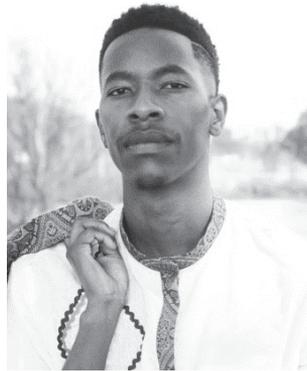


POLICE BODY-WORN CAMERAS: A FOURTH INDUSTRIAL REVOLUTION DEMAND FOR SOUTH AFRICA?

<https://doi.org/10.29053/pslr.v16i1.4503>

by Dr Llewelyn Curlewis* & Thabang Sepuru**



Abstract

Incidents of police brutality are an increasing concern around the world. South Africa faces its own excessive use of force by police exemplified by the case(s) of Khosa v Minister of Defence and Military Veterans 2020 7 BCLR 816 (GP) as well as that of Nathaniel Julies. Countries such as the United Kingdom (UK) and the United States of America (US) have seen positive results from leveraging advancements in technology to provide detailed, firsthand accounts of what happens during a police encounter. In light of the fourth industrial revolution, which brings together with it advancements in data processing and storing, the purpose of this paper is to investigate what value can such advancements in technology can bring to the South African criminal justice system and what possible barriers there could be in its implementation. This paper analyses the effects of Body-Worn Cameras in UK and US jurisdictions on improved police-citizen encounters and overall quality of policing. Body-Worn Cameras have been found to have value in improving police-citizen encounters. However, adoption may be slow because of budgetary constraints related to Information Technology (IT) infrastructure.

* BLC, LLB, LLM (Procedural Law) (*cum Laude*), LLM (Labour Law), LLD (Criminal Law), Certificate in Forensic Accounting, University of Pretoria; LLM Commercial Law, University of South Africa; Advance Diploma from Arbitration Foundation of Southern Africa (AFSA) (*cum laude*); Attorney and Associate at Clarke & Van Eck Attorneys (Pretoria East). ORCID iD: 0000-0002-4950-4491.

** LLB, LLM (Procedural Law), University of Pretoria; Assistant Lecturer (University of Pretoria). ORCID iD: 0000-0002-9572-9587.

1 Introduction

The term ‘Industry 4.0’ has become a buzzword in recent years. It refers to the fourth industrial revolution, which is characterised by a range of new technologies that fuse the digital, physical, and biological worlds. The fourth industrial revolution (4IR) has an impact on all disciplines, economies, and industries by integrating new methods of data collection and analysis in order to provide decision makers with comprehensive information. This is only just the beginning, and it is important for the criminal justice system to not be left behind.

Some of the advancements in modern technology that form part of the foundation of Industry 4.0 include ‘big data’ and ‘cloud computing’. Big data refers to the ability of 4IR technologies to turn large amounts of collected facts and statistics into useful insights, which can then be converted into useful and actionable knowledge. This may include the identification of trends or patterns and the relationships between inputs, processes, and outputs. Cloud Computing, on the other hand, refers to networks of remote servers which store, manage and process data.¹

Fighting crime effectively requires 21st Century technology to take centre stage. These two advances in technology i.e., big data and cloud computing, together with advancements already brought about by the digital revolution can be instrumental in improving police-citizen encounters, as well as the overall quality of policing. Body-Worn Cameras, in particular, are fast becoming necessary equipment for police forces all around the world. This has revolutionised the way state police forces engage with their citizens by addressing issues surrounding poor supervision and a general absence of accountability for police misconduct. The South African Police Services, however, has yet to introduce Body-Worn Cameras as part of their official uniform. But just what are Body-Worn Cameras, and are they necessary for South Africa?

Body-Worn Cameras (hereafter BWCs) are video recording evidence capture systems. They are typically used by law enforcement to record interactions with the public, gather video evidence at crime scenes, and have been reported to increase both officer and citizen accountability. BWC footage provides a detailed, first-hand account of what happens during a police encounter, increasing transparency. The technology can be mounted on an officer’s eyeglasses or chest area and offers real-time information

1 University of Liverpool ‘The Nine Pillars of Industry 4.0’ <https://www.virtualengineeringcentre.com/news-views/2017/the-nine-pillars-of-industry-4-0/> (accessed 30 August 2022).

when used by officers on patrol or other assignments that bring them into contact with members of the community.

Former President of the United States of America, Barack Obama, embraced Body-Worn Cameras, proposing a ‘Body Worn Camera Partnership Program,’ in which the federal government would spend \$75 million to help local governments purchase 50,000 Body-Worn Cameras.² As of November 2017, thirty-four US states have enacted laws regarding the use of body cameras³ and over one-third of the 18,000 law enforcement agencies in the United States are already using this technology.⁴ In South Africa, Parliament has shown support for the implantation of BWCs. *The South African* reported in 2019 that ‘a Parliamentary Portfolio Committee on Police has recommended that lawmakers adopt a rule which would provide all frontline police officers in [South Africa] with their own bodycams’.⁵

This technology is the ‘latest and perhaps most tangible answer to complex social questions regarding the use of force, state legitimacy, and the proper role of police in a liberal democracy’.⁶ The judge in *Floyd v City of New York*⁷ explained that ‘Body-Worn Cameras are uniquely suited to addressing the constitutional harms of abusive policing’.⁸

This article aims to investigate whether BWCs should be worn by officers to ensure that law enforcement uphold and respect rights when engaging with citizens. This study comes in the wake of various events involving high emotional face-to-face engagement with South African Police Services (SAPS) as well as the South African National Defence Force (SANDF). These include the student-led #FeesMustFall

2 The Washington Post ‘President Obama wants to spend \$75 million to buy police bodycams’ <http://www.washingtonpost.com/blogs/the-switch/wp/2014/12/01/president-obama-wants-to-spend-75-million-to-buy-police-bodycams/> (accessed 19 March 2021).

3 National Conference State Legislatures Blog ‘What does the latest research say about Body-Worn Cameras?’ <http://www.ncsl.org/blog/2017/11/20/what-does-the-latest-research-say-about-body-worn-cameras.aspx>[<https://perma.cc/SRV5-6EWT>] (accessed 19 March 2021).

4 CNN Wire Service ‘One-third of United States police departments using body cameras: They’re expensive, so are they worth it?’ <http://fox6now.com/2015/03/02/one-third-of-united-states-police-departments-using-body-cameras-theyre-expensive-so-are-they-worth-it/> (accessed 15 February 2021).

5 The South African ‘SA police officers set for bodycams: These are the main pros and cons’ <https://www.thesouthafrican.com/technology/police-officers-body-cams-pros-cons-south-africa/> (accessed 15 November 2020).

6 I Adams & S Mastracci ‘Police Body-Worn Cameras: Development of the perceived intensity of monitoring scale’ (2019) 3 *Criminal Justice Review* at 44.

7 *Floyd v City of New York*, 959 F. Supp. 2d 668, 685 (S.D.N.Y. 2013).

8 J Bellin & S Pemberton ‘Policing the admissibility of body camera evidence’ (2019) 87(4) *Fordham Law Review* at 1425. Id.; accord *Leadholm v City of Commerce City*, No. 16-cv-02786-MEH, 2017 WL 1862313, at *3 (D. Colo. May 9 2017) (noting that the implementation of body cameras may assist victims of police civil rights violations).

protests,⁹ the enforcement of lockdown regulations by SANDF together with SAPS, as well as the deaths of Nathaniel Julies¹⁰ and Collins Khosa - which was witnessed by neighbours, and although some of the onlookers attempted to record the incidents, their recording devices were confiscated, and they were threatened with violence by SANDF members.¹¹

This article will also discuss what stakeholders should consider before implementing a BWC program. BWCs offer several benefits, one of them being better engagements between citizens and law enforcement. Both the UK and US have introduced BWCs to their police forces and there have since been multiple reports of reductions in citizen complaints in areas and interactions where BWCs were present.¹² The presence of BWCs during police-citizen encounters causes participants to become more cautious in their actions and behaviour when they are alert to possible scrutiny of video records.¹³

This element is crucial for South Africa considering how often citizens report abuses of power by police to the Independent Police Investigative Directorate (IPID). IPID is an independent and impartial investigating and oversight body which acts in the public interest by conducting independent and impartial investigations of criminal offences allegedly committed by members the Municipal Police Services (MPS) and SAPS.

IPID has reported that it is 'concerned about the complaints received from the public on the alleged use of excessive force by members of SAPS and MPS'.¹⁴ BWCs can be very useful in facilitating relief to these types of issues. BWCs have solid theoretical support for being able to influence the behaviour of those under observation and

- 9 The Guardian 'South African police fire teargas as university fees protests spread' <https://www.theguardian.com/world/2016/sep/22/south-african-police-fire-teargas-as-university-fees-protests-spread> (accessed 29 August 2022); Daily Maverick 'In pictures: Police take on Wits students' (accessed 29 August 2022); <https://www.dailymaverick.co.za/article/2016-09-21-in-pictures-police-take-on-wits-students/#.V-P2WzYrJdA> (accessed 29 August 2022).
- 10 Mail & Guardian 'Tombstone and wall of remembrance unveiled for slain teenager Nathaniel Julies' <https://mg.co.za/news/2022-08-29-tombstone-and-wall-of-remembrance-unveiled-for-slain-teenager-nathaniel-julies/> (accessed 29 August 2022); Ivan Pijoo reporting for News24 "'He was killed by his heroes": Special tombstone for Nathaniel Julies unveiled in Eldorado Park' (accessed 29 August 2022).
- 11 *Khosa v Minister of Defence and Military Veterans* 2020 7 BCLR 816 (GP).
- 12 Goodall M 'Guidance for the Police Use of Body-Worn Video Devices' (2007) London: Home Office at 47; L Miller & J Toliver 'Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned' 2014 Washington DC: Office of Community Oriented Policing Services 5 https://pmg.org.za/files/200508PCP_Lockdown_presentation_26_March_-_5_May_2020_Final.pptx
- 13 A Braga et al 'The benefits of Body-Worn Cameras: New findings from a randomized controlled trial at the Las Vegas Metropolitan Police Department' (2017) Final report to the National Institute of Justice at 15.
- 14 P Setshedi 'Joint meeting of the PCP and SCSJ presentation on police misconduct cases' (2020) Independent Police Investigative Directorate at 22.

act as prevention mechanisms.¹⁵ The presence of BWC on officer uniforms may make them more conscious of their actions and consequently see them more seriously respect and uphold the constitutional rights of citizens.

The benefits of BWCs are not limited to just better officer behaviour. In the next section, a further impact of Body-Worn Cameras will be discussed, and will take a closer look at some of the perceived benefits of this technology. The following section will discuss whether there is a need for South Africa to invest in BWCs by briefly discussing the events mentioned above.

2 Impact of Body-Worn Cameras

The full impact of BWCs is still to be realised. In general, however, the introduction of BWCs to police units sees an improvement in performance. Funding research at Arizona State University in 2014 noted by the United States Bureau of Justice Assistance's Smart Policing Initiative that officers with BWCs were more productive making arrests, and had fewer complaints lodged against them than those without. Officers equipped with BWCs also had higher numbers of citizen complaints resolved in their favour.¹⁶

The research on this technology and its application is still novel, however, the UK and the US have observed similar benefits in various studies. The four main benefits identified as relevant for this study are (i) evidentiary benefits, (ii) improved officer (and citizen) behaviour, (iii) expedited resolution of citizen complaints/lawsuits, and (iv) identifying training opportunities. These perceived benefits will now be briefly discussed.

2.1 Perceived benefits

2.1.1 Evidentiary

Body-Worn Cameras create a real-time, permanent record of what transpires during an encounter between the police and citizens. The captured footage can be used as evidence in arrests for prosecution and may also be used for corroborating evidence in officer complaints for IPID.

Admissible video evidence will reduce the amount of time it takes to write reports and give a clear(er) account of the events that transpired. While the reliability of eyewitness accounts can be

¹⁵ Braga et al (n 13) 15.

¹⁶ C Katz et al 'Evaluating the impact of officer worn body cameras in the phoenix police department' (2015) *Arizona State University* at 32.

affected by the psychological limits of human attention,¹⁷ BWCs are able to capture and preserve evidence for trial better than the naked eye. They further provide a more holistic picture, and record details that would otherwise be unavailable to or ignored by the human mind.¹⁸

Although BWC video is far from perfect in that it relays visuals from an officer's point of view, eye-witness testimony bears a similar risk in that it may also be skewed by emotions or personal loyalties. Whereas the accused can challenge the oral testimony of a witness to provide a more favourable account of events for themselves, the availability of video evidence forces the accused to frame his narrative in accordance with the recording.¹⁹ BWCs can also help make a significant impact in instances of domestic violence. The UK Home Office guide commented in this regard, saying:

the evidence gathered using [Body-Worn Cameras] at the scene of a domestic abuse incident has assisted greatly in supporting reluctant witnesses through the court process. In providing an exact record of the demeanour and language of the accused, the disturbance throughout the scene and the emotional effect on the victim, the use of [Body-Worn Cameras] can significantly strengthen the prosecution case.²⁰

Domestic and gender-based violence is a major problem in South Africa. BWCs can be the technology which motivates victims and witnesses to report such crimes, knowing that a police unit will arrive to assist and be able to document the scene. This video evidence will also strengthen prosecution cases resulting in more convictions and hopefully begin to work as a deterrence.

2.1.2 Police use of force

Most research reveals that the presence of a body-worn camera seems to have a 'civilising effect' on all those present.²¹ This is influenced by the officer's awareness that their actions are being monitored, who is then more likely to comply with set procedures and less likely to abuse their powers when engaged with citizens. The implementation of BWCs can, in this way, be used to demonstrate law enforcement's dedication to transparency and be used to restore community trust by demonstrating a commitment to interacting with

17 J Blitz 'Police Body-Worn Cameras: Evidentiary benefits and privacy threats' (2015) *American Constitution Society* at 5.

18 Bellin & Pemberton (n 8) 1439.

19 Blitz (n 17) 6.

20 M White 'Police Officer Body-Worn Cameras: Assessing the evidence' (2014) *National Institute of Corrections* at 24.

21 J Maskaly et al. 'The effects of Body-Worn Cameras (BWCs) on police and citizen outcomes: A state-of-the-art review' (2017) *Policing: An International Journal of Police Strategies & Management* at 672; C Lum et al 'Existing and ongoing body camera research: Knowledge gaps and opportunities' (2015) *New York: The Laura and John Arnold Foundation*.

citizens in a way that is fair and just. This can then improve perceptions of police legitimacy.²²

When there is a visual record of what occurred during a police encounter, it is much more difficult for an officer to deny excessive use of force or other abuse, so it is better to steer clear altogether. It works both ways as it will also be more difficult for accusers to fabricate police abuse or misconduct where video footage is absent.²³

The 'civilising effect' present may prevent some situations from escalating to levels requiring the use of force and improve interactions between officers and citizens. The Las Vegas Metro Police Department did just that and introduced BWCs as a way to increase police accountability and a remedy to resolve issues surrounding community trust.²⁴

2.1.3 Training opportunities

The use of BWCs also offers potential opportunities to advance policing through training. By monitoring officers in the field, superiors are able to identify areas of poor performance and can distil causes for poor performance. With such information available, superiors are able to structure appropriate training programs to address areas of concern. Areas of concern include the disregard of human rights. This was identified by Gumede in a statement critiquing members of SANDF in their engagement with South African citizens during the COVID-19 national lock down. He believes:

After 26 years since the end of apartheid, the South African police appear still not to have been trained, neither have they inculcated a culture of human rights-policing ... In the long-term, the training curriculum of the police and army must be overhauled to make it more human rights based.²⁵

Had BWC technology been available, superiors would have had the opportunity to review the actions of their subordinates and address the issues of excessive force appropriately. White agrees that 'body-worn camera technology could hold great promise both as a training tool for police and as a mechanism for more thorough and fair review of officer behaviour during critical incidents'.²⁶

22 T Tyler 'Procedural justice, legitimacy, and the effective rule of law' (2003) 30(6) *Crime and Justice the University of Chicago Press* at 283.

23 Blitz (n 17) 1.

24 Braga (n 13) 11.

25 Associate Professor W Gumede of Witwatersrand University 'Complaints against SANDF' <https://www.wits.ac.za/news/latest-news/general-news/2020/2020-04/complaints-against-sandf.html> (accessed 20 February 2021-).

26 White (n 20) 26.

2.1.4 Expedited resolution of citizen complaints

BWCs may lead to a faster resolution of citizen complaints and lawsuits that allege excessive use of force or other forms of officer misconduct. IPID may find BWCs extremely convenient as police complaints may involve an officer fitted with BWC. Although there may be many hours of footage to sit through in order to ascertain the details of what transpired, it is far better than going through various inconsistent reports, often without any evidence, trying to find the truth.

IPID is a statutory oversight body with a mandate to investigate cases involving the police. During the early stages of the lockdown period – 26 March-5 May 2020 – over 800 cases were reported to IPID.²⁷ In the previous year, 26 March-5 May 2019, this number was less than 200. While COVID-19 may have played a role in increasing cases, the IPID office often has its hands full. IPID has also admitted that it is possible that other community members might have been unable to report cases due to movement restrictions, which might result in IPID receiving more cases after the lockdown period.²⁸ Generally, the complaints were about the excessive use of force and the physical abuse of civilians by law enforcement. Such a plethora of cases presents a number of problems during investigations, especially if the evidence is often not reliable.

The investigation of cases involving inconsistent accounts of encounters between officers and citizens are often found to be ‘not sustained’ and are subsequently closed when there is no video footage, nor independent or corroborating witnesses. This is because the complaint is reduced to the officer’s word against that of the citizen. The availability of video evidence can change this position, allowing complaints to be investigated to their conclusion and grant relief to wronged citizens.

BWCs are not just beneficial for citizens; officers can benefit from them as well when confronted with a false accusation. The UK Home Office guide has noted that ‘in a number of cases the complainants have reconsidered their complaint after [the video] review, thus reducing investigation time for unwarranted complaints’.²⁹

Additionally, there are several reports which indicate that there is a higher percentage of (earlier) guilty pleas and convictions when video evidence is readily available and presented.³⁰ This could assist greatly with relieving an overburdened court as matters will be resolved quicker. It is not, however, clear from the reports whether

27 Setshedi (n 14) 9.

28 Setshedi (n 14) 22.

29 Goodall (n 12) 7.

30 Maskaly et al (n 21) 679.

it is indeed the video evidence which directly results in guilty pleas. More research is required in this regard.

3 Does South Africa need Body-Worn Cameras?

One of the biggest motivators for BWC programs in the US is that body cameras can cultivate an environment of better transparency and accountability which then improves law enforcement's legitimacy and increases the quality of policing in communities. Precincts often implemented this 'in response to increased community criticism after several controversial police use of force incidents'.³¹

South Africa has had its fair share of controversial use of police force, most notably the deaths of Nathaniel Julies and Collin Khoza, as well as the Marikana Massacre. These incidents have all caused quite the civilian outcry and 'while public opinion alone does not assure that laws or government policies will change, it is often a necessary precondition to provoke such change'.³²

There is a growing lack of trust in the police force by citizens. This lack of trust is echoed by community members of Eldorado Park. Community leader, Bishop Robinson, and residents accuse police members of colluding with criminals and drug dealers, saying:

[T]he main concern in our area is that the police are incompetent, they are eating with the criminals. Now the community wants to burn down the police station. What is happening in Eldos is very painful ... We are tired of constantly talking about crime, we want all the corrupt officers to leave our area with immediate effect.³³

Mr Robinson is not alone. Sandra Foster, a 38-year-old Eldorado Park resident, said 'police must do their work right if they want to be respected by the Eldorado Park community. Right now, they are shooting at us and are failing to provide answers.'³⁴ Without question, community trust in law enforcement is very low in Eldorado Park. The community has no faith in law enforcement's legitimacy and there is a poor quality of policing in this community. This article will now address a few controversial incidents of police force that result in the violations of important constitutional rights.

31 Braga (n 13) 1.

32 Blitz (n 17) 7.

33 Daily Maverick 'Community protests after boy with down syndrome allegedly shot by police' <https://www.dailymaverick.co.za/article/2020-08-28-community-protests-after-boy-with-down-syndrome-allegedly-shot-by-police/> (accessed 19 February 2021).

34 As above.

3.1 South African Police Services use of force and the violation of Constitutional rights

The Bill of Rights is the cornerstone of democracy in South Africa, underpinning the democratic values of human dignity, equality and freedom which must be respected, protected, promoted and fulfilled by the State.³⁵ However, the culture of law enforcement in South Africa appears to be in direct conflict with the Constitution.³⁶ This is according to Gumede, who writes that ‘the organisational culture of the police and army, which clearly is based on humiliation, aggression and abuse, should be thoroughly shaken up to focus on compassion, human rights and decisions based on common sense’.³⁷ It is hard to argue with his analysis given what has transpired during the early stages of the national lockdown.

The lockdown period provided a unique opportunity to observe police and civilian interactions. Police and civilians engaged often as the SAPS and SANDF were patrolling, tasked with enforcing the COVID-19 regulations. Unfortunately, plenty of the encounters were unpleasant. IPID reported a 32% increase in complaints against the police during the first 41 days of lockdown compared to the same period last year.³⁸ From these arrests, 828 cases were reported to IPID in terms of its mandate to investigate incidents of wrongdoing by police officers, including deaths as a result of police actions or in custody, rapes by police officers, or alleged assault by police officers.³⁹ The constitutional offences range across the board, however, this article will touch briefly on (a) the right to dignity, (b) the right to freedom and security of the person, and (c) the right to life.

3.1.1 Human Dignity – section 10

The constitution provides everyone with inherent dignity and the right to have their dignity respected and protected. An individual’s human dignity is impaired if that person is subjected to treatment that is degrading, humiliating, or treats them as subhuman. This was echoed in *Minister of Home Affairs v Watchenuka*, where the Supreme Court

35 *Khosa* (n 11).

36 Constitution of the Republic of South Africa, 1996.

37 Witwatersrand University ‘Complaints against SANDF’ <https://www.wits.ac.za/news/latest-news/general-news/2020/2020-04/complaints-against-sandf.html> (accessed 20 February 2021).

38 Institute for Security Studies ‘Police abuses during lockdown reflect deep accountability problems’ <https://issafrica.org/iss-today/police-abuses-during-lockdown-reflect-deep-accountability-problems> (accessed 29 August 2022).

39 Independent Police Investigative Directorate ‘Joint Meeting of the PCP And SCSJ Presentation Police Misconduct Cases’ (2020) at 4.

of Appeal expressed the right to human dignity as ‘the ability to live without positive humiliation and degradation’.⁴⁰

However, within the first few weeks of lockdown, there were already multiple reports of abuse of power and excessive use of force by SAPS and SANDF. Citizens and a few news houses reported the witnessing of soldiers coercing members of the public to do push-ups⁴¹ and other forms of physical exercise. This was done as a form of punishment for those who violated the lockdown regulations. This was undoubtedly a violation of the citizen’s right to human dignity as such actions only served to humiliate and degrade.

In an uproar, citizens took to social media and submitted to news houses captured footage of these gross violations of their rights and the rights of others. Admittedly, not all online footage has been verified to be true and authentic. The national SAPS spokesman, Brig Vish Naidoo, also made sure to point out that SAPS has ‘noted these videos with serious concern but the authenticity of these videos would need to be verified’.⁴² However, this article is prepared to accept the videos identified herein as a prima facie true reflection or account of events, given the multitude of videos from multiple sources alleging similar events – both official and unofficial – with official police and military uniforms identifiable in the videos, as well as the visible wearing of masks which indicates that these events transpired during COVID-19.

However, video evidence needs to be admissible to have any evidentiary value. This was the case when an NGO tried to take the government to court over alleged SAPS and SANDF brutality and use of force when enforcing the COVID-19 lockdown measures. The NGO soon withdrew its case after President Cyril Ramaphosa accused it of failing to provide admissible evidence.⁴³ The admissibility of evidence clearly cannot be overlooked because of the mere existence of potential evidentiary material, even if it does relate to a fundamental human right. The case was withdrawn, presumably to ‘[secure] sworn evidence confirming the veracity of social media footage and media reports about the alleged brutality, which it had relied on to make its

40 2004 4 SA 426 (SCA).

41 Twitter ‘Push-ups in Soweto’ https://twitter.com/ProsperShezi/status/1244304346986287105?refsrc=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1244304346986287105%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fcityzen.co.za%2Fnews%2Fsouth-africa%2Fsocial-media%2F2262188%2Fwatch-police-and-sandf-force-soweto-residents-to-do-hard-exercise-as-punishment%2F (accessed 26 February 2021).

42 Times Live ‘Defence minister slams soldiers for punishing civilians during lockdown’ <https://www.timeslive.co.za/politics/2020-03-30-defence-minister-slams-soldiers-for-punishing-civilians-during-lockdown/> (accessed 14 February 2023).

43 Business Live ‘NGO withdraws shutdown brutality case’ <https://www.businesslive.co.za/bd/national/2020-04-06-fair-and-equitable-society-withdraws-shutdown-brutality-case/> (accessed 20 February 2021).

original case'.⁴⁴ Seemingly, the lack of BWC evidence allowed for abusive police conduct and public humiliation to go unpunished.

Respect for due process and procedural fairness demands the use and reliance of legally admissible evidence, and rightly so. However, it is still disheartening that such an important case which sought to defend the right of citizens to human dignity was halted because the available evidence was not admissible. One might wonder how the case would have progressed had some officers been fitted with BWCs, allowing both the state and the NGO access to admissible video evidence. Perhaps the court would have instructed the state to draft a plan or policy to ensure that such infringement to the dignity does not happen again or is at least substantially reduced.

Had it been available, BWC footage would have assisted in increasing community trust as citizens would see law enforcement's commitment to transparency by exposing delinquent conduct violating the human dignity afforded to all South African citizens.

3.1.2 Freedom and security of the person – section 12(1)(c) - (e)

The right to freedom and security of the person is contained in section 12 of the Constitution and it consists of two subsections, subsection (1)(c) and (e). The section provides that: Everyone has the right to freedom and security of the person, which includes the right (c) to be free from all forms of violence from either public or private sources; and (e) not to be treated or punished in a cruel, inhumane or degrading way.

Although this right protects the physical and psychological integrity of the individual, it was not too long after the beginning of lockdown that incidents of law enforcement violating section 12 rights were reported. On just the second day of lockdown, while citizens were queuing at a popular store in Yeoville 'police arrived in 10 patrol vehicles and started firing rubber bullets towards the shoppers ... [and] ... later the police used whips to get the shoppers to observe social distancing rules'.⁴⁵ It is apparent that the shoppers are not immune to violence from the state, infringing on section 12(1)(c).

In another incident, a SANDF member confiscated and shattered a beer bottle while another member assaulted a citizen by slapping and kicking them in a derogatory manner. A video of this encounter was reported by *The Citizen*.⁴⁶ Such treatment is in clear violation of section 12(1)(e). To exacerbate matters, members of SAPS were

⁴⁴ As above.

⁴⁵ The Citizen 'SA police fire rubber bullets at shoppers during lockdown, and whip them' <https://www.citizen.co.za/news/south-africa/crime/2261939/sa-police-fire-rubber-bullets-at-shoppers-during-lockdown-and-whip-them/> (accessed 26 February 2021).

present on the scene but instead of protecting the citizen and his constitutional rights, they acted as mere onlookers.

3.1.3 Life – section 11

Section 11 of the Constitution guarantees the right to life. This places a duty on the state to not act in a way which would deprive someone of their life. The two matters below highlight a failure by the state to respect this right.

Eldorado Park shooting of Nathaniel Julies

In August of 2020, ‘the community of Eldorado Park erupted with protest action following the death of 16-year-old Nathaniel Julies, who was allegedly shot by police after they allegedly became frustrated with his responses to their questions. Nathaniel had down syndrome’.⁴⁷

Netshiongolo is an Eldorado Park police station sergeant and the third accused in the matter. He faces charges of being an accessory to murder after the fact and defeating the ends of justice. Gauteng NPA spokesperson Phindi Mjonondwane explained that ‘the state alleges that after the third accused, Netshiongolo, was alerted to the crime he then tried to assist in concealing the crime’.⁴⁸ Sergeant Netshiongolo allegedly planted bullets at the scene of Julies’ death to make it look as if there had been an earlier shooting in a confrontation between police and local gangs.⁴⁹

In its most basic form, section 11 provides citizens with a guarantee that they have the right to ‘be alive’. This means that no citizen should be arbitrarily deprived of his or her life. However, there are varying accounts of the circumstances which led to the death of Nathaniel Julies. The allegation that the officers staged the scene,⁵⁰ can only make matters worse as the truth of what really transpired

46 The Citizen ‘WATCH: Army members break beer bottle, slap and kick member of the public’ <https://www.citizen.co.za/news/south-africa/crime/2261827/watch-army-members-break-beer-bottle-slap-and-kick-member-of-the-public/> (accessed 26 February 2021).

47 Daily Maverick ‘Community protests after boy with down syndrome allegedly shot by police’ <https://www.dailymaverick.co.za/article/2020-08-28-community-protests-after-boy-with-down-syndrome-allegedly-shot-by-police/> (accessed 19 February 2021).

48 Daily Maverick ‘Another postponement in Nathaniel Julies murder case against cops – as victim’s family faces eviction’ <https://www.dailymaverick.co.za/article/2021-01-27-another-postponement-in-nathaniel-julies-murder-case-against-cops-as-victims-family-faces-eviction/> (accessed 19 February 2021).

49 As above.

50 Daily Maverick ‘Community protests after boy with down syndrome allegedly shot by police’ <https://www.dailymaverick.co.za/article/2020-08-28-community-protests-after-boy-with-down-syndrome-allegedly-shot-by-police/> (accessed 25 July 2022).

will be harder to ascertain. The confusion will only deprive the community and especially the parents of the victim peace and/or closure. Such a situation demonstrates the value of BWCs.

It is hard to say with absolute certainty whether Sergeant Netshiongolo would have tried to tamper with the scene if BWC evidence had been readily available. The BWCs of the officers would have revealed whether the alleged shooting between the officers and gang members had actually occurred. Equipped with this knowledge, the BWCs would act as a deterrent and the sergeant would have thought twice about staging a crime scene, especially as it was revealed during the accused's bail hearing that he had reported sick on the day and should not have been anywhere near the murder scene.⁵¹

No right is absolute and can be limited, including the right to life. In instances where this right is limited, the killing must be a proportionate response in the circumstances. Had standard policy required officers to be fitted with BWCs during the encounters, footage of what exactly transpired would have been easily and readily available, shedding light on the circumstances which led to the infringement of this right. If the BWCs were turned off, a reasonable and acceptable explanation of why this was would have had to be provided. Failure thereof could have had the court or IPID draw a negative inference from such conduct.

The right to life and dignity are the most important of all human rights, and as Chaskalson P stated in *S v Makwanyane*, they are the source of all other personal rights. This explains why they are to be protected at all costs, and BWCs can assist in this regard. Given the extent of the community outcry, the footage could have even been made public to allow the parents and community to receive closure having witnessed the true account of the events which led to Julies' death.

BWCs can prove their worth by revealing the truth when a situation proves to be tricky such as in case of a crime scene being (allegedly) tampered with. BWCs have the power and potential to remove the inconsistent accounts of an incident and calm the public outrage by providing a single narrative.

Collins Khosa

Briefly the facts are as follows: On 10 April 2020, members of the SANDF entered the premises of Mr Khosa and accused him of violating the Lockdown Regulations. During this time, Mr Khosa was within the confines of his residential premises. The SANDF members then raided

51 As above.

the house and confiscated liquor, ordering Mr Khosa and another to leave the property and go into the street. Shortly after, more law enforcement personnel arrived on the scene, including the Johannesburg Metropolitan Police Department (the JMPD) and armed SANDF members. It was at this point that the contents of the confiscated liquor were emptied over Mr Khosa, after which he was assaulted.⁵² Mr Khosa succumbed to his injuries shortly after.⁵³

The Constitution offers a guarantee of freedom from state brutality – there is no general license for the use of force. Use of force is only justifiable in very limited cases.⁵⁴ In general, the SAPS may not use force except for when it is necessary.⁵⁵ When it does become necessary, only the bare minimum force is to be applied and deadly force may be used only where there is a threat to life.⁵⁶

From the facts, there is nothing to suggest that the (deadly) use of force was ever necessary. The rights contained in Chapter 2 of the Constitution must always be respected by the government and security forces. As organs of state, members of the police services and the national defence force are under section 7(2) of the Constitution obliged to respect, protect, promote and fulfil the rights in the Bill of Rights.⁵⁷ The SANDF and JMPD officers ignored all of these provisions. They infringed on the freedom of security and of bodily integrity resulting in the ultimate infringement on the right to life.

State security forces appear comfortable abusing power. It is not unreasonable to assume the trained officers knew their actions were unconstitutional. Attempts at actively ensuring that no video evidence of their actions could be recorded, including use of threats of violence against concerned citizens, further suggests as much. These are however exactly the type of instances that proponents of BWCs wish to remedy. Civilians may be less intimidated when recording the actions of security forces if they know their supervisors can monitor them. Of course, rotten apples can always turn off the camera when they intend to offend the Constitution, but then they will have to provide a convincing account of why their cameras were turned off.

Ultimately, what happened to Mr Khosa was a tragedy. IPID reports reveal that Mr Khosa was not the only citizen to die at the hands of security forces. Although the introduction of BWCs will not magically stop such deaths, they will go a long way to deter such conduct, and that is an important first step to ensure security forces

52 *Khosa* (n 11).

53 As above.

54 See Defence Act 42 of 2002; South African Police Service Act 68 of 1995; Criminal Procedure Act 51 of 1977.

55 Criminal Procedure Act 51 of 1977, sec 49(2)

56 *Khosa* (n 11).

57 Constitution of South Africa, 1996, sec 7(2).

do not abuse their powers, and not only respect, but protect the rights in the Bill of Rights.

4 Considerations before implementation of Body-Worn Cameras

While BWCs may be on the agenda for SAPS top management, there has yet to be an official date for implementation. The reasons advanced by the Department of Police spokesperson suggests that the department is awaiting more information and funding.⁵⁸

Seemingly, the idea of BWCs has already crossed the minds of those in the SAPS leadership. BWCs were set to make their first appearance as a pilot project with the National Traffic Department in April of 2021. BWC implementation must be done carefully. As Professor Wasserman writes, the ‘ultimate effectiveness of Body-Worn Cameras depends on the hard details of implementation’.⁵⁹ This article has identified the following as factors for the national government to consider as it introduces this technology.

4.1 Implementation fees

BWCs provide many potential benefits to law enforcement, but they do come at a considerable financial cost. Fees are not just limited to the initial purchasing cost; in addition ‘agencies must devote funding and staffing resources toward storing recorded data, managing videos, disclosing copies of videos to the public, providing training to officers, and administering the program’.⁶⁰ The type of resources needed for storing and managing data include the transmission type of footage – whether live or not, and the associated carrier costs if it is live – and how the data will be captured and stored. Staffing resources speaks to the personnel required for the administrative workload of downloading and categorising at the end of each shift.

Many United States precincts are being held back by the costs of BWC programmes. The Police Executive Research Forum’s (PERF) survey revealed that 39 percent of the respondents that do not use Body-Worn Cameras cited cost as a primary reason. Chief amongst these are the crippling storage costs. These costs have been identified

58 Business Tech ‘South African police officers to wear body cameras’ <https://businesstech.co.za/news/technology/324999/south-african-police-officers-to-wear-body-cameras/> (accessed 10 November 2020).

59 Blitz (n 17) 7; quoting H Wasserman ‘Moral panics and Body-Worn Cameras’ (2015) 93(3) *Washington University LawReview* at 10.

60 Police Executive Research Forum et al ‘Implementing a Body-Worn Camera Program: Recommendations and lessons learned’ (2014) *Washington DC: Office of Community Oriented Policing Services* at 31.

as one of the greater costs and often the main reason for not implementing BWC programmes.⁶¹

It is true that BWCs can have high implementation fees, but it is remedied by a reduced cost in gathering evidence and securing convictions, thereby decreasing overall litigation costs. The Las Vegas Metro Police Department estimated the cost of labour required to investigate an average complaint, with and without BWC evidence. According to data provided by LVMPD, BWCs save over \$6,200 in officer time spent investigating an average complaint, compared to complaint investigations for officers without BWCs.⁶²

With such high fees, it should also be obvious that not every SAPS precinct will be fitted with BWCs at one go. Rather, SAPS can pilot BWCs in high crime areas, collecting data from there and learning how to improve the system before implementing it elsewhere or more broadly.

4.2 Policy considerations

Body-Worn Cameras are potential game changers for law enforcement, from evidence collection to building community trust. To truly be successful in the implementation of a BWC programme, clear guidelines and policies on how officers and other members of SAPS are to collect, store and access footage must be established. All members of SAPS involved with BWCs will need to be trained appropriately.

A successful BWC program will need considerable groundwork before camera deployment. This includes selecting a vendor for the cameras; overcoming officer and union objections; and developing training and policy that covers a wide range of critically important issues, from when to turn the cameras on and off to supervisor review and video redaction.⁶³

Spencer identifies a few elements which can help the smoother integration of BWC programmes.⁶⁴ Firstly, the operational policy on the use of BWC should be developed around the officer's experience in the field. This will assist in making sure the policies are not only practical, but officers will feel included as a part of the process. Secondly, pertaining to the use of BWC video, saving and transferring data should be simple and quick. Finally, information technology (IT) infrastructure is a significant consideration. Download speeds, in

61 As above.

62 Braga (n 13) 10.

63 White (n 20) 36.

64 D Spencer & R Cheshire 'Ten years of body worn video in Northamptonshire police' (2017) 12(1) *Oxford University Press* at 4.

particular, should be quick to not cause unnecessary delay or abstraction from other duties.

When implementing BWCs, SAPS leadership needs to take special consideration of key decisions such as when officers ought to activate their cameras; who has access to the recorded footage; how long the recordings should be retained and how internal and external requests for disclosure will be processed.⁶⁵ Designing a clear policy displays a commitment to transparency for police operations, accurate documentation of events, and evidence collection. A few policy considerations are discussed below.

4.2.1 Determining when to record

Some authors argue that BWCs should remain on during an officer's entire shift, otherwise the whole aim of the program is defeated. This is not a sound argument as sometimes shifts can be long and uneventful. It will be time consuming to go through so many hours of footage when uploading and categorising. Such lengthy videos will also have a detrimental impact of storage and the associated costs. It is then important to identify the instances when an officer will be required to start recording. These instances should be made as clear as possible as this will be very important for the purposes of legitimacy.

In determining which instances officers should start recording, the most common approach observed is to require officers to activate their cameras when responding to calls for service and during law enforcement-related encounters and activities, such as traffic stops, arrests, searches, interrogations, and pursuits. In many cases, the department's written policy defines what constitutes a law enforcement-related encounter or activity, and some policies also provide a specific list of which activities are included.⁶⁶ The rule of thumb, however, is that when in doubt, record.

It is accepted that recording will not be possible at all times, even if policy requires it. Recording may be unsafe, impossible, or impractical and in such cases, the officers should be afforded some discretion. For example, an officer may be taking a statement of an abuse or rape victim. Such victims may be uncomfortable with being recorded and the officer should have the discretion to be able to deactivate the camera. To avoid misuse and abuse of said discretion, as part of its policy, SAPS can require officers to explain the reason for deactivation prior to such deactivation. If they are unable to do so at the time, at the end of his or her shift, the officer must record or report why they chose to deactivate the camera.

65 Police Executive Research Forum et al (n 60) 11.

66 Police Executive Research Forum et al (n 60) 13.

Although digital technology can be very useful, it does not find relevance in all areas of policing. The demand for BWCs is to combat defective and unsatisfactory policing. In instances where there is a failure to observe the guidelines, this should result in a hearing to ascertain why the camera was not activated and to allow for any relevant disciplinary steps. The aim of this technology is to improve police-citizen encounters, not impede them.

4.2.2 Access, storage, and retention of data

An issue which may present itself in the implementation of this technology is the routine storage and management of collected video footage.⁶⁷ This demands considerations that relate to where data will be stored (i.e., internal or external hard drives) through third-party cloud services. However, when making these decisions, Chief of Police Ken Miller emphasises that ‘protecting the data and preserving the chain of custody should always be a concern’.⁶⁸ What is vital here is the creation of a system that ensures that one is unable to tamper with a video.

Essentially, however one decides to store and manage the video footage, the integrity of the recordings should not be compromised. A clear policy guideline as to who can access the data is of paramount importance. The policy should explicitly state who has access to the data and under which circumstances. In this way, an auditing system is created to monitor access. This can be done in consultation with the National Prosecuting Authority.

With regards to storage, the policy should specify how data will be downloaded from the camera and onto the system. This process should include protection against the tampering of data prior to downloading. The uploaded videos should be categorised properly and according to the type of event contained in the footage to ensure easier access when it is searched for.

4.3 Admissibility concerns

Body-Worn Cameras present a cognitive bias in evidence as one is seeing the events that transpired from an officer’s point of view. Accordingly, Bellin and Pemberton wrote that ‘in light of police officers’ unilateral control of body cameras, many of the scenarios courts encounter will raise important normative concerns about the reliability and fairness of the introduction of this evidence against criminal defendants’.⁶⁹

67 White (n 20) 36.

68 Police Executive Research Forum et al (n 60) 15.

69 Bellin & Pemberton (n 8) 1446.

Bellin and Pemberton continue to warn that ‘police body camera statements can be manipulated to create a one-sided and potentially misleading account – an account that can be uniquely persuasive’.⁷⁰ This can happen when the camera conveniently ‘gets switched off’ and fails to record the whole incident, forming a certain narrative which does not truly represent the true state of affairs. As knowledgeable consumers of the criminal justice system, ‘police officers may be tempted to shape [the] evidence as arrests and cases unfold’.⁷¹

As mentioned in 4.2 above, clear policy guidelines, as well as disciplinary measures are necessary and should be established to deter officers from committing such acts. SAPS must train its officers with the proper use of BWCs technology as well as teaching and explaining any BWC related policy in order to facilitate proper collection of admissible reliable evidence.

Even though ‘cameras do not provide a neutral window into reality, they do provide visual evidence that is often far better than what fact-finders would have [had] otherwise’.⁷² Even when body-worn camera evidence is flawed, it is often far better than written officer reports and eye-witness accounts which are usually given long after the event has occurred.

4.4 Addressing officer concerns

An effective body-worn camera program needs the support of everyone, from the highest level of law enforcement to the frontline officers who will be wearing these cameras. It is vital to introduce the technology in a way which does not imply that supervisors do not trust their subordinates as this may erode the relationship between officers and higher management, which would frustrate the implementation process.

To achieve harmonious implementation, senior management must include officers in the implementation process and allow them to provide meaningful input. There should be ongoing engagement between officers and senior management, where the parties communicate programme goals, management’s expectations of the officers, the benefits, and the challenges of using Body-Worn Cameras.

A ten-year study in Northamptonshire in the UK found that ‘a significant piece of learning was that the users need to recognise the need for [BWC] and want to use it’.⁷³ In view of that, SAPS should

70 Bellin & Pemberton (n 8) 1441.

71 Bellin & Pemberton (n 8) 1427.

72 Blitz (n 17) 2.

73 Spencer & Cheshire (n 64) 2.

present the technology as a tool to help create evidence and ensure public safety, and not as a means to check on their performance. This can be done by evidencing examples of cases where officers have been exonerated of false charges because of the readily available BWC evidence. This can make the officers more welcoming of the technology and encourage voluntary use. SAPS will have to show that the technology can be used as teaching tools, rather than disciplinary ones, where supervisors review footage together with the officer and provide constructive feedback. Videos of exemplary performances can also be shown at training and award ceremonies to highlight impressive officers and encourage acceptance.

Though implementation may be a bit challenging, there is room for South Africa to adopt BWC technology and the evidenced complaints to IPID demands its expeditious implementation. As a way of encouraging speedy application, SAPS should identify ‘champions’ to help the rest of the force accept the idea of BWC. Spencer describes these champions as ‘positive advocates of [BWCs], promoting and demonstrating its use to colleagues, providing credibility and reassurance to colleagues arousing their interest in using the devices’.⁷⁴ These SAPS champions would receive training ahead of the launch of the technology to explain to the rest of the force how new additions work.

5 Conclusion

While research into the use of BWCs is still novel, there has been a clear correlation between its implementation and improved police-citizen encounters. It must be kept in mind that Body-Worn Cameras are just tools and have their limits. While there has been steady growth in the research on the impact of BWCs on officers’ use of force, citizen complaints and community perceptions, more research is needed still to fully understand the breadth of BWCs’ impact on policing and the criminal justice system.⁷⁵

With the fourth industrial revolution upon us, it would be wise for South African law enforcement to embrace new technology, especially ones which could go a long way in protecting and promoting Constitutional rights. Gradual implementation will assist agencies to learn which policies, practices, and camera systems are the best fit for their departments. Local Municipalities which support research and development should consider providing funding streams for comprehensive research and evaluation of body-worn camera systems.

⁷⁴ As above.

⁷⁵ Braga (n 13) 13.

Importantly, Blitz highlights that ‘while it is important not to treat Body-Worn Cameras as a “magic bullet” that will solve all problems in police interaction with citizens, it is equally important not to overstate their disadvantages’.⁷⁶ BWCs will increase public confidence in policing – and possibly the justice system – as it demonstrates a police agency’s commitment to transparency and accountability. This is very important in the South African climate where faith in law enforcement is eroding, and abuse of power is seemingly increasing. An incremental approach can be applied when introducing this technology, and this can be a good enough first step to rebuild the community’s trust in SAPS.

76 Blitz (n 17) 2.