The Enforcement of Morality: Law, Policing and Sexuality in New South Wales

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This article addresses the policing of consensual sexual activity in public places in New South Wales (NSW), Australia. It draws upon data produced during a qualitative study conducted in NSW that involved semistructured interviews with key professionals who have specialist knowledge of this area of policing. Using these interview data and an analysis of NSW Police policy documents, the article considers operational policing within the broader context of contemporary NSW law. It argues that the legal construction of public sex offences facilitates forms of police discretion that, because of the social and moral landscape in which such discretion takes place, encourages the disproportionate social control of male homosexual conduct. By thinking of policing as a dynamic arena in which competing moral values are brought into tension, the article explores how the moral decision-making of police officers (a product of their 'moral habitus') determines the scope and application of the law. It concludes by arguing that the 'problem' of selective enforcement in relation to male homosexuality lies not in policing or in 'police culture' but in law that allows heteronormative social morality to become translated into police practice.

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This article addresses the policing of consensual sexual activity in public places in New South Wales (NSW), Australia. It builds upon previously published work (Johnson, 2008) in which I suggested that the current composition of Australian law may encourage its differential enforcement in relation to sexual orientation and, as a result, produce disproportionate social control of male homosexual conduct. Here, I investigate that proposition using data from an empirical study of the enforcement of law by NSW Police and, in particular, their negotiation of the 'sensitive issue' (NSW Police, 2008) of policing 'beats' — those public locations such as parks, beaches or public lavatories, where men meet to facilitate or engage in sexual activities. Despite the development of a 'culture' of liaison between NSW

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Police and the 'gay and lesbian community' (see, e.g, Network of Government Agencies, 2007; Thompson, 1991), and the more general embracement of styles of community policing (Findlay, 2004), there is a dearth of information about operational policing in this area. As such, this research is a first step towards addressing, what Dalton (2008) calls, the 'vexatious issue' of policing male homosexual public sex in NSW.

This article draws upon data produced during a qualitative study conducted in NSW in August/September 2009. The study involved semistructured interviews with a purposive sample of 12 personnel from criminal justice related agencies who are routinely involved with the policing of beats. The aim of the interviews was to provide the first insight into this area of operation policing in Australia from the perspective of criminal justice professionals. Such an insight is rare because police action in relation to consensual sexual acts in public places (like the behaviour it relates to) is neither readily observable nor produces much critical public discussion. The police have often been unwilling to participate in social science research of this kind, and previous studies have used different methodologies to circumvent the difficulties posed by gaining access to them: these have included covert participant observation (Humphreys, 1970), qualitative interviews with 'suspects' (Dalton, 2007), analysis of court records (Moran, 1996), a review of official reports by law enforcement officers (Walby, 2009), and an examination of surveillance and the Internet (Ashford, 2006). Few researchers, with the exception of Desroches in Canada (1990 and 1991), have been able to engage with operational officers 'on the ground' to illuminate this area of law enforcement.

The fieldwork for the research consisted of individual interviews with six NSW Police officers and a group interview with six members of the 'Beats Working Group'. The sample of police officers comprised individuals from the rank of senior constable to superintendent and was selected, in negotiation with a senior officer acting on behalf of the Commissioner of Police, on the basis of the officers' work as, or with, Gay and Lesbian Liaison Officers (GLLOs). Two of the officers have been instrumental in revising NSW Police guidelines for policing in this area and in delivering specialist 'beat training' to officers across the force. The interviews lasted between one and two hours and were conducted in person (with four officers in Sydney) and by telephone (with two officers in north NSW). The Beats Working Group comprises representatives from health, law enforcement (including NSW Police, Park Rangers, and NSW Attorney General's Department), local government, and gay and lesbian community organisations. This group is an inter-agency forum that, since its formation in 2007, has worked to improve the health and safety of beat users, minimise the impact of beats on the environment and maintain public amenities for beat and other users of such space. I attended and observed one of the regular meetings of the group in Sydney and conducted a group interview with its members. In all interviews I explored five key areas with respondents: the relationship between NSW law and policing; investigative practices; police training; historical changes in policing; and perceptions of complaints to the police about, or by, those engaged in sex in public places.

There are some limitations to the qualitative dataset. The size of the sample, and the fact that it comprises individuals with a specialist interest in this area of law enforcement, means that it offers an insight into policing from a particular stand-

point. One police officer told me that the research offered a partial understanding of policing because it focused on the views of those who work as, or closely with, GLLOs and excluded the views of those officers who take a 'hard line' on homosexual sex in public places. However, in acknowledging that those who work as GLLOs may have a particular political or professional orientation to this aspect of police work (they might not be 'hard liners') does not mean that those I interviewed were homogenous in their views or practices. On the contrary, the officers with whom I spoke had divergent views on, and approaches to, the social control of public sexual activities. Similarly, the diversity of membership of the Beats Working Group meant that a range of opinions and experiences were expressed. I have sought to represent the richness of the views of these professionals throughout the article and use them to illuminate some of the complexities of policing in this area. Contrasting these individual 'voices' is compromised by the necessity of maintaining the anonymity of the respondents. Because of the size of the sample, the way in which access to police officers was negotiated, and the distinct composition of the Beats Working Group, I provide very limited identifying information in relation to each individual.

Using the data from the qualitative interviews, and an analysis of NSW Police policy documents, I consider operational policing within the broader context of contemporary NSW law. In the first sections of the article I explore the legal construction of public sex offences and argue that the law facilitates forms of police discretion that encourage the disproportionate social control of male homosexual conduct. I show that selective enforcement, while often explained by the police to be the inevitable outcome of their response to complaints by the public, is significantly influenced by officers' view that male homosexual conduct falls more readily within the scope of the law. While this attracts the complaint that beats are 'over-policed', and that this expresses the institutional homophobia of NSW Police, a historical understanding of policing shows that operational practices designed to target men engaged in homosexual sex in public (practices once regarded as a core aspect of police work) have become officially regarded as antithetical to contemporary policing and are actively discouraged. I argue that the disproportionate focus on male homosexual conduct cannot be explained simply by viewing NSW Police as institutionally homophobic but rather must be seen to result from the enforcement of the current legislation within the context of the broader social, cultural and political relations of contemporary society.

A key argument throughout this article is that the moral decision-making of police officers is crucial in determining the scope, focus and application of the law. The decision-making of officers is decisive because the law creates a dynamic arena in which different moral values relating to sexuality are brought into tension and compete for legitimacy. In the latter sections of the article I explore how officers adjudicate this 'moral competition' by using their discretion to transform the abstract moral paternalism of the current legislation into particular forms of social control. There is no doubt that police officers' use of discretion is *influenced* by their own conceptions of social morality (Reiner, 2000; Westley, 1970) and that officers 'drink regularly from the fount of morality and replenish their internal esprit de corps by invoking a larger virtue that their actions serve' (Herbert, 1996, p. 815). What is less understood is how officers *negotiate* competing community, societal, organisational and personal moral demands in order to interpret and enforce the law

in this area. The final sections of the article employ the conceptual framework of 'moral habitus' to explore how police discretion in relation to sexual activities in public is significantly determined by the broader heteronormative social, cultural and political relations in which policing operates.[1]

Setting the Scene: Legal Moralism and Moral Policing

NSW has a range of statutory law that enables the regulation of sexual activities in public places. All statutory provision is gender-neutral and, since the repeal of all male homosexual specific offences from the *Crimes Act 1900* by the *Crimes Amendment (Sexual Offences) Act 2003*, there is no legal distinction between heterosexual and homosexual sexual activities in public or in private. No specific sexual 'act' is made illegal, but a range of 'offensive', 'obscene' and 'indecent' conduct in public places is criminalised. For instance, regulation 13 of the *National Parks and Wildlife Regulation 2002* prohibits a range of 'offensive conduct' that includes any 'act of indecency'; regulation 15 of the *Royal Botanical Gardens and Domain Trust Regulation* states that a person must not 'behave in an offensive or indecent manner'; and section 4A of the *Inclosed Lands Protection Act 1901* regulates 'offensive conduct'. These statutory instruments empower park rangers and NSW Police officers to take action against those engaging in prohibited behaviour while in particular geographical areas, such as national parks.

The most frequently used law by NSW Police in relation to sexual activity in public places comprises sections 4 and 5 of the *Summary Offences Act 1988* (hereafter referred to as 'section 4' and 'section 5'). Section 4 prohibits 'offensive conduct' so that a person 'must not conduct himself or herself in an offensive manner in or near, or within view of hearing from, a public place or a school'. The definition of 'public place' is extremely wide and covers any place 'that is open to the public, or is used by the public whether or not on payment of money or other consideration, whether or not the place or part is ordinarily so open or used and whether or not the public to whom it is open consists only of a limited class of persons'. The test to determine whether any conduct is offensive is its capacity to 'wound the feelings, arouse anger, resentment, disgust or outrage in the mind of the reasonable person' (*Grivelis v Horsnell*, 1974, 8 SASR 43). The maximum penalty upon conviction of a section 4 offence is three months imprisonment.

Section 5, a more serious offence, prohibits 'obscene exposure' so that a person 'shall not, in or within view from a public place or a school, wilfully and obscenely expose his or her person'. Whether exposure is 'wilful' is determined by an act being done 'deliberately and intentionally', rather than by 'accident or inadvertence', so that 'the mind of the person who does the act goes with it' (*R v Senior*, 1899, 1 QB 283). Classifying acts as 'obscene' largely depends upon common definitions, taken from the *Macquarie Dictionary*, of conduct that is 'offensive to modesty or decency, indecent, inciting to lust or sexual depravity, lewd, abominable, disgusting, repulsive'. The interpretation of the word 'person' in the legislation remains undefined in Australian law and is not taken to mean, as in English law, 'penis' (*Evans v Ewels*, 1972, 2 All ER 22). The maximum penalty upon conviction of a section 5 offence is six months imprisonment.

While sections 4 and 5 are written as gender-neutral offences, two questions arise about their enforcement in respect of sexual orientation. The first question is whether sections 4 and 5 are enforced more frequently in relation to homosexual, as opposed to heterosexual, sexual conduct in public places. A second and related question concerns whether, when any form of sexual conduct is policed, the more serious section 5 offence is applied more frequently to homosexual behaviour as opposed to heterosexual behaviour.

These questions arise not least because of the historical use of the law to underpin a range of policing activities, such as covert surveillance of public lavatories and other public sex environments, designed to detect and prosecute men engaged in homosexual acts (Dalton, 2007, 2008; Wotherspoon, 1990). Dalton's work illuminates the long history of policing in NSW directed against homosexual activities in public that was given significant encouragement by Police Commissioner Colin Delaney who, in 1958, described homosexuality as the 'greatest social menace' (quoted in Willett, 2000). While the historical use of these offences must be set in the broader context of the criminalisation of male homosexuality, Dalton's work suggests that subsequent to partial decriminalisation in 1984, NSW Police officers were still utilising these legal provisions to carry out protracted surveillance operations to detect men engaged in homosexual acts in public. While the use of covert surveillance is now discouraged, complaints about officer misconduct and unethical behaviour continue to be made against NSW Police. Such complaints led to the first Commissioner's Circular on policing 'beats' in 1995 and the development of the service's current operating guidelines. The most recent iteration of these guidelines continues to recognise that the 'majority of problems experienced by police at beats relate to officers being discourteous and rude' (NSW Police, 2008).

Questions about disproportionate enforcement with respect to sexual orientation also arise because of the way in which these offences rely on moral interpretations of conduct. Both sections 4 and 5, as legal instruments designed to enforce social morality, require police officers to make moral judgments about sexual conduct in relation to the standards of 'reasonable people'. Such 'standards', which are conceptualised as an amalgam of the broader social, cultural and sexual norms of society, continue to underpin different moral judgments about homosexual and heterosexual sex in public places. For example, I have examined elsewhere (Johnson, 2007) the ways in which male homosexual activity in public (such as 'cruising') is culturally constructed, through both lay and criminal justice discourses, as inherently morally offensive and harmful, whereas heterosexual conduct is often taken to be socially benign.

These cultural distinctions around different sexual conduct become reproduced in law through the framework of 'community morality'. For instance, in Australian law, sexual conduct becomes legally classified as 'indecent' when it is 'contrary to the ordinary standards or morality of respectable people in the community' (*R v Harkin*, 1989, 38 A Crim R per Lee J). As Devlin argued, the way in which sexual behaviours are classified in relation to the moral law is with recourse to judgments about the 'intolerance, indignation and disgust' of the 'man in the Clapham omnibus' (1965, p. 15). Such 'feelings', Devlin argued, are 'the forces behind the moral law' and allow the state to 'deprive the individual of freedom of choice' (Devlin, 1965, p. 17). When sexual activities are classified in relation to ideas about

the moral standards of 'reasonable' or 'respectable' people, homosexual acts are always more vulnerable to classification as 'offensive' or 'obscene' because such standards of reasonableness and respectability have often been conceived in diametric opposition to homosexuality and, vice versa, homosexuality has often been regarded as a de facto infringer of a community's moral standards. Therefore, understanding how 'front line' decision-makers determine the moral standards of 'ordinary' people, and decide which practices can be classified as 'disgusting', is crucial to understanding the operation of law in this area.

There is little available data that are useful to answering questions about how police officers interpret and enforce the law in this area. Statistical data from the NSW Bureau of Crimes Statistics and Research (as shown in Table 1), which detail the number of persons found guilty of section 4 and 5 offences over the last two years for which data are available, shows a significant bias in relation to the prosecution of male conduct.

The data in Table 1 show that approximately 90% of those found guilty of section 4 offences, and nearly all of those found guilty of section 5 offences, are male. Although these data are useful in providing an insight into the gendered dimension of the application of the law, they do not tell us anything about the types of conduct of those men found guilty of these offences. Data on section 4, for instance, do not distinguish between sexual and nonsexual conduct and therefore cover a range of offences that include use of offensive language and disorderly conduct. Similarly, the data for section 5 do not distinguish between types of obscene exposure and group together consensual sexual activity in a public place with behaviours such as 'flashing'.

NSW Police data similarly reveal little about police practice in this area. For instance, NSW Police do not disaggregate arrest data for specific offences in respect of sections 4 and 5. However, even if such data were available, they would be of limited value since arrest for consensual sexual activity under section 4 or 5 is extremely uncommon. This is because, guided by the principle of 'least restrictive action', arrest is only used by officers to prevent an offence continuing and in cases of consensual sex in public places this is rarely necessary. Instead, police use a range of other powers to deal with consensual sexual activity in public. For example, officers are empowered under section 197(c) of the *Law Enforcement (Powers and*

TABLE 1

Persons Found Guilty of Offences Under Sections 4 and 5 of the *Summary Offences Act 1988*

	2006			2007		
Offence	Male	Female	Total	Male	Female	Total
Section 4(1) Behave in offensive manner in/near public place/school	1920	218	2138	2321	215	2536
Section 5 Wilful and obscene exposure in/near public place/school	149	5	154	135	3	138

Source: NSW Bureau of Crime Statistics and Research.

Responsibilities) Act 2002 to issue a 'move on direction' to those in a public place who are 'causing or likely to cause fear to another person'. Such a direction is given in the form of words that instruct a person to leave a place and not return within a certain specified period. A person given a 'move on direction' is not issued with a form, but officers should record details of the event in their notebooks. Use of these directions, however, produces no centrally held data that distinguish between the particular forms of conduct to which they relate. Sections 4 and 5, the most commonly used legislation, allows police officers to issue 'on the spot' fines or, alternatively, a Field Court Attendance Notice that requires attendance at court within a specified time. In these cases, an officer files a written description of the offence but no statistical data are produced by NSW Police to show how often these are issued in respect of particular types of public conduct.

Therefore, while it may be unsurprising to report that everyone I interviewed said that homosexual activity in public places is more likely than heterosexual activity to be considered a criminal offence under sections 4 and 5 by the police, there is a dearth of existing data to help explain why this is so. To understand why male homosexual sex is more often classified as offensive and obscene, and why this practice is accepted as a commonplace 'fact', requires an empirical understanding of how operational officers' interpret and enforce the law. In the next section, I begin to explore how a range of social, cultural and organisational factors influence officers' understanding of the 'problem' of public sex and, in turn, their interpretation of the law as a mechanism to deal with it. In particular, I examine how the social and cultural construction of sex and sexuality shapes officers' discretion in enforcing the law and how this produces the differences in police practice around male homosexual and heterosexual behaviours.

Constructing the 'Problem': Morality, Law and Culture

Why certain forms of sexual conduct, and not others, become recognised as socially problematic and, in turn, as 'crime' is the outcome of how sexual acts are understood in relation to socially dominant ideas, and moral evaluations of, sex and sexuality. For instance, although section 4 potentially regulates *any* sexual activity in a public place that does not involve the display of genitals, what becomes regarded as 'offensive' conduct by the police is determined by their evaluation of *particular* sexual acts. In determining which acts will fall within the scope of the law, officers assess the capacity of the behaviours to cause moral harm by considering the context in which they take place and the 'audience' who may witness them. This standard operating procedure is outlined in NSW Police (2008) guidance on policing beats that states that the 'nature and level of police responses […] will vary considerably depending on the seriousness of the offences occurring in the location [and] the nature of the geographical location'.

All of the criminal justice practitioners I interviewed stated that, in practice, the geographic location in which sexual conduct takes place is central to adjudicating the 'seriousness' of the offence. One police officer, for example, made the distinction between sexual behaviour in a city public park and rural bushland to argue that sexual activity in a public park is easier to define as offensive because it takes place in a context where others are regularly expected to be. However, while the serious-

ness of offences is determined by an evaluation of the potential audience within different geographical location, this hinges upon a consideration of those involved in the activities that might be witnessed. For instance, in a consideration of kissing in a public place, one police officer said that if two men were witnessed kissing in a public park at night, then this behaviour could be categorised as offensive because it could be deemed to be 'threatening' to those who witness it — something that would not be the case in relation to heterosexual conduct.[2] The seriousness of offences, in this sense, is determined within a conceptual framework where male homosexual conduct is always imagined as 'more' offensive to an audience (and this 'offended audience' is itself imagined as heterosexual).

That officers regard male homosexual acts in public places to have a greater capacity to be harmful to those who witness them is significantly influenced by culturally normative ideas about male sexuality. In classifying particular types of sexual behaviour in relation to the scope of the law, it is notable that officers utilise dominant cultural ideas about gender. It is striking, for instance, that when police officers are asked to account for why women are so infrequently charged with section 5 offences (see Table 1 above) they use cultural, rather than legal, understandings to explain this. All of the officers I interviewed explained the disproportionate focus on male conduct to stem from biological differences between male and female bodies, with one officer stating that 'it is difficult for a woman to commit [this offence] because it is difficult for a woman to show her genitals in public'. This understanding of bodies, which relies upon socially normative conceptions of female genitalia as essentially hidden and difficult to 'wilfully' display in public, provides the basis on which gender-neutral law is performatively translated into police practice. Because this normative understanding of bodies underpins the legal framework for categorising offences — a framework that one officer described as: 'if you can't see the genitals, then it is offensive conduct, if you can see genitals then it is a section 5 offence' — it means that only displays of male genitalia are likely to be regarded as 'obscene'.

However, the point at which the display of male genitals in public places becomes regarded as obscene is subject to further culturally normative understandings about the display of bodies in public. It is not simply that the display of a penis in any public place will result in police officers classifying conduct as a section 5 offence. For instance, the officers I spoke to said that they would not use section 5 to deal with men urinating in a public place. Such behaviour does fall within the scope of the legislation but officers felt it was rarely used because most men urinating in public were not 'deliberately' attempting to expose their penis to others. Yet, what constitutes 'deliberate' exposure is subject to considerable interpretation. For example, officers said that it would be uncommon to use section 5 in cases of nonsexual public nakedness when a man exposed his genitals as part of some disorderly conduct. As in the case of urination in public, they said it would be more common to use section 4 to classify behaviour as offensive.

Where officers do encounter sexual activities in public that involve the explicit display of genitals, all of the criminal justice practitioners I interviewed indicated that the use of sections 4 and 5 was significantly determined by the sexual orientation of those involved in the acts. All of the police officers stated that the use of section 5 in relation to heterosexual activity is largely considered by most officers to

be disproportionate. Most heterosexual sexual acts in public places are, they said, dealt with using either section 4 or, more commonly, through the issuing of 'move on directions' under section 197(c) of the *Law Enforcement (Powers and Responsibilities) Act 2002*. By contrast, in cases of genital sexual acts involving men, all of the officers I interviewed were unequivocal that the use of section 5 was potentially appropriate.

Nevertheless, there was a shared perception among those I interviewed that the use of section 5 in respect of homosexual sexual activity was variable across Local Area Commands (LACs). One senior constable told me that in her Sydney LAC it would be common, for instance, to charge male suspects detected engaging in masturbation, either alone or with others, in a public place with both section 4 and 5 offences. The purpose of doing so, she told me, is to use section 5 as a 'back-up' charge so that, in the event of a magistrate finding insufficient evidence for one charge, the other can be considered. By contrast, another senior constable in a different Sydney LAC told me that the use of section 5 is discouraged in cases of consensual sexual activity and usually reserved for other offences, such as 'flashing'. 'If an officer came back to the station with a public sex report and wanted to charge under section 5', she told me, 'I would strongly urge the offence to be reclassified as section 4 unless there was a victim against which the action was directed'.

In summary, accounts by officers suggest that, while differences in LACs may produce variations in the enforcement of the law, it is clear that male homosexual behaviours are understood to more easily fall within the scope of section 5. This can be seen as the result of the way in which cultural and moral interpretations of sexual conduct 'meet' in offence categorisation: first, male homosexual behaviour is more easily imagined to fall within the scope of section 5 because of cultural understandings of how male genitals can be 'wilfully' displayed in public; second, the wilful display of genitals in the context of male homosexual acts is culturally encoded as possessing more capacity to harm the audience who witnesses it; and third, these offensive and obscene acts are usually imagined to taken place in geographical contexts, such as public lavatories and parks, where they can be easily witnessed by an audience.

It is clear that a key element of offence categorisation is regarded to be the impact of sexual activities in public places upon those who witness and are 'harmed' by them. The police officers I interviewed saw offence categorisation as the outcome of their duty to enforce the law in such a way that it responded to the needs of people in the communities that they police. Because of this, all of the officers strongly expressed the view that the interpretation of the law in this area should be in response to 'problems' that are identified by the community itself. Therefore, as I explore in the next section, criminal justice practitioners regard the most important factor determining offence categorisation to be the nature of complaints that the police receive from members of the public.

Community Policing and Public Complaints

The key way in which policing is 'officially' imagined in relation to consensual sexual acts in public is that it is a response to complaints from members of the public. NSW Police (2008) states that the purpose of policing beats is to 'deter offensive behaviour' because of 'complaints about offensive behaviour' from

'residents or locals'. They stress, through their publically available and internal operational documents, that the source of, and desire for, the policing of beats is found in the community. In this sense, policing is officially imagined to be based on a model of community engagement and response within the tradition of neighbourhood policing where community concerns are seen as a vital element in defining and identifying the nature and presence of local problems. The NSW Police intranet informs its officers, for example, that it 'is often difficult to identify whether an area is a beat' and that beats are 'often identified by members of the public or members of certain occupations such as security guards and rangers who then contact police to report the matter'. As one officer explained, 'we are acting on the genuine concerns of the community' or, as another more prosaically put it, 'we don't go looking for it'.

When policing is understood to be a solution to community-identified problems, it means that any selective enforcement on the grounds of sexual orientation can be understood to be the outcome of community complaints rather than discriminatory policing. However, it is important to recognise that public complaints to the police about 'crime' in this area pose several problems. The most significant is that, as the Association of Chief Police Officers (ACPO) of England and Wales recognise, it 'is likely that the majority of complaints from members of the public are still likely to be about public sexual activity between men' (Metropolitan Police, n.d.). ACPO recognise that complaints to the police cannot be seen to simply reflect a higher level of male homosexual public sex in a community, but rather that disproportionate levels of complaints are shaped by and produced because of the broader social and moral relations of society. This is certainly a key concern of NSW Police. All of the officers and other criminal justice practitioners I spoke to were aware that complaints, across both urban and rural LACs, largely relate to homosexual conduct and rarely to heterosexual sexual activities. In one LAC, which is known for its concentration of sex shops and prostitution, the police station does receive complaints about heterosexual sexual conduct but these largely relate to paid 'sex work'.

The nature of complaints about homosexual sexual activities in public received by the police suggests that complainants, as in relation to prostitution (Hubbard, 1999; Sanders, 2009), are often motivated by wider moral concerns about sexuality. At one Sydney city centre LAC, for instance, complaints are regularly received from 'dog walkers' who report having seen 'homosexual activity' in public parks at night. These complaints, however, rarely relate to visible sexual acts witnessed by the complainants, but rather to the congregation of men in a particular area. As one officer put it, complaints are frequently received about 'lots of parked cars with one bloke in each car'. Another frequent complaint to the police concerns 'littering' in areas where discarded condoms, underwear and other sexual paraphernalia are found. Officers told me that such complaints are regularly received from parents who report concerns about their children encountering such 'litter' when in parkland or public toilets. The police interpret these complaints as expressions of anxiety about behaviours perceived to be 'threatening', rather than as reports of visible sexual activities that could be legally classified as offensive or obscene. In other words, police are aware that complaints often express a culturally normative 'fear' about male homosexuals as predatory sexual 'monsters' or perverts (Warner, 2000) rather than reporting instances of crime. This contrasts sharply with

complaints regarding heterosexual public sex that, although infrequently received, overwhelmingly relate to concerns about the safety of those involved in activities and their vulnerability to crime.

Higher levels of public complaints lead to, as one officer put it, the 'inevitability' of higher levels of policing in relation to male homosexual activities. This officer saw the disproportionate policing of male homosexual sexual activity to be the outcome of a 'complaint driven' process that reflects the concerns of the wider community. Therefore, while officers are aware that higher levels of complaints are not necessarily based on any evidence that men are more frequently witnessed engaging in homosexual sexual activity in public places, they regard higher levels of policing as the inevitable outcome of the nature and scope of community policing. Given the tacit knowledge among officers regarding the nature of complaints made about male homosexual sex, it is surprising that NSW Police do not issue formal guidance on how to conceptualise or process complaints. While guidelines specify that the number and nature of the complaints should be considered before police intervention takes place, no direction is given in relation to what types of complaints should be prioritised or for what reason. This is especially problematic given that many of the complaints received are often communicated to the police anonymously by telephone. Anonymous complaints pose problems for officers policing in this area because, in the absence of any way of acquiring further intelligence, they invariably necessitate an operational response. A lack of formal guidelines on responding to complaints fails to ensure that officers do not respond 'willy nilly' to calls from the public (Loader, 2006) or adopt a more problem-orientated approach to policing (Bullock et al., 2006; Goldstein, 1990).

Despite the absence of formal guidelines, however, the officers I interviewed said that they do routinely consider complaints in relation to the motivations of the complainants. This is illustrated by one recent complaint by a member of the public that was received anonymously by telephone and conveyed by the regional dispatcher to officers in a rural LAC via their car radios. The officers received the complaint from the dispatcher in the following way: 'there are men having sex in the public toilets'. The officer I interviewed, who was on duty at the time the complaint was received, said that he immediately questioned the accuracy of the complainant's report and, in addition, whether it was 'beefed up' by the dispatcher. As was common with the other officers I interviewed, this officer questions the validity of such complaints because of a tacit operational knowledge that sex between men in public toilets is highly likely to be discreet and largely invisible to the 'general public' — a view supported by Humphreys' (1970) ethnography of the interaction order of public sex encounters between men — and that complaints about such activity tend to be exaggerated.

Complaints in this area were regarded by those I interviewed as especially problematic because, reflecting the prejudices and biases of those making them, they often 'beef up' crime problems. A central concern of those I interviewed was that complaints can (and do) become the foundations on which disproportionate policing activity is generated. While one complaint about an area may result in one or more patrols by officers to a scene, more complaints may be regarded as the basis for sustained police presence. As one officer told me, complaints about beats result in 'ongoing complaints areas' becoming identified and these produce more frequent

police attention. This officer felt that the identification of such areas produces an escalation in policing that is problematic: because officers know these areas have received complaints, he argued, it can 'prejudice their policing' and 'cloud their judgment'. This is because of a failure on the part of some police officers, he argued, to distinguish between the nature of the complaints received and the actual nature of the problem. Because complaints rarely relate to nudity or visible sexual activity, but rather to 'signs' that a beat exists, the moral offence that underpins the complaint may not relate to any tangible crime. In short, officers raised the concern that, while 'the community' has become seen as the essential driver in all criminal justice matters (Garland, 2001), expressions of 'problems' by members of a community need thorough, ongoing and formally guided analysis by the police.

Community Morality and Police Discretion

It is because of the nature of complaints in this area, their tendency to reflect a cultural and moral response to particular types of behaviour rather than report actual instances of legally defined crime, and a lack of clear guidance on how to conceptualise them, that police discretion becomes highly significant. Policing of public sex environments, and particularly beats, relies heavily on officer discretion. As criminal justice practitioners in Sydney told me, if an officer encounters a 'guy and girl in Hyde Park' having sex they will most often say 'piss off', or 'get a room' and move them on and make no formal record of the event. A lack of complaints about heterosexual sex accounts, in some part, for why this form of discretion may be used, but there is another reason for why it might happen: what officers call the responsibility of the police to make decisions that reflect 'community morality' and uphold 'community standards'. As Fielding has argued, while police officers 'have a knowledge of relevant law' this will have less impact on their decision-making than their 'appreciation of local community norms' (1988, p. 52).

It is common for academics to question whether, as the 'lens' through which community norms are filtered, police officers refract a particular conservative, sectarian or authoritarian set of standards (Reiner, 2000) or reflect a common set of social values and beliefs (Waddington, 1999) in their approach to the enforcement of the law. Some have argued that police officers must be seen as moral agents who, when enforcing the law, do not simply detect crime but actively conceive and construct it (Cohen, 2002; Hall, Critcher, Jefferson, & Clarke, 1978; Young, 1971), and previous research in this area has shown that police officers do actively 'uncover' homosexual conduct — and therefore make visible behaviour that would otherwise go unseen by 'the public' — on the basis that *they* find it morally offensive or obscene (Desroches, 1991; Moran, 1996). However, it would be wrong to reduce the 'moral arbitration' of police officers in this area to the level of the 'psychological' or cognitive processes of individual officers (Mason, 2007) or see it as an effect of 'police culture'. Rather, it is important to recognise how officers' discretion in relation to offence categorisation is shaped by the broader normative community relations in which policing operates.

Understanding police discretion in relation to community norms is complex in this area of law enforcement. On the one hand, the officers I interviewed all said that the moral values of the 'general community' underpins policing in this area and that, in responding to this, a greater focus in policing male homosexual conduct is

'inevitable'. On the other hand, officers also said that changing social attitudes about the 'gay community' have resulted in policing approaches that do not simply criminalise beat users but also ensure their health and safety when they are themselves victims of crime. These ideas of community — of the 'general' and 'gay' communities — can be seen to create a number of tensions within policing that, in turn, produce different (and contradictory) police styles. Such tensions illuminate the more general problematic ideological notion of 'community' at the heart of 'community policing' (Findlay, 2004). However, they also show how policing is a crucial nexus at which the needs and expectations of multiple and different communities meet and compete.

When the policing of public sex environments is understood as a form of community policing it can be imagined, as in relation to other types of crime, as a way to facilitate 'the interaction of police and all community members to reduce crime and the fear of crime through indigenous proactive programs' (Oliver, 1998, p. 51). However, it is important to recognise the highly selective way in which a 'community' and its 'problems' become recognised and legitimated by the police. As Brogden and Nijhar argue, through the use of discretion 'the police determine the nature of the community, its problems and how such problems should be responded to' (Brogden & Nijhar, 2005, p. 65). Given the competition between what becomes framed as the moral values of the 'gay' and 'general' communities, policing 'on the ground' is often an attempt to balance the demands of various interested community groups and individuals. As street-level bureaucrats (Lipsky, 1980; Somerville, 2009), the police therefore exert considerable influence in determining which moral values become privileged.

As I argued above, it is common for academic commentators to argue that the uses of police discretion are influenced by the morality of individual police officers — what Reiner (2000) calls the 'working personality' of officers — and by 'police culture'. While all those I spoke to said that police discretion does contribute to higher levels of formal control of male homosexual sex, they did not account for this as simply the result of the 'personalities' of individual officers or of police culture. Rather, they saw it as the outcome of the interaction between the individual 'values' of officers and the broader cultural and moral relations of communities in which they work. For example, one officer said that his use of discretion in policing beats had 'changed dramatically' since joining NSW Police and accounted for this as the result of two main changes, in policing and in society: first, he saw the training that he undertook to become a GLLO as significant in altering his approach and, second, he felt that his time spent policing in a community where there was a high density of 'gay couples' had a significant impact upon his practice. 'This community was very accepting of gay couples', he told me, and there were 'older couples living with their life partners, with established businesses … ordinary people who just happen to be gay'. The impact of police training, as well as greater familiarity with the 'gay community', resulted, he said, in him exercising greater leniency when policing homosexual public sex.

The perceived impact of the 'gay community' upon policing beats, which was shared by all those I interviewed, is sociologically interesting for two main reasons: first, aligning the 'gay community' with 'beats' is problematic because many men who use beats will not identify as 'gay'; and, second, there is an implicit, normative,

but empirically problematic, assumption that the 'gay community' is more tolerant of public sex than the 'general community'. Nevertheless, all of the criminal justice personnel I interviewed recognised broad change in the use of police discretion, resulting in a 'softer' approach to policing beats, to be the outcome of changes in 'community values' and a significant factor in this change was seen to be the greater visibility and presence of the 'gay community'.

Despite this change, those I interviewed saw competition between different community norms and values as central to policing in this area. One officer, for example, contrasted his experience of policing in Sydney with policing in a rural community where there were 'no visible gay groups' and where '90% of the gay community is underground'. This LAC, he told me, comprised an 'old fashioned, old world Australian homophobic community'. He contrasted these two locations to make a point about the important symbolic role of policing in respect to its 'community function': 'you have to be seen to be doing the job in relation to the law but also in relation to community opinion'. This officer found working in a 'homophobic community' frustrating because of the community expectation that policing should always uphold these values. All of the officers I spoke to expressed, in differing ways, the sentiment that they felt 'caught' between the expectations of the 'general community' and those of the 'gay community'.

These conceptions of tensions between different community values can be seen to have a significant impact upon police discretion and decision-making. One officer, for example, contrasted the once routine and standard practice of visiting male public toilets to detect men engaged in sexual activity with the contemporary NSW Police policy that such practice should only be in response to public complaints. He described how the once standard 'surveillance' practice engaged by police officers — of looking under cubicle doors to count pairs of feet in order to determine whether there was more than one person in each cubicle — was no longer common in police work. When I asked him if officers still engaged in that practice he said 'you're damned if you do, and damned if you don't'. He went on to explain that, even when a complaint about offensive behaviour necessitated a duty to investigate, if he attended a scene and found no sexual acts being committed 'openly in public' then he felt there was no significant problem that demanded further investigation. But he added that he felt that the decision to not investigate further (by not looking under cubicle doors, or forcibly opening them) would not meet the expectation of, or gain approval from, most members of the 'general public'. Another officer described how, following several complaints about litter, a high number of parked cars and the destruction of the vegetation at a local beat, she organised a 'risk assessment' of all the local parks to determine the status of lighting and other aspects of the facilities. She was subsequently accused, she says, of harassing the gay community and asked 'how do you not know it was kids who destroyed the vegetation, or left condoms?' In line with NSW force policy, she also engaged in discussions with beat users as a method of discouraging the types of activities being complained about and was, she says, accused by others of 'encouraging gay sex' and 'sitting in a police car giving out condoms'. 'You can't win', she said.

The views expressed by officers suggest that policing in this area is often imagined as a negotiation of different moral values within particular communities. Officers feel they 'can't win', or that they are 'damned if they do, and damned if

they don't', because they recognise their role in adjudicating a competition between different moral values in the communities they police. As a result, officers engage in decision-making in relation to these competing values and the discretion they exercise must be seen as a vital element in determining the landscape of this ongoing moral contest. While the uses of discretion in policing cannot be seen as wholly determined by individual officers (Waddington, 1999), officers do have significant 'space' in which to make decisions. Such space, best described by Dworkin's (1977) 'doughnut' metaphor, comprises the freedom for officers to make decisions within the surrounding legal, organisational and cultural constraints in which policing operates. What is significant for this area of policing is that, because the offences in question are constructed through law that encourages a moral interpretation of behaviours (as 'offensive' or 'obscene'), this space affords the 'strong' use of discretion. In other words, the law actively requires criminal justice practitioners to engage in moral arbitration around certain activities and this, inevitably, involves police officers making moral judgments. In the next section, I suggest that the moral decision-making of individual officers can best be understood as the product of a 'moral habitus' that is itself shaped by the heteronormative morality of contemporary society.

Morality, Discretion and 'Habitus'

Police officers' moral reasoning in relation to different types of behaviour is a significant aspect in both the conceptual construction of 'crime' and the subsequent response to 'criminals'. As Punch argues, the police 'tend to divide people into "moral" categories, which generates powerful negative feelings about those involved […] and leads to feelings of contempt if not hatred for criminals' (Punch, 2009, p. 43). An implicit aspect of the moral categorisation of all crime is, as Punch argues, how officers view certain behaviours as 'unsavoury and seedy' (2009, p. 43). In the case of public sex offences, the law makes these moral 'feelings' central and explicit.

In one sense, because it is socially normative for male homosexual sexual acts in public places to be understood as 'disgusting' (Johnson, 2007), it is unsurprising that individual officers disproportionately classify such behaviour as 'offensive' or 'obscene'. It is routine for male homosexual sexual acts in public places to be seen by police officers as 'other' to and 'outside' of the normative moral conventions of a community. One officer explained it like this: police officers, she said, are 'a part of the community at large' and 'this community at large cannot on the whole understand why anyone would want to be a beat user'. This officer explained encounters between police officers and beat users as a reflection of a broader moral tension between the 'community at large' and men who have sex at beats: when officers encounter sex at beats, she argues, it 'confronts their morality'.

A key aspect of the characterisation of this 'confrontation' between moral values is that police officers are understood to occupy a particular standpoint in respect of sexual morality — the standpoint of 'ordinary' members of a community. What is significant about this standpoint is that it is not politically neutral, but is aligned with socially normative ideas about sex and sexuality. For instance, as one officer explained, in relation to sexual activities involving men in public toilets: 'all visible sexual behaviour is offensive because a reasonable person wouldn't do that'. These

ideas, about what a reasonable person would and would not do, often reflect heteronormative understandings of sex, sexuality and sexual orientation. When such understandings are the basis on which police officers use their discretion to transform the abstract legal moralism of sections 4 and 5 into operational practice, policing attracts the complaint that it 'intersects with the normalization of sexuality' (Walby, 2009, p. 377).

However, police officers are not the passive instruments of 'heteronormative morality' but agents who are actively engaged in an ongoing moral evaluation, interpretation and classification of different behaviours. If, through their interpretation and enforcement of the law, police officers do reproduce the heteronormative morality of the 'general community' then this must not be seen as *inevitable* or *automatic*, but rather as an *active* accomplishment of police work. 'Public morality' should therefore be seen as a dynamic resource that is used by police officers to reach judgments about the behaviours they police. Police discretion, in this sense, should be seen as the outcome of *individual* moral decisions made in relation to *socially dominant* ideas about particular types of conduct.

A way of understanding discretion in this area — as the product of both social norms and individual actions — is to see it as the outcome of 'habitus'. Habitus, Bourdieu and Wacquant argue, is a 'structuring and structured structure' that 'engages in practices and in thoughts practical schemata of perception issued out of the embodiment […] of social structures' (1992, p. 139). In other words, habitus is our embodiment of social relations and our expression of them through thoughts and actions. As Bourdieu and Wacquant argue:

> The notion of habitus accounts for the fact that social agents are neither particles of matter determined by external causes, nor little monads guided solely by internal reasons, executing a sort of perfectly rational internal programme of action. Social agents are the *product of history*, of the history of the whole social field and of the accumulated experience of a path within the specific subfield […] to put it differently, social agents will *actively determine*, on the basis of these socially and historically constituted categories of perception and appreciation, the situation that determines them. One can even say that *social agents are determined only to the extent that they determine themselves*. But the categories of perception and appreciation which provide the principle of this (self-) determination are themselves largely determined by the social and economic conditions of their constitution. (1992, p. 136)

The concept of habitus is useful because it provides a way of understanding how individual actions, and the subjective perceptions that guide them, are shaped by the social and historical relations in which individuals are situated. Habitus is social relations inculcated into the body and manifest in the form of individual 'dispositions'. Such dispositions become felt and expressed as personal 'taste', in the form of 'aversion' or 'comfort' with particular ideas or events. The utility of this theoretical framework is therefore its potential to explain how individualised 'feelings' about certain forms of sexual conduct, such as disgust, are the product of the social relations in which individuals are situated. This allows us to understand how broader normative relations fashion individual moral decision-making, rather than seeing it as the outcome of an individual 'psychological' process.

It is a sociological conceptualisation of human agency that resonates strongly with police officers' own understandings of decision-making and discretion. For example, one officer described his own decision-making in relation to public sex offences as significantly influenced by his own 'background': 'as a police officer', he told me, you 'come across' instances of public sex 'now and again' and you tend to 'tolerate what you are used to'. He viewed his toleration of 'what you are used to' as the outcome of the process of 'growing up' and 'seeing certain types of behaviour as normal'. 'Young heterosexual couples having sex on the rocks by Sydney Harbour' is, he said, 'normal behaviour' and 'something that is part of young people growing up'. As a police officer, he said, when you see young heterosexual couples having sex in public places you respond by thinking 'it's just a young couple in the back of a car' and 'you tolerate what you as an individual could have said when you were younger: "that would be me"'.

For this officer, 'learned' conceptions about heterosexual conduct as 'normal' were understood to have a direct influence on shaping particular types of discretionary policing in relation to them. The police officers I interviewed were all very reflexive about the influence of heteronormative sexual morality on police decision-making and discretion. One officer described it as the relationship between 'what is in my mind, and the mind of the community' in order to explain how the 'mind' of the general community influences the 'minds' of police officers. This officer was critical of such an influence in relation to policing beats, stating that individual police officers too unproblematically translate normative social morality into police actions. The result of this, he said, is that when officers detect a heterosexual couple in a public toilet having sex they think 'they're just taking advantage of the privacy' and move them on saying 'on you go', but if it's a homosexual couple, 'well, god forbid'. It's our 'upbringing', he says, and our 'in-built' ideas about sexuality that make us 'fear what we don't understand' and then 'react against it'.

It is these 'built-in' ideas, and the 'reactions' they produce, that NSW Police have been keen to address. Through the implementation of written guidelines and training, NSW Police can be seen to have engaged in addressing the habitus of individual officers in order to refashion their perceptions about beats. Nowhere is this more evident than in the use of specialist 'beats training'. Such training is not provided to all officers, as part of their standard constable training, but offered on a 'need' basis in LACs where there are identified 'problems' in policing in this area — most often this will be where beat users have made complaints against police officers and practices. One of the key aims of the training is, as the superintendent charged with running it told me, 'demystifying a beat for ordinary police officers'. The aim of 'demystification' is based on addressing, and changing, the *perceptions* of 'ordinary' officers about beat sex in an attempt to modify their police *practice*. Attempts to change police officers' perception are done in recognition that 'ordinary' perceptions about beats are problematic in contemporary police work. Whereas Chan (1996) views police training as 'rule tightening' designed to address problems in 'police habitus' that result from police culture, 'beat training' can be seen to actively confront the wider heteronormative social, cultural and political landscape in which police habitus are shaped.

Because of this, it was not without irony that those I interviewed said that they felt NSW Police policy was more 'liberal' in respect of male homosexual public sex

than 'society at large'. They viewed this as a positive development, and argued that it showed awareness in the service that 'ordinary' social perception about beats was a hindrance to 'good policing' in this area. Those I spoke to felt that it would be beneficial to include beat training as a part of standard constable training because, as one officer put it, the 'communities' that new officers 'come from' often shape their perception in ways that are in contradiction to official NSW Police policy. Many police officers come from 'closed communities', she told me, and they need to be given the 'tools to police professionally behaviours that they have not encountered before'. The key aspect of beat training is, she explained, to convey to officers the idea that 'you might be shocked by what you encounter at beats but the activity in question should elicit no greater response to other [heterosexual] activities'. In other words, training is an attempt to address the 'ordinary' subjective 'feelings' that result from an embodiment of the values of these 'closed communities'.

As part of the training, officers are asked to reflect on the nature of both heterosexual and homosexual sex in public places and to think about the similarities and differences between them. They are, as the superintendent in charge of the training put it, 'reminded that men at beats are discrete and not exhibitionists [and] are not there to indulge in any "fetish"'. To make this point, she asks officers to think about 'beats' and 'lover's lanes' in order to 'think through' the similarities between homosexual and heterosexual sexual activities in public places. In doing so, the training attempts to address perceptions about sexual conduct and reshape understanding about them. To explain why this is important, this superintendent describes a recent 'beats training day' she organised in which officers discussed a complaint, made by a member of the public to a LAC, about the presence of a 'dead goat surrounded by some used condoms' at a known beat: 'some of the officers were saying "I don't know what goes on up there" and I was saying "well it's probably the Freemasons because they do that sort of thing don't they"'. The Freemason remark, she told me, was a jokey response to what she sees as a serious issues in terms of both the attitudes of the police and the public: 'it shows us just how far we have to go as a society because people really do think men at beats are having sex with animals'.

This example serves to highlight the way in which NSW Police are attempting to address the perceptions and understandings of male homosexual public sex among officers. The training is not, as one officer put it, designed to 'change people's mind', but to encourage officers to reflect on the nature of the conduct and to question how they view it — why, for instance, they may feel disgusted by it. As such, the training can be seen as an attempt to problematise heteronormative social relations and the individual perceptions that depart from them. For those officers that I spoke to in rural LACs, this was regarded as particularly desirable. One officer felt that younger, inexperienced constables from rural communities should have access to this training. Because these constables often come from the communities in which they police, he told me, they 'grasp the community's values' but, because these can be 'narrow minded', it is 'not easy for them to gauge if the community is wrong'. He argued that policing needs to negotiate multiple sets of values — the values of the local community, of society, and of the police service — and that it is important to be able to 'see outside' of small community norms. A key aim of 'beat training' in NSW Police is to facilitate this broader vision: it aims to render the habitus of individual officers 'a fish out of water' (as Bourdieu often describes it) in

order to 'make strange' those perceptions that, because they are shaped by the social relations in which they are situated, so often feel 'normal'.

'Bad Policing' and 'Homophobia'

The Beats Working Group have produced and distributed a 'Z Card', which outlines beat users' legal rights and gives advice on dealing with the police. One aspect of this advice is to 'be discreet' when having sex because 'most police activity at beats is in response to complaints from the public about obvious sexual activity taking place in easy-to-view areas'. Yet during discussions with members of the Beats Working Group one criminal justice professional, with experience of working with operational police officers, told me that she knew that officers policed beats not because of complaints but as a 'sport'. Another member was sceptical that policing was complaint driven at all (regardless of whether it related to 'easy-to-view' sexual activity or not). And an operational officer told me that 'informal policing' of beats was common and that 'unofficial' patrols were undertaken for the 'enjoyment' of officers. This officer talked candidly about how officers, who have not been directed to beats on the basis of public complaints, go because 'they're bored' and 'do it for fun'. She said that such practices were not unique to any LAC and were 'fairly common': in her own LAC she estimated that it would happen 'perhaps once a month'. 'They line the guys up that they find at the beats', she told me, and 'question them'. Most often these are not men that have been witnessed engaging in offensive or obscene acts, but individuals who are 'hanging around' at beats. I asked this officer what outcome this police activity produced: 'nothing', she said, 'there are no statistics' because the officers do not issue charges, and 'there are no complaints' from beats users because they are reluctant to report the activity. If questioned, officers say they are 'just patrolling' and, she says, 'they have the right to'.

It is views such as these that make the enforcement of sections 4 and 5 a complex and contested area. This type of policing, as I outlined above, is now seen as officially antithetical to NSW Police policy and, as one officer put it, is regarded as the result of 'over-aggressive and over-zealous' individual officers rather than a 'core' element of police work. Yet complaints that are regularly posted on a website called the 'Sydney Beats Project' suggest a different view (http://www.beatproject.org.au/). The website states that it was 'developed as a result of the increasing level of police harassment and threatening behaviour, intimidating questioning and the use of unreasonable and disturbing police tactics, which actively targets men at "known beats" across NSW'. It claims to 'receive reports from beat users in NSW — on a daily basis — of police harassment and intimidation, and the use of barbaric tactics which may be unlawful'. Such unlawful tactics are described as the active 'hunting' of men at beats through the use of various practices (such as the use of vehicles and lights to 'flush' men out of secluded areas) and inappropriate language (such as calling men 'filthy animals').

The complaints made on this website — which the website organisers state are anonymously submitted because of the reluctance of many beat users to make 'official' complaints — suggest a different application of the law than the one proscribed by NSW Police policy. While many members of the Beats Working Project dismissed the claims made on this website — ostensibly as the unsubstanti-

ated opinions of one man — some of the operational officers I spoke to did recognise them as legitimate. One officer said that the practice of 'flushing out' did happen with, for example, officers driving into a park with their lights off and then shining them, on full-beam, on those who would otherwise have remained unseen. On such occasions, officers told me, beat users often run and are then pursued by officers who, apprehending them, question and charge them.

However, those I interviewed did not view the use of such 'tactics' when policing beats as either 'barbaric' or 'unlawful'. Rather, as the superintendent tasked with running 'beats training' argued, such practices are the 'inevitable' outcome of policing in this area. 'Police officers patrol parks with their torches off', she told me, and 'when they hear a noise they put their torches on': 'they see people, people run, and the police chase'. 'Police also use their car headlights to blind suspects' but this, she argued, is 'a general policing tactic and not one confined to policing men at beats'. And, 'yes', she said, 'we crawl around in the dark' looking for people, 'that's what police officers do'. While individual beat users have the right to be treated 'professionally' and not to be called 'filthy faggots', she said, they 'do not have the right not to be policed'.

For this officer, and for the others I spoke to, there was a fundamental agreement about the 'right to police' public sex environments and for police officers to engage investigative powers. What police officers viewed as 'bad policing', therefore, was not the use of police powers to patrol, investigate and charge those engaged in public sex, nor the more frequent use of these powers in relation to homosexual sex. Rather, 'bad policing' was seen to result from the use of section 4 and 5 to pursue a 'homophobic agenda' — that is, a form of policing that is underpinned by individual officers' own moral intolerance of homosexual acts in public. Set against a historical background of homophobic policing in NSW (and exacerbated by what officers felt were 'old fashioned', 'patriarchal', 'macho' and 'masculine' values embedded in the police force) 'good practice' was seen to reside in 'respect' for sexual minorities. A common view of policing in this area, therefore, was not that homosexual conduct should be policed 'less' but that it should be policed 'professionally'. In other words, that while policing must be responsive to the moral 'standards' and concerns of 'most people' in the community, police officers must also deal with homosexual activities in a measured, balanced and respectful way.

Nevertheless, for two of the officers I interviewed, training officers to be 'professional', by asking them to be courteous and polite, was important but inadequate because it failed to address the fundamental cultural distinctions underpinning the policing of different types of public sex. To illustrate this point, one officer told me about an e-mail that was recently circulated to all police stations in NSW by a senior constable. The e-mail contained a high-quality image, taken from CCTV footage, of a man at a beat and was accompanied by the statement 'wanted for homosexual sex'. Because there had been no complaints from members of the public, and the suspect was not being investigated for any other offence, this officer viewed this as an example of how male homosexual sex in public is regarded by some officers as a serious offence worth pursuing. This officer said that such policing was common, with 'intels' (intelligence reports) regularly produced about men at beats that contain statements such as 'this person was seen at a homosexual beat'. For this officer, policing practices that 'target' beat users continue because of a view

among 'some officers' that such activity is fundamentally morally offensive and obscene. In other words, changing the 'style' of police practice and holding officers to a standard of courteousness and politeness does not in itself alter the underlying moral habitus of officers and challenge their tendency to respond to male homosexual activities with intolerance, indignation and disgust.

Conclusion

The question of whether police practice in this area is motivated by homophobia is obviously an important one. Recognising that homophobia has certainly played a role in the past is the basis on which NSW Police have responded with specific training and issued new guidelines in relation to the policing of beats. Training aimed at addressing the perceptions of officers has been an attempt to reorientate policing practices in respect of male homosexual acts in public. Yet, despite the importance of changing the 'style' of policing in this area, this alone does not address the differential and discriminatory use of law in this area. It does not, for instance, address the central fact recognised by all those I spoke to that, in essence, policing responds to heterosexual and homosexual behaviours in public in fundamentally different ways. This happens not simply because of, as one officer put it, the prejudice of 'lone guns' operating on the margins of policing, but because of dominant ideas about homosexual sexual activity and those who engage in it. It is these ideas that ultimately mean police officers still 'crawl around' at beats, shining their torches at men and 'flushing them out', while heterosexual sex hardly registers a concern.

Discussions about homophobia in 'law enforcement' tend towards emphasising problems in 'enforcement' rather than 'law'. Enforcement *is* an important element of the legal regulation of public sex and, as I have argued, NSW Police have recognised that police officers' interpretation of the law often produces policing 'styles' now regarded as officially antithetical. However, the disproportionate focus in policing on male homosexual conduct is significantly influenced by the legal environment in which policing operates. The law in this area offers a wide space for moral decision-making and affords police officers a strong degree of discretion. Sections 4 and 5 require police officers to be 'moral arbiters' and demand enforcement in relation to the 'community standards' of 'reasonable people'. Recognising that the standards of 'ordinary' (heterosexual) people often produce significant disadvantages for sexual minorities, NSW Police training is an attempt to ensure officers approach moral arbitration in a 'professional' way. 'Beats training' is significant in recognising, and addressing, the way in which the 'ordinary' perceptions of police officers influence the use of discretion in ways that may discriminate against homosexual men. In addressing these subjective perceptions, NSW Police can be seen to have confronted the 'heteronormative habitus' of their officers.

Yet, because heteronormativity is not specific to 'police habitus' (Chan, 1996), but characterises the cultural relations of contemporary Australian society more generally, it is important to recognise that the use of the law to disproportionately characterise male homosexual conduct as 'offensive' or 'obscene' does not result from a 'problem' in policing. While 'police culture' plays an important role in influencing officers' uses of discretion, and specialist training attempts to direct discre-

tion in particular ways, the 'problem' of discretion lies in the legislative framework that produces it. Sections 4 and 5 demand a form of enforcement founded on the moral judgments of police officers — moral judgments that are required to 'reflect' the wider moral values of society. This legal framework exemplifies Devlin's (1965) view that the law should embody the moral principles of 'ordinary' people and that the 'test' of this morality should be the subjective reaction of those ordinary people to certain forms of conduct. As proxy 'ordinary people', police officers are the barometers through which certain forms of sexual conduct are measured in relation to the standards of the communities they police. If male homosexual sex, whether in public or in private, often 'offends' the majority of (heterosexual) people in society (Johnson, 2005) police officers cannot be 'blamed' if they reiterate this heteronormative sentiment. To avoid discriminatory policing, therefore, what is needed is law that less easily allows these moral sensibilities to be the basis on which police practice is based; in other words, law that removes the need for police officers to make moral judgments about what 'reasonable' people find 'offensive' and 'obscene'.

Endnotes

1 I use the term 'heteronormativity' throughout this article to mean, as Berlant and Warner argue, 'the institutions, structures of understanding, and practical orientations that make heterosexuality seem not only coherent […] but also privileged' (1998, p. 548). The concept of heteronormativity is useful for describing the ways in which heterosexuality is commonly regarded in social life as 'normal' or 'natural' and, because of this, achieves what Smart calls its 'effortless superiority' (1996, p. 173). Berlant and Warner (1998) argue that heteronormativity comprises less a body of norms that can be located in particular practices, processes or doctrines, and more a 'sense of rightness' that characterises a pervasive approach to understanding heterosexuality in contemporary societies. The research presented in this article aims to show how heteronormativity *is* expressed through particular practices, processes and doctrines and the effects that this produces.

2 In fact, *NSW Guidelines for the Effective Policing of Beats* (NSW Police, 2008) explicitly state that 'two men kissing in a car at a beat' does not constitute a criminal offence.

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Disclaimer

The interpretation presented here is that of the author and does not represent the official view of New South Wales Police Force or the Beats Working Group.

References

Ashford, C. (2006). The only gay in the village: Sexuality and the Net'. *Information and Communications Technology Law, 15*(3), 275–289.

Berlant, L., & Warner, M. (1998). Sex in public. *Critical Inquiry, 24*(2), 547–566.

Bourdieu, P., & Wacquant, L.J.D. (1992). *An invitation to reflexive sociology*. Cambridge, UK: Polity Press.

Brogden, M., & Nijhar, P. (2005). *Community policing: National and international models and approaches*. Cullompton, UK: Willan Publishing.

Bullock, K., Erol, R., & Tilley, N. (2006). *Problem-oriented policing and partnership*. Cullompton, UK: Willan.

Cohen, S. (2002). *Folk devils and moral panics: the creation of the Mods and Rockers* (3rd edition). London: Routledge.

Chan, J. (1996). Changing police culture, *British Journal of Criminology. 36*(1), 109–134.

Dalton, D. (2007). Policing outlawed desire: 'Homocriminality' in beat spaces in Australia. *Law and Critique, 18*, 375–405.

Dalton, D. (2008). Gay male resistance in 'beat' spaces in Australia: A study of outlaw desire. *Australian Feminist Law Journal, 28*, 97–120.

Desroches, F. (1990). Tearoom trade: A research update. *Qualitative Sociology, 13*(1), 39–61.

Desroches, F. (1991). Tearoom trade: A law enforcement problem. *Canadian Journal of Criminology, 33*(1), 1–21.

Devlin, P. (1965). *The enforcement of morality*. Oxford, UK: Oxford University Press.

Dworkin, R. (1977). *Taking rights seriously*. Cambridge, MA: Harvard University Press.

Fielding, N. (1988). Competence and culture in the police. *Sociology, 22*(1), 45–64.

Findlay, M. (2004). *Introducing policing: Challenges for police and Australian communities*. Oxford, UK: Oxford University Press.

Garland, D. (2001). *The culture of control: Crime and social order in contemporary society*. Oxford, UK: Oxford University Press.

Goldstein, H. (1990). *Problem-oriented policing*. New York: McGraw Hill.

Hall, S., Critcher, C., Jefferson, T., & Clarke, J.N. (1978). *Policing the crisis: Mugging, the state and law and order*. London: Palgrave MacMillan.

Herbert, S. (1996). Morality in law enforcement: Chasing 'bad guys' with the Los Angeles Police Department. *Law & Society Review, 30*(4), 799–818.

Humphreys, L. (1970). *Tearoom trade: A study of homosexual encounters in public places*. London: Duckworth.

Hubbard, P. (1999). *Sex and the city: Geographies of prostitution in the urban west*. Chichester, UK: Ashgate.

Johnson, P. (2005). *Love, heterosexuality and society*. London: Routledge.

Johnson, P. (2007). Ordinary folk and cottaging: Law, morality and public sex. *Journal of Law and Society, 34*(4), 520–543.

Johnson, P. (2008). 'Crimes against morality': Law and public sex in Australia. *Alternative Law Journal, 33*(3), 150–159.

Lipsky, M (1980). *Street-level bureaucracy: Dilemmas of the individual in public services*. New York: Russell Sage Foundation.

Loader, I. (2006). Policing, recognition, and belonging. *The ANNALS of the American Academy of Political and Social Science, 605*(1), 201–221.

Mason, G. (2007). Hate crime as moral category: Lessons from the Snowtown case. *Australian and New Zealand Journal of Criminology, 40*(3), 249–271.

Metropolitan Police. (n.d.). *ACPO Guidance on the Policing of Public Sexual Activity*. Retrieved from http://www.met.police.uk/dcf/files/LGBTacpo.pdf

Moran, L.J. (1996). *The homosexual(ity) of law*. London: Routledge.

Network of Government Agencies. (2007). *Strategic Framework 2007–2012. Working together: Preventing violence against gay, lesbian, bisexual and transgender people*. Sydney, Australia: Authors.

NSW Police. (2008) *Guidelines for the effective policing of beats*. Sydney, Australia: Author.

Oliver, W. (1998). *Community-oriented policing: A systemic approach to policing*. Upper Saddle River, NJ: Prentice-Hall.

Punch, M. (2009). *Police corruption: Deviance, accountability, and reform in policing*. Cullompton, UK: Willan Publishing.

Reiner, R. (2000). *The politics of the police* (3rd ed.). Oxford, UK: Oxford University Press.

Sanders, T. (2009). Controlling the 'anti sexual' city: Sexual citizenship and the disciplining of female street sex workers. *Criminology & Criminal Justice, 9*(4), 507–525.

Smart, C. (1996). Collusion, collaboration and confession: On moving beyond the heterosexuality debate. In D. Richardson (Ed.), *Theorising heterosexuality* (pp. 161–177). Buckingham, UK: Open University Press.

Somerville, P. (2009). Understanding community policing. *Policing: An International Journal of Police Strategies & Management, 32*(2), 261–277.

Thompson, S. (1991). New South Wales Police Service crime prevention program on anti-gay/lesbian violence. In S. McKillop & J. Vernon (Eds.), *National overview on crime prevention*. Canberra: Australian Institute of Criminology.

Waddington, P.A.J. (1999). Police (canteen) subculture: An appreciation. *British Journal of Criminology, 39*(2), 286–308.

Walby, K. (2009). Ottawa's National Capital Commission Conservation Officers and the policing of public park sex. *Surveillance and Society, 6*(4), 367–379.

Warner, M. (2000). Zones of privacy. In J. Butler, J. Guillory & K. Thomas (Eds.), *What's left of theory? New work on the politics of literary theory* (pp. 75–113). New York: Routledge.

Willett, G. (2000). *Living out loud: A history of gay and lesbian activism in activism in Australia*. Sydney, Australia: Allen and Unwin.

Westley, W. (1970). *Violence and the police: A sociological study of law, custom, and morality*. Cambridge, MA: MIT Press.

Wotherspoon, G. (1990). *'This nest of perverts': Policing homosexuality in cold war Australia*. (Working Papers in Australian Studies No. 32). Sydney, Australia: Sydney University.

Young, J. (1971). *The drugtakers*. London: Paladin.