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Policing hate crime: markers for negotiating common ground in policy implementation

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This article considers the implementation of police hate crime policy. Victoria, a state in Australia, provides a case study of a jurisdiction where police have introduced a Prejudice Motivated Crime Strategy without an animating hate crime offence. The article identifies the organisational, relational and operational challenges and opportunities that arise in the implementation of this strategy. The literature reveals that successfully policing hate crime is impeded where the approach to defining and categorising hate crime is over- or under-inclusive. Over-inclusive approaches focus on community expectations while under-inclusive approaches are oriented towards prosecution. The absence of a legally bounded definition of hate crime in Victoria provides an opportunity to develop an approach that meets public expectations and operational needs of police, thus avoiding the pitfalls of over- or under-inclusive approaches. To realise this opportunity, the article draws upon the results of a research partnership between Victoria Police and a consortium of Australian universities. Synthesising legal standards with community interests, a set of five markers are advanced for frontline officers to negotiate, rather than assume, a common understanding of hate crime and to build police/community trust. The article makes an important contribution to the field by demonstrating that it is possible to advance the implementation of hate crime policy through strategies that are responsive to both legal standards and community expectations.

Keywords: hate crime; prejudice motivated crime; community policing; policy implementation

Introduction

This article focuses on policing hate crime in Victoria, an Australian state. Victoria is a unique policing environment and a valuable case study. In 2011, Victoria Police (VicPol) launched a strategy to address prejudice motivated crime (PMC). They did so in response to intense public pressure but in the absence of a distinct hate crime offence. The Strategy is thus atypically proactive in seeking to respond to public concerns about PMC outside of any legal requirement to do so. There is a well-developed literature on the difficulties of mobilising hate crime statutes into policing policy and transmitting the meaning of these legal rules to frontline officers (Bell 2002, Grattet and Jenness 2005, Cronin *et al.* 2007, Grattet and Jenness 2008, Hall 2012). In contrast, the lack of a prosecutorial imperative in Victoria means that the criminal law provides an indicative but far from

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exhaustive framework for identifying the kind of criminal conduct that amounts to PMC in daily policing activity. This opens up the opportunity to pay closer attention to the needs of targeted communities in formulating the meaning of PMC, implementing the Strategy and policing the problem. In addition to their traditional role as gatekeepers of the criminal justice system, this places a responsibility upon police to become more active agents of social justice and inclusion.

In this article, we aim to contribute a new dimension to the literature on the mobilisation of hate crime policing policy by examining the distinct opportunities and challenges presented by a police-generated hate crime strategy. Within the context of community policing in Victoria, we identify organisational, relational and operational variables that impact upon the implementation of VicPol's PMC Strategy. This analysis exposes a key distinction in the operationalisation of hate crime policy that we refer to as 'under-inclusive' and 'over-inclusive' approaches. Constrained by the aim of determining offender liability, the former tend to restrict the meaning of hate crime to its prosecutorial elements, excluding many events considered deeply troubling by vulnerable communities. Driven by community concerns about harm and safety, the latter tend to rely upon an amplified understanding of hate crime that is difficult for frontline decision-makers to implement.

Taking an evidence-based approach to policy implementation (Neyroud 2009), we propose a middle ground between these approaches by drawing upon the results of a collaborative research project with VicPol on the implementation of their PMC Strategy. In particular, we advance a series of flexible, rather than prescriptive, markers that provide operational police with a practical guide for identifying PMC. These markers are the product of a two-tiered process of research and analysis. First, although Victoria has not introduced a substantive hate crime offence that can be relied upon to charge suspects, it has enacted discretionary sentencing provisions for offences that are motivated by prejudice. Through extensive searches, the project identified 25 relevant sentencing cases and extracted the core ingredients in the evidence needed to establish PMC beyond reasonable doubt. These judicial interpretations provide a firm foundation and the only legal guidance for law enforcement in Victoria on the definition of PMC. Second, the strictures implicit to this legal definition of PMC are tempered and augmented with lessons learnt from key inquiries and studies into long-standing problems in the policing of marginalised and vulnerable groups in Victoria (the very same groups that are likely to be targeted for PMC). We distil these lessons into the need for recognition, fairness and commitment on the part of police if communities are to develop the confidence and trust to report hate crime. The result of this analysis is a set of legally grounded but community-oriented markers that present VicPol with a framework for negotiating shared understandings amongst its own members, with minority populations and with the broader public about the nature and significance of PMC.

The article begins by outlining the social and legal context for the emergence of the VicPol PMC Strategy, recognising the tension between VicPol's broader commitment to community policing and its vexed relationship with minority populations. The next section draws on implementation literature to consider those aspects of the Victorian situation that are likely to support effective hate crime policing and those aspects which may impede it. We address implementation in three sections; *organisational,* referring to internal organisation aspects; *relational*, referring to the relationship between the police and minority communities, and *operational*, referring to practical policing matters. This analysis reveals the limits of over- and under-inclusive approaches to policing hate crime.

The second half of the article advances the flexible markers we have developed with VicPol to minimise the pitfalls of both approaches. Although the markers are generated in the Victorian context, they have relevance for other jurisdictions by demonstrating that a legally valid but negotiated interpretation of hate crime policy is possible. This attribution of common meaning is particularly salient for marginalised communities that tend to have poor actual encounters with police (Murphy and Cherney 2011) and essential for building trust in hate crime policy.

The PMC strategy: community policing, vulnerable communities and criticism

The need to work with and for communities has become integral to professional police services, merging with crime prevention objectives and problem-oriented approaches to produce a commitment to community engagement (Putt 2010). Like most modern police forces (Oliver 2001), community or neighbourhood policing has thus become a strongly articulated element of policing in Victoria (Pickering *et al.* 2008, Nixon and Chandler 2011). Rather than instituting significant organisational restructure, VicPol has engaged directly with local communities to initiate community-focused practices and partnerships in the pursuit of both crime reduction and higher levels of confidence and trust (Beyer 1993, Murphy *et al.* 2008, Fleming 2010).

Much contemporary operational effort made under the banner of community policing has focused on so-called vulnerable, 'hard to reach' or 'at risk' communities and the most successful initiatives, or those with the most visible impact, appear to be those that target particular groups, defined according to criteria such as age, ethnicity, gender, risk, familiarity and experience of crime (Bartkowiak-Theron and Corbo Crehan 2010; Fleming and McLaughlin 2010). While community policing has the capacity to improve engagement with vulnerable populations, these populations are, of course, classified as such because they are at higher risk of becoming either victims or offenders, or both. For minority communities, especially racial, religious or ethnic minorities, this can manifest as a problem of over- or under-policing. For example, Australian research reveals that both minority and non-minority groups hold the perception that police both unfairly target ethnic groups as potential suspects *and* neglect or trivialise the victimisation of these same communities, undermining the perceived credibility and legitimacy of police (Joudo Larsen 2010, Murphy and Cherney 2011).

In Victoria, the problem of over-policing has manifested in strong criticism that VicPol's community policing initiatives have failed to deliver on the public rhetoric (McCulloch 2001). Community legal centres working with marginalised and racialised young people have consistently challenged VicPol's commitment to community policing, arguing, for example, that police 'community liaison' often operates as intelligence gathering in marginalised communities, deepening distrust of police (Fitzroy Legal Service 2010, see also Sentas 2014). Hopkins (2009) claims that the complaints system in Victoria does not adequately respond to reported incidents of police misconduct, including discrimination and brutality against ethnic minorities. A recent racial discrimination action against VicPol on behalf of a group of African youth (Flemington Legal Service 2013, VicPol Community Consultation 2013) has exposed the concerns of many stakeholders, including indigenous Victorians, for whom over-policing, racial profiling, prejudice and police brutality are significant and long-standing problems (Cunneen 2001, Hopkins 2009).

In 2009, the problem of under-policing was forcefully exposed when a series of violent attacks against Indian nationals studying in Melbourne, Victoria became the subject of widespread Australian and international media attention (Graycar 2010). Although these incidents were understood by the Indian community as part of a larger culture of prejudice and discrimination, VicPol's initial response was to portray them as 'opportunist' crimes, largely for financial gain (Mason 2012). In so doing, they repeated the well-rehearsed mistake of examining each incident in isolation from the larger social processes that rendered it meaningful for the victim community (Bowling 1999). Subsequent research revealed deep levels of dissatisfaction towards police for mis-identifying the drivers of the violence, taking a lethargic response to the perpetrators and failing to recognise the serious impact of the attacks on the newly arrived Indian community (Babacan *et al.* 2010, Graycar 2010). This dissatisfaction culminated in United Nations censure for 'failure by the government and police (both at a state and federal level) to address the racial motivation of these acts' (quoted in Flitton 2010).

An examination of these recent public inquiries and remonstrations exposes three primary concerns and demands (Hopkins 2009, Babacan *et al.* 2010, Fitzroy Legal Service 2010, Graycar 2010, Mason 2012, Flemington Legal Service 2013, Sentas 2014). First is the need for police to *recognise* the racial or prejudiced nature of (at least some) of the hostility directed towards minority communities and to engage in culturally appropriate practices of identification and investigation (the problem of under-policing). Second is the need to move away from practices of racial profiling and hostility at the operational level towards greater respect and *fair* treatment (the problem of over-policing). Third is the call for a public *commitment* from VicPol leadership to challenge organisational values widely seen as insensitive to the needs of minority communities. In other words, minority communities need open lines of communication that facilitate genuine engagement and negotiation with police, not just intelligence gathering. They want their own experiences and perceptions of PMC to be taken seriously. They also want to feel safe from prejudiced abuse – both from police and the mainstream public – and to trust that police will play an active and positive role in helping engender such safety. Securing this kind of trust is imperative if Victoria's minority communities are to gain the confidence to report crime (Hough *et al.* 2010), which comes down to the belief that police will treat their complaints fairly and effectively.

Although VicPol had previously initiated community policing responses to hate crime (Nixon and Chandler 2011), these depictions of their agency as insensitive or hostile towards minority communities were the impetus for the introduction of the PMC Strategy in 2011. Australia has a well-established history of human rights protection but this is the first policing policy to specifically and comprehensively address hate crime. The vision of the PMC Strategy is to develop a 'whole of organisation' response enabling police to tackle prejudice crimes through sustained, integrated and coordinated capacity building (VicPol Prejudice Motivated Crime Strategy 2011, p. 3). The Strategy's explicit aims are to: (1) increase VicPol's understanding of PMC; (2) reduce the incidence of PMC and (3) increase community confidence to report PMC. The policy aims to address the harm of PMC for individuals and communities and to improve VicPol's organisational response through integrated engagement with key community, agency and government stake-holders (VicPol Prejudice Motivated Crime Strategy 2011). This approach is consistent with good practice internationally and mirrors jurisdictions where the recognition and recording of hate crime is a key element of inclusive community policing (e.g. College of Policing 2014, UK).

A distinctive feature of VicPol's PMC Strategy is that it has been introduced in the absence of a legislative imperative to do so. Technically, serious racial and religious vilification is criminalised in Victoria but due to a narrow definition and cumbersome procedural rules there has never been a prosecution in the 13-year history of the offence (Meagher 2006). The effect is that there is no substantive offence that police can rely upon to charge hate crime offenders. In 2009, the Victorian government did, however, respond to public discord about the victimisation of Indian students by enacting discretionary sentencing provisions that make it an aggravating factor at sentencing if an offence is 'motivated (wholly or partly) by hatred for or prejudice against a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated' (s5(2)(daaa) *Sentencing Act 1991*). This sentencing legislation does not provide VicPol with an avenue for charging an offender but it does place an onus upon officers to identity and collect evidence capable of convincing a sentencing court beyond reasonable doubt that an offence was motivated by prejudice or group hatred. VicPol draws its definition of PMC explicitly from this sentencing legislation. The Strategy states:

> A prejudice motivated crime is a criminal act which is motivated (wholly or partly) by hatred for or prejudice against a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated. (VicPol Prejudice Motivated Crime Strategy 2011, p. 2)

Common characteristics are further delineated to include, but are not confined to, 'religious affiliation, racial or cultural origin, sexual orientation, sex, gender identity, age, impairment … or homelessness' (VicPol Prejudice Motivated Crime Strategy 2011, p. 2).

Despite the good will exemplified by the PMC Strategy, VicPol's relationship with minority communities continues to be troubled. Just as the Stephen Lawrence Inquiry and its revelations of institutionalised policing racism had a major impact on community-oriented policies to tackle hate crime in the UK (HM Government UK 2012), so too is VicPol's Strategy the product of some serious deficits, which all too often manifest as over- or under-policing. To be effective, the Strategy needs to function as a significant public relations document that looks externally to facilitate dialogue and partnerships with vulnerable communities at the local level. This is not to ignore the importance of internal practices but simply to say that the Strategy provides police with a unique avenue to build trust with minority communities by sending the message that their concerns are recognised, that their complaints will be treated fairly and that VicPol is committed to working with them towards the development of a shared and negotiated understanding of PMC. The absence of an animating offence in Victoria opens up the opportunity to pursue these community policing objectives without the usual prosecutorial restrictions on investigation; to take the harm of hate crime to victim communities, not just the legal liability of the offender, as a defining feature of PMC. Next we consider the challenges of implementation provided by this opportunity.

Policy into action: implementing VicPol's PMC Strategy

The introduction of a policing strategy for hate crime in the absence of a specific hate crime offence is atypical. Much of the literature assessing policing activity in this field examines the effectiveness of implementing hate crime legislation through policing policy

(Walker and Katz 1995, Bowling 1999, Grattet and Jenness 2005, Oakley 2005, Cronin *et al.* 2007, Chakraborti 2009). There are, however, aspects of this literature that illuminate the variables that impact on the translation of VicPol's policy into action, particularly within a community policing model that seeks to build trust in the eyes of marginalised communities at the same time it remains cognisant, albeit not obliged to follow, a legal definition of PMC. These challenges circulate around organisational matters and police–community relations but coalesce at the operational level to expose the shortcomings of under- and over-inclusive approaches to policing hate crime.

Organisational issues

Scholarship from the USA, UK and the European Union demonstrates that the deployment of internal policing resources is a significant variable in the successful implementation of hate crime policies (Bell 1996, Boyd *et al.* 1996, Martin 1996, Association of Chief Police Officers [ACPO] 2005, Jenness and Grattet 2005, Oakley 2005, Cronin *et al.* 2007). Key ingredients include the existence of a dedicated police group addressing hate crimes, a systematic approach to recording and organisational leadership. As a proactive initiative by police leadership, rather than a response to legislative drivers, VicPol's PMC Strategy certainly helps demonstrate a genuine commitment to organisational values and aspirations for change (Nolan and Akiyama 1999, Perry 2010). Yet, leadership and structure alone are not enough to guarantee effective enforcement as out-dated occupational culture can 'retain a stubborn influence on police practice irrespective of changes to police policy' (Chakraborti 2009, p. 124). Hall (2012) suggests that the most influential element in policing responses to hate crime is the 'operational common sense' of rank and file officers. Towards this end, VicPol's Strategy is supported by recruit training and a strengthening of 'social inclusion' programmes, including liaison positions dedicated to multicultural, gay/lesbian and new/emerging communities (VicPol Gay and Lesbian Liaison Officers 2011, VicPol Community Consultation 2013). This organisational investment is designed to send a clear message of force commitment to the policing of PMC and to embed PMC in 'common sense' objectives of everyday policing activity (Walker and Katz 1995). This is vital if the Strategy is not to be seen as a cynical method of managing criticism or a ploy for intelligence gathering in presumed high crime communities.

The relationship between the police and the community

The relationship between the police and the community is identified as a key ingredient in the effective translation of hate crime policy into policing action (Grattet and Jenness 2008, Perry 2010, Hall 2012). In relation to reporting, which is a central aim of the VicPol Strategy, Grattet and Jenness (2008, p. 518) argue that 'the more an agency is engaged in a symbiotic relationship with the community in which it resides, the more the policy affects reporting'. This is well recognised in some jurisdictions. For example, on the heels of a cross-government action plan which 'frees' police to work more closely with their communities (HM Government UK 2012), recent national guidelines published by the UK College of Policing emphasise the role of community engagement in addressing hate crime (College of Policing 2014). Unfettered by the strictures of successful prosecution as a measurable outcome of the Strategy, VicPol has an unparalleled opportunity to entrench this kind of 'partnership approach' (Perry 2010) to combatting hate crime. This will only be realised if they approach the Strategy as a

vehicle, rather than a hurdle, for consulting directly with those communities where there is a history of long-standing distrust and, in so doing, strive to accommodate their perceptions of harm and safety (as well as detecting and punishing offenders). However, the absence of a direct legislative instrument for policing hate crime does create uncertainty for frontline decision-makers who still need clear, consistent and practical guidance to identify PMC.

Operational issues

Vague or variable terminology and definitions have been recognised as a core challenge in the effective enforcement of hate crime policies, especially creating problems of identification and classification at the operational level (Boyd *et al.* 1996, Cronin *et al.* 2007). This is heightened for VicPol because they appear to be the only policing jurisdiction internationally to consistently use the term PMC (other policing strategies largely rely on the concept of hate crime, such as the London Metropolitan Police Service and Toronto Police, or bias crime, such as the Federal Bureau of Investigation). Traditionally, police rely on a range of filtering mechanisms and rules of thumb to overcome the operational challenge of defining and identifying hate crime (Bell 1996, 2002, Boyd *et al.* 1996, Cronin *et al.* 2007). These reflect quite different strategic goals and produce divergent recording and investigation practices.

Many law enforcement agencies have prioritised the need for greater consistency by adopting standardised procedures for recording and investigation, for example by using checklists to help officers sift facts to assess an offender's motivations (Ontario Hate Crimes Working Group 2007, Alberta Police Services 2010, US Department of Justice, Federal Bureau of Investigation 2012). Such checklists are largely directed towards identifying 'real' hate crime that can lead to successful prosecution. In the USA especially, first Amendment and statutory requirements have generated narrow interpretations that focus on evidence of discriminatory group selection on the part of the offender and avoid the criminalisation and punishment of hate speech, irrespective of the harm to the victim (Boyd *et al.* 1996, Bell 2002, Cronin *et al.* 2007). With some exceptions (Grattet and Jenness 2005), this approach tends to be under-inclusive because it relies upon shortcuts to identify typical non-hate crime scenarios and rule out a range of incidents, such as those where there is a pre-existing relationship between the victim and the offender, those with mixed motives or those that would still have been committed if the victim were of another background. This approach is inappropriate for an agency such as VicPol, where such evidence has no direct bearing on charge, prosecution or conviction itself (yet may still need to be gathered for sentencing purposes).

At the other end of the spectrum, are policing services that have responded to political pressure to give greater emphasis to public sentiment (Fleming and McLaughlin 2010) by classifying events as hate crime largely on victim perception. The UK stands out in this regard. In 2007, the ACPO UK (2010) agreed on a common definition of hate crime as 'any criminal offence which is perceived, by the victim or any other person, to be motivated by a hostility or prejudice' based on a person's race, religion, sexual orientation, disability or transgender (ACPO UK 2010, p. 32). This definition is inclusive of community expectations and broader than any of the statutory definitions used to prosecute hate crime in the UK. This has had a significant impact on increased recording of hate crime (Home Office UK 2012). Only a small proportion of recorded crime, however, comes close to possessing the elements necessary for prosecution (CPS 2012).

Although this 'outside-in' method (O'Connor 2010) of defining hate crime is a better fit for any community policing approach, it risks creating an inflated image of the problem and raising unsustainable public expectations for greater say over the provision of policing services (Fleming and McLaughlin 2010). A large gap between recording and prosecution can sap public confidence by implying that policy statements have little practical impact when it comes to punishing offenders. It can also affect police performance and morale by obfuscating the signs that prompt investigating police to gather evidence of PMC for sentencing purposes. In effect, an 'over-inclusive' approach to the identification of hate crime may undermine the legitimacy of policing policy by severing the connection between the operation of the policy and any legal standard.

In sum, Victorian police need concrete but flexible markers of PMC to effectively implement their Strategy. Under-inclusive checklists geared towards the identification of offender liability for the purpose of prosecution have only limited value for VicPol because prosecutions are virtually impossible in the current legal context. Imposing narrow and prescriptive definitions is likely to encourage officers to exclude 'messy' cases that do not fit a legal category even though they may cause public outrage. This will do little to address the expectations of minority communities for enhanced recognition, fairness and commitment in the policing of hate crime. On the other hand, over-inclusive approaches that give precedence to victim perceptions can exaggerate the nature and extent of the problem as well as create unrealistic expectations, leading to criticism that the PMC Strategy is merely symbolic. Implementation of VicPol's Strategy calls for evidence-based but flexible indicators that enable officers to identify PMC in ways that strike a balance between high community ideals and narrow legal standards. Achieving greater common ground between law enforcement and stakeholder understandings of hate crime is, of course, a desirable goal in jurisdictions beyond Victoria.

Markers of PMC

The project

As part of its commitment to community policing and evidence-based policy implementation (Neyroud 2009), VicPol has a long-standing history of research partnerships with academics in strategic fields of policing. With the introduction of the PMC Strategy, VicPol partnered with a consortium of Australian universities to undertake a three phase study investigating implementation, recruit training and community perceptions of PMC in Victoria (Mason *et al.* 2014). In terms of implementation, the research team ascertained the need to develop a set of markers that can be used by frontline police to interpret and identify potential PMC, including initial recording and subsequent investigation. To avoid the pitfalls of under- or over-inclusive approaches, such markers must be sufficiently flexible to take account of community interests but simultaneously cognisant of robust legal standards. In other words, they should provide a framework or roadmap for negotiating common ground between the need for consistency and certainty in law enforcement and the expectation of communities that their voices and experiences will be heard.

The above discussion points to two forms of evidence with direct bearing on how the concept of PMC can be operationalised into a set of concrete but flexible markers for frontline officers in Victoria: (1) legal interpretations of PMC in Victoria's *Sentencing Act*; (2) inquiries and research that reveal the specific policing needs of Victoria's vulnerable and minority communities in the context of hate crime. First, given that the

definition of PMC in VicPol's Strategy is taken directly from Victoria's *Sentencing Act,* judicial interpretations of this definition provide the logical beginning point – and indeed the only firm legal foundation – for interpreting the meaning of PMC. As two other Australian jurisdictions (New South Wales and the Northern Territory)[1] have a similar sentencing provision the project began by identifying all reported, and available unreported, cases where sentencing courts gave serious consideration to the submission that the offence was aggravated by prejudice or group hatred (in 80% of these cases the court accepted that the offence was motivated by prejudice). We then analysed the nature of the evidence relied upon to establish such a motive beyond reasonable doubt, extracting its core consistent elements. Second, although these judicial interpretations function as authoritative texts on the scope and meaning of PMC (Grattet and Jenness 2001), it would be remiss to allow them to stand as the only attribution of meaning, especially given VicPol's relative autonomy from this legislative framework. We therefore tempered and augmented this legal threshold with the interests and expectations of Victoria's vulnerable and minority communities as identified in recent inquiries and consultations discussed above. The consistent message to emerge from Victoria's vexed history of police-minority relations is that the latter can only develop the trust that is necessary to report hate crime if they are confident that the nature of their complaint will be recognised and met with a fair and respectful response from an organisation committed to social inclusion.

The markers are thus guided by legal standards – and share some characteristics with conventional checklists – but are modified to accommodate reasonable community expectations and the major tenets of inclusive policing. The mapping of this nascent terrain, towards a shared understanding of prejudiced motivated crime, produced five markers related to suspect/victim difference, suspect statements, circumstances of the offence, the absence of other motives and the suspect's history of group victimisation. We consider each in turn below.

Suspect/victim group difference

Consistent with most hate crime checklists, the cases in our study make clear that the suspect and victim in PMC cases usually come from different social or cultural groups (e.g. race, religion, sexual orientation, gender). In 'typical' cases the victim will be from a minority group background and the offender from a majority group background (e.g. African victims and white offenders in *Holloway v R* [2011] NSWCCA 23). International case law suggests that this group difference is not essential for a crime to be classified as a hate crime (*R v White* [2001] EWCA Crim 216), as people can be prejudiced against those from the same background, but such difference should immediately put investigating officers on alert to start asking the right questions. Several complexities arise for frontline decision-makers here.

First, exactly which forms of group difference, or which forms of prejudice, ought to be protected? In many jurisdictions, this question appears settled by the legislature which specifies the characteristics to be protected under the relevant statutory regime, which must then be implemented by law enforcement. However, in the wake of high profile cases where victims were targeted for characteristics not protected by statute, some governments now delegate authority to local area police (HM Government UK 2012) to decide which forms of prejudice will be recognised and recorded as hate crime; for example, alternative subcultures such as 'goths' are now recognised as a victim group in

the Greater Manchester area (Garland and Hodkinson 2014). Victorian police have similar discretion. While the Australian courts have recognised race, ethnicity and religion as protected characteristics, very few cases of violence against gay or lesbian victims have come before the courts and none that involve disabled victims. Clearly, training is required to assist investigating officers to identify these obvious groups as possible victims of PMC and to gather the evidence necessary for the prosecution to establish this kind of a prejudiced motive at sentencing. In contrast, prejudice against women has been included as a form of PMC by the courts (e.g. severely humiliating and demeaning group sexual assault was held to be motivated by gender prejudice in *R v I.D. and O.N.* [2007] NSWDC 51). While this creates a precedent for VicPol to extend its strategy into the field of gendered violence, it also presents a dilemma in terms of the 'floodgate' argument that has been used in other jurisdictions to exclude gendered violence from the category of hate crime (Hodge 2011).

Secondly, PMC can also be committed by members of minority groups against members of majority groups (e.g. Muslim against Christian in *R v Al-Shawany* [2007] NSWDC 141) or by members of minority groups against other minority groups (e.g. African against Indian in *Hussein v The Queen* [2010] VSCA 257 or Sunni Muslim against Shiite Muslim in *R v El Mostafa* [2007] NSWDC 219). Indeed, in approximately two-thirds of the cases in our study, offenders came from racial or religious minority, immigrant or non-English-speaking backgrounds. While recording and investigating such incidents as PMC is consistent with the Strategy's broad commitment to respect for all forms of diversity, this over-representation of minority offenders does put police on notice that investigating officers may be more willing or able to identify PMC when it issues from minority groups.

In a world where the public appetite for state recognition of 'difference' seems limitless (Law Commission 2013), police need principled guidance to identify forms of difference that are most consistent with, and able to further, the objectives of their hate crime policies. This is difficult to achieve through checklists that interpret neutral statutory definitions of PMC to mean that any form of group difference will suffice; a point which was brought home in two cases in our study where sentencing aggravation provisions were applied to protect 'paedophiles' as a victim group (*R v Robinson* [2004] NSWSC 465; *Dunn v R* [2007] NSWCCA 312). Police need to be steered towards a more goal-oriented understanding of suspect/victim difference, not as a matter of benign diversity (e.g. blue versus brown eyes) or vigilantism but, instead, as a sign of existing inter-group animus grounded in larger social problems of injustice; that is, in unfair intolerance, inequality and disrespect towards others because of their assumed difference (Mason 2014). Approaching suspect/victim difference through the lens of injustice orients policing resources towards those communities most vulnerable to hostile discrimination (Bowling 1999, Grattet and Jenness 2008, Perry 2010, Sherry 2010) and furthers the goal of inclusive community policing that provides the incentive for VicPol's Strategy and, indeed, the original impetus for hate crime policing policy in general.

Suspect statements

Insulting, demeaning or abusive statements made directly to the victim or other witnesses are one of the most obvious alerts that a crime is motivated by prejudice. Such statements may be made before, during or after the event. They include verbal remarks, written comments (e.g. graffiti or Internet posts) or may be in the form of symbols

(e.g. swastikas). Examples of statements relied upon by Australian courts as evidence of a prejudice motive include: 'fuck off, Japanese cunt, fuck off back to Japan'; 'Bloody Indians. Fuck off'; 'fucking black cunts' (*R v Dean-Willcocks* [2012] NSWSC 107*; Hussein v The Queen; Holloway v R* [2011] NSWCCA 23).

It is important, however, for police to recognise that such statements are not necessarily proof that the offence is *motivated* by prejudice. The difficulty lies in distinguishing between events where prejudiced statements are: (1) probative of the offender's underlying prejudiced motive (e.g. the offender has no other motive); (2) indicative of partial motive where the offender is motivated by prejudice but also by other motives (e.g. where the offender is driven by generalised anger, intoxication and racism to attack a stranger as in *R v O'Brien* [2012] VSC 592) or (3) merely additional or incidental to the offender's motive (e.g. where the offenders made racist comments having already resolved to rob the victim as in *R v Thomas* [2007] NSWDC 69). Driven by the goal of successful prosecution, under-inclusive guidelines tend to record only the first category. They encourage officers to exclude so-called 'ambiguous' cases (Phillips 2009), such as those where there is a pre-existing suspect/victim relationship (which is common, for example, in disablist hate crime [Sherry 2010]) or where the statements are made in circumstances involving drugs, traffic accidents or neighbours (Bell 1996, 2002). This focus on proving offender culpability fails to recognise cases of mixed motives, much less distinguish them from incidental prejudice. Over-inclusive approaches, such as those that record a complaint as hate crime if the victim or any other witness perceives it to be so, tend to record all three categories as hate crime. Such approaches also fail to distinguish between cases of partial motive or incidental prejudice because police are responding, less to evidence of the offender's motive, and more to public perceptions of the harm that hate speech inflicts on the dignity of the victim and targeted community (Roberts and Hastings 2001).

Police need tools to assist them to make nuanced distinctions between cases where the suspect uses prejudiced or insulting language in the commission of the crime. Events where prejudice is the only or partial motive (below we discuss how partial a prejudiced motive should be) are clearly included in VicPol's PMC Strategy but events of incidental prejudice are more problematic because the offender's language is not necessarily a sign of his or her motive for committing the crime (and insufficient for sentencing purposes) but nonetheless can cause considerable victim and community disquiet. A recording system that enables such distinctions to be made is thus an essential support mechanism for the flexible markers we propose here. For example, a three-tiered system that includes a standard recording category for events where there is compelling evidence of prejudice, such as 'PMC Beyond Reasonable Doubt', as well as a category for 'Suspected PMC' enables operational police to recognise incidental prejudice, boosting public confidence that such complaints are taken seriously, while simultaneously providing investigators with the time to gather evidence to determine whether offender statements are probative of actual motive (Mason and Moran 2014).[2] As other jurisdictions have recognised (ACPO UK 2010), a further category of 'PMC Incident' similarly helps meet community expectations by allowing abusive or hostile encounters to be recorded as 'incidents' even if they are unlikely to amount to a criminal offence.

Circumstances of the offence

The circumstances of the crime should also put police on notice that a prejudiced motive might be involved; if, for example, the crime occurred in a well-known gay area or involved an attack on a religious institution (e.g. where the offender set fire to a mosque in *R v Hanlon* [2003] QCA 75); or if there is evidence of severe violence in circumstances where the victim and suspect are from different social or cultural groups (e.g. where a group of white men violently and repeatedly attacked a group of homeless Aboriginal people with fatal consequences as in *R v Doody* [Unreported, Supreme Court of the Northern Territory, 23 April 2010]). Other factors such as the cultural make-up and history of the neighbourhood, the extent to which the victim is a minority in the area, the date of the incident or the involvement of organised hate groups have also all been identified as relevant circumstances in international checklists that help determine if the crime has a prejudiced flavour (Alberta Police Services 2010, US Department of Justice, Federal Bureau of Investigation 2012). Here, officers must be trained to recognise and draw upon local community knowledge as a crucial form of intelligence (Hall 2012).

The absence of any other substantial motive

Many cases in our study share a feature that is not immediately apparent: the absence of cogent evidence from which another non-prejudiced motive can be inferred. This becomes clear if successful cases are compared to cases where the prosecution's claim of a prejudiced motive was unsuccessful, despite evidence of offender/victim difference and derogatory statements. The difference in these latter cases is that there was also some kind of evidence from which an alternative motive could be inferred. In most cases this evidence pointed to the existence of a pre-existing conflict between the parties that had nothing to do with prejudice (e.g. where a white offender fatally wounded an Aboriginal victim over a driving dispute but made boastful and belligerent racial taunts when the fight was over as in *R v Winefield* [2011] NSWSC 337). Contrary to some checklists (Boyd *et al.* 1996), police should be on alert to start probing in such situations of unexplained inter-group violence, even if there are no accompanying prejudiced statements (e.g. as in *R v Doody* above, where there was no other reason for a group of white men to viscously and repeatedly attack a group of homeless Aboriginal people). Certainly, investigating officers must search for positive evidence of a prejudiced motive but they must also be attuned to the persuasive nature of the *absence* of a clear motive in circumstances where the offence, especially one of severe violence, is committed by a dominant group against a stigmatised or marginalised group.

As we noted above, however, offenders may have more than one motive. Some guidelines, especially for second-level reviewers, prompt officers to ask whether the incident would have taken place if the victim were from the same cultural group (e.g. US Department of Justice, Federal Bureau of Investigation 2012). The effect of this is to exclude all events except those that would not have been committed 'but for' the victim's group membership, that is, to include only events where prejudice is the sole cause of the offence. This is too narrow a marker in the Victorian context – and arguably in many other jurisdictions – where both the PMC Strategy and the sentencing legislation specify that partial motive is sufficient. However, police may need to exercise caution if faced with over-zealous characterisations from vulnerable communities when one of their members is the victim of a crime. Judicial approaches to this issue of proportionality (Mason and Dyer 2013) suggest that officers would be well advised to ask a further

question: did prejudice or hatred make a *substantial* contribution to the offender's motive even if it is not the only motive?

Still, this does not fully resolve those situations where prejudice is a less-than-substantial influence on the offender but the victim remains unconvinced by the seemingly subtle difference between an offender whose 'real' motive is prejudice and one for whom it is just an offensive or insulting afterthought. Rather than adopting an overly-inclusive 'perception test' that mandates police to record an incident as hate crime if the victim or other witnesses believe it to be so, the category of 'Suspected PMC' proposed above allows police to recognise community viewpoints without committing to a final PMC categorisation before further investigation. Here, the work of hate crime specialist teams or second-tier assessors have a critical role to play in evaluating the relevant evidence, taking responsibility for the final categorisation out of the hands of local police who need to maintain effective and open lines of communication with community members and, ultimately, feed the reasons for their decision back to victims. It is too often assumed that victims and communities will be dissatisfied with a police decision to not record or charge a complaint as a hate crime. However, this remains untested. What the research (Bowling 1999, Babacan *et al.* 2010, Joudo Larsen 2010) does show is that communities resent hasty or mechanical declarations by police that the incident is not a hate crime before all of the evidence has been carefully and fairly weighed (e.g. through public statements that it is merely 'opportunistic'). Flexible markers, supported by granulated recording categories, enable police to demonstrate to the public that they neither 'rule in' nor 'rule out' an incident until it has been thoroughly investigated. They prompt police to carefully liaise with victims and witnesses, building common understanding by explaining the evidentiary reasons for their decision. It is counter-intuitive to assume that minority communities will feel safer if more incidents are labelled as hate crime. There is no reason to assume that perceptions of safety cannot be fostered by convincing evidence that an incident was *not* a hate crime.

Offenders with a history of group victimisation

If an offender has a history of choosing victims from the same group or if there is evidence that the victim was chosen because of his/her membership of a particular group this should alert police to investigate the likelihood of prejudice motivation (*R v Gouros* [Unreported, Victorian County Court, 14 December 2009]). As the 'violence against Indian students' issue demonstrated, a spate of targeted incidents can produce community unrest and disorder (with political and economic repercussions) even where some of those victims have been chosen not because of deliberate prejudice but, rather, because of assumptions about their suitability as targets (e.g. because they are believed to carry valuable items worth stealing or to be unlikely to resist). While the drivers (stereotypes of vulnerability rather than intense feelings of animosity) and goals (actuarial rather than symbolic) of such crime mean that they may be more accurately characterised as bias crime than prejudice-motivated crime (Boyd et al. 1996, Sherry 2010), police need to respond sensitively to such patterns of victimisation if they hope to advance community confidence and enhance reporting practices. Recognition that an offender, for example, attacked only Asian victims is thus a good start. On its own, however, such a pattern of offending is insufficient evidence of a prejudiced motive. The cases in our study suggest (*R v Aslett* [2006] NSWCCA 49; *DPP v Caratozzolo* [2009] VSC 305) that officers should also be prompted to ask: *why* did the offender choose a victim from this group?

Are there sufficient signs that this selection was because the offender wanted to harm a member of this group? Again, this further insight is crucial if police are to gather the evidence necessary to avoid over-classification and be in a position to present communities with evidence about the extent to which prejudice is a driving force in their victimisation, paving the way for apposite intervention.

All in all, these markers represent a more nuanced, discretionary and victim-oriented form of guidance than traditional checklists dominated by legislation and the demands of prosecution. They use the standards of law as a threshold, prompting officers to identify not just the evidence needed to successfully sentence an offender for a hate crime but also the processes of harm experienced by community stakeholders in circumstances that may fall short of legal requirements. The 'messy' but socially relevant terrain of atypical victim groups, mixed motives, patterns of group selection and the like are not automatically excluded because they fall into the too hard basket but are actively opened up to police discretion in the implementation of the PMC Strategy. The markers are designed to prompt operational police to investigate further by listening to victims and communities but without the obligation to automatically record an incident as a PMC based on public perception, which can divert attention and resources away from where they are needed most. In juggling legal standards with community experience, the markers are appreciative of both but beholden to neither. Undoubtedly, achieving this balance between under- and over-inclusive approaches sets high demands on frontline officers. In organisational terms, this requires external recognition of the seriousness of the problem and internal commitment to invest in training that equips members with the skills to filter and adjust these markers on a case-by-case basis, encouraging an enhanced appreciation of the larger on-going social processes of victimisation (Bowling 1999). In terms of police–community relations, the markers also provide a useful touchstone for communities to acquire realistic and sustainable expectations for police commitment to the problem of PMC: a blueprint for common understanding that reaches beyond the symbolism of the Strategy.

Conclusion

In this article, we considered the implementation of a recently launched PMC Strategy in the Australian state of Victoria by the state's policing agency, VicPol. Variables identified as impacting on the implementation of the policy within a community policing model include: organisational factors, relating to matters internal to the police such as leadership, training, education and specialist programmes; relational factors, referring to the relationship between police and the community, especially minority communities and; operational factors relating to the practical policing challenges such as definition, identification and recording of PMC. VicPol's initiation of the PMC Strategy gives them an advantage on the organisational front as it demonstrates commitment from senior police. This commitment must be followed up at the relational and operational levels. While the lack of a statutory offence creates uncertainty for defining and recording PMC, the diminution of prosecution and conviction as the ultimate performance indicators creates an opportunity for VicPol to lead the way in the development of legally valid but community-oriented markers for recognising hate crime, thereby avoiding the major pitfalls of under- and over-inclusive approaches to law enforcement: the former are linked to policing which gives undue weight to the goal of prosecution and the latter to policing which gives undue weight to unsustainable community expectations. The evidence that

has utility in the development of such markers is not confined to traditional statistics or formal evaluations (Neyroud 2009) but, as our study demonstrates, extends to the careful synthesis of rigorous legal standards with public experience.

Drawing upon evidence of both legal interpretations and community interests, we developed a series of flexible rather than prescriptive markers to guide frontline decision-makers in the identification of PMC. While echoing alerts and operational checklists in other jurisdictions, these markers are distinctive because they prompt officers to pay attention to the harm that PMC inflicts on victims and communities as well as the evidence needed to establish the criminal culpability of offenders (i.e. they are geared towards community policing ideals not just the delivery of punishment). Towards this end, the markers actively deter members from making an immediate assessment that an incident is or is not a PMC unless the evidence is compelling one way or the other. Such assessments: (1) are damaging to community confidence if hate crime is ruled 'out' prematurely, whether explicitly or implicitly through the use of camouflaging descriptors (such as 'opportunistic'); (2) create long-term problems for data analysis, investigation and public expectations if PMC is ruled 'in' without supporting evidence. The markers are also distinctive because they provide operational police with a triage tool for recognising community perceptions of hate crime *and* minority communities with a framework for understanding the complexities of evidence-based policing, helping build a much-needed sense of fairness.

The markers we have developed through this research do not purport to reflect the existence of a common language between police and minority communities but, instead, provide a balanced set of indicators for the on-going process of negotiation needed to ultimately arrive at such common ground. In particular, evidence of: *suspect/victim difference* prompts police to look for larger warning signs of social relations of injustice, inequality or intolerance; *prejudicial statements* by the suspect encourage police to ask if those statements are probative of motive or merely incidental to it; *circumstances of the offence*, such as extreme violence or symbolic targets, provide a situational context which helps expose the flavour of the crime; *the absence of an alternative motive* is a signal to police that unexplained intergroup violence needs to be examined more closely for evidence of substantial prejudice; and *a history of group selection* on the part of the suspect sounds an alarm for police that they need to ask why these victims were chosen. Supported by a recording system that prompts rather than hinders further investigation, the goal of these markers is not just to arrive at a legally defendable determination but to take victims and communities on the same evaluative path so that the reasons for identifying and classifying an event either way are understood by all parties: to the point that demonstrating that a given incident is not a hate crime is just as comforting to communities, if not more comforting, than demonstrating that it is.

As operational indicators, these markers exhibit organisational commitment to the problem of hate crime that is practical as well as symbolic. Together, they set in train the process for achieving a negotiated definition of PMC that is meaningful to communities but tied to legal standards that are essential for credibility in the eyes of frontline police (and the sentencing courts where relevant). While the markers were developed with one particular jurisdiction in mind, they make an important contribution to the field by demonstrating that it is possible to advance the implementation of hate crime policy through strategies that are responsive to both legal standards and public expectations.

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Notes

1. See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s21A(2)(h); *Sentencing Act 1995 (NT)* s6A(e). Judicial interpretations of these provisions represent the end point of a chain of criminal justice actors, starting with police, and are thus the cumulative product of law enforcement agencies and advisors.
2. At the time of writing, these recording categories are being considered by the New South Wales Police Force for bias crime (Mason and Moran 2014).

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