UN Body of Principles, Principle 5 (2).

<sup>91</sup> ACHPR, Luanda Guidelines, para. 3 (b).

<sup>92</sup> ACHPR, Luanda Guidelines, para 4 (b). Also refer to UN Body of Principles, Principle 10.

<sup>93</sup> ACHPR, Luanda Guidelines, para 4 (c). Also refer to UN Body of Principles, Principle 16.

<sup>94</sup> ACHPR, Luanda Guidelines, para 4 (f). Also refer to UN Body of Principles, Principle 15.

<sup>95</sup> ACHPR, Luanda Guidelines, para 4 (i). Also refer to UN Body of Principles, Principle 11.

<sup>96</sup> ACHPR, Luanda Guidelines, para 4 (j).

<sup>97</sup> Law enforcement objectives could vary from ensuring compliance with lawful police instructions, arresting a non-cooperative or dangerous suspect, protecting members of the public or breaking up a violent crowd. In each of these circumstances, law enforcement officials have to use approaches and tactics, based on their training, that ensure they achieve their purpose and still protect human rights.

<sup>98</sup> Human Rights Committee (2014), General Comment 35 – Article 9 (liberty and security of person), para 12.



It suffices to say that the use of BWCs in these circumstances could potentially strengthen the monitoring process and can be used as part of reviews of processes and procedures in the arrest and detention of suspects by law enforcement. The question is how to deploy and evaluate their effectiveness.

#### 3.1.1.4 *The right to privacy and family life*

In order to understand how the use of BWCs by law enforcement official might impact individual human rights, or indeed be impacted by international human rights law, it is important to examine the content and scope of the right to privacy. Although universally recognised, the right to privacy does not have a universally accepted definition and this despite multidisciplinary attempts to define it.<sup>99</sup> According to the South African Law Reform Commission, definitions vary widely according to context and environment.<sup>100</sup> However, these discussions are beyond the scope of this thesis.

The right to privacy is protected under Article 17(1) of the ICCPR also stipulates that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”<sup>101</sup> Further, Article 17(2) states that everyone’s right to privacy must be protected by law against such interference and attack.

Rather than define the right to privacy, the Human Rights Committee’s General Comment No. 16 of 1988, sought to give examples of activities that could impact on privacy. These include personal and bodily searches, search of home and property which is seen in terms of individuals’ right not to have their home, private life or personal property interfered with, and surveillance, which is predominantly viewed in

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<sup>99</sup> Refer to South African Law Reform Commission. 2005. "Discussion Paper 109: Privacy and Data Protection." <https://www.justice.gov.za/salrc/dpapers/dp109.pdf>, p. 10. Also see Basimanyane, Dorcas, and Dumisani Gandhi. 2019. Striking a balance between CCTV surveillance and the digital right to privacy in South Africa: Considerations for the Information Regulator. Cape Town: APCOF. <http://apcof.org/wp-content/uploads/027-cctvsurveillanceanddigital-dorcasbasimanyanedumisaniandgandhi.pdf>, p. 3.

<sup>100</sup> South African Law Reform Commission. 2005. "Discussion Paper 109, p. 10.

<sup>101</sup> The ACHPR’s *Principles and Guidelines on Human Peoples’ Rights While Countering Terrorism in Africa* (ACHPR Counter Terrorism Guidelines) explicitly protects the right to privacy and replicates the language of ICCPR’s Article 17 (1).

terms of “privacy of communications” and relating to protection from interference with individuals’ communications through any medium.<sup>102</sup>

For the first time, the Human Rights Committee included the protection of personal information or what is now called “informational privacy” as an element of the right to privacy stating, that the “gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law.”<sup>103</sup> This covers “information that exists or can be derived about a person and her or his life and the decisions based on that information.”<sup>104</sup>

The 2015 African Commission on Human and Peoples’ Rights (ACHPR) Counter Terrorism Principles and Guidelines provide similar protections that are more directly in the context of counter terrorism by law enforcement officials and stipulate that,

Measures used to counter terrorism that interfere with privacy (in particular body searches; house and property searches; bugging; telephone tapping; surveillance of correspondence and metadata; electronic monitoring; use of undercover agents; and receipt, collection, access, use, storage, maintenance, examination, disclosure, destruction, and intra- and interstate dissemination and sharing of privacy information, including through the use of databases) must be provided for by law, strictly proportionate with and absolutely necessary for achieving a legitimate goal, conducted in a manner consistent with human dignity and the right to privacy, and as otherwise permitted under international human rights law.<sup>105</sup>

As pointed out in the (ACHPR) Counter Terrorism Principles and Guidelines, international law obligates State parties to adopt “legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the

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<sup>102</sup> This is principally how privacy is framed in the ACHPR Declaration of Principles on Freedom of Expression and Access to Information. See Principles 40 to 42.

<sup>103</sup> UN HRCtee, General Comment No. 16, para. 10

<sup>104</sup> Refer to OHCHR (2018), *The Right to Privacy in the Digital Age: Report of the United Nations High Commissioner for Human Rights*, A/HRC/39/29, para. 5.

<sup>105</sup> 2015 ACHPR Counter Terrorism Principles and Guidelines, Part 11.

protection of this right.”<sup>106</sup> Further, States parties have a “duty themselves not to engage in interferences inconsistent with Article 17 of the Covenant and to provide the legislative framework prohibiting such acts by natural or legal persons.”<sup>107</sup> To give effect to Article 17(2) of the ICCPR, the Human Rights Committee recommends that States parties should provide adequate legislative protection against arbitrary and unlawful interferences and attacks including a provision “for everyone effectively to be able to protect himself against unlawful attacks that do occur and to have an effective remedy against those responsible.”<sup>108</sup>

Thus, the powers of stop, search and seizure granted to law enforcement officials could potentially lead to gross interference with individuals’ right to privacy if conducted unlawfully and this could be exacerbated by the use of BWCs introduces yet another layer of potential privacy violations in the form of personal data. From the foregoing, BWCs cannot be used *carte blanche*, and because of the limitations listed above, it will not be possible for law enforcement officials to record every encounter.

### 3.1.2 Rules governing police use of force and requirements for accountability

The key contexts in which the individual rights outlined above are typically at stake is often during arrests, policing assemblies, counter terrorism operations or other emergencies and in custodial settings. As observed by Casey-Maslen and Connolly, while the international law sets standards that oblige States and their agents and organs to respect, protect and fulfil human rights, the more detailed body of law relating to regulating police use of force is found in customary rules.<sup>109</sup> According to Casey-Maslen, four general principles of law govern the use of force in law enforcement, and these are legality, precaution, necessity and proportionality.<sup>110</sup> Casey-Maslen further states that there must be accountability for all use of force by State agents and where

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<sup>106</sup> UN Human Rights Committee (UN HRCttee), *General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, (8 April 1988), para 1.

<sup>107</sup> UN HRCttee, General Comment No. 16, para 9.

<sup>108</sup> UN HRCttee, General Comment No. 16, para 11.

<sup>109</sup> Casey-Maslen and Connolly. *Police Use of Force Under International Law*, p. 94.

<sup>110</sup> Casey-Maslen, Stuart. 2021. *The Right to Life Under International Law: An Interpretative Manual*. Cambridge: Cambridge University Press., p. 143.

the state breaches the four general principles of law “the right to life of any person harmed as a consequence will ordinarily have been violated.”<sup>111</sup>

Most of these rules are encapsulated in three soft law instruments namely the *1979 Code of Conduct*, the *1990 Basic Principles*, and the *UN Human Rights Guidance on Less Lethal Weapons in Law Enforcement*. The *2014 Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions* also provides a synthesis and analysis of the rules. These principles apply equally to all government agents who exercise police powers of arrest and detention including military authorities, state security forces as long as they are doing law enforcement duties and private security if delegated to exercise law enforcement duties.<sup>112</sup>

In the context of this thesis, an exploration of these principles is important because they are an integral part of how police agencies and officers should act during operations and they form the core basis for accountability processes that follow when there are allegations of, or have been, human rights violations. The proposition that BWCs can enhance accountability derives from the fact that the technology provides an opportunity to determine whether law enforcement agencies and their agents adhere to the rules governing their operations which is important during investigations. The section below outlines the principles and their implications on the use of force by law enforcement officials.

### *3.1.2.1 Principle of legality*

The principle of legality draws from Article 2(2) of the ICCPR which stipulates that rights must be protected by law. In general, this means that any interference with fundamental human rights contained in the ICCPR must be traceable to a legal source that law enforcement can point to as a justification for their actions. Further, the legal source of police powers in this instance should comply with the prescripts of international law.

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<sup>111</sup> Casey-Maslen, *The Right to Life under International Law.*, p. 143.

<sup>112</sup> 1979 Code of Conduct, Article 1. Also refer to Casey-Maslen and Connolly, *Police Use of Force Under International Law*, p. 81. For use of force and accountability of private security personnel see Maslen, Stuart. 2016. *Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council*. Geneva: Geneva Academy. [https://www.geneva-academy.ch/joomlatools-files/docman-files/in-brief6\\_WEB.pdf](https://www.geneva-academy.ch/joomlatools-files/docman-files/in-brief6_WEB.pdf), p. 27.

Principle 1 of the 1990 Basic Principles stipulates that “Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials.”<sup>113</sup> In this context legality “means that force must not be exercised arbitrarily” and this is meant in the narrow sense that such force should only be exercised according to the law.<sup>114</sup> As the 2014 Report of the UN Special Rapporteur observes, “Rights may be limited – and force may likewise be used – only in the pursuit of a legitimate objective” and the “only legitimate objective that can be legitimate when lethal force is used is to save the life of a person or to protect a person from serious injury.”<sup>115</sup> A legitimate law enforcement objective could take the form of containing a suspect violently resisting arrest, protecting the public or dispersing a violent crowd or in general, enforcing compliance with the law. It is worth noting that the principle of legality is typically contravened where national domestic laws do not comply with the standards set under international law.<sup>116</sup>

### 3.1.2.2 *The Principle of precaution*

As observed by Casey-Maslen and Connolly, the principle of precaution is the most recent of the principles relating to use of force by law enforcement officials.<sup>117</sup> Although the principle of precaution is the more recent one, it is a precursor to the principles of necessity and proportionality which regulate the actual use of force by law enforcement officials. Hence, it is discussed here as the logical next step after the requirement of legality.

The principle of precaution imposes a duty on the State, its agents and organs to ensure that law enforcement operations and actions are conducted “while taking all necessary precautions to prevent or at least minimise the risk of recourse to force by law enforcement officials and members of the public, and to minimise the severity of

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<sup>113</sup> 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 1.

<sup>114</sup> Casey-Maslen and Connolly, *Police Use of Force Under International Law*, p. 94.

<sup>115</sup> Heyns, Report of the Special Rapporteur, para. 58.

<sup>116</sup> Heyns, Report of the Special Rapporteur, paras. 30, 31 and 32. Also refer to Law on Police Use of Force Worldwide at <https://www.policinglaw.info/>.

<sup>117</sup> Casey-Maslen and Connolly, *Police Use of Force Under International Law*, p. 95.

any injury that may be caused.”<sup>118</sup> The precautionary steps in the planning of law enforcement operations and actions include the provision of appropriate protective equipment and training<sup>119</sup> and an appropriate range of less-lethal weapons.<sup>120</sup> Principle 5 of the 1990 Basic Principles also stipulate that whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall exercise “restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved”<sup>121</sup> and “minimise damage and injury, and respect and preserve human life.”<sup>122</sup> Further, in order to preserve life, such planning must include ensuring the provision of “assistance and medical aid to the injured or affected persons at the earliest possible moment.”<sup>123</sup> In the context of managing an assembly in which certain individuals behave violently and a decision is made to use less-lethal weapons, law enforcement officials have a duty to distinguish between those individuals and other participants and “due care should be given to the likely proximity of third parties and bystanders.”<sup>124</sup>

The requirement to take these precautionary measures by the state and its agents is critically important and the failure to do so in such contexts constitutes a violation of the right to life. An example of this is the case of the killings of Daniel McCann, Mairead Farrell and Sean Savage by members of the United Kingdom Security Forces in 1988. In the ensuing case of, the European Court of Human Rights found that the use of lethal force by the soldiers who erroneously but in good faith believed that a group of terrorists were about to trigger an explosion did not violate the right to life, but that the lack of care in the control and organisation of the operation as a whole did violate the right.<sup>125</sup> Similarly, even though 30 people died solely because of trampling and asphyxiation, the ACHPR found that the state of Egypt bore legal responsibility for the deaths because law enforcement officials failed to take sufficient steps to prevent the

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<sup>118</sup> OHCHR, *UN Guidance on Less-Lethal Weapons*, para 2.6. Also refer to ACHPR General Comment No. 3, para. 27.

<sup>119</sup> ACHPR General Comment No. 3, para. 27.

<sup>120</sup> OHCHR, *UN Guidance on Less-Lethal Weapons*, para 2.6.

<sup>121</sup> 1990 Basic Principles, Principle 5 (a).

<sup>122</sup> 1990 Basic Principles, Principle 5 (b).

<sup>123</sup> 1990 Basic Principles, Principle 5 (c).

<sup>124</sup> OHCHR, *UN Guidance on Less-Lethal Weapons*, para. 6.3.2.

<sup>125</sup> *Case of McCann and Others v. The United Kingdom* (application no. 18984/91, 27 September 1995), para. 213.



deaths and protect lives after cordoning off protesters and not providing any means of escape and indiscriminately using teargas, truncheons and water cannons on protesters.<sup>126</sup>

### 3.1.2.3 Principle of necessity

The principle of necessity is one of two, together with the principle of proportionality, which regulate the actual use of force by law enforcement agents. The principle of necessity is articulated in Article 3 of the Code of Conduct which states that law enforcement officials “may use force only when strictly necessary and to the extent required for the performance of their duty.” The same principle is reinforced in Article 4 of the Basic Principles which provides that “Law enforcement officials, in performing their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They must use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.”

Casey-Maslen & Connolly identify three legal duties associated with the principle of necessity, namely, (1) “to use non-violence wherever possible; (2) to use force for a legitimate law enforcement purpose and, (3) to use only the minimum necessary force that is reasonable in the prevailing circumstances.”<sup>127</sup> The first duty means that the default position for law enforcement officials is to explore non-violent approaches before resorting to the use of force and firearms and where possible, such non-violent approaches should be exhausted before resorting to the use of force.<sup>128</sup> The second relates to the principle of legality that discussed above which requires that the use of force be non-arbitrary and have a basis or justification in law.

In the event that some kind of force is necessary to achieve a legitimate law enforcement objective as stated above, the third legal duty is triggered and requires the law enforcement officers “to use the minimum necessary force required to meet the law enforcement objective.”<sup>129</sup> What this entails is that once the law enforcement

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<sup>126</sup> ACHPR Communication No 344/07 – George Iyanyori Kajikabi v The Arab Republic of Egypt, 2020.

<sup>127</sup> See Casey-Maslen and Connolly, *Police Use of Force Under International Law*, p. 82.

<sup>128</sup> OHCHR/UNODC (2017), *Resource Book on the Use of Force and Firearms in Law Enforcement*. New York, p. 16.

<sup>129</sup> OHCHR/UNODC, *Resource Book on the Use of Force*, p. 17.



objective is achieved, any continued use of force is a violation of the State's obligation to protect human rights under international law as such force is considered unnecessary.<sup>130</sup>

#### 3.1.2.4 *The principle of proportionality*

The principle of proportionality is triggered once the law enforcement officials find it necessary to use force. According to the OHCHR/UNODC *Resource Book on Use of Force and Firearms in Law Enforcement*, the principle of proportionality serves to assess the balance between the harm caused through the use of force and the benefits achieved. This is provided for in Principle 5(a) of the Basic Principles which states that; "Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved."

Proportionality entails balancing the type and level of force used with the harm it can cause to the suspect and the harm that the suspect can cause and normally this is linked to the level of the threat posed by the suspect to life and property.<sup>131</sup> The use of deadly force, for instance, in trying to arrest and detain a petty criminal would be disproportionate use of force and a violation of the human rights of the suspect. For the police to apply this principle consistently, they must be equipped with the right tools from equipment to techniques for use of force in order to have the option to use the appropriate tool under the circumstances to achieve a legitimate objective.<sup>132</sup>

According to Casey-Maslen and Connolly, "proportionality holds that the threat an individual poses, whether to a law enforcement official or to the general public, as well as the seriousness of the offence an individual is suspected of committing (or is about to commit), will determine the maximum level of force that may lawfully be used."<sup>133</sup>

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<sup>130</sup> OHCHR/UNODC, *Resource Book on the Use of Force*, p. 17.

<sup>131</sup> OHCHR/UNODC, *Resource Book on the Use of Force*, p. 18.

<sup>132</sup> OHCHR/UNODC, *Resource Book on the Use of Force*, p. 18.

<sup>133</sup> Casey-Maslen and Connolly, *Police Use of Force Under International Law*, p. 93.

### 3.1.2.5 *The principle of accountability*

As observed in the preceding sections, international law requires States Parties to ensure that any person whose rights have been violated have an effective remedy regardless of the identity of the perpetrator. This constitutes the second component of the protection of each human right – the procedural element which refers to actions taken when incidents in which potentially unlawful uses of force have occurred. Accountability entails that States, their agencies and agents should take responsibility for the appropriate use of force and be answerable to their victims.<sup>134</sup> As observed by Casey-Maslen and Connolly, the principle of accountability is important because without “effective accountability, the core principles governing the use of force by law enforcement officials – necessity, proportionality, and the principle of precaution that underpins them – are effectively dead letter.”<sup>135</sup>

Thus, as part of their duty to safeguard rights, international law requires States to put in place a system of internal and external checks and balances aimed at ensuring that law enforcement agencies carry out their duties properly and are held responsible if they fail to do so.<sup>136</sup> With respect to the legitimate use of force, the principle of accountability entails the institutional arrangements that should be in place before and practical steps to take in the aftermath of the use of force by law enforcement officials. International law requires States to establish “effective systems and legal processes of police investigation (including capacity to collect and analyse forensic evidence) and accountability (including independent oversight mechanisms).”<sup>137</sup> The principle of accountability also requires law enforcement officials to report incidents promptly to their superiors where the use of firearms results in injury of death,<sup>138</sup> and that “those affected by the use of force and firearms, or their legal representatives shall have access to an independent process, including a judicial process.”<sup>139</sup>

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<sup>134</sup> UNODC. (2011). *Handbook on Police Accountability, Oversight and Integrity*.

Retrieved April 6, 2018, from UNODC:

[https://www.unodc.org/pdf/criminal\\_justice/Handbook\\_on\\_police\\_Accountability\\_Oversight\\_and\\_Integrity.pdf](https://www.unodc.org/pdf/criminal_justice/Handbook_on_police_Accountability_Oversight_and_Integrity.pdf).

<sup>135</sup> Casey-Maslen and Connolly, *Police Use of Force Under International Law*, p. 374.

<sup>136</sup> OHCHR/UNODC, Resource Book on the Use of Force and Firearms.

<sup>137</sup> ACHPR General Comment No. 3, para. 16.

<sup>138</sup> 1990 Basic Principles, Principle 6. Also see Article 3(c) of the 1979 Code of Conduct.

<sup>139</sup> 1990 Basic Principles, Principle 23.

Under international law, monitoring, reporting and transparency are considered essential elements of accountability.<sup>140</sup> According to the 1990 Basic Principles, States are also required to establish effective reporting and review procedures for all incidents of serious injury, or use of firearms by law enforcement officials in the performance of their duty.<sup>141</sup> The 2020 UN Guidelines on Less-Lethal Weapons oblige States and law enforcement agencies to “monitor the use and effects of less-lethal weapons and related equipment” including the “contextual circumstances of use” and that the results of such monitoring “should be made public in accordance with transparency requirements.”<sup>142</sup> Monitoring also requires the State and law enforcement agencies to cooperate with the monitoring of the use and effects of less-lethal weapons by external monitoring bodies.<sup>143</sup> Significantly, for this thesis, the *2020 UN Human Rights Guidance* also implore States to consider “the use of BWCs (or other suitable recording equipment) when less lethal weapons are being used”, suggesting that the technology is considered to be a potentially useful tool for enhancing accountability.<sup>144</sup>

The *2020 UN Guidelines on Less-Lethal Weapons* provide that accountability can also be facilitated by “keeping a record of law enforcement officials with less lethal weapons combined with the prompt, comprehensive reporting of incidents where officials have used force.”<sup>145</sup> Where there has been an injury, the guidelines stipulate that the reports produced by law enforcement officials should be sufficiently detailed to determine,

whether the use of force was necessary and proportionate and should set out the details of the incident, including the circumstances; the characteristics of the victim; the measures taken to avoid the use of force and to de-escalate the situation; the type and manner of force employed, including the specific weaponry; the reasons for the use of force, and its effectiveness; and the consequences. The report should conclude whether the use of force was lawful and, in any event, should identify any lessons learnt from the incident.<sup>146</sup>

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<sup>140</sup> 2020 *UN Guidelines on Less Lethal Weapons*, Guideline 3.3.

<sup>141</sup> 1990 Basic Principles, Principle 11 (f) and Principle 22.

<sup>142</sup> OHCHR. 2020. *United Nations Guidance on Less-Lethal Weapons*, para 4.3.2.

<sup>143</sup> OHCHR. 2020. *United Nations Guidance on Less-Lethal Weapons*, para. 4.3.5.

<sup>144</sup> OHCHR. 2020. *United Nations Guidance on Less-Lethal Weapons*, para. 4.3.3.

<sup>145</sup> OHCHR. 2020. *United Nations Guidance on Less-Lethal Weapons*, para. 3.3.

<sup>146</sup> OHCHR. 2020. *United Nations Guidance on Less-Lethal Weapons*, para. 3.4.

Although the *2020 UN Guidelines* recommend the use of BWCs for monitoring the use of less-lethal weapons by law enforcement officials, the implicit assumption is that the audio and video footage can also be used to review incidents after use of force incidents to ensure the accuracy of reports to pursue accountability.

As highlighted above, States parties assume a heightened responsibility to protect the human rights of individuals deprived of their liberty through arrest, detention, or imprisonment. Given the control that States have over individuals held in custody and pre-detention trial, the Luanda Guidelines stipulate that States “shall provide satisfactory explanation and make available information on the circumstances surrounding custody or detention in every case of death or serious injury of persons deprived of their liberty”.<sup>147</sup> Similarly, international human rights law provides that all persons all people in custodial settings shall have a right to lodge a complaint and if there are reasonable ground to believe that an act of torture or other serious human rights violation has taken place, States shall ensure prompt investigation by an independent authority.<sup>148</sup> The use of BWCs could be a tool for monitoring police conduct and where human rights violations are alleged, the technology can be used to review the conduct of the suspected perpetrators.

#### *Provisions on the use of firearms by law enforcement officials*

Over and above the principles of legality, precaution, necessity, proportionality and precaution, international law prescribes rules for the use of firearms by law enforcement officials. Firearms are potentially deadly and designed to kill and their use could lead to the loss of life. Once a life is taken, there is no way of restoring it. That is why the threshold for the use of firearms is placed at a higher level than the use of any other law enforcement tool. Principle 9 of the Basic Principles stipulates that,

Law enforcement officials shall not use firearms against persons except in self-defence or defence of other against imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape,

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<sup>147</sup> ACHPR, Luanda Guidelines, para 20.

<sup>148</sup> ACHPR, Luanda Guidelines, para 22.

and only when less extreme means are insufficient to achieve these objectives. In any event, the intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.<sup>149</sup>

The safeguards in this principle point out that the default position is to use any other means than take a life. As Heyns observes, by recognising that any use of firearms should be treated as lethal or potentially lethal, Principle 9 is a strong affirmation of the principle of proportionality.<sup>150</sup> Heyns identifies two parts to Principle 9. The first is in regard to any use of firearms and provides that potentially lethal force may be used only to avert a potentially lethal threat or risk of a similarly serious nature. The second is in respect of the intentional lethal use of force “which in any event may only be used when strictly unavoidable to protect life.”<sup>151</sup>

#### *Use of force in the context of policing assemblies*

As discussed in the preceding sections, law enforcement officials may use force when there is a legitimate law enforcement purpose such as effecting an arrest or preventing the commission of a crime. However, in the context of policing assemblies, certain levels of force may be used against individuals or groups who are not committing any crime, but such uses of force are narrowly restricted. As the 2014 Report of the UN Special Rapporteur observes, it is widely accepted that it is the task of law enforcement to facilitate and, if necessary to manage peaceful protest, they have specific obligations in the context of assemblies.<sup>152</sup> These are outlined in 1990 UN Basic Principles. However, the more recent and detailed guidance is outlined in the ACHPR’s *Guidelines on Policing Assemblies by Law Enforcement Officials in Africa* (ACHPR Guidelines on Policing Assemblies), UN Human Rights Committee’s General Comment no. 37 (2020) on the right of peaceful assembly (Article 21) and the 2019 *UN Guidance on Less-Lethal Weapons in Law Enforcement* (2019 UN Guidance).

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<sup>149</sup> 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 9.

<sup>150</sup> Heyns, Report of the Special Rapporteur on extrajudicial, para. 70.

<sup>151</sup> Heyns, Report of the Special Rapporteur on extrajudicial, para. 70.

<sup>152</sup> Heyns, Report of the Special Rapporteur on extrajudicial, para. 70.

According to the ACHPR Guidelines on Policing Assemblies, the measures to respect, protect and fulfil the right to life and freedom from torture start with an emphasis on refraining from use of force. These include provisions that “only trained police officers should be involved in policing of assemblies”<sup>153</sup> and the duty to “equip police officers with appropriate less-lethal weapons and defensive equipment.”<sup>154</sup> During the process of managing assemblies, operational commanders must prioritise “de-escalation tactics that favour the presumption of the right to assemble freely with others, such as open communications, negotiation and dialogue with assembly organisers and participants.”<sup>155</sup> According to General Comment No. 37, law enforcement officials are obligated to exhaust non-violent means and to give prior warning if it becomes absolutely necessary to use force, unless doing either would be manifestly ineffective.”<sup>156</sup> However, the 2019 UN Guidance cautions law enforcement that “heavy displays of less-lethal equipment may escalate tensions during assemblies.”<sup>157</sup>

In respect of the use of firearms, ACHPR Guidelines on Policing Assemblies stipulate that, “Firearms are not an appropriate tactical tool for policing assemblies. Firearms must never be used to disperse an assembly. The indiscriminate discharge of firearms into a crowd is a violation of the right to life.”<sup>158</sup> Similarly, the 2019 UN Guidance states that “where some force is necessary, only less-lethal weapons may be used”, but “in such situations less-lethal weapons that can be aimed shall target only individuals engaged in acts of violence”.<sup>159</sup>

### 3.1.3 The Duty to Investigate

As part of the accountability process, the State’s duty to investigate alleged or suspected violations is a critical element in the protection of the right to life and

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<sup>153</sup> ACHPR Guidelines on Policing Assemblies, para. 7.1. Also refer to UN HRCttee, General Comment No. 37 (2020) on the right of peaceful assembly (Article 21), CCPR/C/GC/37. [17 September 2020], para. 80.

<sup>154</sup> ACHPR Guidelines on Policing Assemblies, para 21.3.1.

<sup>155</sup> ACHPR Guidelines on Policing Assemblies, para 20.2. Also refer 2019 *UN Guidelines on Less-Lethal Weapons*, para. 6.3.1.

<sup>156</sup> UN HRCttee, General Comment no. 37, para 78.

<sup>157</sup> 2019 *UN Guidance of Less Lethal Weapons*, para 6.3.1. Also refer to UN Human Rights Committee’s General Comment no. 37, para 79.

<sup>158</sup> 2019 *UN Guidance of Less Lethal Weapons*, para 21.2.4.

<sup>159</sup> 2019 *UN Guidance of Less Lethal Weapons*, para 6.3.4.

freedom from torture and other cruel, inhuman, and degrading treatment or punishment. The purpose of an investigation is to determine whether human right(s) have been violated by establishing what happened, who was responsible (directly or indirectly), who was affected (victim), was there any institutional failure, will it be necessary to remedy the impact on victims and whether there is a need for legislative, institutional, or practical reform.<sup>160</sup>

International law provides that “States must take steps both to prevent arbitrary deprivations of life and to conduct prompt, impartial, thorough and transparent investigations into any such deprivations that may have occurred, holding those responsible to account and providing for an effective remedy and reparation for the victim or victims.”<sup>161</sup> Similarly, with regard to freedom from torture, international law stipulates that “[e]ach State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is a reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.”<sup>162</sup> Further, States Parties are required to ensure that any individual who alleges being tortured “has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities.”<sup>163</sup>

The duty to investigate is triggered where the state knows or should have known of any potentially unlawful death, including where reasonable allegations of a potentially unlawful death are made.<sup>164</sup> Notably, international law not only emphasises the importance of investigating alleged violations of human rights but also, the quality of the investigation itself. Thus, the process and the outcome are critically important in determining whether or not the State fulfils its duty to protect the right in question. The *Minnesota Protocol on the Investigation of Potentially Unlawful Death* (the Minnesota

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<sup>160</sup> Probert, T. (2017, May). Vehicles for Accountability or cloaks of impunity? How can National Commissions of Inquiry Achieve Accountability for Violations of the Right to Life: *IJR Policy Brief Number 25*, p. 4. Also refer to the Luanda Guidelines, para 20 for deaths in police custody.

<sup>161</sup> ACHPR’s General Comment No. 3, para 7.

<sup>162</sup> UN CAT, Article 13. Also see Rule 57(1) of the United Nations Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules) for dealing with complaints in conditions of detention.

<sup>163</sup> UN CAT, Article 14.

<sup>164</sup> UN CAT, Article 15.



Protocol) and the *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment* outline the standards in respect of the right to life and freedom from torture, respectively. As observed above, in each case, an investigation must be prompt, independent and impartial, effective, and thorough, and transparent. Below is an analysis of what these standards entail under international law.

According to the *Minnesota Protocol*, a prompt investigation means that authorities must conduct the investigation as soon as possible and proceed without unreasonable delays. Where an investigation is not conducted promptly, the right to life and an effective remedy are violated.<sup>165</sup>

To be effective and thorough, investigators should, to the fullest extent possible, collect and confirm all testimonial, documentary and physical evidence and must be capable of ensuring accountability for unlawful death; leading to the identification and, if justified by the evidence and seriousness of the case, the prosecution and punishment of all those responsible.<sup>166</sup> Moreover, the investigation must determine who was involved in the death, and their individual responsibility for the death and not just direct perpetrators, but also others who were responsible for the death,<sup>167</sup> including, for example, officials in the chain of command who were complicit in the death;<sup>168</sup> determine whether there was a breach of the right to life; identify failure to take precautionary measures that could have had a real prospect of preventing the deaths and systematic failures that may have contributed to the death.

To be independent and impartial, the investigators and investigative mechanisms must be, and must be seen to be, independent (institutionally and formally as well as in practice and perception) of undue influence at all stages of the investigation process.<sup>169</sup> This means that investigators must be independent of any suspected

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<sup>165</sup> *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, Office of the United Nations High Commissioner for Human Rights, New York/Geneva, 2017, para 23.

<sup>166</sup> *Minnesota Protocol*, para. 25.

<sup>167</sup> *Minnesota Protocol*, para. 25.

<sup>168</sup> *Minnesota Protocol*, para. 26.

<sup>169</sup> *Minnesota Protocol*, para. 28.

perpetrators and the units, institutions, and agencies to which they belong,<sup>170</sup> as well as that they must be impartial and must act at all times without bias.<sup>171</sup> Finally, the investigation process and outcomes must be transparent, including openness to the scrutiny of the general public and the victims' families<sup>172</sup> and that any limitations to transparency must be legitimate and justifiable.<sup>173</sup>

The duty to investigate is a vital aspect of the State's duty to protect human rights to the extent that a failure to transparently investigate "suspicious deaths and all killings by state agents and to identify and hold accountable individuals or groups responsible for violations of the right to life constitutes in itself a violation of the right to life."<sup>174</sup>

In the context of police use of force in custodial settings, international law stipulates that there must be a prompt, impartial and independent inquiry to investigate if a person under arrest, in police custody, pre-trial detention or in the process of transfer dies.<sup>175</sup> Similarly, in cases of suspected torture or other human rights violations, the Luanda Guidelines stipulate that States shall ensure prompt investigations by independent and impartial authorities.<sup>176</sup>

The rules regulating the use of force by law enforcement as discussed above illustrate that any investigation of police actions and in particular police use of force must include a review of both upstream and downstream events linked to the actual use of force. The investigation itself as part of the accountability process, must meet the standard of being prompt, impartial, thorough, and transparent. According to international law, a failure in this regard also entails a violation of the right(s) in question.<sup>177</sup> These are important considerations when assessing the potential difference that BWCs can make in improving police accountability and will be considered in the next chapter.

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<sup>170</sup> *Minnesota Protocol*, para. 30.

<sup>171</sup> *Minnesota Protocol*, para. 31.

<sup>172</sup> *Minnesota Protocol*, para. 32..

<sup>173</sup> *Minnesota Protocol*, para. 33.

<sup>174</sup> *Minnesota Protocol*, para. 15.

<sup>175</sup> Luanda Guidelines, para. 20 (a).

<sup>176</sup> Luanda Guidelines, para. 22 (b).

<sup>177</sup> ACHPR General Comment No. 3, para. 15.

The section above set out the international standards regarding the respect and protection of human rights that are more frequently implicated in law enforcement. As stated in the introductory chapter, one of the main stated reasons for the adoption of BWCs was their potential to aid in investigations after use of force incidents or other general cases of misconduct by law enforcement officials. It is conceivable that BWCs will enable law enforcement officials to record events before, during and after detention and arrest and use of force and to enable investigators to determine whether the use of force in any incident was necessary or indeed proportional. However, it still begs questions regarding how the BWCs should be deployed, under what conditions, with what expected outcomes and how best to evaluate them. There are also potential opportunities on the extent to which BWCs could contribute to some of the key elements of the duty to investigate such as enabling an independent and impartial, effective, and thorough, and transparent investigation. With these questions in mind, the next section examines the extent to which the South African legislative framework meets the standards set under international law.

## 3.2 South African National Legislation on Law Enforcement

As observed in the preceding sections, the domestic laws of a country should be the first port of call for the governance of the powers of law enforcement and provide the first defence against the abuse of human rights by the police. The following sections focus is on the extent to which the South African law of law enforcement as provided for in the country's constitution, supporting legislation and policing policies and guidelines reflects the same standards and principles as encapsulated in international human rights law as discussed in the preceding sections. The section also provides an overview of the laws that will impact the use of BWCs in South Africa.

### 3.2.1 South African Constitutional Rights

The Bill of Rights in Chapter 2 of the South African Constitution is described as the “cornerstone of democracy in South Africa”<sup>178</sup> which “applies to all law, and binds the legislature, the judiciary, the executive and all organs of state”<sup>179</sup> and contains the rights of all people in South Africa which the “State must respect, protect, promote and

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<sup>178</sup> Constitution of the Republic of South Africa, s. 7(1).

<sup>179</sup> Constitution of the Republic of South Africa, s. 8(1).

fulfil.”<sup>180</sup> The South African Constitution provides protections to fundamental human rights as reflected in the ICCPR and the African Charter on Human and Peoples’ Rights subject to limitations outlined in Section 36 of the constitution or as stated in the Bill of Rights itself.

The right to life is protected under Section 11 which states that “Everyone has the right to life.”<sup>181</sup> Section 12(1) of the Constitution also protects the “right to freedom and security of person” which includes the right (a) not to be deprived of freedom arbitrarily or without just cause; (b) not to be detained without trial; (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way.<sup>182</sup> Thus, Section 12 protects in one stroke two rights that are enumerated separately in the ICCPR namely, the right to liberty and security of person, and the prohibition of torture, cruel, inhuman or degrading treatment or punishment.

The right to privacy is protected under the constitution and under common law. Section 14 of the constitution provides that, everyone has the right to privacy, which includes (a) the right not to have their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed. Although Section 14 (d) refers to the privacy of communications, it does not explicitly identify the personal data protection and the associated unwarranted physical surveillance of individuals which come into question when regulating the use of surveillance technologies such as BWCs. However, the protections cover the main elements of the right to privacy that are protected under international law.

Notably, the prohibition of torture and other inhuman or degrading treatment or punishment is absolute is identified as an absolute right, the South African constitution does not explicitly grant the same status to this right. The other rights identified in this section are not absolute and are subject to limitations outlined in Section 36 (1) of the South African Constitution which states that they “may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in

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<sup>180</sup> Constitution of the Republic of South Africa, s. 7(2).

<sup>181</sup> Constitution of the Republic of South Africa, s. 11.

<sup>182</sup> Constitution of the Republic of South Africa, s. 12(1)(a) – (d).

an open and democratic society based on human dignity, equality and freedom.” The following section examines the individual laws relating to the management of police powers and in particular the use of force in South Africa and the extent to which the country’s laws comply with international law. This is important for this thesis because these laws contain the rules regarding the lawful use of force that guide police accountability processes.

### 3.2.2 South African legislation on the use of force in law enforcement

The operational mandate of SAPS, including the management of the use of force is provided for under several pieces of legislation. Among the key legislation are the South African Police Service (SAPS Act) Act 68 of 1995, the Correctional Services Act, 111 of 1998; the Prevention and Combating of Torture of Persons Act 13, 2013, the Criminal Procedure Act, Act no. 57 of 1977 and the Regulation of Gatherings Act 205 of 1993. Below is an assessment on the extent to which these laws comply with the rules under international law.

#### 3.2.2.1 *The South African Police Service Act 68, 1995*

In its current form, South African Police Service Act 68, 1995 (the SAPS Act) stipulates that; “Where a member who performs an official duty is authorised by law to use force, he or she may only use the minimum force which is reasonable in the circumstances.”<sup>183</sup> This does not meet the standards set under international law in that it neither sets clear limits on the use of force nor enumerate with clarity the rules and limits that apply to different types of force while relying on what is arguably a subjective criteria of “reasonableness”.

However, in 2020 the South African cabinet approved the South African Police Services Amendment Bill 2020 which proposes wide-ranging changes on enforcement laws including police use of force. The Bill proposes to amend s.13(b) cited above to specify more objective criteria in line with international law which says that a police officer may “use only the minimum force which is reasonably necessary and proportional in the circumstances.”<sup>184</sup> The proposed additional clause s.13(b)(ii) of the

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<sup>183</sup> South African Police Service (SAPS) Act 68 of 1995, s. 13 (3) (b).

<sup>184</sup> South African Police Services Amendment Bill 2020, s.13 (b) (i).

Bill stipulates that when authorised by law to use force, a police officer may “use deadly force only . . . if there is a threat to serious bodily harm to a member or any other person.” This is a significant improvement from the current s.13 with language that is close to Principle 9 of the 1990 Basic Principles discussed above. However, there is a notably significant difference in that Principle 9 stipulates that deadly force may be used only when there is an “imminent” threat of serious bodily harm to the member or any other person.” The omission of the “imminent” element lowers the threshold for the use of deadly force and creates an apprehension that a law enforcement officer may use deadly force when the chance of a life-saving alternative may still be available.

### *3.2.2.2 The Criminal Procedure Act (Act No. 51 of 1977)*

The Criminal Procedure Act (Act No. 51 of 1977) governs law enforcement powers in South Africa from arrest and detention, search and seizure as well as the use of force during an arrest. With respect to use of force, Section 49(2) of the Criminal Procedure Act (Act No. 51 of 1977) states that;<sup>185</sup>

If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing, but, in addition to the requirement that the force must be necessary and proportional in the circumstances, the arrestor may use deadly force only if – The suspect poses a threat of serious violence to the arrestor or any other person; or The suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of affecting arrest, whether at that time or later.

The Criminal Procedure Act’s threshold for the use of deadly force is lower when compared to international standards and is susceptible to abuse through the use of

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<sup>185</sup> There is also Section 39 which states: Section 39(1) An arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his body.

inappropriate force. As stated above, international human rights law standards on the use of firearms by law enforcement officials state that the “intentional lethal use of firearms may only be made when strictly unavoidable in order to protect a life.”<sup>186</sup> Exceptions to this principle include the common law right to self-defence or “defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.”<sup>187</sup>

The most prominent case regarding the use of deadly force by law enforcement officials is that of *Govender v. Minister of Safety and Security*. It concerned an unarmed boy who was shot in 1995 during a chase resulting from a suspicion he had stolen a car resulting in him sustaining serious injuries that left him a paraplegic.<sup>188</sup> The court found that the use of deadly force in this instance failed the proportionality test in that “the nature and degree of force used and the threat posed by the fugitive to the safety and security of police officers, other individuals and society as a whole,” and considered that the suspect was “young, or unarmed, or of slight built, etc., and where applicable, he could have been brought to justice in some other way.”<sup>189</sup>

As observed by Tharien van Der Walt, the purpose of the use of force provided for in Section 49(2) is to arrest a fleeing suspect in order to bring them to justice before a court of law.<sup>190</sup> But by allowing law enforcement officials to easily default to the use of deadly force without first resorting to alternative means, Section 49 (2) of the Criminal Procedure Act potentially reneges on the State’s duty to protect enshrined in Section 205(3) of the South African Constitution which bestows on the police, the duty to protect the safety and security of the citizens of South Africa and to maintain law and

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<sup>186</sup> Principle 9, 1990 Basic Principles on the use of Force and Firearms.

<sup>187</sup> Principle 9, 1990 Basic Principles on the use of Force and Firearms.

<sup>188</sup> See: The Law on Police Use of Force Worldwide: South Africa. Accessed at: <https://www.policinglaw.info/country/south-africa>

<sup>189</sup> The Law on Police Use of Force Worldwide.

<sup>190</sup> Walt, T. v. (2011). The use of force in effecting arrest in South Africa and the 2010 Bill: A Step in the Right Direction? *Potchefstroom Electronic Law Journal*, 14(1), p. 149.



order.<sup>191</sup> Related to this point, Section 49 (2) fails to recognise that even suspects have fundamental human rights that are protected under the Constitution which the State, its agents and organs must also protect.<sup>192</sup>

The constitutionality of Section 49 of the CPA has been discussed above but the interpretation of its provisions on the use of force has been an ongoing process and there have been other judgments regarding its constitutionality. For example, the South African Constitutional Court ruled that the words “*use such force as may in the circumstances be reasonably necessary . . . to prevent the person concerned from fleeing*” [author’s emphasis] contained in the clause should be interpreted as generally excluding the use of firearms unless 1) the suspect poses an immediate threat of serious bodily harm to him or her or a threat of harm to members of the public; or 2) that the suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm.”<sup>193</sup> This does not relieve the apprehension that the provision is open to abuse and may be used to prevent the prosecution of potentially unlawful killings considering that IPID’s a significant majority of deaths as a result as a result of police action, including the management of assemblies, result from the use of official law enforcement firearms in circumstances the threat posed by the suspects is either unknown or not published in IPID’s reports.

### 3.2.2.3 *Prevention and Combating of Torture of Persons Act, 13 of 2013*

South Africa promulgated the Prevention and Combating of Torture of Persons Act, 13 of 2013 to domesticate its ratification of the UNCAT in 1998 which paved the way for the ratification of the OPCAT in June 2019. The Prevention and Combating of Torture of Persons Act provides for the criminalisation of torture, measures aimed at preventing and combating torture, and for the training of persons who may be involved in the custody, interrogation or treatment of a person subjected to any form of arrest, detention or imprisonment, on the prohibition and combating of torture.<sup>194</sup>

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<sup>191</sup> Walt, The use of force in effecting arrest in South, p. 149.

<sup>192</sup> Walt, The use of force in effecting arrest in South, p. 149.

<sup>193</sup> *S v Walters and Another 2001 (2) SACR 471 (Tk); 2001 (10) BCLR 1088 (Tk)*, para 38.

<sup>194</sup> Prevention and Combating of Torture of Persons Act, 13 of 2013, s 2.

The Act also makes it clear that freedom torture is an absolute right (something that the South African Constitution does not include) and penalises any person, regardless of status or stature, “who commits torture, attempts to commit torture or incites, instigates, commands or procures any person to commit torture.”<sup>195</sup> This provision complies with international law regarding the prohibition of torture, at least in terms of criminalising the offence.

### *3.2.2.4 The Regulation Gatherings Act 205 of 1993*

Section 9 (2) of the Regulation of Gatherings Act of 1993 gives effect to the provisions of Section 17 of the South African constitution. The Regulation of Gatherings Act authorises law enforcement use of force to disperse a non-violent and unlawfully gathered crowd that is disobeying a police order to disperse and “may for that purpose order the use of force, excluding the use of weapons likely to cause serious bodily injury or harm.”<sup>196</sup> Section 9 (2) (b) is the proportionality clause which states that, “the degree of force which maybe so used shall not be greater than is necessary for dispersing the persons gathered and shall be proportionate to the circumstances of the cause and the object to be attained.” This clause seems to meet the proportionality test as prescribed under international law where some form of force is necessary in crowd management.

Section 9 (2) (d) empowers a high-ranking officer to authorise police use of force, including deadly force in policing a violent assembly “if he (sic) finds other methods to be ineffective or inappropriate.”<sup>197</sup> This is important step for accountability as it allows for a clear chain of command regarding when and when not to use deadly force. However, Section 9 (2) (e) of Regulation of Gatherings Act states that “the degree of force which may be so used shall not be greater than is necessary for the prevention of the actions contemplated in subparagraph d (i) and (ii)<sup>198</sup> and the force shall be moderated and be proportionate to the circumstances of the case and the object to be attained.” To the extent that this Act authorises the use of force, including deadly force,

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<sup>195</sup> Prevention and Combating of Torture of Persons Act, s 4.

<sup>196</sup> s 9(2)(a), Regulation of Gatherings Act of 1993.

<sup>197</sup> Regulation of Gatherings Act 205, s. 9 (2) (d).

<sup>198</sup> The actions contemplated in Section 9 (d) (ii) act include attempts to destroy or cause serious damage to movable or immovable property considered to be valuable.

to protect property, it violates international law and as the 2018 Panel of Experts Report recommends, it must be repealed.<sup>199</sup> Under the principle of proportionality, a life can only be taken to protect another life and not property.

As with the SAPS Act 205 of 1993, the SAPS Bill 2020<sup>200</sup> includes proposals for the amendment of the Regulation of Gatherings Act which if enacted into law, will significantly bring Section 9 (d) and (e) closer to international law standards especially regarding the use of deadly force. Most of the amendments are linked to recommendations of the Marikana Commission of Inquiry, the 2018 *Report of the Panel of Experts on Policing and Crowd Management* and judgments such as *Mlungwana and Others v The State and Another* that ruled that some sections of the Regulation of Gatherings Act were unconstitutional.<sup>201</sup> The new s.9 (2A) (b) would stipulate that a law enforcement officer may use deadly force subject to the principle of necessity and proportionality, “only if there is a threat of serious bodily harm to the member or any other person.” As with s.13 (b) (ii) of the SAPS Bill 2020 cited above, the absence of an emphasis on “imminence” of the threat to life or injury raises the threshold of use of deadly force but not as high as that set under international law which might result in unnecessary and disproportionate uses of deadly force.

The proposed Section 9 (2A) (c) makes it unlawful “to use deadly force to protect property only.” However, by adding the word “only” to the prohibition of using deadly force to protect property, it creates the idea that a law enforcement official can use deadly force as long as property is not the only reason. According to Minister of Police, Bheki Cele, this proposed clause takes on board recommendations of the Marikana Commission of Inquiry<sup>202</sup> and would be an assurance that no automatic weapons may

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<sup>199</sup> Refer to Panel of Experts. 2018. *Panel of Experts Report on Policing and Crowd Management Final Report*. Pretoria: SAPS, 1-596. Accessed July 30, 2021.

[https://www.saps.gov.za/resource\\_centre/publications/panel\\_of\\_experts\\_2021.pdf](https://www.saps.gov.za/resource_centre/publications/panel_of_experts_2021.pdf), p. 250.

<sup>200</sup> Minister of Police. (2020). *South African Police Service Amendment Act, 2020*.

[https://www.gov.za/sites/default/files/gcis\\_document/202010/sapsamendmentbill2020.pdf](https://www.gov.za/sites/default/files/gcis_document/202010/sapsamendmentbill2020.pdf).

<sup>201</sup> This judgement Ruled that Section 12 (1) (a) that criminalised assemblies of more than fifteen people without giving notice to law enforcement was an unjustifiable limitation on the right to freedom of assembly and therefore unconstitutional.

<sup>202</sup> See Marikana Commission of Inquiry. 2015. Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at The Lonmin Mine in Marikana, in the North West Province. Marikana Commission. [https://justice.gov.za/comm-mrk/docs/20150710-gg38978\\_gen699\\_3\\_MarikanaReport.pdf](https://justice.gov.za/comm-mrk/docs/20150710-gg38978_gen699_3_MarikanaReport.pdf), para. B (7), p. 547.

be used in crowd control but that “whenever life and property is endangered simultaneously, use of lethal force will be warranted.”<sup>203</sup> The inclusion of “property” is unnecessary considering that the guiding principle under international law is that a life may be taken intentionally only to save another life, not property. This clause creates a false equivalence between life and property that may create a potential legal loophole that allows interpretations of this law that make it permissible to take a life for reasons that include protecting property.

South Africa's current laws relating to police use of force do not meet the standards set out under international law. Although significantly improved, the proposed reforms under the SAPS Amendment Bill 2020 still fall short of the principles and standards set under international law. Such reforms should ensure that the State positions itself to comply with its international duty to respect, protect and fulfil the human rights of its citizens.

### 3.2.3 Police accountability system in South Africa

This section looks at the legal framework in relation to the procedural elements of human right implicated in police use of force. The main principle associated with the procedural element is the principle of accountability. As noted in Section 1.4.3 of the preceding chapter, police accountability is a critical factor for police effectiveness. Thus, the conduct of police officers has a direct bearing on their ability to promote safety because systemic misconduct undermines public trust and legitimacy which is essential for police effectiveness.<sup>204</sup>

The SAPS external oversight architecture includes the parliamentary Portfolio Committee on Police which straddles both the SAPS’ internal disciplinary management processes, the Independent Police Investigative Directorate (IPID), the

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<sup>203</sup> South African Government Media Statement. 2020. *Police welcomes approval of publishing of South African Police Service Amendment Bill, 2020 for public comments.* September 29. <https://www.gov.za/speeches/police-welcomes-approval-publishing-south-african-police-service-amendment-bill-2020-public>.

<sup>204</sup> Newman, Gareth. 2021. *Briefing Note: South African Police Service Resourcing and Performance 2012 to 2020.* Pretoria: ISS. <https://issafrica.s3.amazonaws.com/site/uploads/SAPS-resourcing-and-performance-2012-2020.pdf>, p. 2.

external oversight body for SAPS and the South African Human Rights Commission (SAHRC) and *ad hoc* independent oversight mechanisms such as commissions of inquiry. The Civilian Secretariat for Policing (CSPS) also plays a critical but indirect role on enhancing police accountability. The CSPS plays an advisory role to the Minister of Police and has the mandate to work collaboratively with SAPS and IPID and to conduct quality assessments of the police service and monitoring and evaluating its performance and recommending corrective measures.<sup>205</sup>

### 3.2.3.1 SAPS internal accountability system

The internal accountability system is established under Section 24 of the SAPS Act which empowers the minister of Police to make regulations relating to discipline management within SAPS. As Newman observes, the SAPS internal disciplinary system is “the single most important accountability mechanism available to maintain discipline and remove officers who, through their actions, undermine public trust in the organisation.”<sup>206</sup>

The actual modalities of discipline management are outlined in the 2016 South African Police Service Disciplinary Regulations (2016 SAPS Disciplinary Regulations). According to the regulations, discipline is seen as a corrective and not punitive measure which must be applied in a prompt, fair, consistent and progressive manner and employees accused of misconduct must have representation and the right of response against any finding of misconduct at a disciplinary hearing.<sup>207</sup> The 2016 SAPS Disciplinary Regulations provide for arbitration processes in the event of police misconduct. Such processes include the designation of disciplinary officers by the National or Provincial Commissioner of Police, whose role is to initiate investigations concerning alleged misconduct and cause an employee to be charged with misconduct in accordance with the regulations.<sup>208</sup> The disciplinary hearing is chaired by an employee appointed by SAPS who must always be of a higher rank than the employee charged with misconduct.<sup>209</sup>

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<sup>205</sup> Refer Civilian Secretariat for Policing Service (CSPS) Act, 2011, s. 6 (1).

<sup>206</sup> Newman, *Briefing Note*, p. 2.

<sup>207</sup> 2016 SAPS Disciplinary Regulations, Regulation 4.

<sup>208</sup> 2016 SAPS Disciplinary Regulations, Regulation 6.

<sup>209</sup> 2016 SAPS Disciplinary Regulations, Regulation 11.

SAPS' management of discipline is reported in its annual reports under the title "Labour Relations" and critics argue that the discipline management processes are inefficient and ineffective. According to Newman, between year 2012-2013, the SAPS ability to hold disciplinary hearings declined by 71% with 50% of the hearings resulting in either a case being withdrawn against the officers accused of misconduct (as witnesses did not show up), or the officers were not found guilty.<sup>210</sup> Newman's findings corroborate the findings of a 2019 report by African Criminal Justice Reform on the internal disciplinary processes within SAPS indicating a failure of internal discipline that is fostering a culture of impunity.<sup>211</sup> The report found that very few SAPS officials are subject to internal discipline in relation to the size of the organisation and when disciplinary action is instituted.<sup>212</sup>

The management of use of force is regulated through National Instruction 1 of 2016 (NI: 1/2016) whose purpose is "to regulate the use of force by a member to effect the arrest of a suspect as provided for in Section 49 of the Criminal Procedure Act."<sup>213</sup> According to Lt Gen Jephta, although the NI: 1/2016 purpose refers to Section 49 of the Criminal Procedure Act, it also extensively deals with use of force in Section 39 (1). But when it comes to reporting injury or death as a result of the discharge of a firearm by SAPS members, it only covers reporting under Section 49 (2) and is silent on reporting death or injury as a result of Section 39 (1). Such cases only become known when affected parties lodge complaints or initiate civil cases against the SAPS but in some cases no records would be found of these cases. Arguably, this reflects the reality that non-fatal forms of potentially unlawful SAPS violence are likely to be underreported and that alleged perpetrators escape investigation and punishment.

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<sup>210</sup> Newman, *Briefing Note*, p. 2.

<sup>211</sup> Africa Criminal Justice Reform. 2019. "Failing to discipline in SAPS: Fostering a culture of impunity." *Africa Criminal Justice Reform*. February. <https://acjr.org.za/resource-centre/fact-sheet-9-failing-to-discipline-v-3.pdf>. See page 2 for a list of transgressions.

<sup>212</sup> Africa Criminal Justice Reform, *Failing to discipline in SAPS*, p. 5.

<sup>213</sup> Jephta, Sharon. J. 2018. *Assessment and Evaluation of SAPS Operational Instructions, Procedures, Practices, Strategies and Systems that Undermine Effective and Efficient Policing Within a Constitutional Democracy*. February 9. [https://www.saps.gov.za/resource\\_centre/publications/lt\\_gen\\_jephta\\_saps\\_colloquium.pdf](https://www.saps.gov.za/resource_centre/publications/lt_gen_jephta_saps_colloquium.pdf).



In view of observations in the preceding two chapters and the legal and policy loopholes identified above, the SAPS' discipline management system is ineffective and could enable a culture of impunity among law enforcement officials in South Africa. Although there is no direct evidence, the inefficiencies of the internal discipline management system might be the result of the endemic negative effects of police culture, in particular the clannishness, secrecy, and the propensity to deceive as discussed in Chapter 2. What this entails is that the external accountability system discussed below happens in a general context of internal accountability weaknesses.

### 3.2.3.2 SAPS external accountability processes

The central external accountability mechanism is the Independent Police Investigative Directorate (IPID) which is established under the Independent Investigative Directorate Act of 2011 giving effect to Section 206(6) of the South African Constitution. Among other things, the IPID's mandate is to provide for independent and impartial investigation of identified; criminal offences allegedly committed by members of the South African Police Service;<sup>214</sup> to make disciplinary recommendations in respect of members of the South African Police Service and Municipal Police Services resulting from investigations conducted by the Directorate,<sup>215</sup> and to enhance accountability and transparency by the South African Police Service and the Municipal Police Services in accordance with the principles of the Constitution.<sup>216</sup>

The IPID has the mandate to investigate, among other things, any deaths in police custody; deaths as a result of police actions; any complaints relating to the discharge of an official firearm by any police officer; and any complaint of torture or assault against a police officer in the execution of his or her duties.<sup>217</sup> An IPID investigation is instigated through a reactive approach, which is either triggered by an incident being

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<sup>214</sup> IPID Act 1 of 2011, s. 2 (d).

<sup>215</sup> IPID Act 1 of 2011, s. 2 (e).

<sup>216</sup> IPID Act 1 of 2011, s. 2 (g).

<sup>217</sup> IPID Act 1 of 2011, s. 28 (1).



referred by SAPS/MPS,<sup>218</sup> a complaint from the general public<sup>219</sup> or a referral by Minister, MEC, Executive Director or Civilian Secretariat for Police.<sup>220</sup>

The procedures for SAPS/MPS referrals are outlined in Section 29 of the IPID Act. The IPID Act requires that members of the SAPS and MPS must “immediately after becoming aware,” notify the oversight body of any matters referred to in section 28<sup>221</sup> and within 24 hours thereafter, submit a written report using prescribed procedures.<sup>222</sup> as outlined in the IPID Standard Operating Procedures (IPID SOPS) and the IPID Regulations. The failure by SAPS/MPS members to comply with the duty to notify and cooperate with IPID is an offence that is punishable by a fine or imprisonment for a period not exceeding two years.<sup>223</sup> Complaints from members of the public are generally received by IPID in written format including through email, and by phone.

Once received, complaints are screened to ensure they are within IPID’s mandate and to ensure there is no duplication. After the case intake, each case that is within IPID’s mandate is allocated to an investigator and a supervisor. The actual procedures of investigation depend on the type of offence or alleged violation. However, procedures and workflows relating to the investigations entail an investigation into the alleged misconduct or criminal offences against the officer(s) involved and the outcome is a determination of guilt or innocence of the suspected offending officer(s) with recommendations as to the form of punishment for those found guilty or acquittal for those not found guilty.

IPID’s regulations include service standards for the disposal of investigations. Once a case is registered on IPID’s case management system, it must be disposed of within

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<sup>218</sup> Independent Police Investigative Directorate. (2012, February 10). Independent Police Investigative Directorate Act: Regulations: Operation of Independent Police Investigative Directorate. (IPID Act Regulations) *Government Gazette*, 35018., Regulation 2 (1).

<sup>219</sup> IPID Act Regulations, Regulation 2 (4) (a).

<sup>220</sup> Section 28 (1) (h) of the IPID Act suggests that there are cases that are referred to IPID as a result of a decision by the IPID Executive Director, or at the request of the Minister of Police, or Member of the Executive Council (MEC) responsible for policing in a province, or the Secretary for the Police Service in the Civilian Secretariat for Policing.

<sup>221</sup> IPID Act 1 of 2011, s. 29 (1) (a).

<sup>222</sup> IPID Act 1 of 2011, s. 29 (1) (b).

<sup>223</sup> IPID Act 1 of 2011, s. 33 (1) (3).

a reasonable period which may not exceed 90 days for deaths in police custody<sup>224</sup> and death as a result of police action<sup>225</sup> and 30 days after designation for cases involving the dislodge of firearms.<sup>226</sup> Thus, the timely completion of investigations is an important indicator of efficiency and effectiveness for IPID and aligns with the requirement under international law for prompt investigations into violations once law enforcement agencies are aware or are made aware of violations.

As noted above, the investigation procedures depend on the type of allegation. Where the alleged offence is death as a result of police action or as a result of police action, the investigator who is designated for the case by the IPID executive director must, within 24 hours attend the crime scene and ensure that it is secured, oversee it and conduct a preliminary investigation. This entails taking over the crime scene from a member(s) of the SAPS or MPS already present and receiving a briefing on what transpired at the crime scene from them, recording the personal details of the deceased, identify and record particulars of witnesses for purposes of interviewing them and authorising the removal of the corpse in consultation with a pathologist and notifying the deceased's next of kin and obtaining statements that may assist in the investigation.<sup>227</sup>

The IPID investigator must proceed to cordon off the area and record his observations at the scene, protect obvious exhibits from contamination, make note of each exhibit to protect its integrity and location if it has to be moved, regarding the corpse as a source of evidence and identifying other scenes that might have a direct connection with the primary crime scene and also protecting such scenes.<sup>228</sup> The investigator must ensure that all clues and forensic evidence have been marked and photographed in their original positions by the Local Criminal Record Centre (LCRC)<sup>229</sup> and that

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<sup>224</sup> Independent Police Investigative Directorate. (2012, February 10). Independent Police Investigative Directorate Act: Regulations: Operation of Independent Police Investigative Directorate. *Government Gazette*, 35018., Regulation 4 (6).

<sup>225</sup> IPID Act Regulations, Regulation 5 (4).

<sup>226</sup> IPID Act Regulations, Regulation 6 (3).

<sup>227</sup> IPID Act Regulations, Regulation 4. Also refer to Procedure 8.8.6 of Independent Police Investigative Directorate. 2019. *Departmental Standard Operating Procedure (IPID SOPS)*. Pretoria: IPID.

[https://www.groundup.org.za/media/uploads/documents/2019\\_SIGNED\\_IPID\\_SOPS.pdf](https://www.groundup.org.za/media/uploads/documents/2019_SIGNED_IPID_SOPS.pdf)

<sup>228</sup> IPID Act Regulations, Regulation 8.

<sup>229</sup> 2019 IPID SOPS, Procedure 8.7.6.

exhibits are collected from the crime scene for processing by the Forensic Science Laboratory (FSL) sealed and preserved in designated evidence bags with serial numbers and booked at the local police station within the jurisdiction.<sup>230</sup>

The IPID regulations include post-crime scene investigative procedures which stipulate that within 30 days of being designated, the investigator must proceed with a full investigation. This entails attending the post-mortem (if not done during preliminary investigations) and interviewing witnesses and obtaining statements that may assist with the investigation,<sup>231</sup> and to identify the police officer who allegedly committed the offence, obtain a warning statement.<sup>232</sup> As contemplated in section 29 of the IPID Act, the cooperation of SAPS/MPS is important in this process. The investigator is required to arrange and hold an identification parade and take affidavits or affirmed declarations or giving of evidence or the production of documents in the possession or under the control of a SAPS/MPS officer.<sup>233</sup>

The IPID Regulations also outline procedures regarding how IPID should investigate criminal matters such as rape by a police officer whether on or off-duty, torture or assault and corruption. The regulations regarding the investigation of such matters are similar to death in custody or as a result of police action in terms of case allocation, opening a docket, securing the crime scene, timeframes to investigate, and the identification and interviewing of witnesses. In addition, the investigator must ensure that the victim(s) of rape and torture or assault is/are examined by a medical practitioner without delay.<sup>234</sup> In cases of cases of rape, the medical examination must comply with the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007).

In respect of the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment, there are additional institutional and legal standards that are complementary to IPID role in investigating alleged violations of this right. After South

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<sup>230</sup> 2019 IPID SOPS, Procedure 8.7.7.

<sup>231</sup> IPID Act Regulations, Regulation 8.

<sup>232</sup> 2019 IPID SOPS, Procedure 8.8.5.

<sup>233</sup> IPID Act Regulations, Regulation 9.

<sup>234</sup> IPID Act Regulations, Regulation 6.

Africa's ratification of OPCAT in 2019, the country has begun implementing the mechanism for the prevention of torture in places of detention. These include measures to enable the UN Subcommittee on Prevention of Torture to visit all places of detention in South Africa and examine the treatment of people deprived of their liberty with a view "to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment."<sup>235</sup> In line with its obligation to institute the NPM, the South African government has designated a multiple-body national prevention mechanism to be coordinated by the South African Human Rights Commission (SAHRC) and comprising IPID, the Judicial Inspectorate of Correctional Services (JICS), the Military Ombud and the Health Ombud.<sup>236</sup> All these bodies have pre-existing legislative mandates to perform oversight over places of detention and correctional services.

Investigations of complaints regarding the discharge of firearms must be finalised within 30 days to enable the IPID director or relevant provincial head determine whether a full investigation is warranted or not.<sup>237</sup> Where a full investigation is required, the investigator must compile a docket with evidence regarding the incident, statements from witnesses, technical and expert reports. The full investigation must be completed within 90 days.

Once the investigator has completed her/his investigation, she/he compiles all the evidence into a docket which is organised in a specified format. The investigator then drafts an investigative report indicating what has been done relating to the investigation and submit the case investigative report to the IPID's provincial management with a suggestion of the method of completion.<sup>238</sup> The case investigative report forms the basis upon which the provincial management decides on how to classify a case on IPID's Case Management System. In IPID's parlance, this is termed the "decision-ready" status which refers to cases where the investigator has conducted

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<sup>235</sup> See OPCAT, Articles 4 and 11.

<sup>236</sup> South African Human Rights Commission (SAHRC). 2022. *Introducing South Africa's Mechanism For The Prevention of Torture*. January 10. <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/2353-introducing-south-africa-s-mechanism-for-the-prevention-of-torture>.

<sup>237</sup> 2012 IPID Regulations, Regulation 6.

<sup>238</sup> 2019 IPID SOPs, Procedure 8.10.5.

a quality investigation and obtained all necessary evidence to either refer the case to the NPA for a decision (to prosecute or not), or make a recommendation to the SAPS/MPS, or make a Police-related recommendation or a General Recommendation.<sup>239</sup>

### 3.2.3.3 Parliamentary Portfolio Committee on Police

The internal and external accountability measures described above also come under the oversight of the Portfolio Committee on Police (PCoP) of the South African parliament which is also an integral institution on police accountability in South Africa and exercises this function on the Minister of Police and SAPS.<sup>240</sup> The PCoP's method of operation is based on the principle of "inquisitorial oversight through accountability."<sup>241</sup> The methods used include monitoring police stations, engaging a broad range of partners in civil society and academia to receive evidence on the experiences and perceptions of the police before engaging SAPS and other entities in the committee's hearings on the budget, annual reports and strategic plans.<sup>242</sup> The PCoP's oversight functions broadly include political, administrative, financial, ethical, legal and strategic elements and are aimed at detecting and preventing arbitrary behaviour on the part of government and public agencies, to hold government to account for public finances, ensure that policies announced by government and authorised by Parliament are actually delivered.<sup>243</sup>

The PCoP's accountability functions include the object of enhancing the integrity of public governance to safeguard government against corruption, nepotism, abuse of power. It also seeks to improve performance and to assure public confidence in government through transparency, responsiveness, and answerability and to enable

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<sup>239</sup> 2019 IPID SOPs, Procedure 5.25 (Definitions).

<sup>240</sup> The Portfolio Committee on Police (PCoP) has a broad portfolio that also includes oversight on the Minister of Police, the Civilian Secretariat for Police Service, the National Forensic Oversight and Ethics Board (DNA Board) and the office of the Directorate for Priority Crime Investigation Judge.

<sup>241</sup> Portfolio Committee on Police. 2018. Report of the Portfolio Committee on Police on its activities undertaken during the 5th Parliament (May 2014 – November 2018). <https://pmg.org.za/taled-committee-report/3643/>.

<sup>242</sup> Portfolio Committee on Police, Report of the Portfolio Committee on 5<sup>th</sup> Parliament Activities.

<sup>243</sup> Parliament of the Republic of South Africa. (n.d.). *Oversight*. <https://www.parliament.gov.za/oversight>.

the public to judge the performance of the government by the government giving account to the public.

The PCoP also plays an oversight role on the Civilian Secretariat for Police Service (CSPS). The CSPS serves as technical advisor to the Minister of Police and its advisory functions include, among other things, ministerial policy and strategy, legislation, and police performance through conducting audits, communication, and community mobilisation on crime prevention. At a strategic level, the CSPS works collaboratively to conduct quality assessment of the SAPS and monitoring and evaluation of the performance of the police service and make recommendations for corrective measures.<sup>244</sup> The Civilian Secretariat for Policing also works to translate recommendations from external police oversight bodies such as IPID and commissions of inquiry into policy.<sup>245</sup> Therefore, the CSPS plays a significant role in translating policy into practice for both SAPS and IPID.

### 3.3 Other Laws Relevant to Potential Use of BWCs

The laws outlined in the preceding sections focus on the norms, standards and principles guiding the use of force by law enforcement officials. However, the use of body-worn cameras can potentially cause harm on the rights to privacy and other related rights such as freedom of assembly. In turn, it can be foreseen that if States uphold the right to privacy and restrict the use of BWCs, it could potentially affect the success or failure of BWC programmes. As highlighted in section 3.1.1, international law identifies four elements of the right to privacy that States are obliged to respect and protect namely, search of house and property, personal and bodily search, surveillance, and personal information. The sections below focus on the laws that are unrelated to the physical use of force but that affect the right to privacy.

#### 3.3.1 Criminal Procedure Act (Act No. 51 of 1977) (CPA)

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<sup>244</sup> Refer to Civilian Secretariat for Police Service Act, 2011., ss. 6(1) and 6 (2) (b) (i).

<sup>245</sup> See for example Parliamentary Portfolio Committee on Police. 2015. Minister of Police on Farlam Commission Recommendations implementation; Civilian Secretariat for Police & IPID 1st Quarter 2015/16 performance. Cape Town, Western Cape, September 2. <https://pmg.org.za/committee-meeting/21452/>.

SAPS officers have search and seizure powers, but such powers cannot be used arbitrarily. Chapter II of the Criminal Procedure Act shows that South Africa relies on a combination of a warrant-based system and warrantless officer discretionary powers but within the bounds of the law, policies and regulations which includes some form of oversight to avoid arbitrary violations of this right. Section 21 of the CPA provides that any article “shall be seized only by virtue of a warrant” issued by either a magistrate or judge based on information under oath that there are reasonable grounds for believing that any such article is in the possession or control of an individual or at any premises, or that such as article can be used as evidence in court proceedings.<sup>246</sup>

South African law also provides for a warrantless search where under two conditions. The first when the person gives consent to being searched or consent to the search the container or premises and the seizure of the article in question.<sup>247</sup> The second is when the officer is confident that a search warrant will be issued to her/him if she/he applies for it and that any delay in obtaining a warrant would defeat the object of the search.<sup>248</sup> The SAPS guidelines also prioritise the importance of protecting of children’s privacy. According to *National Instruction 2 of 2010: Children in Conflict with the Law* of 2010, a police officer must take steps to protect the privacy and dignity of the child and must ensure that discussions with the child and his or her parent or guardian take place in private and out of sight and hearing of other people.<sup>249</sup>

The presence of police BWCs to collect, record and store personal information in search and seizure operations brings an additional and more pervasive dimension to the invasion of privacy. This is particularly true when law enforcement officials undertake home and personal bodily searches and potentially wrongful interference with privacy rights of children in which the expectation of privacy is high under common law. It also applies in cases of surveillance and the requirement of protecting personal information which are also significant in a highly computerised and digitised internet age. Common law and the South African Constitution provide a basis for justifiable law

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<sup>246</sup> The Criminal Procedure Act 51 of 1977, s. 21.

<sup>247</sup> The Criminal Procedure Act 51 of 1977, s 22(a).

<sup>248</sup> The Criminal Procedure Act 51 of 1977, s 22(b)(i) and (ii).

<sup>249</sup> National Instruction 2 of 2010: Children in Conflict with the Law (GN 759 in GG 33508 of 2 September 2010), s 3 (2) (e).



enforcement interference with this right but the use of BWCs may require the augmentation of the warrant-based system to include considerations for the use of BWCs during search and seizure operations by law enforcement officials.

### 3.3.2 Protection of Personal Information Act 4 of 2013

Although there is no direct reference to personal information in South Africa's constitution, the Protection of Personal Information Act 4 of 2013 is the principal legislation regarding the protection of informational privacy. The POPI Act broadens the definition of the right to privacy to include "protection against unlawful collection, retention, dissemination and use of personal information."<sup>250</sup> The purpose of the POPI Act, among other things, is to promote the protection of personal information processed by public and private bodies and to introduce certain conditions so as to establish minimum requirements for processing personal information.

Under the POPI Act "personal information" is defined as "information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person."<sup>251</sup> This entails that the information collected through police BWCs is personal information. Any law enforcement agency that collects and stores such information is designated as a "responsible party"<sup>252</sup> and should comply the eight conditions for the lawful processing of personal information as outlined in Chapter 3, of POPI Act. Although formulated slightly differently, these conditions are consistent with both the OECD Guidelines with but with additional insights from other jurisdictions.<sup>253</sup> The first condition is that responsible parties must with all measures and conditions required for the lawful processing of information "at the time of the determination of the purpose and means of processing and during the processing itself."<sup>254</sup>

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<sup>250</sup> See POPI Act, Preamble.

<sup>251</sup> Refer to Chapter 1: Definitions of POPI Act for the full definition.

<sup>252</sup> The POPI Act defines responsible party as "a public or private body or any other person which, alone or in conjunction with others, determines the purpose of, and means for processing personal information."

<sup>253</sup> Refer to South African Law Reform Commission. 2005. "Discussion Paper 109: Privacy and Data Protection." <https://www.justice.gov.za/salrc/dpapers/dp109.pdf>.

<https://www.justice.gov.za/salrc/dpapers/dp109.pdf>, para. 4.2.3.

<sup>254</sup> POPI Act, s 8. Under the POPI Act the data subject is defined as the person to whom the personal information relates.

The second condition is “processing limitation” which emphasises three minimal pre-conditions for the processing of personal information. The first is that personal information must be processed lawfully and must not infringe on the privacy of the data subject.<sup>255</sup> Second, that when processing personal information, only the minimum requirement for the purpose should be processed if it is adequate, relevant and not excessive.<sup>256</sup> Third, that personal information should be processed only if the data subject, or a competent person where the data subject is a child, consents to the processing and the responsible party bears the burden of proof for the data subject’s consent.<sup>257</sup> Finally, process limitation also makes it a general rule, as observed by Privacy International, that personal information must be collected directly from the data subject.<sup>258</sup>

The third condition is “purpose specification” which entails that “personal information must be collected for a specific, explicitly defined, lawful purpose related to a function or activity of the responsible party.”<sup>259</sup> There is a requirement for transparency hence the stipulation that “steps must be taken to ensure that the data subject is aware of the purpose of the collection of information.”<sup>260</sup> This condition also entails that “records of personal information must not be retained any longer than is necessary for achieving the purpose” except, among other circumstances, the retention of the record is required or authorized by law,<sup>261</sup> the consent of the data subject or for historical, statistical or research purposes.<sup>262</sup> Further, responsible party is also required “destroy or delete a record of personal information or de-identify it as soon as reasonably practicable after the responsible party is no longer authorized to retain the record”<sup>263</sup>

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<sup>255</sup> POPI Act, s 9.

<sup>256</sup> POPI Act, s 10.

<sup>257</sup> POPI Act, s 11.

<sup>258</sup> Privacy International (January 2019), State of Privacy in South Africa, retrieved on 3 October 2019) from Privacy International GB <https://privacyinternational.org/state-privacy/1010/state-privacy-south-africa>.

<sup>259</sup> POPI Act, s. 13 (1).

<sup>260</sup> POPI Act, s 13 (2).

<sup>261</sup> POPI Act, s. 14 (1) (a).

<sup>262</sup> POPI Act, s. 14 (1) (b).

<sup>263</sup> POPI Act, s. 14 (4).

and such destruction or deletion must be done in such “a manner that prevents its reconstruction in an intelligible form.”<sup>264</sup>

The fourth condition is the “further processing limitation” which provides that “further processing of personal information must be in accordance or compatible with the purpose for which it was collected.”<sup>265</sup> The section also outlines how the responsible party may assess whether or not further processing is compatible with the purpose for which the personal information was collected.

The fifth condition focuses on “information quality.” This obliges the responsible party to “take reasonable, practicable steps to ensure that personal information is complete, accurate, not misleading and updated where necessary.”<sup>266</sup>

The sixth condition is “openness,” and it requires the responsible party to “maintain documentation of all processing operations under its responsibility” under the POPI Act. This includes ensuring that the data subject is made aware that their personal information is being collected, why it is being collected, by whom, for what purposes, under what law and whether the responsible party intends to transfer the information to a third party including the right by the data subject to access and rectify information collected or object to the collection or processing of the information.<sup>267</sup>

The seventh condition focuses on “security safeguards” and it requires the responsible party “secure the integrity and confidentiality of the personal information in its possession or under its control by taking appropriate, reasonable technical and organizational measures to prevent the loss of, damage to or unauthorised destruction of information, and unlawful access to or possession of personal information.”<sup>268</sup> Other measures for guaranteeing the integrity and security of personal information include processing personal information only when authorized by the responsible party; maintain the confidentiality and not disclose personal information unless if required by law; the third parties of the responsible party must maintain security measures as

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<sup>264</sup> POPI Act, s. 14 (5).

<sup>265</sup> POPI Act, s. 15 (1).

<sup>266</sup> POPI Act, s. 16 (1).

<sup>267</sup> POPI Act, s.18 (a)-(h).

<sup>268</sup> POPI Act, s. 19 (a) & (b).

prescribed under POPI Act and proactively notify the responsible party when there is reason to believe that the security measures have been compromised; and to notify the Information Regulator and the affected data subjects of any security compromises as soon as is reasonably possible.

Finally, the eighth condition relates to “data subject participation” and together with the “openness,” this is arguably. the transparency clause of POPI Act. The data subject has the right to confirm if the responsible party holds information about the data subject and to request, and at a nominal fee, within a reasonable format and time frame, the record itself.<sup>269</sup> It also empowers the data subject to request the responsible party to delete or correct personal information about the data subject in its possession if it is inaccurate, irrelevant, out of date, incomplete, misleading or obtained unlawfully or, if personal information is retained beyond a time that is lawfully permitted.<sup>270</sup>

To ensure accountability, the POPI Act establishes the Officer of the Information Regulator to administer the Act and this office has a promotional and protective mandate. Overall, the Information Regulator’s role is to monitor and enforce compliance by public and private bodies with the provisions of the Act.<sup>271</sup> Among other things, this includes receiving and investigating complaints about alleged violations of the protection of personal information of data subjects and reporting to complainants in respect of such complaints and resolving such disputes by means of dispute resolution mechanisms such as mediation and conciliation.<sup>272</sup> The promotional mandate includes promoting awareness POPI Act and its purposes and working collaboratively with members of the public, public and private bodies to create awareness and assist public and private bodies on compliance issues.<sup>273</sup>

From the foregoing analysis, the South African legal framework on the right to privacy is sufficiently robust enough to regulate the use of BWCs by law enforcement. SAPS officials cited the Regulation of Interception of Communications and Provision of

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<sup>269</sup> POPI Act, s. 23 (2).

<sup>270</sup> POPI Act, s. 24.

<sup>271</sup> POPI Act, s. 40 (1)

<sup>272</sup> POPI Act, s. 40 (d).

<sup>273</sup> POPI Act, s. 40 (d).

Communication-Related Information Act 70 of 2002 (RICA) as an impediment to the adoption of police BWCs.<sup>274</sup> RICA was ruled to be unconstitutional by the Constitutional Court of South Africa and although the law was focused more on covert surveillance of communications practices by the state, the ruling reinforced international standards relating to the processing of information that equally apply to the processing of personal information in overt surveillance by any information processor. The Constitutional Court invalidated sections 35 and 37 of RICA because the law failed to prescribe proper procedures to be followed when state officials examine, copy, share, sort through, use, destroy and/or destroy data obtained from interceptions.<sup>275</sup> As can be observed from the POPI Act's eight minimum conditions for the lawful processing of personal information discussed above, they encapsulate the principles of legality, necessity, and proportionality as well as clear standards for protecting informational privacy. However, the SAPS have been reticent to roll out police BWCs.

Legality would entail that all types of mass State surveillance-related activities, including through BWCs must be conducted on the basis of a "publicly accessible domestic legal frameworks that are compatible with international standards and subject to scrutiny by the courts."<sup>276</sup> The legal framework must "sufficiently precise"<sup>277</sup> in which "vague and overbroad"<sup>278</sup> justifications such as "national security" do not justify violating the right to privacy. Legality not only ensures that interference is not arbitrary, but that it is also significant for the practical reason that it determines the admissibility of video evidence in the courts, conciliation or disciplinary meetings which heavily rely on the legal rules regarding its collection, storage, and usage.

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<sup>274</sup> SAPS (Technical Management Services). 2018. "Digital Policing and Specific Projects." <https://pmg.org.za>. May 23. Accessed October 23, 2019.

[https://pmg.org.za/files/180523TMS\\_Digital\\_Policing\\_Projects.pdf](https://pmg.org.za/files/180523TMS_Digital_Policing_Projects.pdf), Slide 31.

<sup>275</sup> *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others (CCT 278 of 2019) [2021] ZACC 3 (04 February 2020)*, para 168.

<sup>276</sup> UN HRCtee, General Comment No. 37, para 61. Also refer to OHCHR, *The Right to privacy in the digital age*, para. 34.

<sup>277</sup> OHCHR, *The Right to privacy in the digital age*, para. 35.

<sup>278</sup> OHCHR, *The Right to privacy in the digital age*, para. 35.

Proportionality would entail taking consideration that, ordinarily, filming everyday life encounters between police and citizens using BWCs would be unjustified when there is no need. Therefore, BWC usage should happen when there is a pressing social need for which there is a reasonable expectation that that need will be resolved by capturing video images of the police-public encounters. This provides a safeguard for unreasonable and unwarranted surveillance in violation of the fundamental right to privacy. However, this varies between countries. In most European countries and increasingly in the United States, the public is more amenable to state surveillance than in other jurisdictions.

Further, where a warrant is not required, surveillance is limited by the subject of the requirement of notice for overt surveillance.<sup>279</sup> However, legislation has generally lagged behind technology resulting in police departments in law enforcement jurisdictions such as the United States and the United Kingdom where BWCs were pioneered, taking the lead in passing policies to address how to balance the need for surveillance and the protection of the fundamental right to privacy.<sup>280</sup>

### 3.3.3 The Promotion of Access to Information Act, 2000

The Promotion of Access to Information Act of 2000 (PIAIA) gives effect to Section 32(1)(a) of the South African Constitution which gives citizens the right to right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights.<sup>281</sup> If the SAPS deploy BWCs, they will need a policy that that enables data subjects or members of the public who are recorded to access the video footage in order to exercise or protect their rights.

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<sup>279</sup> UNODC (2009) *Current Practices in Electronic Surveillance in the investigation of Serious and Organised Crime*. United Nations. Vienna. [https://www.unodc.org/documents/organized-crime/Law-Enforcement/Electronic\\_surveillance.pdf](https://www.unodc.org/documents/organized-crime/Law-Enforcement/Electronic_surveillance.pdf), p. 14.

<sup>280</sup> Fan, Mary D. 2017. "Justice Visualised: Courts and the Body Worn Camera Revolution." *UC Davis Law Review* 50 (3): 897-959. [https://lawreview.law.ucdavis.edu/issues/50/3/Articles/50-3\\_Fan.pdf](https://lawreview.law.ucdavis.edu/issues/50/3/Articles/50-3_Fan.pdf), p. 936.

<sup>281</sup> The Promotion of Access to Information Act, 2000 (PAIA) is administered by the Information Regulator of the POPI Act.

The PAIA provides for the administrative mechanisms for accessing such information which complements the administration of the POPI Act. Section 11 grants the right of access to records of public bodies, subject to compliance with all the procedural requirements of the Act relating to a request for access to that record. The PAIA also provides for Information Officers and Deputy Information officers to facilitate requests for access to information which is a requirement under the POPI Act for public and private bodies to be considered compliant with the lawful processing of personal information.<sup>282</sup>

Thus, read together with the POPI Act, the PAIA facilitates public access to personal records to allow data subjects recourse when they feel their right to privacy is violated. South African legislation regarding protection of personal information meets the standards set under international law and would facilitate the lawful use of BWCs by South African law enforcement.

### 3.3.4 The Electronic Communications and Transactions Act 25, 2002

As observed in the preceding chapter, one of the potential advantages of BWCs is the evidential value of the footage from the technology. However, there are rules of evidence in court trials police misconduct hearings. In South Africa, the admissibility of electronic evidence is governed by the Electronic Communications and Transactions Act 25, 2002 provides for the admissibility and evidential weight of a data message as electronic evidence during legal proceedings. Section 15(3) of the ECT Act states that “In assessing the evidential weight of a data message, regard must be had to-

- (a) the reliability of the manner in which the data message was generated, stored, or communicated.
- (b) the reliability of the manner in which the integrity of the data message was maintained.
- (c) the manner in which its originator was identified; and
- (d) any other relevant factor.

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<sup>282</sup> Refer PAIA, s.17.



Section 16(1) prescribes the standards for the retention of information when required under the law. That requirement is met by retaining such information in the form of a data message if “the information contained in the data message is accessible so as to be usable for subsequent reference;<sup>283</sup> the data message is in the format in which it was generated, sent or received, or in a format which can be demonstrated to represent accurately the information generated, sent or received;<sup>284</sup> and the origin and destination of that data message and the date and time it was sent or received can be determined.”<sup>285</sup>

The recording, storage, and retention of BWC video footage will need to meet these requirements. However, the POPI Act seems to encapsulate these requirements in terms of ensuring the integrity and authenticity of information recorded. Policies regarding the recording and storage of BWC footage must not allow for tampering, editing, or altering of the original footage in any way.

### 3.4 Conclusion

This chapter provided an assessment of the legal context of policing in South Africa. The chapter assessed South African laws governing the police powers against the standards set under international human rights law and customary international law. For each of the rights that are likely to be interfered in the day-to-day exercise of policing, such interference should be based on the principles of legality, necessity, proportionality, precaution, and accountability.

In other words, police actions should be justified by law and such law must be consistent with the International Covenant on Civil and Political Rights; that any interference must be necessary in a democratic society to solve a pressing social need; that where such interference is lawful, it must be proportional to the circumstances and the objective to be attained; that where the law enforcement official have reasonable expectation of violent confrontation, that they must put in place precautions to mitigate violence and finally that, where there have been allegations of,

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<sup>283</sup> Electronic Communications and Transactions Act 25, 2002, s. 16 (1) (a).

<sup>284</sup> Electronic Communications and Transactions Act 25, 2002, s. 16 (1) (a).

<sup>285</sup> Electronic Communications and Transactions Act 25, 2002, s. 16 (1) (a).

or an actual violation of human right(s), the state must institute a prompt, impartial and independent investigation and hold any perpetrators accountable. Accountability would also include effective remedies to those affected by such violations including their families and relatives and a failure to hold those responsible accountable amounts to the violation of the right in question.

The South African Constitution guarantees the rights outlined under international law. The legal protections of the right to privacy, in particular informational privacy, meet the minimum standards set under international law and would be comparable to leading regional blocs such as the European Union who have pioneered the crafting of informational privacy legislation. This is particularly relevant for the deployment of BWC by the South African law enforcement and it facilitates issues such as the consent of data subjects, the right to access to personal information held by SAPS or any other public body, the right, for legitimate reasons, to request the correction or deletion of personal information held by SAPS.

Notably, South African laws dealing with police use of force which include the Criminal Procedure Act of 1977; the Correctional Services Act of 1998, and the Gatherings Act of 1993 do not currently meet international and regional standards on the use of force and require revision. Although the proposed amendments promise to be a huge improvement on the current status of these laws and policies as discussed above, some of the proposed amendments require change. In particular, the framing of (RGA) Section 9(2A) (c) of the RGA which makes it unlawful “to use deadly force to protect property only” needs adjustment to ensure that it is in line with international law which prohibit taking a life to protect property. That clause should just prohibit using deadly force to protect property.

Apart from a progressive legislative framework governing law enforcement, this chapter also shows that South Africa has a robust accountability architecture which includes internal and external oversight structure and a review mechanism for assessing and evaluating law enforcement performance and turning lessons learned into law enforcement policy and practice. However, the first three chapters illustrate some discord between the aspirational norms and values of South African law

enforcement and the outcomes of policing. It is a context in which practice lags aspirations and expectation of law enforcement practice, and this constitutes the context in which BWCs are seen as having the potential to improve police accountability or effectiveness. Having reviewed how they have been evaluated; it is now worth assessing the proposed theories of change in relation to accountability.

## Chapter 4: BWCs in Theory and Practice: Potential Impacts in a South African Context

This chapter provides an overview of the literature on current debates on technology and policing, specifically, the relationship between BWCs more effective or accountable policing. The review is done by providing a critical analysis of the value proposition of BWCs as a potentially effective tool to address a wide range of policing outcomes, including the theorisation that BWCs can enhance police accountability for unlawful use of force by the police which is the focus of this thesis.

### 4.1 Overview of literature

Scholarship on technological adoption by law enforcement agencies points to the fact that although technology provides new promising tools for police officers, it does not automatically increase the effectiveness and efficiency of police work or lead to improved crime control.<sup>1</sup> The scholars also state that the impact of technology on various law enforcement outcomes is not self-evident, is often complex and sometimes contradictory, and, as stated in Chapter 1, has not yet been sufficiently and systematically studied.<sup>2</sup>

In part, the complexities of evaluating the impact of technology in policing can be found in non-technological factors that acknowledge that technology's impact is more dynamic than linear. Just as technology can impact police work, so too can the technology be impacted by law enforcement agencies and their agents. According to Koper *et al.*, the impact of technology may be limited or offset by many factors, such

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<sup>1</sup> Koper, Christopher S., Cynthia Lum, James J. Willis, Daniel Woods, and Julie Hibdon. 2015. Realising the Potential of technology in Policing: A multisite study of the Social, Organisational, and Behavioural Aspects of implementing Policing Technologies. National Institute of Justice. Also refer to Lum, Cynthia, Christopher S. Koper, and James Willis. 2017. "Understanding the limits of Technology's Impact on Police Effectiveness." *Police Quarterly* 20 (2).

<sup>2</sup> Ernst, Sander, Hanneke ter Veen, and Nicolien Kop. 2021. "Technological innovation in a police organization: Lessons learned from the National Police of the Netherlands." *Policing* 15 (3): p. 1819.

as the technical features of BWCs.<sup>3</sup> They argue that a better understanding of how technology and various organisational aspects of policing interact is needed.

Researchers have also found that the police generally resist tools that seek to hold them accountable.<sup>4</sup> Such resistance can include pushing back on the implementation policies or technologies that seek to hold them accountable. For example, the use of automated vehicle locators to ensure police officer accountability by keeping them in hotspots was inhibited by police unions in the US, who felt that police supervisors wanted to micromanage police officers.<sup>5</sup>

Scholars also argue that one of the factors that could hinder the success of BWC programmes is officer perception of organisational justice, which incorporates elements of distributive and procedural justice within their organisations.<sup>6</sup> Organisational justice refers to employee perceptions of fairness in the workplace. In contrast, distributive justice reflects the perceptions regarding the fairness of outcomes. In contrast, procedural justice reflects on perceptions of processes that lead to these outcomes.<sup>7</sup> In other words, police officers, like ordinary individuals, expect procedural justice when there are allegations against them.

For example, while police officers recognise the potential for BWC to reduce frivolous complaints, a large number of officers could take a dim view of BWC usage as a sign of a lack of trust in their work<sup>8</sup> and fear that administrators and supervisors will use BWC footage to punish them for minor infractions.<sup>9</sup> Investigations of police misconduct can cause so much anxiety among the rank and file police officers, including mental,

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<sup>3</sup> Koper *et al.*, Realising the Potential of technology in Policing, p. 27.

<sup>4</sup> Koper *et al.*, Realising the Potential of technology in Policing, p. 29. Also see Cubukcu, Suat, Nusret M. Sahin, Erdal Tekin, and Volkan Topalli. 2021. "Body-Worn Cameras and Adjudication of Citizen Complaints of Police Misconduct." *National Bureau of Economic Research*. July. Accessed May 17, 2022. <https://www.nber.org/papers/w29019>., p. 5.

<sup>5</sup> Koper *et al.*, Realising the Potential of technology in Policing, p. 29.

<sup>6</sup> Huff, Jessica, Charles M. Katz, Vincent J. Webb, and E. C. Hedberg. 2020. "Attitudinal Changes Toward Body-Worn Cameras: Perceptions of Cameras, Organisational justice, and Procedural Justice Among Volunteer and Mandated Officers." *Police Quarterly* 0 (0), p. 8.

<sup>7</sup> Huff *et al.*, Attitudinal Changes Toward Body-Worn Cameras, p. 8.

<sup>8</sup> Huff *et al.*, Attitudinal Changes Toward Body-Worn Cameras, p. 9.

<sup>9</sup> Huff *et al.*, Attitudinal Changes Toward Body-Worn Cameras, p. 12. Also refer to Perkins, Grainne. 2017. "Lights, Camera, Action! Body-worn Camera: challenges and opportunities in police research." *Policing* 1-5, p. 2.

physical and financial consequences, particularly if the officers are suspended for long periods and, if found guilty, demoted to lower ranks or worse, dismissed from the service.<sup>10</sup> Thus, scholars argue that officer buy-in is critical to such reform efforts, and officer perceptions about organisational fairness could influence the success or failure of a BWC programme.<sup>11</sup>

As Tanner and Meyer observe, this conflict of rationalities between the intended outcomes of introducing innovative technology and the effects of their implementation or use by police officers results in unintended consequences in the form of police officers either welcoming, protesting or neutralising the technology by working around it or diverting it depending on how officers understand how the new technology interacts with their daily routines.<sup>12</sup>

Although the discussion in the preceding section suggests that police agencies have been averse to evidence-based policy choices when innovating, BWCs have attracted much attention from academics and police practitioners. There is a burgeoning body of academic literature, most of which are evaluations of the impact of BWCs and mainly originating from northern countries. As of September 2013, there had been a mere five evaluations of BWCs<sup>13</sup> However, by June 2018, that number had increased to over 70 published or publicly available evaluations containing over 110 sub-studies examining various outcomes or aspects of BWCs.<sup>14</sup> A comprehensive global narrative

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<sup>10</sup> See *Police* (December 2019-January 2020). <https://www.polfed.org/news-media-campaigns/police-mag/>; Independent Police Investigative Directorate (IPID), Annual Reports at <http://www.ipid.gov.za/node/12>; and the Independent Office for Police Conduct (IOPC), Our investigations at <https://policeconduct.gov.uk/investigations/our-investigations> for sanctions against police officers.

<sup>11</sup> Huff *et al.*, Attitudinal Changes Toward Body-Worn Cameras, p. 3; Also refer to *Associated Press* (2016, September 6), Boston police union goes to court after officers' resistance to wearing body-worn cameras. <https://www.police1.com/police-products/body-cameras/articles/boston-police-union-goes-to-court-after-officers-resistance-to-wearing-body-worn-cameras-y8IF7jdjX4hCyNW2/>.

<sup>12</sup> Tanner and Meyer, *Police work and the new 'security devices'*, p. 385.

<sup>13</sup> White, Michael. D. 2014. *Police Officer Body-worn cameras: Assessing the evidence*. Washington DC: Office of Community Oriented Policing Services. Retrieved August 24, 2018, from

[https://www.ojpdagnosticcenter.org/sites/default/files/spotlight/download/Police\\_Officer\\_Body-Worn\\_Cameras.pdf](https://www.ojpdagnosticcenter.org/sites/default/files/spotlight/download/Police_Officer_Body-Worn_Cameras.pdf)

<sup>14</sup> Lum *et al.*, *Research on Body-worn Cameras*, p. 98.

review of (English-language) literature on BWCs<sup>15</sup> and a systematic review of BWC effects on police and citizen behaviour<sup>16</sup> conducted by Lum *et al.* provides a good entry point to an analysis of this literature in terms of the breadth of questions asked, the research indicators and outcomes. Two more recent developments merit attention. These are Williams *et al.*'s paper on the benefits and costs of BWCs<sup>17</sup> and Barbosa *et al.*'s paper on BWC impact on citizen-police interactions.<sup>18</sup> The literature review focuses on the range of outcomes that previous research has concentrated on, an analysis of the questions the researchers sought to answer, the evaluation approaches used, and the research outcomes.

Lum *et al.* identified at least six outcomes against which BWC effects have been investigated through this research, and these were: 1) impact of BWCs on officer behaviour, 2) officer attitudes about BWCs, 3) impact of BWCs on citizen behaviour, 4) citizen and community attitudes about BWCs, 5) the impact of BWCs on criminal investigations, and 6) the impact of BWCs on law enforcement agencies.<sup>19</sup> Figure 5<sup>20</sup> below illustrates the frequency with which researchers focused on each outcome

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<sup>15</sup> Lum *et al.*, Research on Body-worn Cameras, p. 98.

<sup>16</sup> Lum, Cynthia, Christopher S. Koper, David B. Wilson, Megan Stoltz, Michael Goodier, Elizabeth Eggings, Angela Higginson, and Lorraine Mazerolle. 2020. "Body-worn cameras' effects on police officers and citizen behaviour: A systematic review." *Campbell Systematic Reviews* 16 (3): 1-40.

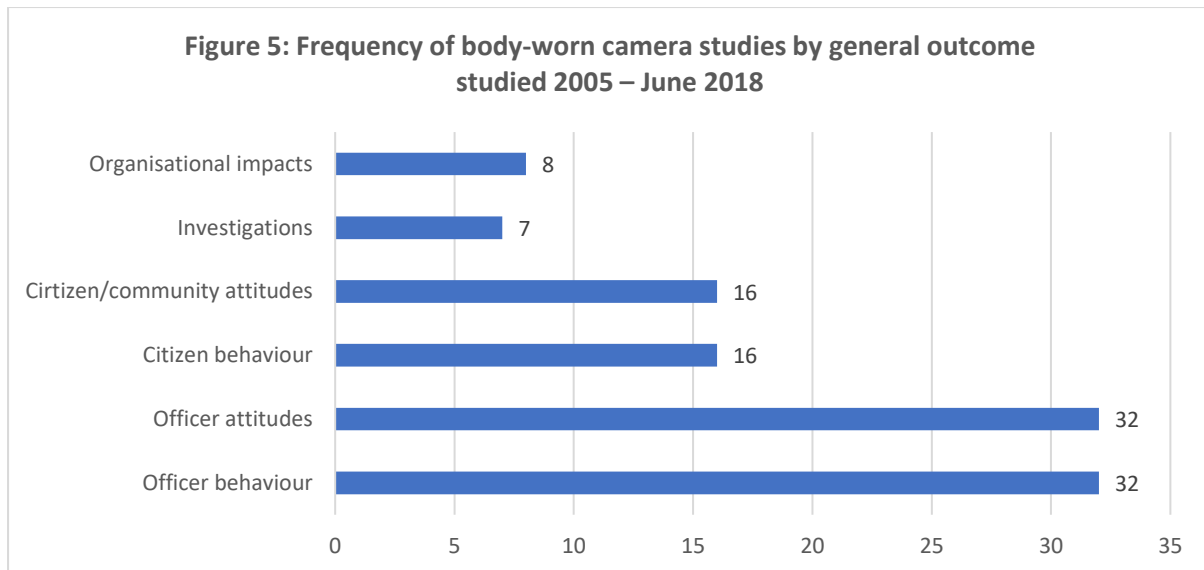
<sup>17</sup> Williams Jr, Morgan C, Nathan Weil, Elizabeth Rasich, Jens Ludwig, Hye Chang, and Sophia Egrari. 2021. *Body-Worn Cameras in Policing: Benefits and Costs*. Chicago: University of Chicago Crime Lab. [https://www.documentcloud.org/documents/20533586-cl\\_bwc-study](https://www.documentcloud.org/documents/20533586-cl_bwc-study).

<sup>18</sup> Barbosa, Daniel AC, Thiemo Fetzer, Caterina Soto, and Pedro CL Souza. 2021. "De-escalation Technology: The Impact of Body-worn Cameras on Citizen-police Interactions." Vers. Warwick economics research papers series (WERPS) (1371). *University of Warwick*. September. <http://wrap.warwick.ac.uk/158499/>.

<sup>19</sup> Lum, C., Stoltz, M., Koper, C. S., & Scherer, J. A. (2019). Research on body-worn cameras: What we Know and What we Need to Know. *Criminology and Public Policy*, 18(1), p. 97.

<sup>20</sup> Adapted from Lum *et al.*, Research on Body-worn Cameras, p. 97.





Notably, although police accountability was one of the main motivations for adopting BWCs, certainly in the US, it is curious that after almost 17 years of research, there has been limited direct focus on the direct impact of BWCs on police accountability, with the exception two studies published after Lum, and her colleagues had finalised their evaluations.

Much of the research focus of the literature on the impact of BWCs on policing has been driven by behavioural science researchers focusing on the effects of BWCs on public perception of policing and the behaviour of both the police and members of the public to measure police legitimacy. That literature is driven by two main theories - deterrence theory from criminology and “self-awareness” theory from behavioural psychology.<sup>21</sup> The deterrence theory hypothesises that the perceived likelihood of apprehension increases with police use of BWCs, as misconduct caught on camera is more likely to lead to adverse consequences for the officer who breaks the rules.<sup>22</sup>

<sup>21</sup> For a detailed description of the two theories refer to Ariel, Barak, Alex Sutherland, Darren Henstock, Josh Young, Paul Drover, Jayne Sykes, Simon Megicks, and Ryan Henderson. 2017. “Contagious Accountability”: A Global Multisite Randomized Controlled Trial on the Effect of Police Body-Worn Cameras on Citizens’ Complaints: A Global Multisite Randomized Controlled Trial on the Effect of Police Body-Worn Cameras on Citizens’ Complaints .” *Criminal Justice and Behavior* 44 (2), p. 297.

<sup>22</sup> Ariel, Barak, Renée J. Mitchell, Justice Tankebe, Maria Emilia Firpo, Ricardo Fraiman, and Jordan M. Hyatt. 2020. “Using Wearable Technology to Increase Police Legitimacy in Uruguay: The Case of Body-Worn Cameras. Law and Social Inquiry-.” *Journal of the American Bar Foundation* 45 (1), p. 58.

Therefore, using BWCs elevates the probability of a sanction threat, which corresponds to officer preferences toward compliance.<sup>23</sup>

The theory of “self-awareness” carries the same basic tenets but from a psychological approach. In short, the theory postulates that people adhere to social norms and change their conduct when they know they are being watched.<sup>24</sup> Translated to law enforcement, the presence of BWCs during police-citizen encounters is perceived to provide a cue for police officer self-awareness, and the knowledge by the police officers that their actions were being recorded which “ignites a cognitive and emotional process that alters our actions.”<sup>25</sup> Thus, BWCs were postulated to have behaviour modifying effect in the presence of which, officers were caused to act according their prescribed code of conduct, exhibit a professional approach, demonstrate fairness, show dignity and respect, and use proportional force, and only when necessary.<sup>26</sup>

As can be deciphered from the general themes shown in Figure 5 above, this thesis found that evaluations the existing evaluations of BWCs (mainly in the US and the UK) have tended to overleap the direct impacts of BWCs on police accountability and effectiveness and, instead, they evaluated the indirect impacts of BWCs (such as on the propensity of officers or members of the public to engage in violence during an encounter, or the frequency of public complaints).

Another feature of this literature is its focus on the impact of BWCs on behavioural change (reduced violent confrontation in police-public encounters) due to the presence of BWCs. In that respect, the focus was on whether police use of BWCs could cause the police and members of the public to refrain from using force during police-public encounters, which would reduce the resort to the use of force by the police.

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<sup>23</sup> Ibid.

<sup>24</sup> See Ariel, B., Farrar, W. A., & Sutherland, A. 2015. The effect of police body-worn cameras on use of force and citizens' complaints against the police: A randomized controlled trial. *Journal of Quantitative Criminology*, 31(3), p. 511; Also see Ariel *et al.*, *Contagious Accountability*, p. 297.

<sup>25</sup> Ariel, Barak *et al.*, "Using Wearable Technology to Increase Police Legitimacy in Uruguay, p. 58.

<sup>26</sup> Ariel *et al.*, *The Effect of Police Body-Worn Cameras*.

However, from the standpoint of international human rights law and an interest in designing an accountability mechanism, this was inadequate. This stems from the fact that the behavioural change approach did not deal with how BWCs could be used where there is an allegation or suspicion that a violation has been committed. As indicated in Chapter 3, current literature does not deal with how BWCs can enhance the protection of the more procedural element of human rights, which requires proper investigation and accountability where there is reason to believe a violation of a human right has occurred or allegations of a violation have been made.

#### 4.2 Critical analysis of BWC value-proposition in enhancing police accountability.

This section focuses on analysing hypotheses related to BWCs' perceived ability to prevent violence and, where violence has occurred, the technology's perceived value in restoring the violated norms and relations between the police and the communities they serve. The chapter examines five hypotheses on the impact of BWCs on aspects of accountability and police effectiveness with a view to test the strength of the theoretical assumptions associated with the hypotheses. The hypotheses are as follows: 1) BWCs can increase the transparency and legitimacy of the police, 2) BWCs can reduce police use of force, 3) BWCs increase the likelihood that victims and/witnesses are emboldened to report questionable conduct by the police, 4) BWCs increase the availability of evidence to resolve complaints, and 5) BWCs increase public understanding of investigations, acceptance of outcomes and restoration or norms. For each hypothesis, the law enforcement challenge or opportunity associated with police adoption of BWCs is identified followed by a description of the theory of change and then an analysis of factors that might counteract or limit the hypothesised impact of the technology and an analysis of the research that has been undertaken about each hypothesis.

The analysis predominantly derives from a Northern evidence base, in particular the United Kingdom and the United States of America (US). While some of the theories and outcomes of research may not be transferrable, they provide insights into some of the opportunities and challenges of using BWC technology that can inform the utility of BWC technology in different contexts. The focus on BWC developments in the two

countries is because the technology has diffused more rapidly and has the most extensive usage in the two countries than in any other context. According to the Police Federation of England and Wales, all police forces in the United Kingdom have rolled out BWCs to their police officers.<sup>27</sup> In the US, the most recent statistics in the US show that by 2016, 60% of local police departments and 47% of sheriff's offices had fully deployed BWCs.<sup>28</sup>

### 4.3 The relationship between BWCs, transparency and legitimacy in policing

#### 4.3.1 Erosion of public trust and legitimacy crisis

As street-level bureaucrats, law enforcement officials are widely recognised as the "most visible manifestation of state authority by virtue of their regular day-to-day interaction with members of the public and their control over the legitimate use of force in their actions to serve the well-being of individuals and communities".<sup>29</sup> By implication therefore, their actions are a yardstick by which members of the public measure authority and their legitimacy (or illegitimacy) can be a proxy of other forms of state legitimacy impacting on public trust in broader levels of government including the criminal justice systems to which they belong and the governments they represent.<sup>30</sup>

As discussed in Chapter 2, police legitimacy is the product of how law enforcement officials treat the people they police and in which members of the public who interact with police officers expect to be allowed to participate in being policed, where police

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<sup>27</sup> Police Federation of England and Wales. n.d. *Body-worn Video*. <https://www.polfed.org/our-work/operational-policing/body-worn-video/#:~:text=In%20a%20survey%20of%20our,force%20in%20England%20and%20Wales.>

<sup>28</sup> Hyland, Shelley. 2018. *Body-Worn Cameras In Law Enforcement Agencies, 2016*. November 16. <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6426>.

<sup>29</sup> Caparini, Marina, and Juneseo Hwang. 2019. *Police Reform in Northern Ireland: Achievements and Future Challenges*. Stockholm, October 28. <https://www.sipri.org/commentary/topical-backgroundunder/2019/police-reform-northern-ireland-achievements-and-future-challenges>.

<sup>30</sup> Soss, Joe, and Vesla Weaver. 2017. "Police Are Our Government: Politics, Political Science, and the Policing of Race–Class Subjugated Communities." *Annual Review of Political Science* 20: 565-591, p. 574. Also refer to Williams, Hubert. 2002. "Core Factors for Police Corruption Across the World." *Forum for Crime and Safety* 2 (1), p. 85.

decisions are rooted in the law, where members of the public are treated with dignity and respect and where police officers display care and concern for their communities.

The public calls for the use of BWCs in law enforcement in the UK and US were linked to diminishing police legitimacy, and the perceived lack of transparency of police actions that have been at the heart of the crisis in policing across these countries.<sup>31</sup> The reference to diminishing transparency does not mean that before the rapid adoption of BWCs in the decade beginning 2010 the police were a beacon of transparency.

Law enforcement practices in the UK and US were perceived not to reflect procedurally just policing practices. Cases of high-profile, and sometimes patently discriminatory, officer-involved use of deadly force incidents and other questionable uses of force by law enforcement officials in low visibility situations fuelled public discontent and cemented perceptions that the police could not be trusted to hold themselves to account.<sup>32</sup> This perceived lack of accountability was heightened the fact that police increasingly faced recordings of controversial police actions made by bystanders and some of the video footage challenged accounts provided by officers thus undermining the credibility of the police and with it the legitimacy of their authority.<sup>33</sup>

The killings by police of an unarmed criminal suspect Mark Duggan in the United Kingdom (UK) in 2011,<sup>34</sup> and of Michael Brown and Eric Garner, two unarmed men in the United States (US) in 2014 and the widespread protests that followed them, were

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<sup>31</sup> "Considering Police Body Cameras." *Harvard Law Review* 128 (1728), p. 1796.

<sup>32</sup> Coudert, Fanny, Dennies Butin, and Daniel Le Metayer. 2015. "Body-worn cameras for police accountability: Opportunities and risks." *Computer Law & Security Review* (Elsevier) 31 (6), p. 749; Louis, Ermus St., Alanna Saulnier, and Kevin Walby. 2019. "Police Use of Body-Worn Cameras: Challenges of visibility, procedural justice and legitimacy." *Surveillance and Society* 17 (3/4), p. 306; Nagin, Daniel S., Robert M. Solow, and Cynthia Lum. 2015. "Deterrence, Criminal Opportunities, and Police." *Criminology*, 53(1), p. 339.

<sup>33</sup> Coudert *et al.*, Body-worn cameras for police accountability, p. 749; Primicerio, Jarod. 2017. *Police Body-worn Cameras: Is Transparency Achievable?* December 7. <https://cpoa.org/police-body-worn-cameras-transparency-achievable/>.

<sup>34</sup> Spencer, David, and Richard Cheshire. 2017. "Ten Years of Body Worn Video in Northamptonshire Police." *Policing* (Oxford University Press) 12 (1). Also see Bowling, Ben, and Shruti Iyer. 2019. "Automated policing: the case of body-worn video." *International Journal of Law in Context* 15.

but three of the many incidents which triggered the heightened, global-wide public awareness and disenchantment with lack of transparency in policing.<sup>35</sup> The loss of community trust was exacerbated by long-standing racially discriminatory police practices in police use of force which disproportionately affected black and other minority ethnic populations, thus worsening the already fractured relations with those communities in both the UK and the US. While the same disproportionate impact exists in both jurisdictions, law enforcement officials reportedly kill people far more people in the US than other police forces in similar democracies. In 2015 it was noted that the US had killed more people in the first 24 days of 2015 compared to the total number of people killed by the police in 24 years in the United Kingdom<sup>36</sup> with the burden of officer involved fatalities disproportionately affecting minority populations.<sup>37</sup>

Apart from police killings, discriminatory and corrupt police practices also negatively affected the public's perceptions of law enforcement officials. Soss and Weaver cite the example of the state of Missouri in the US, which ran a "predatory system of government in which poor and black residents were targeted, arrested, and summonsed for violations of civil ordinances, assessed prohibitive fines and fees, arrested, and subjected to jail if they failed to pay."<sup>38</sup> Similarly, in the UK the Metropolitan Police Service (MPS) statistics show that the police are more likely to use force and restraint techniques on black people.<sup>39</sup> A report by the UK Home Affairs Committee also reported disproportionate stop and search without adequate explanation or justification for the nature and scale of disparities in which blacks were

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<sup>35</sup> See list of some of the people killed by police here:

<https://interactive.aljazeera.com/aje/2020/know-their-names/index.html>.

<sup>36</sup> Latey, Jamiles. 2015. *By the numbers: US police kill more in days than other countries do in years*. Retrieved from *The Guardian*:. June 9. <https://www.theguardian.com/us-news/2015/jun/09/the-counted-police-killings-us-vs-other-countries>.

<sup>37</sup> University of Chicago Law School - Global Human Rights Clinic. 2020. "Deadly Discretion: The Failure of Police Use of Force Policies to Meet Fundamental International Human Rights Law and Standards." *Global Human Rights Clinic* 14: 1-99. <https://chicagounbound.uchicago.edu/ihrcl/14/>, p. 4.

<sup>38</sup> Soss and Weaver, *Police Are Our Government*, p. 566.

<sup>39</sup> Francis, Sam, Tarah Welsh, and Zack Adesina. 2020. *Met Police 'four times more likely' to use force on black people*. July 30. <https://www.bbc.co.uk/news/uk-england-london-53407560>.

nine times more likely than white people to be searched.<sup>40</sup> Such practices have dented the credibility and legitimacy of the police in the UK.

Efforts to investigate and prosecute the officers involved in alleged unnecessary or excessive use of force were in some cases marred by highly subjective police testimonies that left victims and witnesses with feelings of injustice.<sup>41</sup> In the UK case, the police shot suspected criminal Mark Duggan allegedly in self-defence but who was later found to have been unarmed at the time of the shooting.<sup>42</sup> In the Michael Brown case, the officer's contention that he fired six shots at Brown in self-defence were contradicted by witness statements stating that Brown was stood some distance from the police officer and posing no threat to the officer who shot him.<sup>43</sup> In both these cases, the police officers involved in the killings were not charged for their potentially criminal conduct, and this worsened the fallout between the police and those communities.

The fallout from these police practices and some of the specific incidents mentioned above led to widespread protests, including the formation of the Black Lives Matter (BLM) movement to protest the perceived discriminatory use of force and call for police reforms. In both the US and UK, these incidents catalysed public calls for police

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<sup>40</sup> Home Affairs Committee (United Kingdom). (2021, July 30). *Urgent action needed to tackle deep rooted and persistent racial disparities in policing*. Retrieved from UK Parliament: <https://committees.parliament.uk/work/347/the-macpherson-report-twentyone-years-on/news/157006/urgent-action-needed-to-tackle-deep-rooted-and-persistent-racial-disparities-in-policing/>.

<sup>41</sup> Coudert, Body-worn cameras for police accountability, p. 750.

<sup>42</sup> BBC. 2014. *Mark Duggan inquest: Family fury at lawful killing decision*. January 8. <https://www.bbc.co.uk/news/uk-england-25657949>; Coudert, Body-worn cameras for police accountability, p. 751.

<sup>43</sup> Francis *et al.*, Met Police 'four times more likely'; Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services (HMICFRS). 2021. *Disproportionate Use of Police Powers: A spotlight on stop and search and the use of force*. London: HMICFRS. <https://www.justiceinspectores.gov.uk/hmicfrs/wp-content/uploads/disproportionate-use-of-police-powers-spotlight-on-stop-search-and-use-of-force.pdf>.



officers to wear body-worn cameras<sup>44</sup> as part of reforms with a focus on restoring police legitimacy and community policing.<sup>45</sup>

Scholars such as Robertson *et al* have argued that the calls for BWCs may have been informed by what in the US is called the “CSI effect” – an unrealistic public or juror expectation about the types and extent of forensic evidence, or in the context of BWCs, video available in a case, is anticipated to influence jurors.<sup>46</sup> The CSI effect is the result of an overwhelming amount of crime television shows and explains the public’s misconceptions about the criminal justice system. For example, a survey of prosecutors and public defenders in the US found that the respondents agreed or strongly agreed that jurors favoured video testimony rather than relying on the “suspicious” testimony of the police (lack of trust) largely because of the CSI effect.<sup>47</sup>

As observed by Chuck Wexler, executive director of the Police Executive Research Forum (PERF),<sup>48</sup> the fact that both the police and the public increasingly felt the need to record every police encounter was a testament to the breakdown in relations between the police and the communities they served.<sup>49</sup> Since then, BWCs have diffused and proliferated among police agencies particularly in the US and the UK. But

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<sup>44</sup> Coudert *et al.*, Body-worn cameras for police accountability, p. 750; Mateescu, Alexandra, Alex Rosenblat, and Dana Boyd. 2016. "Dreams of Accountability, Guaranteed Surveillance: The Promises and coss of Body-Worn Cameras." *Surveillance and Society* 14 (1): 122-127. <https://ojs.library.queensu.ca/index.php/surveillance-and-society/article/view/cdebate2/bc2>, p. 124.

<sup>45</sup> President’s Task Force on 21st Century Policing. 2015. *Final Report of the President’s Task Force on 21st Century Policing*. Washington, DC: Office of Community Oriented Policing Services, p. 31; PERF. 2014. *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*. Washington DC: Office of Community Oriented Policing Services. Accessed May 22, 2018. <https://cops.usdoj.gov/RIC/Publications/cops-p296-pub.pdf>.

<sup>46</sup> Robertson, O. Nicholas, John D. McCluskey, Shakierah S. Smith, Craig D. Uchida, and Damon Mosler. n.d. *Prosecutorial and Public Defender Perceptions: Anticipated Impact of Police Body Worn Cameras on Jurors' Decision Making*. <https://www.bwctta.com/resources/commentary/view-commentary-prosecutorial-and-public-defender-perceptions-anticipated>.

<sup>47</sup> Robertson *et al.*, *Prosecutorial and Public Defender Perceptions*.

<sup>48</sup> The *Police Executive Research Forum (PERF)* is a non-profit, membership-driven *police research* and policy organization of police executives and a provider of management services, technical assistance, and *executive-level* education to support *law enforcement* agencies primarily from the largest city, county, and state law enforcement agencies in the United States.

<sup>49</sup> PERF, *Implementing a Body-Worn Camera Program*, p. v.

not everyone was convinced, with critics suggesting that this was merely exemplifying the human tendency to latch on to the most readily available solution to a complex problem in times of tragedy.<sup>50</sup> The lingering question is to explain how BWCs were envisaged to increase transparency and improve legitimacy in policing. This is discussed with in the next section.

#### **4.3.2 The perceived impact of BWC on police transparency and legitimacy**

Given the issues raised in the preceding section, it is understandable why body-worn cameras were seen to be a practical solution for police departments struggling with accusations of lack of transparency and failure to resolve civilian complaints efficiently.<sup>51</sup> It was hypothesised that the adoption of BWCs would be a signal of transparency, that is, to show the willingness by police agencies to open themselves up to external scrutiny,<sup>52</sup> and in so doing demonstrate to the community that officers aim to act in a fair and just manner when interacting with citizens which could increase police legitimacy.<sup>53</sup> Thus, by complying with public demands for outfitting police officers with BWCs it was envisaged that this would increase public trust, increase transparency and improve police legitimacy.<sup>54</sup>

Police practitioners viewed BWCs as an advance in policing that would create an instant, objective record that allows the entire community to see for themselves what happened during an encounter and that could either confirm or refute allegations of police misconduct, discrimination or abuse of power, thus allaying some of the mistrust between the police and communities.<sup>55</sup> Therefore, an implicit assumption of the theory

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<sup>50</sup> Harvard Law Review, Considering Police Body Cameras, p. 1796.

<sup>51</sup> Harvard Law Review, Considering Police Body Cameras, p. 1799.

<sup>52</sup> White, Michael D. 2014. "Police Officer Body-worn cameras: Assessing the evidence." <https://www.publicsafety.gc.ca/lbrr/archives/cnmcs-plcng/cn31934-eng.pdf>.

<sup>53</sup> White, Police Officer Body-worn cameras, p. 19; Also see Adams, I., & Mastrasci, S. (2017). Visibility is a trap: The Ethics of Police Body-Worn Cameras and Control. *Administrative Theory and Praxis*, 39(4), p. 313.

<sup>54</sup> White, Police Officer Body-worn cameras, p. 19; Adams, Iam, and Sharon Mastrasci. 2017. "Visibility is a trap: The Ethics of Police Body-Worn Cameras and Control." *Administrative Theory and Praxis* 39 (4), p. 313; PERF, *Implementing a Body-Worn Camera Program*, p. v.

<sup>55</sup> This theorisation is captured in White, Police Officer Body-worn cameras, p. 19. Also see similar conceptualisations in PERF, *Implementing a Body-Worn Camera Program*, p. 5, and The Independent Police Complaints Commission. (2016). *IPCC position statement on body worn video*. IPCC. Retrieved December 26, 2020, from

is the issue of voluntarily or upon request, ensuring public access to BWC footage, not only as it was a public record but also, in the words of a 2014 PERF report, because “doing so enables [police organisations] to demonstrate transparency and openness in their interactions with members of the community.”<sup>56</sup> This theorisation of BWCs usage in policing presents them, to a large extent, as public relations and communications management devices meant to create trust and legitimacy with communities that the police serve.<sup>57</sup>

As discussed in the second chapter, police effectiveness is dependent on public support, cooperation and participation in being policed, an approach to policing described as policing by consent.<sup>58</sup> Procedural justice, the dominant model on police legitimacy, which looks at why people cooperate with the police and obey the law, points to the fact that public cooperation with the police is enhanced by public perceptions of fair decision making and respectful treatment of people.<sup>59</sup> Thus, it was argued that by recording police activities and ensuring access to, or proactively releasing BWC footage of disputed incidents to the public or police oversight and investigative bodies and communicating more effectively to the public about ongoing investigations into allegations of police misconduct and the outcomes of such investigations,<sup>60</sup> it could improve the existing climate of distrust and in the process enhance police legitimacy - an important factor in police effectiveness.

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[https://www.policeconduct.gov.uk/sites/default/files/Documents/Who-we-are/Our-Policies/IPCC\\_position\\_statement\\_on\\_body\\_worn\\_video.pdf](https://www.policeconduct.gov.uk/sites/default/files/Documents/Who-we-are/Our-Policies/IPCC_position_statement_on_body_worn_video.pdf); and Bowling, Automated policing, p. 149.

<sup>56</sup> PERF, *Implementing a Body-Worn Camera Program*, p. 5.

<sup>57</sup> Louis, Ermus St., Alanna Saulnier, and Kevin Walby. 2019. "Police Use of Body-Worn Cameras: Challenges of visibility, procedural justice and legitimacy." *Surveillance and Society* 17 (3/4), p. 313.

<sup>58</sup> Demir, Mustafa, Robert Apel, Anthony A. Braga, Rod K. Brunson, and Baraka Ariel. 2020. "Body Worn Cameras, Procedural Justice, and Police Legitimacy: A Controlled Experimental Evaluation of Traffic Stops." *Justice Quarterly*, p. 1; College of Policing. 2014. "Body-Worn Video." *National Police Library Online*. Accessed May 28, 2020. (2014), Body-Worn Video. <http://library.college.police.uk/docs/college-of-policing/Body-worn-video-guidance-2014.pdf>, p.3.

<sup>59</sup> White, *Police Officer Body-worn cameras*, p. 19.

<sup>60</sup> Lum, Cyntia, and Daniel S. Nagin. 2017. "Reinventing American Policing." *Crime and Justice* (Chicago University Press) 46 (1), p. 378; Harvard Law Review, *Considering Police Body Cameras*, p. 1803.

Thus explained, the postulation of the problem and proposed solution seemed to fit, and the promise of improved relations between the police and community enhanced seemed achievable. However, to achieve a positive effect as hypothesised, the proposition depends on certain factors being present, such as the availability of and public access to the relevant footage, which is an indication that there could be other factors that might countervail the hypothesised impact of BWCs on transparency and police legitimacy. These are explored below.

### **4.3.3 Other moderating factors on perceived relationship between BWC, transparency and police legitimacy**

This section will challenge the theorisation of BWC as producing the particular, positive outcome of enhancing transparency and police legitimacy. There are factors that can have competed or conflicting impacts on BWCs perceived effect of increasing transparency on police-community relations and building legitimacy. It has been acknowledged that the rapid diffusion of BWCs occurred under a context of limited empirical evidence into their wider, and unintended consequences outside of the prevailing optimistic postulations of their proponents.<sup>61</sup>

In terms of the link between BWCs, increased transparency and enhanced police legitimacy, pre-existing attitudes towards the police can be a factor in determining whether the release of BWC footage enhances police legitimacy.<sup>62</sup> For example, data collected from a survey before the 2014 fatal shooting of Michael Brown, examining citizens' perceptions of police shootings found that participants were more likely to perceive the shooting was justified when evidence of the encounter was presented in video and audio format compared to text format.<sup>63</sup> However, a replication of the study after Brown's death found that respondents presented with the same evidence in video format compared to audio or text format, were more likely to report that the shooting

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<sup>61</sup> Adams and Mastrasci, *Visibility is a Trap*, p. 313; Lum *et al.*, *Research on Body-worn Cameras*; White, *Police Officer Body-worn cameras*.

<sup>62</sup> Louis *et al.*, *Police Use of Body-Worn Cameras*, p. 312. Also see discussion of "confirmation bias" in Fan, Mary D. 2017. "Justice Visualised: Courts and the Body Worn Camera Revolution." *UC Davis Law Review* 50 (3): 897-959. [https://lawreview.law.ucdavis.edu/issues/50/3/Articles/50-3\\_Fan.pdf](https://lawreview.law.ucdavis.edu/issues/50/3/Articles/50-3_Fan.pdf), p. 917.

<sup>63</sup> Culhane, Scott E., and Kimberly Schweitzer. 2017. "Police shootings and body cameras one year post-Ferguson." *Policing and Society* 1-11. doi:10.1080/10439463.2016.1275624, p. 312

was unjustified.<sup>64</sup> This illustrates that perceptions of police legitimacy about a police shooting or other use of force incident may not be permanent and can be influenced by other similar incidents at that particular time.

The police may also find their legitimacy eroded whether or not the footage is released because of privacy concerns. As observed in a 2015 editorial commentary in the *Harvard Law Review*, privacy can be a counterpoint to access to video footage because increased transparency as of necessity means more people viewing body-camera footage, which frequently includes personal information of members of the public who may not want the recordings of themselves shared.<sup>65</sup> Similarly, some families of the deceased may not give consent for the release of the images to the public. Also, because sharing of BWC footage of victims of crimes or officer-involved shootings without consent could raise privacy concerns after the fact and lead to secondary victimisation and a backlash from the public.<sup>66</sup> The release of video may also put the police officers involved and their families in harm's way whether or not their actions were lawful or not.

Indeed, civil society organisations such as the American Civil Liberties Union (ACLU) expressed concern over the risk of BWCs becoming just another surveillance device with the real potential to invade privacy.<sup>67</sup> Such unchecked transparency can negatively affect perceptions of procedural justice because of the poor quality of treatment and lack of respect for the privacy of victims or families of the deceased<sup>68</sup> and equally problematic, police may use privacy as an excuse to curtail public oversight.<sup>69</sup>

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<sup>64</sup> Culhane and Schweitzer, Police shootings and body cameras; Also see Louis *et al.*, Police Use of Body-Worn Cameras, p. 312.

<sup>65</sup> Harvard Law Review, Considering Police Body Cameras. *Harvard Law Review*, 128(1728), 1794-1817, p. 1808.

<sup>66</sup> Coudert *et al.*, Body-worn cameras for police accountability; Ariel, Barak, William A. Farrar, and Alex Sutherland. 2015. "The Effect of Police Body-Worn Cameras on Use of Force and Citizen Complaints Against the Police: A Randomised Controlled Trial." *Journal of Quantitative Criminology* (Springer) 31: 509-535; Adams and Mastracchi, Visibility is a trap, p. 314.

<sup>67</sup> Stanley, Jay. 2015. *Police Body-Mounted Cameras: With the Right Policies in Place, A win for all*. March. Accessed June 24, 2018. <https://www.aclu.org/other/police-body-mounted-cameras-right-policies-place-win-all>.

<sup>68</sup> Louis *et al.*, Police Use of Body-Worn Cameras, p. 311.

<sup>69</sup> Harvard Law Review, Considering Police Body Cameras, p. 1809.

Although privacy concerns are currently not seen as a hindrance in the deployment of BWCs in either the US and UK policing, the roll-out of BWCs in the US was initially met with cynicism and concerted resistance from police unions who sought to push back and demand greater respect for their “on-the-job privacy.”<sup>70</sup> It is also conceivable that in police states or circumstances where police have never enjoyed public legitimacy, BWCs can be viewed as another tool for the invasion of privacy and a potential threat to liberty, rather than a concession toward transparency.

The public’s low tolerance of police use of force is also a critical determinant on whether transparency can lead to police legitimacy. The postulation that the presence of BWC increases transparency leading to improved police legitimacy, carries the implicit assumption that recorded footage only reveals the procedurally just intentions and actions of law enforcement officials and that the public can only view this from the same perspective as the police.

While BWC can potentially enhance police legitimacy, the transparency brought about by BWCs is not inherently legitimising. It can also be double-edged because it might cause friction in police-community relations.<sup>71</sup> Terrill and Paoline’s four perspectives of what constitutes appropriate or inappropriate use of force that are discussed in detail in the second chapter of this thesis are an illustration of the faultiness of this assumption. The public perspective, which is based on public surveys, anecdotes of victims of police violence and also driven by media coverage and bystander recordings is typically based on a low tolerance of any amount of force used by the police, whether justified or not, can thus have the determining factor in perceptions of police legitimacy.

The March 2016 killing of Loreal Tsingine in Winslow, Arizona, US, by a police officer, Austin Shipley provides one of many examples of how this assumption backfires. Shipley shot Tsingine after a short confrontation and claimed that he felt threatened

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<sup>70</sup> Bruinius, Harry. 2016. *Why police are pushing back on body cameras*. New York, August 30. Accessed September 19, 2020. <https://www.csmonitor.com/USA/Justice/2016/0830/Why-police-are-pushing-back-on-body-cameras>.

<sup>71</sup> Louis *et al.*, *Police Use of Body-Worn Cameras*, p. 306.



by Tsingine, who was holding a pair of scissors at the time.<sup>72</sup> The State Attorney's office ruled that the shooting was justified and decided not to file any charges after reviewing all evidence including the BWC footage. A follow-up Internal Affairs investigation by the Mesa Police Department was concluded in October 2016, but not all investigation records were made public, and it was only after officer Shipley resigned, that some of the evidence reviewed, including BWC footage, was released.

The release of the footage did everything but ameliorate relations with the Navajo indigenous community from which Tsingine originated. The footage was released it showed officer Shipley being aggressive with Tsingine and another officer standing near Tsingine poised to assist. However, the officer rapidly discharged his firearm five times into her chest just thirty-five seconds after disembarking the patrol car.<sup>73</sup> The State Attorney's office decision not to charge the officer was protested throughout Arizona.<sup>74</sup> The release of the footage in this case only served to worsen public perceptions of the police including public perceptions of police oversight bodies and the inadequacy of accountability measures even in the presence of BWC footage of police misconduct.

The four perspectives to evaluating police use of force advanced by Terrill and Paoline (the public, organisational, legal and officer perspective) discussed in Chapter 2 provide a useful explanation. In this case the public perspective would not be shaped by something applicable to the lawfulness of the use of force. For example, a police department might release the footage to demonstrate that the deceased did indeed make a sudden threatening movement, leading the officer to have a reasonable suspicion that the suspect was reaching for a concealed weapon. But an affected community might well be enraged by something happening several minutes earlier in the video, for example to do with the officer's original attitude toward the deceased or previous similar experiences with the police, potentially contributing to the escalation of the incident. Thus, an organisational or legal perspective can clash with the public perspective in evaluating police use of force thus worsening rather than mending relations. This is particularly the case with marginalised communities, who use the

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<sup>72</sup> Louis *et al.*, *Police Use of Body-Worn Cameras*, p. 313.

<sup>73</sup> Louis *et al.*, *Police Use of Body-Worn Cameras*, p. 313

<sup>74</sup> Louis *et al.*, *Police Use of Body-Worn Cameras*, p. 313.



“this is what we have to put up with on a daily basis” argument, linked to a case that has had a tragically lethal outcome, and becomes a potent wedge between community and the police, despite the footage potentially confirming a disciplinary panel’s view that (on the narrow question of the use of force) the officer did nothing wrong.

Thus, the same theorisation that makes BWCs useful in enhancing public perceptions of police legitimacy through making the process of policing more transparent can also capture moments when police actions erode police legitimacy.<sup>75</sup> Therefore, the key issue is not whether BWC footage has been released or not, it is about the tactics used by the police and how the footage is interpreted that influences perceptions of police legitimacy.

There is also research in the US showing that population demographics, especially for minorities, could be a determining factor on whether the impact BWCs on perceptions of police legitimacy are negative or positive.<sup>76</sup> According to findings of this research, BWCs may entrench the already existing antagonistic relations between police and marginalised communities, racialised sections of the population are less likely to believe that the implementation of BWCs can make the police more transparent and accountable.<sup>77</sup>

Depending on the context, another moderating factor on BWCs achieving their theorised goal of enhancing police legitimacy is the existence of credible processes and institutions tasked with the control and sharing of video footage in a manner that is perceived (by victims of deceased’s relatives, witnesses, and the public) to be fair and transparent. This is particularly the case in the US where there is no single, credible institution tasked with this role.<sup>78</sup> As observed by Sacharoff and Lustbader, police agencies have taken control of who may have access to the videos and when.<sup>79</sup>

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<sup>75</sup> Louis *et al.*, “Police Use of Body-Worn Cameras”, p. 306.

<sup>76</sup> Ray, Rashawn, K. Marsh, and Connor Powelson. 2017. “Can Cameras Stop the Killings? Racial Differences in Perceptions of the Effectiveness of Body-Worn Cameras in Police Encounters,.” *Sociological Forum*.

<sup>77</sup> Louis *et al.*, “Police Use of Body-Worn Cameras”, p. 311.

<sup>78</sup> Refer to Sacharoff, Laurent, and Sarah Lustbader. 2017. “Who should Own Police Body-Worn Camera Videos?” *Washington University Law Review* 95 (2): 267-323.

<sup>79</sup> Fan, Mary D. 2016. “Privacy, Public Disclosure, Police Body Cameras: Policy Splits.” *Alabama Law Review* 395: 395-444.

Although this varies by state and by police department in the US, this state of affairs is counterintuitive to the idea of transparency: that the very party that the BWC programme aims to keep in check has full control over its contents.<sup>80</sup> In part this explains the contested nature of police-community relations in the US and hence the calls for an independent accountability agency<sup>81</sup> or independent prosecutors<sup>82</sup> as a way of engendering trust in body worn camera programmes. However, this is not the case in the UK where there is a reputable<sup>83</sup> independent investigative body to which the police are legally mandated to cooperate during investigations, including by providing BWC footage for investigatory processes.

Thus, while it is logical that the availability of BWC footage enhance transparency there are other moderating factors that can lead to unexpected and sometimes unwanted effects compared to those hypothesised. However, BWCs have been in use for at least fifteen years and there has been a lot written about the technology and its use over this period, the following section reviews the existing empirical evidence regarding the relationship between BWC and transparency and police legitimacy.

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<https://www.law.ua.edu/lawreview/files/2011/07/Privacy-Public-Discourse-Police-Body-Cameras.pdf>, p. 414; Sacharoff and Lustbader, *Who should Own Police Body-Worn Camera Videos?*, p. 273.

<sup>80</sup> Sacharoff and Lustbader, "Who should Own Police Body-Worn Camera Videos?", p. 288.

<sup>81</sup> Sacharoff and Lustbader, *Who should Own Police Body-Worn Camera Videos?*, pp. 292-293.

<sup>82</sup> Simmons, Kami Chavis. 2015. "Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors." *Washington University Journal of Law & Policy* 49: 137-158.

<https://openscholarship.wustl.edu/cgi/viewcontent.cgi?art>. Also see Quigley, Aidan. 2016. "Would independent prosecutors make police shooting investigations fairer?" *The Christian Science Monitor*. July 14. <https://www.csmonitor.com/USA/Justice/2016/0714/Would-independent-prosecutors-make-police-shooting-investigations-fairer> and Godley, Kendall. 2021. "Police investigating police: Systematic injustice shields officers from accountability." *Denver Law Review* 1-36.

<sup>83</sup> Independent Office for Police Conduct. 2019. *The Independent Office for Police Conduct: Public Perception Tracker*. Independent Office for Police Conduct.

[https://www.policeconduct.gov.uk/sites/default/files/Documents/statistics/IOPC\\_public\\_perceptions\\_tracker\\_annual\\_report\\_summary\\_201819.pdf](https://www.policeconduct.gov.uk/sites/default/files/Documents/statistics/IOPC_public_perceptions_tracker_annual_report_summary_201819.pdf), p. 4. The Independent Office for Police Conduct is the independent police oversight body for England and Wales which oversees the police complaints system and investigates all serious matters including deaths following police contact and sets the standards by which police should handle complaints. The 2019 public perception and attitudes survey of the IOPC found that public awareness of and confidence in its impartiality was high.

#### 4.3.4 Evidence of BWC impact on transparency and police legitimacy

Although research assessing public and police perceptions of BWCs have consistently found strong public support for police use of the technology in the US and the UK,<sup>84</sup> the evidence of the actual effects of BWCs on improved transparency and enhanced perception of police legitimacy is limited.<sup>85</sup> As noted above, this hypothesis has two elements asserting firstly, that BWCs increase police transparency and secondly, that such transparency leads to public trust, and which enhance police legitimacy. A review of existing literature, including a narrative review of BWC evidence<sup>86</sup> and a systematic review<sup>87</sup> both by Lum and her colleagues shows that the assertion that body-worn cameras enhance the transparency of a police department has not been extensively researched.<sup>88</sup>

One of the few studies conducted on the relationship between BWC and transparency and police legitimacy was a randomised controlled trial conducted by PERF researchers at Arlington, Texas in 2016 which sought to assess, among other hypotheses, the changes in citizen perceptions of police legitimacy and professionalism due to the use of BWCs at the Arlington Police Department.<sup>89</sup> As per hypothesis, the expectation was that individuals interacting with the experimental group (officers with BWCs) would have significantly better perceptions of police legitimacy, greater satisfaction with interactions, and better views of police professionalism compared to those who interacted with the control group officers who had no BWCs. However, contrary to expectations, the PERF researchers found no significant differences between the experimental and control groups.

Research also shows that BWC impacts confirm the double-edged element of the postulated impact of BWC on transparency in policing discussed in the preceding

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<sup>84</sup> PERF, *Implementing a Body-Worn Camera Program*. Also refer to White, Michael, D., Janne Gaub, and Natalie Todak. 2016. *Results from a Citizen Survey Research (memo)*. Phoenix: ASU Centre for Violence Prevention and Community Safety. <https://icma.org/articles/pm-magazine/pm-article-body-worn-police-cameras-separating-fact-fiction>; ODS Consulting, Body worn video projects in Paisley and Aberdeen.

<sup>85</sup> White, Michael D. 2014. *Police Officer Body-worn Cameras: Assessing the Evidence*, p. 19.

<sup>86</sup> Lum *et al.*, *Research on Body-worn Cameras*.

<sup>87</sup> Lum *et al.*, *Body-worn Cameras' Effects on Police Officers and Citizen Behaviour*.

<sup>88</sup> White, M. D. (2014). *Police Officer Body-worn Cameras: Assessing the Evidence*, p. 19.

<sup>89</sup> PERF, *Implementing a Body-Worn Camera Program*.

section showing that releasing footage can produce mixed and contradictory outcomes. Anecdotal evidence has shown that even where police agencies have released BWC video whether pro-actively or on demand, in an attempt to demonstrate transparency, there have been counter-intuitive outcomes in terms of police legitimacy wherein relations between the police and communities are further damaged. For example, the officer-involved killings of Samuel DuBose,<sup>90</sup> Daniel Prude,<sup>91</sup> and George Floyd in the US sparked widespread protests which included demands for the release of BWC footage and the subsequent release of the footage and other evidence only served to increase tensions between the police and communities.

There is also significant research on the impact of BWCs on police legitimacy. Scholars such as Mustafa Demir contributed to that research,<sup>92</sup> sometimes in collaboration with some of the pioneering authors on this subject in the US and UK, such as Barak Ariel and Anthony A. Braga<sup>93</sup> to explore the impact of BWCs on police legitimacy using experimental research techniques to measure the impact of BWCs on drivers' perceptions of police legitimacy after interactions with the police at traffic stops. Ariel *et al.* also carried out a similar study on traffic officers in Uruguay.<sup>94</sup> In all these studies, the researchers found that BWCs improved citizen perceptions of police

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<sup>90</sup> Lopez, German. 2020. "The Failure of Body Worn Cameras." *Vox*. July 21.

<https://www.vox.com/policy-and-politics/2017/7/21/15983842/police-body-cameras-failures>.

<sup>91</sup> Sanchez, Ray, Sheena Jones, and Evan Simko-Bednarski. 2020. "Rochester police chief to retire amid Daniel Prude death protests." *CNN*. September 8.

<https://www.cnn.com/2020/09/08/us/rochester-police-chief-daniel-prude-case/index.html>.

<sup>92</sup> See Demir, Mustafa. 2019. "Citizens' perceptions of body-worn cameras (BWCs): Findings from a quasi-randomized experimental study." *Journal of Criminal Justice* 60, Demir, Mustafa. 2023. "Demir, M. (2023). Effect of awareness and notification of body-worn cameras on procedural justice, police legitimacy, cooperation, and compliance: Findings from a randomized controlled trial." *Journal of Experimental Criminology* 19, and Demir, Mustafa. 2023. "The Effect of Perceived Use of Body-Worn Cameras on Procedural Justice, Police Legitimacy, Police Lawfulness, Compliance, Cooperation, and Satisfaction." *Journal of Policing, Intelligence, and Counter Terrorism* 18 (3).

<sup>93</sup> Refer to Demir, Mustafa, Anthony A. Braga, and Richard Apel. 2020. "Effects of police body-worn cameras on citizen compliance and cooperation: Findings from a quasi-randomized controlled trial." *Criminology and Public Policy* 19 (3) and Demir, Mustafa, Robert Apel, Anthony A. Braga, Rod K. Brunson, and Barak Ariel. 2020. "Demir, M., Apel, R., Braga, A., Brunson, R., Ariel, B. (2020a). Body worn cameras, procedural justice, and police legitimacy: A controlled experimental evaluation of traffic stops." *Justice Quarterly* 37.

<sup>94</sup> Ariel, Barak, Renée J. Mitchell, Justice Tankebe, Maria Emilia Firpo, Ricardo Fraiman, and Jordan M. Hyatt. 2020. "Using Wearable Technology to Increase Police Legitimacy in Uruguay: The Case of Body-Worn Cameras. Law and Social Inquiry-." *Journal of the American Bar Foundation* 45 (1): 52-80.

legitimacy and concomitantly found that overall, drivers who interacted with traffic officers were more likely to express satisfaction with the police than drivers who interacted with officers not equipped with body cameras.<sup>95</sup>

Critics of this research, such as Louis *et al* argue that the challenge with this theory, particularly its link between increased transparency and enhanced police legitimacy is that it seeks “to address the consequences, not causes of poor community-police relations” and the adoption of BWCs “will fail without simultaneous commitment to broader reforms to inclusionary policing practices.”<sup>96</sup> In other words, police transparency does not inherently lead to police legitimacy and it may also depend on whether it is an externally imposed or voluntary transparency. This may be because the rapid diffusion of the technology without a strong evidence base was something, as observed by Palmer, of a mythical “solution in the search of a problem” rather than a problem finding a solution.<sup>97</sup> Most of the research into the impact of BWCs has occurred in a *post hoc* manner and as such, the research, policy, and practice surrounding technology started developing after implementation had taken off.<sup>98</sup>

What this analysis shows is that the adoption of BWCs could potentially benefit the criminal justice system if they work as theorised to provide visibility to police-citizen encounters. However, this should be accompanied by broader reforms in terms of police practices and tactics in relation to use of force. The use of BWCs also provides an opportunity for police agencies to proactively engage communities regarding their use of force policies so that the gap between public, legal, organisational, and occupational perspectives on use of force in such policies can be brought closer to avoid the erosion of police legitimacy for justifiable uses of force.

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<sup>95</sup> Ariel, B. *et al.*, 2020. "Using Wearable Technology to Increase Police Legitimacy in Uruguay, p. 25. Also see Demir, M., Apel, R., Braga, A., Brunson, R., Ariel, B. (2020a). Body worn cameras, procedural justice, and police legitimacy, p. 68; and Demir, Citizens' perceptions of body-worn cameras (BWCs), p. 136.

<sup>96</sup> Louis *et al.*, Police Use of Body-Worn Cameras, p. 305.

<sup>97</sup> Palmer, Darren. 2016. "The Mythical Properties of Police Body-Worn: A Solution in the Search of a Problem." *Surveillance and Society* 14 (1): 138-144.

<sup>98</sup> Louis *et al.*, Police Use of Body-Worn Cameras, p. 315.

## 4.4 The relationship between BWC and reduction in police use of force

### 4.4.1 The problem of use of force in policing

This section analyses the perceived impact of BWCs on police use of force. This analysis is essential in that violence reduction is normatively a critical factor in enhancing police legitimacy, but also, the need to reduce police use of force was one of the driving motivations for the adoption of BWCs, particularly in the US. As highlighted in the preceding section, the loss of trust and legitimacy in policing was exacerbated mainly by police officers' frequent and high-profile incidents of questionable use of force. For example, according to the *Washington Post*<sup>99</sup> database, its records on police killings showed that there were 994 fatal police shootings recorded in 2015, and the number has remained steady with 962 shootings in 2016, by which time more than half of police agencies in the US had adopted BWCs, and marginally increasing to 986 in 2017, 992 in 2018, 999 in 2019 and 1031 for 2021.<sup>100</sup>

Similarly, but with less incidence of fatal officer-involved shootings, this phenomenon was characterised by discriminatory use of force tactics on minority black and minority ethnic (BME) citizens in the UK. Statistics from Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) and the Metropolitan Police Service showed that the police were more likely to use force on black people and three times more likely to use restraint techniques such as wristlocks, strikes, takedowns and ground-pinning on black people than on the white population.<sup>101</sup>

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<sup>99</sup> *The Washington Post*. <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/>. In the US police organisations do not systematically collect data on police use of force. In the absence of a police database, *The Washington Post*, and other databases such as Mapping Police Violence and KilledbyPolice have been used as a proxy to gauge the extent of the use of deadly force by law enforcement officials.

<sup>100</sup> Miller, Ben. 2020. *What Body Cams Do: Behavior, Accountability and Trust*. July 26. <https://www.govtech.com/biz/What-Bodycams-Do-Behavior-Accountability-and-Trust.html>. Also refer to Nix, Justin, Natalie Todak, and Brandon Tregle. 2020. "Understanding Body-Worn Camera Diffusion in U.S. Policing." *Police Quarterly* 23 (3): 396-422; *Washington Post* at <https://www.washingtonpost.com/graphics/2019/national/police-shootings-2019/> and at <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> for 2021.

<sup>101</sup> Francis, Sam, Tarah Welsh, and Zack Adesina. 2020. *Met Police 'four times more likely' to use force on black people*. July 30. <https://www.bbc.co.uk/news/uk-england-london-53407560>; Also refer to HMICFRS, *Disproportionate Use of Police Powers*.



Thus, the police's questionable uses of force were far more widespread in the US than in the UK. But, as stated in the preceding section, Michael Brown's death was the watershed moment that resulted in the unusual convergence of thought between the public, policymakers, and the police chiefs in viewing BWCs as a solution for reducing potentially unlawful uses of force by police. This development begs the question of what it is about the technology that could reduce the likelihood of police use of force. This is the subject of discussion in the following section.

#### 4.4.2 The perceived impact of BWC on police use of force

Among the many touted benefits of BWC technology, proponents of the technology claimed that BWCs could reduce violence during police-citizen encounters.<sup>102</sup> This premise is rooted in deterrence - a theory of choice in which potential offenders are perceived to balance the benefits and costs of crime<sup>103</sup> and which assumes that the primary factors motivating human behaviour are incentives and penalties associated with following the law.<sup>104</sup>

The hypothesised relationship between BWCs and the reduction of police use of force lies in the proposition that people adhere to social norms and change their conduct when they recognise that someone else is watching.<sup>105</sup> That is to say, if police know that their every action is being recorded, they are more likely to be on their best behaviour.<sup>106</sup> Proponents of deterrence theory identify three key elements that work in tandem to make deterrence effective: certainty, swiftness, and severity. Based on these three elements, deterrence theory posits that, by increasing the perception of the certainty of being apprehended for wrongdoing and the swiftness and severity of punishment, a criminal actor is deterred from committing the crime.<sup>107</sup>

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<sup>102</sup> White, Michael D., James E. Gaub, and Nathalie Todak. 2017. "Exploring the Potential of Body-Worn Cameras to Reduce Violence in Police-Citizen Encounters." *Policing* (Oxford University Press) 12 (1): 66-76, p. 2

<sup>103</sup> Nagin, Daniel S. 2013. "Deterrence in the Twenty-first Century: A Review of the Evidence." *Crime and Justice* 42 (1). <https://www.jstor.org/stable/10.1086/670398>, p. 200.

<sup>104</sup> Tyler, Tom R. 2006. *Why People Obey the Law*. Princetown: Princetown University Press, p. 3.

<sup>105</sup> Ariel *et al.*, *The Effect of Police Body-Worn Cameras*, p. 511.

<sup>106</sup> Miller, *What Body Cams Do*.

<sup>107</sup> Tyler, *Why People Obey the Law*. p. 3; Ariel *et al.*, *The Effect of Police Body-Worn Cameras*, p. 511.



In other words, the more likely it is for a criminal to be caught and the more severe a punishment for committing a crime is, the more likely it is that a rationally calculating human being will desist from criminal acts.<sup>108</sup> It is assumed in this proposition that getting caught while breaking these rules is unacceptable and can be career-limiting for police officers hence it is something that officers are predicted to seek to avoid.<sup>109</sup>

However, deterrence can be observed directly,<sup>110</sup> and the mechanism that triggers deterrent behaviour is explicable through the behavioural psychology theory of “self-awareness”<sup>111</sup> or what psychologist Bibb Latane called “social impact theory.”<sup>112</sup> Self-awareness broadly refers to a variety of changes in psychological states and subjective feelings, motives, emotions, cognitions, beliefs, values and behaviour, that occur in an individual [...] as a result of real, implied, or imagined presence or actions of other individuals.<sup>113</sup> Defined narrowly, self-awareness theory posits that “people modify their attitudes and behaviour when they think others are observing them.”<sup>114</sup> This self-awareness process triggers a complex cognitive process of self-scrutiny and a heightened construction of one’s own identity.”<sup>115</sup>

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<sup>108</sup> Tyler, *Why People Obey the Law*, p. 3

<sup>109</sup> Ariel *et al.*, The Effect of Police Body-Worn Cameras, p. 516.

<sup>110</sup> Jansen, A. M., Giebels, E., Rompay, T. J., & Junger, M. (2018). The Influence of the Presentation of Camera Surveillance on Cheating and Pro-Social Behavior. *Frontiers in Psychology*, 9, p. 3.

<sup>111</sup> Ariel, B., Sutherland, A., Henstock, D., Young, J., Drover, P., Sykes, J., . . . Anderson, R. (2018). Paradoxical Effects of self-awareness of being observed: testing the effect of body-worn cameras on assaults and aggression against officers. *Journal of Experimental Criminology*, 14, p. 21.

<sup>112</sup> Jansen, Anja M., Ellen Giebels, Thomas J. L. van Rompay, and Marianne Junger. 2018. "The Influence of the Presentation of Camera Surveillance on Cheating and Pro-Social Behavior." *Frontiers in Psychology* 9: 1-12, p. 3; Latane, Bibb. 1981. "The psychology of social impact." *American Psychology* 343-356, p. 343.

<sup>113</sup> Latane, The psychology of social impact, p. 343.

<sup>114</sup> Ariel, Barak, Alex Sutherland, Darren Henstock, Josh Young, Paul Drover, Jayne Sykes, Simon Megicks, and Ryan Anderson. 2018. "Paradoxical Effects of self-awareness of being observed: testing the effect of body-worn cameras on assaults and aggression against officers." *Journal of Experimental Criminology* 14: 19-47, p. 20.

<sup>115</sup> Ariel, Barak, Alex Sutherland, Darren Henstock, Josh Young, and Gabriela Sosinski. 2017. "The Deterrence Spectrum: Explaining Why Police Body-Worn Cameras 'Work' or 'Backfire' in Aggressive Police-Public Encounters." *Policing* (Oxford University Press) 12 (1): 1-20, p. 4.

In policing, the presence of BWCs acts as the stimulus creating the perception of being observed and the concomitant certainty of being apprehended. Proponents argue that this effect is achieved by creating an objective record of what happens during police-public interactions, thus providing a channel through which supervisors and commanders can monitor and review police activities leading to increased risk of detection and punishment.<sup>116</sup>

Further, the theory posits that for BWCs to elicit the intended behaviour response, they must be used overtly. Both law enforcement officials and citizens must be aware of the physical presence of a BWC, that they are being recorded, they know who is watching or will review the footage and also, what types of behaviours are punishable.<sup>117</sup> This awareness is hypothesised to compel both police officers and citizens to adopt socially, and for police officers, organisationally, and professionally accepted behaviour knowing with certainty that they can be apprehended and face sanctions.<sup>118</sup> Hence, the requirement in BWC protocols that police officers should inform citizens that the encounter is being recorded.<sup>119</sup>

While the theory seems plausible, there is an oddity about the theorised positive outcome each time self-awareness occurs. The section below presents factors and scenarios that challenge the perception of a uniform outcome when someone is being observed.

#### **4.4.3 Other factors that could affect BWC impact on police use of force.**

There are situational factors that challenge the assumption that BWCs reduces the likelihood of police use of force. Perhaps the first one is the rather strict assumption that every decision-making process in all police encounters is rational. By extension, the assumption is that the likelihood of reducing force depends on the BWC pacifying both officer and citizen, but this may not be the case at all times.

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<sup>116</sup> Jansen *et al.*, *The Influence of the Presentation of Camera Surveillance on Cheating*, p. 3.

<sup>117</sup> Jansen *et al.*, *The Influence of the Presentation of Camera Surveillance on Cheating*, p. 3. Also see Ready and Young *et al.*, *The Impact of On-officer Video Cameras*, p. 446.

<sup>118</sup> Coudert *et al.*, *Body Worn Cameras for Police accountability*, p. 756.

<sup>119</sup> PERF, *Implementing a Body-Worn Camera Program*, p. 40.

Critics have cited instances when officers engage intoxicated citizens or individuals who lack knowledge of the consequences of rule-breaking as examples of when police use of force might escalate.<sup>120</sup> Research by the Edmonton Police Service found cases of cognitive dissonance in which citizens who were peripheral to the interaction being a distraction to the police officer seeking to control the situation and those the individual involved in the stop would be encouraged to ramp up their bad behaviour to show off to their friends.<sup>121</sup> Such situations can inadvertently lead to an escalation of tensions that may result in even the most restrained officer to use force. In some cases, use of force can be determined by the context.

Ariel *et al.* also advanced what they termed the “deterrence spectrum” – a theoretical explanation for why sometimes BWCs produce counterintuitive results. This came after Ariel *et al.*'s replication studies that had found that wearing BWCs increased assaults on officers and did not reduce police use of force.<sup>122</sup> Ariel and his colleagues found that in circumstances where the police had discretion to switch off the cameras, there were increases in suspects' and police use of force.<sup>123</sup> They could not explain the causal mechanism leading to these results but they speculated that police officers who announce the start of a recording after an encounter is already heated can backfire and escalate matters resulting in significant levels of force being used.<sup>124</sup>

In some cases, there is no obvious explanation for why deterrence fails. For example, the killing of an unarmed, compliant, in-police-custody George Floyd on 25 May 2020 in the US, in the presence of not just BWCs but also bystanders, had no effect on the officer's use of force.<sup>125</sup> This despite Floyd George's pleas and begging the police officer over 30 times that he could not breathe and bystanders exhorting the police officer to stop, he did not stop until George Floyd was dead.<sup>126</sup> It can be argued

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<sup>120</sup> Ariel *et al.*, Paradoxical Effects of self-awareness of being observed, p. 38.

<sup>121</sup> Edmonton Police Service. 2015. *Body Worn Video: Considering the Evidence: Final Report of the Edmonton Police Service*. Edmonton, June. [https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/edmontonps\\_canada\\_bwvfinalreport.pdf](https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/edmontonps_canada_bwvfinalreport.pdf), p. 71.

<sup>122</sup> Ariel *et al.*, Paradoxical Effects of self-awareness of being observed.

<sup>123</sup> Ariel *et al.*, Report: Increases in Police Use of Force, p. 461.

<sup>124</sup> Ariel *et al.*, The Deterrence Spectrum, p. 11.

<sup>125</sup> BBC. 2020. *George Floyd: What happened in the final moments of his life*. July 16. Accessed November 1, 2020. <https://www.bbc.co.uk/news/world-us-canada-52861726>.

<sup>126</sup> BBC. *George Floyd: What happened in the final moments of his life*.

therefore, that in some cases, it does not follow that being watched induces compliance with rules.

A challenge of using the frequency of police use of force as a measure of the impact of BWCs is that different agencies have different thresholds for the use of force and for when a use-of-force report must be written, and this could lead to variations in findings across sites.<sup>127</sup> More broadly, the use of "reduction in the use of force" as an outcome measure is also seen as problematic for various reasons. The import of this argument is that what should be aimed for is the reduction in unnecessary and disproportionate force because police officers have a legitimate lawful reason to use force when circumstances justify it. Thus, the most significant value of BWCs should also include an evaluation of the extent to which BWCs can assist in identifying unjustified uses of force and holding officers accountable for it and, in so doing, reducing future unjustified uses of force. In addition, the link between BWCs and the reduction of force is not obvious, and the strength of the correlation may not be the single factor causing the reduction of the use of force by police officers.

Given the preceding discussion, the hypothesis that BWC cameras can deter police from using force against citizens is challenged under certain contexts and in specific conditions and may not always be expected to apply at all times. In addition, the choice of outcome measure may help identify more direct ways by which BWCs can reduce police use of force.

#### **4.4.4 Empirical knowledge on impact of BWCs on police use of force**

While empirical research on the impact of BWCs on police use of force has grown phenomenally, the rapid diffusion of the technology was almost singularly influenced by one randomised controlled trial at Rialto, California, which is referenced by most research on the relationship between BWC and police use of force.<sup>128</sup> Subsequently,

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<sup>127</sup> Lum *et al.*, Research on body-worn cameras, p. 101.

<sup>128</sup> PERF, *Implementing a Body-Worn Camera Program*. Also refer to Independent Police Complaints Commission. (2016). Independent Police Complaints Commission. 2016. *IPCC position statement on body worn video*. IPCC. Accessed December 26, 2020. [https://www.policeconduct.gov.uk/sites/default/files/Documents/Who-we-are/Our-Policies/IPCC\\_position\\_statement\\_on\\_body\\_worn\\_video.pdf](https://www.policeconduct.gov.uk/sites/default/files/Documents/Who-we-are/Our-Policies/IPCC_position_statement_on_body_worn_video.pdf).

research on BWC outcomes related to use of force were the most frequently examined – twenty-six out of the thirty - in the sample of research studies that was reviewed by Lum and her colleagues.<sup>129</sup>

Early randomised controlled studies on the effects of BWCs found significant reductions in police use of force by officers equipped with BWCs compared to the control group, suggesting that BWCs could significantly reduce police use of force. The first evaluation, as indicated above, was the Rialto Police Department's randomised control trial which found that there was a 50% reduction in police use of force and 90% reduction in complaints against the police.<sup>130</sup> Ariel and Henstock replicated the Rialto experiment in a British policing context, and the results were consistent with the Rialto experiment with a 48% reduction in the likelihood of police use of force beyond compliant handcuffing in the treatment group and thus concluding that BWCs were an effective tool in deterring officers from misconduct.<sup>131</sup> Likewise, research by Jennings et al. showed a 54% reduction in use of force during police-citizen encounters.<sup>132</sup>

However, results from other evaluations produced a mixture of contradictory, inconclusive, or null hypotheses on the impact of BWCs on police use of force. A study by Yokum *et al.* at the Metropolitan Police Department in Washington, DC found no effect of BWCs on police use of force with a statistically insignificant difference between the treatment and the control group.<sup>133</sup> Ariel *et al.* also conducted a meta-analysis of ten multi-site and multi-national randomised controlled trials and found that BWCs had no discernible effect on police use of force characterised by heterogeneous

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<sup>129</sup> Lum *et al.*, Body-worn cameras' effects on police officers, p. 20.

<sup>130</sup> Ariel *et al.*, The Effect of Police Body-Worn Cameras on Use of Force, pp. 523-524.

<sup>131</sup> Henstock and Ariel, Testing the Effects of Police Body-worn.

<sup>132</sup> Jennings, Wesley G., Mathew D. Lynch, and Lorie Fridell. 2015. "Evaluating the impact of police officer body-worn cameras (BWCs) on response-to-resistance and serious external complaints: Evidence from the Orlando Police Department (OPD) experience utilising a randomized controlled experiment." *Journal of Criminal Justice* (Elsevier) 43: 480-486.

<sup>133</sup> Yokum, David, Anita Ravishankar, and Alexander Coppock. 2017. *Evaluating the Effects of Police Body-Worn Cameras: A Randomised Controlled Trial*. October 20.

[https://bwc.thelab.dc.gov/TheLabDC\\_MPD\\_BWC\\_Working\\_Paper\\_10.20.17.pdf](https://bwc.thelab.dc.gov/TheLabDC_MPD_BWC_Working_Paper_10.20.17.pdf).

outcomes from one site to another including that BWCs increased assaults on police officers.<sup>134</sup>

A follow up report by Ariel *et al.* sought to explain some of the counterintuitive outcomes of BWC evaluation on police use of force.<sup>135</sup> Using the ten randomised controlled trials referred to above, Ariel and his colleagues sought to find out the extent to which officer discretion to switch BWCs off or on impacts on police use of force rates. Their finding was that there is stronger evidence that BWCs are effective in reducing police use of force when agencies limit officer discretion on when and when not to switch on the cameras.<sup>136</sup> In other words, when police agencies that give officer broad discretion regarding when to record incidents, when to announce the recording of these events to citizens and at which stage of the event to start recording, such agencies eliminate the stimulus effect of BWCs as discussed above.<sup>137</sup>

To sum up, research to date has not produced decisive evidence on whether BWCs can reduce police use of force and, if so, under what circumstances. Even the most fervent advocates of the technology have admitted that most BWC experiments remain black boxes that tell us nothing about how the technology's effects are brought about and questions the extent to which they can be generalised.<sup>138</sup>

Further, other factors other than BWCs could be at play with possibly different outcomes than the theorised relationship between BWC and police use of force. The implications are that any police service that decides to adopt BWCs to reduce police use of force must test the technology before a full roll-out. The methodology used for such testing should identify outcomes measures that can be more directly attributed to the presence of BWCs than have hitherto been used in previous research. An

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<sup>134</sup> Ariel, Barak, Alex Sutherland, Darren Henstock, Josh Young, Paul Drover, Jayne Sykes, Simon Megicks, and Ryan Henderson. 2016. "Wearing Body Cameras Increases Assaults Against Police Officers and does not Reduce Police Use of Force: Results from a Global Multi-site Experiment." *European Journal of Criminology* 13 (6): 744-755.

<sup>135</sup> Ariel *et al.*, Report: Increases in Police Use of Force.

<sup>136</sup> Lum, Cynthia, Christopher S. Koper, David B. Wilson, Megan Stoltz, Michael Goodier, Elizabeth Eggings, Angela Higginson, and Lorraine Mazerolle. 2020. "Body-worn cameras' effects on police officers and citizen behaviour: A systematic review." *Campbell Systematic Reviews* 16 (3): 1-40, p. 31.

<sup>137</sup> Ariel *et al.*, The Deterrence Spectrum, p. 10.

<sup>138</sup> Ariel *et al.*, Paradoxical Effects of Self-awareness, p. 36.



outcome and indicator selection based on principles and standards espoused in the law of law enforcement may be useful and is subject to examination in the next chapter.

#### 4.5 Likelihood that victims and/or witnesses are emboldened to report questionable conduct by the police.

##### 4.5.1 Lack of confidence and support

A vital element of the debate about how BWCs can enhance police accountability is whether the presence of BWCs can change the complaints reporting behaviour of members of the public. According to Graham Smith, one of the key factors that influence a complainant's decision to make a complaint is lack of confidence and support.<sup>139</sup> The lack of confidence could be in the form of lack of basic information about who to complain to and where, what the procedures are, assistance with completing forms, providing statements and attending interviews.<sup>140</sup>

Complaints against the police are very serious and therefore it is important if the complainant has evidence and witnesses to support their complaint or otherwise some police officers could also take legal action against the complainant for defamation of character.<sup>141</sup> The unavailability of information and support can be an immediate hindrance for a person with a grievance against the police and could be influential in their decision whether or not to make a complaint and see it through.

This section focuses on the impact of the knowledge of the availability of BWC evidence on the likelihood that victims and/or witnesses of potentially unlawful police use of force would feel more empowered to lodge a complaint. It explores this hypothesis before evaluating the strength of its underpinning assumptions and then analysing what empirical research has found regarding the proposition.

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<sup>139</sup> Smith, Graham. 2009. "Why Don't More People Complain Against the Police?" *European Journal of Criminology* 6 (3): 249-266., p. 259.

<sup>140</sup> Smith, Why Don't More People Complain?, p. 259.

<sup>141</sup> Citizens Advice Scotland. n.d. *Complaints and legal action against the police*. <https://www.citizensadvice.org.uk/scotland/law-and-courts/legal-system-s/police-s/complaints-and-legal-action-against-the-police/>.



#### **4.5.2 Perceived impact of BWCs on likelihood that victims and/or witnesses are emboldened to report questionable conduct by the police.**

Police agencies benefit from the public's willingness to lodge complaints when they have been victims and witnesses of police misconduct, as this would increase the detection of such cases and improve discipline within the ranks of police agencies. In the presence of police BWCs, it is theorised that the victim's or witness' (or the public's) knowledge of the availability of evidence significantly increases the perception and likelihood that a complaint could lead to an investigation in circumstances where an investigation is triggered by a complaint or where the investigation is somehow discretionary and there is public pressure to investigate.<sup>142</sup> In other words, victims and/or witnesses of police use of force may have hitherto been deterred or felt disempowered, as highlighted in the preceding sections, by the fact that without access to evidence, it would be their word against an officer in an accountability system that traditionally places more weight on the evidence of a police officer than citizens.<sup>143</sup>

Complaints by members of the public against officers can make supervisors aware of problems, but the share of total police misconduct that results in a complaint is not well understood. Even when a complaint is filed, the investigation can end up boiling down to the officer's word against that of the complainant. Knowing this could make some individuals reluctant to file complaints in the first place, so body-worn cameras have the potential to increase the likelihood that any officer misconduct is appropriately detected, investigated, and sanctioned.<sup>144</sup> With the presence of BWCs, it is perceived that citizens would be emboldened by the thought that the availability of camera

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<sup>142</sup> This is contrasted to a situation where the complaint is officer or agency-initiated in which case the point is irrelevant.

<sup>143</sup> Williams Jr, Morgan C, Nathan Weil, Elizabeth Rasich, Jens Ludwig, Hye Chang, and Sophia Egrari. 2021. *Body-Worn Cameras in Policing: Benefits and Costs*. Chicago: University of Chicago Crime Lab. Accessed June 14, 2021. [https://www.documentcloud.org/documents/20533586-cl\\_bwc-study](https://www.documentcloud.org/documents/20533586-cl_bwc-study), p. 4. Also refer to Moran, Rachel. 2018. "Contesting Police Credibility." *Washington Law Review* 1339-1396, and Ba, Bocar Abdoulaye, and Roman Rivera. 2020. *Police think they can get away with anything. That's because they usually do*. June 8. Accessed March 24, 2021. <https://www.washingtonpost.com/outlook/2020/06/08/complaints-force-police-ignore-black-citizens/>.

<sup>144</sup> Williams Jr *et al.*, *Body-Worn Cameras in Policing*, p. 4.

footage would vindicate their perspective of what happened in a controversial encounter.

However, it is still plausible in that the presence of BWC evidence potentially empowers citizens who are victims of, or witnesses of officer-involved acts of misconduct to compel police agencies to investigate cases that would otherwise be less likely to be reported. This theorisation also raises some scenarios that might challenge this proposition, and these are discussed in the next section.

#### **4.5.3 Factors that might challenge impact of BWCs on likelihood of a complaint.**

Although this hypothesis is part of the literature associated with the advantages of police use of BWCs, there is not much written about how BWCs can be the key to determining confidence to report police misconduct. A review of literature on factors that explain why victims and/or witnesses do not report crime shows that several factors may influence one's confidence to report police misconduct. The factors that might affect a victim and/or witness' confidence to report police misconduct depend on the context and reporting mechanisms.

Some of the more obvious ones are that complainants or witnesses may not know where to go and how to lodge a complaint.<sup>145</sup> A person's immigration status could also be a determinant. In the US, for example, immigration status is a crucial factor among Hispanics, and even if illegal immigrants do not have negative experiences with the police, they are inherently afraid of formal authority.<sup>146</sup>

The existence of the footage, and the knowledge that it might be made public, might make also certain kinds of potential complainants less likely to come forward. In some

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<sup>145</sup> Collins, Allyson. 1998. *Shielded from Justice: Police Brutality and Accountability in the United States*. Human Rights Watch.

<https://www.hrw.org/legacy/reports98/police/uspo14.htm>; also see Smith, Why Don't More People Complain?, p. 252; Schulenberg, Jennifer L., Allison Chenier, Sonya Buffone, and Christine Wojciechowski. 2017. "An Application of Procedural Justice to Stakeholder Perspectives: Examining Police Legitimacy and Public Trust in Police Complaints Systems." *Policing and Society public trust in police complaints systems* 1-18.

<sup>146</sup> Seokhee Yoon (2015). PhD diss. 2015. *Why Do Victims Not Report?: The Influence of Police and Criminal Justice Cynicism on the Dark Figure of Crime*. New York: City University of New York, May.

[https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=2209&context=gc\\_etds](https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=2209&context=gc_etds).

instances, as observed by Smith, if the complainant has been arrested and is facing criminal charges, it would make the complainant feel discredited and disarm him/her from making a complaint,<sup>147</sup> or those whose complaint was that they were somehow humiliated by the officer might make an abstract complaint, if possible, through an intermediary, but would recoil from the idea that a video of the event might turn up on the evening news. This could compromise the idea that one could complain anonymously. However, this can be addressed by the integrity of the data protection system in place which must ensure that footage can only ever be made public with the consent of a complainant.

The confidence to file a complaint may also depend on the public perception of the institution to which such a complaint should be made and whether an individual prefers other dispute resolution mechanisms such as the courts where a violation is of a criminal nature. In the US, police oversight systems like civilian review boards are criticised for their lack of independence by the public. They are also resisted and viewed suspiciously by police unions and police officers, while prosecutors from state attorney's offices are also perceived to be biased in favour of police officers.<sup>148</sup> By contrast, in the UK, far more of people surveyed in 2019 were confident of the Independent Office of Police Conduct (IOPC)'s impartiality compared to a minority who felt it favoured the police.<sup>149</sup> These factors can influence whether victims and/or witnesses report police acts of misconduct. In this instance, it is not just the legitimacy of the police that might be the deciding factor; it could be the perception of the effectiveness or legitimacy of the independent investigatory body.

The fear of police reprisals may also prevent complainants and witnesses from reporting police acts of misconduct.<sup>150</sup> As Smith observes, most of the people the police tend to come into contact with are “disadvantaged and discriminated” against and these people “are vulnerable to excesses committed by police officers who stand

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<sup>147</sup> Smith, *Why Don't More People Complain?*, p. 254.

<sup>148</sup> Office of the State's Attorney. 2016. *Investigating and Prosecuting Police Misconduct: Reform Proposals*. Baltimore: Office of the State's Attorney for Baltimore City. Accessed March 16, 2021. <https://www.stattorney.org/images/PolicyReformFull.pdf>.

<sup>149</sup> Independent Office for Police Conduct, *The Independent Office for Police Conduct: Public Perception Tracker*.

<sup>150</sup> Schulenberg *et al.*, *An application of Procedural Justice to Stakeholder Perspectives*, p. 9.

before them as powerful agents of the state” and are “not best placed to make a complaint.”<sup>151</sup>

Police officers could dissuade them through threats and intimidation, including through asking victims and witnesses about their criminal history or charges that may arise as a result of the arrest that gave rise to the alleged abuse.<sup>152</sup> The example of Ramsey Orta and Feiding Santana who each filmed the killings of Eric Garner and Keith Scott respectively illustrate this point. Orta claimed he faced harassment (being followed by the police) and was subsequently arrested on an unrelated charge and imprisoned for four years while Santana faced racist death threats for sharing his video with the Scott family.<sup>153</sup> This illustrates some of the key considerations that potential complainants might have to contend with as they evaluate whether or not to report police misconduct.

Critics of US BWC programmes have also pointed to the fact that police departments have near-total control of BWC video footage as a hindrance to reporting police abuse of power.<sup>154</sup> Police departments have resisted BWC video disclosure by denying or delaying the release of video evidence not only to complainants but also, to official police oversight bodies and prosecutors that are officially mandated to investigate the police conduct. For example, in 2018, a New York Civilian Review Complaints Board did not receive footage it requested in hundreds of cases as the New York Police Department (NYPD) denied that such tapes existed when in fact they did.<sup>155</sup> In one instance, the NYPD thrice denied that video evidence existed until the footage was leaked to a local newspaper.<sup>156</sup> In Los Angeles, the Los Angeles Police Department

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<sup>151</sup> Smith, Why Don't More People Complain?, p. 254.

<sup>152</sup> Collins, Allyson. 1998. *Shielded from Justice: Police Brutality and Accountability in the United States*. Human Rights Watch.  
<https://www.hrw.org/legacy/reports98/police/uspo14.htm>.

<sup>153</sup> Nevett, Joshua. 2020. *George Floyd: The personal cost of filming police brutality*. June 11. <https://www.bbc.co.uk/news/world-us-canada-52942519>; Also refer to Merlan, Anna. 2014. "Orta, Arrested Witness to Eric Garner's Death, Is "Demonizing the Good Work of Police Officers"." *The Village Voice*. August 4.  
<https://www.villagevoice.com/2014/08/04/police-union-president-ramsey-orta-arrested-witness-to-eric-garners-death-is-demonizing-the-good-work-of-police-officers/>.

<sup>154</sup> Sacharoff and Lustbader, Who should Own Police Body-Worn Camera Videos?, p. 272.

<sup>155</sup> Matsakis, Louise. 2020. *Body Cameras Haven't Stopped Police Brutality. Here's Why*. June 17. <https://www.wired.com/story/body-cameras-stopped-police-brutality-george-floyd/>.

<sup>156</sup> Matsakis, *Body Cameras Haven't Stopped Police Brutality*

(LAPD) initially refused to release any video footage to the public, including to prosecutors unless ordered by the courts to do so while releasing footage primarily to support its own officers' testimony in high profile use of force incidents.<sup>157</sup>

The key in this theorisation is whether perceptions of police legitimacy resulting from the use of BWCs can supersede these factors and embolden victims and witnesses to report crimes, including potentially unlawful uses of force by the police. As such, BWCs may not be the only deciding factor at all times and it is difficult to determine the extent to which this is the case.

However, the strength of this hypothesis depends on several assumptions whose absence may undermine its potential realisation. The likelihood of a complaint seems to depend more on the practices of police agencies rather than the presence of BWCs. Below, the chapter explores whether there has been empirical research on this hypothesis and how it has impacted police accountability.

#### **4.5.4 Impact of BWCs on the likelihood that victims and/or witnesses are emboldened to report questionable conduct by the police.**

A survey of existing research found no empirical research directly focusing on the extent to which police use of BWCs emboldens victims and/or witnesses to lodge complaints against suspected police misconduct. The closest research to this aspect is a study by Barak Ariel that broadly focuses on the extent to which BWCs are perceived to influence victims and witnesses of potentially unlawful police conduct to cooperate with the police. However, the research does not explicitly refer to victims and/or witnesses reporting crimes committed by the police in police-citizen encounters. The study sought to test whether wearing BWCs in routine police operations would affect crime or crime reporting in two hotspots of crime and disorder in Denver, Colorado and found that BWCs led to greater willingness to report crimes to the police in low-crime areas compared to high-crime areas.<sup>158</sup>

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<sup>157</sup> Sacharoff and Lustbader, *Who should Own Police Body-Worn Camera Videos?*, p. 289.

<sup>158</sup> Ariel, B. (2016). *Increasing Cooperation With the Police Using Body Worn Cameras. Police Quarterly, 0(0)*, p. 28.

Other research studies such as that conducted by the Edmonton Police Service in Canada were survey-based and therefore did not test the causal effect of BWCs usage on empowering victims and/or witnesses to cooperate with the police, let alone lodge complaints against police misconduct.<sup>159</sup> Of the respondents to the public survey, 58% thought BWCs would have an effect on victims or witnesses providing information and of these respondents, 67% thought it would increase willingness to do so.<sup>160</sup> Thus, this is a hypothesis about which there has been limited research, but one that could be important in determining the added value of BWCs in terms of their ability to improve police accountability.

However, there is empirical research suggesting that the likelihood of a complaint being investigated increases when there is external pressure supported by the availability of bystander recordings of officer-involved incidents of misconduct.<sup>161</sup> In her analysis of the importance of both police and bystander recordings, Fan argues that bystander recordings, already recognised by the police as valuable in investigations, can overcome the challenge of police non-disclosure and policy limits on the use of body-camera video to detect violations.<sup>162</sup> Because of this potential, Fan proposes the pooling together of public and police videos which could serve an important function in addition to offering evidence to solve crime and in the process democratise proof so that members of the public can help shape and contest the official story.<sup>163</sup> That angle requires separate research on its own but it suffices here to say, bystander video is seen as more likely to lead to a complaint being investigated.

However, it should be noted that it is a standard practice in policing to investigate police use of force, particularly deadly force, and therefore, in the context of the availability of BWCs, the question may also have more to do with whether victims and/or witnesses are emboldened to lodge complaints on less serious cases of police

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<sup>159</sup> Edmonton Police Service, *Body Worn Video: Considering the Evidence*, p. 71.

<sup>160</sup> Edmonton Police Service, *Body Worn Video: Considering the Evidence*, p. 71.

<sup>161</sup> Fan, Mary D. 2018. "Democratising Proof: Pooling Public and Police Body-Worn Camera Video." *North Carolina Review* 96: 1639-1680; BBC. 2020. *George Floyd: Videos of police brutality during protests shock US*. June 5. Accessed December 17, 2020. <https://www.bbc.co.uk/news/world-us-canada-52932611>.

<sup>162</sup> Fan, *Democratising Proof*, p. 1671.

<sup>163</sup> Fan, *Democratising Proof*, p. 1639.



misconduct. That said, it is important to investigate whether this hypothesis would be more applicable, especially in contexts such as South Africa, where policing tends to target the disadvantaged.<sup>164</sup>

## 4.6 Value of BWC footage in investigating and resolving complaints

### 4.6.1 The problem of lack of adequate evidence and contested investigations

As has been highlighted in the preceding sections, the need to improve accountability for police misconduct was one of the primary reasons for the calls to outfit law enforcement officials with BWCs. A central part of this thinking was that BWCs would improve the collection of quality evidence in controversial police-citizen encounters which in turn would increase the likelihood that complainants would have sufficient evidence upon which to reach a finding. This demand arose in the wake of high-profile credibility contests in the investigation and resolution of cases of police misconduct including in criminal trials of officer-involved shootings.<sup>165</sup>

According to Mary D. Fan, most investigations, and prosecutions of officer-involved shooting in the US were generally adjudicated through what she calls “blind justice” – a justice “guided heavily by testimony in a system where one party is often silent and both sides wage fierce credibility wars” which pose a risk of being incomplete justice.<sup>166</sup> Numerous high-profile, officer-involved shootings poignantly illustrate Fan’s point, and they go beyond the US context. For example, in the inquest into the fatal shooting of Mark Duggan, in a police operation, allegedly because he was armed and yet images taken by bystanders showed that he was unarmed.<sup>167</sup>

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<sup>164</sup> Faull, Andrew. 2018. *Police Work and Identity: A South African Ethnography*. London & New York: Routledge.

<sup>165</sup> Coudert et al (2015), *Body Worn Cameras for Police accountability: Opportunities and Risks*. *Computer Law and Society Review*, p. 750; Also see Lum, Cynthia; Koper, Christopher S.; Wilson, David B.; Stoltz, Megan; Goodier, Michael; Eggings, Elizabeth; Higginson, Angela; Mazerolle, Lorraine (2020, September 20). *Body-worn cameras' effects on police officers and citizen behaviour: A systematic review*. *Campbell Systematic Reviews*, 16(3), p. 5.

<sup>166</sup> Fan, M. D. (2017). *Justice Visualised: Courts and the Body Worn Camera Revolution*. *UC Davis Law Review*, 50(3), Retrieved July 23, 2018, from [https://lawreview.law.ucdavis.edu/issues/50/3/Articles/50-3\\_Fan.pdf](https://lawreview.law.ucdavis.edu/issues/50/3/Articles/50-3_Fan.pdf), p. 900.

<sup>167</sup> BBC. 2014. *Mark Duggan inquest: Family fury at lawful killing decision*. January 8. <https://www.bbc.co.uk/news/uk-england-25657949>; Coudert *et al.*, *Body Worn Cameras for Police Accountability*, p. 750.



In the shooting of Michael Brown which is referred to in an earlier section, the officer-involved and witnesses offered polarised and divergent statements regarding what transpired on the day Brown was shot. As a result, it remained unclear whether Brown punched officer Darren Wilson resulting in the latter shooting Brown in fear for his life or officer Wilson punched and shot Brown in the back even though Brown held his hands up in surrender.<sup>168</sup> Similarly, it was not clear whether officer Michael Thomas Slager shot Walter Scott in “total fear” for his life after Scott repeatedly disobeyed commands and grabbed the officer’s taser during a scuffle, or did the officer shoot Scott five times in the back when he was fleeing from the officer?<sup>169</sup> Numerous other incidents also illustrated the challenges of investigating and trying to resolve police-citizen encounters that happen out of sight of police supervisors, independent witnesses and oversight bodies.

The death of Michael Brown and Mark Duggan and the lack of transparency in establishing the truth about what happened created the momentum for public consensus that police BWCs could provide a solution.<sup>170</sup> In the US, this culminated in the President’s Taskforce on 21<sup>st</sup> Century Policing (The Taskforce), established by President Barak Obama in December 2014 as a response to widespread public discontent with policing, recommending the use of police BWCs to police agencies in the US. The Taskforce’s final report touted the evidentiary benefits of BWCs stating that “[b]y documenting encounters between police and the public, body-worn cameras can also be used to investigate complaints about officer-involved incidents.”<sup>171</sup>

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<sup>168</sup> Fan, *Justice Visualised*, p. 923.

<sup>169</sup> Laughland, Oliver. 2016. *Walter Scott shooting: mistrial declared in case against former police officer*. Charleston, December 5. <https://www.theguardian.com/us-news/2016/dec/05/walter-scott-shooting-michael-slager-police-officer-mistrial>.

<sup>170</sup> Coudert *et al.*, *Body-worn Cameras for Police Accountability*, p. 750. Also see Mateescu *et al.*, *Dreams of Accountability, Guaranteed Surveillance*, p. 124; Sanburn, Josh. 2014. *The One Battle Michael Brown’s Family Will Win*. November 24. <https://time.com/3606376/police-cameras-ferguson-evidence/>; Travis, Alan. 2014. “Met police hope personal cameras can restore trust after Mark Duggan killing.” *The Guardian*. London, January 9. <https://www.theguardian.com/uk-news/2014/jan/09/metropolitan-police-cameras-mark-duggan>; Ellis *et al.*, *Evaluation of the Introduction of Personal Issue Body-Worn Video Cameras*, p. 9.

<sup>171</sup> President’s Task Force on 21st Century Policing, *Final Report of the President’s Task Force*, p. 31.

Considering the widespread support for the adoption of BWCs following the aforementioned events, it is important to explore what the technology's perceived evidential value is and how the technology was theorised to strengthen complaints handling and criminal prosecutions in cases of questionable use of force. The next section explores the theory behind the idea.

#### **4.6.2 BWC and the likelihood of having sufficient evidence to reach findings in handling complaints**

The theory behind the evidentiary value of BWCs is central to the investigatory aspect of the accountability processes triggered by the harm caused by police use of force when human rights norms have been violated. BWCs are assumed to document any acts of misconduct, including questionable uses of force, thus enabling the apportionment of responsibility on review. In this formulation, BWCs are seen as a transparency mechanism in policing, subjecting to scrutiny what so far was limited to the parties involved in police-involved fatalities or injuries.<sup>172</sup> At the onset of the more widespread adoption of BWCs, this was seen as a game-changing innovation technology that can improve police accountability.<sup>173</sup>

Video is seen as an objective, unbiased, transparent observer of events that even-handedly reproduces reality for the viewer and from an evidentiary value perspective, it is often portrayed as overwhelming proof at trial.<sup>174</sup> To illustrate the game-changing nature of BWC evidence, BWC proponents listed several added advantages of audio-visual evidence. They argued that an audio-visual record provides for a more reliable, accurate fact-finding after an incident using footage which is an objective recording of events that officers encounter, which, unlike human memory, are objective and impartial.<sup>175</sup> This would make it more difficult for officers to deny accusations of excessive use of force or other abuses when these happened, and it would similarly be more difficult for accusers of police to fabricate abuse or misconduct where it is

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<sup>172</sup> Coudert, *et al.*, *Body-worn Cameras for Police Accountability*, p. 754.

<sup>173</sup> Blitz, March Jonathan. 2015. *Police Body-Worn Cameras: Evidentiary Benefits and Privacy Threats*. Washington DC: American Constitution Society, p. 1; Also see <https://www.urban.org/debates/evaluating-impact-police-body-cameras>

<sup>174</sup> Harvard Law Review, *Considering Police Body Cameras*, p. 1813.

<sup>175</sup> Fan, *Democratising Proof*, p. 1662; Also see <https://www.urban.org/debates/evaluating-impact-police-body-cameras>

absent.<sup>176</sup> Thus, the availability of this record is seen as valuable in evaluating whether the decisions of law enforcement agents to use deadly force were justifiable or not.<sup>177</sup>

Proponents of BWCs also argue that BWC footage is superior to witness testimony which is constrained by the psychological limits on human attention. Human beings, they argue, cannot consciously focus on those elements of action that are prominent or otherwise important - a failure which can also affect the way investigators perceive or understand the sequence of events captured in a video.<sup>178</sup> Moreover, advocates of BWCs argue that video evidence allows for rewinding and reviewing which can allow investigators, lawyers, and judges to notice things they may have not noticed at first and also allows for multiple interpretations by different investigators. They further argue that even though a good cross-examination might reveal flaws of eyewitness perception or memory, lawyers and judges do not have the opportunity, without video evidence, to compare such testimony to an objective record of the event and reach an independent assessment of what happened.<sup>179</sup>

Furthermore, advocates of BWCs argue that eyewitness (whether it be police officials or bystanders) biases are built into the eyewitness record in a way they are not built into a video of the scene and even though the video may not provide a complete record of what occurred, it is less likely to be skewed by biases, emotions, or personal loyalties as can human memory. A video record is also seen as having the additional advantage of being more vivid than a retelling, providing more information and cannot be accused of forgetting or fabricating events in the way human memory can. A video recording can be subject to varied interpretation, but it does not leave room for people recorded the freedom to deny being on the scene, or that that recorded events occurred or, that recorded words were ever spoken. BWC video evidence does not allow an individual to revise the narrative or tell a more favourable account as would

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<sup>176</sup> Blitz, *Police Body-Worn Cameras*, p. 1. Also see Ready and Young, The impact of on-officer video cameras on police-citizen contacts, p. 446.

<sup>177</sup> Pyo, Sunyoung. 2020. Home » local policy adoption » Understanding the Adoption and Implementation of Body-Worn Cameras among U.S. Local Police Departments. October 1. <https://urbanaffairsreview.com/2020/10/01/understanding-the-adoption-and-implementation-of-body-worn-cameras-among-u-s-local-police-departments/>.

<sup>178</sup> Blitz, *Police Body-Worn Cameras*, p. 5.

<sup>179</sup> Blitz, *Police Body-Worn Cameras*, p. 6.

be the case if it was merely their word against another's and would need to ensure that any testimony fits with the documented record.<sup>180</sup> To that extent, it is argued that whatever version is provided is likely to be closer to the truth than would be the case without video evidence.

Beyond the evidentiary value of BWC video, proponents also argue that BWCs are an upgrade to other forms of video recording because of its "high level of mobility, chain-of-custody, and the capacity to capture audio-visual data continuously."<sup>181</sup> This is seen as more straightforward than bystander mobile phone recordings which rely on the unplanned presence of a bystander willing to record the police-citizen encounter. BWC would "eliminate the need for fortuitous happenstance by recording continuously and approximating the field of view of police officers on the ground in day-to-day activities."<sup>182</sup>

BWCs make it possible to tie evidentiary materials to a specific incident – a crucial factor in considering that there could be multiple interpretations of BWC footage. Technical features such as time date and time stamps allow such metadata to be verified with external clues.<sup>183</sup> In addition, the GPS feature makes the evidence more valuable as it can place officers involved at the scene of encounters with citizens.<sup>184</sup>

To counter arguments that police officers can sabotage BWC programmes by not activating their cameras as discussed above, proponents have argued that BWC technology allows independent investigations of such failures to rely on forensic metadata that allows them to determine whether the camera failed.<sup>185</sup> In addition, more recent research has revealed that "meta data can also be used to tell the exact number of minutes an officer attended a call, how many officers were at the scene, and whether

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<sup>180</sup> Blitz, *Police Body-Worn Cameras*, p. 6.

<sup>181</sup> Mateescu *et al.*, *Dreams of Accountability, Guaranteed Surveillance*, p. 122.

<sup>182</sup> Mateescu *et al.*, *Dreams of Accountability, Guaranteed Surveillance*, p. 122.

<sup>183</sup> Coudert *et al.*, *Body-worn Cameras for Police Accountability*, p. 755.

<sup>184</sup> Coudert *et al.*, *Body-worn Cameras for Police Accountability*, p. 755.

<sup>185</sup> Martain, Ben R, Vincent Harinam, and Barak Ariel. 2020. "Linking body worn camera activation with complaints: The promise of metadata. *Australian and New Zealand Journal of Criminology*. Vol (0)(0)." 0 (0): 1-21, p. 2. Also see Sacharoff and Lustbader, *Who should own police body-Worn Camera Videos?*, p. 297.

officers complied with their organisation's BWC policy."<sup>186</sup> This could provide an equalising effect that can be used to counter potential false testimonies by police officers or citizens during investigations of officer-involved shootings and other acts of misconduct.

Based on these arguments, proponents of police BWCs argue that despite its imperfections, BWC video evidence is "often a significant improvement upon the evidence that would be available without it, such as eyewitness testimony."<sup>187</sup> This theorisation is central to the optimism surrounding the potential of police-worn BWCs to increase the accountability of police officers for their conduct, and in particular, their uses of force.<sup>188</sup> These arguments all seem strong but when the hypothesis is tested against the presence of other factors there are potential alternative outcomes. This is discussed in detail in the next section.

#### **4.6.3 Factors that might limit the perceived evidentiary value of BWC footage**

Despite the compelling arguments on the efficacy of BWC footage in increasing the likelihood of reaching a finding on the use of force complaints and other allegations of police misconduct, there are other factors where the availability of BWC footage has fallen short of bringing clarity in investigations of questionable uses of force even where officers appear to have flagrantly flouted their agency policies.

Perhaps the quintessential example, which pre-dates the age of mobile phones and BWCs, is the 1991 brutal assault on an unarmed black man, Rodney King, by Los Angeles Police Department (LAPD), recorded using a video camera. The ability to record such flagrant violence appeared then, as it does now in the era of BWCs and smartphones, to be a game-changer as many shocked Americans and a global audience could see what most black Americans feared in their encounters with the police.<sup>189</sup> Contrary to the perceived evidentiary value propositions outlined above,

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<sup>186</sup> Ben R Martain *et al.*, Linking Body-worn Camera Activation with Complaints, p. 2.

<sup>187</sup> Blitz, *Police Body-Worn Cameras*, p. 6.

<sup>188</sup> Lum *et al.*, Body-worn cameras' effects on police officers and citizen behaviour, p. 20; Coudert *et al.*, Body-worn Cameras for Police Accountability, p. 755.

<sup>189</sup> Martin, Brian. 2005. *The beating of Rodney King: the dynamics of backfire*. <https://documents.uow.edu.au/~bmartin/pubs/05cc.html>.

none of the four police officers involved was convicted on the basis of that evidence, and as shall be illustrated below, it was a harbinger of similar occurrences.

There are more modern and even more controversial reincarnations of the Rodney King-type abuses of authority in the presence of BWCs and the availability of video footage in which few result in the officers involved being charged and even fewer result in the conviction of officers.<sup>190</sup> These include the shooting of Loreal Tsingine in 2016, discussed above, who was shot by an officer who felt threatened by the small pair of scissors she was holding; the July 2016 shooting of Alton Sterling in Baton Rouge, Louisiana by police officers whose BWC allegedly fell off in the scuffle with the victim;<sup>191</sup> the August 2017 shooting and killing of Patrick Harmon in Salt Lake City, Utah because the police believed he was reaching out for a knife that he had;<sup>192</sup> the March 2018 shooting and killing of Stephen Clark in Sacramento, California, by two police officers who believed at the time that he was carrying a gun which turned out to be an iPhone.<sup>193</sup> In all these cases, BWC was present, all cases were investigated and the police officers were not charged<sup>194</sup> resulting in widespread protests against the police for pulling the trigger too quickly.<sup>195</sup> Considering its much-touted evidentiary value, this prompts the question of how it is possible that despite the availability of video evidence there are few cases of police officers being held responsible for the

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<sup>190</sup> Miller, What Body Cams Do.

<sup>191</sup> Gallo, Andrea. n.d. "End of federal Alton Sterling investigation puts spotlight back on body cameras." *The Advocate*. Baton Rouge. [https://www.theadvocate.com/baton\\_rouge/news/alton\\_sterling/article\\_815cec3a-31d6-11e7-a9dd-1b789f73ec80.html](https://www.theadvocate.com/baton_rouge/news/alton_sterling/article_815cec3a-31d6-11e7-a9dd-1b789f73ec80.html).

<sup>192</sup> Burns, Iain. 2017. Cop cleared of wrongdoing after he shot and killed a fleeing criminal who was pulled over in Salt Lake City for riding a bicycle across six lanes. Salt Lake City, October 5. <https://www.dailymail.co.uk/news/article-4951364/Cop-cleared-shot-killed-fleeing-criminal.html>.

<sup>193</sup> Bandlamudi, Adhiti, Cody Drabble, Chris Remington, and Nick Miller. 2018. 'Gun! Gun! Gun!': Body Camera Video Shows Sacramento Police Officers Shooting Unarmed Stephen Clark. Sacramento, March 21. <https://www.caprado.org/articles/2018/03/21/sacramento-police-department-release-body-camera-helicopter-video-from-stephon-clark-shooting/>.

<sup>194</sup> The lack of an indictment refers to the initial mostly grand jury investigations in the US. Some of the officers were subsequently tried through civil prosecution, found guilty and sent to prison. For an example, see Knapp, Andrew. 2017. "After hung jury is declared in Michael Slager trial, prosecutor vows: 'There will be another day'." *The Post and Courier*. January 26. Accessed January 17, 2021. [https://www.postandcourier.com/news/after-hung-jury-is-declared-in-michael-slager-trial-prosecutor-vows-there-will-be-another/article\\_b43c72ec-baad-11e6-a6eb-8714ab6ea5f8.html](https://www.postandcourier.com/news/after-hung-jury-is-declared-in-michael-slager-trial-prosecutor-vows-there-will-be-another/article_b43c72ec-baad-11e6-a6eb-8714ab6ea5f8.html).

<sup>195</sup> Miller, What Body Cams Do.



loss of life or infliction of life-threatening injuries on citizens in such controversial incidents?

One factor that could limit BWCs evidentiary value's impact is how the interpretation - or misinterpretation - of recording is the real issue. According to Fan, the allure of BWCs' perceived objectivity and impartiality masks the potential distortions caused by camera angle, framing, perspective, and the filter of one's own preconceived notions.<sup>196</sup> Thus, even a video that looks patently unambiguous is susceptible to multiple interpretations depending on the “cultural outlook” of the individual viewing the tape.<sup>197</sup> According to the *Harvard Law Review*, cultural outlook implies implicit biases when determining whether an officer's actions were reasonable under the circumstances for reasons of indictment or conviction.<sup>198</sup> The misinterpretation of video evidence can be illustrated in how video footage in the trial of four police officers directly involved in the brutal assault of Rodney King was conducted.

Using what Martin called the “backfire analysis”, which assumes that reality is socially constructed, attorneys for the police officers reinterpreted the recorded events of the assault on King as a justified use of force.<sup>199</sup> While the Rodney King video evidence showed police beating an outnumbered and defenceless man, the officers' elaborate defence sought to convince the jury and the public that what happened was not actually what it seemed.<sup>200</sup> This was done by targeting the victim and illustrating that although the beating was undoubtedly brutal, Rodney King deserved the treatment he got because, among other things, he was a powerful and potentially dangerous threat to the police as evidenced by the fact he had “superhuman strength” – he survived two high voltage tasers when under normal circumstances one would be enough; that he seemed to be on drugs and that he was an ex-convict.<sup>201</sup> That, including “testilying” and interfering with potential witnesses convinced the jury that the force used was justified.

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<sup>196</sup> Fan, *Democratizing Proof*, p. 1662.

<sup>197</sup> *Harvard Law Review*, *Considering Police Body Cameras*, p. 1813.

<sup>198</sup> *Harvard Law Review*, *Considering Police Body Cameras*, p. 1813.

<sup>199</sup> Martin, *The beating of Rodney King*.

<sup>200</sup> Martin, *The beating of Rodney King*.

<sup>201</sup> Martin, *The beating of Rodney King*.



The King story resonates with justifications used for killing victims in the presence of BWCs. One of the most recent ones was the death of George Floyd. The defence sought to sanitise police use of force arguing that it can look horrifying and unattractive on video but that it is a necessary part of the job and that officer Derek Chauvin did exactly what he had been trained to do in his 19-year service.<sup>202</sup> The defence also tried to argue that Floyd may have died because of the drugs found in his system as reflected in his toxicology report.<sup>203</sup> Thus, in some instances there are interpretive limitations and external biases that can distort what is otherwise in plain sight and is much more difficult to address through BWCs.<sup>204</sup> This is more so in the US where there is a jury system which is susceptible to racial and other biases.

Another often-unstated factor that might weaken the perceived evidentiary value of BWC footage is the underlying assumption that police BWCs record every police-citizen encounter and that such evidence is available for every investigation.<sup>205</sup> Critics of BWCs argue that a combination of police discretion, technological malfunctions, and related controversies over failure to record contested encounters by officers wearing BWCs can nullify the perceived efficacy of BWC footage. For example, while BWC can automatically start recording upon detecting certain cues, the same police BWC programmes allow officer discretion to activate the recording device or not activate it or stop it.<sup>206</sup> Therefore the more discretion police officers have to decide when to start, stop or never start filming, in some cases there may simply not be video evidence to review.

Ironically, some of the listed advantages of BWC evidence can lead to unfair outcomes for police officers. For example, the benefit of reviewing and rewinding footage is not a luxury that the officer has during a heated confrontation with potential suspects, and he/she acts based on the circumstances as he or she sees them. The benefit of the

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<sup>202</sup> Levenson, Eric. 2021. *Derek Chauvin's defense is using these 3 arguments to try to get an acquittal in George Floyd's death*. April 12. <https://edition.cnn.com/2021/04/12/us/derek-chauvin-defense-strategy/index.html>.

<sup>203</sup> BBC. 2021. *George Floyd died from lack of oxygen, not fentanyl, says expert*. April 9. <https://www.bbc.co.uk/news/world-us-canada-56670912>.

<sup>204</sup> Urban Institute. n.d. *Evaluating the Impact of Police Body Cameras*. <https://www.urban.org/debates/evaluating-impact-police-body-cameras>.

<sup>205</sup> Fan, *Democratizing Proof*, p. 1657.

<sup>206</sup> Sacharoff and Lustbader, *Who should own police body-Worn Camera Videos?*, p. 287.

video evidence should be about what happened and whether the police officer's actions were justified or not. Therefore, an investigation into the police officer's actions may reveal crucial factors that the officer could have relied on to make decision in line with organisational policies and regulations, but which escaped hers/his attention in the heat of the moment.

As stated above, proponents of BWC video evidence argue that human memory is constrained by the limits on human attention and cannot focus on elements prominent and may not sequence events properly for investigators. This assumes BWC footage is a complete record of what happened, that the police officer saw and factored all of the information into his/her decision making, this assertion may not necessarily be true because as this may depend on where the BWC is mounted. For example, if the camera is mounted on the officer's chest, the officer may turn his/her head and see pertinent events out of shot of the camera, which may influence his/her decision to act in a certain way, including decisions regarding the use of force. Such aspects would not be available during a review or investigation of the incident. In that instance, BWC evidence may need to be supplemented by witness statements to get all the facts.

The perceived neutrality of the BWC or its attribute as an objective, truthful record of what happened may be deliberately undermined by police officers to turn it into a tool for holding citizens to account, including on false grounds.<sup>207</sup> For example, what was deciphered from the recorded BWC footage of police officers in Marion County, Florida was that they had an altercation with a suspected drug dealer, and they were heard repeating orders to the suspect to stop resisting arrest and the footage appeared to confirm, even though not in a directly obvious way, what they wrote in their incident reports. However, surveillance camera video footage of the arrest from a nearby building showed that the suspect had entirely yielded to the officers' control from the start and yet the officers proceeded to physically beat him regardless.<sup>208</sup> Without additional evidence from other sources, the case of unnecessary use of force would

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<sup>207</sup> Upturn. 2017. *The Illusion of accuracy: How body worn camera footage can distort evidence*. The Leadership Conference on Civil and Human Rights.

<https://www.upturn.org/reports/2017/the-illusion-of-accuracy/>. Also refer to Miller, What Body Cams Do; Koper *et al.*, *Realising the Potential of technology in Policing*, p. 124.

<sup>208</sup> Upturn, *The Illusion of accuracy*. Also refer to Miller, What Body Cams Do; Koper *et al.*, *Realising the Potential of technology in Policing*, p. 124.

not have been immediately evident as the police had lied in their incident reports.<sup>209</sup> The police officers later pleaded guilty to violating civil rights and one of them for obstruction of justice for falsifying his police report.

Thus, the impact of the availability of BWC footage on the likelihood that a complaint will have sufficient evidence upon which to reach a finding can be impacted by other factors in ways that challenge the optimistic theorisation of proponents of the technology. That said, perhaps the availability of footage is probably the theory's strength because it allows for a record of the event that can, together with all other relevant evidence, be reviewed after the fact to determine what actually happened in a controversial incident between the police and a member(s) of the public. Otherwise, there would be nothing to use as evidence in determining what exactly happened.

#### **4.6.4 Evidence of the adequacy of BWC evidence in resolving complaints**

The evidentiary value of BWCs one of the main reasons for adopting them. Therefore, it is logical that this thesis must analyse evidence from empirical studies regarding the extent to which the introduction of BWCs has enhanced the collection of evidence and the adequacy of such evidence in the resolution of complaints against police misconduct. Despite the need for improved police accountability being one of the main motivations for citizens and policymakers to call for the introduction of BWCs, research has not addressed whether BWCs can increase police accountability and therefore, that there is still a research void to fill as far as seeking to understand the impact BWCs have on the reaction to and investigation of controversial officer-involved shootings.<sup>210</sup> This claim is bolstered by Koen and Mathna who also point out that the question that still lingers is whether police agencies are using BWCs and the resulting footage with the intent of holding officers any more accountable for their conduct and performance than before.<sup>211</sup>

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<sup>209</sup> Mateescu *et al.*, *Dreams of Accountability, Guaranteed Surveillance*, p. 124.

<sup>210</sup> Lum *et al.*, *Body-worn Cameras' Effects on Police officers and Citizen Behaviour*, p. 36. Also see Lum *et al.*, *Research on Body-worn Cameras*, p. 109.

<sup>211</sup> Koen, Marthinus, and Brooke Mathna. 2019. "Body-worn Cameras and Internal Accountability at a Police Agency." *American Journal of Qualitative Research*, p. 2.

The unresearched relationship between BWC and more accountable policing is an anomaly considering the ever-present motif of BWC's potential for enhancing transparency and accountability in the literature on BWCs, be it academic, advocacy and policy positions, some of which have been referenced in the sections above. Lum and her colleagues' theory is that there was an incongruence between the police and community expectations of the impact of BWCs. While the public expected BWC footage to be used to increase accountability of the police in specific incidents, the police's likely reason to have positive feelings about BWCs was that they saw the technology as a means of protecting themselves from vexatious complaints or one-sided stories about their conduct.<sup>212</sup> These incongruencies affect the interpretation of BWC effectiveness.

For police officers, BWCs are seen as effective because they deter citizen misbehaviour and keep citizens accountable and are a valuable evidence-gathering tool that can aid in the investigations of crimes.<sup>213</sup> While there are no empirical studies on hypothesis focusing on public expectations of police accountability as a result of the presence of BWCs, there are what one may describe as “police-centric” BWC studies that found BWCs to be effective in the investigation and resolution of crimes in terms of increasing the number of charges filed, the rates of guilty pleas, and convictions against suspects.<sup>214</sup> For example, three UK studies found that BWCs may increase detection and clearance rates of criminal investigations as well as the rate of guilty pleas.<sup>215</sup> A report by the West Midlands Police BWC programme in the UK celebrated how its 4,929 BWCs were used in almost 9,000 successful prosecutions in the period between April 2018 and May 2020<sup>216</sup> provides an example of how police

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<sup>212</sup> Lum *et al.*, Body-worn cameras' effects on police officers and citizen behaviour, p. 4-5.

<sup>213</sup> Sacharoff and Lustbader, Who should own police body-Worn Camera Videos? Also see Lum *et al.*, Body-worn Cameras' Effects on Police Officers and Citizen Behaviour, p. 5.

<sup>214</sup> Lum *et al.*, Research on body-worn cameras, p. 108; Also see Owens, Mann, & Mckenna (2014), The Essex Body-Worn Video Trial: The Impact of body-worn video on Criminal Justice Outcomes of Domestic Abuse Incidents.

<sup>215</sup> Lum, C., Stoltz, M., Koper, C. S., & Scherer, J. A. (2019). Research on body-worn cameras: What we know and what we need to know. *Criminology and Public Policy*, 18(1), 108.

<sup>216</sup> Perrin, Ben. 2020. Watch - WORST Crimes Caught on Bodycam as West Midlands Police Reveals Camera Evidence Used in 9,000 Successful Prosecutions. July 19. <https://www.birminghammail.co.uk/news/midlands-news/watch-worst-crimes-caught-bodycam-18602206>.

organisations perceive BWCs. It is not clear whether these statistics include prosecutions of police officers. However, this does not take away the fact that the BWC technology provides useful evidence in prosecuting cases.

Research by Owens *et al.* found that BWC were effective in increasing the detection and clearance of criminal investigations as well as the rate of guilty pleas;<sup>217</sup> while Morrow *et al.* found substantial evidentiary benefits of BWC in investigations of intimate partner violence resulting in criminal charges for domestic violence,<sup>218</sup> including the fact that video footage had advantages in pursuing criminal prosecution even without the victim cooperating with the investigation and that such cases are more likely to result in a charge or result in a guilty plea or verdict at trial.<sup>219</sup>

While there have been no systematic studies yet on this theory, it also seems there is anecdotal evidence that BWCs are working, as can be deciphered from media reports and official reports from the police<sup>220</sup> and the IOPC in the UK. For example, investigations of police use of force by police forces in the UK use BWC footage as evidence in internal and external investigations of officer misconduct. As stated by the Independent Police Complaints Commission (IPCC) in a 2016 position statement on BWCs, there was a growing number of cases where BWC video formed part of the available evidence presented to it by [police] forces. Such evidence was seen as providing valuable information in connection with complaints, conduct matters and death and serious injury matters.<sup>221</sup> Unfortunately, there has been no accessible information on systematic research of the impact of video evidence reaching findings during complaints handling processes compared to the situation before as well as the outcome measures used to determine success or failure of the technology. The same

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<sup>217</sup> Owens, Catherine, David Mann, and Rory Mckenna. 2014. *The Essex Body-Worn Video Trial: The Impact of body-worn video on Criminal Justice Outcomes of Domestic Abuse Incidents*. October.

[https://whatworks.college.police.uk/Research/Documents/BWV\\_Report.pdf](https://whatworks.college.police.uk/Research/Documents/BWV_Report.pdf).

<sup>218</sup> Morrow, Weston J., Charles M. Katz, and David E. Choate. 2016. "Assessing the Impact of Police Body-Worn Cameras on Arresting, Prosecuting, and Convicting Suspects of Intimate Partner Violence." *Police Quarterly* (Sage) 19 (3): 303-325.

<sup>219</sup> Morrow *et al.*, Assessing the Impact of Police Body-Worn Cameras on Arresting.

<sup>220</sup> See: <https://www.met.police.uk/foi-ai/af/accessing-information/published-items/?q=&dt=Misconduct+outcome>

<sup>221</sup> Independent Police Complaints Commission. *IPCC position statement on body worn video*.

claim can be made about the US context, but this is no substitute for empirical research to confirm or deny the hypothesis that the use of BWC in law enforcement improves the quality and quantity of evidence which enhances police accountability. This leaves open the main question for this thesis regarding how best to evaluate the efficacy of BWCs in increasing police accountability.

The findings of this research raise two key issues that have implications for the evidentiary value of BWC footage and what might be termed the non-technological determinants of the efficacy of BWCs. The first, also a hypothesis, is that if BWC footage can be used to lead to a quick resolution of criminal investigations in ordinary criminal cases why would it not achieve the same or similar effect in police misconduct cases? After all, BWCs are guaranteed to be present at every scene of controversial police-citizen encounters, ideally from the start of the confrontation. The second relates to a general observation by researchers on the outcomes of technological innovations in policing,<sup>222</sup> which is succinctly summed up by Lum and her colleagues who state that the outcomes associated with policing technologies are often a function of how agencies view and implement those technologies and that, therefore, agencies shape technology use and not the other way round.<sup>223</sup>

This salient observation by Lum et al. is essential in estimating the impacts of BWCs and the conditions under which they may be achieved. The lack of systematic research in this line of thinking is partly what this thesis seeks to contribute to, but there is more that needs to be done to determine the extent to which BWC evidence may or may not increase the likelihood that a complaint will have sufficient evidence upon which to reach a finding. From the preceding discussion, this might include identifying the circumstances under which this potential can be realised.

#### 4.7 Impact of BWC on public understanding of investigations, acceptance of outcomes and restoration of norms

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<sup>222</sup> Koper *et al.*, *Realising the Potential of technology in Policing*. Also refer to Byrne, James, and Gary Marx. 2011. "Technological Innovations in Crime Prevention and Policing. A Review of the Research and implementation and Impact." *Jaagang* 3 (20): 17-40.

<sup>223</sup> Lum *et al.*, *Body-worn cameras' effects on police officers and citizen behaviour*, p. 5.



#### 4.7.1 The trust deficit between the police and communities

As stated in the preceding chapter, a critical aspect of accountability under international law is the idea of restoring the norms that have been violated. Further, police misconduct, particularly the questionable use of lethal force on citizens and the perceived lack of transparency and accountability for these actions are all factors that contribute to the erosion of police legitimacy as illustrated in Section 4.1 above.<sup>224</sup>

While BWCs were expected to improve policing practices and build community trust and legitimacy, critics argue that the technology has done anything but improve policing practices.<sup>225</sup> Various types of evidence have been given for this criticism, and some of it is compelling. For example, critics of BWCs have cited the number of high-profile shootings documented by organisations such as *The Washington Post*,<sup>226</sup> and the persistent occurrence of cases of high-profile shootings captured on BWCs, few of which result in charges being brought against officers and even fewer of which result in a conviction, as evidence that BWCs are ineffective in improving police accountability.<sup>227</sup>

In other words, there is public mistrust about the investigative processes and a refusal to accept the outcomes of such investigations. In the US, this is evidenced by protests each time the various state prosecutors announce mistrials and acquittals in officer-involved shooting incidents.<sup>228</sup> During investigations, this tension plays out in the form

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<sup>224</sup> Rogers, Coling. 2020. *Police legitimacy: How It Can be Regained Once Lost*. August 27. <https://theconversation.com/police-legitimacy-how-it-can-be-regained-once-lost-144154#:~:text=The%20response%20to%20the%20killing,that%20contribute%20to%20its%20erosion.>

<sup>225</sup> Lum *et al.*, *Body-worn Cameras' Effects on Police Officers and Citizen Behaviour*, p. 34; Also see Lopez, German. 2018. *Cops are Almost Never Prosecuted and Convicted for Use of Force*. November 14. <https://www.vox.com/identities/2016/8/13/17938234/police-shootings-killings-prosecutions-court> and Lockhart, P. R. 2019. "Body-worn cameras were supposed to help improve policing. They aren't living up to the hype." *Vox*. May 27. <https://www.vox.com/2019/3/27/18282737/body-camera-police-effectiveness-study-george-mason> and Matsakis, *Body Cameras Haven't Stopped Police Brutality*.

<sup>226</sup> Park, Madison. 2018. *Police Shootings: Trials, convictions are rare for officers*. October 3. <https://edition.cnn.com/2017/05/18/us/police-involved-shooting-cases/index.html>. The Washington Post database can be found at <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/>.

<sup>227</sup> Miller, *What Bodycams do: Behaviour, Accountability and Trust*. Also see Park, *Police Shootings: Trials, convictions Are Rare*.

<sup>228</sup> See examples here: BBC. 2019. *Protesters Take to Streets of Pittsburgh after Policeman Acquitted of Killing Black Teen*. March 24. <https://www.bbc.co.uk/news/world-us-canada-47683162>.



of demands by victims, families of the deceased and witnesses for the release of the footage.<sup>229</sup> Delays in releasing the footage only serve to exacerbate the tensions amid suspicions of a police cover-up.<sup>230</sup> This was the case with the shooting of Tsingine and most police shootings discussed above.

Similarly, the Rochester Police Department, New York made concerted efforts to delay the release of incriminating BWC video footage of police officers using excessive force on a handcuffed, naked black man, Daniel Prude, who was sitting on the ground with a "spit sock"<sup>231</sup> over his head before he stopped breathing and was declared brain-dead at a hospital. On March 28, 2020, Prude died a week after the incident,<sup>232</sup> and his family filed an information request on April 3. However, the footage was only released on August 12, leading to days of continuous protests and accusations of a cover-up.

After grand jury trials of such incidents, when the alleged offending officers are not indicted<sup>233</sup> or indicted but are not found guilty,<sup>234</sup> it further intensifies protests leading

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<sup>229</sup> Foley, Ryan J. 2019. "Public Regularly Denied Access to Police Officer Video." *AP*. March 14. <https://www.apnews.com/67f22d5857f14413a4a9b34642c49ae3>.

<sup>230</sup> Glenza, Jessica. 2016. *Chicago officials delayed release of Laquan McDonald shooting video*. New York, January 1. <https://www.theguardian.com/us-news/2016/jan/01/chicago-officials-delayed-release-laquan-mcdonald-shooting-video>. Also see Pathieu, Diane, Will Jones, and John Garcia. 2018. *Chicago police release body cam video of South Shore police shooting*. July 16. <https://abc7chicago.com/chicago-police-shooting-protests-harith-augustus-police-involved/3766539/>.

<sup>231</sup> A spit hood, or spit guard, is a loose, breathable fabric sack that can be loosely placed over a person's head not just to shield themselves from infectious diseases, but also, many American police departments employ them as a restraining device to prevent arrested suspects and prisoners from biting or spitting.

<sup>232</sup> Valle, Evan Simko-Bednarski, and Lauren Del. 2020. "Rochester officials intentionally delayed the release of Daniel Prude body cam video." *CNN*. Rochester, September 16. <https://www.cnn.com/2020/09/16/us/daniel-prude-rochester-emails/index.html>. Also refer to Sanchez, Ray, Sheena Jones, and Evan Simko-Bednarski. 2020. "Rochester police chief to retire amid Daniel Prude death protests." *CNN*. September 8. <https://www.cnn.com/2020/09/08/us/rochester-police-chief-daniel-prude-case/index.html> and Villareal, Alexandra. 2021. *Daniel Prude: protesters decry New York jury's failure to indict officers in death*. Rochester, New York, February 24. <https://www.theguardian.com/us-news/2021/feb/24/daniel-prude-protests-new-york-failure-indict-officers-death>.

<sup>233</sup> Villareal, *Daniel Prude: protesters decry New York jury's failure*.

<sup>234</sup> Baker, J. David Goodman and Al. 2014. *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*. New York, December 3. <https://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html>.

to a vicious cycle that diminishes police legitimacy. As law enforcement officials commit even more violations during the management of the protests, thus reinforcing the fractured relations with the communities they are supposed to serve.<sup>235</sup> These examples are illustrative of the point that the lack of transparency in the investigative processes can further create public misunderstandings and widen the trust deficit between the police and communities they serve. It seems to be the case in the US that it will take more time to restore trust and police legitimacy with certain sections of the US population.

#### **4.7.2 Impact of BWCs on public understanding of investigations, acceptance of outcomes and restoration of norms**

As discussed in the preceding chapter on the law of law enforcement, the accountability processes triggered when there is death or serious injury as a result of police actions are part of an overall process for restoring the violated norms. The restoration of norms also extends to the restoration of the fractured relationships between the police and the communities they serve. The first part of accountability is the investigation - the fact-finding - which seeks the truth about what happened, who was responsible, who was the victim and whether there should be remedies and reforms to avoid future repetition of the violations.

It is argued in this thesis that the impact of BWCs on enhancing public understanding of the investigation and its findings is dependent on the extent to which it can contribute to the accountability process. This hypothesis assumes that the availability and accessibility (transparency) of BWC evidence – seen as an objective and accurate record of what transpired in a use of force incident – ensures that public investigations are fairer and more likely to produce acceptable outcomes that restore the norms that have been violated and thus the legitimacy of law enforcement.

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<sup>235</sup> Jansen, Anja M., Ellen Giebels, Thomas J. L. van Rompay, and Marianne Junger. 2018. "The Influence of the Presentation of Camera Surveillance on Cheating and Pro-Social Behavior." *Frontiers in Psychology* 9: 1-12.; Zansberg, Steve. 2021. *Public Access to Police Body-Worn Camera Recordings (Status Report 2020)*. American Bar Association. [https://www.americanbar.org/groups/communications\\_law/publications/communications\\_lawyer/fall2020/public-access-police-bodyworn-camera-recordings-status-report-2020/](https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/fall2020/public-access-police-bodyworn-camera-recordings-status-report-2020/).

Despite the compelling hypothesis on the evidentiary value of BWC footage as discussed above, the theorisation is open to influence by other factors that may lead to different outcomes. These are discussed in the section below.

#### **4.7.3 Other factors that might affect the perceived impact BWC on public understanding of investigations, acceptance of their outcomes and restoration of norms.**

The first countervailing factor to this hypothesis is the validity of its implicit assumption that BWC evidence is fool-proof, and therefore, it will end all the controversies regarding inaccuracies during investigations and be understood by all stakeholders without equivocation. As illustrated in the preceding sections and through anecdotal examples, this is not possible at all times, mainly because of (mis)interpretations. As Luis *et al.* sum it up, the same BWC footage that can be used to condemn an officer can also be used to justify and explain his actions.<sup>236</sup> Where meaning is contested it follows that outcomes are also contested. This can be a cause of serious misunderstandings during and after investigations and trials as evidenced by the Rodney King incident and others such as Loreal Tsingine that are discussed above.

However, there are other non-technological factors that might lead to different outcomes. Based on anecdotal evidence of the aftermath of investigations into officer-involved shootings in the US, it is evident that there can be contestations on the investigative process in the absence of one or more of the investigation standards outlined in the Minnesota Protocol. This often leads to a refusal to accept outcomes and further deterioration of police-community relations. Thus, the likelihood of public understanding of investigations and acceptance of outcomes would require a credible investigative mechanism and a transparent process. Such credibility depends on the investigation being prompt, effective and thorough, transparent, independent and impartial.<sup>237</sup>

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<sup>236</sup> Louis *et al.*, *Police Use of Body-Worn Cameras*, p. 312.

<sup>237</sup> *Minnesota Protocol on the Investigation of Potentially Unlawful Deaths* (2006), para 23.

With regards to evidence, which is where BWCs are implicated, the investigative mechanism should be able to collect all testimonials, documentary, and physical evidence; be capable of ensuring accountability for unlawful death and should lead to the identification, and if justified by the evidence and seriousness of the case, the prosecution and punishment of all those responsible and, preventing future unlawful death.<sup>238</sup> This formulation illustrates that BWCs are only a part of a broader process where BWC footage is not the only evidence but more importantly, that public acceptance of findings is the result of many other factors including perceptions of independence and impartiality and who the key players in the investigation are.

However, considering that one of the principal reasons why communities called for the adoption of BWCs was their perceived objectivity and accuracy, it follows that each investigation where BWC was present heightens this expectation by victims, relatives of the deceased and witnesses. This raises the question of whether the public can accept a different outcome even if it is correct. This argument arises from the fact that police use of force is an occupational hazard and as illustrated in the preceding chapter, there are circumstances law enforcement officers are justified to use force. It is predictable that in the presence of BWCs, and in contexts of low police legitimacy, members of the public will expect a conviction for the police officer, but the officer may have lawfully used force. In such situations, BWCs provide an opportunity for law enforcement agencies to educate members of the public about their use of force policies to minimise future violent confrontations. It is also plausible that BWCs can also trigger reforms by helping cast a spotlight on the failures of an accountability system beyond the mere lack of access to relevant evidence.

The US provides good examples. Critics of grand jury investigations have questioned the use of local state prosecutors suggesting that this can negatively impact the appearance of fairness of investigations and prosecution of officer-involved incidents.<sup>239</sup> They call for local prosecutors to be presumptively barred from

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<sup>238</sup> *Minnesota Protocol*, para 24.

<sup>239</sup> For example, see Harvard Law Review. 2017. "Restoring Legitimacy: The Grand Jury as the Prosecutor's Administrative Agency." *Harvard Law Review* 130 (4): 1205–26. Also see Robertson, Restoring Public Confidence in the Criminal Justice System and Fairfax, The Grand Jury's Role in the Prosecution of Unjustified Police Killings.

prosecuting police officers in their locality because of a combination of their unfettered discretionary powers in filing charges and a possible conflict of interest that might threaten public understanding of investigations thus threatening the appearance of justice in the process.<sup>240</sup> The perception of a possible conflict of interest arises from the fact that prosecutors have a close working relationship with police officers in nearly every criminal case, which might create mutual respect and admiration between them, which might taint prosecutorial decisions.<sup>241</sup> They argue that falling foul of the police by indicting them may also be a career-limiting choice for prosecutors.

Such incidents and the perceptions they generate can be counterproductive in achieving the objective of creating trust and legitimacy in the police and the broader criminal justice system. They possibly explain the contested nature of the relationship between the police and communities in the US compared to the UK and South Africa, where independent investigatory bodies are in place to avoid the challenges US law enforcement faces when investigating police misconduct.

#### **4.7.4 Evidence on the relationship between BWC and likelihood of public understanding of investigations, acceptance of outcomes and restoration of norms**

The literature on the relationship between BWCs and police legitimacy has been discussed in detail in the introductory chapter. Most such studies rely on perception surveys of processes before, during and after investigations. Perception surveys, which have been discussed in section 4.1, focus on the relationship between BWCs and procedurally just policing and its impact on perceptions of police legitimacy. As argued above, the long-standing animosity between the police and certain sections of

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<sup>240</sup> Robertson, C. J. 2018. "Restoring Public Confidence in the Crminal Justice System: Policing Prosecutions When Prosecutors Prosecute Police." *Emory Law Journal* 67 (4): 853-886. <https://scholarlycommons.law.emory.edu/cgi/viewcontent.cgi?article=1073&context=elj>, p. 865. Also refer to Fairfax Jr., Roger A. 2017. "The Grand Jury's Role in the Prosecution of Unjustified Police Killings — Challenges and Solutions." *Harvard Civil Liberties Review* 398-419. <https://harvardcrcl.org/wp-content/uploads/sites/10/2017/07/Fairfax.pdf> and Elderbroom, Brian, and Lauren-Brooke Eisen. 2015. *The Gatekeepers: Four ways Prosecutors Can Improve their Decision Making*. March 16. <https://www.themarshallproject.org/2015/03/16/the-gatekeepers>.

<sup>241</sup> Robertson, Restoring Public Confidence in the Crminal Justice System, p. 866. Also see Fairfax, *The Grand Jury's Role in the Prosecution of Unjustified Police Killings*, p. 403.

the community in both the UK and the US, particularly among minority populations and immigrants, means that even before the proceedings start, there is animosity and preconceived ideas that tamper with that particular section of the community's understanding of outcomes of the investigative processes, and this is whether the findings are correct or not.

However, one of the widely analysed aspects is the perception of bias and lack of independence of investigative bodies.<sup>242</sup> As argued by Sacharoff and Lustbader, any perception of bias in an investigation and prosecution of police will result in dissatisfaction with the outcome regardless of its accuracy.<sup>243</sup> Such criticism is more relevant in the US<sup>244</sup> than in the UK where most people perceive the IOPC as impartial.<sup>245</sup>

The 2015 shooting of an unarmed black man, Samuel DuBose, by officer Ray Tensing in Cincinnati in the US illustrates this perception of bias. Despite what could be considered unambiguous video footage from officer Tensing's BWC showing how he stopped DuBose for not displaying a front license plate and then shooting him when his car started moving before he had complied with Tensing's request for a driver's license and for him to unfasten his seatbelt.<sup>246</sup> Despite video evidence showing that that DuBose posed no danger to Tensing and regardless of a supportive prosecutor, the case against Tensing was dropped after two mistrials caused by a hung jury.

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<sup>242</sup> These include *The Guardian Newspaper*; *CNN*, *ABC News* and experts from *Think Tanks* who are widely cited in this chapter.

<sup>243</sup> Sacharoff and Lustbader, *Who should Own Police Body-Worn Camera Videos?*

<sup>244</sup> Fairfax, *The Grand Jury's Role in the Prosecution of Unjustified Police Killings*. Also refer to Angelis, Joseph De, Richard Rosenthal, and Brian Buchner. 2016. *Civilian Oversight of Law Enforcement: A Review of Strengths and Weaknesses of Various Models*. Issue Overview, Washington, DC: Office of Justice Programs, 1-18.

[https://d3n8a8pro7vnmx.cloudfront.net/nacole/pages/161/attachments/original/1481727977/NACOLE\\_short\\_doc\\_FINAL.pdf?1481727977](https://d3n8a8pro7vnmx.cloudfront.net/nacole/pages/161/attachments/original/1481727977/NACOLE_short_doc_FINAL.pdf?1481727977); Cassell, Paul. 2014. *Who prosecutes the police? Perceptions of bias in police misconduct investigations and a possible remedy*. December 5. Accessed September 30, 2020. <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/05/who-prosecutes-the-police-perceptions-of-bias-in-police-misconduct-investigations-and-a-possible-remedy/>; and Dewan, Shaila, and Serge F. Kovaleski. 2020. *Thousands of Complaints Do Little to Change Police Ways*. June 8. Accessed March 24, 2021. <https://www.nytimes.com/2020/05/30/us/derek-chauvin-george-floyd.html>.

<sup>245</sup> Independent Office for Police Conduct, *The Independent Office for Police Conduct: Public Perception Tracker*, p. 4.

<sup>246</sup> Lope, *The Failure of Body Worn Cameras*.



The implications of this discussion can be daunting to police agencies. It means that even where the evidence points to a justified homicide or use of force, which may not translate to a restoration of relations with communities. However, where perceptions of bias, lack of independence and lack of thoroughness in the investigation can be validated, the norms may not be restored, and relations between the police and communities worsen, as is the case mainly in the US. Any police organisation adopting BWCs should consider these issues because, as argued elsewhere in this chapter, BWCs are not a silver bullet. Their impact on police accountability outcomes depends to a large extent on how they are used.

#### 4.8 Conclusion

The analyses of the theoretical assumptions on the efficacy of BWCs across several outcomes related to transparency, violence reduction and police accountability reveals several lessons that are of practical importance for a country planning to introduce BWC in law enforcement such as South Africa. This chapter illustrates that there are a limited number of studies on the relationship between the presence of BWCs in policing and increased accountability. However, the value of having BWC footage is undoubtedly the main advantage of cameras in that it allows visibility that in most instances was not there in controversial police-citizen encounters. Understandably, there are concerns with how this evidence is interpreted, but it is significantly better to have footage included as part of all other evidence than otherwise would be the case without such evidence.

Concerning the hypothesis that transparency of police actions leads to police legitimacy, the analysis shows that problem is not whether the public has access to evidence of police-citizen encounters; it is what they see in the video footage that fractures the relationship between the police and community even further. As procedural justice theory illustrates, police tactics determine individuals' perception of the police, and the implications are that it is the behaviour of the police that should be addressed first. Hence, BWCs alone should not be over-relied on in postulations about issues requiring broader police policy and practice reforms. An example of something closely related to the use of BWCs is that SAPS currently records its management of



assemblies, and the video evidence is used to review operations after the event. However, because of secretive and clannishness of SAPS' organisational and occupational culture, investigations by the Marikana Commission were almost derailed because SAPS would not release the evidence. Thus, the use of BWCs could be undermined by police culture and not bring about more the desired accountable policing.

The chapter also sought to analyse the theory that BWCs increase the likelihood of officers resorting to the use of force – an important issue as the state's duty to protect obliges the states, their agents, and agencies to refrain from arbitrary conduct that leads to a violation of human rights. As Lum and her colleagues illustrate in their narrative evaluation, this is the most researched hypothesis on the efficacy of BWC, but the findings are also mixed and contradictory. The varied nature of these findings is not least because of the outcome measures that are largely based on a correlation between the presence of BWC and the reduction in the use of force among officers wearing BWCs or a reduction in complaints against police use of force and not a direct causal relationship between these variables. Also, many other confounding factors and circumstances may influence the fluctuation in police use of force and the number of complaints against police officers' use of force, making it difficult to attribute such changes to the presence of BWCs decisively.

Regarding the hypothesis that when the police are perceived as legitimate, victims and witnesses feel more empowered to cooperate with the police, including lodging complaints regarding questionable uses of force by the police. There is limited research, if any, linking the presence of BWCs to this theorisation. However, the predictors of whether this happens or not are more likely to depend on the context, particularly the legitimacy and integrity of reporting mechanisms than the mere presence of BWCs. While the theory is plausible, issues such as fear of reprisals from the police and elements of police culture such as resistance to transparency and accountability can also be influential. Regarding the second theorisation, it appears police having the evidence does not necessarily increase the likelihood of an investigation. However, external pressure to investigate based on either the release

of bystander video or the strong assumption that the police have video evidence increases the likelihood of a police investigation.

The most significant finding and one that has a direct bearing on this study is the fact that, to date, there has been limited systematic, empirical research that directly evaluates the efficacy of BWCs on improving police accountability for questionable uses of force in general, but in particular, the use of deadly force. The dearth of information regarding the efficacy of BWCs on police accountability, the extent to which the technology impacts public understanding of investigations, acceptance of their findings and the extent to which this reinforces the background norms is unknown. This provides an opportunity in the next chapter of this thesis to create a framework for how the impact of BWCs on police accountability could be evaluated more effectively with consideration to some of the non-technological determinants of effectiveness in technological adoption within policing.

Finally, the permeating issue about these theorisations is that the impact of BWCs on violence reduction may have been overstated because the evidence so far is inconclusive, heterogeneous, and varied depending on context. Notably, most of the evidence regarding BWC research has in the majority come from northern evidence base, a context that is relatively different to South Africa in terms of the history of law enforcement, police culture, the accountability architecture and the incidence of police use of force. As has been observed, the evaluation approaches have tended to focus on indirect impacts of BWCs that acknowledge but do not factor in contextual and implementation factors into evaluating the impact of the technology. Further, there has not been any research directly focusing on the efficacy of BWCs in improving police accountability. As evidenced in this chapter, hypotheses outcomes are not linear and guaranteed, and they fluctuate depending on the impact of different factors resulting in unexpected, and in some cases, unwanted outcomes. Therefore, the whole research field of BWCs is an experimental one, and it is essential for police agencies to adopt and scale the technology based on the evidence of what works and under what circumstances.

## Chapter 5: Evaluating BWCs impact on accountable policing in a South African Context

The preceding chapter illustrated that research on the uses of BWCs and their efficacy across various expected outcomes needs to be more conclusive. This chapter calls for evaluating BWCs before a national roll-out and suggests how SAPS can trial the technology. It then proposes an approach to evaluate the relationship between BWCs and more accountable policing or effectiveness in South Africa.

### 5.1 Status of BWC adoption in South Africa

The use of body-worn cameras (BWCs) by law enforcement agencies in South Africa needs further evaluation. Current literature suggests that the effectiveness of the technology remains uncertain. However, as discussed in the introductory chapter, the South African process regarding adopting BWCs suggests that at a policy level, the PCoP decided to adopt BWCs without adequate evidence that the technology works and in support of law enforcement outcomes. The rationale given by the PCoP for suggesting the adoption of BWCs was that international jurisdictions such as the US and the UK "have commenced with this approach, and feedback on the impact is very positive."<sup>1</sup> That seemed to suggest that from a policy perspective, the rationale was informed by the *vanguard fallacy* (see section 1.7.1.1 of Chapter 1), an approach to technological adoption which assumes that if the leading players are doing it, then it must be the way to go. The refusal by SAPS and MPS to participate in a trial conducted by APCOF and the Western Cape Provincial Transport Department may suggest the vanguard approach or a lack of interest on the part of the SAPS.

SAPS updated PCoP on its digital policing strategy, including BWCs. The roll-out plan had four phases over two years. The first two phases focused on defining requirements and determining the technology to be used. The third phase addressed

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<sup>1</sup> Portfolio Committee on Policing (PCoP). 2017. *Seven Measures to Improve SAPS' Record on Human Rights-centred Policing*. April 20. <https://www.parliament.gov.za/press-releases/seven-measures-improve-saps-record-human-rights-centred-policing>. Accessed 6 August, 2023.

legal considerations, and the fourth phase aimed to procure the technology after a tender process.<sup>2</sup>

Consultations between TMS and SAPS' Visible Policing Division (VISPOL) in November 2017 questioned the legality of police use of BWCs on the basis that "in general the police are prohibited from recording (intercepting) communications of another without permission."<sup>3</sup> SAPS' legal services advised that either new legislation would have to be drafted to regulate the use of BWCs by law enforcement officials and the admissibility of BWC evidence in a court of law or amend the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 (RICA) to qualify the use of BWCs to "intercept communication by party to communication."<sup>4</sup> The Department of Justice's (DOJ) advice was to amend section 4 RICA stipulated that,

- (1) Any person, other than a law enforcement officer, may intercept any communication if he or she is a party to the communication, unless such communication is intercepted by such person for purposes of committing an offence.
- (2) Any law enforcement officer may intercept any communication if he or she is—
  - (a) a party to the communication: and
  - (b) satisfied that there are reasonable grounds to believe that the interception of a communication of another party to the communication is necessary on a ground referred to in section 16(5)(a).unless such communication is intercepted by such law enforcement officer for purposes of committing an offence.

Two issues arise from the legal advice regarding the use of body-worn cameras (BWC) in South African law enforcement. Firstly, the legal advice considers recording conversations through BWCs as interference with communication, even when the cameras are not covert or secretive. Secondly, the Constitutional Court of South Africa has invalidated the Regulation of Interception of Communications and Provision of Communication-Related Information Act (RICA), as it violated the confidentiality of

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<sup>2</sup> SAPS (Technical Management Services). 2018. "Digital Policing and Specific Projects." <https://pmg.org.za>. May 23. Accessed October 23, 2019.

[https://pmg.org.za/files/180523TMS\\_Digital\\_Policing\\_Projects.pdf](https://pmg.org.za/files/180523TMS_Digital_Policing_Projects.pdf)., Slide 31.

<sup>3</sup> SAPS (TMS), Digital Policing and Specific Projects, Slide 32.

<sup>4</sup> SAPS (TMS), Digital Policing and Specific Projects, Slide 32.

surveillance subjects.<sup>5</sup> Therefore, it is not clear why the South African Police Service (SAPS) is hesitant to implement the use of BWCs in their operations.

Furthermore, no legal opinion was provided regarding the Protection of Personal Information (POPI) Act, which permits the overt collection and processing of data when the data subject is informed of the collection, a legitimate reason, or benefits for such collection, how such data is used, and guarantees of privacy. The South African Police Service (SAPS) has already deployed similar technologies, such as CCTV, vehicle dashboard cameras, and video recordings of crowd management events. The absence of legal analysis on these issues creates the impression that law enforcement officials in South Africa have either misapplied the law, or they view police use of BWCs as covert surveillance. Although the context is slightly different and there are fewer potential conflicts, the adoption of BWCs by traffic officers of the Road Traffic Management Corporation (RTMC) in March 2021 illustrates that existing legislation facilitates, rather than hinders, the deployment of BWCs in law enforcement.<sup>6</sup>

Regarding the admissibility of evidence derived from BWCs in the courts, there was also no reference to the Electronic Communications and Transactions Act 25 (ECT Act) of 2002. As illustrated in Chapter 3, Section 3.3.4 of the ECT Act outlines how the evidential weight of a data message is assessed. Section 16 (1) of the POPI Act also provides for responsible parties to ensure that personal information is complete, accurate, not misleading and updated where necessary.

As can be observed from SAPS' Digital Policing plan, none of the activities listed includes piloting the technology, showing that the decision has been taken to deploy BWCs in South Africa.<sup>7</sup> The absence of BWC evaluation is a significant omission considering the observations from the preceding chapter, that there are still many

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<sup>5</sup> Refer to *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others (CCT 278 of 2019) [2021] ZACC 3 (04 February 2020)*.

<sup>6</sup> SA News. (2021, March 29). Body Cameras to Strengthen Law Enforcement. South Africa. Retrieved March 30 April, 2021, from <https://www.sanews.gov.za/south-africa/body-cameras-strengthen-law-enforcement>. Also see ENCA. 2021. *Officers Start Wearing Body Cameras*. March 29. Accessed April 7, 2021. <https://www.youtube.com/watch?v=-SdHtk-yisA>.

<sup>7</sup> SAPS (Technical Management Services). *Digital Policing and Specific Projects*, Slide 31.

unknowns about the technology, and South Africa can potentially learn valuable lessons from the challenges confronted elsewhere in the world.

SAPS has taken extensive measures to perform due diligence to ensure the smooth implementation of Body-Worn Cameras (BWCs). However, there has been a lack of information about any progress made in this regard, at least in the public domain. There has yet to be an update on the status of policies and procedures on the use of BWCs, which were mentioned in the plan, and changes to RICA have stalled since some of its sections were declared unconstitutional by the Constitutional Court of South Africa in February 2021. Although SAPS advertised a Request for Information (RFI) on BWCs and Vehicle Dashboard cameras in September 2019, there is no publicly available information regarding the procurement of BWCs or the floating of a Request for Proposals (RFP).

Despite all this, the SAPS still has the opportunity to trial the technology before a full roll-out. In its RFI of September 2019, the SAPS' goals for deploying BWCs focus on improving the agency's crime detection and investigative practice. According to the RFI, the SAPS seeks to equip frontline officers with BWCs "to gather information relating to services for the body-worn . . . cameras for use by the SAPS, to process crime scenes, record police actions, and ensure situational awareness in the field for the benefit of both police officers and the public". SAPS also envisages that BWCs will "increase the ability for decision-making in live field situations at incidents attended by the SAPS while police members evidence digital evidence of encounters (sic)".<sup>8</sup>

The following section summarises some of the general shortcomings with existing evaluations of BWCs from which lessons can be learned to inform more appropriate evaluations of the relationship between BWCs and more police accountability in a South African context.

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<sup>8</sup> South African Police Service. 2019. "Request for Information for Body Worn and Vehicle Dashboard Cameras: Technology Management Services." *Tender Bulletin*. October 9. Accessed February 16, 2020. <https://tenderbulletins.co.za/tender-bulletin/request-for-information-rfi-for-body-worn-and-vehicle-dashboard-cameras-division-technology-management-services/>, p. 7.

### 5.1.1 The shortcomings of quantifying police accountability

One of the shortcomings of existing research was to equate the reduction in police use of force and public complaints against the police as a sign of police accountability. A notable one was by Ariel *et al.*, whose conceptualisation of accountability based on the interpretation of aspects of the United Nations Office on Drugs and Crime's (UNODC) definition. They argue:

In terms of accountability, BWC can very well be construed as a 'fix' because complaints reflect most directly on procedural compliance . . . , and procedural compliance is an essential part of the definition of accountability.<sup>9</sup>

As per the concept, the decrease in police use of force and complaints against them was considered as an indication of increased police accountability. However, it should be noted that police accountability does not just mean a reduction in their use of force but also the actions taken by the state after the violation of rights. The definition given by Ariel *et al.* ignored the procedural aspect of UNODC's definition of accountability, which includes the investigation of police misconduct and holding them responsible for their actions when they fail to adhere to the law.<sup>10</sup>

Although important, the limitation of using reduction in uses of force and complaints against police misconduct as indicators of the success of BWCs is that it creates the misnomer of defining police accountability by indicator and not by the expected outcomes of accountability processes (as outlined in Chapter 3 of this thesis). The understanding of accountability in Chapter 3 views accountability as a normative concept which involves the state's duty investigate, and where necessary to prosecute and punish those responsible and to provide remedies and to repair the harm caused by police misconduct. The goal is to restore compliance with norms and positive relations between communities and the police, and to restore police legitimacy.

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<sup>9</sup> Ariel, Barak, Alex Sutherland, Darren Henstock, Josh Young, Paul Drover, Jayne Sykes, Simon Megicks, and Ryan Henderson. 2017. "Contagious Accountability" A Global Multisite Randomized Controlled Trial on the Effect of Police Body-Worn Cameras on Citizens' Complaints Against the Police." *Journal of Criminal Justice and Behavior* 44 (2), p. 304.

<sup>10</sup> OHCHR/UNODC. 2011. *Handbook on Police Accountability, Oversight and Integrity*. New York: United Nations, p. 9.



While the reductions in police use of force and complaints concerning police misconduct lend themselves to quantitative analysis, quantifying a complex normative concept such as accountability has limitations. In the case of Ariel *et al.* discussed above, the research did not ask all the relevant questions regarding the potential impact of BWCs on the linkages between BWCs and police accountability.

There are several reasons why the question regarding the direct impacts of BWC on accountability has hitherto received limited attention. It could be that the researchers felt that this was too obvious to warrant an evaluation. However, law enforcement agencies conduct internal investigations for disciplinary purposes; therefore, the question should have been part of all the right questions on the impact of BWCs. Another plausible and perhaps more compelling reason for this gap in the research is that most of the ground-breaking research on BWC impacts was done from a law enforcement perspective of the benefits of the technology to police operations.

Based on this perspective, accountability was seen as a function of external independent oversight, which had the onus to carry out such research. Besides, overfocusing on accountability could have reinforced suspicion among the rank-and-file police officers that the roll-out of BWCs was targeted at victimising them, which could have jeopardised the diffusion of BWCs. However, discipline management is also an internal objective in policing, and claims were made regarding the potential impact of the presence of BWC evidence to result in the dismissal of frivolous complaints and early guilty pleas. However, none of this had been tested, or if it was, details about the outcomes were not made public.

Whatever the explanation, as Lum *et al.* observe, since one of the main reasons for adopting BWCs was to improve transparency and accountability in investigating serious police misconduct, particularly police use of deadly force, it is still essential to determine how BWCs affect investigations into police misconduct.<sup>11</sup> This test could, as they observe, be the most effective way to improve police-community relations and achieve police legitimacy in the long run.

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<sup>11</sup> Lum, Cynthia, Megan Stoltz, Christopher S. Koper, and J. Amber Scherer. 2019. "Research on body-worn cameras: What we know and what we need to know." *Criminology and Public Policy* 18 (1), p. 111.

### 5.1.2 Questionable attribution of impact and chances of ineffective controls

Another shortcoming of the research on BWCs effects was the deterministic nature of BWCs' theory of change without sufficient controls to rule out other confounding factors. This criticism, which is also discussed in the preceding chapter, refers to the theorisation of BWCs as stimuli that induced self-awareness, which in turn are said to deter police misconduct. The result is fewer cases of use of force and a reduction in the number of complaints against the police.

While human behaviour can be triggered by certain events, it does not follow that the resulting behaviour will be uniform, stable, and always predictable. It is also impractical to determine whether the camera has the same effect on the police officer as it does on the civilian. As observed by Lum *et al.*, although the current evaluations show a correlation between the use of BWCs and reductions in the use of force or complaints, the researchers cannot tell the actual mechanism by which this impact is made and why it happens in some but not other contexts. For example, as McClure *et al.* discovered, there were numerous instances where citizens who interacted with the police did not remember whether officers were wearing BWCs despite the BWC protocol requiring those police officers to announce that the interaction was being recorded.<sup>12</sup> It could also be argued that in general, a majority of people willingly cooperate with law enforcement officials and therefore it makes it almost impossible to determine cooperation that is attributable that is attributable exclusively to BWCs.

Thus, as Lum *et al.* observe, these study findings need to be more conclusive in determining BWC effects in reducing officers' use of force, and they need to sufficiently account for the causal relationship between BWCs and the reduction in complaints against the police. Therefore, an experiment to explain the behavioural choices of law enforcement officials and civilians uniformly in terms of stimuli from a single technology sounds reductionist.

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<sup>12</sup> McClure, Dave, Nancy La Vigne, Mathew Lynch, Laura Golian, Daniel Lawrence, and Aili Malm. 2017. "How Body Cameras Affect Community Members' Perceptions of Police Results from a Randomized Controlled Trial of One Agency's Pilot." [https://urban.org/sites/default/files/publication/91331/2001307-how-body-cameras-affect-community-members-perceptions-of-police\\_1.pdf](https://urban.org/sites/default/files/publication/91331/2001307-how-body-cameras-affect-community-members-perceptions-of-police_1.pdf), p. 4.

However, a 2021 study by Barbosa *et al.* in Brazil used an innovative method to mute spill-over effects by not only randomising dispatches, but also days in which no officer at all would wear a camera in order to account for the contamination effects. Further, Barbosa *et al.* had granular dispatch level data<sup>13</sup> which allowed the researchers to document that contamination.<sup>14</sup> According to Barbosa *et al.*, dispatch data included information regarding (i) timing of the event (call, dispatch, arrival at the scene and end of the event); (ii) geographic information (the precise GPS location and full address); (iii) event classification and reporting (dispatch opening and closing classifications, internal prior risk assessment, the facts that were reported during the interaction, and an indicator if the event generated a formal police report); (iv) use-of-force (physical, non-lethal or lethal-force and number of victims, arrests and handcuffs deployed) and (v) the hashed identifiers of officers that attended the event. This data was linked with the serial number of the camera that had been assigned to treatment officers at the start of each shift.<sup>15</sup>

In this set up, a dispatch was considered treated if at least one police officer with a body worn camera responded to the event. With this more granularised information, the methodology increased the confidence in the relationship between BWCs and a reduction in police use of force. However, like most of the research on BWCs, the focus was on indirect effects and not how BWC evidence improves police accountability where there has been a potential human rights violation.

In some of the studies, the method of counting the incidence of police use of force may also have minimised the magnitude of the problem of police misconduct. In the Rialto Study, which was replicated in the UK, the use of force (the dependent variable) only indicated whether force was used or not and did not include the type of force used and how much. Further, the method of counting was such that if three officers used force on one person or one officer used force on two people, it was counted as one use of

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<sup>13</sup> See Barbosa, Daniel AC, Thiemo Fetzer, Caterina Soto, and Pedro CL Souza. 2021. "De-escalation Technology: The Impact of Body-worn Cameras on Citizen-police Interactions." Vers. Warwick economics research papers series (WERPS) (1371). *University of Warwick*. September. Accessed March 16, 2022. <http://wrap.warwick.ac.uk/158499/>, p. 7.

<sup>14</sup> Barbosa *et al.*, De-escalation Technology, p. 4.

<sup>15</sup> Barbosa *et al.*, De-escalation Technology, p. 7.

force.<sup>16</sup> Further, there was also no data on which party instigated the use of force which is important when evaluating police use of force. The researchers also relied on officer-reported uses of force,<sup>17</sup> which means the incidence excluded uses of force reported by members of the public or indeed, uses of force that police officers did not include in their incident reports.

In some of the studies, counting the incidence of police use of force minimised the magnitude of the problem of police misconduct. For instance, in the Rialto Study, which was also conducted in the UK, the use of force only indicated whether force was used or not without including the type and amount of force used. Additionally, the counting method was such that if three officers used force on one person or one officer used force on two people, it was considered just one use of force.<sup>18</sup> The subjective nature of data collection may have downplayed significant contextual issues such as the universally acknowledged police culture and how its code of secrecy could have skewed the number of incidents reported.

Regarding the use of complaints to complement data on the use of force, the Rialto Study also used an unreliable counting system to measure BWC impact. The researchers took the position that citizen complaints against police officers provided more reliable estimates of the use of force. They used data captured on the system to count the number of complaints (of any kind) filed against Rialto police officers.<sup>19</sup> This means that they counted even other complaints unrelated to police use of force and attributed fluctuations of these figures to the impact of BWCs. Arguably, the findings were more incidental or, at most, based on a weak correlation rather than the result of a causal relationship and also prone to many possible confounding factors.

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<sup>16</sup> Ariel, Barak, William A. Farrar, and Alex Sutherland. 2015. "The Effect of Police Body-Worn Cameras on Use of Force and Citizen Complaints Against the Police: A Randomised Controlled Trial." *Journal of Quantitative Criminology* (Springer) 31, p. 522.

<sup>17</sup> Ariel *et al.*, The Effect of Police Body-Worn Cameras, p. 522.

<sup>18</sup> Ariel *et al.*, The Effect of Police Body-Worn Cameras, pp. 521-522.

<sup>19</sup> Ariel *et al.*, The Effect of Police Body-Worn Cameras, p. 522.

The general criticism from analysts<sup>20</sup> and including researchers such as Ariel *et al.*,<sup>21</sup> is that most of the RCTs and the replications had limited statistical power to detect impacts on critical policing outcomes such as police use of force. The use of quasi-experimental research in some of the studies may have also meant that their findings lacked internal validity.<sup>22</sup> While researchers such as Ariel *et al.* acknowledged some of these shortcomings, the magnitude of the impact of these shortcomings on the findings of the research were not sufficiently factored in the final analysis including the decisions by policy makers and practitioners during the adoption of the technology.

Given the preceding discussion, it is evident that the research conducted to date has limitations, and most of the known findings are based on data from police departments that were the first to adopt the new technology.<sup>23</sup> Overall, as Lum *et al.* observe, the findings from these studies may have overestimated the anticipated effects of BWCs and that the postulated behavioural changes may be modest or mixed.<sup>24</sup>

### 5.1.3 Contextual-dependence and limited utility of evidence

As observed in the introductory chapter, for research to inform theory and practice, it must be generalisable or explicit about the contexts in which it applies. Research about an innovative practice should be replicated to enable the accumulation and application of knowledge about what works and what does not work about innovation in different situations and contexts. More pointedly, internal, and external validity are important because "without internal validity, the issue of external validity has limited meaning as there are no valid effects to apply beyond the experiment."<sup>25</sup>

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<sup>20</sup> Lum *et al.*, *Body-worn Cameras' effects*, pp. 20, 21 and 22.

<sup>21</sup> See Ariel, Barak *et al.*, *The Effect of Police Body-Worn Cameras on Use of Force*, p. 519.

<sup>22</sup> Williams Jr, *Body-Worn Cameras in Policing: Benefits and Cost*, p. 2. Also refer to Lum, Cynthia, Megan Stoltz, Christopher S. Koper, and J. Amber Scherer. 2019. "Research on body-worn cameras: What we know and what we need to know." *Criminology and Public Policy* 18 (1), p. 97.

<sup>23</sup> Williams Jr, *Body-Worn Cameras in Policing: Benefits and Cost*, p. 4.

<sup>24</sup> Lum *et al.*, *Body Worn Cameras effects*, p. 3.

<sup>25</sup> James, O., Jilke, S., & Ryzin, G. V. (2017). Chapter 1: Introduction. In O. James, S. Jilke, & G. V. Ryzin, *Experiments in Public Management Research: Challenges and contributions* (pp. 3-19). Cambridge: Cambridge University Press, p. 12.

The mixed and contradictory nature of BWC evaluations reflects something akin to a replication crisis,<sup>26</sup> meaning the need for more reliability in the outcomes of research on the theorised effects of BWCs on police/citizen behaviours. If replication means attempting to reproduce a previously observed finding, then a replication crisis refers to a growing belief that efforts to replicate past study findings frequently do not show the same result and that they are likely to be wrong.<sup>27</sup>

The claims of a replication crisis need further explanation. An analysis of the replications that followed the Rialto Experiment shows that there were symptoms of a replication crisis, that is, statistically significant results for the first studies (Rialto), but replications do not all achieve the same result. The signs of a replication crisis include a considerable number of replications in which the direction of an effect changes from a positive effect to a negative and vice versa.

According to Lum et al.'s review of body-worn cameras (BWCs), there seems to be a replication crisis when it comes to measuring behaviour change in police use of force.<sup>28</sup> The review analysed multiple studies and discovered that officers wearing cameras were less likely to use force in four experimental studies and one quasi-experimental study compared to those without BWCs.<sup>29</sup> However, four randomised controlled trials (RCTs) and four quasi-experimental studies showed no significant difference in the use of force between officers wearing BWCs and the control group.<sup>30</sup> Lum et al. also pointed out that the direction of effects in the non-significant findings was inconsistent across studies, and the results were heterogeneous regardless of context.

One of the RCTs whose direction of effects confounded the expected reduction in police use of force was the Cambridge University Replication Study interestingly

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<sup>26</sup> Anvari, Farid, and Daniel Lakens. 2019. "The replicability crisis and public trust in psychological science." *Comprehensive Results in Social Psychology* 3 (3), p. 266.

<sup>27</sup> Maxwell, Scott E., Michael Y Lau, and George S. Howard. 2015. "Is Psychology Suffering From a Replication Crisis? What Does "Failure to Replicate" Really Mean?" *American Psychologist*, p. 487.

<sup>28</sup> The review covered evaluations beyond the UK and US written in English.

<sup>29</sup> Lum, *et al.*, Research on body-worn cameras, p. 101.

<sup>30</sup> Lum, *et al.*, Research on body-worn cameras, p. 101.

because it was conducted by the same researchers who undertook the Rialto experiment, and it was based on an identical methodology<sup>31</sup> However, the Cambridge study had a much larger dataset, drawing from ten RCTs from eight police forces in six jurisdictions across the UK.<sup>32</sup> On average, the study found that BWC usage by the police had no effect on police use of force. However, the results between sites were heterogeneous with some sites showing an increase in police use of force in the presence of BWC compared to control conditions.<sup>33</sup> These diverse findings, which were unexpected and not in line with the study's hypothesis, emphasises the need for further research and analysis.

The same authors carried out a study to explore the unexpected outcomes related to the use of body-worn cameras (BWCs) by police officers. They conducted a sub-group analysis based on the discretion of police officers to activate or deactivate the cameras. The results showed that the more discretion the officers had, the more they tended to use force.<sup>34</sup> Therefore, having more police discretion was comparable to receiving no treatment, resulting in no stimuli to affect behaviour change. Even though officer discretion was taken into account, the expected theoretical claims on BWC effects were reinstated, but the researchers themselves were unable to explain the causal mechanism linking the increase in the use of force by police officers with police discretion. It is important to note that previous studies on police use of force did not monitor the activation of BWCs, so it remains unclear to what extent the discretion explanation applies to those studies.<sup>35</sup>

According to a study conducted by Lum et al., 22 experiments were analysed to assess the effects of body-worn cameras (BWCs) on police officers' behaviour when faced

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<sup>31</sup> Sutherland, Alex, Barak Ariel, William Farrar, and Randy De Anda. 2017. "Post-experimental follow-ups—Fade-out versus persistence effects: The Rialto police body-worn camera experiment four years on." *Journal of Criminal Justice* 53, pp. 110-116.

<sup>32</sup> Ariel, Barak, Alex Sutherland, Darren Henstock, Josh Young, Paul Drover, Jayne Sykes, Simon Megicks, and Ryan Henderson. 2016. "Wearing Body Cameras Increases Assaults Against Police Officers and does not Reduce Police Use of Force: Results from a Global Multi-site Experiment." *European Journal of Criminology* 13 (6), p. 747.

<sup>33</sup> Ariel et al., Wearing Body Cameras Increases Assaults Against Police Officers, pp. 745-746.

<sup>34</sup> Ariel et al., Wearing Body Cameras Increases Assaults Against Police Officers, pp. 745-746.

<sup>35</sup> Lum, et al., Research on body-worn cameras, p. 101.



with complaints. The study revealed that in 18 of these experiments, officers who wore BWCs received fewer complaints compared to those who did not wear them, which was expected.<sup>36</sup> However, the failure in the research design to convincingly explain the causal mechanism between the two variables makes the finding questionable.<sup>37</sup>

The inconsistencies and heterogeneous nature of the research outcomes derive from the varied methodological design and the highly contextual-dependent nature of the evidence. As noted above, RCTs may have internal validity, but in applied research, it is essential to replicate the proposed solution in a local context because context is a critical variable in developing and advancing theory. What this means is that trials are useful in a specific context but not necessarily elsewhere. The researchers themselves and critics alike widely acknowledge that their findings are not generalisable.<sup>38</sup>

With this critique, it is important to explain that the mixed nature of BWC evaluation effects is not something negative. As Lum *et al.* observe, the variation of effects suggests there may be conditions in which BWC could be effective.<sup>39</sup> A replication signifies the need for continued and further research on the impacts of BWCs until there is sufficient knowledge of what works and why and how it works and under what circumstances. The hint of a replication crisis and the methodological shortcomings identified in this section also show the importance of context and implementation as important variables because the impact of a technology may be as effective as how it is implemented in a specific context.

## 5.2 Comparative analysis of contexts of BWC adoption

The preceding section illustrates the importance of the context of the adoption of innovation as an important variable in how it is evaluated. The three sections below provide a comparative analysis of how BWC technology was adopted in the UK and

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<sup>36</sup> Lum, *et al.*, Research on body-worn cameras, p. 100.

<sup>37</sup> Lum, *et al.*, Research on body-worn cameras, p. 101.

<sup>38</sup> See for example Ariel, B., Farrar, W. A., & Sutherland, A. (2015). The Effect of Police Body-Worn Cameras on Use of Force and Citizen Complaints Against the Police: A Randomised Controlled Trial. *Journal of Quantitative Criminology*, 31 and Yokum, D., Ravishankar, A., & Coppock, A. (2017, October 20). *Evaluating the Effects of Police Body-Worn Cameras: A Randomised Controlled Trial*. Retrieved from The Lab: [https://bwc.thelab.dc.gov/TheLabDC\\_MPD\\_BWC\\_Working\\_Paper\\_10.20.17.pdf](https://bwc.thelab.dc.gov/TheLabDC_MPD_BWC_Working_Paper_10.20.17.pdf).

<sup>39</sup> Lum *et al.*, Research on body-worn cameras, p. 99.

the US and how it influenced the nature of evaluations in each case. It then analyses current developments regarding the adoption of BWCs South Africa and what it might mean for the roll out of the technology nationally.

### 5.2.1 UK and US BWCs adoption context

The manner of adoption of an innovative idea is a vital factor when analysing how its effects have been evaluated. While police transparency and accountability have become the most widely stated reasons for using BWC in policing, the evaluations that informed the policy choice to adopt BWC technology in both the UK and the US hardly tested the potential of BWCs to improve police accountability. The available grey and peer-reviewed literature shows that the evaluation of BWCs was a police-centric, outward-looking process driven by the police's need to find innovative ways to improve the efficiency and effectiveness of its core function of preventing and investigating crimes.<sup>40</sup>

The use of BWCs for recording police-public encounters was first tested in a series of non-randomised pilot tests. The tests started with a small trial in Plymouth by the Devon and Cornwall Constabulary in 2005.<sup>41</sup> From October 2006, the Plymouth trial was extended to include more BWCs being used in more operational situations, with over 300 police officers taking part. These tests were further piloted nationally in 2006 by the Police and Crime Standards Directorate. The focus was on the effect of BWCs in investigating domestic violence cases.<sup>42</sup> On the basis of these pilot tests,<sup>43</sup> the UK

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<sup>40</sup> See Jameel, L., & Bunn, S. (2015). *Body-Worn Video in UK Policing*. London: Parliamentary Office of Science and Technology. Retrieved September 17, 2018, from <https://post.parliament.uk/research-briefings/post-pb-0014/>

<sup>41</sup> Jameel, Leila, and Sarah Bunn. 2015. *Body-Worn Video in UK Policing*. POSTbriefs, London: Parliamentary Office of Science and Technology. Accessed September 17, 2018. <https://post.parliament.uk/research-briefings/post-pb-0014/>, p. 3.

<sup>42</sup> Police and Crime Standards Directorate. 2007. *Guidance for the Police Use of Body-Worn Video*. Police and Crime Standards Directorate, London: Home Office.

<sup>43</sup> Two other non-randomised pilot tests were later conducted in Scotland in 2011 and on the Isle of Wight in 2015 and they reinforced and provided new evidence on the effects of BWCs in policing. Not all pilot tests led to positive results. For example, the Metropolitan Police Service also carried out pilot tests in selected London boroughs in 2008. After an evaluation of the pilot which included an analysis of the benefits and costs it was decided not to pursue the project at that stage. For details see <https://www.london.gov.uk/questions/2011/4116> and Grossmith, Lynne, Catherine Owens, David Mann Will Finn, Tom Davies, and Laura Baik. 2015. *Police, Camera, Evidence: London's Cluster Randomised Controlled Trial of Body-*

Home Office touted the potential of BWCs radically to enhance police performance in terms of evidence-gathering at domestic violence and other violent crime incidents.<sup>44</sup> This led to the publication of a policy-setting document titled 'Guidance for the Police Use of Body Worn Video' by the Home Office.<sup>45</sup> The purpose of this document was to standardise practices in the use of the technology, provide guidance on the legal and procedural framework, and identify the appropriate technical specifications to make the technology fit for policing purposes in England and Wales.<sup>46</sup>

The studies conducted to investigate the relationship between body-worn cameras (BWCs) and police goals and criminal justice objectives were non-randomised. Upon analysing the objectives of some of the research, it becomes clear that the police were using this technology to enhance their ability to perform their traditional duties more effectively and safeguard their power and agencies against external public threats. For instance, the Essex Body-Worn Video Trial and the Metropolitan Police's London cluster RCT are examples. The Essex trial aimed to evaluate the impact of BWCs on criminal justice outcomes of domestic violence incidents and, despite statistical power issues, found that the treatment group had a 9% higher chance of incidents resulting in a criminal charge.<sup>47</sup>

A randomised control trial (RCT) conducted by the London cluster of the Metropolitan Police aimed to assess the effectiveness of Body Worn Cameras (BWCs) in reducing allegations against police officers and their use of stop and search practices. Additionally, the trial sought to explore the impact of BWCs on the criminal justice

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*Worn Video*. November. Accessed June 26, 2018.

<http://whatworks.college.police.uk/Research/Pages/Pyblished.aspx>, p. 5.

<sup>44</sup> Police and Crime Standards Directorate. (2006). *Lessons Learned from Domestic Violence Enforcement Campaigns*. London: Home Office. Retrieved June 18, 2021, from <https://lemosandcrane.co.uk/resources/Home%20Office%20-%20Lessons%20Learned%20from%20the%20Domestic%20Violence%20Enforcement%20Campaigns%202006.pdf>, p. 12.

<sup>45</sup> See Police and Crime Standards Directorate. (2007). *Guidance for the Police Use of Body-Worn Video*.

<sup>46</sup> Police and Crime Standards Directorate. (2007). *Guidance for the Police Use of Body-Worn Video*, p. 5.

<sup>47</sup> Owens, Catherine, David Mann, and Rory Mckenna. 2014. *The Essex Body-Worn Video Trial: The Impact of body-worn video on Crimnal Justice Outocmes of Dmestic Abuse Incidents*. October. Accessed April 5, 2018.

[https://whatworks.college.police.uk/Research/Documents/BWV\\_Report.pdf](https://whatworks.college.police.uk/Research/Documents/BWV_Report.pdf).

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outcomes of violent crimes. The hypothesis was that BWCs could increase the proportion of violent incidents attended by police officers that resulted in a criminal justice outcome due to the higher quality of evidence they provide. The study found that BWCs can decrease the number of allegations and complaints against officers arising from interactions with the public. However, the trial did not find any significant effect of BWCs on the number or type of stop and searches performed, nor did it reveal any change in how police officers treated victims and suspects.<sup>48</sup>

Three pilots,<sup>49</sup> lacking randomisation and control conditions and relying on anecdotal evidence and police officers' perceptions of BWC effects, found similar results across crime and perception indicators. For example, the three studies found significantly greater reduction of offences in several categories of crime in targeted areas compared to those not targeted;<sup>50</sup> higher rates of early guilty pleas in investigations that used BWCs;<sup>51</sup> significantly fewer police officers wearing BWCs were assaulted compared to those without;<sup>52</sup> reduction in complaints against police officers;<sup>53</sup> and, most respondents to a public survey said they felt the use of BWC reduced their fear of crime.<sup>54</sup> There is nothing objectionable with these findings, but it seems curious that police agencies and national independent police oversight bodies did not evaluate the

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<sup>48</sup> Grossmith *et al.*, *Police, Camera, Evidence*, pp. 6-7.

<sup>49</sup> ODS Consulting. 2011. *Body-Worn Video Projects in Paisley and Aberdeen Self Evaluation*. July. Accessed 12 28, 2020. <http://www.bwvsg.com/wp-content/uploads/2013/07/BWV-Scottish-Report.pdf>; Also see Ellis, Tom, Craig Jenkins, and Paul Smith. 2015. *Evaluation of the Introduction of Personal Issue Body-Worn Video Cameras (Operation Hyperion) on the Isle of Wight: Final Report to Hampshire Constabulary*. Portsmouth: University of Portsmouth, 1-65. Accessed May 24, 2019. [https://researchportal.port.ac.uk/portal/files/2197790/Operation\\_Hyperion\\_Final\\_Report\\_to\\_Hampshire\\_Constabulary.pdf](https://researchportal.port.ac.uk/portal/files/2197790/Operation_Hyperion_Final_Report_to_Hampshire_Constabulary.pdf) and University of Plymouth (2007).

<sup>50</sup> ODS Consulting. 2011. *Body-Worn Video Projects in Paisley and Aberdeen*, p. 7-8; Ellis *et al.*, *Evaluation of the Introduction of Personal Issue Body-Worn Video Cameras*, p. 2; also see Jameel & Bunn, *Body-Worn Video in UK Policing* for additional commentary. ODS Consulting. 2011. *Body-Worn Video Projects in Paisley and Aberdeen*, p. 11; Ellis *et al.*, *Evaluation of the Introduction of Personal Issue Body-Worn Video Cameras*, p. 2; University of Plymouth, p. 2.

<sup>52</sup> ODS Consulting. 2011. *Body-Worn Video Projects in Paisley and Aberdeen*, p. 12; Ellis, *et al.*, *Evaluation of the Introduction of Personal Issue Body-Worn Video Cameras*, p. 1; University of Plymouth. (2007). *Police, Camera, action . . . Head Cameras*. Plymouth: City of Plymouth, p. 2.

<sup>53</sup> ODS Consulting. 2011. *Body-Worn Video Projects in Paisley and Aberdeen*, p.10; Ellis *et al.*, *Evaluation of the Introduction of Personal Issue Body-Worn Video Cameras* p. 3.

<sup>54</sup> ODS Consulting. 2011. *Body-Worn Video Projects in Paisley and Aberdeen*, p. 13; Ellis *et al.*, *Evaluation of the Introduction of Personal Issue Body-Worn Video Cameras*, p. 1.

extent to which BWCs could potentially improve police oversight investigative practices in controversial incidents involving potentially unlawful uses of force and other cases of serious misconduct by law enforcement officials.

Notably, all the initial pilot studies and subsequent experimental-type research bypassed any reference to using BWC evidence in improving police accountability. Although the Home Office's *Guidance for the Police Use of Body Worn Video* recognised that BWCs may have the benefit of providing an accurate record of the justification for police use of firearms or less lethal weapons,<sup>55</sup> there is no reference to BWCs' potential to improve investigations of police misconduct. Under the section on Professional Standards Departments, the *Guidance for the Police Use of Body Worn Video* was only restricted to stating that:

Any member of the public, fellow officer, or staff member is able to make a complaint about the conduct of any officer or member of staff, and all officers have the responsibility to secure and preserve evidence of any complaint made about the conduct of officers and staff. Such complaints are subject to independent review and scrutiny by the IPCC [now IOPC].<sup>56</sup>

The rest of the guidance focused on how to secure and preserve BWC evidence. The guidance did not make the case for how the presence of BWC evidence would likely impact external investigation processes. Although UK police forces forwarded BWC video evidence to the IPCC (now the IOPC) for investigations of police conduct, the potential impact of BWC police accountability was not evaluated. The only known attempt identified in the course of this research to evaluate the effects of BWCs on police investigative practices in the UK was made by Police Ombudsman for Northern Ireland (PONI) but this was much later, in 2020.

Thus, most of the evidence that was used to evaluate the use of BWC and provide a basis for the acquisition of the technology in policing was derived from police pilot programmes as opposed to RCTs.<sup>57</sup> In the absence of randomisation and control

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<sup>55</sup> Police and Crime Standards Directorate. (2007). *Guidance for the Police Use of Body-Worn Video*. London: Home Office, p. 7.

<sup>56</sup> Police and Crime Standards Directorate, *Guidance for the Police Use of Body-Worn Video*, p. 27.

<sup>57</sup> Jameel and Bunn, *Body-Worn Video in UK Policing*, p. 4.

conditions, the pilot studies lacked internal validity, that is, a measurable level of certainty that the changes observed were the result of the intervention as the causal inference was not tested.<sup>58</sup> As noted by the Parliamentary Office of Science and Technology, these pilots were more focused on "assessing operational challenges and the feasibility of implementing BWCs on a large scale, rather than providing scientific evidence to support the use of technology in specific circumstances."<sup>59</sup>

Although the Home Office recognised these shortcomings and recommended police forces to wait for outcomes of formal trials (RCTs) to consider the results and evaluations before planning capital expenditure,<sup>60</sup> a considerable number of police areas in the UK had already begun using the technology before results of RCTs were published in 2014.<sup>61</sup>

In the US, the adoption of BWCs was initially triggered and informed by developments in the UK. Although it is not clear when the first police agencies adopted BWCs, a 2013 Bureau of Justice Statistics survey estimated that 32% (3,900) of local police departments were using the devices,<sup>62</sup> although it is not clear whether this meant all officers in those departments were using BWCs.

However, a coincidence of factors stimulated the diffusion of BWCs in the US that was different to the UK.<sup>63</sup> One of these factors was the publication of the first randomised controlled trial on BWC effects by the Rialto Police Department in California. The study found that officers equipped with BWCs had a reduction in police-reported use of force

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<sup>58</sup> Jameel and Bunn, *Body-Worn Video in UK Policing*, p. 4.

<sup>59</sup> Jameel and Bunn, *Body-Worn Video in UK Policing*, p. 4.

<sup>60</sup> Police and Crime Standards Directorate. (2006). *Lessons Learned from Domestic Violence Enforcement Campaigns*, p. 12.

<sup>61</sup> Big Brother Watch. (2015, April). *Body Worn Video Cameras*. Retrieved July 16, 2018, from [www.bigbrotherwatch.org.uk](https://www.bigbrotherwatch.org.uk/wp-content/uploads/2014/07/Body-Worn-Cameras-Briefing-Update.pdf): <https://www.bigbrotherwatch.org.uk/wp-content/uploads/2014/07/Body-Worn-Cameras-Briefing-Update.pdf>.

<sup>62</sup> Reaves, Brian J. 2015. *Local Police Departments, 2013: Equipment and Technology*. Washington DC: US Department of Justice, 1-17. Accessed July 23, 2019. <https://www.bjs.gov/content/pub/pdf/lpd13et.pdf>, p. 4.

<sup>63</sup> Also see Pyo, Sunyoung. 2020. Understanding the Adoption and Implementation of Body-Worn Cameras among U.S. Local Police Departments. October 1.

<https://urbanaffairsreview.com/2020/10/01/understanding-the-adoption-and-implementation-of-body-worn-cameras-among-u-s-local-police-departments/>, pp. 5-6.



incidents and citizen complaints against them, which became a primary driver for subsequent acquisitions of BWCs.<sup>64</sup> Another factor was the widespread killings of mostly black men by police officers, which sparked a national debate about policing practices, transparency, and accountability. The public, particularly the Black Lives Matter movement, called for the adoption of BWCs. Additionally, the US Federal Government provided funding to police agencies for piloting and expanding the use of BWCs.<sup>65</sup> The growth of a ready market of BWC developers also spurred the rapid adoption of BWCs.

The implementation of Body Worn Cameras (BWCs) in the US and UK was motivated by varied factors. The US prioritised meeting the public's demand for accountability, while the UK focused on enhancing police operations' efficiency and effectiveness. In the UK, the Independent Police Complaints Commission (IPCC) and the police forces' voluntary adherence to external investigations helped ensure transparency and accountability. Conversely, in the US, some police departments declined to disclose video evidence in lethal force cases, further eroding the already strained relationship between law enforcement and the community.

### 5.2.2 Context of BWC adoption in South Africa

South Africa's context of adoption is outlined in the introductory chapter and Section 5.1 above. There are notable similarities in the manner of introduction of BWCs in South Africa and the UK compared to the US. In the UK and South Africa, the introduction of BWCs was (for the UK) and is being spearheaded by policymakers and the police. In the UK, and with the support of the executive, the police solicited public opinion on police adoption of BWCs and whether the public felt the technology would be helpful across various law enforcement objectives. There was thus public backing for the use of BWCs, which included through the media.

However, in South Africa it is more of a top-down driven process, although some experts have called for the adoption of the technology. Notably, the process of

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<sup>64</sup> Ariel *et al.*, The Effect of Police Body-Worn Cameras on Use of Force.

<sup>65</sup> President's Task Force on 21st Century Policing. (2015). *Final Report of the President's Task Force on 21st Century Policing*. Washington, DC: Office of Community Oriented Policing Services.



adopting BWCs has been undertaken without any significant consultation or pressure from the public (grassroots pressure groups, NGOs, or ordinary citizens) or the authorities seeking public support for the adoption of the technology. Not even the solidarity protests by South Africans after the death of George Floyd prompted any public debates regarding the use of BWCs in South Africa even though the technology was central to the discussions on police use of force in the US.<sup>66</sup>

At least two high-profile potentially unlawful killings by South African law enforcement officials in close proximity to George Floyd's death also did not elicit calls for innovations such as BWCs by the media and members of the public. Nor were there calls from policy makers whose parliamentary portfolio committee had been advocating the use of BWCs. In April 2020, law enforcement officials from the Johannesburg Metropolitan Police Department and the South African National Defence Force that were enforcing COVID-19 restrictions brutally assaulted Collins Khosa in Johannesburg's Alexandra township, leading to his death.<sup>67</sup> Witnesses to the assault alleged that the law enforcement officials involved in the assault had forced them to delete footage of the assault.<sup>68</sup> These actions did not prompt a discussion on police use of BWCs as a potential solution to help hold the alleged perpetrators to account.

Similarly, SAPS officers shot and killed Nathaniel Julius, a 16-year-old boy in Soweto, leading to widespread protest and debate about police brutality. Nathaniel Julius' family alleged that the police were covering up a cold-blooded murder by saying Nathaniel was caught in the crossfire between suspected gang members and the police while residents alleged that there were witnesses who saw the police shoot

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<sup>66</sup> See Africanews. (2020, June 4). "Black Lives Matter" protest hits South Africa. Cape Town. Retrieved from <https://www.africanews.com/2020/06/04/black-lives-matter-protest-hits-south-africa/>; Zenda, Cyril. 2021. *Ensuring all Black Lives Matter in South Africa*. July 10. <https://towardfreedom.org/story/ensuring-all-black-lives-matter-in-south-africa/>.

<sup>67</sup> Pijoo, Ivan. 2020. *'Beer poured over his head, choked, kicked, hit with machine gun': how Collin Khosa died in Alex*. April 15. <https://www.timeslive.co.za/news/south-africa/2020-04-15-beer-poured-over-his-head-choked-kicked-hit-with-machine-gun-how-collin-khosa-died-in-alex/>.

<sup>68</sup> Afrika, Mzilikazi Wa, and Karabo Ngoepe. 2020. *Police seek to recover deleted footage of Collins Khosa murder*. Johannesburg, May 17. <https://www.iol.co.za/news/south-africa/gauteng/police-seek-to-recover-deleted-footage-of-collins-khosa-murder-48044274>.

him.<sup>69</sup> Despite contradictory statements the varied testimonies on the circumstances of the shooting, the use BWCs as a potential solution to determine what actually happened was also not part of the debate. This context prompts the question of how best the relationship between BWCs cameras and more accountable policing can be evaluated in a South African context.

A few lessons from the preceding discussion should be considered in any research design and methodology for evaluating BWCs in South Africa. The first is that accountability should be properly conceptualised as described in Section 5.1.1 above, and the methodology must identify those aspects of accountability that BWCs can potentially impact. The second is the importance of context as a critical variable in applied research, which must be factored in when considering measuring impact. The measurement of causation between an exposure and an outcome in as complex an environment as the criminal justice system cannot be proven by one study alone; multiple studies across different populations should be considered when making causation assessments. Such evaluation must also contend that attributing "behaviours of interest to fundamental deterministic laws does not mean that we can fully account for or predict how those laws will play out in the wider context."<sup>70</sup>

Therefore, the choice of methodology should move away from deterministic causal inferences and accommodate other approaches that add insight into some of weaknesses of RCTs. As Deaton and Cartwright observe, the choice of methodology should be dictated by the questions that the researcher seeks to answer as opposed to hierarchising evidence. The next section incorporates these observations in identifying elements of a research design that might suit the South African context.

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<sup>69</sup> Modise, Kgomo. 2020. *Nathaniel Julius' Family: SAPS Trying to Cover Up His 'Cold-blooded Murder'*. Johannesburg, August 28. <https://ewn.co.za/2020/08/28/nathaniel-julius-family-saps-trying-to-cover-up-his-cold-blooded-murder>. Also see Sibisi, Gezzy S. 2020. *Two SAPS officers face murder charges following Nathaniel Julies death from Eldorado Park*. Johannesburg, August 31. <https://www.news24.com/you/news/local/two-saps-officers-face-murder-charges-following-nathaniel-julies-death-from-eldorado-park-20200831>.

<sup>70</sup> Monsell, Liam. n.d. *The Game of Life: Discussing Determinism in Behavioral Science*. <https://thedecisionlab.com/insights/business/the-game-of-life-discussing-determinism-in-behavioural-science/>.

### 5.3 Towards a BWC evaluation strategy for South Africa

The focus of this thesis is on police accountability. Therefore, its main focus is more on the procedural element of human rights in relation to police use of force and related forms of police misconduct. As highlighted in the preceding chapter, BWCs are perceived to impact policing across various outcomes. However, the mandate of holding law enforcement officials accountable for suspected unlawful uses of force is a function of internal and external police oversight. In the South African context, this role implicates the Independent Police Investigative Directorate (IPID) as the main constitutionally mandated external oversight body.<sup>71</sup> Therefore, once SAPS decide to roll out a BWC programme, it will provide an opportunity for the IPID to evaluate the impact of BWCs on police accountability. The following sections discuss the research setting for evaluating the relationship between BWCs and accountable policing in South Africa.

#### 5.3.1 The Evaluation Setting

This thesis focuses on the impact of BWCs on oversight investigative practice. However, the context in South Africa is different to Northern Ireland or Chicago where the PONI report and Cubukcu *et al.*'s evaluations were designed and conducted and where the police agencies being studied had already adopted BWCs. In the South African context, this thesis has to contend with the fact that the SAPS has yet to adopt and deploy the technology officially. Therefore, a discussion of the research setting includes a proposed general approach for how SAPS can test BWCs for various law enforcement outcomes but with a focus on policies and practices that will enhance the effectiveness of BWCs on more accountable policing.

##### 5.3.1.1 The South African Police Service

South Africa's policing environment has some unique and arguably advantageous features for innovation compared to the UK and the US. South Africa's policing system is more centralised compared to both the UK and the US systems. However, despite

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<sup>71</sup> The South African Human Rights Commission (SAHRC) has both a promotional and protective mandate on human rights in South Africa. These powers are set out in Section 2 and Section 3 respectively of the South African Human Rights Commission Act 40 of 2013. The SAHRC and IPID play complementary roles during investigations as was the case at the Marikana Commission.

such centralisation, SAPS is structured to function at the national, provincial, and local spheres of government where necessary.<sup>72</sup> The advantage of introducing a policy impacting technological innovation, such as BWCs, in a single hierarchical structure is that the reforms apply uniformly to one hierarchical organisation. This is unlike the structure in the UK and the US, where there are multiple law enforcement agencies, some of which have relative autonomy to decide their policies and strategies as well as police accountability mechanisms. However, this is relatively less so in the UK.

SAPS is headed by a National Commissioner of Police appointed by the president. The National Police Commissioner manages and exercises control over the police service.<sup>73</sup> There are nine Commissioners, one for each of the country's nine provinces.<sup>74</sup> The ministerial responsibility for policing sits with the minister of police. According to the most recent SAPS annual report, as of March 31, 2021, the agency has a total number of 182,126 employees, of which 144,253 are SAPS Act employees, and 37,840 are Public Service Act (PSA)<sup>75</sup> employees.

The organisation has 21,396 commissioned officers with the rank of captain and higher and 122,075 non-commissioned officers constituted by police officers with the rank of warrant officer, sergeant, and constable. It is in the latter group from which most frontline officers who will wear BWCs come. According to SAPS' latest annual report, the agency has 1,155 police stations which makes an average of 128 police stations per province. The Eastern Cape (approximately 198 police stations)<sup>76</sup> and the North-West (83)<sup>77</sup> are the outliers in terms of the distribution of police stations. The provincial SAPS is further divided into several policing areas. For example, Gauteng Provincial SAPS is divided into seven areas each headed by an Assistant Commissioner who is responsible for the police stations under his/her jurisdiction.

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<sup>72</sup> Constitution of the Republic of South Africa, 1996 (Act No 108 of 1996), sec. 205(1).

<sup>73</sup> Constitution of the Republic of South Africa, 1996 (Act No 108 of 1996), sec. 207(1) (2).

<sup>74</sup> Constitution of the Republic of South Africa, 1996 (Act No 108 of 1996), sec.207 (3) (4).

<sup>75</sup> According to the Public Service Act, this refers to employees who work in administrative roles within the SAPS.

<sup>76</sup> See list at: <https://www.saps.gov.za/contacts/provdetails.php?pid=5>

<sup>77</sup> See list of police stations in the North West Province at:  
<https://www.saps.gov.za/contacts/provdetails.php?pid=8>.

This brief profile shows that SAPS is an enormous institution and justifies testing the value proposition of BWCs before incurring the sizeable costs of procuring technology that the organisation may fail to derive the best results from its usage. On a practical note, the SAPS profile provides the relevant information for determining how best to conduct a trial of BWCs in South Africa. As indicated above, the thesis does not dwell on a detailed methodology in terms of how SAPS can measure specific outcomes. The thesis is more focused on the impact of BWCs on police accountability. However, it is essential to dwell on how the SAPS can best adopt and mainstream the use of BWC into its operations because it provides a foundation for using the technology to enhance police accountability.

There are two broad aspects of policing that SAPS can evaluate the impact of BWCs on. These relate to SAPS' operations and in particular its investigative practice and internal oversight or discipline management. These are briefly discussed below.

#### *SAPS operations*

As outlined in Section 5.1 above, SAPS' goals for adopting BWCs relate to the agency's internal investigative practice and increasing operational efficiencies. The formulation of SAPS' objective in acquiring BWCs needs to clearly identify an existing challenge or outcome that the adoption of BWCs would improve or enhance. This suggests that there is no clear strategy on what BWCs can add to existing operational tactics within SAPS.

However, UK evaluations of BWCs provide some pointers to some outcomes that SAPS might seek to evaluate. The literature review in the introductory chapter and the critical analysis of the various theories of change associated with BWCs and specific law enforcement outcomes illustrate that BWCs have shown more positive results in investigations of specific crimes. For example, the ODS Consulting report in Scotland showed that in cases where BWC evidence was used, they were 70-80% more likely to result in a guilty plea compared to others.<sup>78</sup> A 2007 UK study by Goodall found similar effects regarding the quicker resolution of cases, reduction in officer time spent

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<sup>78</sup> ODS Consulting, *Body-Worn Video Projects in Paisley and Aberdeen*.

on paperwork and more time on patrol.<sup>79</sup> Researchers such as Morrow *et al.* and Owens *et al.* found that the use of BWC evidence increased conviction rates for specific categories of crime such as domestic and intimate partner violence including in situations where the victims refused to testify.<sup>80</sup> These encouraging findings could be helpful because South Africa has a massive problem with domestic and sexual violence as shown by the most recent South African crime statistics showing that this category of crime is on an upward trajectory.<sup>81</sup>

While these methods have produced more promising results in the UK and the US, they may still produce different outcomes in a different context in South Africa. However, SAPS can import and trial these models in South Africa as part of the BWC roll-out programme.

### *Piloting BWCS in South Africa*

The South African context and the evidence and analysis of current research and use of BWCs in the north suggest that SAPS should trial BWCs before rolling them out nationwide. This thesis identifies three reasons why this is important. The first is that the technology is still unproven on most of the claims that have been made about its efficacy and most of what is promising about BWCs impact is only proven in specific contexts and therefore more evidence is required for a context such as South Africa. The need for evidence resonates with South Africa's own strategies, such as the 2016 White Paper on Safety and Security, which advocates knowledge-based approaches in which interventions and programmes used by law enforcement officials must be based on demonstrated and proven results.<sup>82</sup> The launch of the SAPS research division in 2016 whose agenda includes a burgeoning interest in evidence-based policing and including, in particular, investigations aimed at discovering systems,

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<sup>79</sup> Police and Crime Standards Directorate, *Guidance for the Police Use of Body-Worn Video*.

<sup>80</sup> Morrow, Weston J., Charles M. Katz, and David E. Choate. 2016. "Assessing the Impact of Police Body-Worn Cameras on Arresting, Prosecuting, and Convicting Suspects of Intimate Partner Violence." *Police Quarterly* (Sage) 19 (3): 303-325.

<sup>81</sup> Refer to: <https://www.gov.za/speeches/minister-bheki-cele-release-quarter-four-crime-statistics-202122-3-jun-2022-0000>.

<sup>82</sup> Civilian Secretariat for Police. 2016. "2016 White Paper on Policing." Accessed November 19, 2019.

[http://www.policesecretariat.gov.za/downloads/bills/2016\\_White\\_Paper\\_on\\_Policing.pdf](http://www.policesecretariat.gov.za/downloads/bills/2016_White_Paper_on_Policing.pdf), p. 12.



devices and gadgets that will enhance policing and resolving of crime.<sup>83</sup> Thus, the potential use of BWCs should ideally fall in this category of SAPS' objectives.

Second, given the size of SAPS as described above, it would be financially costly to roll out such an expensive project when there is uncertainty about the efficacy of BWCs and, more importantly, the conditions under which the technology produces the desired outcomes in a South African context. The third is that a trial provides SAPS with the opportunity to test the product among the users (police) in a safer environment of learning before it is rolled out.

What follows in this section assumes that SAPS has yet to conduct such a trial, which is based on information from SAPS' digital policing strategy. It would be advisable, from the onset, for SAPS to work collaboratively with IPID, CSPA, the NPA and any institutions of the criminal justice system that might have a direct interest in using BWCs. The SAPS and IPID might be the immediate beneficiaries. However, the ultimate users of whatever advantages that BWCs bring are the NPA and the courts that use BWC evidence from both police investigations and oversight investigations.

This thesis envisages at least three ways to adopt BWCs. The first and perhaps likely, considering that a policy and institutional decision has been made to adopt the technology, is that SAPS will unilaterally roll out the technology nationwide without a collaborative trial phase and informed only by claims of effectiveness based on good intentions and evidence from evaluations from the US and the UK. If SAPS take this route, the best possible approach would be to generate and apply knowledge derived from an analysis of SAPS' own crime problems and internal performance measures and how the deployment of BWCs would help them achieve their objectives. For example, SAPS could replicate some of the promising UK research regarding the effect of BWCs on investigating domestic violence cases. This would require

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<sup>83</sup> Zulu, Bongwiwe. 2016. "SAPS Research Agenda 2016-2020 Research Colloquium." *Research Colloquium: Towards an ideal and suitable policing model for the SAPS*. South African Police Service. 1-48. Accessed May 22, 2018. [https://www.saps.gov.za/resource\\_centre/publications/lt\\_gen\\_Zulu\\_final\\_research\\_agenda\\_2017\\_02\\_07.pdf](https://www.saps.gov.za/resource_centre/publications/lt_gen_Zulu_final_research_agenda_2017_02_07.pdf).



identifying appropriate indicators and basing the evaluation on a pre-and post-intervention impact measurement.

The second is that SAPS could decide to test BWCs in one province. The selection criteria might be based on the province considered a hotspot of crime or a specific category of crime that SAPS wants to target in a phased approach before expanding to other provinces. Regarding methodology, SAPS could divide existing provincial policing areas in the selected province into two and administer BWC treatment in one group of police areas, with the other acting as the control group. The lessons learned and findings from this experiment can then be customised for other provinces and replicated to produce context-specific information about the efficacy of BWCs on various law enforcement outcomes in those provinces.

The author suggests that a third approach would be more practical and ideal for generating evidence that is sensitive to possible contextual differences between provinces. Instead of a national roll-out or single-province roll-out, the SAPS could undertake trials simultaneously in all nine provinces using the same or similar methodologies to test the impact of BWC evidence on police investigative practice. As stated above, there is promising evidence from the UK and US that SAPS could replicate, such as focusing on the effect of BWCs on investigating domestic violence cases.

This approach assumes that since the decision to adopt BWCs has already been made, a significant budget is available to roll out the technology. The approach to initially trial the technology in each province would also afford SAPS to test not only the impact of BWCs on law enforcement outcomes but also the whole suite of technologies that are part of a BWC programme (cloud storage/servers, bandwidth, filing protocols, technological compatibility with NPA and the courts, chain of custody) and develop knowledge about how best to optimise the technology before rolling it out nationally. This approach would also be ideal because it allows for planning a national roll-out based on evidence of what works, how it works and with the knowledge of the optimal conditions under which BWCs produce desired outcomes. This information

would help produce a template that all provincial SAPS can utilise to expand the roll-out to all parts of the provinces.

After the nine provincial trials, the lessons learned from that coordinated and collaborative process could be shared at a SAPS symposium and consolidated into a code of practice on using BWCs in South Africa. As indicated above, the evaluation methodologies may rely on existing UK and US approaches. However, it is safe to assume that SAPS has its own priority crimes on which it can evaluate the impact of BWCs, which may not be pressing issues in the UK and the US.

### *BWC regulations and inter-institutional cooperation*

As suggested above, the roll-out of BWCs in South Africa should ideally be done at different stages in collaboration with the Information Regulator, IPID, the NPA, the South African Human Rights Commission and the CSPS, particularly regarding the legal aspects of deploying BWCs in South African law enforcement. The aspects of BWC policies that directly affect members of the public may also require consultations with civil society.

As shown in Chapter 3, the inappropriate use of BWCs may violate a number of human rights and in particular the right to privacy. Therefore, any BWC project must conform with international human rights law, the Constitution of South Africa, South African common law, the POPI Act and the PAIA of 2002. Together, these laws set out the rules regarding the lawful collection, storage, and processing of personal information. In addition, the Electronic Communications and Transactions Act 25 of 2002 and the POPI Act have provisions relating to the admissibility and evidential weight of a data message as electronic evidence during legal proceedings. The Electronic Communications and Transactions Act 25 of 2002 emphasises the reliability of how the data message is generated, stored and communicated, how it is maintained and how the originator is identified.<sup>84</sup> Similar safeguards can be found in Section 16 (1) of the POPI Act which stipulates that responsible parties “must ensure that personal information is complete, accurate, not misleading and updated where necessary.” Section 19 (1) of the POPI Act obligates the responsible party to secure the integrity

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<sup>84</sup> Refer to Electronic Communications and Transactions Act 25, of 2002, s 15 (3).

and confidentiality of personal information by preventing the “loss of, damage or unauthorised destruction, and unlawful access to or processing of personal information.”<sup>85</sup> Thus, this legal framework will implicate several institutions when SAPS rolls out the BWC programme.

As the responsible party, SAPS would be the leading player responsible for ensuring that any collection, storage, processing and sharing of personal information is done lawfully. However, as the administrator of the POPI Act, the Information Regulator has a critical role in ensuring compliance with the law from the beginning. The Information Regulator's powers and duties include, from time to time, the issuing, amending and revoking of codes of conduct and making guidelines to assist bodies in developing or applying codes of conduct.<sup>86</sup> According to the POPI Act, such codes of conduct must incorporate all conditions for the lawful processing of personal information and prescribe how the conditions for the lawful processing of personal information are to be applied or are to be complied with, given the particular features of the sector or sectors of society in which the relevant responsible parties are operating.<sup>87</sup>

There is an established practice in BWC regulations and policies in the US and the UK. South Africa might find lessons from the UK more palatable because of the similar legislation and institutional set-up. As stated in Chapter 3, ordinarily, the recording of members of the public on a massive scale for no justifiable and lawful reason is not an accepted practice. However, a few of the conditions for the lawful processing of personal data discussed in Chapter 3 require emphasis where the processing of personal information is done with the view that it may be used for oversight investigative practice to improve police accountability.

The Information Regulator's code of conduct or practice will have to balance the imperative for privacy with the need to ensure the accountability of police actions. As illustrated in Chapters 1 and 2, the policy regarding when to record and when not to record (whether based on privacy concerns or police discretion) can be a critical factor for the successful use of BWCs. An always-on, cast-the-net-wide policy may be

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<sup>85</sup> POPI Act, 2013, s 19 (1).

<sup>86</sup> POPI Act, 2013, s 40 (1).

<sup>87</sup> POPI Act, 2013, s 60 (1).

attractive because it allows law enforcement not to miss any incident of value. However, it will almost always violate the privacy rights of both the police officers and members of the public, especially where there is no specific legitimate law enforcement objective for recording.

The approach that is most likely to ensure compliance with the law has become the norm in the UK and the US, which is to switch on the cameras before initiating contact or when the officers are dispatched and to record until that contact is complete or when the officer and the other party have separated and then switch off. During crowd management, BWCs can be switched on at the commander's signal when necessary. However, for frontline policing or responders to 10111 emergency calls, it would be advisable to switch on their BWCs as soon as they receive the call until after resolving the interaction. The disadvantage of this approach is that police officers might not switch on the camera until well into a confrontation — either as a deliberate choice or a genuine mistake — which could undermine the evidentiary value of BWCs in police investigative and oversight investigative practice. It can be envisaged that police officers will initially forget to record, but as they get used to using BWCs, compliance will increase. The code of practice should ensure that privacy and the need for evidence are balanced and done according to the law.

Another issue of importance regards the evidential value of BWC recordings. Recordings are a critically important factor for police accountability because BWCs have always been cast as a backwards-looking mechanism with the ability to apportion responsibility.<sup>88</sup> However, as observed by Coudert *et al.*, the ability to use the recording as a source of evidence is based upon their authenticity, reliability and admissibility.<sup>89</sup> Authenticity refers to the quality of "making it possible to positively tie evidential material to the incident" and this is important considering perceptions of BWC recording as the "objective truth" as discussed in Chapter 4. This could be solved technically by purchasing BWCs with features such as timestamp and GPS metadata, making it possible to provide the incident's date, time, and location, making it more

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<sup>88</sup> Coudert, Fanny, Dennies Butin, and Daniel Le Metayer. 2015. "Body-worn cameras for police accountability: Opportunities and risks." *Computer Law & Security Review* (Elsevier) 31 (6), p. 755.

<sup>89</sup> Coudert *et al.*, "Body-worn cameras for police accountability", p. 755.

likely to be accepted as authentic in a court of law. Other technical issues listed by Coudert *et al.* include camera placement to replicate the officer's view, camera width to ensure BWCs record what the officer can see, the battery life of the device and, as discussed above, clear instructions on the latitude of officers to switch BWCs on and off. Most of these technical issues are reflected in SAPS' RFI of 2019, which means the SAPS has done its due diligence.<sup>90</sup>

The reliability of BWC evidence means that “nothing about how the evidence was collected and subsequently handled may cast doubts about its authenticity and veracity.”<sup>91</sup> The POPI Act and the Electronic Communications and Transactions Act 25 of 2005, discussed in Chapter 3, provide the framework for guiding legal compliance regarding reliability. Therefore, issues such as the transfer of video from the devices to storage, who is authorised to access such information and how long and under what conditions it must be disposed of are all areas of vulnerability from tampering, misfiling, or misusing. Solutions include encryption and ensuring every video has a digital signature to ensure confidentiality and prevent tampering.

Admissibility means that the evidence must conform to the legal rules of gathering, conservation, communication, and presentation that are encapsulated in South Africa's law of evidence and respect the privacy of persons recorded, including the officers who are part of all the recorded interactions.

Finally, in the context of police accountability, the presence of BWC evidence brings a new challenge to how investigations are conducted. As observed in Chapter 1 and Chapter 4, before the use of BWCs and in the absence of helpful bystander or CCTV video recordings, where police-public encounters happened in situations of invisibility, the challenge was that there were divergent testimonies from police officers and victims or witnesses. Criminal justice systems were more inclined to believe the officers' version in these situations. This raises the question of whether it is advisable

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<sup>90</sup> South African Police Service. 2019. "Request for Information for Body Worn and Vehicle Dashboard Cameras: Technology Management Services." *Tender Bulletin*. October 9. Accessed February 16, 2020. <https://tenderbulletins.co.za/tender-bulletin/request-for-information-rfi-for-body-worn-and-vehicle-dashboard-cameras-division-technology-management-services/>, see Annexure A.

<sup>91</sup> Coudert *et al.*, "Body-worn cameras for police accountability", p. 756.

for police officers involved in potentially unlawful uses of force to be allowed to use footage to draft their statements. The apprehension is that it might lead to unfair outcomes if the officer(s) can draft their statements using the footage without the same privilege being granted to the victim, witness, or complainant. This contention is informed by the fact that the police officer(s) may tailor their statements to what the police officer(s) see in the video rather than how they assessed the situation based on what they saw because they cannot be assumed to see everything that is on video.

This approach might have had the effect that complainants may be discredited if their recollection does not align with the footage. Therefore, both the police officers and victims or witnesses should have the equal benefit of reviewing the images, especially before trials or adjudication, which often happens long after the events. Alternatively, as recommended by two US civil rights organisations, the Upturn and The Leadership Conference on Civil and Human Rights, the officer(s) must draft two statements, one based on the officer(s)' independent recollection of an event and then a supplementary report to address clarifications after the footage is reviewed.<sup>92</sup>

With these mechanisms and considerations in place, IPID can be in a better position to utilise BWC evidence for investigating police misconduct. The section below examines how IPID conducts investigations before presenting how the oversight body can evaluate the relationship between BWCs and more accountable policing in a South African context.

### *5.3.1.2 The Independent Police Investigative Directorate*

This section examines the current setting and institutional role of IPID as the South African police oversight investigative body. The central external accountability mechanism is the Independent Police Investigative Directorate (IPID), which is established under the Independent Investigative Directorate Act of 2011. As stated in Chapter 3, among other things, the IPID's mandate is to provide for independent and impartial investigation of identified criminal offences allegedly committed by members

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<sup>92</sup> Upturn and The Leadership Conference on Civil and Human Rights. 2017. *The Illusion of accuracy: How body worn camera footage can distort evidence.* <https://www.upturn.org/reports/2017/the-illusion-of-accuracy/>.

of the South African Police Service, to make disciplinary recommendations in respect of members of the South African Police Service and Municipal Police Services resulting from investigations conducted by the Directorate, and to enhance accountability and transparency by the South African Police Service and the Municipal Police Services in accordance with the principles of the Constitution.<sup>93</sup>

According to IPID's current strategic plan, the organisation has provincial offices located in each of South Africa's nine provinces and another four satellite offices.<sup>94</sup> The number of satellite offices was reduced from nine to four and then to none because of financial constraints.<sup>95</sup> As the end of FY2020-2024 IPID had 397 staff members which included nine interns.<sup>96</sup> Of this staff complement, 161 are investigators.<sup>97</sup>

The functions and investigative powers of investigators are outlined in Section 24 of the IPID Act (Act 1 of 2011). However, the more operational description of these functions and powers can be deciphered from IPID's Standard Operating Procedures (IPID SOPS).<sup>98</sup> According to the IPID SOPS, the duties of IPID investigators include among others, receiving, registering, and allocating cases, attending crime scenes and post-mortems.<sup>99</sup> Investigators safeguard and process exhibits at the crime scene, conduct interviews with suspects and witnesses, and obtain affidavits. Investigators have duties to advise the next of kin and other relevant stakeholders regarding progress of investigations.<sup>100</sup> They also conclude cases by drafting reports and draft memoranda with recommendations to SAPS to take disciplinary actions and referrals

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<sup>93</sup> IPID Act 1 of 2011, s 2 (d), (e) and (g).

<sup>94</sup> These satellite offices were closed in 2018 because IPID could not afford them. See IPID Annual Report 2017-2018 at

[https://www.gov.za/sites/default/files/gcis\\_document/201810/ipidannual-report-20172018.pdf](https://www.gov.za/sites/default/files/gcis_document/201810/ipidannual-report-20172018.pdf)

<sup>95</sup> Independent Police Investigative Directorate. (IPID) (2020). *Strategic Plan 2020-2025*.

Pretoria: IPID. Retrieved April 15, 2021, from <http://www.ipid.gov.za/node/13>, p. 15 and IPID Annual Report 2017-2018.

<sup>96</sup> (IPID) (2023). *Annual Performance Plan 2023-2024*.

<https://www.ipid.gov.za/sites/default/files/documents/IPID%20APP%202023-2024.pdf> p. 15.

<sup>97</sup> IPID (2023). *Annual Performance Plan 2023-2024*, p. 11.

<sup>98</sup> IPID. (2019, March 25). *Investigative and Firearm Related Standard Operating Procedures Relating*. Retrieved September 23, 2020, from GroundUp:

[https://www.groundup.org.za/media/uploads/documents/2019\\_SIGNED\\_IPID\\_SOPS.pdf](https://www.groundup.org.za/media/uploads/documents/2019_SIGNED_IPID_SOPS.pdf), p. 21.

<sup>99</sup> IPID (2019), *Investigative and Firearm Related SOPS*, p. 21.

<sup>100</sup> IPID (2019), *Investigative and Firearm Related SOPS*, p. 21.



to the National Prosecuting Authority for consideration to prosecute and to update the status of each case on the database.<sup>101</sup> Senior Investigators have the same duties in addition to the responsibilities of supervising investigators and trainees.<sup>102</sup>

However, according to IPID and parliamentary oversight reports, IPID's investigative programme is underfunded, understaffed, and lacks specific skills<sup>103</sup> as a result of which IPID struggles to meet its mandate.<sup>104</sup> As stated above, IPID closed all its nine satellite offices because of lack of funds. These critical factors can be viewed positively and negatively vis-à-vis the presence of BWC evidence. On the one hand, the lack of funding, inadequate staff and lack of skills could potentially undermine some of the expected benefits of BWCs. However, on the other hand, the presence of BWC evidence may be the force multiplier that also simplifies investigations and makes them cheaper and easier to get to a finding. These uncertainties can be settled by effectively evaluating how BWCs impact more accountable policing.

#### *The challenges of accountability*

Given the issues raised above, this thesis identified three challenges that describe the nature of the lack of accountability in South African policing. The thesis took a broader perspective on factors that can enhance police accountability whose evaluation can potentially lead to improved police accountability.

The first derives from the fact that police accountability is deepened by the detection and reporting of misconduct by members of the public. However, victims or witnesses of police use of force may be deterred or disempowered to lodge complaints because of lack of evidence and the feeling that it would be their word against an officer in an accountability system that traditionally places more weight on the evidence of a police officer than that of citizens. This is particularly true of citizens who are more likely to

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<sup>101</sup> IPID (2019), *Investigative and Firearm Related SOPS*, p. 21.

<sup>102</sup> IPID (2019), *Investigative and Firearm Related SOPS*, p. 21.

<sup>103</sup> Parliament of the Republic of South Africa (9 April 2020), Analysis of the 2020-2025 Strategic Plan, 2020/21 Budget and Annual Performance Plan (APP) of the Independent Police Investigative Directorate (IPID): Vote 24. Retrieved from <https://www.documentcloud.org/documents/6889479-Research-Unit-IPID-APP-and-Budget-2020-21.html>, p. 9.

<sup>104</sup> IPID (2019), Annual Report, p. 20.

frequently come into contact with the police or otherwise be viewed as a suspect. Under such circumstances, it is postulated that it is unlikely that some potentially unlawful police uses of force or police misconduct are investigated, and the alleged police officer offenders are not likely to be held accountable. The relevance of this challenge derives from the assumption that police agencies benefit from the public's (victims or witnesses) willingness to lodge complaints of misconduct against police officers, as this increases the detection of such cases and improves discipline and accountability within the ranks of police agencies.

The second problem is that a lack of sufficient evidence decreases the likelihood that complainants or investigators will have sufficient evidence to reach a finding. As has been highlighted in the preceding chapters, one of the main impediments to holding police officers to account is that some police uses of force happen under situations of invisibility and outside the gaze of police supervisors, oversight bodies and, in certain instances, only in the presence of the parties involved. Thus, investigations and adjudications of complaints in internal and external oversight mechanisms or criminal have to contend with contradictory and contested versions of what transpired during aggressive encounters, and this, in criminal justice systems that are generally perceived to favour law enforcement officials.

The third problem relates to procedural justice and the crisis of legitimacy in policing emanating from a failure to ensure that citizens' voices are heard, including through complaint mechanisms. This also includes public perceptions of a lack of transparency and accountability for perceived inappropriate use of force by police officials. As discussed in Chapter 3, accountability under international law is to restore the violated norms and the broken relationships between the police and communities. This can only be achieved if complaints are investigated promptly, independently, and impartially, effectively and thoroughly, and transparently to ensure public understanding of the process, acceptance of the outcomes and the restoration of norms. The hypotheses and assumptions are stated below.

### 5.3.2 Proposed hypotheses

The primary focus of evaluating the relationship between BWCs and improved police accountability evokes the idea of an impact evaluation. As illustrated in the preceding chapter and elaborated on above, it is essential to know what works. However, because of multiple possible confounding factors in the use of BWCs identified in Chapter 4, it is also essential to know why and how it works to ensure the use of the technology in ways that can detect and respond to changes in circumstances that undermine the potential efficacy of the technology. While it is essential to know if something works using average test effects, selecting a methodology that can highlight why BWC footage works in some but not all investigations is vital. Under international law, every investigation is essential in its own right.

The piloting of BWC programmes is a huge undertaking impacting policy and practice. It also requires significant adjustment during the pilot process. This thesis identifies three hypotheses that can be used to measure the effect of BWCs on police accountability. These are outlined below, including an analysis of why only one of the hypotheses is likely to provide more reliable findings.

**Hypothesis 1:** Victims and/or witnesses might be emboldened to report questionable conduct by the police.

This hypothesis postulates that the knowledge by victims or witnesses of the presence of police BWCs and the availability of BWC evidence significantly increases the perception and likelihood that a complaint could lead to an investigation in circumstances where an investigation is triggered by a complaint or where the investigation is somehow discretionary, and there is public pressure to investigate. In other words, victims and/or witnesses of police use of force may have hitherto been deterred or felt disempowered, as highlighted in the preceding sections, by the fact that without access to evidence, it would be their word against an officer in an accountability system that traditionally places more weight on the evidence of a police officer than citizens. Therefore, citizens would be emboldened by the thought that the availability of camera footage would vindicate their perspective of what happened in a controversial encounter.

This hypothesis could be measured by counting the number of complaints against police misconduct in policing areas where law enforcement officials use BWCs, in which an increase in such complaints could be linked to the complainants' knowledge of the availability of BWC evidence. This could be linked to access to information requests made by victims and/or witnesses or relatives of the deceased regarding law enforcement information officers regarding police misconduct. However, the challenge with this indicator is that it is an indirect indicator based on the correlation between an increase in complaints where BWCs are being used to increase knowledge of the availability of BWC evidence.

As this is the main criticism of existing research regarding its reliance on indirect effects, the impact of BWCs this indicator falls in that same category. There are other limitations and confounding factors. For example, factors other than the availability of evidence might influence an increase in complaints by citizens; therefore, it would be tenuous to attribute impact only to BWCs. For example, increased access to information requests depends on the knowledge of and public confidence in the access to information request system. Thus, while this hypothesis might produce potentially helpful information about BWC effects, it is not easy to attribute the findings to BWCs with reasonable certainty.

**Hypothesis 2:** BWCs will enhance public understanding of investigations, acceptance of outcomes and restoration of norms.

This hypothesis is about measures of public satisfaction that engender police legitimacy. It hypothesises that if police are perceived to be receptive and responsive to public complaints against suspected acts of police misconduct and oversight bodies use BWC footage evidence to promptly, thoroughly, effectively, and transparently investigate and hold those found responsible accountable, it could enhance public understanding of investigations, acceptance of outcomes<sup>105</sup> and restoration of norms.

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<sup>105</sup> "Acceptable outcomes" does not refer to preferred outcomes. It refers to a transparent process of reaching the verdict whether the use of force was justified, or not and which individuals and communities find acceptable.

If this happens, BWCs contribute to procedurally just policing practices that ensure a symbiotic relationship between the police and the communities they serve.

The challenge with this hypothesis is that it is too broad to be attributable to BWCs. However, it is theorised that in the long-term, the more the police are held accountable, the more likely they are to reduce potential unlawful uses of force and that BWCs can contribute to legitimate policing. Given the discussions in Chapter 2 regarding the different perspectives on the use of force between the legal, public, organisational and officer perspectives, it is near-impossible to attribute public understanding of investigations on BWCs. Because of the low tolerance of any use of force by law enforcement, even that which is lawful, the more the public sees recordings of such uses of force, the more it will always create tensions. It could be with a section of the population, especially the overpoliced communities, which tend to be minorities or lower-class communities.

The kind of research that might be possible includes knowledge and attitudes surveys regarding public perceptions of procedurally just policing in the presence of BWCs or surveying victims, witnesses, and members of the public regarding their perception of police in the age of BWCs. However, this approach needs to measure the impact of BWCs on police accountability or effectiveness.

Thus, while the two hypotheses raise essential questions regarding police accountability and effectiveness, it is difficult to measure the impact of BWCs and to attribute the results narrowly to the presence of BWCs. That leaves one hypothesis which seeks to measure more directly how BWCs can lead to more accountable policing.

**Hypothesis 3:** BWC footage (evidence) will contribute to the resolution of investigations in a timely manner.

This hypothesis theorises that BWCs would improve the collection of quality evidence in controversial police-citizen encounters, thus increasing the likelihood that investigators would have sufficient evidence to reach a finding. BWCs are assumed to

document any misconduct, including questionable uses of force, thus enabling the apportionment of responsibility upon review. In this sense, BWCs are seen as a transparency mechanism in policing, subjecting to scrutiny what so far was limited to the parties involved in the encounter. The presence of BWC video footage is thus seen as a solution in determining what happened, who was responsible (directly or indirectly), who was affected (victim), and whether there was any institutional failure and to apportion responsibility or exonerate the police officers. The answers to these questions are a necessary and significant first step to remedying the violated norms (harm caused) and identifying whether there is a need for legislative, institutional, or practical reform to avoid future recurrence of the problem.

The following section elaborates on how the impact of BWC evidence can contribute to the resolution of investigations, which is an essential aspect of police accountability.

## 5.4 Proposed evaluation process

5.4.1 BWC footage (evidence) will contribute to the resolution of investigations in a timely manner.

This hypothesis seeks to measure the impact of BWC evidence on the outcomes of IPID's oversight investigations. An impact evaluation lends itself to an experimental design with a control and treatment group. However, in view of the confounding factors identified in Chapter 4, this thesis recommends a mixed method evaluation approach that includes qualitative methodologies to focus on what works, why, and how it works, which is important for sustaining preferred outcomes over time.

### *Theories of change*

Three theories of change would explain the effect of BWC evidence as postulated in the hypothesis.

Theory of change 1: *Easier identification of material witnesses or more targeted search of the crime scene*

Theory of change 2: *Less obfuscation by the subject of investigation or associated witnesses (fellow officers) in relating the narrative of facts in officer-involved uses of force*

Theory of change 3: *Greater receptivity of NPA prosecutors to cases without material witnesses*

As illustrated in this thesis, most existing evaluations on these more direct effects of BWC usage in pursuing accountability are limited. The South African context provides an excellent opportunity to explore these effects.

### *Analytic strategy*

As suggested above, under the various scenarios for how SAPS would roll out BWC in South Africa, the analytic strategy for this hypothesis will rely on a comparison between two emerging data sets of IPID investigations in which BWC footage is available and investigations in which BWC evidence is not available against four process and investigative outcome indicators. The outcome indicator selection is informed by expectations under international law stipulating that once the duty to investigate is triggered, such an investigation must be done promptly, independently, impartially, effectively, thoroughly, and transparently. The standards most applicable in this case are effective and thorough and transparency. To determine the impact of the availability of BWC video evidence on the investigative process, the analytic strategy identifies four outcome indicators to be analysed for both samples.

The analysis will be in two complementary parts. The first is a comparative analysis of investigations with and without BWC evidentiary footage based on IPID Case Management System data. However, this approach is open to criticism in that BWC evidence is one of many other pieces of evidence that might have a decisive effect in reaching a finding. Also, the fact that an officer is wearing a BWC does not necessarily mean there will be a recording of all his/her encounters. Neither does it mean that all recordings are useful for the investigation of a case.

To address this potential shortcoming and add explanatory power, the evaluation approach will complement the average test effects with a brief survey of investigators



in the treatment group to assess two aspects of their experience during an investigation regarding two indicators. Deaton and Cartwright's contention that there should be no hierarchy of evidence is instructive. Each evaluation approach has advantages, and although randomised controlled trials are said to be the golden standard for testing the impact of interventions, they cannot answer some crucial questions, especially if dealing with a policy impacting technology on normative concepts that do not lend themselves to quantification such as accountability within the criminal justice system. In this case, while randomised controlled trials can potentially show that using BWC evidence enhances accountability, the methodology may not provide evidence of why it works and under what circumstances. The two analytic processes are described below based on four indicators associated with the theory of change identified above.

**The outcome indicators for this hypothesis shall be as follows:**

*Average number of days for each investigation to move from case allocation to decision-ready status in the targeted financial year.*

For this outcome, efficiency is used as the indicator of effectiveness and measured in terms of the time it takes from opening to closing a case as a proxy for efficiency. The expectation for this indicator is for more quality investigations to reach decision-ready status in less time in the treatment than the control group of investigations. From an international law perspective, this reflects that the BWC evidence contributes to the effectiveness and thoroughness of an investigation.

The choice of this indicator may be affected by the fact that the time between the opening of an investigation and its closing does not account for the number of investigators involved or the number of cases they may have been working on simultaneously. It also does not anticipate the effects of attrition in terms of investigators resigning or being on long-term absences for various reasons, including but not limited to maternity or sick leave. However, the service standards<sup>106</sup> contained

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<sup>106</sup> See *Regulations: Operation of Independent Police Investigative Directorate*. Retrieved December 6, 2020, from South African Government: <https://www.gov.za/documents/independent-police-investigative-directorate-act-regulations-operation-independent-police>. Refer to Regulations 4(6) regarding investigations of death in

in the IPID Act – Regulations for the Operations of Independent Police Investigative Directorate suggest that this is a vital indicator for IPID’s measurement of operational effectiveness and management would make alternative plans to keep the staff complement stable including through hiring external expertise where possible.

Also, using BWC evidence significantly increases the number of potential witnesses who may need to be tracked down to establish valuable insight into the case, thus also quickening the gathering of more evidence into what happened. The use of facial recognition technology (FRT) enables investigators to quickly identify the people captured in the footage and track them down for questioning. However, FRT opens ethical and legal challenges regarding protecting personal data. The POPI Act has the scope to provide legal guidance regarding the overt use of FRT in South Africa, and some of the critical conditions implicated include legality, purpose specification and the consent of those being monitored.

1. *Proportion of investigations reaching a finding within the targeted financial year*<sup>107</sup>

As pointed out in the introductory chapter, the average case completion rate (decision-ready investigation status) per year intake in the five-year period from 2016-2017 to 2019-2020 was 42%. The expectation for this indicator is that there will be an increase in the number of cases reaching decision-ready status due to the availability of increased quantity and quality of evidence from BWCs. The postulated effect of BWCs is that more cases will reach a finding in the treatment group than in the control group.

2. *Proportion of “Unsubstantiated” cases per year*

There are many investigations that IPID closes as unsubstantiated every year. The term “unsubstantiated” is used in IPID annual reports but is non-existent in the IPD SOPS. The closest fit is “undetected”, which occurs either because the complainant is

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police custody, 5(4) on investigation of criminal matter (rape in police custody, torture or assault and corruption) and 6(5) on investigation of discharge of a firearm.

<sup>107</sup> The minimum reasonable time within which investigations must be completed is 90 days after the designation of the case. Thus, investigations that are designated within the last 90-days of the year can only be evaluated against this service standard at the end of the first quarter of the new year.

uncooperative, the suspect cannot be identified, or a crime cannot be established.<sup>108</sup> In the period 2015-2016 to 2019-2020, IPID closed an average of 20% of the cases per year on the basis that they were unsubstantiated meaning that there was insufficient evidence to determine that the alleged misconduct happened. It is hypothesised that in the presence of BWC footage, the number of unsubstantiated or undetected cases will decrease significantly.

1. *Proportion of investigation in which the NPA upholds criminal charges in the targeted financial year.*

With this indicator, the thesis postulates that the availability, quantity, and quality of BWC video evidence will reduce cases returned by the NPA due to lack of evidence and the concomitant increase of cases in which the NPA upholds charges. The expectation is that the NPA will uphold the criminal charges recommended by IPID and reject fewer cases compared to the current status in which the NPA declined to prosecute an average of 58% of investigations in the five years from 2015-2016 to 2019-2020.

The outcome of research on these four indicators should help answer the questions of whether the presence of BWC evidence during investigations will ensure 1) that investigations are completed in a shorter timeframe than in the absence of BWC evidence, 2) increase the number of decision-ready cases per annum compared to current average, and 3) the decrease in the number of unsubstantiated cases every year and 4) an increase in the number of cases being upheld for prosecution by the NPA. The importance of using these measurements is that incidents of police misconduct often happen in places that are invisible to supervisors and investigators (Backstage). The availability of BWC evidence is assumed to make visible the backstage policing practices discussed in Chapter 2 and, therefore, reduce the time it takes to know what happened, who was involved, the alleged perpetrator, and the victim, thus aiding a quicker resolution of the case.

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<sup>108</sup> IPID. 2019. "Investigative and Firearm Related Standard Operating Procedures Relating." *GroundUp*. March 25. Accessed September 23, 2020. [https://www.groundup.org.za/media/uploads/documents/2019\\_SIGNED\\_IPID\\_SOPS.pdf](https://www.groundup.org.za/media/uploads/documents/2019_SIGNED_IPID_SOPS.pdf), p. 15.

IPID investigations that are disposed of through a disciplinary recommendation will be a challenge regarding whether the SAPS acts on them. While such cases are covered in the first three indicators above, there have been problems with SAPS' implementation of the recommendations, and the failure to do so has not been driven by the poor quality of the investigation but by organisational and occupational culture of clannishness. That is more of a reflection of SAPS' commitment to accountability, which undermines the work of IPID. That is an issue for the CSPA to resolve as it evaluates SAPS' performance. A possible remedy would be to have SAPS held accountable by publicly reporting back to IPID and the PCoP on which recommendations it implemented, and which were not and to provide justifiable reasons for not implementing them.

### *Sampling*

IPID's performance regarding its mandate to investigate SAPS and MPS is monitored annually. This timeframe provides a valuable reference for the sampling methodology. Assuming that SAPS tests BWCs in at least nine provinces simultaneously, this would mean that the population is all investigations initiated from when BWCs are used by SAPS officers in the different pilot sites. In order to evaluate the impact of BWCs on performance indicators, such as the number of days taken to complete an investigation, the pilots should ideally run for a year and start at the beginning of the financial year on April 1 and run for 12 months. In terms of investigations, some of the Section 28 classifications of police misconduct, such as acts committed while off duty<sup>109</sup> and cases of rape of any person while in police custody<sup>110</sup> will be excluded because they occur in circumstances where police officers are not required or are unlikely to be wearing BWCs and therefore may skew the data.

Given the observation in the paragraph above, the thesis proposes an investigation of all classifications of police misconduct as stated in Section 28 of the IPID Act except s.28(1)(d) and s.28(1)(e) relating to acts of misconduct committed while off duty and cases of rape committed while in police custody by non-police officers, respectively.

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<sup>109</sup> See s.28(1)(d), IPID Act of 2011

<sup>110</sup> See s.28 (1) (e), IPID Act of 2011

This approach eliminates concerns regarding statistical power in that South African law enforcement attracts many complaints annually.

### *Assumptions*

The prospective nature of this research design poses its challenges. Therefore, it is essential to outline the assumptions that form the basis for the proposed type of evaluation. This proposal assumes that the SAPS and MPS, subject to IPID's investigations, acquire BWCs. Policy statements from the PCoP and, to a lesser extent, from the SAPS regarding the roll-out of BWCs suggest that improved police accountability is one of the objectives for the planned BWC programmes.

The second assumption is that once a BWC is adopted as standard policing equipment, the existing obligation for SAPS and MPS to cooperate with the IPID must be understood to include making available at the earliest possible time the complete data downloaded from their BWC or immediate custody of the BWC itself to allow for IPID to download the data.<sup>111</sup> It is conceivable that there will be circumstances where an officer may be equipped with a BWC but in which there might be no footage for legitimate reasons. These may include, but are not limited to, legitimate privacy concerns as discussed in Chapter 3, for example, interviewing victims of sexual assault, especially involving minors, and in private settings such as inside the homes of suspects without a warrant or a justifiable warrantless search.

However, there could be cases where the officer or the agency fails to release the footage to IPID investigators. When it is an officer, such behaviour should be classified as misconduct, and the offending officer should face disciplinary action.<sup>112</sup> As discussed in the preceding chapter, in the US, police officers who fail to record a fatal incident have often been summarily fired from their jobs. Therefore, failure to share footage of suspected torture, cruel, inhuman, and degrading treatment, as well as fatal shootings, should ideally attract a similar or a variation of the same depending on the circumstances. Delays in releasing BWC footage may be justifiable if releasing the

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<sup>111</sup> This is in line with s.29 (2) (b) of the IPID Act.

<sup>112</sup> In the South African context, Section 33(3) of the IPID Act No. 2 of 2011 stipulates that "Any police officer who fails to comply with Section 29 is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years."

footage may jeopardise an ongoing investigation. However, Freedom of Information Laws (FOI), such as South Africa's PAIA, generally allow for the release of information to persons or relatives of deceased victims. The SAPS should draft policies regarding releasing personal information guided by the POPI Act and the Promotion of Access to Information Act, as discussed in Chapter 3.

On the technical aspects of BWCs, the assumption is that IPID and the NPA will procure equipment compatible with SAPS' BWC camera technology to ensure data sharing between these institutions. This technology includes docking stations to charge BWCs, compatible software and a server (physical or virtual) for storing data with the ability to tag and organise data in line with IPID's Case Management System.

#### *Data Elements*

The type of data collected to measure the outcome indicators identified above is available from the IPID's Case Management System, considering the requirements for registering a complaint discussed above. To ensure that the system can generate this type of data, it is prudent to test the case management system based on data collected in previous years to check for the data's availability and ensure that relevant data are collected consistently for each investigation. This exercise would ensure that any limitations in the collected data are adjusted, and investigators are made aware of the importance of capturing all data required for the test. Significantly, there are no fears of spillover effects if investigators investigate both police misconduct where there is BWC evidence and where there is not. Investigating both gives investigators a clearer understanding of the impact of BWCs on the investigative process, which can be captured quantitatively and qualitatively.

For comparative analysis, baseline data can be collected from investigations in previous years. For example, if 2023-2024 is the year earmarked to start the research, then the baseline data for the previous year before the deployment of BWCs is used as an additional control for investigations that allows for comparisons with previous years. The type of data required will include the following data elements.

- Study ID
- Province/district/Area
- Date & estimated time of offence
- Date & time IPID registered the alleged offence
- Date the case is assigned to an investigator
- Date BWC footage requested/accessed
- Date BWC received/accessed
- Reason for non-availability of BWC footage if not received
  - a) Non-cooperation of data holder
  - b) Officer not wearing BWC
  - c) Officer wearing BWC but device not on
  - d) Device switched on but data corrupted
- Date Investigation finalised
- Manner of Disposal
  - a) Convicted
  - b) Acquitted
  - c) Unsubstantiated
- Criminal Case Opened/Disciplinary Recommendations upheld

#### *Possible confounding factors*

- Investigators may not consistently update progress on the Case Management System as investigations progress resulting in inaccuracies or information gaps.
- Investigators assigned to both groups of investigations may concentrate more on investigations where there is BWC evidence because of the novelty of the technology or the belief that using BWV evidence makes it easier to know what happened, follow leads, and conclude investigations. As a result, this might affect the time dedicated to investigations.

#### **Survey of investigators**

As stated above, the survey of investigators is an innovation to bolster the explanatory power of the comparative analysis of investigations with and without BWC evidence. The survey is designed to elicit the felt experience of the investigators, to gauge their opinion on whether BWC evidence makes it easier to identify material witnesses or a



more targeted search of the crime scene. It also seeks to gauge investigators' practical experience on whether the use of BWC evidence contributes to less obfuscation by the subject of an investigation or associated witnesses (fellow officers) in relating the narrative of facts in officer-involved uses of force compared to investigations without BWC evidence.

The idea of the survey is to acknowledge that BWC evidence may not be the only source of a decisive piece of evidence in reaching a finding. Therefore, it is essential to engage investigators to determine how they rate BWC evidence's significance in each investigation. Besides, as illustrated in the preceding chapter, some crucial aspects of incidents critical to the evidence of the offence may occur out of camera range, or the recordings may be incomplete or the sound inaudible. The use of BWCs by law enforcement officials must not be seen as a silver bullet. Therefore, the value of other evidence in reaching a finding necessitates surveying investigators regarding their experience in investigating with and without BWC evidence and their rating of BWC evidence's contribution to the resolution of an investigation.

The idea of a survey is an innovation borrowed from the Police Ombudsman of Northern Ireland (PONI). However, it is used with a variation in this thesis. The PONI undertook the survey retrospectively, but, in this case, the proposal is for investigators to be surveyed after each investigation to ensure that investigators' responses address each investigator's perception of the difference between investigating with or without BWCs evidence. The suggested survey questions are as follows:<sup>113</sup>

1. Was the footage decisive in reaching a finding in the investigation?
  - a. Critical – decisive in that without it the finding could not have been reached
  - b. Critical – decisive in that without it, the finding could not have been reached
  - c. Unhelpful – BWC evidence did not impact the investigation

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<sup>113</sup> The survey approach and the framing of questions is adapted from the Police Ombudsman for Northern Ireland's report entitled *Impact of the Introduction of Body-Worn Video by PSNI on Complaints in Northern Ireland*. The report can be found at: <https://www.policeombudsman.org/PONI/files/0b/0b46b087-1f7f-4366-8b82-6dab63c0ccce.pdf>.

- d. Hindered – BWC evidence the footage raised more questions than it answered, so more investigative work was required than had there been no footage
2. Did the presence of BWC evidence increase the speed of the investigative process?
    - a. Yes – it helped identify witnesses, recreate the crime scene, identify essential clues or additional evidence, or expedite the evaluation of witness statements and police officer affidavits
    - b. No – it would have taken the same time even without BWC evidence
    - c. Slower – the footage opened more lines of inquiry and thus, the case took longer to investigate

#### *Survey questionnaire administration and analytic strategy*

The questionnaire could be administered and completed for investigations in the treatment group and analysed statistically. The survey findings will be triangulated with the findings from the comparison between investigations with and without BWC evidence in the first part of the methodology outlined above. The expected outcome of the survey is that in most cases, the investigators will say the availability of BWC evidence was a decisive factor in reaching a finding more quickly than it would otherwise have been without the footage. However, it can also be envisaged that investigators will potentially provide feedback on the circumstances when BWCs work and where they do not aid an investigation.

#### *Possible confounding factors with the survey method*

- Surveys by nature are subjective. They do not indicate a causal relationship but if answered with integrity, they can be useful in supplementing statistical findings.

#### *Sampling*

As stated above, IPID is constrained in terms of capacity. The same investigator will likely be allocated cases in the treatment and control groups. The advantage of such a scenario is that the investigators can contrast the investigation with and without BWC evidence. However, the disadvantage arises if investigators spend more time on the

treatment group of investigations because of the quality of with more leads to follow and spend less time on the control group, as stated above. This will require supervisors to ensure that they are regularly updated on the status of open investigations and that the information regarding progress or lack of it is continuously updated for evaluation. The implementation process will thus be an essential variable in the evaluation process. This aspect will be discussed in the next chapter.

### *Data collection*

The survey should be administered as part of the docket compilation process. Investigators must include a completed survey when an investigation reaches decision-ready status or reaches the service standards time limit at the end of the financial year. If an investigation is not complete by the end of the financial year, investigators will complete the survey and the data is collected. The date cut-off rule is IPID's service standards, which require that investigations be completed within 90 days of being allocated.

### *Limitations and confounding factors*

The following factors will require mitigation strategies at the sampling stage and during implementation.

- The speed with which an investigation proceeds and ensures a finding may depend on the experience of the investigator and his/her availability for the duration of the investigation up to decision-ready status.
- The experience of an investigator may also have a bearing on their judgement as to whether the presence of BWC video footage was decisive in altering the conclusion. Ideally, it will require investigators with similar levels of experience in undertaking investigations without BWC video footage to get credible responses.
- Investigators may only complete some of the survey questionnaires by the end of the investigation period, thus affecting an adequate sample to analyse.

The hypotheses and theories of change identified above focus on the extent to which BWC evidence should increase police accountability in line with expectations of international law. The proposed approach provides a framework that can be further

adjusted and tailor-made for IPID when more detail is needed on the operational issues of SAPS' BWC programme and the operational structures at IPID.

## 5.5 Conclusion

This chapter started by critiquing some of the shortcomings of previous evaluations of BWCs impacts, particularly those linked to police accountability, to provide the setting for how the impact of BWCs can be evaluated in a South African context. These include the reliance on the conceptualisation of accountability and indirect measures of impact that do not address the procedural element of the human rights implicated in law enforcement operations. There are also methodological weaknesses in the units of analysis, indicator selection and interpretation of data where there is low statistical power. Context is also identified as a critical variable in evaluating innovations such as BWCs, as it was in the US and the UK. It is, therefore, important for countries such as South Africa to evaluate BWCs before fully rolling them out.

Informed by this critical analysis, the chapter finds that research on BWCs is still experimental. This means that the deployment of BWCs in South Africa should acknowledge this by evaluating the technology in its policing context. The chapter suggests that the optimal approach to piloting BWCs cameras would be for SAPS, IPID, and the CSPS to work collaboratively in piloting BWCs simultaneously in all nine provinces. While SAPs will pilot the technology for its investigative practice, IPID will use the same pilots to measure the impact of BWCs on improved police accountability with a focus on police oversight investigations. The research design seeks to investigate the more direct impacts of BWCs on police accountability.

The chapter identified one hypothesis, two associated theories of change, a set of measurement indicators for each, and a research design and data analysis strategy for each. The proposed approach is summarised below.

**Hypothesis:** BWC footage (evidence) will contribute to the resolution of investigations in a timely manner.

The assumption is that BWC footage (evidence) will contribute to resolving cases of suspected misconduct in a more timely and judicious manner that makes more efficient use of investigative resources. Four measurement Indicators were identified for the hypothesis as follows:

- *Average number of days for each investigation to move from case allocation to decision-ready status in the targeted financial year*
- *Proportion of investigations reaching a finding within the targeted financial year*
- *Proportion of "Unsubstantiated" cases per year*
- *Proportion of cases in which the NPA upholds criminal charges in the targeted financial year*

This hypothesis is associated with three theories of change as follows:

Theory of change 1: *Easier identification of material witnesses or more targeted search of the crime scene*

Theory of change 2: *Less obfuscation by the subject of an investigation or associated witnesses (fellow officers) in relating the narrative of facts in officer-involved uses of force*

Theory of change 3: *Greater receptivity of NPA prosecutors to cases without or with fewer material witnesses*

As highlighted in this thesis, one of the main reasons why policymakers and members of the public called for the adoption of BWCs was because of the challenge of contradictory statements by victims, witnesses, and alleged police officer offenders regarding the circumstances of the incident. These first two theories of change contemplate how the use of BWCs and the availability of audio and visual footage might assist in reducing the time officers take to compile compelling evidence that might lead to the quicker resolution of investigations. The third theory of change relates to the potential of BWC footage providing improved quality of evidence to quickly finalise cases where witnesses disagree or refuse to cooperate with an investigation. The data for the indicators would be drawn from IPID's Case Management System and tracked for the duration of one financial year for investigations with and without BWCs. There would be no need to do a retrospective analysis of such investigations.

### *Survey of investigators' experience in investigating with and without BWC evidence*

The hypotheses and theories of change acknowledge that BWC evidence may not be the only source of decisive evidence in reaching a finding. In some cases, as illustrated in Chapter 4, BWC footage may be available but not of a quality that can be decisive in finalising the investigation as the evaluation approach suggested in this thesis recognises the need not only to know whether BWC footage works to enhance more accountability but also, more importantly, why it works. To add more explanatory power on what works (or does not work) with BWC evidence, the research design includes a survey of the investigators to find out how they rate the significance of BWC evidence in each investigation, emphasising why they think it works or does not. This approach is borrowed from the PONI evaluation referred to above, but in this case, it bolsters or challenges the findings of the first hypothesis. For each case, investigators must respond to a survey agreeing or disagreeing with two hypothetical statements linked to the theories of change outlined above.

#### 1. The presence of BWC footage was critical to concluding the case

The choice of responses will be based on a sliding scale between BWC footage "hindered" and "critical" to concluding the investigation. The expectation is that in most cases, the case investigator will say the presence of BWCs was decisive. This is considering that the main challenge has been the contradictory testimony between police officers and victims or witnesses regarding what happened during encounters, resulting in cases being dropped as unsubstantiated.

#### 2. The availability of BWC footage had an impact on the time taken to complete the investigation

The choice of responses will be based on a sliding scale between whether BWC footage "slowed" or "quickenened" the investigation. The expectation is that in most cases, case investigators will say the presence of BWCs quickened the investigation.

The survey will be completed each time an investigation reaches decision-ready status or as and when the time to investigate exceeds IPID's service standard of 90 days. The analytic strategy for the first theory of change would be to compare the performance against the stated indicators between investigations with BWC footage

present and investigations without BWC footage. The advantage of this survey is that it is targeted at eliciting the professional perception of the investigators. Therefore, notwithstanding the potentially subjective nature of the feedback, such feedback is drawn from knowledgeable people with the lived experience of investigating.



## Chapter 6: Discussion of Findings and Conclusion

### 6.1 Discussion of findings

Over the past two decades, the relationship between BWCs and various law enforcement outcomes has been the subject of significant public debate, research, and evaluation, albeit from a Northern evidence base. BWCs – a small audio-visual recording device mounted on police officers on the torso or as headgear to record a police officer's view during operations – were seen as a "game-changer" in resolving controversial, particularly violent police-public encounters, especially where there are contradictory statements regarding what happened in an encounter and where there was a need to reconcile the divergent testimonies. Thus, it was postulated that BWCs enabled the apportioning of blame to enhance accountability – a claim based on a plausible hypothesis that BWCs provide more objective evidence for investigations that can conclusively determine whether a police officer has engaged in unlawful conduct. This thesis sought to examine how best this knowledge inference could be evaluated in a South African context.

The overall aim of this thesis was to contribute to theory, policy, and practice in evaluating the impact of BWCs on more accountable or effective policing in the context of diminishing public trust in policing occasioned by high-profile officer-involved incidents of potentially unlawful uses of force. The relationship between BWCs and more accountable or effective policing was explored from a human rights practitioner's perspective interested in police accountability and more effective state responses to violence reduction. This Chapter will discuss this study's findings, value, relevance, and contribution, particularly in South Africa, and provide recommendations on theory, policy, and practice in evaluating BWCs. The Chapter will also provide a conclusion summarising the main findings, value and contribution of this study, its limitations, and proposals for future research in this field from a South African context.

Apart from problematising and describing the challenges of police accountability in South Africa and briefly explaining the potential of BWCs to contribute solutions to this challenge, the first Chapter of this study sought to conceptualise the relationship

between police accountability and police effectiveness and the potential of BWCs to contribute to both. The title of the thesis refers to "more accountable or effective policing", but this should not mean that the thesis intended to focus on one or the other. These are interrelated concepts, but this thesis focuses on broader accountability for police use of force.

The thesis defined *police effectiveness* as broadly referring to the extent to which policing achieves its proper, officially sanctioned goals to keep people safe and reduce crime.<sup>1</sup> Relatedly, police accountability was viewed as broadly referring to institutionalised systems and processes of checks and balances that ensure that law enforcement officials undertake their activities according to expectations and, if not, be held responsible and answerable to the relevant authorities. Police accountability is thus a necessary precondition for police effectiveness, albeit not the only one, as the discussion below will illustrate. Significantly, this study viewed police accountability as necessarily of a legal and institutional character associated with the rule of law. Although there is nothing novel about this observation, the significance of it lies in how previous conceptualisations of police accountability have ignored its legal and institutional nature, as shall be illustrated below. Thus, police effectiveness and accountability are vital outcomes in law enforcement. However, in this thesis, the focus was more on police accountability and more narrowly on accountability for police use of force.

As this thesis is evaluative in nature, it was necessary as a first step to review the current literature on evaluations of the relationship between BWCs and more accountable policing. The thesis found that although police accountability was one of the most publicly stated reasons for adopting BWCs among the public, policymakers and law enforcement agencies, particularly in the US, where most of the evaluations have been undertaken, there was limited research on the direct relationship between BWCs and more accountable policing. Most of the existing evaluations of BWCs (in

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<sup>1</sup> Her Majesty's Inspectorate of Constabulary (HMIC). 2017. *PEEL: Police effectiveness 2016: An inspection of the Metropolitan Police Service*. London: HMIC. <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/peel-police-effectiveness-2016-metropolitan.pdf>, p. 7. Also see Cordner, Gary. 2020. "A Practical Approach to Evidence-Based Policing." *European Law Enforcement Research Bulletin* 20: 53-71.

the US and partly in the UK) tended to overlap these more direct impacts. Instead, researchers tried to evaluate the indirect impacts of BWC (such as the propensity of officers or members of the public to engage in violence during an encounter or the frequency of public complaints). However, these results can only illustrate context-specific potential. As Lum *et al.* observed, some of the expected impacts tended to be overestimated and incapable of being transferrable to different contexts.<sup>2</sup> Some evaluations produced contradictory and unexpected outcomes. Thus, some of the adoptions of BWCs were based on inconclusive evidence regarding the relationship between the presence of BWCs and a reduction in police use of force and a reduction in public complaints against the police, which persists to date.

The literature review only found two studies that directly addressing the relationship between BWCs and police accountability. One was by the Police Ombudsman of Northern Ireland (PONI), which focused on the impact of the availability of BWCs evidence on the investigation of complaints.<sup>3</sup> The other was by Cubukcu *et al.*, who evaluated the impact of BWC technology on the likelihood of reaching a finding in an investigation using complaints data from the Chicago Police Department in the US before and after the deployment of BWCs.<sup>4</sup> Both provided a new focus and approach in evaluating BWCs, but the PONI and Cubukcu *et al.*'s evaluations had weaknesses. The PONI report relied on a qualitative analysis of the subjective perceptions of investigators. In contrast, Cubukcu *et al.* relied on the estimated average effects of BWCs regardless of whether all incidents were recorded on video or whether the footage captured was helpful in the investigation, using data from a pre-and-post study of BWC usage. Therefore, the purported impact of the BWCs could exclude other potential influential factors and may not be directly attributed to the BWCs. However,

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<sup>2</sup> Lum, Cynthia, Megan Stoltz, Christopher S. Koper, and J. Amber Scherer. 2019. "Research on body-worn cameras: What we know and what we need to know." *Criminology and Public Policy* 18 (1): 93-113.

<sup>3</sup> Police Ombudsman for Northern Ireland. 2020. *Impact of the Introduction of Body-Worn Video by PSNI on Complaints in Northern Ireland*. Belfast: Northern Ireland Statistic and Research Agency. Accessed July 28, 2021. <https://www.policeombudsman.org/PONI/files/0b/0b46b087-1f7f-4366-8b82-6dab63c0ccce.pdf>.

<sup>4</sup> Cubukcu, Suat, Nusret M. Sahin, Erdal Tekin, and Volkan Topalli. 2021. "Body-Worn Cameras and Adjudication of Citizen Complaints of Police Misconduct." *National Bureau of Economic Research*. July. Accessed May 17, 2022. <https://www.nber.org/papers/w29019>.

the two studies provided evaluation templates that can be improved on, and the contribution of these two studies to this thesis is discussed below.

The review of literature also showed that in both the UK and the US, evidence from RCTs was placed at the top of the hierarchy because they are designed to minimise the effects of confounding factors to ensure that differences between the two groups can be directly attributed to the intervention rather than other factors.<sup>5</sup> This study challenges the methodological orthodoxy of placing RCTs at the apex of impact evaluations at the expense of other methods of generating evidence of the impact of BWCs. The thesis argued that the choice of methodology should be determined by the nature of the phenomenon under investigation and the type of questions that the research seeks to answer.

On this matter, this thesis concurs with Deaton and Cartwright that the method that is most likely to yield good causal inferences depends on what the researcher is trying to discover and what is already known about the topic.<sup>6</sup> As the two authors observe, at best, RCTs elicit unbiased estimates of the effects of an intervention through the quantification of variables. However, in RCTs there is no control over other potentially confounding factors when dealing with normative concepts such as police accountability and effectiveness in law enforcement and more broadly, in the criminal justice system, especially when the experiment is done in real-life conditions.<sup>7</sup> This argument will be further elaborated on when discussing the context of law enforcement in South Africa below.

The thesis argued that the current research focus on using RCTs to measure the impact of BWCs on law enforcement outcomes overlooks the compelling arguments backed by empirical evidence regarding the evaluation of the impact of technology in policing. Researchers suggest that the outcomes associated with policing technologies are often a result of how agencies view and implement those

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<sup>5</sup> Cubukcu *et al.*, Body-Worn Cameras and Adjudication of Citizen Complaints.

<sup>6</sup> Deaton, Angus, and Nancy Cartwright. 2018. "Understanding and Misunderstanding Randomised Controlled Trials." *Social Science and Medicine* 210: 2-21.

<sup>7</sup> Jameel, Leila, and Sarah Bunn. 2015. *Body-Worn Video in UK Policing*. POSTbriefs, London: Parliamentary Office of Science and Technology.  
<https://post.parliament.uk/research-briefings/post-pb-0014/>, p. 3.

technologies. In other words, police agencies shape technology use rather than technology shaping the agencies. There is empirical evidence that supports this argument.<sup>8</sup> As Koper *et al.*'s study on the organisational and behavioural aspects of implementing technologies in law enforcement agencies, technology may be limited or offset by many factors, and therefore, a better understanding of how technology and various aspects of policing interact is needed.<sup>9</sup> Thus, the success of technological fixes for non-technological problems in policing often depends upon a non-technological context.<sup>10</sup>

Some of the identified non-technological factors include the fact that law enforcement officials generally resist the adoption of policies or technologies that are designed to record their activities and to hold them accountable<sup>11</sup> and when BWCs were introduced, police officers feared that administrators and supervisors would use the footage to micromanage them and punish them for minor infractions.<sup>12</sup> As observed by Tanner and Meyer, such attitudes could result in police officers either welcoming, protesting or neutralising the technology by working around it or diverting it depending on how officers understand how the new technology interacts with their daily routines.<sup>13</sup>

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<sup>8</sup> Lum, Cynthia, Christopher S. Koper, David B. Wilson, Megan Stoltz, Michael Goodier, Elizabeth Eggings, Angela Higginson, and Lorraine Mazerolle. 2020. "Body-worn cameras' effects on police officers and citizen behaviour: A systematic review." *Campbell Systematic Reviews* 16 (3), p. 35.

<sup>9</sup> Koper, Christopher S., Cynthia Lum, James J. Willis, Daniel Woods, and Julie Hibdon. 2015. *Realising the Potential of technology in Policing: A multisite study of the Social, Organisational, and Behavioural Aspects of implementing Policing Technologies*. National Institute of Justice. [https://www.researchgate.net/publication/278026001\\_Realizing\\_the\\_Potential\\_of\\_Technology\\_in\\_Policing\\_A\\_Multi-Site\\_Study\\_of\\_the\\_Social\\_Organizational\\_and\\_Behavioral\\_Aspects\\_of\\_Policing\\_Technologies](https://www.researchgate.net/publication/278026001_Realizing_the_Potential_of_Technology_in_Policing_A_Multi-Site_Study_of_the_Social_Organizational_and_Behavioral_Aspects_of_Policing_Technologies).

<sup>10</sup> Koper *et al.*, *Realising the Potential of technology in Policing*. Also refer to Byrne, James, and Gary Marx. 2011. "Technological Innovations in Crime Prevention and Policing. A Review of the Research and implementation and Impact." *Jaagang* 3 (20).

<sup>11</sup> Koper *et al.*, *Realising the Potential of technology in Policing*, p. 29. Cubukcu, Suat, Nusret M. Sahin, Erdal Tekin, and Volkan Topalli. 2021. "Body-Worn Cameras and Adjudication of Citizen Complaints of Police Misconduct." *National Bureau of Economic Research*. July. Accessed May 17, 2022. <https://www.nber.org/papers/w29019>, p. 5.

<sup>12</sup> Huff *et al.*, *Attitudinal Changes Toward Body-Worn Cameras*, p. 12. Also refer to Perkins, Grainne. 2017. "Lights, Camera, Action! Body-worn Camera: challenges and opportunities in police research." *Policing* 1-5, p. 2.

<sup>13</sup> Tanner, Samuel, and Michael Meyer. 2015. "Police work and the new 'security devices': A tale from the beat." *Security Dialogue* (Sage) 46 (4), p. 385.

The researchers also indicated that police officers' perceptions of fairness in the workplace and the fairness of outcomes when managing cases of misconduct was also a crucial determinant of whether police officers supported technological reform that sought to hold them accountable.<sup>14</sup> Thus, these scholars argued that officer buy-in is critical to such reform efforts and the success or failure of a BWC programme could be influenced by officer perceptions about organisational fairness.<sup>15</sup> These are factors that cannot be controlled through RCTs and illustrate that RCTs may not be adequate in attributing impact to a single technology.

Given the compelling arguments above, which indicate that the context of law enforcement was a critical variable in determining the impact of technology in policing, Chapters 2 and 3 of the thesis examined the police practice regarding the use of force, the standards that guide such practice and the rules that limit it. The focus was on the non-legal and legal contexts. The exploration of these two contexts showed tension between the two as far as the use of force and police accountability is concerned in which the socio-historical context and police practices undermined the legal context and the need for more accountable policing. This finding was important because it provides empirical evidence of how and for what ends BWCs can be evaluated.

Regarding the non-legal context, the thesis argued that the history of policing in South Africa and the police practices it has engendered have generally engrained unbridled violence as the default method of coercion with limited accountability for potentially unlawful uses of force. While this character of South African policing is widely acknowledged, the thesis argued that the use and evaluation of the impact of BWCs on more accountable policing in South Africa must identify the non-technological socio-historical, organisational, and occupational cultural factors that make officer-involved violence without adequate accountability to exist. Any selected evaluation method of BWCs would need to either control or account for these factors.

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<sup>14</sup> Huff *et al.*, *Attitudinal Changes Toward Body-Worn Cameras*, p. 8.

<sup>15</sup> Huff *et al.*, *Attitudinal Changes Toward Body-Worn Cameras*, p. 3; also refer to *Associated Press* (2016, September 6), Boston police union goes to court after officers' resistance to wearing body-worn cameras. <https://www.police1.com/police-products/body-cameras/articles/boston-police-union-goes-to-court-after-officers-resistance-to-wearing-body-worn-cameras-y8IF7jdjX4hCyNW2/>.



The first factor identified in this thesis is that South Africa's law enforcement environment is characterised by pervasive structural and physical violence to which police officers are a significant contributor and target from members of the public. As ethnographic research shows, much of this violence is a legacy of apartheid and, more specifically, a failure by South Africa's law enforcement to transition from apartheid paramilitary and violent policing tactics to a model based on respect for human rights and the rule of law.

As was illustrated in Chapter 2, this is a context in which SAPS officers on the shift are likely to be on edge because of the perceived risk of death due to physical violence.<sup>16</sup> As one of the police officers interviewed said, every day out on shift "might be your last day".<sup>17</sup> In such an environment, it more likely, as observed by Perkins, that fearful police are prone to making mistakes that can lead them to use unnecessary or excessive force during public-police encounters. Due to the history of violence in South African society and the lack of trust in law enforcement, there is a higher tolerance for excessive use of force within the SAPS. This situation ultimately undermines police accountability efforts.

The thesis analysed the factors within South African law enforcement that perpetuate the use of excessive force without accountability. The thesis used the concepts of occupational and organisational culture to show how excessive use of force often goes unpunished. Although distinct, these concepts refer to the dominant set of attitudes and values shared by police officers as they collectively cope with the stress of their work environment and how these factors shape their behaviour.<sup>18</sup> Some typical

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<sup>16</sup> Hornberger, Julia. 2011. *Policing and Human Rights: the Meaning of Everyday Violence and Justice in the Everyday Policing in Johannesburg*. Abingdon: Routledge. Also refer to Steinberg, Jonny. 2017. "Policing During and After Apartheid." In *Police in Africa: The Street Level View*, by Jan Beek, Mirco Gopfert, Olly Owen and Jonny Steinberg, 61-77. London: Hurst & Company, Faull, Andrew. 2018. *Police Work and Identity: A South African Ethnography*. London & New York: Routledge., and Perkins, Grainne. 2018. *Danger and Death: Organisational and Occupational Responses to the Murder of Police in South Africa - a Case Study* (Unpublished doctoral thesis). University of Cape Town.

<sup>17</sup> Hornberger, *Policing and Human Rights*, p. 48.

<sup>18</sup> Terril, William, Eugene A. Paoline, Eugene A Paolne, and Peter K. Manning. 2003. "Police Culture and Coercion." *Criminology* 41, p. 1006.



occupational and organisational culture attributes include secrecy and clannishness, which are inimical to transparency and accountability.

Julia Hornberger and Andrew Faull's adaptation of Erving Goffman's theatrical production concepts of "back stage" and "front stage" to refer to different behaviours that people engage in daily and apply to law enforcement aptly illustrates this context. The underlying factor in "back stage" and "front stage" policing is that police officers' social life is a performance in which the setting or context is vital in shaping the performance. As illustrated below, this was an important metaphor when conceptualising the deployment of BWCs as an intervention.

Applied to policing, South African law enforcement, "back stage" policing, which happens on the streets and in settings or contexts outside the gaze of supervisors and police oversight bodies, is characterised by unbridled violence against suspects and is tacitly approved within the SAPS. The thesis used empirical evidence from ethnographic research and findings of commissions of inquiry into policing that "back stage" policing in South Africa is driven by an institutional, organisational and occupational culture that values secrecy and clannishness. As demonstrated in Chapter 2, what happens in this setting is never discussed, as depicted by Inspector Marais's statement that "What happens on the shift stays on the shift; what happens in the station stays in the station."<sup>19</sup>

"Back stage" policing in South African law enforcement relies on violence as a means of coercion; it resists respect for human rights, transparency, and accountability. Other back stage tactics highlighted in this thesis included falsifying performance failures through the manipulation of performance data, refusal to cooperate with or, worse still, blocking external investigations of gross police misconduct, condoning the violent abuse of law enforcement powers at the cabinet level, contriving to obfuscate and deceive commissions of inquiry into SAPS' officer misconduct, intimidating journalists to avoid bad publicity and having a generally adversarial relationship with members of the public.

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<sup>19</sup> Faull, Andrew. 2010. *Behind the Badge: The Untold Stories of South Africa's Police Service Members*. Cape Town: Zebra Press. p. XVII.

At the occupational level in frontline policing, "back stage" policing tactics include refusal to cooperate with internal or external investigations of fellow officers,<sup>20</sup> reluctance to intervene when fellow officers used unnecessary or excessive force even when the officers who witnessed the violence knew that the use of force violated SAPS regulations.<sup>21</sup> Ethnographic researcher Andrew Faull also witnessed police assaults being meted out on suspects at police stations even in the presence of CCTV which is a curious fact considering that BWCs are a similar technology.<sup>22</sup>

"Front stage" policing in South Africa is a policing performance that is based on the rule of law and respect for human rights. However, according to Hornberger, most police officers in South Africa are uncomfortable in front stage policing because they believe it is impossible to conduct policing without recourse to backstage policing tactics. Chapter 2 illustrated that SAPS officers feel that lawyers and magistrates (front stage institutions), and arguably IPID, treat them like they were on trial instead of the alleged offenders. The discomfort is illustrated when SAPS officials are exposed to "front stage" accountability processes and revert to "backstage" policing tactics. Examples of such scenarios include SAPS officials refusing to release evidential footage of the Marikana Mine killings, lying under oath and, conspiring to sanitise their testimony at the Marikana Commission of Inquiry and counter-investigating the IPID typifying this culture.

The discussion of backstage and frontstage policing highlights the earlier argument that the effectiveness of technological solutions for non-technological policing problems could depend on the non-technological context. The examples given above - such as suspects getting assaulted in the presence of CCTV and the withholding of recordings of SAPS activities during their management of assemblies - could indicate what is to come when BWCs are implemented. Therefore, merely introducing BWCs to the SAPS may be inadequate to enhance police accountability. However, this thesis contends that the use of BWCs will expose backstage policing methods by making

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<sup>20</sup> Faull, *Police Work and Identity*, p. 179.

<sup>21</sup> Ivkovic, Sanja Kurtinjak, Andri Saueman, Andrew Faull, Michael E. Meyer, and Gareth Newman. 2020. *Police Integrity in South Africa*. New York: Routledge, p. 50.

<sup>22</sup> Ivkovic *et al.*, *Police Integrity in South Africa*.

street-level police officers more accountable to their supervisors, leading to training, de-escalation, and the use of lessons learned to enhance overall police accountability.

The thesis argued that effectively evaluating the relationship between BWCs and more accountable policing required an understanding of the legal and institutional context regarding the use of force in South Africa. This argument is critical because at the core of this thesis is the need to reduce violence and advance the principle that police officers who use violence unlawfully must be held accountable under protective laws and punished if found guilty. The paradoxical nature of police powers compounds this contention in that although law enforcement officials are sworn to protect public safety and enforce the law, they are also vested with enormous powers to use force, including lethal force, to achieve their goal. However, the authority of law enforcement officials to use force has limits and obligations to ensure that law enforcement officials do not abuse their powers, which are stated in law.

The first objective of examining the legal context was to define the limits and obligations on police use of force because they constitute the pre-determined rules and standards against which police officers are held to account. As observed by Casey-Maslen and Connolly, while the national laws of any country are the first point of reference in defining the principles and rules governing law enforcement, international human rights law provides the overarching framework for the law governing the limits of police powers and sets out the appropriate standards and mechanisms for accountability to be in place.<sup>23</sup> South Africa is a State Party to most of these treaties. The country is also bound by customary international law.

The thesis extensively discussed how international human rights law outlines limits and guidelines on the use of force by the police. However, the use of BWCs to enhance police accountability was found to be affected by three issues. The first issue is that the international human rights system assumes all human beings have the right to human rights. Whenever these rights are violated, there should be consequences for

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<sup>23</sup> Casey-Maslen, S., & Connolly, S. (2017). *Police Use of Force Under International Law*. Cambridge: Cambridge University Press, p. 79.

the violator and effective remedies for victims, regardless of the identity of the perpetrator, determined by a competent authority.<sup>24</sup>

The thesis needed to specify the fundamental human rights that are most likely to be affected when law enforcement officials use force. The rights involved were the right to life, freedom from torture and inhuman or degrading treatment, and the right to liberty and security of the person. Chapter 3 illustrated that international human rights law requires States Parties to safeguard, respect and fulfil all human rights recognised in the ICCPR. One of the ways to protect these rights is through legal protection.<sup>25</sup> Therefore, the thesis compared the extent to which South African domestic laws complied with international human rights law in terms of legal protections to identify any potential weaknesses in legal protections that could offset the impact of BWCs on more accountable policing.

The thesis concluded that South Africa has a fairly robust legal architecture to hold police accountable, which mostly complies with precepts of international human rights law. However, some of the legislative and regulatory standards need to meet international human rights law requirements regarding police use of force and could provide legal loopholes for escaping accountability. For instance, in policing assemblies, Section 9 (2) (e) of The Regulation of Gatherings Act allows police to use deadly force on persons engaged in acts that include attempts to destroy or cause severe damage to property. As described in Chapter 3, while the proposed revisions of the Regulation of Gatherings Act through the SAPS Amendment Act 2020 represent an improvement to the current formulation of the law, there still remains a reference to the use of deadly force to protect property. The revised provision does not increase the threshold for police use of deadly force by law enforcement officials to the level set by international human rights law.

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<sup>24</sup> Article 2, 1966 International Covenant on Civil and Political Rights (ICCPR). Also see Probert, Thomas. 2017. "Vehicles for Accountability or cloaks of impunity? How can national commissions of inquiry achieve accountability for violations of the right to life:." *IJR Policy Brief Number 25*, May, p. 1.

<sup>25</sup> ICCPR, Article 2.

The thesis also compared South African laws on the extent to which they comply with two principles of international law that guide police use of force: necessity and proportionality. International human rights law places a higher threshold on police use of deadly force, which provides that the intentional lethal use of firearms may only be made when strictly unavoidable to protect a life. However, Section 34(3) of the Correctional Services Act and Section 49 (2) of the Criminal Procedure Act contravene international law and the two principles by making it lawful to use live ammunition at an escaping suspect or inmate. Thus, perpetrators of excessive violence may find a loophole in the law to escape accountability even where the presence of BWC footage may show a violation under international law.

As this is a thesis focused on evaluation, it highlighted that the operationalisation of the principles of necessity and proportionality illustrate that a salient objective of police accountability is to reduce unnecessary and excessive use of force. The importance of BWCs is that if an officer-involved violent encounter occurs and is recorded, it provides objective information upon which it is possible to determine whether the force used was necessary and the level and type of force proportional.

Thus, the thesis argued that in order to effectively evaluate the contribution of BWCs to improved accountability within policing, it would be prudent to evaluate BWC technology on what it can directly contribute to the accountability process rather than attribute failure or success where there are other multiple possible countervailing factors. This, unless the evaluation methodology has the ability to account for the other factors.

One of this thesis' criticisms of a majority of the existing evaluations on the impact of BWCs on more accountable policing was that the evaluations needed to adequately pay attention to the institutional mechanisms that provide for how BWCs could achieve their impact. In other words, law enforcement officials' mere usage of BWCs is not a sufficient guarantee to increase police accountability. To ensure accountability and as part of their duty to safeguard rights, international requires States to establish "effective systems and legal processes of police investigation (including the capacity

to collect and analyse forensic evidence) and accountability (including independent oversight mechanisms)."<sup>26</sup>

It was, therefore, essential to examine the extent to which the South African legal and institutional framework measured up to the standards set under international law and how BWCs would contribute to more accountable policing within the institutional setting. The thesis argued that, from a legal standpoint and the quantity of police oversight bodies, South Africa has a robust institutional framework for police oversight, at least in theory. SAPS has a functional internal discipline management system that provides arbitration in cases of police misconduct as a corrective, but not punitive measure applied promptly, fairly, consistently, and progressively, as observed in Chapter 3.

Committee on Police, which straddles both the SAPS' internal disciplinary management processes, the Independent Police Investigative Directorate (IPID), which is the designated independent external oversight body for SAPS, the South African Human Rights Commission (SAHRC) and *ad hoc* investigative oversight mechanisms such as commissions of inquiry. The Civilian Secretariat for Policing (CSPS) also plays a critical but indirect role in enhancing police accountability. The CSPS plays an advisory role to the Minister of Police and is mandated to work collaboratively with SAPS and IPID and conduct quality assessments of the police service, monitoring and evaluating its performance and recommending corrective measures.<sup>27</sup>

While all these institutions are a vital part of the police accountability ecosystem, IPID is the one that is directly mandated to deal with potentially unlawful uses of force. The IPID mandate and its standard operating procedures meet most of the conditions stipulated under international law for external oversight institutions. The IPID mandate is for the independent and impartial investigation of identified criminal offences allegedly committed by members of the South African Police Service and to make disciplinary recommendations regarding members of the South African Police Service

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<sup>26</sup> ACHPR General Comment No. 3, para. 16.

<sup>27</sup> Refer Civilian Secretariat for Policing Service (CSPS) Act, 2011, s. 6 (1).

and Municipal Police Services resulting from investigations. IPID has the mandate to investigate, among other things, any deaths in police custody, deaths as a result of police actions, any complaints relating to the discharge of an official firearm by any police officer, and any complaint of torture or assault against a police officer in the execution of his or her duties.<sup>28</sup>

The IPID investigative processes include many of the procedures outlined under international law. Section 29 of the IPID Act imposes the duty to notify members of SAPS and MPS immediately after any use of force and to submit a report within 24 hours of such incidents. Investigations are also triggered through complaints by members of the public. An IPID investigator and supervisor are assigned to each case and must complete investigations within specified timeframes ranging from 30 to 90 days, depending on the alleged misconduct or criminal behaviour. Investigators must compile an investigation docket by compiling evidence at crime scenes such as forensic exhibits, attending post-mortems in the case of death in custody or as a result of police action, interviewing witnesses and obtaining statements (including from the alleged offending officers) that may assist in identifying the police officer(s) who allegedly committed the offence.<sup>29</sup> Once the investigation is complete, the investigator drafts an investigative report which forms the basis for IPID superiors to decide whether there is sufficient evidence for a conclusion of guilt or innocence of the alleged offender(s).

Thus, the thesis argued that, in principle, South Africa enjoys a robust legal, policy and institutional framework in line with international law that can ensure accountability for potentially unlawful uses of force. Notably, an investigation requires various evidence to identify the officers who allegedly committed an offence. Therefore, the use of BWCs contributes to all other evidence and may not be the only deciding factor in the finalisation of an investigation.

However, international law goes beyond just the general existence of laws and institutions to include the quality of institutions in operational practice. As observed by

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<sup>28</sup> Refer to IPID Act 1 of 2011, s. 28.

<sup>29</sup> Refer to IPID Act Regulations.



Heyns, "an effective external oversight agency requires the necessary powers, resources and independence, transparency and reporting, community and political support, and civil society involvement". The thesis concluded that South Africa has a robust network of constitutional and statutory bodies that can hold law enforcement officials accountable for potentially unlawful use of force.

As illustrated in the introductory Chapter and in Chapter 3, IPID, which is the independent body directly mandated to investigate potentially unlawful uses of force by the MPS and SAPS, lacks adequate operational and financial independence from the Minister of Police and the SAPS, which occasionally undermines IPID's work. IPID is also overwhelmed by its workload because of inadequate numbers and quality of staff. Thus, the thesis argues that to effectively evaluate the contribution of BWCs to improved accountability within policing, it would be prudent to evaluate BWC technology on outcomes that can be directly attributed to it. The Independent Police Investigative Directorate Draft Bill of October 28 seeks to address some of these weaknesses by democratising the appointment process of the Executive Director and explicitly stating in law the requirement for IPID to be independent and impartial.

The fourth human right that would most likely be impacted by the use of BWCs is the right to privacy. However, the thesis argues that the more critical issue is how privacy protections might impact law enforcement officials' effectiveness of BWC use. At the same time, the thesis found that the South African legal context had adequate legal protections on using BWCs by law enforcement to record police-public encounters through the POPI Act of 2013. The POPI Act encapsulates most principles governing the lawful processing of personal information. However, the institutional mechanism to facilitate the enjoyment of this right, which includes the office of the Information Regulator and an obligation on the part of all public and private bodies that process personal information to do it in line with the law, is still at its infancy and challenging to assess.

The thesis recommends that the SAPS, IPID, NPA and the CSP jointly develop policies to enable SAPS to deploy BWCs lawfully and facilitate IPID's access to BWC footage as part of investigations. As illustrated in Chapter 4, the US provides some of

the typical examples of how the availability of BWC evidence can be neutralised by institutional practices that resist transparency and accountability. The POPI Act's eight conditions for the lawful processing of personal information are a tool that can be used to customise BWC policies. In addition, common law provisions regarding privacy, as discussed in Chapter 3, can set parameters regarding what and when not to record. Such policies would address the specific issues regarding how the use of BWCs impacts privacy in the daily law enforcement officers' routine activities such as searches, arrest pursuits, responses to calls for service, use of force encounters, transportation of suspects in custody and consensual encounters initiated by law enforcement officers in circumstances where there is no clear basis yet for reasonable suspicion. Because of considerations for privacy for both officers and members of the public involved in an encounter, the question is: should the BWCs always be on, or if not, when does recording start, and when does it stop? Further, under what circumstances should the BWCs be turned off to protect privacy?

An assessment of BWC guidelines conducted in the US showed variations on what are considered sensitive contexts where recording video footage would interfere with the right to privacy. The research found that these policies were almost unanimous that BWCs should be switched off in restrooms (toilets), hospitals and other restricted areas that are not open to the public and when talking to informants. However, there was no consensus in other sensitive contexts, including on recording minors, victims (including victims of sexual assault and domestic violence), seriously injured individuals and other incidents that could be deemed inappropriate or embarrassing situations which could unnecessarily harm the reputations and social standing of the individuals recorded.<sup>30</sup>

To address some of these concerns, law enforcement policies and regulations on using BWCs in the US have rules on what to record and what not to. Key features of such policies include informing citizens when they are being recorded and restricting citizens from reviewing footage at the scene of the incident; prohibition of recording in

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<sup>30</sup> Mary D. Fan (February 2017) *Justice Visualised: Courts and the Body Worn Camera Revolution*, *UC Davis Law Review*, p. 945.

settings such as hospitals and mental healthcare facilities;<sup>31</sup> exemption from public request depictions of categories of vulnerable individuals such as sex crime and domestic violence survivors and minors.<sup>32</sup>

Some researchers have suggested that the courts could help standardise these rules by supplementing gaps in law and policy by giving orders, for example, requesting for the anonymisation of faces identifiable details or by sealing evidence from general public disclosure laws and prohibiting dissemination of such information.<sup>33</sup> The suggested involvement of the NPA in South Africa would help bridge this gap.

Also, while citizens have lower expectations of privacy in public spaces and cannot insist that their actions be free from law enforcement's gaze, citizens' right to privacy is heightened when law enforcement officers record footage in private spaces and homes. The South African adoption of BWCs will require comprehensive policies and guidelines to ensure that BWCs do not become another tool for unlawful interference with the individual right to privacy, creating another wedge in fragile relations between law enforcement agencies and South African communities.

Three areas of possible vulnerability will need strong policies: control of access to footage, chain of custody and the use of the evidence in drafting sworn statements by police officers and, potentially, complainants or victims. As pointed out by Lacharoff and Lustbader, one of the challenges for accountability in the US was that the police departments against whose officers against whom members of the public wanted to complain had total control of the footage. The police departments had the discretion to deny or delay access to such evidence by investigators and victims, thus frustrating the accountability process. The recommendation is to acquire technology that allows automatic privileged access to footage by investigators from oversight bodies and to victims or complainants subject only to reasonable and justifiable reasons based on

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<sup>31</sup> Nkechi Erundu (2018), *Five trends in Police Body-Worn Camera legislation*, retrieved on 27 September 2019 from <https://www.urban.org/urban-wire/five-trends-police-body-camera-legislation>

<sup>32</sup> Mary D. Fan (February 2017) *Justice Visualised: Courts and the Body Worn Camera Revolution*, *UC Davis Law Review*, p. 945.

<sup>33</sup> Fan, *Justice Visualised*, p. 945.

reasons of privacy and practical investigative issues in case disclosure may jeopardise investigations.

Chain of custody is an essential aspect of ensuring accountability. One of the principles for the lawful processing of personal information under the POPI Act and generally under data protection laws is that the data must be accurate, up-to-date and kept secure to avoid manipulation. This principle necessarily means there must be a limited number of people who have access to it to ensure accountability and chain of custody. Without the assurance of chain of custody and accuracy of the data, the evidence may not be admissible as evidence during misconduct hearings.

While law enforcement officers use footage from BWCs in drafting incident reports in ordinary investigative practice, doing the same after an incident of their alleged involvement poses ethical questions that may undermine or enhance accountability. Such a scenario could be perceived as giving an unfair advantage to the police officer at the expense of the victim or witness who does not have the same opportunity when filing their affidavit. On the one hand, critics of using audio-visual footage to draft statements express the apprehension that the alleged offending officers may tailor their story to fit in with the recording. In cases where the victim is deceased, and there were no witnesses, this might jeopardise the investigation into the accuracy of what and how it happened. Such fears are founded considering the discussion in Chapter 2 about the secretive nature of both organisational and occupational culture.

On the other hand, proponents argue that using the footage to draft sworn statements ensures statement fidelity during misconduct hearings or in criminal prosecutions. Both perspectives are essential for resolving accused officers. However, the thesis recommends that officers draft two statements, one with and another without the aid of the footage and then another with the footage. The main reason is that the BWCs do not capture the thought processes of a police officer and his or her sense of danger at the time of the incident. In real-time, it is also impossible for officers involved in such incidents to see all the things captured on BWC during an encounter and to factor them all into their decision-making. Thus, it would be better to draft a statement without the footage and then a second one afterwards with the footage. The issue of statement

fidelity would then be up to those adjudicating to determine how credible the police officer(s) statements are. The idea is to avoid a punitive approach in which every alleged incident is viewed as intentional or negligent and to enhance fairness where an officer honestly believes about the situational characteristics of an incident ending in a case of alleged unlawful conduct.

The thesis also dealt with the perceived impediments that have delayed the deployment of BWCs in South Africa. In 2018, the SAPS received legal advice that using BWCs would violate the Regulation of Interception of Communications and Provision of Communication-related Information Act 70. of 2002 (RICA Act). The proposed solution was to draft a new law or amend the RICA Act.<sup>34</sup> However, that argument fell away with the 2021 Constitutional Court ruling that the RICA Act was unconstitutional.

The legal advice cited a second legal impediment because there is no legislation to ensure the admissibility of BWC evidence in South African courts. However, as illustrated in Chapter 3, the Electronic Communications and Transactions Act of 2002 provides for the conditions of the admissibility of electronic evidence in courts of law. The SAPS has been lethargic in its approach to the adoption of the technology, considering that the RTMC traffic police officers started using the technology in March 2021.

Given this evidence, the thesis argued that the POPI Act and the Electronic Communications and Transactions Act of 2002 have adequate legal scope to facilitate the lawful use of BWCs. As the preambular section of the law states, the POPI Act seeks to promote the protection of personal information processed by public bodies and to introduce conditions for the lawful processing of personal information. Considering the extent of failures in the systems and processes of accountability in South Africa detailed in Chapter 1, the SAPS' use of BWCs to record police-public

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<sup>34</sup> SAPS (Technical Management Services). 2018. "Digital Policing and Specific Projects." <https://pmg.org.za>. May 23. Accessed October 23, 2019. [https://pmg.org.za/files/180523TMS\\_Digital\\_Policing\\_Projects.pdf](https://pmg.org.za/files/180523TMS_Digital_Policing_Projects.pdf), Slide 31 and 32.

encounters would meet the minimum conditions for processing personal information under the POPI Act.

With the preceding argument in mind, the thesis went to more directly address how the impact of BWCs on more accountable policing could be evaluated in South Africa. Based on the compelling argument by Deaton and Cartwright that the choice of methodology should be determined by the research questions or what the researcher seeks to find, Chapter 4 of this thesis critically examined theories of change associated with potential BWC impacts on a various of outcomes related to police accountability.

Four of the hypotheses, namely, BWCs increase transparency and police legitimacy; BWCs reduce police use of force and complaints against a police officer; the availability of BWC footage emboldens victims/witnesses to report questionable police conduct; and BWC cameras improve public understanding of investigations, acceptance of outcomes and restorations of norms were eliminated. The reason was that an evaluation of BWCs based on these hypotheses could not be effectively done because they would fall foul of the same criticism of overleaping direct effects. However, more pointedly, the resultant evaluation would not control the influence of other factors, thus denying researchers the ability to attribute outcomes directly to BWCs.

As Deaton and Cartwright point out, randomisation does not automatically deliver a precise estimate of the average test effects. Randomisation does not relieve researchers of the need to think about and factor in (observed and unobserved) covariables during research.<sup>35</sup> That said, the thesis also argued that despite this critique of RCTs, they should not be discarded, just that other methodologies should be incorporated to focus not only on "what works" but also, on "why it works". In other words, it is essential to know other factors, including non-technological factors, which are not only impacted but also impact BWC programmes. This approach requires the researcher to have an open mind and to design an iterative research process that

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<sup>35</sup> Deaton, Angus, and Nancy Cartwright. 2018. "Understanding and Misunderstanding Randomised Controlled Trials." *Social Science and Medicine* 210.

incorporates the impact of all other potentially influential variables in measuring the impact of BWCs.

The thesis concluded that instead of evaluating the indirect effects based on average test effects alone, the most viable approach would be to evaluate the relationship between the presence of BWC evidence and improved oversight investigative practice and in police investigative practice that they ordinarily do as part of combating and investigating crime. While there are concerns with how this evidence is interpreted, it is significantly better to have footage included as part of all other evidence than otherwise would be the case without such evidence.

The thesis recognises that there have been limited evaluations of the impact of BWCs on more accountable and effective policing, and this will provide South Africa with the opportunity for a more clarifying and direct evaluation of the impact of BWCs that underlines, for contexts such as the US, that non-technological factors can mediate the efficacy of technological interventions and that until the accountability architecture is resolved, any technological solutions will not solve the problem.

Thus, to advance theory and practice in evaluating the impact of BWCs on more accountable or effective policing, Chapter 5 of the thesis outlined the proposed methodology and data analysis strategy that can be used to effectively investigate the impact of BWCs on more accountable policing in a South African context. The thesis argued that the methodology and data analysis strategy should avoid some of the pitfalls of previous evaluations. These included avoiding relying on quantifying a normative concept, such as police accountability attributing the impact of BWCs in experiments implemented in actual conditions and lacking sufficient controls of potentially confounding factors. The thesis also cautioned against projecting evidence of impact as if it is replicable when context specific. Finally, the thesis underlined the importance of context as a critical variable in interpreting results.

The overall assumption of the proposed methodology was that the SAPS and MPS adopt BWCs as official law enforcement equipment. It is also assumed that when an investigation is triggered, BWC footage is included as part of the evidence that SAPS



and MPS police officers are mandated to release to IPID as per the requirement of Section 29 of the IPID Act relating to cooperation with IPID investigations. The evaluation strategy would be based on one hypothesis and two theories of change. The evaluation hypothesises that the availability of BWC footage (evidence) will contribute to resolving cases of suspected misconduct in a more timely and judicious manner that makes more efficient use of investigative resources. The hypotheses apply to internal and external accountability. The logic is that if BWCs can improve oversight investigative practice, that indirectly affects effective policing and could increase trust and legitimacy.

The three theories of change are 1) Easier identification of material witnesses, or more targeted search of the crime scene; 2) Less obfuscation by the subject of investigation or associated witnesses (fellow officers) in relating the narrative of facts in officer-involved uses of force, and 3) Greater receptivity of NPA prosecutors to cases without or with fewer material witnesses. The analytic strategy relies on comparing two data sets from IPID's Case Management System of investigations in which BWC footage is available and investigations in which BWC evidence is not available based on four indicators. A survey of investigators' perceptions about each investigation acknowledges that BWC footage is not the only evidence available and seeks to gauge investigators' opinions on the value of BWC footage and whether it is a decisive factor in achieving the first three indicators. The indicators are listed below.

**The indicators:**

- Average number of days for each investigation to move from case allocation to decision-ready status in the targeted financial year
- Proportion of investigations reaching a finding within the targeted financial year
- Proportion of IPID-referred criminal cases with BWC evidence that the NPA takes up for prosecution.
- Investigator experience and perceptions of investigating with and without BWC video.

The expectation is that a considerable number of investigations with BWC footage as evidence reach decision-ready status earlier than investigations without BWC footage as evidence. There is also an expectation of an increased proportion of investigations with BWC evidence reaching a finding within the year of being allocated to an investigator. There is also an expectation that there would be a greater likelihood that the NPA will uphold criminal charges in an investigation referred to it where there is BWC footage as evidence.

Finally, it is expected that most investigators will feel that the availability of BWC evidence is a decisive factor in reaching a finding more quickly than it would otherwise have been without the footage.

Overall, the findings provide a more direct evaluation of whether using BWCs can improve police accountability and, indirectly, police effectiveness. Researchers can conduct similar research to investigate whether BWCs can enhance the quality of evidence for arrest and prosecution in criminal investigations across various crime categories.

## 6.2 Conclusion

In conclusion, this thesis demonstrates that Body Worn Cameras (BWCs) have the potential to enhance accountable and effective policing. However, despite the existing evidence which shows that BWCs indeed work, researchers still have limited knowledge about how they work. Therefore, they are unable to control the deployment of the technology to make it work consistently. While randomised controlled trials are important for estimating effects, they may not be sufficient to explain some of the variables that are uncontrollable during data collection.

The methodology designed specifically for a South African context in this thesis offers an opportunity to contribute to the theory and practice of evaluating BWCs. This can be achieved by testing the impact of BWCs more directly on oversight investigative outcomes using a methodological template that is designed to be iterative and responsive to the South African context. This template has the ability to detect other

possible confounding factors during data collection and factor them in interpreting the outcomes.

South Africa is an excellent case study for the impact of BWCs when compared to the US and the UK for two reasons. Firstly, South Africa has the legal and institutional architecture for police accountability that is robust, like the UK (but unlike the US). Secondly, South Africa has a high incidence of police violence, like the US. Evaluating the impact of BWCs on accountability in either of the other two countries will be limited because each lack one of the key factors.

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