



New South Wales

Special Commission of Inquiry into LGBTIQ hate crimes

Expert Report
Professor Nicole L Asquith

A. Qualifications and Professional Background

1. My name is Nicole Asquith.
2. I acknowledge that I have read the Expert Witness Code of Conduct in Schedule 7 to the *Uniform Civil Procedure Rules 2005 (NSW)* and agree to be bound by it.
3. I am currently the Chair and Professor of Policing and Emergency Management in the School of Social Sciences within the College of Arts, Law and Education at the University of Tasmania.
4. I also currently hold several other academic positions. These positions are:
 - a. Since August 2020 I have been the Director of the Tasmanian Institute of Law Enforcement Studies (**TILES**). TILES is a research institute that focuses on the study of law enforcement in Australia and has facilitated research into police education, public health, vulnerability, interpersonal violence and critical forensic studies. TILES works closely with Tasmania Police and Victoria Police in relation to police education.
 - b. Since 2014 I have been the co-director of the Vulnerability, Resilience and Policing Research Consortium (**Consortium**). The Consortium brings together scholars and practitioners to address policing practices that make both victims and offenders vulnerable in the criminal justice system.
 - c. Since 2014 I have been a Research Associate with Sexualities and Genders Research (**SaGR**) at Western Sydney University. SaGR is an interdisciplinary organisation that brings together academics across disciplines with expertise in sexuality and gender.
 - d. Since August 2020 I have been a Board Member of the Academic Governance Board and Executive Leadership Course Advisory Committee with the Australian Institute of Police Management (**AIPM**). AIPM is an educational organisation that focuses on the education of senior employees within emergency, law enforcement and public safety organisations including the police.
5. Over the course of my career, I have held a number of positions both inside and outside academia. In around 2005, shortly after I completed my PhD on the role of hate speech in hate crime, I started working as a Policy Officer with the Australasian Police Multicultural Advisory Bureau (**APMAB**). APMAB was an advisory bureau to Commissioners of Police in Australia and New Zealand police on multicultural issues.

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6. In 2006, I was appointed as a Lecturer in the School of Sociology at the University of Tasmania (UTas). Initially I was responsible for the creation of a new degree program in Ageing and Social Planning, and later transferred to the School of Government to take up a short-contract of employment in Policing.
 7. In January 2009, I began working as a Senior Lecturer in Applied Criminal Justice Studies at the University of Bradford in the United Kingdom.
 8. In 2011 I was employed as a Senior Lecturer at UTas. It was in this role that I began to teach police officers directly, because the unit I was teaching was for police recruits.
 9. Between 2012 and 2014 I was employed as a Senior Lecturer in Criminology at Deakin University in Victoria.
 10. Between 2014 and 2020 I was employed as an Associate Professor in Policing and Criminal Justice at Western Sydney University.
 11. In 2020 I commenced my current role at UTas. Annexed to this report and marked "A" is a copy of my Curriculum Vitae.

Teaching commitments

12. I have taught undergraduate and postgraduate students, and supervised Masters and PhD students, in the fields of criminal justice, criminology, policing, and sociology since 1997 and across all the universities I have worked at, although I have not consistently been supervising PhD students over that entire period.
13. My current undergraduate teaching commitments involve teaching into the Tasmania Police Recruit Training Program, which is integrated into the Associate Degree of Social Science (Policing Practices) coordinated by the Policing and Emergency Management team at UTas. Since 2010, Tasmania Police have partnered with UTas to integrate evidence-based learning into its police training, both at the recruit level and for serving officers. Currently within Australia only two States partner with universities to train police officers in this way, the other State being NSW, which partners with Charles Sturt University.
14. Tasmania Police recruits are required to complete 15 units of a 24-unit degree in a Bachelor of Social Science (Police Studies) while undergoing their Tasmania Police training. At the completion of all of the units, UTas confers an Associate Degree in Social Sciences (Policing Practices) on the recruits. There are also other programs available through UTas for police

officers who are already serving in the Tasmania Police, depending on their rank, which terminate in a Bachelor degree for Sergeants, and a Professional Honours degree for Inspectors (the latter of which is also taught with Victoria Police). For this reason, all of my current undergraduate students are serving or trainee police officers.

15. The unit that I teach into the Tasmania Police Recruit Training Program is called PEM105 Strategic Communication, Conflict Resolution, and Leadership. I do not teach operational skills; rather, I teach police officers to think critically from within the disciplines of criminology and sociology. The purpose of this unit is to enable police officers to recognise basic social patterns and behaviour including introducing some foundational concepts such as what is crime and debunking assumptions about which people are likely to commit crimes. We also teach police officers to understand and interpret crime data and statistics.
16. The purpose of mandating a degree program like this is to ensure that right from the very beginning of their careers police officers start to engage in evidence-based policing. This accords with the current trend in policing generally which is towards a much more evidence-based practice.
17. Currently, one out of my nine higher degree students (PhD and masters), is also a police officer. That particular student serves in the Maldives Police Service. In the past, some of my higher degree students have also been police officers.

Research, publications, and projects

18. In my academic career, I have published 96 books, journal articles, book chapters, reports, and other resources relating to a range of sociological, criminological, victimological, and policing research. Just over half of these publications have related to hate crime or violence against LGBTIQ people specifically. The most important of these publications for this inquiry are (in reverse date order):
 - a. Derya Iner, Gail Mason and Nicole L Asquith, 'Expected but not accepted: Victimisation, gender, and Islamophobia in Australia' (2022) 28(3) *International Review of Victimology* 286-304.
 - b. Derya Iner et al, 'Graffiti, arson, death threats: new research finds widespread violence against Australian mosques', *The Conversation* (online), 15 March 2021 <<https://theconversation.com/graffiti-arson-death-threats-new-research-finds-widespread-violence-against-australian-mosques-156843>>

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- c. Ryan Thorneycroft and Nicole L Asquith, 'Unexceptional violence in exceptional times: Disablist and ableist violence during the COVID-19 pandemic' (2021) 10(2) *International Journal for Crime, Justice and Social Democracy* 140-55.
 - d. Brooke Brady et al, 'Fear of Heterosexism Among Sexuality and Gender Diverse Staff and Students' (2022) 37(3-4) *Journal of Interpersonal Violence* NP1908-38.
 - e. Gail Mason and Nicole L Asquith, 'Islamophobia and Hate Crime' in Derya Iner (ed), *Islamophobia in Australia* (Islamophobia Register, 2019).
 - f. Christopher Fox and Nicole L Asquith, 'Measuring the Tangible Fear of Heterosexist Violence' (2018) 33(6) *Journal of Interpersonal Violence* 980-1007.
 - g. Ryan Thorneycroft and Nicole L Asquith, "'Figurehead' hate crime cases: Developing a preliminary model and exposing the 'problem' with 'disability'" (2017) 31(3) *Continuum*, 482-94.
 - h. Nicole L Asquith 'Honour, Violence & Heteronormativity' (2015) 4(3) *International Journal of Crime, Justice and Social Democracy* 73-84.
 - i. Ryan Thorneycroft and Nicole L Asquith, 2015, The Dark Figure of Disablist Violence, *Howard Journal of Criminal Justice*, 54(5), pp. 489-507.
 - j. Nicole L Asquith 'A Governance of Denial: Hate Crime in Australia and New Zealand' in Nathan Hall et al (eds), *Routledge International Handbook on Hate Crime* (Routledge, 2014) 174-90.
 - k. Nicole L Asquith, *The Role of Verbal-Textual Hostility in Hate Crime Regulation* (Final Report, London Metropolitan Police Service, 2013).
 - l. Nicole L Asquith, 'Vulnerability and The Art of Complaint Making' in Isabelle Bartkowiak-Théron & Nicole L Asquith (eds), *Policing Vulnerability* (Federation Press, 2012) 147-64.
 - m. Nicole L Asquith, 'Verbal and Textual Hostility in Context' in Neil Chakraborti (ed), *Hate Crime: Concepts, Policy, Future Directions* (Willan Publishing, 2010) 99-123.
 - n. Nicole L Asquith, 'The Harms of Verbal and Textual Hatred' in Paul Iganski et al (eds), *Hate Crimes: The Consequences of Hate Crime Vol. 2* (Praegar, 2019) 161-73.

- o. Nicole L Asquith 'Race Riots on the Beach: A Case for Criminalising Hate Speech?' (2018) *6 Papers from the British Criminology Conference - Criminological Futures: Controversies, Developments and Debates* 50-64 <<http://handle.uws.edu.au:8081/1959.7/546091>>/.
 - p. Nicole L Asquith, *The Text and Context of Malediction: A Study of Antisemitic and Heterosexist Hate Violence* (VDM Verlag, 2008).
 - q. Nicole L Asquith, 'Speech Act Theory, Maledictive Force and the Adjudication of Vilification in Australia' in Jason Ensor, Iva Polak and Peter Van de Merwe (eds), *New Talents 21C: other contact zones* (Network Books, 2007) 179-88.
 - r. Nicole L Asquith, 'in terrorem: "with their tanks and their bombs, and their bombs and their guns, in your head"' (2004) 40(4) *Journal of Sociology* 400-16.
 - s. Nicole L Asquith, 'Responding to Heterosexist Hate: A Gender Critique of Coalitionist Strategies in New South Wales' (2002) 11 *Women against Violence Journal* 43-7.
19. I am currently in the process of writing a further book that has the working title "Propinquitous Policing" about building affinities between police and communities in rural and remote areas. In the course of researching for this book I conducted ethnographic research with frontline police officers, which involved shadowing them in their work, including during patrols.
 20. Many of the books and other publications that I have authored address the issue of how the police engage with "vulnerable people". The term vulnerable is a relatively loose one and is often used to refer to those people with characteristics protected by hate crime legislation in any particular jurisdiction. When I have used this term, I have usually intended for it to encompass LGBTIQ people unless there is any indication to the contrary. A large portion of my research over the past 25 years, and a number of research projects that I have been involved in, relates to police encounters with vulnerable people. I have also co-authored or edited three books on this subject: *Policing Vulnerability* (Federation Press, 2012), *Policing Encounters with Vulnerability* (Palgrave, 2017), and *Policing Practices and Vulnerable People* (Palgrave, 2021). I am also the co-author of the criminological theory textbook, *Crime & Criminology*, currently in its seventh edition.
 21. Another focus of my work is the role of hate speech in hate crime. Since the mid-1990s I have conducted research in Australia and the United Kingdom (UK) on the role of hate speech in hate crime, and the forensic evidence of hate crime motivation such as verbal and textual hostility communicated before, during, or after a crime or incident. This included an analysis

of 100,000 hate crime cases reported to the London Metropolitan Police Service (**MPS**), which enabled an inferential data analysis of the models of hate crime and hate speech.¹

22. In that research, I was able to create a typology of hate speech themes (interpellation, pathologisation, demonisation, sexualisation, criminalisation, expatriation, and terrorisation), which correlated with a range of hate crime characteristics (such as location, type of violence, and relationship between perpetrator and victim). I found that there was a direct relationship between the verbal/textual hostility and the type of crime committed during or after that verbal/textual hostility.
23. In 2016, I was contacted by Geoff Steer from the New South Wales Police Force (**NSWPF**) Bias Crime Unit to discuss how the MPS research findings could be used in developing a hate crime risk assessment tool.
24. In 2018, Geoff Steer, Professor Gail Mason and I established the Australian Hate Crime Network (**AHCN**). Whilst this name had existed for much longer as a clearinghouse hosted by the University of Sydney under the direction of Professor Mason, from 2018, the AHCN convened an interagency network (see below for more details on the AHCN).
25. In 2020, the AHCN under the auspice of Professor Gail Mason and the University of Sydney received funds from the City of Sydney to develop a website and Online Guide to Understanding and Reporting Hate Crime and Hate Incidents. This site can be accessed at the following URL: <https://hatecrime.com.au/>
26. During the course of my career, I have also researched issues affecting the LGBTIQ community, particularly in the context of intimate partner and family violence, as well as heterosexist and cissexist violence. Some of the key publications generated from this research include (in reverse date order):
 - a. Eloise Layard et al, 'LGBTQ+ people's experiences and perceptions of sexual violence' (Research Summary Report, ACON, 2022).
 - b. Angela Dwyer and Nicole L Asquith, 'LGBTIQ Tasmanians and Tasmania Police' (Tasmanian Department of Police, Fire, and Emergency Management, 2021).

¹ Nicole L Asquith, The Role of Verbal-Textual Hostility in Hate Crime Regulation (Final Report, London Metropolitan Police Service, 2013).

- c. Nicole L Asquith et al, 'Home is where our story begins: A study of CALD LGBTQ people's relationships to family' (2019) 31(3) *Current Issues in Criminal Justice* 311-32.
 - d. Nicole L Asquith et al, 'Introduction: Queer(y)ing Justice' (2019) 31(3) *Current Issues in Criminal Justice* 305-10.
 - e. Nicole Asquith, Angela Dwyer and Paul Simpson, 'A Queer Criminal Career' (2018) 29(2) *Current Issues in Criminal Justice* 167-80.
 - f. Nicole L Asquith, Vanessa R Panfil and Angela Dwyer, 'LGBQ People and Social Justice' in Cliff Roberson (ed), *Routledge Handbook of Social, Economic, and Criminal Justice* (Routledge, 2018) 168-86.
 - g. Jess Rodgers, Nicole L Asquith and Angela Dwyer, 'Cisnormativity, criminalisation, vulnerability: Transgender people in prisons' (Briefing Paper No 12, Tasmanian Institute of Law Enforcement Studies, 2017).
 - h. Nicole L Asquith and Christopher Fox, 'No Place Like Home: Honour, Heteronormativity and Hate Crimes' in Angela Dwyer et al (eds), *Queering Criminology* (Palgrave, 2016) 163-82.
 - i. Nicole L Asquith and Christopher Fox, 'Be Proud Tasmania' (Technical Report, Working It Out, TasCHARD, Tasmanian Gay and Lesbian Rights Group, 2012).
27. I have also been involved in a number of projects concerning the LGBTIQ community. In around 1996 to 1998, I was the Co-Convenor of the Mary's Place Project. This project involved the creation of a memorial at the site of a brutal bashing and rape of a woman called Mary, in Floods Lane in Darlinghurst, after she attended a female-only lesbian night at Kinselas nightclub. The purpose of the project was to reclaim the laneway for Sydney's LGBTIQ community.
28. In 2018 to 2020 I was engaged as a Research Consultant by Tasmania Police to evaluate the relationship between LGBTIQ+ Tasmanians and Tasmania Police. More recently, over 2021-2022 I have worked with ACON (in conjunction with other academics) to conduct research into LGBTQ Communities and Sexual Violence.

Other work in the field of hate crime

29. From 1994 to 1997, I was employed by the Lesbian and Gay Anti-Violence Project as the Client Advocate (and later, as the Client Manager) for victims of hate crime. I supported hundreds of

victims of cissexist and heterosexist hate crime to report to the NSWPF and also liaised with other government agencies to both prevent hate crime and protect victims.

30. In 2009 to 2010, I was a Group Member of the International Expert Advisory Group (Hate Crime) for the Victoria Police. The purpose of this group was to discuss how to proceed with policing practices and help develop legislation concerning hate speech and hate crime. This group was eventually disbanded when the Victoria Police established the Priority Communities Unit, which took over a lot of that work.
31. In 2009 to 2010 I was a Hate Crime Scrutiny Panel Member for the West Yorkshire Police in the United Kingdom. There were different panels for different types of hate crimes and each of these panels met on a particular schedule. For example, the panel that dealt with race hate crimes met monthly but the panel that dealt with LGBTIQ hate crimes met quarterly.
32. This work involved attending meetings with other group members (there was a group of about 8 of us) and the police would come with a box of files of all the hate crimes that were reported in that period and one of the members would take a file at random and go through the case file, talking about what went well and what didn't go well and whether the result was positive or negative. These reviews occasionally reported back to police that the crime was not actually a hate crime. At the end of these meetings feedback would be given to the officers in charge. At the next meeting we would receive a report about what was done as a result of our feedback.
33. In 2022, I became the Co-Convenor of the Tasmanian Prejudice Related Violence Working Group. This is a very new group that was only set up last year in response to a series of hate crimes in Tasmania. A colleague approached me about bringing together interested parties. Currently, the membership of this group is at around 30 people from a range of targeted communities. The purpose of the group is multifaceted but one of them is to lobby for law reform.
34. I am currently the Convenor of the AHCN. Although the AHCN was formally established as an interagency organisation in 2019, I have been involved with the AHCN since 2018. Between 2018 and 2022 I was the Secretary of the AHCN. The AHCN was originally auspiced by the University of Sydney under the direction of the Founding Convenor, Professor Gail Mason. Since Professor Mason's retirement from academia, the leadership and management of the Network has moved to the Tasmanian Institute of Law Enforcement Studies at UTas.

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35. The AHCN is a partnership of non-government and government agencies, and academics, that develops priorities and outcomes addressing and preventing hate crime and hate incidents in Australia. It aims to improve understanding, reduce incidence, and minimise the impact of hate crime and hate incidents in Australia. The AHCN's membership of 75 individuals includes representatives from targeted communities, scholars, and some government agencies.
36. The AHCN's Terms of Reference include:
- a. provide leadership, advocacy and support for state and national government responses to hate crime and hate incidents;
 - b. provide an educative and advisory role to key agencies and services on preventing and responding to hate crime and hate incidents;
 - c. enhance community awareness of hate crime and hate incidents, and encourage reporting, help seeking and access to available resources;
 - d. monitor and review patterns in hate crime and hate incidents;
 - e. advocate for improvement in data collection, law enforcement and criminal justice responses; and
 - f. collect and distribute relevant current research and knowledge on hate crime and hate incidents.
37. The main priorities of the AHCN are to:
- a. conduct state and national advocacy to support a coordinated policy, project, and reform agenda for the government and non-government sectors to address the problem of hate crime and hate incidents;
 - b. establish an effective and well-resourced hate crime unit in Australian policing organisations based on international evidence of good practice;
 - c. provide resources for data collection capable of advancing current understanding of and responses to hate crime and hate incidents;
 - d. investigate the establishment of third-party reporting systems including an online reporting facility for victims to report hate crime and hate incidents, hosted by an independent organisation in partnership with policing organisations; and

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- e. provide strategic support to build community capacity to understand and address hate crime and hate incidents in NSW.
38. In 2021/22, the AHCN was funded by the City of Sydney to create the www.hatecrime.com.au website, which is a clearinghouse for community and victim resources relating to hate crime. Core resources have been translated into six community languages, and the website is available in 26 community languages.
39. My roles in the AHCN, along with over two decades of academic research in the areas of hate crime and LGBTIQ people’s experience of violence—and my early career as a hate crime victim advocate which I discuss further below—makes me one of the leading international experts on hate crime victimisation and policing.
40. Not only do I have a working and scholarly knowledge of heterosexual and cissexist hate crime, but I have also conducted research and published widely on other forms of hate crime (antisemitic, Islamophobic, racist, and ableist), which has invested me with the skills to recognise shared patterns of hate crime victimisation across targeted communities, and to identify the unique characteristics of heterosexual and cissexist hate crime.
41. My academic knowledge is fortified by work and experience in frontline service delivery to victims of hate crime. From 1995-1997, I worked as a Client Advocate (and later, Client Manager) at the Lesbian and Gay Anti-Violence Project (**LGAVP**) receiving reports of hate crimes and hate incidents. During my time at the LGAVP we received on average 200-300 reports per year of hate crimes and hate incidents. Many of these hate crimes and hate incidents were never reported to the police because those reporting these incidents didn’t feel safe doing so. The type of reports we received ranged from being called derogatory names on the streets to quite serious assaults. I believe that this non-academic work experience informs my academic work on hate crime and assists me to understand the complexity of hate crime.

Strike Force Parrabell Tender

42. I first heard about SFP when I was invited to attend an *Operation Parrabell* briefing at the Surry Hills police station on 1 December 2015, as part of a group of interested parties and stakeholders. The purpose of this briefing was for the NSWPF to provide us with an overview of their findings in relation to about eight of the cases that the NSWPF had reviewed. Annexed to this report and marked “**B**” is a copy of an invitation I received to this briefing.

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43. On 27 January 2016, Dr Angela Dwyer and I were contacted by email by Jacqueline Braw of the NSWPF, who asked if we would be interested in the role of academic reviewer of the work of Strike Force Parrabell (**SFP**). On 11 February 2016, Dr Dwyer and I submitted a draft contract brief for the proposed work on SFP. That email chain is annexed to this report and marked “**C**”.
44. Over the ensuing several months, it was my understanding based on conversations with Jacqueline Braw that the NSWPF needed to obtain quotes from three tenderers. Later, on 22 July 2016, I received by email from Jacqueline Braw an invitation to tender for the academic review of SFP, attaching a “Request for Tender” and a “Supply Agreement”. Annexed to this report and marked “**D**” is a copy of the Request for Quotation sent to me by NSWPF. My understanding, based on prior conversations with Jackie Braw from the NSWPF, was that the NSWPF was having some difficulty finding three tenderers for the academic review and I recall asking Associate Professor Angela Dwyer if she knew anyone else who worked in the field. Associate Professor Dwyer recalled that an Associate Professor Derek Dalton had done some work in relation to policing and gay beats. I recall giving Jackie Braw Associate Professor Dalton’s name around the middle of 2016 as a person who had done some work in the field but at that stage, I knew very little about Associate Professor Dalton and I had no familiarity with him or his work.
45. In around August 2016 I submitted a tender to conduct the academic evaluation of the SFP review, together with Associate Professor Dwyer. That tender outlined our proposed methodology for undertaking the SFP review. At the time of submitting the tender, we anticipated we would assess the SFP cases as against the NSWPF Bias Crime Standard Operating Procedures and also possibly against the hate crime assessment tool used by the MPS. Associate Professor Dwyer and I also anticipated that, consistent with the Request for Quotation that was sent to us by the NSWPF, we would review the original source materials used by SFP where required. Annexed to this report and marked “**E**” is a copy of our tender brief submitted to the NSWPF.
46. Our tender was ultimately unsuccessful. I believe that we were informally notified by Jackie Braw that we were unsuccessful due to what was perceived as a lack of independence—from the NSWPF, from ACON, and from Professor Stephen Tomsen, who was also employed by Western Sydney University (**WSU**) at that time. A formal notice that we were unsuccessful in our bid for this work may have been sent to the Research Office of WSU.

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47. The fact that Associate Professor Dwyer and I tendered for the work of reviewing the SFP report and that we were unsuccessful in that tender has not affected the opinions I have expressed in this report.

B. Preparation of this report

1. I have been asked to provide a report addressing certain questions to the Special Commission of Inquiry into LGBTIQ Hate Crimes (**Inquiry**). Annexed to this report and marked “F” is a copy of my letter of instruction from Mr Enzo Camporeale dated 11 October 2022 (**Letter of Instruction**).
2. The Letter of Instruction identified 7 questions that I have been asked to answer. These questions are as follows:
 1. *Please outline the origins and use of the Bias Crime Indicators contained in the BCIF, whether in this country or overseas, including any literature that has evaluated or critiqued those indicators.*
 2. *In relation to bias crime, or hate crime, against LGBTIQ people, what do you consider to be the appropriate indicators in that particular context and why?*
 3. *What is your view as to the appropriateness of the methodology used by the Strike Force Parrabell officers, including the use of the BCIF, having regard to the objectives of the Strike Force (as to which see assumptions 3, 4 and 5 above)?*
 4. *What is your view as to the appropriateness of the different methodology used by the academic team, having regard to those objectives?*
 5. *What are the other ways and/or models of which you are aware, in which bias crime has been, or may be, identified and/or documented and/or characterised and/or analysed, whether in Australia or overseas? If there are any relevant differences between models of identifying and analysing bias crime available today and those available in 2015-2018 when Strike Force Parrabell was carrying out its work, please include a discussion of those differences.*
 6. *Please outline the more widely accepted views to be found in the literature relating thereto, including whether any consensus has evolved or is evolving.*
 7. *Please outline the history and development, both in Australia and overseas, of the use of the terms “bias crime” and “hate crime”, and/or related language, in relation to offences against LGBTIQ people, and provide your views as to what terminology is preferable and why.*

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3. The Letter of Instruction enclosed the following documents which I have read and considered:
 - (1) The Inquiry's Terms of Reference;
 - (2) The SFP Final Report;
 - (3) The Coordinating Instructions for SFP (**Coordinating Instructions**);
 - (4) A joint written submission, dated 5 November 2018, by Professor Willem de Lint and Associate Professor Derek Dalton of Flinders University to the Standing Committee of the NSW Legislative Council;
 - (5) The transcript of the joint oral testimony of Professor de Lint and Associate Professor Dalton to the Standing Committee of the NSW Legislative Council on 28 November 2018;
 - (6) An academic article by Professor de Lint and Associate Professor Dalton entitled 'Anatomy of Moral Panic: The "List of 88" and Runaway Constructionism' (2021) 29 *Critical Criminology* 723 (published online 31.7.20); and
 - (7) A document authored by McLaughlin *et al* entitled *Responding to Hate Crime: A Multidisciplinary Curriculum for Law Enforcement and Victim Assistance Professionals* (Report, US National Centre for Hate Crime Prevention, Education Development Centre, 2000)).
 4. On 31 October 2022 I received a further letter of instruction from Mr Camporeale which enclosed further material for the purposes of preparing this report. Annexed to this report and marked "G" is a copy of my letter of instruction from Mr Enzo Camporeale dated 31 October 2022 (**Further Letter of Instruction**). The Further Letter of Instruction enclosed the following document which I have read and considered:
 - (1) The joint statement of Professor Willem de Lint and Associate Professor Derek Dalton dated 28 October 2022.
 5. To the extent that I have relied upon any other document in this report, I have identified that document in the body of this report or in a footnote.
 6. In preparing this report I have adopted the following assumptions, which were contained in the Letter of Instruction:
 - (1) In or about 2015, the NSWPF established SFP.
 - (2) SFP was a successor to "Operation Parrabell", which had commenced in about 2013.

- (3) SFP was established to review a list of 88 previously investigated deaths of persons, between 1976 and 2000, to determine if a “sexuality or gender bias” was a contributing factor”: Coordinating Instructions, p 2.
- (4) Elsewhere in the Coordinating Instructions (at pp 2 and 3) and in the SFP Final Report itself (e.g. at pp 17-20), other terms were used besides “sexuality or gender bias”, including “gay hate crimes”, “bias crime” and “anti-gay bias”, as also indicating the objective or purpose of the Strike Force.
- (5) SFP was to review matters that had already been investigated by the NSWPF. It was not to, and did not, reinvestigate any matters. It did not contact any witnesses, suspects or family members. Rather, it reviewed written “holdings” from NSWPF files. Its aim was to arrive at a determination as to whether any of the 88 deaths were in fact motivated by an “anti-gay bias” (or the like), rather than identifying and prosecuting offenders.²
- (6) Various officers from the NSWPF were seconded to SFP over an 18-month period.³ The names and ranks of those officers are at p 6 of the SFP Final Report.
- (7) NSWPF engaged academics from Flinders University (the academic team) to conduct a review of the work of the Strike Force.⁴
- (8) Pages 1 – 46 of the SFP Final Report comprise the report of the Strike Force officers, while the longer part of the SFP Final Report, at pages 47 – 133, consists of the academic review by the Flinders University academic team.
- (9) In conducting their review of the cases, SFP officers used a “Bias Crime Indicators Form” (**BCIF**), said to be used by the NSWPF Bias Crime Unit.⁵
- (10) That BCIF Form is set out in full at pp 4-13 of the Coordinating Instructions.
- (11) According to the Coordinating instructions (pp 3-4 and footnote 1), and the SFP Final Report itself⁶ (see pp 67-70 within the academic review section of the Report, and footnote 20 thereto):

² NSW Police Force, Strike Force Parrabell Coordinating Instructions 3, 14; NSW Police Force, Strike Force Parrabell Final Report (Report, 2018) 19-22.

³ NSW Police Force, Strike Force Parrabell Final Report (Report, 2018) 20.

⁴ Ibid 21.

⁵ NSW Police Force, Strike Force Parrabell Coordinating Instructions 3-4; NSW Police Force, Strike Force Parrabell Final Report (Report, 2018) 20-1.

⁶ NSW Police Force, Strike Force Parrabell Final Report, above n 3, 67-70.

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- i. Indicators 1-9 in the BCIF had been derived from the US document authored in 2000 by McLaughlin et al (document 7 above), while
 - ii. Indicator 10 (as to “Level of Violence”) had been developed by the NSWPF Bias Crime Unit.
 - (12) The methodology employed by the Strike Force officers, including their use of the BCIF, was set out at pp 3-4 of the Coordinating Instructions and at pp 19-22 of the SFP Final Report. It was the subject of comment by the academic team at pp 65-70 of the SFP Final Report.
 - (13) In respect of each of the cases considered by SFP:
 - i. the BCIF form was completed by one or more of the police officers who comprised the Strike Force, in the sense that the 10 sets of “prompts” and “indicators” in the left hand column of the form were answered in writing in the right hand column;
 - ii. such police officers were of varying ranks and experience;
 - iii. such answers, and thus such completed BCIF forms, were of varying lengths and composition;
 - iv. the answers to such “prompts” and “indicators”, in each particular case, were composed by whichever SFP officer or officers was or were assigned to that case, derived from the views formed by such officer/s in the light of their reading of whatever historical files were available in that case; and
 - v. in all or most completed forms, there was a final box headed “Summary of Findings”, in which the assigned SFP officer/s ascribed one of four possible descriptors to the case, namely either “Evidence of bias crime”, or “Suspected bias crime”, or “No evidence of bias crime”, or “Insufficient information”.
 - (14) In Recommendation 3, the SFP officers expressed the view that “the current system with 10 bias crime indicators” was “not user friendly for operational police”.⁷
 - (15) The academic team expressed reservations about the BCIF tool used by the NSWPF.⁸

⁷ Ibid 39.

⁸ Ibid 68-71.

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- (16) The academic team used a different methodology, as outlined by them at pp 56-58, 70-71 and 79-91 of the SFP Final Report.
- (17) The academic team created and applied their own definition of “bias”.⁹
- (18) The academic team then categorised bias crimes based on whether they were:
- i. “proactive” or “reactive”, and
 - ii. “associative” or “non-associative”.¹⁰
- (19) On 5 November 2018, Professors De Lint and Dalton made a joint written submission (document 4 above) to the Standing Committee of the NSW Legislative Council on Social Issues, which was conducting an Inquiry into Gay and Transgender Hate Crimes between 1970 and 2010 (the Parliamentary Committee), in which they said, among other things:
- “There are difficult questions to be asked when assessing whether an incident is a bias crime and quite often investigators do not have the information to answer them” – at [3.4];¹¹
 - “The tool used by the NSWSP, the Bias Crime Indicators Review Form (BCI[R]F), draws its ten indicators from the National Centre for Hate Crime Prevention ... It leaves too much discretion and does not rank or prioritise among the indicators and is being discontinued by the NSWSP”;¹²
 - “[W]e designed a simple three-part test of bias is as follows. Bias crime: expresses a categorical animus (directed at a person or group on the basis of his/her perceived identification with a vulnerable group); produces an act that intentionally, by way of criminal predation on the basis of that categorical animus, causes harm to that person or group; is mitigated or aggravated by an offender’s contemporaneous associations that are linked by a commitment of denunciatory non-identification with the vulnerable person or group”.¹³

⁹ Ibid 82-3.

¹⁰ Ibid 88-90.

¹¹ Willem de Lint and Peter Dalton, Submission to the Standing Committee of the NSW Legislative Council on Social Issues, *Inquiry into Gay and Transgender Hate Crimes between 1970 and 2010*, 5 November 2018, [3.4].

¹² Ibid [3.6].

¹³ Ibid [3.8].

(20) On 28 November 2018, Professors De Lint and Dalton gave joint oral testimony (a transcript of which is referred to at 3a above) to the Parliamentary Committee, in the course of which they made statements to the following effect:

- At p 11 – that the material with which the academic team was provided, and on which they based their analysis, consisted of “case summaries” (which the Inquiry at this stage, subject to any later clarification, understands to be a reference to the completed BCIF questionnaires with the ten sets of “prompts” and “indicators”) created by the Parrabell police officers (in 2015-16);
 - At pp 11-12 and p 14 – that the academic team did not look at any of the primary documents which “sat behind” those summaries;
 - At pp 10, 14 – that the academic team looked at the case summaries “to determine whether or not the attribution of bias that was provided (by the Parrabell officers) made sense to us”;
 - At p 15 – that the police did not attempt to ascertain whether other homicides in the relevant period, beyond the list of 88, might be gay bias related; and
 - At pp 17-18 – that the academic team treated cases of anti-paedophile bias (where in their view that was indicated, from the case summaries) as separate and distinct from anti-gay bias.
7. To the extent that I have made any other assumption in this report, I have identified that assumption in the body of this report.
8. Finally, the Letter of Instruction also enclosed the Expert Witness Code of Conduct contained in Schedule 7 to the *Uniform Civil Procedure Rules 2005* (NSW). I have read this document and agree to be bound by it.

C. Definitions

48. Before addressing each of the questions put to me by the Inquiry, I want to first clarify a few terms, concepts, and phrases I will use in this report.

“Hate crime” and “hate speech”

49. First and foremost is the term, “hate crime”. While this term has some face validity in some contexts in Australia, it is not a term used in all contexts across Australia—and it was not used within the NSWPF at the time of SFP.

50. In Australia, the phrases “bias crime” and “prejudice-related crime” are used interchangeably with the term “hate crime”. In part, the different use of language in this area is a result of the confusion and difficulty in measuring an emotion such as hate.

51. In my own experience initiating the Tasmanian Prejudice-Related Violence Working Group in 2021, several communities including the palawa (Tasmanian Aboriginal) people of lutruwita (Tasmania) requested the term “hate crime” not be used in our work. Their concerns are primarily with the way that “hate” is individualised, whereas their experiences of violence have been institutional and genocidal.

52. I prefer to use the term “targeted violence” where others would use the term “hate crime” because it implies a deliberate, active stance against minority communities, and whether the violence is motivated or aggravated, the (assumed) characteristics the victim shares with others is either wholly or partially the reason for a particular individual to be targeted.

53. There is no consensus on the terminology to be used in this area, and often the choice of language used comes down to the personal preference of the scholar or practitioner (or architect of legislation); however, increasingly—and despite the international salience of “hate crime”—scholars are using alternative terms such as bias- or prejudice-related.

54. The language shift is in no way an attempt to minimise the harms caused by violence motivated or aggravated by animus/hate/bias/prejudice against individuals because of their perceived membership of a protected class of people. Instead, I use the term “targeted violence” to focus police and criminal justice responses on the harms caused in targeting specific people. Additionally, it highlights what Barb Perry—a founding scholar of hate crime

research—(and Perry & Alvi) frame as “message crimes”¹⁴, which sends a message to the individual, to their community, and to society in general that they are different, they are vulnerable, and they are not tolerated.

55. Using the term targeted violence rather than hate crime also empowers individuals and communities to consider the victim characteristics that facilitate targeting, and to collectively address the situational and environmental conditions that gives perpetrators the sense that they have permission to target specific people.
56. However, the AHCN uses the nomenclature “hate crime”, and defines it as:

...an act that is against the criminal law and is motivated, in whole or in part, by bias, prejudice or hatred towards a group characteristic of the victim. This includes bias on the grounds of race, religion, ethnic/national origin, sexuality, disability, gender identity, gender, age or being homeless.
57. The AHCN also recognises the importance of recording and tracking hate *incidents*, namely other acts that are motivated, in whole or in part, by bias, prejudice or hatred towards a group characteristic of the victim but that do not amount to a breach of the criminal law. These incidents tend to be less serious but may breach some other law, such as civil vilification law, and can sometimes be reported to a human rights agency. Some hate incidents may not be illegal at all.
58. I, along with the AHCN, recognise the importance of reporting and recording both crimes and incidents as often there is a continuum of violence ranging from non-crime matters through to assault and homicide.
59. Aligned with this concern about “hate crime”, the term “hate speech”—while having some face validity—is also perceived as being problematic for similar reasons to “hate crime”.
60. In addition to the issues with quantifying and qualifying the emotion of “hate”, there are also issues with reducing verbal-textual hostility to “speech”, when it is increasingly common that the forensic evidence of verbal-textual hostility is textual (email, social media posts, graffiti). Here my preference is to use the term verbal-textual hostility as it captures the intent as well as the form that this violence may present.

¹⁴ Barbara Perry, *In the Name of Hate: Understanding hate crimes* (Routledge, 2001); Barbara Perry and Shahid Alvi, “We are all vulnerable’: The in terrorem effects of hate crimes’ (2012) 18(1) *International Review of Victimology* 57-71.

Heterosexist and cissexist violence

61. While hate crimes against LGBTIQ people are often referred to as homophobic and/or transphobic violence, my preference is to use the terms heterosexist and cissexist violence. Both terms align with the way the community refers to and understands sexist, antisemitic, and racist violence, and point to the structural underpinnings of these types of targeted violence, rather than the individual “fear” or phobias of offenders.

“LGBTIQ” and “LGBTIQ community”

62. Previous reviews, inquiries, and SFP itself did not make reference to the LGBTIQ community (or more appropriately, communities), and nor did they explore either the lethal or sub-lethal violence experienced by lesbians, bisexual women (or men for that matter), or intersex people. Furthermore, in the SFP Final Report, transgender people appear to have been erased or deadnamed.
63. Given that NSWPF—and crime agencies more generally—rarely collect data on sexuality, sex, or gender diversity, and especially not intersexuality, I believe that the Inquiry needs to use the acronym carefully so as to ensure that the matters explored, and findings reported, actually do take into account the varied experiences of those that are named explicitly (and implicitly by reference to the plus sign frequently used together with the acronym, i.e. LGBTIQ+).
64. For the purposes of consistency, I have used the acronym “LGBTIQ” in this report because it is the acronym used in this Inquiry’s Terms of Reference, unless I am referring to a specific acronym used in a source document.

Victimology

65. Throughout this report I make reference to victimology and victim characteristics. Daigle, in her third edition of her book *Victimology: The Essentials*¹⁵, notes that

Victimology is often considered a subfield of criminology, and the two fields do share much in common. Just as criminology is the study of criminals—what they do, why they do it, and how the criminal justice system responds to them—victimology is the study of victims. Victimology, then, is the study of the etiology (or causes) of victimization, its consequences, how the criminal justice system

¹⁵ Leah E Daigle, *Victimology: The Essentials* (SAGE, 2020) 1.

accommodates and assists victims, and how other elements of society, such as the media, deal with crime victims.

66. Victimology or victim characteristics are those factors, situations, and behaviours of victims that bring them into contact with offenders, and which are central to understanding the nature of crime. Victimology is crucial to understanding hate crimes and hate incidents as it is the perceived or assumed characteristics of the victim that is targeted by the offender.

“Typologies” and “indicators”

67. Finally, I want to make the distinction between typologies and indicators, which are explored in detail in my evidence below. Indicators are meant to prompt investigators to consider the wider social, institutional, and cultural contexts of crimes that may be motivated by hate/bias/prejudice/animus. Indicators can be inductively developed from data in reported hate crimes, and/or through engaging targeted communities about the characteristics and wider contexts of their victimisation. The BCIF contains and utilises one set of indicators. Indicators are not risk assessment forms, nor are they determinative as to whether a crime is a hate crime.
68. In contrast, typologies are meta-categories that allow us to explore the different motivations underpinning hate crimes. Typologies are normally—but not always—developed from an aggregate analysis of data sets such as crime reports or prosecuted cases. As with indicators, typologies are not determinative of whether a crime is a hate crime. However, they assist in honing the investigation process by identifying the unique characteristics—offender and victim—of each type of motivation, and may assist police in exploring and collecting relevant forensic evidence of hate/bias/prejudice/animus.

D. Questions

1. ***Please outline the origins and use of the Bias Crime Indicators contained in the BCIF, whether in this country or overseas, including any literature that has evaluated or critiqued those indicators.***
69. In the Letter of Instruction, I was instructed to assume that indicators 1–9 in the BCIF had been derived from the US document authored in 2000 by McLaughlin et al, while indicator 10 (as to “Level of Violence”) had been developed by the NSWPF Bias Crime Unit.
70. The original nine bias crime indicators were created by McLaughlin et al¹⁶ on behalf of the Centre for the Prevention of Hate Violence. They were based on law and policy development in the US, and reflected the US statutes and policing practices, including the use of the objective approach to assessing whether an incident is a hate crime. It was devised off the back of Levin & McDevitt’s original typology of hate crimes,¹⁷ which classifies motives as:
- a. Thrill—offenders who committed their crimes for the excitement or the thrill;
 - b. Reactive (or defensive)—offenders who saw themselves as defending their turf; and
 - c. Mission—offenders whose life’s mission had become to rid the world of groups they considered evil or inferior.¹⁸
71. This typology was expanded by Levin & McDevitt in 2002 to include a fourth hate crime motive category:
- a. Retaliatory—offenders who (re)act in response to a hate crime, whether real or perceived.¹⁹
72. In McLaughlin et al’s training program, the authors provide a detailed overview of each of these categories and their hate crime characteristics, which is replicated in Table 1 below.²⁰

¹⁶ Karen A McLaughlin et al, *Responding to Hate Crime: A Multidisciplinary Curriculum for Law Enforcement and Victim Assistance Professionals* (National Center for Hate Crime Prevention, Education Development Center, 2002).

¹⁷ Jack Levin and Jack McDevitt, *Hate crimes: The rising tide of bigotry and bloodshed* (Westview, 1993).

¹⁸ Jack Levin, Jack McDevitt and Sarah Bennett, ‘Hate Crime Offenders: An Expanded Typology’ (2002) 58(2) *Journal of Social Issues* 303-17.

¹⁹ Jack Levin and Jack McDevitt, *Hate crimes revisited: America’s war on those who are different* (Westview, 2002); Levin, McDevitt and Bennett, above n 18.

²⁰ McLaughlin et al, above n 16.

Table 1: Levin & McDevitt's 1993 Typology of Hate Crime Motivation²¹

TYPE	CRIME FACTORS	CHARACTERISTICS
THRILL	Offender	<ul style="list-style-type: none"> ▪ Usually, groups of teenagers ▪ Not generally associated with an organized hate group
	Precipitating Events	<ul style="list-style-type: none"> ▪ Generally, none
	Victim	<ul style="list-style-type: none"> ▪ Almost any member of a vulnerable group ▪ Members of groups perceived as inferior by offenders
	Location	<ul style="list-style-type: none"> ▪ Generally outside of offenders' "turf" ▪ Area(s) frequented by members of targeted group(s)
	Other	<ul style="list-style-type: none"> ▪ Most common type of hate crime; represents approximately 60 percent of all cases ▪ Since attacks are random, it is often difficult to identify the offenders ▪ Attacks often involve desecration and vandalism, although they can also involve more violent crimes ▪ Hatred of victim is relatively superficial; offenders may be deterred from repeating the crime if there is strong societal response condemning the behavior ▪ Each group member's participation may be limited to a specific aspect of the crime, enabling each offender to avoid acknowledgment of or accountability for the seriousness of the crime
REACTIVE	Offender	<ul style="list-style-type: none"> ▪ Have a sense of entitlement regarding their rights, privileges, or way of life, which does not extend to the victim ▪ Usually have no prior history of criminal behavior or overt bigotry; not generally associated with an organized hate group, although may call on an organized hate group to assist in mitigating the perceived threat
	Precipitating Events	<ul style="list-style-type: none"> ▪ Offenders perceive a threat to their way of life, community, place of work, or privilege
	Motivation	<ul style="list-style-type: none"> ▪ To protect or defend against the perceived threat constituted by the presence of "outsiders" ▪ To use fear and intimidation to send a message that will repel the "outsiders"
	Victims	<ul style="list-style-type: none"> ▪ Particular individual or group of individuals who are perceived to constitute the threat ▪ Most often, people of color
	Location	<ul style="list-style-type: none"> ▪ Typically, offender's own neighborhood, school, or place of work
	Other	<ul style="list-style-type: none"> ▪ If the threat is perceived to subside, criminal behavior also subsides ▪ Offenders feel little if any guilt because they perceive their behavior as a justifiable response to their feelings of violation at the mere presence of the victim
MISSION	Offender	<ul style="list-style-type: none"> ▪ Often psychotic, suffering from mental illness that may cause hallucinations, impaired ability to reason, and withdrawal from other people ▪ Perceive victim groups as evil, subhuman, and/or animal
	Precipitating Events	<ul style="list-style-type: none"> ▪ None
	Motivation	<ul style="list-style-type: none"> ▪ Believe they have been instructed by a higher order (God, the Fuhrer, the Imperial Wizard, etc.) to rid the world of this evil ▪ Believe they must get even for the misfortunes they have suffered and perceive a conspiracy of some kind being perpetrated by the groups they have targeted ▪ Have a sense of urgency about the mission; believe they must act before it is too late
	Victims	<ul style="list-style-type: none"> ▪ Any or all members of the category of people they perceive as responsible for their frustrations
	Location	<ul style="list-style-type: none"> ▪ Areas where members of the targeted group are likely to be found
	Other	<ul style="list-style-type: none"> ▪ The rarest kind of bias crime ▪ Crimes are of a violent nature; the mission may end in the offender's suicide

²¹ Jack Levin and Jack McDevitt, *Hate crimes: The rising tide of bigotry and bloodshed* (Westview, 1993), cited in McLaughlin et al. above n 16, 49-52.

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73. As I have noted above, in 2002, McDevitt et al²² expanded their 1993 typology to include a fourth category to capture those incidents that are retaliatory in nature. Little is known about these type of hate crimes, as it is rare for hate crime victims to retaliate.
74. McLaughlin et al²³ provide two examples of retaliatory hate crimes. First, the riots by African American communities following the Los Angeles Police Department’s beating of Rodney King and secondly, the retaliation against the Jewish community in the early 1990s when the African American community perceived the inaction of the Hasidic Ambulance staff to be contributory to the death of a young Black child. Just as mission hate crimes are rare, so too are retaliatory hate crimes.
75. Although Levin & McDevitt’s motive typology has been widely cited since its publication, very little research has been conducted on it.²⁴ Gerstenfeld claims that “its utility and meaning remain to be found”.²⁵
76. Additionally, Phillips claims that the utility of this motive typology is hampered by the fact that the categories were not mutually exclusive, with categories often overlapping within a single incident.²⁶ Phillips also notes that three of the four categories require an offender to seek out victims at particular locations, and three of four categories involve peer pressure to act. It was only the retaliatory motive that was distinct in its characteristics, especially that the offender most often acted alone.²⁷
77. Furthermore, an important distinction can be made between “thrill” and “mission” motivated crimes in that the former requires the social organisation of hate (usually between friends and family members), and the latter is the ideological organisation of hate (usually between like-minded, motivated offenders).
78. Despite these caveats about its efficacy and face validity, Levin & McDevitt’s typology continues to be used in hate crime scholarship. Multiple studies have since sought to clarify its purpose and capacity to capture the complex nature of targeted violence, where motive

²² McDevitt, Levin and Bennett, above n 18.

²³ McLaughlin et al, above n 16, 53.

²⁴ Nickie D Phillips, ‘The prosecution of hate crimes: The limitations of the hate crime typology’ (2009) 24(5) *Journal of Interpersonal Violence* 883-905. NB: This research included all offences and was not limited to homicides. Phillips is cited here not because her work is foundational; rather, because this is the only known study to retrospectively test the Levin & McDevitt expanded typology against cases prosecuted as hate crimes, which allows for a more robust testing of the typology against the legal constitution of the offence.

²⁵ Phyllis B Gerstenfeld, *Hate crimes: Causes, controls, and controversies* (Sage, 2004) 77.

²⁶ Ibid.

²⁷ Ibid 887.

(and its attendant forensic evidence such as verbal-textual hostility) is difficult to ascertain and can often be obfuscated by offenders and their defence team to avert any penalty enhancements that may apply in these crimes.²⁸

79. Importantly, in their follow up study in 2002, Levin & McDevitt found that of the 169 cases reported to the Boston Police Department between July 1991 and December 1992, 66% were motivated by the thrill, 25% were reactive or defensive, 8% were retaliatory, and only one (or 0.6%) were motivated by mission.²⁹
80. The findings of Levin & McDevitt in their 2002 study are significant in relation to the typology created by Dalton et al³⁰ to counter the perceived inadequacies of the BCIF used by SFP. Levin & McDevitt's "mission" motive most closely aligns with the Type A (proactive and associative) category of bias crimes created by the SFP academic team,³¹ which is the most unlikely form of targeted violence to occur according to Levin & McDevitt. In Dalton et al's typology,³² mission-motivated violence is given primacy over other motivations. They suggest this form of hate/bias/prejudice/animus is the most amenable to prosecution given that it is ideologically or socially organised. They also suggest that delimiting the types of motivation to proactive and, preferably, associative ensures that the law does not overreach or over-criminalise.

²⁸ See, for example, Maria Antonia Paz, Julio Monter-Diaz and Alicia Moreno-Delgado, 'Hate Speech: A Systematized Review' (2020) 10(4) *SAGE Open*; Sarah Lockwood and Carlos A Cuevas, 'Hate Crimes and Race-Based Trauma on Latinx Populations: A Critical Review of the Current Research' (2022) 23(3) *Trauma, Violence & Abuse* 854-867; Jesse Daniels, *Cyber Racism: White Supremacy Online and the New Attack on Civil Rights* (Rowman & Littlefield Publishers, 2009); Frank S Pezzella, Matthew D Fetzer and Tyler Keller, 'The Dark Figure of Hate Crime Underreporting' (2019) *American Behavioral Scientist* <<https://journals.sagepub.com/doi/abs/10.1177/0002764218823844?journalCode=absb>>; Paul Iganski, *'Hate Crime' and the City* (Policy Press, 2008); James Treadwell and Jon Garland, 'Masculinity, Marginalization and Violence: A Case Study of the English Defence League' (2011) 51(4) *The British Journal of Criminology* 621-634; Matthew M Sweeney and Arie Perliger, 'Explaining the Spontaneous Nature of Far-Right Violence in the United States' (2018) 12(6) *Perspectives on Terrorism* 52-71; Brandon Lantz, Andrew S Gladfelter and R Barry Ruback, 'Stereotypical Hate Crimes and Criminal Justice Processing: A Multi-Dataset Comparison of Bias Crime Arrest Patterns by Offender and Victim Race' (2019) 36(2) *Justice Quarterly* 193-224; Mark Austin Walters, 'A General Theories of Hate Crime? Strain, Doing Difference and Self Control' (2010) 19(4) *Critical Criminology* 313-330; Colleen E Mills, Joshua D Freilich and Steven M Chermak, 'Extreme Hatred: Revisiting the Hate Crime and Terrorism Relationship to Determine Whether They Are "Close Cousins" or "Distant Relatives"' (2017) 63(10) *Crime & Delinquency* 1191-1223; Mark A Walters, Rupert Brown and Susann Wiedlitzka, 'Causes and Motivations of Hate Crime' (Research Report 102, Equality and Human Rights Commission, 2016) 102; Brendan Lantz and Joonggon Kim, 'Hate Crimes Hurt More, but so Do Co-Offenders: Separating the Influence of Co-Offending and Bias on Hate-Motivated Physical Injury' (2019) 46(3) *Criminal Justice and Behavior* 437-456; Gail Mason, 'Hate Crime and the Image of the Stranger' (2005) 46(3) *The British Journal of Criminology* 837-859; Thomas J Holt et al, 'Loners, Colleagues, or Peers? Assessing the Social Organization of Radicalization' (2019) 44(1) *American Journal of Criminal Justice* 83-105.

²⁹ McDevitt, Levin and Bennett, above n 18, 307.

³⁰ NSW Police Force, Strike Force Parrabell Final Report, above n 3.

³¹ Willem De Lint and Derek Dalton, 'Anatomy of Moral Panic: the "List of 88" and Runaway Constructionism' (2021) 29 *Critical Criminology* 723-743; also cited in NSW Police Force, Strike Force Parrabell Final Report, above n 3.

³² NSW Police Force, Strike Force Parrabell Final Report, above n 3.

81. However, in Phillips' study of hate crime *prosecutions* in New Jersey,³³ she found that only 5% (or 30 cases) of hate crime cases were prosecuted between 2001 and 2004, and that of these cases, 43% were thrill, 3% were retaliatory, 3% were reactive or defensive, and 13% were mission. A further 37% (or 11 cases) were unclassifiable.³⁴ The differences in motive prevalence between *reported* and *prosecuted* hate crime cases points to the assessment by police and prosecutors that "mission" hate crimes—that is, motivated (not aggravated) hate crimes—are more likely to be prosecuted despite their relative rarity. However, according to Phillips' research, thrill hate crimes are more likely than the other three types of hate crime motive to be *prosecuted* as hate crimes (8/13 or 62%), which compares with the 50% of crimes prosecuted as mission hate crimes. Neither of the retaliatory or defensive motive cases were prosecuted as hate crimes.³⁵
82. In their critique of Levin & McDevitt's typology, Gruenewald & Kelley, using open-source data (rather than reported crime data) on homicides of LGBT people, reconceptualised existing offender motivation typologies such as Levin & McDevitt's typology, to consider what they call the *offender mode of victim selection*. Here they focus on "how, not why, offenders discriminately select victims", and avoid the "impossible task of reading offenders' minds and evaluating their feelings".³⁶
83. What the Levin & McDevitt and the Gruenewald & Kelley typologies demonstrate is that over the years preceding SFP, there was already a large corpus of research and theorisation about hate crime motivation. While much of this has yet to be subject to a robust evaluation using the gold-standard random control trials (RCT) methodology, the follow up study conducted by Levin & McDevitt, along with others such as Gruenewald & Kelley, and Phillips³⁷ (and those

³³ In New Jersey, there is a standalone offence of "bias intimidation" which is additive to the underlying offence. In this respect, an offender is charged with two offences, and "bias intimidation" cannot be merged with the underlying offence. s2C:16-1 - Bias intimidation of the *New Jersey Code of Criminal Justice* enhances penalties depending on the nature of the underlying offence, such that s2C: 16-1c "Bias intimidation is a crime of the fourth degree if the underlying offense referred to in subsection a. is a disorderly persons offense or petty disorderly persons offense. Otherwise, bias intimidation is a crime one degree higher than the most serious underlying crime referred to in subsection a., except that where the underlying crime is a crime of the first degree, bias intimidation is a first-degree crime and the defendant upon conviction thereof may, notwithstanding the provisions of paragraph (1) of subsection a. of N.J.S.2C:43-6, be sentenced to an ordinary term of imprisonment between 15 years and 30 years, with a presumptive term of 20 years".

³⁴ Phillips, above n 24, 894.

³⁵ *Ibid.*

³⁶ Jeff Gruenewald and Kristen Kelley, 'Exploring Anti-LGBT Homicide by Mode of Victim Selection' (2014) 41(9) *Criminal Justice and Behavior* 1130–1152.

³⁷ Levin and McDevitt, above n 17; McDevitt, Levin and Bennett, above n 18; Gruenewald and Kelley, above n 36; Phillips, above n 24.

noted at f16) provide ample evidence of the two typologies' efficacy in capturing most contexts in which hate crime occurs.

84. The original set of nine indicators was developed by McLaughlin et al³⁸ based on Levin & McDevitt's typology, first published in 1993 and expanded in 2002.³⁹
85. As far as I am aware, and as identified by Dalton et al in their contribution to the SFP Final Report,⁴⁰ the BCIF—whilst 9 of the 10 indicators found within it were in wide use across the US as an assessment tool used by police—has not been evaluated either by policing organisations or independent researchers.
86. As noted in the different results reported by McDevitt *et al*⁴¹ and Phillips⁴², and as with some of the research cited at footnote 16, researchers have sought to test the Levin & McDevitt expanded typology, but no consistent and reliable results have been reported as each study uses different data sets, collected by different agencies, often with different purposes or intents.
87. I have referred to the Levin & McDevitt typology—as well as that of Gruenewald & Kelley—to illustrate the limited understanding of hate crime typologies and motivations demonstrated by Dalton et al in their academic review of SFP, and to demonstrate that despite their limitations, these typologies continue to be used as a measure of motivation or victim selection across various jurisdictions, data sets, and agencies.
88. In my view, there are some obvious limitations to using the BCIF both in an Australian context and in the context of reviewing possible crimes for LGBTIQ bias.
89. Before considering my specific concerns with the BCIF prompts, I note that SFP—and/or the NSWPF—added the term “immutable” to the first “differences” prompt. This was not in the original set of indicators and prompts as developed by McLaughlin et al, and seems out of place in any discussion about sex, gender, and/or sexuality. While some LGBTIQ people believe they are born LGBTIQ, others recognise the fluidity of sex, sexuality, and gender characteristics. Immutability also appears out of place when considering the unique

³⁸ McLaughlin et al, above n 16.

³⁹ Levin and McDevitt, above n 17; McDevitt, Levin and Bennett, above n 18; Levin and McDevitt, above n 19.

⁴⁰ NSW Police Force, Strike Force Parrabell Final Report, above n 3.

⁴¹ McDevitt, Levin and Bennett, above n 18.

⁴² Phillips, above n 24.

characteristics of men who have sex with men at beats, which can include not only gay and bisexual men, but also men who identify as heterosexual.⁴³

90. Furthermore, while Australia is home to a variety of far-right and extremist organisations that target some communities—particularly, Jewish and Muslim communities and their infrastructure such as places of worship—the social and cultural context of the US is somewhat different, especially as it relates to racist hate crime. For example, unlike the US, Australia has not had an organised hate group comparable to the Ku Klux Klan, which has instigated racist violence in the US since its formation in the late nineteenth century.⁴⁴
91. The work of organisations such as the Southern Poverty Law Centre and the Federal Bureau of Investigation (FBI) in identifying and classifying organised hate groups has set the frame of reference for assessing the characteristics of hate crime, including actions such as cross burnings, which are rare in Australia. While hate crime in the US is regulated largely via State-based hate crime legislation, the FBI has been responsible for monitoring, tracking, and reporting on hate crimes since the passage of the *Hate Crimes Statistics Act 1990* (U.S.), later modified by the *Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act 2009*. Similarly, while the Southern Poverty Law Center was created to monitor, track, and report on racist violence, since its creation in 1971 its remit has expanded to include all forms of hate crime, including heterosexist and cissexist hate crime.⁴⁵
92. This focus on organised hate groups (OHGs) skews the nature of the understanding of hate crime outside of the US, and directs attention to *motivated* (or in the terms of Dalton et al, proactive associative) offenders rather than those who aggravate an underlying offence with animus/hate/bias/prejudice, or those who use hate habitually without reference to an ideological framework such as white supremacy.

⁴³ Importantly, there is also some concern about the use of “immutability” to delimit who is recognisable in both hate crime and discrimination law. Clarke suggests that the meaning of immutability can expanded to include not just those traits a person cannot change but also those traits considered “too important for anyone to be asked to change” (such as sexuality or religion). However, in relation to disability, immutability has a much murkier history, with many social services withheld from disabled people who are not willing to “fix” their disability (such as those who identify as Deaf/deaf). Jessica A Clarke, ‘Against Immutability’ (2015) 125(1) *The Yale Law Journal* 2-102.

⁴⁴ This is not to assert that Australia does not have its own organised racist hate groups. As has become crystal clear since Tarrant’s attack against New Zealand mosque attendees in 2019, Australia is the home to a variety of white supremacist groups such as The Base, Antipodean Resistance, and the National Socialist Network. These groups, however, have not had the widespread, mainstream support, financial backing or public presence as the Ku Klux Klan in the US, nor do they openly or publicly identify as white supremacists.

⁴⁵ See for example, “Our Issues” on the Southern Poverty Law Center’s website at <https://www.splcenter.org/issues>

93. This US context is plainly obvious in the BCIF prompts and its focus on organised, motivated, and proactive hate offenders. For example, indicator 4 of the BCIF is wholly focused on OHGs, which are rare—if non-existent in Australia—in relation to heterosexual and cissexist hate crime.⁴⁶ Similarly, three of the four prompts for indicator 7 of the BCIF, which is focussed on the motive of the offender, point to an organised and motivated offending pattern. Additionally, indicator 9 of the BCIF, which focusses on a lack of any alternative motive, precludes a *partial* motivation (or aggravation) that is common in Australian definitions of hate crime.⁴⁷
94. As to partial motivation, robbery is often a concurrent offence with hate crimes such as assault, which Tomsen calls an “incidental relation”⁴⁸ to hate crime motivation, and Gruenewald & Kelley call “instrumental offenses”.⁴⁹ This does not mean that hate/bias/prejudice/animus was not present; rather, it indicates that hate can be an additive to an underlying offence, or that the harms of the underlying hate-motivated assault can be enhanced by robbery.
95. While most public knowledge and attention is on the motivated “Type A” hate crimes⁵⁰, the research available demonstrates that hate often aggravates an underlying offence—such as assault, robbery, harassment, or criminal damage—in which case the hate crime motivation may be partial.⁵¹ As noted above, partial motivation is not excluded in the NSWPF definition of hate crime, nor in the scope of the sentencing legislation. Yet, Dalton et al and de Lint and Dalton seem to dismiss these cases as not being hate crimes at all, and that including such cases will evacuate the term hate crime of all meaning.
96. Most heterosexual and cissexist hate crime is opportunistic, rather than motivated. For example, offenders often take the opportunity to rob victims as well as send the message that

⁴⁶ NB: While there are OHGs in Australia that focus their attention on racial, ethnic, and religious characteristics (and migration more generally), this does not preclude them from also denigrating and hating LGBTIQ people—or disabled people for that matter—or denigrating racial and religious others by reference to epithets conventionally directed at LGBTIQ people. However, as far as I know there are no Australian OHGs whose primary focus is on LGBTIQ people.

⁴⁷ Section 21A(2)(h) of the NSW *Crimes (Sentencing Procedure) Act 1999* only references “motivation” but in some case decisions, Courts have found *partial* motivation as being sufficient to apply that sentencing provision, and in Victoria, Section 5(2)(daaa) of the *Sentencing Act 1991* refers to crimes motivated in part or in whole.

⁴⁸ Stephen Tomsen, *Violence, prejudice and sexuality* (Routledge, 2009).

⁴⁹ Gruenewald and Kelley, above n 36.

⁵⁰ NSW Police Force, *Strike Force Parrabell Final Report*, above n 3.

⁵¹ Gail Mason, ‘Hate Crime Laws in Australia: Are They Achieving Their Goals?’ (2009) 33(6) *Criminal Law Journal* 326–340; Gail Mason, ‘The Hate Threshold: Emotion, Causation and Difference in the Construction of Prejudice-motivated Crime’ (2014) 23(3) *Social & Legal Studies* 293–314.

the victim is hated. We see this across other types of hate crime such as the spate of assaults that occurred on Indian students some years ago in Melbourne.⁵²

97. I saw this layered victimisation first hand with some of our clients at the LGAVP when they were robbed during a targeted assault. The concurrent robbery is often used as demonstration of alternative motives, yet the harms are exacerbated. Not only has the victim been assaulted because of their sexuality/gender but the offenders also have their home address on their IDs in their wallets. In these cases, rather than lessening the harms caused by being targeted for a group characteristic, the concurrent robbery adds another layer of harm, trauma, and fear as the perpetrator could come back to their house and re-victimise them.⁵³
98. In the intervening 20+ years since the publication of the 9 indicators by McLaughlin et al in 2000, much work has been done by multiple US criminal justice organisations, including policing organisations to better record and investigate hate crimes. In its 2021 report entitled *Investigation of Hate Crimes*,⁵⁴ the US-based International Association of Chiefs of Police (IACP) identified 16 characteristics of hate crime, which relate to the time, place, offender(s), and victim(s), including:
- a. Were the offender and the victim of different racial, religious, ethnic, or national origin; sexual orientation, gender, or gender identity/expression; or disability groups?
 - b. Would the incident have taken place if the victim and offender were part of the same groups?
 - c. Were oral comments, written statements, or gestures made by the offender that indicate their improper bias? (For example, the offender shouted a racial epithet at the victim.)
 - d. Were improper bias-related drawings, markings, symbols, or graffiti left at the crime scene? (For example, a swastika was painted on the door of a synagogue.)

⁵² Gail Mason, 'I Am Tomorrow': Violence Against Indian Students in Australia and Political Denial' (2011) 45(1) *Australian and New Zealand Journal of Criminology* 4-25.

⁵³ Similar concurrent victimisation by robbery has been reported to the Tasmanian Prejudice Related Violence Working Group from migrants and CALD people who drive taxis. These incidents may start as racist abuse but then develop into a robbery. A similar ableist hate crime occurred in 2020 when a man using a wheelchair, who abused, assaulted, then robbed after using an ATM.

⁵⁴ International Association of Chiefs of Police *Investigation of Hate Crimes* (IACP, 2021) <<https://www.theiacp.org/resources/policy-center-resource/hate-crimes>>.

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- e. Were certain objects, items, or things that indicate improper bias used (e.g., the offender wore a white sheet with a hood covering their face) or left behind by the offender (e.g., a burning cross was left in front of the victim's residence)?
 - f. Was the victim visiting a neighbourhood where previous hate crimes had been committed against other members of their group and/or where tensions remain high against their group?
 - g. Have similar incidents occurred in the same locality or at about the same time, and are the victims all of the same racial, religious, ethnic, or national origin; sexual orientation/expression, gender, or gender identity/expression, or disability group as those targeted in these incidents?
 - h. Was the victim engaged in activities or an event promoting their personal identity?
 - i. Did the incident coincide with a holiday, historical event, religious event, celebration, etc., relating to a date that is perceived to be of significance to a particular group (e.g., Rosh Hashanah)?
 - j. Was the offender previously involved in a similar hate crime or a member of a gang organized around shared personal characteristics, including a school-based gang?
 - k. Were there indications that a hate group was involved? (For example, a hate group claimed responsibility for the crime or was active in the neighbourhood.)
 - l. Does a historically established animosity exist between the victim's group and the offender's group?
 - m. Is this incident similar to other known and documented cases of improper bias, particularly in this area? Does it fit a similar modus operandi to these other incidents?
 - n. Has the victim been previously involved in similar situations?
 - o. Are there other explanations or motivations for the incident, such as economic gain?
 - p. Did the offender have some understanding of the impact their actions would have on the victim?⁵⁵

⁵⁵ Ibid.

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99. This set of characteristics extends well beyond the original nine indicators proposed by McLaughlin et al, yet does not include the tenth indicator—extreme violence—that was added by the NSWPF.
 100. The tenth indicator or characteristic of hate crime added by NSWPF is appropriate for assessing some hate crimes, especially those involving interpersonal violence. This tenth characteristic is an important factor in many of the “88/85” cases of SFP, and in some reported cases of aggravated bodily harm/grievous bodily harm and sexual assault, but is largely irrelevant to other hate crimes such as those of criminal damage and graffiti.

2. In relation to bias crime, or hate crime, against LGBTIQ people, what do you consider to be the appropriate indicators in that particular context and why?

101. Beyond the indicators developed from the work of Levin & McDevitt and McDevitt et al⁵⁶—which formed the basis of McLaughlin et al’s 9 indicators—other jurisdictions and regions have begun to develop their own typologies and indicators of hate crime that align more closely with their cultural contexts and historical practices of hate.
102. Below, I document the typologies and indicators which have been developed in Australia and the UK, in contrast to the dominant US model. However, there are also other jurisdictions, such as South Africa and Canada that have had to create their own indicators because of the different social and cultural contexts operating in those jurisdictions. For example, in South Africa, “corrective rape”⁵⁷ is a crime committed against women perceived to be lesbian or transgender, and is so common that it receives specific attention from South African police.⁵⁸
103. In Canada, in addition to increased penalties that can apply to underlying crimes motivated by hate, there are four substantive hate crime offences contained in the Criminal Code of Canada, which are relatively rare in other democratic (and Westminster) systems of criminal justice. These additional offences include advocating genocide (s 318), and “mischief motivated by hate in relation to property primarily used for religious worship” (s 430(4.1)).⁵⁹

Australia

104. As with South Africa and Canada, Australian jurisdictions have their own unique hate crime characteristics.
105. In November 2022, the Centre for Resilient and Inclusive Societies published research into the characteristics of hate crime in Australia, which includes guidance on identifying hate

⁵⁶ Levin and McDevitt, above n 17; McDevitt, Levin and Bennett, above n 18; Levin and McDevitt, above n 19.

⁵⁷ See, for example, Roderick Brown, ‘Corrective Rape in South Africa: A Continuing Plight despite an International Human Rights Response’ (2012) 18(1) *Annual Survey of International & Comparative Law* 45-66; René Koraan and Allison Geduld, ‘“Corrective rape” of lesbians in the era of transformative constitutionalism in South Africa’ (2015) 18(5) *Potchefstroom Electronic Law Journal*, 1931-1952; Luis Abolafia Anguita, ‘Tackling corrective rape in South Africa: the engagement between the LGBT CSOs and the NHRIs (CGE and SAHRC) and its role’ (2012) 16(3) *The International Journal of Human Rights* 489-516; Lea Mcambene and Maudri Wheel, ‘Realisation or oversight of a constitutional mandate? Corrective rape of black African lesbians in South Africa’ (2015) 15(1) *African Human Rights Law Journal* 58-88.

⁵⁸ This is not to assert that “corrective rape” is unique to South Africa. It occurs worldwide, including in Australia. For example, Mary’s Place Project (noted earlier in my evidence, and of which I was a co-convenor) was a community project aimed at highlighting the targeted rape of a lesbian after leaving a lesbian-only event from which the perpetrators were refused entrance.

⁵⁹ *Canadian Criminal Code*, RSC 1985.

motives.⁶⁰ In that report, Vergani et al not only provide a set of criteria for all hate crimes, but also identify the unique characteristics of each form of hate crime. They also categorise these criteria in relation to the victims, the perpetrator(s)' actions, the context, and the perpetrator(s)' background context.⁶¹

106. In Australia, the work of Vergani et al⁶² has been important in initiating discussion about the shared and unique characteristics of hate crime. Their typologies of hate crime—as they have bespoke indicators for each targeted community—were developed in close collaboration with targeted communities, rather than inductively generated from reported hate crimes as was the case with the Levin & McDevitt, McDevitt et al and the Gruenewald & Kelley typologies. However, it must be noted that as these indicators have only just been published in November 2022, their efficacy in assessing hate crime motivation is untested.
107. An important distinction between the indicators found in the BCIF and Vergani et al's indicators is the foregrounding of victim characteristics, which are largely absent from the BCIF. While the focus on victim characteristics can be read as victim blaming when considered out of context, indicators such as the visible presentation of victims—what they wear, how they look, whose hand they hold—are central in understanding who is targeted.
108. In our research on Islamophobic violence⁶³ (as with Zempi⁶⁴, and Zempi and Chakraborti⁶⁵), we found that Muslim women were more likely targets of hate crime than Muslim men—no matter the location, time, or motives of offenders—as they are more visibly Muslim than Muslim men because of their hijab, niqab, or burka. Conversely, Jewish men are more likely to be targeted than Jewish women as they are more visibly Jewish because of their head covering, the yarmulke; though, the use of the tichel by Jewish women in some Hasidic-dominant neighbourhoods may also make them more visibly Jewish. Both Muslims and Jews are more likely to be targeted in their travels to and from mosque/temple on Friday evenings.

⁶⁰ Matteo Vergani et al, 'Defining and identifying hate motives: bias indicators for the Australian context' (Report, Centre for Resilient and Inclusive Societies, 2022).

⁶¹ Ibid.

⁶² Ibid.

⁶³ Derya Iner, Gail Mason and Nicole L Asquith, Expected but not accepted: Victimization, gender, and Islamophobia in Australia (2022) 28(3) *International Review of Victimology* 286-304.

⁶⁴ Irene Zempi, 'The lived experiences of veiled Muslim women as 'undeserving' victims of Islamophobia' in Marian Duggan (ed) *Revisiting the 'Ideal Victim': Developments in Critical Victimology* (Policy Press, 2018) 63-81; Irene Zempi, 'Veiled Muslim women's responses to experiences of gendered Islamophobia in the UK' (2020) 26(1) *International Review of Victimology* 96-111.

⁶⁵ Irene Zempi and Neil Chakraborti, 'They make us feel like we're a virus': The multiple impacts of Islamophobic hostility towards veiled Muslim women' (2015) 4(3) *International Journal for Crime, Justice and Social Democracy* 44-56.

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109. In the reports of violence collected by the LGAVP, we also found that LGBTIQ people were more likely to be targeted if they were
- a. near a LGBTIQ area such as Oxford Street, Darlinghurst or King Street, Newtown;
 - b. during the Mardi Gras festival and especially on the day and evening of the Mardi Gras parade;
 - c. were in or near a LGBTIQ venue (or a venue using the pink triangle sticker to indicate a safe place for LGBTIQ people); and
 - d. if they held hands or kissed their same-gender partner in public.⁶⁶
110. Victimology, in the context of hate crimes, is essential in fully grasping the (opportunistic) motivation and harms caused by these crimes, especially given that hate crime victimisation is not equally spread within targeted communities, and is more likely to occur when the victim is visibly different.⁶⁷
111. In the case of heterosexist violence, Vergani et al suggest the following 23 indicators are required in an assessment of hate crime and hate incidents:
- a. Was the victim dressed or otherwise presenting a non-heteronormative fashion at the time of the incident? Or was their connection to the LGBTIQA+ community visible? (E.g., Was the victim with a same sex partner at the time of the event? Were they showing behaviours affection such as holding hands or kissing?)
 - b. Were they wearing pride or other LGBTIQA+ badges/ribbons/clothing?
 - c. Was the victim engaged in activities promoting LGBTIQA+/rights/services/issues at the time of the incident?
 - d. Is the victim a public figure who is known as being LGBTIQA+ or for advocating LGBTIQA+ rights?
 - e. Did the perpetrator refer to the perceived sexual orientation of the victim? (This can include non-verbal references like hand gestures).

⁶⁶ Gary Cox, 'Count and Counter' (Report, Lesbian and Gay Anti-Violence Project, 1994); Nicole L Asquith, *Text and Context of Malediction* (PhD thesis, University of Melbourne, 2004).

⁶⁷ This is also the case with ableist hate crime that tends to target those with apparent disability, such as people who use mobility or sensory aids. Ryan Thorneycroft and Nicole L Asquith, 'Unexceptional violence in exceptional times: Disablist and ableist violence during the COVID-19 pandemic' (2021) 10(2) *International Journal for Crime, Justice and Social Democracy* 140-55.

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- f. Did the perpetrator use homophobic language or terminology such as “faggot”, “poofter”, “dyke”, etc.?
 - g. Did the perpetrator try to vilify the victim and/or LGBTIQ+ people in general? (E.g.: Calling them sexual predators or paedophiles. General insults that indicate victims are somehow morally wrong or “unnatural”. Accusing LGBTIQ+ people of having an ‘agenda’? (e.g., “homosexual agenda” to turn everyone, especially children, into homosexuals)). Suggesting they aren’t a “real” man or woman.
 - h. Did the perpetrator suggest that the victim and/or LGBTIQ+ people in general, do not belong, or are not entitled to the same rights as other people? This can be in general, or in a specific context, e.g., workplace, school, community social event, etc.
 - i. Did the perpetrator deny services (e.g., entry to a venue) or opportunities (e.g., in the workplace) to the victim? This may not constitute a hate incident by itself but can constitute part of one.
 - j. For couples and families especially, did the perpetrator suggest that the victim(s) and/or LGBTIQ+ people in general, are not worthy of the same rights as other couples and families? (E.g., marriage, being treated as a couple, legal rights.)
 - k. For misogynistic/lesbophobic incidents against lesbian, bisexual or queer women especially, did the (male) perpetrator dismiss their sexual identity e.g., suggest lesbianism isn’t a “real” sexuality?
 - l. Did the perpetrator suggest that sexual intercourse with a man will ‘sort out’ (i.e., heterosexualise) lesbian, bisexual or queer women?
 - m. Did the perpetrator threaten the victim?
 - n. Did the perpetrator use physical force or violence (including sexual violence)?
 - o. Did the incident happen at a time of significance for the LGBTIQ+ community? (E.g., Pride festival, marriage equality laws being passed, opening of a new LGBTIQ+ bar for the first time in a city?)
 - p. Did the incident happen near a significant location for the LGBTIQ+ community? (E.g., at an LGBTIQ+ premises/bar/centre, or a place that is known as a meeting place for LGBTIQ+ people. This can include specific locations known for romantic or sexual

- encounters as well as more general suburbs with high support for LGBTIQ+ communities.)
- q. Did the incident occur at a familiar location or on the anniversary of a previous noteworthy event?
 - r. Does the perpetrator have a history of committing similar acts?
 - s. Did the incident occur in a strongly heterosexist context? (E.g., At a male sports club, a 'straight' bar/nightclub, a traditionally 'masculine' or male-dominated workplace, etc.)
 - t. Are there indications that the perpetrator sympathised with far-right organisations, anti-LGBTIQ+ organisations, or ideologies?
 - u. Has the perpetrator been associated with far-right or anti-LGBTIQ+ organisations or ideologies?
 - v. Does the perpetrator have a history of violence towards LGBTIQ+ people? (E.g., have they been involved in committing offences against LGBTIQ+ people in the past?)
 - w. Does the perpetrator have a history of hatred towards LGBTIQ+ people? (E.g., have they expressed homophobic sentiments for a period of time?)⁶⁸
112. While similar to the above criteria, Vergani et al suggest that there are also 19 unique indicators for hate crimes against transgender and gender diverse people:
- a. Was the victim visible to the perpetrator as someone with a diverse gender identity? Or was their connection to the LGBTIQ+ community visible? (E.g., Was the victim dressed in a way that might be perceived as non-binary, non-traditional or non-conforming?)
 - b. Were they wearing pride or other LGBTIQ+ badges/ribbons/clothing?
 - c. Was the victim engaged in activities promoting LGBTIQ+/rights/ services/issues at the time of the incident?
 - d. Is the victim a public figure known for being LGBTIQ+ or advocating for LGBTIQ+ rights?
 - e. Did the perpetrator refer to gender?
 - f. Did the perpetrator use slurs relating to gender identity? (E.g., "tranny")

⁶⁸ Vergani, above n 60.

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- g. Did the perpetrator try to dismiss/invalidate/mock the victim's gender identity? (E.g., Denying their humanity, or suggesting their gender identity is not "real", etc.)
 - h. Did the perpetrator intentionally misrecognise the victim's gender identity? (E.g., deadnaming them (using their birth name), using incorrect pronouns?)
 - i. Did the perpetrator express transphobic views, or endorse negative stereotypes about transgender people? (E.g., Excluding transgender people from equal access to public spaces and fearmongering about their potential to undermine gender equality. Associating transgender people with sexual predators or paedophiles. Insinuating that transgender people are morally wrong or "unnatural".)
 - j. Did the perpetrator threaten the victim?
 - k. Did the perpetrator use physical force or violence (including sexual violence)?
 - l. Did the offence happen in a context of gender segregation, or access to gender specific facilities? (E.g., public toilets.)
 - m. Is there any indication the perpetrator was part of an organisation, network or community (especially social media) with hateful views regarding gender? (E.g., TERF (trans-exclusionary radical feminist) communities.)
 - n. Did the incident occur in a particularly straight/male/hostile environment? (E.g., a male sports group, a non-queer bar/nightclub, a traditionally 'masculine' or male-dominated workplace, etc.)
 - o. Are there indications that the perpetrator sympathised with far-right organisations, anti-LGBTIQ+ organisations, or ideologies?
 - p. Has the perpetrator been involved with far-right or anti-LGBTIQ+ organisations or ideologies?
 - q. Does the perpetrator have a history of violence towards LGBTIQ+ people? (E.g., have they been involved in committing offences towards LGBTIQ+ people in the past?)
 - r. Does the perpetrator have a history of hatred towards LGBTIQ+ people? (E.g., have they expressed transphobic sentiments for a period of time?)
 - s. Was the perpetrator involved in previous incidents of a similar nature?

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- t. Is there any indication the perpetrator was part of an organisation, network or community (especially social media) with hateful views or belief systems related to gender?⁶⁹
113. As these indicators of heterosexist and cissexist hate crime were not available at the time of SFP—or even the NSW Parliamentary Inquiry—they were understandably not considered as alternative assessment criteria to the indicators found in the BCIF. Furthermore, without access to the completed BCIFs—let alone the case summaries or even the full holdings for each of the SFP cases—it is difficult to assess whether these criteria would have better served as guides in assessing the Parrabell cases. However, it is my opinion that these 2022 indicators better capture the nature of *heterosexist* and *cissexist* hate crimes committed in an Australian—not a US—jurisdiction.
114. Unlike the typology established by Dalton et al⁷⁰—or even the McDevitt et al⁷¹ expanded typology—that are based on perceived offender motivation, the Vergani et al indicators more closely align with the approach taken in the UK, where a subjective test is used to report and record hate crimes. The bias crime indicators established by Vergani et al⁷² were created in consultation with targeted communities and are based on the characteristics that they perceive were critical in being targeted.
115. However, while more culturally relevant and linked to the lived experience of hate crime victims, the indicators created by Vergani et al may be inadequate to the *policing* of hate crimes. There are 42 separate indicators relating to violence against LGBTIQ people— notwithstanding intersectional experiences of, for example, Jewish gay men, or Muslim transgender women—which may make this framework difficult to operationalise in frontline policing.
116. Additionally, while these indicators may prompt police to consider the wider context of victimisation and whether the reported crime is hate-motivated (or aggravated), as they are so reliant upon victim characteristics and behaviours, this framework may not be suitable for assessing:
- a. crimes without a clear victim (eg criminal damage, graffiti);

⁶⁹ Ibid.

⁷⁰ NSW Police Force, Strike Force Parrabell Final Report, above n 3.

⁷¹ McDevitt, Levin and Bennett, above n 18.

⁷² Vergani, above n 60.

- b. crimes committed by an unknown (or unknowable) offender; or
 - c. crimes such as manslaughter and homicide.
117. In these circumstances, the hate motivation/aggravation is largely reliant on the responding and/or investigating police officer to make the assessment of hate crime, which is the standard practice in Australia, where the subjective perception of being targeted may be considered in the police officer's determination (if it is known, and recorded), but is not the sole indicator as it is in the UK.
118. However, even where Australian police identify a potential hate crime, hate crime prosecutions are rare, and too often the bias element of the crime is either pled away, or the prosecution fails to make its case for aggravating factors in sentencing considerations. This is, in fact, an artefact of the legislation which governs the way in which prosecutors or members of the judiciary are required to consider hate crimes.⁷³ For example, in NSW, the *Crimes (Sentencing Procedure) Act 1999 (Sentencing Act)* is not explicit about whether an aggravating factor can be considered in matters that are *partially* motivated by hate,⁷⁴ and this often results in prosecutors not considering a hate crime motivation at sentencing when there are additional motivations, such as robbery.⁷⁵ Issues with legislative framing, forensic evidence, and judicial guidance continue to hamper the use of these provisions in Australian jurisdictions, and there is reticence about—or restraint in—applying these provisions to all but the most obviously organised, motivated crimes.⁷⁶

United Kingdom

119. A subjective model of hate crime is used in the UK and, as such, a tool comparable with the BCIF is not deployed by UK policing organisations. However, they are guided in their investigation by a series of what they call prompts, some of which are mandatory for frontline officers to ask and investigators to follow up. Annexed to this report and marked “H” is a copy

⁷³ A Breen, *Comparing the Regulation of Bias Offences in Victoria to New South Wales and the United Kingdom for Reforming the Victorian Model; How Definitional Guidance and Outlawing Expressions of Group-Based Bias Leads to Greater Purposive Outcomes in Bias Crime Cases* (PhD dissertation, University of Tasmania, [to be submitted in March 2023]).

⁷⁴ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h).

⁷⁵ Gail Mason & Andrew Dyer, 'A negation of Australia's fundamental values': Sentencing prejudice-motivated crime' (2013) 36(3) *Melbourne University Law Review* 871-914; A Breen, above n 73. NB This same issue arises in the Victorian legislation even though it explicitly states that motivation can be whole or in part.

⁷⁶ Gail Mason & Andrew Dyer, 'A negation of Australia's fundamental values': Sentencing prejudice-motivated crime' (2013) 36(3) *Melbourne University Law Review* 871-914.

of the Hate Crime Risk Assessment Questions used by the MPS, which are replicated across 42 of the 43 UK policing organisations.

120. While the subjective—or victim-centred—model is used in the UK, the National Police Chiefs' Council (**NPCC**) found in its audits of UK policing organisations' responses to hate crime that in approximately 20% of reported hate incidents and hate crimes, it was police officers—not victims or witnesses—who assigned the incident or crime the hate category on reporting.⁷⁷
121. I note that there are 44 “prompts” in the MPS' Hate Crime Risk Assessment Questions (Annexure H), which significantly exceeds the 10 used in the BCIF, and are much more directed to the unique characteristics of heterosexual and cissexist hate crimes. As with Vergani et al's 2022 bias crime indicators, the number and breadth of prompts used by the MPS may hamper first responders' easy assessment of whether a crime is hate-motivated, and as it is similarly victim-focused, it may not be ideally suited to homicides motivated by hate.
122. However, in communication with Detective Sergeant Anthony Forsyth (MPS Hate Crime Policy and Development Team), and Dr Paul Giannasi (UK National Police Advisor for Hate Crime),⁷⁸ I have been informed that officers are trained in quickly identifying which, if any, of the 44 prompts are necessary in first response (or can wait for follow up), and that strong leadership from senior officers in mandating the completion of these risk assessment questions has been essential to the successful implementation of this practice.
123. Additionally, while the subjective approach is used in the UK, in cases of homicide or manslaughter where the victim is unable to declare their perception that it was hate-motivated, any other person with a “legitimate interest” can make this claim, including family members, carers, police officers, and victim support groups.
124. Where assessment tools are most critical are in the investigation and prosecution of suspected cases, and in the UK, these are often conducted by supervisory or investigative officers and/or hate crime experts.
125. Importantly, unlike Australia, prosecutors in the UK—as with the European Union more generally⁷⁹—are required to complete bespoke training on the unique characteristics of hate crimes, the requisite evidence for motivation, and the terms under which the hate crime

⁷⁷ See Annexure I for a redacted copy of a NPCC Hate Crime Audit Report undertaken with one of the 43 UK policing organisations.

⁷⁸ Personal communication with Anthony Forsyth and Paul Giannasi (1 November – 21 November 2022).

⁷⁹ See for example, Organization for Security and Co-operation in Europe & Office for Democratic Institutions and Human Rights, *Prosecuting Hate Crimes: A Practical Guide* (OSCE/ODIHR, 2014).

motivation can be extracted from the charges during plea bargaining (which is now rare after an earlier finding that the hate crime motivation was often the first thing bargained).⁸⁰ Guidance documents are also provided for Crown Prosecutors on each of the forms of hate crime.⁸¹

126. The police reporting systems in UK policing organisations automatically prompt reporting police officers to consider whether an incident is a hate crime, and if so, they are prompted further for key hate crime forensic evidence (such as verbal-textual hostility, place of significance etc).
127. Additionally, all 43 policing organisations in the UK, along with the Crown Prosecution Service, are required to convene Hate Crime Scrutiny Panels on each type of hate crime, and community members and stakeholders are invited to regularly audit policing responses to hate crime.
128. Despite the caveats noted above as to the efficacy of the MPS 44 Hate Crime Risk Assessment Questions, it is my opinion that the subjective model used in the UK is far preferable to the objective model used in Australia and most other jurisdictions.⁸² Under the objective model, police officers may not recognise an incident as a hate crime, and may not have the knowledge to assess the motivation. Further, if they hold biased views about victims of hate crime, that would affect their capacity for objectivity. Each of these factors can lead to the under-reporting and under-recording of hate crime. In contrast, most people from targeted communities recognise when they are targeted because of a group characteristic, and in many cases, have a life-long history of being targeted.
129. In the BCIF, the opinion of the victim as to whether an incident is a hate crime (indicator 6) is only one of the ten indicators. In the UK, the perception of the victim—or witness—defines an incident as a hate crime. Although the subjective approach may result in the over-reporting

⁸⁰ Elizabeth Burney and Gerry Rose, *Racist Offences: How Is the Law Working? The Implementation of the Legislation on Racially Aggravated Offences in the Crime and Disorder Act 1998* (Home Office, 2002). For a similar critique from South Africa, see Kamban Naidoo and Karels Michelle, 'Prosecuting "hate": An overview of problem areas relating to hate crimes and challenges to criminal litigation' (2016) 41(1) *Journal for Juridical Science*.

⁸¹ Please see here: <https://www.cps.gov.uk/legal-guidance/homophobic-biphobic-and-transphobic-hate-crime-prosecution-guidance> for dedicated guidance on hate crimes against LGBTIQ people. Other guidance documents are available for racist, religious, and ableist violence, and elder abuse.

⁸² I am only aware of two other jurisdictions—Singapore and Malta—that use the “demonstrations” model used in the UK that allows for subjective perceptions to determine whether an incident is a hate crime; though, South Africa is currently consulting on a new Bill to legislate against hate crimes, and it has been proposed that a subjective model may be the most appropriate (Duncan Breen and Juan Adriaan Nel, 'South Africa – A Home for All? The Need for hate crime legislation' (2011) 38 *SA Crime Quarterly*, 33-43). While all jurisdictions take into account the perceptions of the victim (where there is a victim), it is most common that only police can categorise a crime as a hate crime.

of hate *incidents*—that is, sub-criminal victimisation—as noted by Dalton et al in their section of the SFP report, there is no evidence that it results in the over-reporting or over-prosecution of hate *crimes* (which is discussed in more detail below at [238]).

130. Additionally, a subjective model empowers targeted communities as experts on hate crime victimisation—which may increase trust in police—and ensures that police can track and map repeat victimisation, patterns of offending, and escalation in violence.
 131. The most critical limitation of the subjective model for the current Inquiry is that it is so reliant on subjective perceptions of the victim, which is not available to police in cases of homicide. However, as noted above, the NPCC stated in their audit report that in approximately 20% of cases, the police officer was the person who categorised a crime as hate motivated or aggravated. Notwithstanding the inadequate investigations in the Port murders (discussed below in detail), in cases of hate-motivated homicide, it is likely that the investigating officer—through the mandatory “prompts” in the crime reporting system and the Hate Crime Risk Assessment Questions—will identify these as hate crimes where appropriate.
 132. It is perhaps the increased training, leadership, and oversight of hate crimes in the UK, along with the extra prompts in their crime reporting system, that enables UK policing organisations to better record, track, and investigate hate crimes through their subjective approach.
- 3. *What is your view as to the appropriateness of the methodology used by the Strike Force Parrabell officers, including the use of the BCIF, having regard to the objectives of the Strike Force (as to which see assumptions 3, 4 and 5 above)?***

SFP in historical context

133. Policing organisations have had long and often fractured relationships with the communities that are the primary targets of hate crime.⁸³ This is especially relevant to LGBTIQ communities, who have been criminalised and pathologised for much of modern history.
134. It was not until 1997 that same-sex relationships were fully decriminalised in Australia⁸⁴, and this continues to inform the precarious relationships between policing organisations and LGBTIQ communities. It is important to remember that there are people alive today who were

⁸³ Nicole L Asquith and Isabelle Bartkowiak-Theron, *Policing Practices and Vulnerable People* (Palgrave Macmillan, 2021) 183-202.

⁸⁴ Tasmania being the last to remove consensual sodomy from the criminal code in 1997 after a successful case was brought by Toonen to the United Nations Human Rights Committee (*Toonen v Australia*) and Croome to the Australian High Court (*Croome v Tasmania*).

prosecuted and imprisoned because they were LGBTIQ; albeit, in most Australian jurisdictions these historical charges have been quashed.

135. Whether it is the NSWPF, the MPS, or the New York Police Department—the three original leading organisations who responded earliest to hate crime—there continue to be issues with how hate crimes are reported, recorded, investigated, and in rare cases, prosecuted even in these standout jurisdictions. As noted below in relation to recent failures of the MPS, the ongoing concerns about the policing of hate crimes may be an artefact of police culture rather than inadequate or inappropriate policing strategies.
136. Despite their early action in responding to hate crime, all three of these organisations have continued to grapple with inadequate and, at times, biased policing of hate crimes (which is illustrated by the relatively recent failures by the MPS in relation to the Port murders of gay men). Whether a matter of complacency, or a failure to innovate with increased evidence about hate crimes, these early adopters of hate crime provisions—policing practices and legislation—have faced waves of community backlash when inappropriate or inadequate policing is identified.
137. NSWPF continues to lead in Australia on the policing of hate crime, and their willingness to be subject to a series of internal and external reviews is laudable. However, resting on the good work of the past two decades is insufficient in ensuring historical failures are not repeated. As NSWPF—and the MPS, as noted below—are painfully aware, trust takes years to build, seconds to break, and forever to fix. Constant curation of these relationships is essential in maintaining trust.
138. Importantly, NSWPF is not the only policing organisation that is currently grappling with the perceived inadequate investigation of homicides of gay men. The UK Independent Office for Police Conduct (IOPC)⁸⁵ has stated it will conduct a review of the MPS' investigation of four murders committed by Stephen Port in 2014/2015 (the "Port cases") considering the serious flaws in policing practice identified in the 2018 IOPC investigation, which was conducted at the behest of the MPS when flaws in the original investigation were identified in October 2015.

⁸⁵ Independent Office for Police Conduct 2022, *IOPC to reinvestigate Met Police handling of deaths of Anthony Walgate, Gabriel Kovari, Daniel Whitworth and Jack Taylor* (IOPC, 23 June 2022). Viewed on 2 November 2022 from <https://www.policeconduct.gov.uk/news/iopc-reinvestigate-met-police-handling-deaths-anthony-walgate-gabriel-kovari-daniel-whitworth>.

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139. The initial IOPC review led to the re-opening of the Port cases, and a new inquest into all four deaths was conducted by Munro J (Assistant Coroner) in January 2022—after individual inquests into each of the deaths were found to be unsound by the IOPC due to inadequate policing practices and investigation. Assistant Coroner Munro found that the police had a “lack of professional curiosity”, and that this lack of curiosity was in part due to what was perceived to be both individual and institutional homophobia.⁸⁶ The MPS has recently paid compensation to the families of Port’s victims—Anthony Walgate, Gabriel Kovari, Daniel Whitworth, and Jack Taylor—for failures to properly investigate these cases.⁸⁷
140. Despite near complete replication of modus operandi in each of the Port cases, MPS officers failed to recognise the pattern of homicides, and it is claimed that if the first murder of Mr Walgate had been appropriately investigated, it is unlikely Mr Kovari, Mr Whitworth, or Mr Taylor would be dead, or that many other men would not have been sexually assaulted in 2016.⁸⁸
141. The complementarity between the Port cases and those subject to SFP is notable, especially given that the Port cases occurred only eight years ago, and in an organisation:
- a. with over a decade more experience than NSWPF in responding to hate crimes;
 - b. that had been subject to decades of review and reprobation in relation to the inadequately investigated racist homicide of Stephen Lawrence in 1993;
 - c. that has devoted significant financial and human resources to changing police culture and increasing the knowledge and awareness of frontline police officers about hate crime.
142. In this regard, NSWPF is not alone, and the lessons learnt by the MPS in relation to the investigations of the Port murders are salient to NSW and other Australian jurisdictions. Attention to the outcome of the IOPC review later this year and into early 2023 will be important to consider in terms of proposing better policing practices.

⁸⁶ *Inquests Touching the Deaths of Anthony Walgate, Gabriel Kovari, Daniel Whitworth and Jack Taylor: Regulation 28 Report on Action to Prevent Future Deaths* (2022) [60] (Munro J).

⁸⁷ BBC News, ‘Stephen Port murders: Families of victims receive Met payouts’, *BBC News* (online), 30 August 2022 <<https://www.bbc.com/news/uk-england-london-62720741>>.

⁸⁸ *Inquests Touching the Deaths of Anthony Walgate, Gabriel Kovari, Daniel Whitworth and Jack Taylor: Regulation 28 Report on Action to Prevent Future Deaths* (2022) [60] (Munro J).

143. I have noted above that I believe that the UK approach to policing hate crime is the better model. Yet, despite the extensive policy and practice change, officer training, leadership, and oversight mechanisms, issues such as those raised in the Port cases continue to arise. I believe that this is an artefact of the reproductive power of police culture, which Janet Chan has explored in detail, including in relation to the NSWPF.
144. In her ground-breaking work on police culture in the NSWPF (and her extended analysis of police culture generally)⁸⁹, Janet Chan has identified the key characteristics of police culture, and the ways in which this culture is re-encultured with each new cohort of recruits sent out as Probationary Constables. Early in their careers, police are supervised by senior officers, who may continue to hold cultural values that do not align with contemporary social norms. These senior officers were themselves inculcated with similar values by their predecessors, some of whom may have held deeply misogynistic, heterosexist, and cissexist views about LGBTIQ people. Breaking the reproductive power of police culture to replicate such views about LGBTIQ people requires intergenerational commitments by policing organisations.
145. It is my view that NSWPF have made laudable efforts in shifting officer opinions and police culture through the work of the LGBTIQ+ Corporate Sponsor and portfolio, as well as its development of LGBTIQ Liaison Officers across the state. However, as has been demonstrated in the successful discrimination case brought by four gay NSWPF officers in 2019,⁹⁰ these efforts may not be enough to ensure compliance with the stated organisational values of NSWPF, and more may be required in recruiting the right people with the right values in the first place and ensuring promotion to supervisory ranks is based on meeting the organisational expectations of the NSWPF, including respect for LGBTIQ people and staff.
146. It was reassuring to hear at the opening of this Inquiry that the remit of investigation is much wider than that of either SFP or the NSW Parliamentary Inquiry into Historical Gay and

⁸⁹ Janet Chan, 'Changing Police Culture' (1996) 36(1) *The British Journal of Criminology* 109-134; Janet Chan, Chris Devery and Sally Doran, *Fair Cop: Learning the Art of Policing* (University of Toronto Press, 2003); Janet Chan, 'Using Pierre Bourdieu's Framework for understanding Police Culture' (2004) 56-57 *Droit et Société* 327-347; Janet Chan, *Changing Police Culture: Policing in a Multicultural Society* (Cambridge University Press, 2008); Janet Chan, Sally Doran and Christina Marel, 'Doing and undoing gender in policing' (2010) 14(4) *Theoretical Criminology* 425-446.

⁹⁰ Four gay officers were subjected to an internal investigation in 2015 after a fifth officer who was a close colleague of the other four officers returned a positive drug test. The NSW Civil and Administrative Appeals Tribunal found a culture of homophobic bullying and harassment, and that Superintendent Hardman was "homophobic" for referring the four officers to six months of drug testing purely on the basis of the shared characteristic of being gay. *Sheehy v Commissioner of Police*; *Rapisarda v Commissioner of Police*; *McDonald v Commissioner of Police*; *Housego v Commissioner of Police* [2018] NSWCATAD 73; *Rapisarda v Commissioner of Police*; *Housego v Commissioner of Police*; *Sheehy v Commissioner of Police*; *McDonald v Commissioner of Police* [2019] NSWCATAD 242.

Transgender Homicides,⁹¹ and will include Category B cases of hate crimes against all members of LGBTIQ communities. However, I continue to be concerned that due to police reporting practices and the social construction of violence against cisgender and transgender women that many more homicides may escape the attention of the Inquiry due to their classification as domestic or intimate-partner homicides.

147. Given the context of precarious, fractured, and estranged relationships between police and LGBTIQ communities—in Australia as elsewhere—SFP was an important attempt at demonstrating that NSWPF were committed to changing the nature of these relationships and police culture more generally.
148. The “88” had become lore in NSW LGBTIQ communities, and failing to address the concerns of the LGBTIQ communities in relation to these possible historical hate crimes continued—and some argue, continue—to hamper more effective police-community engagement, and policing responses to the unique needs of these communities.
149. The approach decided upon by NSWPF to review the Parrabell cases, however, may have caused more distrust given the exclusion of NSWPF hate crime specialists from the review, the perceived lack of training and preparation of SFP investigators, the exclusion of LGBTIQ stakeholders from the SFP review⁹², and the appointment of an academic team that had only limited knowledge and expertise in heterosexist and cissexist hate crime (or, in fact, hate crime in general).

Limitations of SFP

150. In criminology—as with other disciplines reliant upon government data—the guiding principle is “dirty data in, dirty data out”. This is no more obvious than in the desktop, cold case review of historical homicides against gay men and transgender women.
151. Contemporary police officers reviewing case file evidence collected, collated, and archived by other officers, decades ago—and under very different social and cultural contexts—was always going to encounter gaps and barriers.

⁹¹ NSW Legislative Council Standing Committee on Social Issues, *Inquiry into Gay and Transgender hate crime between 1970 and 2010*, 2021.

⁹² Apart from the one public meeting with LGBTIQ stakeholders and researchers, which was convened in December 2015, early in SFP, to assess the complementarity between the SFP and LGBTIQ communities’ assessment of the “dip sample” cases presented by NSWPF at that meeting.

152. Even with the later (more contemporary) Parrabell cases, in the 1990s, the holdings may be deficient when compared to the kinds of records which might be generated today—more than 20 years later—especially in relation to hate crime, where there have been significant changes to mandatory reporting questions, standard operating procedures, and police training.
153. While the case of Scott Johnson has demonstrated what can be achieved when resources are allocated to cold cases, not all of the families of the “88/85” have the same resources as the Johnson family, who were able to underwrite the costs of independent investigations.
154. It is reassuring that SFP was empowered to refer the Parrabell cases for re-investigation if new evidence came to light; however, they make it clear that they were not conducting new investigations into the Parrabell cases—only reviewing the holdings of these cases—and as such, the outcome achieved in the Johnson case is unlikely to be replicated given the high number of cases deemed as having insufficient information to even assess motivation.
155. As noted by Dalton et al and de Lint & Dalton, the concept of hate crime was not even considered at the time of many of the homicides.⁹³ Even now, within the police—let alone in the general community—knowledge about hate crime is limited. Dr Thorneycroft and I have argued that, at least insofar as the Australian context is concerned, this may be an artefact of no “figurehead” cases—such as the murders of Stephen Lawrence⁹⁴ and Francessca Hardwick, and the suicide of Fiona Pilkington⁹⁵ in the UK, or Matthew Shepard⁹⁶ and James Byrd Jr⁹⁷ in the US—that have compelled a closer attention to targeted violence by governments and their agencies, community organisations, and the general public.⁹⁸
156. Despite these caveats about the context in which the SFP review was conducted, there are three key limitations of the SFP evaluation that need to be addressed.

⁹³ NSW Police Force, Strike Force Parrabell Final Report, above n 3; De Lint and Dalton, above n 31.

⁹⁴ Stephen Lawrence was murdered in 1993 by five white assailants in an unprovoked racist attack whilst waiting for public transport. The failures of the MPS to investigate his murder as a hate crime led to the infamous Macpherson Enquiry. More about this case can be found here: <https://stephenlawrenceday.org/stephens-story/>.

⁹⁵ Francessca Hardwick was killed by her mother in a murder/suicide in 2007 after years of ableist harassment from neighbours that was not recognised by Leicestershire Police. This case led to an Independent Police Complaints Commission inquiry, which can be sourced from here: https://www.report-it.org.uk/files/ipcc_report-fiona-pilkington-leicestershire.pdf.

⁹⁶ Mathew Shepard was tortured and murdered in 1998 for being gay. His death, along with that of James Byrd Jr led to the passing of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act. More about this case can be sourced from: <https://www.matthewshepard.org/about-us/our-story/>.

⁹⁷ James Byrd Jr was tortured and murdered by three white men in an unprovoked racist and ableist attack. He was chained to the back of a truck and dragged along a dirt road. More information about this case can be sourced from: <https://glc.yale.edu/three-held-black-mans-dragging-death>.

⁹⁸ Ryan Thorneycroft and Nicole L Asquith, ‘Figurehead’ hate crime cases: Developing a preliminary model and exposing the ‘problem’ with ‘disability’ (2017) 31(3) *Continuum* 482-94.

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157. First, NSWPF, and as a consequence, the academic team appear to have bracketed off the “88/85” from the wider violence perpetrated against the community during the period under investigation. This is an artefact of the methodology and remit both of SFP, and the evaluation by the academic team.
158. Secondly, I believe that SFP failed in its aims due to the fact that it did not address or seek to investigate the possible bias in the original police investigations, nor could Dalton et al make this assessment given they were not given access to the complete holdings on each case. Neither the SFP officers nor the academic team interviewed any of the original officers in charge of Parrabell cases, which would have been one of the more obvious ways to investigate possible bias in the original investigations.
159. Thirdly, in order to allay community concerns about the original investigations of the Parrabell cases and to ensure that none of these cases were hate motivated, a re-investigation of the unsolved cases, at least, was required. However, in some cases, even if the remit of SFP had enabled them to re-investigate the cases, given the historical nature of many of the cases, some of the original investigators would no longer be alive, and others would have left NSWPF, which would have required that SFP have powers to summons these ex-NSWPF officers.⁹⁹ Similarly, witnesses and family of the murdered gay men and transgender women may no longer be alive or contactable. It is important to note, however, that these same limitations existed in the case of Scott Johnson; yet, with the resources required for such as cold case investigation, an individual was apprehended, charged, and prosecuted.¹⁰⁰

SFP Methodology

160. The re-investigation of the murder of Scott Johnson took his family—and ultimately, NSWPF—decades and millions of dollars to result in a prosecution (which is ongoing, following a successful appeal in November 2022). Every unsolved Parrabell case and those identified by SFP and the independent academic review team as containing “insufficient information” to assess motive would require similar resourcing, which would not even guarantee a different outcome even if there was political will to do so. SFP was not a reinvestigation of this kind.
161. If the intent was to identify possible historical hate crimes against gay men and transgender women, then reliance on “dirty data” or data collected under different institutional

⁹⁹ And that as some cases were over forty years old, memories of action taken (or not taken) would be unreliable at best.

¹⁰⁰ However, this decision has been successfully appealed in November 2022, and the case will return to court to be reconsidered.

expectations (and technologies), and limited only to those cases—the “88/85”—appears counterintuitive. If bias shaped police actions in these cases, then the holdings will be partial, and the evidence of hate crimes will be absent. If the original investigating police did not consider the Parrabell victims as deserving or “ideal” victims,¹⁰¹ then early decisions by those officers about what was to be investigated and in what ways will have hampered any review decades later. As noted in O’Neal’s research on sexual assaults reported to the Los Angeles Police Department in 2008,¹⁰² police officers’ first impressions of victims often determines if they are believed or have their credibility questioned, and whether they will fully investigate, seek forensic tests, or follow up with the victim.

162. In effect, police bias would only be apparent by absence; from the lack of investigation and collection of evidence, and the lean case files. Without re-investigation, it would be impossible to make a reliable, evidenced assessment as to NSWPF bias against LGBTIQ people, let alone whether the cases were motivated by animus/hate/bias/prejudice.
163. Despite these caveats, and as evidenced by the more recent failures of the MPS to investigate heterosexual hate crimes (including homicides), there appears to be ongoing issues with bias against LGBTIQ people in policing organisations, here and elsewhere. As noted above in relation to police culture, this is not surprising given that there are officers still employed in NSWPF that were junior officers at the time of the Parrabell deaths, and who may continue to hold biased views inculcated by their supervisors at the time.
164. SFP was delimited from the outset; it only considered the “88/85”, it only reviewed the existing holdings of each case (and some evidence may have been lost in the intervening years), and no additional investigation was undertaken.
165. To add to the partial nature of the review, SFP involved 13 officers over a long period of time, and whilst there was some oversight to provide consistency, it is unclear from the SFP Final

¹⁰¹ Christie Nils, 1986, ‘The Ideal Victim’ in Ezzat A Fattah (ed), *From Crime Policy to Victim Policy* (St. Martin’s Press, 1986) 17-30; Alice Bosma, Eva Mulder and Antony Pemberton, ‘The ideal victim through other(s)’ eyes’ In Marian Duggan (ed), *Revisiting the ‘Ideal Victim’: Development in Critical Victimology* (Policy Press, 2018) 27-42; Catherine Donovan and Rebecca Barnes, ‘Being ‘ideal’ or falling short? The legitimacy of lesbian, gay, bisexual and/or transgender victims of domestic violence and hate crime’ in Marian Duggan (ed), *Revisiting the ‘Ideal Victim’: Development in Critical Victimology* (Policy Press, 2018) 83-102; Lisa J Long, ‘The ideal victim: A critical race theory (CRT) approach’ (2021) 27(3) *International Review of Victimology* 344-363; Hanna, Mason-Bish, ‘Creating ideal victims in hate crime policy’ in Marian Duggan (ed), *Revisiting the ‘Ideal Victim’: Development in Critical Victimology* (Policy Press, 2018) 43-62; Irene Zempi, ‘The lived experiences of veiled Muslim women as ‘undeserving’ victims of Islamophobia’ in Marian Duggan (ed), *Revisiting the ‘Ideal Victim’: Developments in Critical Victimology* (Policy Press, 2018) 63-81.

¹⁰² Eryn Nicole O’Neal, ‘“Victim is Not Credible”: The Influence of Rape Culture on Police Perceptions of Sexual Assault Complainants (2019) 36(1) *Justice Quarterly* 127-60.

Report whether each of these officers were trained in recognising the unique attributes of hate crime, or the cultural characteristics of the LGBTIQ community historically and contemporaneously. The absence of training in either of these subjects could have tempered and skewed the assessment of the holdings on each of these homicides. Additionally, the extent of the compliance checking undertaken by the SFP senior officer, and whether there was consistency in recording and reporting against the BCIF, is unclear.

166. An additional factor hampering the efficacy—and as a consequence, the extent to which SFP could bolster LGBTIQ communities’ trust in NSWPF—was that nowhere in the SFP Final Report does it give the full list and the conclusions reached by each of the NSWPF and the academic teams in respect of each case. The conclusions are entirely opaque.
167. When these factors are combined with the lack of training and expertise of the SFP police officers and academic team, the results of SFP are unsurprising—especially, the frequent “finding” that there was insufficient information to make an assessment at all.

Use of Language in the SFP Final Report

168. It is concerning that in both the SFP Final Report,¹⁰³ and in De Lint and Dalton’s subsequent academic review,¹⁰⁴ the attention was primarily on the experiences of gay men—and especially the characteristics, cultural attributes, history, and politics of gay men murdered in public places such as beats.
169. In fact, the transgender women who were included in the original “88” (as well as the “85”) seem to have disappeared or have been deadnamed by the authors of both the SFP Final Report and the academic review. This erasure of transgender women’s experiences of cissexist violence is concerning given that the “88/85” homicides were already skewed towards the experiences of heterosexist violence against gay men. As there are unique characteristics of cissexist hate crime (as noted above in Vergani et al’s indicators), the SFP and the academic review may have missed the critical factors that shape this type of hate crime.

4. What is your view as to the appropriateness of the different methodology used by the academic team, having regard to those objectives?

Methodology of the academic team

¹⁰³ NSW Police Force, Strike Force Parrabell Final Report, above n 3.

¹⁰⁴ De Lint and Dalton, above n 11.

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170. As per the Coordinating Instructions¹⁰⁵ for SFP, neither the academic team nor the SFP officers were to re-investigate all hate crimes against LGBTIQ people during the period under scrutiny. Determinations by the SFP officers on the “88/85” were to be undertaken based on the existing NSWPF holdings for each case.
171. These holdings included witness statements, crime scene evidence and photographs, records of interviews, police notes, coronial documents, and other documents determined to be relevant.¹⁰⁶
172. These holdings were used by SFP officers to “score” each case against the BCIF, which was then reviewed by the supervising detective and discussed between the three senior detectives assigned to SFP.
173. Dalton et al in their review of SFP note that even though each case was “scored” by SFP officers, any conclusions as to whether that case was bias-related was “...not determined by counting the number of ‘yes’ or ‘no’ indicators of bias and referencing that number to some sort of table that accorded a finding of bias to a particular threshold number (e.g. seven out of ten indicators)”.¹⁰⁷ Dalton et al instead accept a description of the process of determination, by the SFP officers, as “intuitive” and “contextual”, and say that the Summary of Findings section of the BCIF was “rich in detail”.¹⁰⁸
174. While “intuition” is not necessarily a bad approach to investigating a complex phenomenon such as hate crime, Dalton et al’s adamant declaration that for their part they deployed “objective” techniques to evaluate these cases seems counter to their acceptance that “intuition” was critical to the SFP findings. Only the SFP officers, and not the academics, had access to the full holdings of the cases. The “intuitive” reading and review of that full material was intrinsic to the composition and content of the summary documents (drafted by police officers barely briefed on hate crime offending, motivation, and victimisation), which were all that the academics had available to them.
175. Despite their seemingly favourable view of the “intuitive” and “contextual” approach of the SFP officers, the academic team did not have faith in the BCIF instrument to identify bias (or

¹⁰⁵ NSW Police Force, Strike Force Parrabell Final Report, above n 3.

¹⁰⁶ *Ibid* 3, 66.

¹⁰⁷ *Ibid* 69; emphasis in original.

¹⁰⁸ *Ibid*.

to over-identify bias) and wanted to “get behind the BCIRG [sic] instrument and re-interpret the summary evidence”.¹⁰⁹

176. Using the Summary of Findings sections of the BCIF, the academic team re-examined each case in light of their own typology, which they claim was generated from “research-informed factors”.¹¹⁰ As noted below, Dalton et al were not hate crime experts before their appointment to the SFP review, and their cursory overview of the hate crime literature—which did not include many of the most critical research interventions on this topic (such as the Levin & McDevitt and Gruenewald & Kelley typologies)—illustrates their partial understanding of hate crime offending, motivation, and victimisation. This lack of expertise in hate crime hampered their assessment of these cases, especially in light of the more victim-centred approaches taken in the UK, and as illustrated in the more recent indicators developed by Vergani et al in Australia. Whilst the latter was not available at the time of SFP, the MPS indicators have been available in some form since, at least, 2009, when I was given access to their Standard Operating Procedures as part of my research on hate speech in hate crime.
177. Using research from Australia and the US and UK, the academic team identified key factors in violence against gay men, and violence in public spaces such as beats. Importantly, in the section entitled “A brief overview of gay-bias/hate literature”, the authors make no reference to violence against transgender women (except in referencing others’ research and in their coda). As cissexist violence can present differently, and with different motives, it is problematic that the literature on cissexist violence was not parsed, let alone considered in the development of their own typology. This failure to engage with existing research on, and the unique characteristics of, cissexist hate crime—and their reliance of public heterosexual violence against gay men as the template on which to assess all Parrabell cases—means that they did not fully consider cases of violence against transgender women.
178. Equally, it was concerning that despite the BCIF being based on McLaughlin et al’s work, which in turn was based on Levin & McDevitt and McDevitt et al’s typology, the academic team only reference these authors in passing to evidence an argument about the prevalence of reported hate crime. They do not engage at all with their typology, which, as noted above, is widely recognised, and applied across the field of hate crime studies. A more comprehensive review

¹⁰⁹ Ibid 71.

¹¹⁰ Ibid 71.

of the literature may have assisted in better assessing those cases that do not fit with the bespoke typology created by Dalton et al.

179. While the efficacy of the Levin & McDevitt typology in capturing all forms of hate crime continues to be questioned, it seems counterintuitive to me for the SFP academic team to create their own typology based on a limited analysis of the existing research and without having conducted their own empirical research on heterosexist and cissexist hate crimes.
180. While the academic team note that there is a lack of consistency in language, concepts, and data, it was surprising that given they were not experts in hate crime that they decided to deploy language and phrases not in use in the field. Amongst other things, this has made comparisons with existing research difficult. They further confuse the field by creating another set of concepts and phrases, based on what they already identified as incomplete and unreliable historical data that "...can only yield something that was captured in the first instance".¹¹¹
181. In defining bias, the academic team also make the distinction—not present in law, or hate crime scholarship—between animus and hostility, bias, prejudice or hatred. Further, at times, they elide the concepts into one (for example, in the Executive Summary where they identify "two *categories* of bias or animus", yet then in the following paragraph, assign "animus" to the "most serious types of bias (Type A and B)"¹¹²); at other times, Dalton et al make a distinction between anti-paedophile *animus* and anti-gay *bias*, as they do in the same Executive Summary.¹¹³
182. The academic team also note that they and the NSWPF SFP officers used two definitions of "bias crime", with the second noted in the Coordinating Instructions requiring "[o]bjective facts, circumstances, or patterns".¹¹⁴ This definition varies considerably from that used by the

¹¹¹ Ibid 80.

¹¹² Ibid 49.

¹¹³ Ibid 50; importantly, the Oxford English Dictionary notes that:

1. **Animus** is the feeling or intention that motivated a person to act in a particular, esp. hostile way; animosity, hostility, esp. as shown in speech and action.
2. **Hate** is a feeling of intense dislike or aversion towards a person or thing; hatred, loathing, animosity.
3. **Bias** is a tendency to favour or dislike a person or thing, especially as a result of a preconceived opinion; partiality, prejudice. Also: an instance of this; any preference or attitude that affects outlook or behaviour, esp. by inhibiting impartial consideration or judgement.
4. **Prejudice** is a harm, detriment, or injury to a person or thing resulting from a judgement or action, esp. one in which a person's rights are disregarded; resulting injury.

¹¹⁴ Massachusetts Model – Protocol for Bias Crime Investigation cited in NSW Police Force, Strike Force Parrabell Final Report, above n 3.

NSWPF,¹¹⁵ or that contained in the sentencing legislation.¹¹⁶ It also contradicts the arguments presented by Dalton et al (in citing Hall) that “...it is difficult to overcome...” the subjectivity aligned with hate motivation.

183. Dalton et al, drawing on the work of Chakraborti and Garland¹¹⁷, make the distinction between the first wave of hate crime scholarship that was focused on *objective* conditions of proactive, associative violence against marginalised communities (in large part focussed on racist, antisemitic, and homophobic violence), and the “second wave”, which expanded the scope of hate crime to victims not necessarily considered in the first wave literature. The second wave also sought to qualify their inclusion by the way in which hate crimes send a message that someone is different, unwanted, and less valuable than others in the community. This has led to the “doing difference”¹¹⁸ approach to understanding hate crimes.
184. In line with the “second wave” of hate crime scholarship, the academic team also draw on the work of Perry¹¹⁹ to demarcate between powerless victims and powerful offenders, and to define hate crime in relation to the “reassertion of the dominance of the perpetrator’s group over the victim”, and that bias requires a “relative powerlessness” of victims perceived to be vulnerable.¹²⁰
185. While I agree with Perry’s framing of the role of power in some hate crimes, strict adherence to “relative powerlessness” as a defining feature of hate crime can be problematic as it does not account for intersectionality, and can privilege the experiences of some, whilst ignoring the experiences of others.¹²¹ This framing is also problematic for those jurisdictions such as the UK, where anyone—including white, cisgender, able, heterosexual men—can claim an incident to be motivated or aggravated by hate/bias/prejudice/animus.
186. The issue of relative powerlessness has been tested in NSW anti-vilification law and found wanting in cases of hate crimes perpetrated by one racial minority against another racial

¹¹⁵ NSW Police Force, *Hate Crime Policy Statement* <https://www.police.nsw.gov.au/crime/hate_crimes>; emphasis added.

¹¹⁶ NSW Crimes (Sentencing Procedure) Act 1999, s 21A(2)(h).

¹¹⁷ Neil Chakraborti and Jon Garland, ‘Reconceptualizing hate crime victimization through the lens of vulnerability and ‘difference’ (2012) 16(4) *Theoretical Criminology* 499–514.

¹¹⁸ Barbara Perry, *Accounting for Hate Crime: Doing Difference* (Routledge, 2003).

¹¹⁹ Barbara Perry, *In the Name of Hate: Understanding hate crimes* (Routledge, 2001); Barbara Perry & Shahid Alvi, ‘We are all vulnerable’: The in terrorem effects of hate crimes (2012) 18(1) *International Review of Victimology* 57–71.

¹²⁰ NSW Police Force, Strike Force Parrabell Final Report, above n 3, 82.

¹²¹ The most obvious example here is that which Mason explored in relation to the targeted violence against (perceived) paedophiles in the Snowtown homicides. Gail Mason, ‘Hate Crime as a Moral Category: Lessons from the Snowtown Case’ (2007) 40(3) *Australian & New Zealand Journal of Criminology* 249–71.

minority.¹²² It also complicates assessment of bias when we consider that perpetrators of hate crime can be from other minority communities and/or from positions of powerlessness (such as those from disadvantage economic backgrounds).

187. Similar to the UK approach, the framing of bias/hate/prejudice in NSW anti-discrimination law, along with the generalist framing in the Sentencing Act, is such that anyone can be a victim of a hate crime if they are targeted because of a perceived group characteristic, including characteristics of what is perceived to be a dominant group. While this means that the experiences of dominant and powerful people must be considered contextually in hate crime adjudication, it ensures that there is not a hierarchy or “competition of suffering”.¹²³
188. Rather than rely on the subjectivity of victims’ (and witnesses’) assessments of motivation—who the academic members claim are “...in no better position to determine...” motive, leading to what they claim is over-reporting of bias crimes—Dalton et al take “selectively” from the hate crime scholarship to generate their own definition of bias crime, namely: “Bias crime
- a. *expresses* a categorical animus (directed at a person or group on the basis of his/her perceived identification with a *vulnerable* group);
 - b. produces an act that *intentionally*, by way of criminal predation on the basis of that categorical animus, causes harm to that person or group;
 - c. is mitigated or aggravated by an offender’s contemporaneous *associations* that are linked by a commitment of *denunciatory non-identification* with the vulnerable person or group.”
189. This definition reduces hate crime victimisation to only those incidents that are:
- a. wholly motivated (and not partially motivated);
 - b. not aggravated by other motivations; and
 - c. incidents where the offender, by contemporaneous actions, demonstrates a pre-existing hatred/bias/ prejudice/animus that they share with others (such as Organised Hate Groups [OHGs]).

¹²² See, for example, the decisions in: *Hellenic Council of NSW v Apoleski & Macedonian Youth Association* (Equal Opportunity Tribunal, Biddulph, Mooney and Alt, 25 September 1997); *Hellenic Council of NSW v Apoleski* (Equal Opportunity Tribunal, Biddulph, Mooney and Alt, 25 September 1997); *Aegean Macedonian Association of Australia v Karagiannakis & Hellenic Council of NSW* [1999] NSWADT 130.

¹²³ Hannah Mason-Bish, ‘Conceptual issues in the construction of disability hate crime’ in Alan Roulstone and Hannah Mason-Bish (eds), *Disability, Hate Crime and Violence* (Routledge, 2014).

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190. In particular, the authors claim that “[a] person who seeks out a gay person against whom to do harm because of a perceived vulnerability is arguably more of a threat to the community than a person who reacts violently against an unanticipated gesture or sexual advance”.¹²⁴
191. Not only does this reduce *aggravated* hate crimes to a perceived sexual advance by the victim—as if offenders are not aggravated by the very presence of the hated other in a pre-existing conflict over another matter—it incorrectly assumes lethality from the degree of an offender’s motivation.
192. While it is clear that in the US, and particularly in relation to racist, antisemitic and Islamophobic hate crimes, there is an increased lethality generated by OHGs, the absence of Australian OHGs that target LGBTIQ people, and the lethality of violence demonstrated in some of the “88/85” cases committed by individuals acting alone, appears to contradict this aspect of Dalton et al’s typology.
193. Dalton et al then make the further distinction between anti-gay *bias* and anti-paedophile *animus*. The authors suggest that a perpetrator animated by anti-paedophile animus “...may well believe... has some tacit social approval in subjecting a man... to a violent assault”, as if, at the time of most of the Parrabell cases, this social approval was not also present in attacks against gay men.
194. This distinction between anti-gay bias and anti-paedophile animus is not articulated in other research on heterosexist and cissexist hate crimes—though Mason has discussed the Snowtown cases¹²⁵ in light of hate crime provisions (and rejected their recognition as deserving victims)¹²⁶—and this distinction was not a requisite of the independent analysis undertaken by SFP.
195. The academic team claim that they make the distinction between anti-gay bias and anti-paedophile animus in order to revoke the “inadvertent support to... [the]... historical slander” that “...gays and paedophiles can be understood under a common moniker”.¹²⁷ Whilst this distinction is important from the perspective of the rights of LGBTIQ people, for much of

¹²⁴ NSW Police Force, Strike Force Parrabell Final Report, above n 3, 83.

¹²⁵ The Snowtown cases—also known as the “bodies in barrels” murders because most of the victims were found in an abandoned bank vault in Snowtown, South Australia in plastic barrels—relate to the deaths of 12 people at the hands of three offenders, and one accessory after the fact. Three of the four offenders were led to believe by Bunting, the primary offender, that the victims were paedophiles, homosexuals, or “weak”.

¹²⁶ Mason, above n 121.

¹²⁷ NSW Police Force, Strike Force Parrabell Final Report, above n 3, 85.

period under analysis in SFP, being gay and being a paedophile were considered by many as the same thing. As illustrated in my own PhD research¹²⁸, the popular misconception of homosexuality as paedophilia continued to enliven heterosexist and cissexist violence into the 1990s when there was an uptick in violence against gay men containing anti-paedophile verbal-textual hostility, which occurred concurrently with the Wood Royal Commission.¹²⁹

196. Based on their assessment of the evidence, Dalton et al created their own typology of hate crimes, in which they award Type A Bias Crimes as the “...most serious of bias...”:
- a. Type A Bias Crime = proactive offenders who seek out opportunities to “brutally express their animus” and that they engage in *denunciatory non-identification* with others.
 - b. Type B Bias Crime = offenders who seek out opportunities to “brutally express their animus” but act alone
 - c. Type C Bias Crime = reactive offenders who respond violently to a “perceived slight against his [sic] identity”.¹³⁰
197. All robust, qualitative coding requires triangulation and assessment of “concordance” between coders. Conventionally, this “concordance” or inter-rater reliability is undertaken using software such as NVivo, which enables independent coding and automatic calculation of the actual concordance. Rather than using such technology, the academic team engaged in a process of manual co-coding. They say that initial disagreement was only noted in “three or four of the cases”. Unlike inter-rater reliability assessment that is calculated using NVivo, it appears that the SFP academic review team only sought agreement on the finding of whether a case was bias motivated, suspected bias motivated, no evidence of bias, or insufficient information. Assessment of inter-rater reliability within each of the 10 BCIF indicators – or their own typology – does not appear to have happened.
198. That the academic team developed this typology from the case summaries drafted by SFP officers, and not on the original evidence in these cases, is problematic because they assumed that:

¹²⁸ Nicole L Asquith, *The Text and Context of Malediction: A Study of Antisemitic and Heterosexist Hate Violence* (VDM, 2012).

¹²⁹ While the Woods Royal Commission was focussed on police corruption in the NSWPF, it spent much of its remit on tracking the links between paedophilia and gay men, which is thought to have contributed to the increase in reports of violence received by the Lesbian and Gay Anti-Violence Project at this time.

¹³⁰ NSW Police Force, Strike Force Parrabell Final Report, above n 3, 89.

- a. the case summaries are a true reflection of the evidence and holdings, which requires not only trust in SFP officers and NSWPF as it exists now, but also as it existed at the time of the original creation of these holdings;
- b. the case summaries (based on NSWPF case holdings) are sufficient to create a bespoke typology, despite noting that over a third of cases had insufficient information to make a determination;
- c. they could assess the motivation based on these case summaries despite noting the inadequacy of record keeping—with or without bias, or with or without incompetence—at the time of many of the incidents, and that the subsequent archiving may also be deficient; and
- d. a bespoke typology created from the summary data written by SFP officers could elicit a robust evaluation of the competence of the original SFP assessments of bias, and the methodology of such assessments by SFP officers.

199. Given the quality of data, the context of data consolidation into summaries, and the use of these summaries by the SFP academic review team to create a bespoke typology—and one that does not address the existing literature or typologies and indicators, nor the significant differences in the heterosexist and cissexist violence in the “88/85” cases—I believe that the typology created by Dalton et al has limited utility in evaluating the SFP methodology or whether any of the existing “88/85” cases are hate-motivated or aggravated. I also believe that it does not meet the expected academic conditions required of either a process evaluation or an outcome evaluation.

Data provided by NSWPF

200. The academic team were not granted access to the holdings for the “88/85” cases, and were reliant upon the initial BCIF review conducted by the SFP team. Inconsistencies or inaccuracies in the first order review would necessarily be replicated in the second order review by Dalton et al.

201. As with much crime data, the technological, cultural, social, and political contexts of when that data was collected will shape what is collected, recorded, and archived. Returning to this “dirty data”¹³¹ decades later does not imbue it with new insights; on the contrary, with fresh eyes

¹³¹ Rashida Richardson, Jason Schultz and Kate Crawford, ‘Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice’ (2019) 94(1) *New York University Law Review*; Sarah Brayne, ‘Big Data Surveillance: The

on old data we can better see its inadequacy in light of better, more contemporary policing practices.¹³²

202. Too often policing organisations make decisions about strategy and resourcing based on the data collected, recorded, and archived by the organisation, even when that data was clearly collected under different cultural and social expectations. Using that data to contemporaneously assess bias—or in the case of the academic team, the competency of NSWPF officers’ historical investigations—is deeply flawed given the different contexts of police work.
203. However, in effect, Dalton et al had to trust that the work completed by SFP officers was appropriate to the terms of reference, and that they could rely on these assessments to guide their evaluation of motivation.
204. If inadequate data was collected and recorded at the time of the homicide—which at least appears to be the situation in some of the earlier cases—then the SFP team are assessing based on “dirty data”, which is then taken as fact by the academic teams to evaluate both the bias elements of the “88/85”, as well as the competency and possible presence of bias in the original investigations and SFP review.

Creation of a new typology by academic team

205. As I have noted above, the academic team created their own typology by which to assess the SFP data. Instead of creating a new typology, I believe it was incumbent on the SFP academic team to deploy existing typologies generated from over 30 years of application and research from internationally recognised hate crime scholars—many of whom are not even referenced in their literature review.

Case of Policing’ (2017) 82(5) *American Sociological Review*; Xerxes Minocher and Caelyn Randall, ‘Predictable policing: New technology, old bias, and future resistance in big data surveillance’ (2020) 26(5-6) *Convergence*; Michael Rowe and Rick Muir, ‘Big Data Policing: Governing the machines?’ in John McDaniel and Ken Pease (eds), *Predictive Policing and Artificial Intelligence* (Routledge, 2021).

¹³² To provide an example of how “dirty data” can re-create more “dirty data”, consider “hot spot policing”, which uses existing crime data to identify places where police should direct their limited resources. This data was collected at a time when there was acknowledged institutional racism within police, which resulted in the over-policing of some communities. When police direct more resources to one place/community based on this biased data, they are more likely to witness and respond to other crimes that may go unnoticed if it were not for the redirected policing resources. Moving from reactive to proactive, police are engaging with the “usual suspects” based on what the data tells us about offending, which does not include those people who have not been subject to increased police surveillance. Those who are not the “usual suspects” are not subject to increased police surveillance and could easily engage in criminal activity without police knowledge. By directing increased resources to hot spots identified through “dirty data”, police create more data that justifies even more police resources, which creates more “dirty data”. This becomes a self-sustaining fact that some places/communities are more criminal requiring more criminal (in)justice resources.

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206. In creating a different typology—and one that I believe misconstrues the harms of hate crimes as primarily emanating from the proactive, associative homicides they identified in a minority of cases—the findings of the SFP academic team are not comparable to any other existing research, including the use of terms and concepts not found elsewhere in hate crime scholarship.
207. The distinction made by Dalton et al and de Lint and Dalton between anti-paedophile *animus* and anti-gay *bias* was confusing and seemed to imply that animus was justifiable whilst bias was not. It is also bizarre, particularly given the context at the time in Sydney, that they differentiate between anti-paedophile animus and anti-gay bias.
208. As noted above, during this time there was an increase in the attacks on gay men that referenced paedophilia, particularly during the Royal Commission into the New South Wales Police Service, also known as the Wood Royal Commission. The Wood Royal Commission looked into the activities of organised paedophile networks in New South Wales and their relationship with corrupt members of the NSWPF.
209. Again, as noted above, I do not know of any other hate crime research that has sought retrospectively to reassess alleged heterosexist hate crimes as motivated by anti-paedophile animus. This is a distinction that assumes knowledge about a victim's (perceived and recorded) criminal behaviour, and in some cases, may in fact rely on the perpetrator's own justification for their violence.
210. The Type C hate crime typology established by the SFP academic team is a strange mix of both "retaliatory" and "defensive" motives created by Levin & McDevitt; yet, in Dalton et al, the motive is framed as solely, or primarily, as provocation—or retaliation or defence—from sexual advances. While a "homosexual advance defence" was proffered by perpetrators (and sometimes accepted by courts) to justify their actions, it is difficult to know if an "advance" was made or just used as a way to mitigate their violence. And as this defence has been largely erased from the criminal justice system because of the bias contained in such a construction of motivation—for women do not respond to advances by murdering the perpetrator—it is unusual for Dalton et al and de Lint and Dalton to create a typology that rests on such a construction of motivation.

211. Further, due to the unique typology created by Dalton et al,¹³³ it could be claimed that some of the cases classified as “thrill” in Levin & McDevitt may also be proactive and associative,¹³⁴ given its link to youthful boundary testing, which is more likely to occur in groups even if they may be opportunistic rather than proactive.
212. Defensive and retaliatory hate crimes can be motivated by more than a sexual advance, and as Tomsen rightly highlights, often these types of hate crimes are instigated by a perceived threat to honour—whether that is a threat to perpetrators’ masculinity, or in the case of intrafamilial hate crimes¹³⁵, a threat to the honour of the family.
213. In my research on family violence experienced by culturally and linguistically diverse LGBTIQ people¹³⁶, and in my analysis of the MPS hate crime data¹³⁷, I found a sub-set of hate crimes perpetrated by victims’ families and friends. These intrafamilial hate crimes often occur when a person comes out to their family and are faced with extreme hatred and violence. Similar to honour-based violence, intrafamilial heterosexist and cissexist hate crime targets a group characteristic of the individual, and enacts often extreme violence in hopes that the victim will become heterosexual and/or cisgender.¹³⁸
214. de Lint and Dalton noted that they did not consider hate crimes of an intimate or familial nature as these have different motivations than traditional hate crimes.¹³⁹ However, for women, at times what appears to be a domestic homicide may in fact be additionally motivated by animus/hate/bias/prejudice, especially in cases of divorce from a heterosexual relationship due to same-sex attraction and identity. Additionally, too often transgender women are murdered by current and ex-partners not only due to reasons related to domestic violence, but also animus/hatred/bias/prejudice against the victim’s gender identity. And as

¹³³ NSW Police Force, Strike Force Parrabell Final Report, above n 3.

¹³⁴ Levin and McDevitt, above n 19.

¹³⁵ Nicole L Asquith, ‘Honour, Violence & Heteronormativity’ (2015) 4(3) *International Journal of Crime, Justice and Social Democracy* (Special edition on Islamophobia) 73-84; Nicole L Asquith and Christopher Fox, ‘No Place Like Home: Honour, Heteronormativity and Hate Crimes’, in Angela Dwyer et al (eds), *Queering Criminology* (Palgrave, 2016) 163-82).

¹³⁶ Nicole L Asquith et al, ‘Home is where our story begins: CALD LGBTIQ+ People’s Relationships to Family’ (2019) 31(3) *Current Issues in Criminal Justice* 311-332.

¹³⁷ Asquith, above n 1.

¹³⁸ The most extreme form of this intrafamilial hate crime I encountered was during my time as Client Advocate at the Lesbian and Gay Anti-Violence Project, when I received a call from a 15 year old girl, who had been kidnapped and kept captive by the girl’s maternal uncle on the behest of her mother, and was subjected to repeated acts of “corrective rape”. For more on “corrective rape”, see Sarah Doah-Minh, ‘Corrective Rape: An Extreme Manifestation of Discrimination and the State’s Complicity in Sexual Violence’ (2019) 30(1) *Hasting Women’s Law Journal* 167-96.

¹³⁹ De Lint and Dalton, above n 11.

noted above, when coming out to family, some LGBTIQ people experience extreme forms of intrafamilial hate crime.

215. With a wider remit, and capturing a more diverse range of hate motivated homicides, the typology and assessment tools may need to be significantly amended to account for the intimate/familial nature of some cissexist and heterosexist violence.¹⁴⁰
216. Dalton et al's bespoke categorisation of hate crimes was also distinct from the definition and operationalisation of the concept in international literature, especially with regard to violence against LGBTIQ people, which I believe are more likely to be perpetrated by opportunistic rather than motivated (or in their terms, proactive) offenders.
217. Whilst NSW does not include "in whole or part" in the definition of hate crimes in the Sentencing Act, it does not preclude a partial motivation of hate. Yet the independent evaluators demarcated between *motivated* and *aggravated* crimes even though this distinction is irrelevant to NSW sentencing legislation, nor the assessment of whether the "88/85" were motivated by heterosexist or cissexist animus/hate/bias/prejudice.
218. While gay men are at greater risk of assault and homicide by (groups of) motivated strangers in public places, these are exceptional crimes and do not reflect the quantum of violence experienced by the LGBTIQ community then or now.
219. Excising the non-lethal targeted violence experienced by LGBTIQ people erases this violence and the harms, trauma, and fears generated by this violence, which at the time created a climate of fear. The terms of reference for SFP were delimited by the existence of the "88/85", which necessarily excluded any other possible bias-related homicide of LGBTIQ people, or any sub-lethal, yet extreme violence experienced during the period under scrutiny.
220. Hate crime exists on a continuum,¹⁴¹ and the existence of lethal violence rests on the permission to, and silencing of, hate by less-lethal means.¹⁴² As illustrated in my analysis of

¹⁴⁰ Nicole L Asquith, 'Honour, Violence & Heteronormativity' (2015) 4(3) *International Journal of Crime, Justice and Social Democracy* (Special edition on Islamophobia) 73-84; Nicole L Asquith and Christopher Fox, 'No Place Like Home: Honour, Heteronormativity and Hate Crimes', in Angela Dwyer et al (eds), *Queering Criminology* (Palgrave, 2016) 163-182). NB Unlike victims of racist or faith based hate crime (which is often the template used to create policies and practices)—and as with victims of ableist violence—LGBTIQ people can and do experience extreme hate violence from family members and "friends". The demarcation between domestic, family, and targeted violence for LGBTIQ and disabled people is not as clear cut as de Lint and Dalton have framed their work when focused solely on the "stranger danger" type assaults that make up the bulk of the "88/85".

¹⁴¹ Andrea Hollomotz, 'Disability and the continuum of violence' in Alan Roulstone & Hannah Mason-Bish (eds.) *Disability, hate crime and violence* (Routledge, 2013) 52-63; Jennifer Schweppe and Barbara Perry, 'A continuum of hate: delimiting the field of hate studies' (2022) 77(5) *Crime, Law and Social Change* 503-28.

¹⁴² Barbara Perry, *In the name of hate: understanding hate crimes* (Routledge, 2001).

the link between verbal-textual hostility—often the only evidence of hate motivation—and hate crime, I found that there was a direct link between increasingly violent speech/text and increasingly violent behaviour/action by perpetrators.¹⁴³

221. Recording, reporting, and responding to less-lethal forms of hate crime—as well as hate *incidents*—is not a waste of police resources given that escalation of violence is a common characteristic of ongoing hate crime.
222. In this respect, a subjective assessment by the victim of whether an incident is *motivated* or *aggravated* by hate is better placed to respond to the continuum and escalation of violence as it captures all incidents, not just those that some may perceive as warranting increased police attention.
223. Additionally, and in contrast to de Lint and Dalton’s claim, as experts in being hated, victims have more knowledge and expertise in assessing a matter as motivated by animus/hate/bias/prejudice than police officers who are recruited for their exceptional privilege—which rarely includes experiences of being hated for who they are (not what they do).¹⁴⁴
224. Whilst a subjective assessment of hate may result in the over-reporting of hate *incidents*, this is much more preferable than the under-reporting of incidents given that the permission to ignore “minor” or less-lethal forms of violence may lead to the lethal violence at the centre of this Inquiry.

Expertise of academic team

225. The academic team appointed to conduct the independent evaluation of the methodology and findings of SFP are excellent scholars of criminalising sexuality, policing practices, terrorism, and homicide; but none of the three members of the academic team had previous expertise in hate crimes. In my opinion, this lack of expertise in hate crime is evident in the tone, language, and assessment criteria established to counter the perceived inadequacy of

¹⁴³ Asquith, above n 1.

¹⁴⁴ Obviously, officers who identify with those communities that are targeted in hate crime may have an experiential knowledge of hate beyond those of their cisgender, heterosexual, abled, Christian, male colleagues, but as minorities within an organisation that has a long history of animus against targeted communities and a strong “blue” culture, it may not be culturally safe for these officers to apply their exceptional knowledge.

the BCIF. The lack of complementarity may also be an artefact of the lack of hate crime scholarship by the SFP academic team.¹⁴⁵

226. Homicides *motivated or aggravated* by animus/hate/bias/prejudice are unlike any other homicide in a variety of ways, and a more applied understanding these unique contexts may have assisted in evaluating the “88/85” differently.
227. The decision by NSWPF not to contract recognised hate crime scholars is significant; perhaps under a different team of independent evaluators of the BCIF data, the findings may have been different.
228. Finally, the fear within the NSW LGBTIQ community during the 1980s and 1990s was never a “moral panic” (as mooted by de Lint and Dalton) but a lived reality of NSW LGBTIQ communities during this time, as evidenced by the hundreds of reports of violence collected annually by the Lesbian and Gay Anti-Violence Project. To call the “List of 88” a “moral panic” is an insult to those of us who managed the daily reports of cissexist and heterosexist violence, and understood that the “88/85” were the tip of the iceberg of violence against LGBTIQ people in NSW. Neither the remit of SFP, nor the experience of the academic team in understanding the non-lethal hate crimes in Sydney at this time, would enable this wider context to be considered
5. ***What are the other ways and/or models of which you are aware, in which bias crime has been, or may be, identified and/or documented and/or characterised and/or analysed, whether in Australia or overseas? If there are any relevant differences between models of identifying and analysing bias crime available today and those available in 2015-2018 when Strike Force Parrabell was carrying out its work, please include a discussion of those differences.***
229. The template laws and approaches created by either the United Kingdom and the United States of America have tended to be adopted in whole or part in other jurisdictions. As far as I know from my survey of the literature, it is only the UK, Singapore, and Malta that have adopted the subjective approach to identifying hate crimes. In the UK, the adoption of the

¹⁴⁵ Hate crime scholarship requires a focus on the unique characteristics of hate crimes (whether this relates to victimisation, offending, policing, punishment, victim support etc), and undertaking empirical or theoretical work on these issues. The point I make here is that none of the SFP academic team, prior to their engagement by NSWPF to conduct the independent academic review, had conducted specific research on “hate crime”. Dalton is internationally recognised for his work on the historical criminalisation of gay men, and has investigated some of the violence experienced by gay men historically or contemporary violence at/around beats, but this is the closest any of the team members came to engaging with hate crime concepts and scholarship prior to the SFP review.

subjective approach stems largely from the inadequacies identified by Macpherson in his review of the MPS' investigations into the murder of Stephen Lawrence.

230. In the UK, distrust in police to assess a crime as hate-motivated led to the privileging of a victim-centred—rather than an offender motivation—approach to not only identifying a crime as hate motivated (or aggravated) but in the collection of unique verbal-textual forensic evidence to demonstrate the targeting of victims.
231. The objective approach—where police are the only criminal justice actors with the authority to define a crime as motivated/aggravated by hate—has been adopted in jurisdictions other than the UK, Singapore, and Malta. However, and in my view, the distinction between “subjective” and “objective” is a façade given that police officers' assessment is equally subjective as that of the victim. That they are independent of the crime—being neither victim or offender, or in most cases witnesses—does not necessarily make their judgement “objective” given that they bring their own subjective norms, values, and opinions to every encounter with victims, witnesses, and offenders.
232. Irrespective of whether a subjective or objective approach is used in identifying, recording, and reporting on hate crimes, the models used to adjudicate and punish offenders varies considerably between jurisdictions, including those in Australia, where substantive hate crime offences are codified in Crimes Acts, and/or addressed in sentencing.
233. Additionally, in sentencing, jurisdictions differ as to whether the hate crime motivation is treated as an aggravating factor—in which case the maximum sentence can be applied—or as an additional offence that warrants additional penalty enhancements. In Australia, the trend is for objective assessment of motivation, with the motivation only considered as an aggravating factor in sentencing.
234. As noted earlier, the primary hate crime typology used by hate crime scholars has been that devised originally by Levin & McDevitt in 1993 and expanded by McDevitt et al in 2002 (see above at [68]-[69]). The original and expanded typologies were in wide use internationally well before SFP, and had been tested against a range of types of hate crimes, targeted communities, and data sources (including self-reported, police, and prosecution data). It is unclear why this typology was not adopted by SFP or the academic review team, especially given that the indicators and prompts developed by McLaughlin et al was based on this formative typology.

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235. As noted earlier, in the UK a subjective approach to hate crime identification is used, and while frontline and investigating officers have an assessment tool to explore the nature of hate crimes, the primary categorisation relies in all but approximately 20% of cases on the victim or witness account of bias. In 20% of reported hate crime cases, it is the police officer who makes the assessment of hate crime.¹⁴⁶
236. It is my opinion that the subjective approach is preferable for a range of reasons, not least of which is that targeted communities are well aware of the micro- and macroaggressions that constitute bias, discrimination, vilification, as well as hate crimes.
237. Replacing this embodied knowledge and experience with the views of police, who may have had no or limited training of the unique characteristics of hate crime—and who are extremely privileged by nature of the selection process to become a police officer—is tantamount to fostering a culture of denial.¹⁴⁷
238. In my analysis of the 100,000 hate crimes and incidents recorded by the MPS between 2003 and 2008, I found no over-reporting. While some scholars are critical of the recording of hate *incidents* by police organisations, I believe that when these are dealt with as information-only (as is the case with NSWPF), then there is no attendant increased criminalisation. Rather, recording hate *incidents* enables police organisations to better map patterns and to intervene earlier when incidents become crimes.
239. The original hate crime indicators developed by McLaughlin et al, 9 of which are found in the BCIF, were never intended to be used as a checklist to “score” whether a crime is a hate crime. These were simply meant to be prompts to force first responders to consider what questions need to be asked and what evidence needs to be collected in case it is a crime motivated by hate/bias/prejudice/animus.
240. Similarly, as noted above at [109]-[110] Vergani et al have developed a list of hate crime indicators that may assist police in identifying heterosexist and cissexist hate crimes. These indicators were not available to SFP at the time of the review.
241. While it is difficult to assess with any certainty without access to the BCIF summaries—or, more ideally, the case holdings—I believe that if NSWPF and Dalton et al deployed

¹⁴⁶ This evidence is contained in the redacted audit undertaken by the NPCC, which can be made available to the Commission.

¹⁴⁷ Nicole L Asquith, ‘A Governance of Denial: Hate Crime in Australia and New Zealand’ in Nathan Hall et al (eds), *Routledge International Handbook on Hate Crime* (Routledge, 2014) 174-90.

conventional typologies (such as those of McDevitt et al, or Gruenewald & Kelley) or had access to the more recently developed heterosexual and cissexist risk assessment indicators created by Vergani et al, some of the determinations by the NSWPF SFP officers and the academic team *may* have been different.

242. However, given the pre-eminence assigned to “Type A” proactive, organised hate crimes by both teams, I doubt that the MPS’ or Vergani et al’s indicators would have swayed either team in their categorisation. Nor would the newer and more specific indicators have enhanced missing or inadequate historical data, or contributed to a clearer assessment of those cases that were judged to have had “insufficient information” to make a determination.
243. Indicators such as those proposed by the MPS and Vergani et al may assist in future policing efforts to better respond to hate crimes against LGBTIQ people, but with so many items (44 indicators in MPS, and 23 heterosexual and 19 cissexist in Vergani et al), these indicators may not be viable as a risk assessment tool by frontline officers and investigators. Further information from the MPS on how their significantly more detailed indicators are used by first responders may illuminate how these newer approaches may assist in determining if a crime is hate-motivated (or aggravated).
244. I believe that the MPS and Vergani et al indicators are best used to train criminal justice practitioners to recognise heterosexual and cissexist hate crimes, investigate and prosecute hate crime cases, and to increase the awareness of targeted communities about the characteristics of hate crime and the risk factors that may contribute to hate crime victimisation.
- 6. *Please outline the more widely accepted views to be found in the literature relating thereto, including whether any consensus has evolved or is evolving.***
245. As hate crime legislation is State-based in Australia, and each jurisdiction internationally defines hate crimes (and who is protected by hate crime legislation) differently, there is no consensus on how best to assess a crime as a hate crime.
246. Whether an objective or subjective test is applied in crime reporting is determined by legislation and standard operating procedures within that jurisdiction. Even in comparable jurisdictions, comparisons are difficult because of different definitions, laws, reporting systems, police training etc.

247. Despite these caveats, SFP has taken a set of indicators developed elsewhere—in this case, the US—and applied those indicators (as embedded in a form of their own devising which also contained significant constraints such as the criminal standard of proof) retrospectively to demonstrate their consideration of issues faced by local marginalised and minority communities. Not only does this re-write history—when hate crime was not even recognised as a crime—it dismisses local conditions, cultures, social organisation, and political will. In the future, it is hoped that NSWPF, along with other Australian jurisdictions, can work collaboratively to operationalise Vergani et al’s indicators in such a way that it assists first responders in recognising and recording hate crimes consistently and reliably.

7. Please outline the history and development, both in Australia and overseas, of the use of the terms “bias crime” and “hate crime”, and/or related language, in relation to offences against LGBTIQ people, and provide your views as to what terminology is preferable and why.

248. I do not know the etymology of the term “hate crime”, but it was thought by the FBI to emanate from the United States during the 1980s, when attention was first directed to the unique characteristics of violence directed against particular types of people. Importantly, the FBI claim to have investigated what are now called hate crimes since as early as World War I, though their attention on these crimes increased after the murder of three civil right activists in 1964.¹⁴⁸

249. I suggest that the term was developed as an extension of earlier work on genocide—concepts that seemed too extreme to apply to the seemingly individualised acts of targeted crime—and in scholarship during the 1980s that sought to elucidate the targeted violence experienced by HIV+ people. At the same time, increased attention was being directed to the racist violence experienced by ethnic and racial minorities perhaps as a consequence of the increased migration to Global North countries at that time.

250. Both of these social contexts, and the deteriorating relationship between police and some of the communities they were meant to serve, led to increased resourcing and political will to address the disproportionate violence experienced by marginalised and minority communities.

¹⁴⁸ Federal Bureau of Investigation, *Hate Crimes* <<https://www.fbi.gov/investigate/civil-rights/hate-crimes>>.

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251. Although the term “hate crime” remains the most popular term to use in this area, evidence continues to accumulate about the motivations of offenders and it has become increasingly clear that “hatred” per se does not capture the range of emotions enlivening this violence, even if “hate” may capture the motive of Dalton et al’s Type A—or Levin & McDevitt’s “mission”—hate crimes.
252. In some crimes, discrimination may better represent the motivating force, especially in incidents where the characteristics of victims—such as their vulnerability, or their wealth—discriminate them from others. This prejudice is illustrated in the assumed effeminacy of gay men (and disabled people, and some Asian men), which offenders believe will make them an easy target.
253. Whilst beyond this and the SFP review, “hate” seems inadequate to explaining the motives in crimes that target transgender men and women, and lesbian, queer, and bisexual women for “corrective rape”, where the purported intent is to “fix” the “problem” of not being cisgender heterosexual.
254. Some practitioners and researchers are uneasy about defining crimes based on the assumed emotions and thoughts of the perpetrator, and in jurisdictions such as the US, the line between “thought crimes” and hate crimes is carefully curated lest criminal justice practitioners and courts flout the First Amendment.
255. In most jurisdictions, hate crime laws are formulated to apply when victims are people who belong, or are perceived to belong, to specified minority or marginalised groups, based on race, religion, ethnic/national origin, sexuality, gender (identity), or disability. However, there is some conflict within hate crime scholarship about whether everyone should be protected by hate crime laws, or whether these should be reserved for minority or relatively less powerful communities.¹⁴⁹ In other jurisdictions, the protected classes mirror those groups protected in anti-discrimination legislation and can include a much wider group of victims, including women (not just transgender women), people who are unhoused, and union members, and in some US jurisdictions, police officers and other first responders.¹⁵⁰ In Belgium, protected characteristics can also include political conviction, wealth, and health.¹⁵¹

¹⁴⁹ Neil Chakraborti and Jon Garland, *Hate Crime* (Sage, 2015).

¹⁵⁰ Gail Mason, ‘Blue Lives Matter and Hate Crime Law’ (2020) 12(2) *Race and Justice* 411-430; Rob C Mawby and Irene Zempi, ‘Police officers’ experiences as victims of hate crime’ (2018) 41(5) *Policing: An International Journal* 526-38.

¹⁵¹ Jon Garland and Neil Chakraborti, ‘Divided by a common concept? Assessing the implications of different conceptualizations of hate crime in the European Union’ (2012) 9(1) *European Journal of Criminology* 38-51.

And in the UK, hate crime laws have been extended to alternative sub-cultures, such as Goths.¹⁵²

256. I have otherwise provided my views in relation to the history and usage of the terms “hate crime” and “bias crime” and other related terminology in Section C of this report. In particular, I have included my views in relation to why I prefer to use the term “targeted violence”.

Signature:



Name: Professor Nicole Asquith

Date: 25 January 2023

¹⁵² Jon Garland and Paul Hodkinson, “F**king Freak! What the hell do you think you look like?": Experiences of Targeted Victimization among Goths and developing notions of hate crime(2014) 54(4) *British Journal of Criminology* 613-31.

Annexures

- A. Updated CV
- B. Invitation to Operation Parrabell briefing by NSWPF
- C. Email Chain – 27 January – 11 February 2016
- D. Request for Quote
- E. Strike Force Parrabell tender
- F. Letter of Instructions
- G. Further Letter of Instructions
- H. MPS Hate Crime Risk Assessment Questions
- I. National Police Chiefs' Council, *Hate Crime Audit* (redacted).