An Orwellian Society:

Non-Crime Hate Incidents and the policing of speech

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"There was not a shred of evidence that the Claimant was at risk of committing a criminal offence. The effect of the police turning up at his place of work because of his political opinions must not be underestimated. To do so would be to undervalue a cardinal democratic freedom. In this country we have never had a Cheka, a Gestapo or a Stasi. We have never lived in an Orwellian society."

Mr Justice Knowles, discussing Non-Crime Hate Incidents in the case of Harry Miller

Executive Summary

Non-Crime Hate Incidents (NCHIs) are a recent innovation and one of a growing number of restrictions on free speech. Public awareness of NCHIs has grown since police recorded Harry Miller (in 2019) and Darren Grimes (in 2020) as having committed such "incidents".

What is an NCHI?

NCHIs are codified in a non-legislative document called the Hate Crime Operational Guidance (HCOG) published by the College of Policing (CoP), the quango responsible for the oversight and guidance of police forces in England and Wales. It defines NCHIs as: "any non-crime incident which is perceived by the victim or any other person to be motivated by hostility or prejudice". In particular, this means towards a person because of their possession of certain "characteristics" (race, religion, sexual orientation, disability, or transgender identity).

The College defines "hostility" as being based on the existence of "ill-will", "ill-feeling" and "dislike". This suggests that certain thoughts, when they accompany particular behaviours, are a subject of police scrutiny. Police Scotland has also made provisions for NCHIs. But Parliament has never passed a law that defines NCHIs or requires the police to record them.

Police guidance leads to mass-recording and investigation

Guidance to police on NCHIs is contradictory, but has led to NCHIs being recorded without the need for further investigation and without the accused being informed that an NCHI has been recorded against their name. Whenever accusations of hate are made, unless the expression is found to constitute actual criminality, an NCHI can be recorded against someone's name without any further investigation or notification.

Investigations by the police as a result of an accusation may take place to determine whether the accused has committed an actual hate *crime* (as opposed to an NCHI). But even if the investigation concludes that no crime has taken place, the episode will still be recorded as an NCHI. Investigations often involve the accused being visited by the police and warned that if they continue to engage in the same perfectly legal behaviour – such as expressing their opinion that transwomen are not women – they may be guilty of a criminal offence.

NCHIs as a threat to free speech

Records of NCHIs may be made after anonymous accusations, which risks encouraging a culture of denunciation hitherto unknown in the United Kingdom. The police have claimed that NCHIs are needed to prevent "escalation", but are unable to provide evidence that they do this. It is also not clear how they would have this effect if the accused is not aware that an NCHI has been recorded against their name.

The practice of recording NCHIs suggests the College of Policing believes there should be stricter limits on free speech than Parliament has provided for and is imposing these limits itself. One police force justified NCHIs through a supporting witness statement that said that "the role of British police today goes beyond bringing offenders to justice when they commit crimes", and includes preventing people "question[ing] the identity" of various groups.

Supposed victims need not justify or provide evidence that the accused is guilty of committing a hate incident before the episode is recorded as an NCHI, and police officers are instructed not to directly challenge accusers on the grounds that it is immaterial whether or not a "victim's" feelings are reasonable. The ease with which people can accuse others of hateful behaviour, and the fact that the police require no proof other than the "victim's" feelings, makes it easier for bad actors to make vexatious complaints and discourages people from engaging in debate lest they be falsely accused of committing a "hate incident".

Even though someone who has an NCHI recorded against their name will not face criminal prosecution, it can show up if a prospective employer does an enhanced Disclosure and Barring (DBS) check on them and could mean they will not get the job they have applied for.

Summary of proposals

We recommend that the concept of Non-Crime Hate Incidents be removed from the Hate Crime Operational Guidance. Instead, officers should decide whether reported activity constitutes a crime and not record it if it does not (unless the data indicates a genuine threat of escalation to physical violence or another *non-speech* crime).

This would return police to a "traditional" common law position, sparing police being drafted into an unnecessary national surveillance programme, and allowing for the exercise of common sense and good judgment by the police, instead of overriding it.

Contents

Introduction

Non-Crime Hate Incidents (NCHIs) were codified in 2014 in a non-legislative document called the Hate Crime Operational Guidance (HCOG) published by the College of Policing (CoP), a quasi-autonomous non-governmental organisation (quango) responsible for the oversight and guidance of police forces in England and Wales. (The 2014 version was amended in October 2020 and is available online in a section of the *College of Policing Authorised Professional Practice* website entitled "Major investigation and public protection: Hate Crime"[1]. We refer to this as the "HCOG" in this document, and references to the text should be taken as up to date unless stated.)[2] The Police Scotland document is called Hate Crime Standard Operating Procedure (2018) and makes similar provisions.[3]

The CoP defines these hate incidents as: "any non-crime incident which is perceived by the victim or any other person to be motivated by hostility or prejudice". In particular, this means hatred directed towards a person because of their possession of certain "characteristics" (race, religion, sexual orientation, disability, or transgender identity).

NCHIs are often recorded against a person's name without their knowledge. Police are told that speech "must be flagged" as an NCHI (if it does not meet the threshold of hate crime) "if the victim or any other person perceives that the incident was motivated wholly or partially by hostility". The result is that records of NCHIs are made even if there is no evidence apart from the perception of the alleged victim or a witness.[4]

Although NCHIs are by definition not criminal offences, their recording requires police forces to apply concepts that have their origin in legislation (such as the Public Order Act 1986 and the Equality Act 2010, both of which are discussed below). The list of the "characteristics" above was created for other purposes, namely determining whether crimes such as racially- or religiously-motivated offences have been committed.

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[1] *College of Policing Authorised Professional Practice* (website): "Major investigation and public protection: Hate Crime" (2020). https://www.app.college.police.uk/app-content/major-investigation-and-public-protection/hate-crime/

[2] The concept first emerged in the Guide to Identifying and Combatting Hate Crime (Hate Crime Manual) published by the Association of Chief Police Officers (ACPO) in 2000 (then 2005), but is now codified in the Hate Crime Operational Guidance, which replaces the Hate Crime Manual. The Manual outlined homophobic incidents specifically ("any incident which is perceived to be homophobic by the victim or any other person"). The Manual also defined hate crime as: "a crime where the perpetrator's prejudice against any identifiable group of people is a factor in determining who is victimised" (ACPO, 2000, in Wong, 2002).

[3] Police Scotland (2018). *Hate Crime Standard Operating Procedure* https://www.scotland.police.uk/spa-media/wuuhwqn0/hate-crime-sop.pdf

[4] NB: The link "Recording non-crime hate incidents" on the College of Policing Authorised Professional Practice website was not functioning at time of writing.

Records of NCHIs are available to others, including potential future employers via enhanced Disclosure and Barring Service (DBS) checks.

NCHIs are part of a worrying trend whereby public authorities such as the police are judging the expression of certain points of view as being no longer acceptable in a democratic society. This is one of the reasons a judge recently referred to "the Cheka, Stasi [and] Gestapo" in his discussion of NCHIs, warning that "we have never lived in an Orwellian society". He added that one individual who had an NCHI recorded against his name could reasonably conclude that he "was being warned not to exercise his right to freedom of expression … on pain of potential criminal prosecution".

In the past, the police have had a limited role in carrying out investigations where they do not believe a crime has been committed, such as warning members of the public about complaints involving non-criminal levels of noise. However, NCHIs represent more than simply an escalation of this type of policing, signalling a shift from crime-prevention and detection to monitoring and recording the lawful expression of views which the police have designated unacceptable. It is also important to note that the number of NCHIs the police look into is not trivial. Thirty-four police forces in England and Wales recorded almost 120,000 NCHIs from 2014 to 2019.[5]

This paper explains why the category of Non-Crime Hate Incidents should be removed from the Hate Crime Operational Guidance and Police Scotland's Hate Crime Standard Operating Procedure.

[5] https://www.telegraph.co.uk/news/2020/02/14/police-record-120000-non-crime-incidents-may-stop-accused-getting/

Chapter 1. What is a Non-Crime Hate Incident (NCHI)?

Relationship to non-legislative documents

Hate Crime Operational Guidance (HCOG)

Non-Crime Hate Incidents (NCHIs) are codified in the Hate Crime Operational Guidance (the HCOG), published in 2014 by the College of Policing (CoP) and amended in 2020 within the reviewed Authorised Professional Practice. Most of the HCOG is concerned with criminal offences involving hate (whether this means offences aggravated by hatred, or specific hate-related offences such as stirring up racial hatred).

NCHIs, however, involve the investigation and recording of speech that is perfectly lawful and which the police need not believe will lead to a crime being committed if left unrecorded, although in the case of some NCHIs they do believe this. When police record NCHIs they do not need to inform the "perpetrator" of this fact, which means individuals' speech may be recorded on police databases without their knowledge.

The definition of a hate incident in the HCOG is as follows:

> "Any non-crime incident which is perceived by the victim or any other person to be motivated by hostility or prejudice."

Reports of these incidents do not need to come from the apparent victim and can be based on the perception of an onlooker. There is no "reasonable person" standard.

According to the HCOG, this "hostility or prejudice" must be based on:

- a person's **race** or perceived race, or
  - any racial group or ethnic background including countries within the UK and Gypsy and Traveller groups
- a person's **religion** or perceived religion, or
  - any religious group including those who have no faith
- a person's **sexual orientation** or perceived sexual orientation, or
  - any person's sexual orientation

- a person's **disability** or perceived disability, or
  - any disability including physical disability, learning disability and mental health or developmental disorders
- a person who is **transgender** or perceived to be transgender,
  - including people who are transsexual, transgender, cross dressers and those who hold a Gender Recognition Certificate under the Gender Recognition Act 2004.

In the current guidance, the College of Policing notes that:

- Racial group includes asylum seekers and migrants.
- Religion includes sectarianism.
- Sexual orientation includes lesbian, gay, bisexual and heterosexual.

Meanwhile, referring to the five "monitored strands" (or characteristics) in bold above, the updated guidance states:

> A victim does not have to be a member of the group. In fact, anyone who is perceived to be or associated with an identifiable group of people, could be a victim of a hate crime or non-crime hate incident.

The guidance also outlines the category of "Non-monitored hate crime", giving local police forces license to create their own definitions (this also applies to NCHIs):

> The five strands of monitored hate crime are the minimum categories that police officers and staff must record and flag … Forces, agencies and partnerships can extend their local policy response to include hostility against other groups or personal characteristics, they believe are prevalent in their area …

Although the guidance states that "[t]he recording system for local recording of non-crime hate incidents varies according to local force policy", the guidance implies that any report describing hostility or prejudice concerning the five monitored strands (or other groups) should be recorded as an NCHI.

Guidance adds that NCHIs:

> may also be the precursor to more serious or escalating criminal offending.

However, this does not mean incidents must be *likely* to escalate, or that there needs to be evidence of that risk, before they can be recorded. Recording can therefore be an end in itself, not simply designed to prevent crime, and the emphasis in the guidance is on widening, not narrowing, the reasons to record an NCHI against someone's name. Recording can be for "intelligence purposes" or to help officers spot "patterns of behaviour".

The guidance states that the police should be proportionate in their response (although it gives no benchmark for proportionality, or rationality, beyond "perception") and must take account of Section 6(1) of the HRA (the Human Rights Act), as well as their responsibility not to act in ways that contravene the European Convention on Human Rights.

(In previous versions of the HCOG the police were warned that they may be accused of becoming "the thought police", and of trying to control what citizens think or believe.)

The current guidance states that a "disproportionate response" may "adversely impact on either an individual's human rights, e.g. by inhibiting free speech, or on levels of hostility and tension in society (see *Miller v College of Policing and Humberside Police* [2020] EWHC 225 (Admin))". However, this does not account for how the concept of an NCHI or the recording of NCHIs – which is not an example of a "disproportionate response" – may by themselves inhibit free speech. Indeed, it does not give any example of what a "disproportionate response" would involve.[6] The guidance also outlines a number of third-party reporting structures (beyond contacting the police) designed to make it easier for people to make accusations.

The guidance also says the following:

> In the absence of a precise legal definition of hostility, consideration should be given to ordinary dictionary definitions, which include *ill-will, ill-feeling*, spite, contempt, prejudice, unfriendliness, antagonism, resentment, and *dislike*.

The implication is that the police are now judges, first, of the *intentions* of some people towards others (*will*); of the character of their day-to-day relationships (*unfriendliness*); and of their thoughts about other people (*feeling and dislike*, which means that disliking someone may imply unacceptably hateful thoughts). The guidance explains how actual evidence of the hostility is not required for an incident or crime to be recorded as a hate crime or hate incident:

> Where the victim, or any other person, perceives that they have been targeted because of hate or hostility against a monitored or non-monitored personal characteristic, the incident should be recorded and flagged as a hate crime (where circumstances meet crime recording standards), or a non-crime hate incident.
>
> The victim *does not have to justify or provide evidence of their belief* for the purposes of reporting, and police officers or staff *should not directly challenge this perception. Perception-based recording* will help to reduce under-recording, highlight the hate element and improve understanding about hate-motivated offending. All allegations of hate crime will be subject to investigation to identify, and where available gather evidence to demonstrate the hostility element and support a prosecution.
>
> Where supporting evidence is not found, the crime will not be charged or prosecuted as a hate crime. Where a case cannot be prosecuted as a hate crime, the flag *will remain on file*.

[6] Furthermore, while the 2020 guidance states that in Harry Miller's case Humberside Police did not apply the exemptions in the 2014 guidance, it does not state what these were or specify why Humberside Police should have acted differently. This is discussed in Chapter 2.

This disregard of evidence and reason is dangerous; the statement above that "perception-based recording will help to reduce under-recording" implies that recording is not a means to an end (e.g. reducing crime) but an end in itself. The judge in the Harry Miller case held that the police must base any finding of hate in reason and common sense, and take into account the rationality of the complaint. It is disappointing that the revised guidance disregards entirely these important principles. Furthermore, while the police do not state that they investigate speech knowing in advance that it is not a crime, if the victim alleges any criminality an investigation will take place (and may take place even in the absence of this allegation). This may involve visiting places of work or making contact by letter.

The guidance states:

> Where it is established that a criminal offence has not taken place, but the victim or any other person perceives that the incident was motivated wholly or partially by hostility, it should be recorded and flagged as a non-crime hate incident.

The guidance also outlines the concept of "Secondary victimisation", explaining how this:

> … may include, for example, perceived indifference or rejection from the police when reporting a hate crime or non-crime hate incident. This harm will amount to secondary victimisation. Secondary victimisation is based on victim perception and *it is immaterial whether it is reasonable or not for the victim to feel that way.*

If a police officer fails to record speech as an NCHI, they too are liable to be guilty of inflicting a hate-related "harm" and, in theory anyway, may feel obliged to record an NCHI against their own name.

The guidance also contains a section entitled "Any other person", which says: "A hate crime or non-crime hate incident should not be recorded as such if it is based on the perception of a person or group who has no knowledge of the victim, crime or area, and who may be responding to media or internet stories, or who is reporting for a political or similar motive." But this apparent protection against politically-motivated hate-reporting does not apply to "victims": the police will record anyone who claims to have been the target of hate speech as a "victim".

College of Policing Management of Police Information

In the section of the Authorised Professional Practice entitled "Management of Police Information (Collection and Recording)", a "force information management strategy (IMS) allows information requirements to be set and so determines the information that needs to be collected". Forces "should comply with the national crime recording standard (NCRS) and the Home Office counting rules (HOCR) when recording crimes. Each force has a crime registrar (FCR) who acts as the final arbiter for the interpretation of the NCRS and the HOCR, and for the quality assurance process".

This section also appears to mandate the registration (i.e., recording) of incidents for all reports, meaning any accusation of "hate speech" will see a police record of an individual's opinions being made:

> The police register an incident report for all reports of incidents (whether from victims, witnesses or third parties and whether crime related or not).

National Standard for Incident Recording

Some serving police officers have pointed out to the FSU that some passages in other documents published by police agencies suggest that the recording of hate incident reports is not mandatory. The National Standard for Incident Recording (NSIR)[7] states:

> Broadly, NSIR implies that an incident should be recorded if, on the balance of probabilities, there is a risk to a person or property. So, no risk should mean no record, unless a crime is suspected and NCRS [above] applies.

NSIR states: "The principal aim … is to ensure that incidents are risk assessed at the earliest opportunity" – in other words, incident recording depends on genuine risk, and that: "From the first point of contact, identification and management of risk is crucial to delivering an appropriate response." It then adds:

> There is a simple model consisting of three questions which will support the consideration of risk process: (1) What can go wrong? (2) How likely is it? (3) What are the consequences?

However, the NSIR appears to contradict this in Chapter 2.5: Qualifiers (the section "Hate and Prejudice", under "Recording of Hate Incidents and Hate Crimes"), where a different standard has been created for "hate":

> It must be clearly understood that evidence of an offence is not a requirement for a hate incident to be recorded. There is no evidential test as to what is or is not a hate incident.

This is another dangerous statement, implying that almost anything could be recorded as a hate incident. (The HCOG does not contradict this.) Furthermore, the NSIR then implies police may go against the risk principles above in recording "hate" incidents:

> Where any person, including police personnel, reports a hate incident it *must be recorde*d as such:
>
> - Regardless of whether they are the victim or not.
> - Whether a crime has been committed or not.
> - Irrespective of whether there is any evidence to identify the hate element.

[7] Published by the National Policing Improvement Agency (dissolved in 2013, with most of its functions transferred to the College of Policing) in association with the Home Office, the Association of Chief Police Officers (ACPO, replaced by the National Police Chiefs' Council (NPCC) in 2015) and the Association of Police Authorities.

The guidelines therefore lead to reports of "hate incidents" being automatically recorded by the police, unlike other reports which must first be assessed.

It also remains unclear, despite the copious guidance, whether central government gathers information on NCHIs recorded by local police forces. An auditable trail must be created, but that does not mean the Home Office actively collates and analyses the data. The previous HCOG, now revoked, stated:

> 6.3 The number of non-crime hate incidents is not collated or published nationally, but forces should be able to analyse this locally and be in a position to share the data with partners and communities.

The new guidance simply removes any mention of central data gathering. Alleged perpetrators identified in NCHI reports should know whether the mark against their name is recorded in a national central database. If NCHIs are not being recorded nationally and are not important enough to be monitored by central government, how can they be important enough to justify interference with freedom of speech and privacy?

Police "investigation" and NCHIs

On the question of police "investigation" and the recording of NCHIs, police may be said to "investigate" these reports when they carry out an assessment of whether or not the reported hate speech incident constitutes a crime. As we discuss below in the Harry Miller case, this investigation may take the form of visits or calls from the police to the individual accused, which are liable to serve as *de facto* warnings against expressing the opinions being investigated (whether or not this is the intention of the police). For the public to be aware that this might happen if they say something controversial is likely to have the same chilling effect.

Serving police officers state that for NCHIs there need be no reason to believe there is a risk of escalation.

Support for including NCHIs in the HCOG

The College of Policing was established in 2012 to "provide those working in policing with the skills and knowledge [to] prevent crime, protect the public, and secure public trust".[8] It is currently a company limited by guarantee of which the Home Secretary is the sole controlling member. The College works in association with the Home Office, but states that it "seeks to achieve" Royal Charter status to allow it to work more "independently", which a House of Commons Committee report has supported.[9]

The CoP's description of NCHIs has received support from the government's Independent Advisory Group (IAG) on Hate Crime (which the College describes as "unanimously

[8] https://beta.college.police.uk/about

[9] House of Commons Home Affairs Committee (2017). *College of Policing: Three years on*. Fourth Report of Session 2016-17. https://publications.parliament.uk/pa/cm201617/cmselect/cmhaff/23/2302.htm

supporting" the recording of NCHIs). The role of an IAG is to "build insight into the needs, wants and assets of the groups who are underrepresented in our normal decision-making processes".[10] The IAG advises government and the police and is composed of professionals in the relevant field. It also aims to represent the groups with "protected characteristics". Unlike some IAGs, the IAG on Hate Crime does not currently publish minutes or disclose who its member are.

The CoP also mentions supportive individual academics, including Paul Giannasi, a specialist in the policing of hate crime and a Hate Crime Advisor for the National Police Chiefs' Council. Giannasi led the Cross-Government Hate Crime Programme (2012)[11] and has been the "National Point of Contact" on hate crime for the Organisation for Security and Cooperation in Europe (OSCE), at whose meetings government ministers represent the UK. The College describes Giannasi as "the most experienced and eminent figure on the subject [of hate crime] in the UK". He has defended the HCOG in its current form:

> [R]ecording, measuring and proportionate response is vital to mitigate hate speech and non-crime hate incidents, and this is an important part of the State's effective protection and promotion of human rights. Failure to address non-crime hate incidents is likely to lead to their increase, and ultimately increase the risk of serious violence and societal damage.[12]

He believes the police have "a role in solving societal problems rather than just responding to bring offenders to justice when they escalate to criminality" and compares NCHIs to "parking disputes [and] anti-social behaviour".

Supposed prevention of escalation

One of the central arguments for recording NCHIs is that it helps prevent "escalation". This idea is partly derived from the work of American social psychologist Gordon Allport, whose 1954 book *The Nature of Prejudice* proposed that "antilocution" is a form of escalation in a process of hatred. According to Nathan Hall in a witness statement for the College of Policing, antilocution means "the departure point on the journey through to genocide and extermination". Again, the rationale appears to be that the recording of NCHIs is necessary in order to prevent crime; but the same rationale (crime prevention) could be used to justify a massive escalation of police interference into almost any aspect of our lives.

Even if we were to accept this rationale, is there any evidence that the recording of NCHIs does reduce overall levels of hate crime? In November 2020, the campaigning group

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[10] https://dokumen.tips/documents/independent-advisory-groups-college-of-policing-a-what-we-do-a-support-a.html

[11] The Programme included the Department for Education, Department for Communities and Local Government, Department of Health, Home Office, Department for Culture, Media and Sport, Department for Work and Pensions (Office for Disability Issues), and its aims included "changing attitudes" and using "positive images". https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/97849/action-plan.pdf

[12] Quoted in Miller v. College of Policing, Judgment. https://www.judiciary.uk/wp-content/uploads/2020/02/miller-v-college-of-police-judgment.pdf

Fair Cop filed Freedom of Information Requests to all police forces in England and Wales to establish the effectiveness of NCHIs at preventing this escalation. Fair Cop asked for:

1) The total number of Hate Incidents ("non-crime hate incidents") recorded for each of the five monitored strands (disability, race, religion, sexual orientation, transgender) during the past two years.

2) The total number of Hate Incidents which have escalated to Hate Crime across the five Monitored Strands during this same period.

3) The estimated number of Hate Crimes across the five Monitored Stands which have been prevented as a result of the recording of a hate incident.

In response to Question 2, no force could provide any examples of hate incidents that has escalated to hate crime. In response to Question 3, no force could provide any data or estimate regarding hate crimes that had been prevented as a result of recording NCHIs. That no police force could provide any data to substantiate the rationale for recording NCHIs suggests that they do not take seriously the claim that NCHIs prevent escalation and regard this policing of lawful speech as legitimate in its own right.

Legislation and NCHIs

NCHIs are not defined anywhere in legislation, but their supporters have cited legislation to justify recording them.

The College argued before the High Court that Section 95(1)(b) of the Criminal Justice Act 1991 justified the recording of NCHIs (discussed in Chapter 2). This requires the Home Secretary to publish annually "such information as he considers expedient for the purpose of … facilitating the performance by [persons engaged in the administration of criminal justice] of their duty to avoid discriminating against any persons on the ground of race or sex or any other improper ground". However, this was surely aimed at the behaviour of police officers and related professions and does not state that NCHIs committed by members of the public should be recorded on police databases.

The HCOG states that its categorisation of "incidents" is drawn from the Criminal Justice Act 2003. However, the relevant sections of that Act deal with enhanced sentencing where a crime is aggravated by hatred so cannot, by definition, be used to justify the recording of non-crimes.

As the table (overleaf) from the HCOG shows, the College of Policing seems seem to have assumed powers for itself that have no basis in legislation (the table appears in HCOG Section 1, "Defining hate crime", although its categories are being applied to incidents that are not crimes).

Table 1: "Agreed definitions" of hate incidents in the Hate Crime Operational Guidance 2014

Hate incident	Any non-crime incident which is perceived, by the victim or any other person, to be motivated by a **hostility** or **prejudice based on a person's race** or **perceived race**, or	Any racial group or ethnic background or national origin, including countries within the UK, and Gypsy and Traveller groups.
	Any non-crime incident which is perceived, by the victim or any other person, to be motivated by a hostility or **prejudice based on a person's religion** or **perceived religion** or	Any religious groups, including those who have no faith.
	Any non-crime incident which is perceived, by the victim or any other person, to be motivated by a **hostility** or **prejudice based on a person's sexual orientation** or **perceived sexual orientation** or	Any person's sexual orientation.
	Any non-crime incident which is perceived by the victim or any other person, to be motivated by a **hostility** or **prejudice based on a person's disability** or **perceived disability** or	Any disability including physical disability, learning disability and mental health.
	Any noin-crime incident which is perceived, by the victim or any other person, to be motivated by a **hostility** or **prejudice against a person who is transgender** or **preceived to be transgender**.	People who are transsexual, transgender, transvestite and those who hold a gender recognition certificate under the Gender Recognition Act 2004.

Source: Hate Crime Operational Guidance (HCOG), College of Policing, 2014 (the definitions remain in the 2020 version).

Chapter 2. The Harry Miller case

The "incident" and police response

The case of Harry Miller and the recording of his tweets as an NCHI by Humberside Police, has brought the issue of NCHIs into wider public debate.

According to Humberside Police, on the evening of 3rd January 2019, an anonymous complaint about businessman and former police officer Harry Miller was submitted through an online reporting portal and recorded in an incident log.

The complaint stated that Miller had made "transphobic" comments on his Twitter account "designed to cause deep offence and show his hatred for the transgender community". On 4th January, the Humberside Police Crime Reporting Team (CRT) carried out a "review and risk assessment". The relevant officer made a "professional assessment" that the recording of the episode as a "hate incident" met HCOG requirements. The tweet that seems to have most concerned Humberside Police was a re-tweet of a verse from a feminist songwriter:

> Your breasts are made of silicone/ Your vagina goes nowhere/ And we can tell the difference/ Even when you are not there/ Your hormones are synthetic/ And let's just cross this bridge/ What you have, you stupid man/ Is male privilege.

This followed a number of other tweets on transgenderism. In the weeks before the police complaint, these included: "I was assigned mammal at birth, but my orientation is fish. Don't mis-species me. fuckers."

According to Humberside Police, the Complainant, "Mrs B", is a transgender woman (although this has not been demonstrated) who perceived that transgender women were being "targeted" by Mr Miller. She submitted a complaint to Humberside Police on 3rd January 2019, which was referred to PC Mansoor Gul. On 15th January 2019 he asked that Mrs B send screen shots of the tweets. Having seen these, he spoke to the complainant, leading him to treat this as a hate incident (Gul stated: "there was a perception by the victim that the tweets were motivated by a hostility or prejudice against transgender people").

PC Gul spoke to Miller to "ensure that I had as much information as possible to hand so that I could make an informed decision as to what action to take", leading Gul to "advise him about the complaint and the effect that his anti-transgender tweets were having on the victim". PC Gul has stated that he did not seek to "dissuade [Miller] from expressing himself on such issues in the future".

The decision to speak with Harry Miller in this case was a supposedly separate decision from the initial decision to record the incident. On 23rd January 2019, PC Gul contacted Miller at his work. Miller was not present.

When Gul finally spoke to Miller, Miller states that he was warned that although he had not committed a crime, "his tweets were upsetting numerous members of the transgender community, who were sufficiently upset to report them to the police", and that, should the behaviour escalate "it may amount to a hate crime".

Although no crime was committed, Miller's incident has also been recorded on a Crime Report which stated under "Modus Operandi Summary" that the "suspect" was "posting transphobic comments on Twitter, causing offence and showing hatred for the transgender community", and the complainant was the "victim".

On 26th January, Miller complained to the Humberside Police Professional Standards Department. This was not upheld, nor was his appeal (decided on 18th June 2019 by the Humberside Police Appeals Body). A statement from Assistant Chief Constable Young followed, calling Miller's tweets "transphobic". He claimed such incidents might "escalate" and that a "correct decision was made to record the report as a hate incident".

Legal challenge

Miller responded by challenging the legality of the actions of Humberside Police, taking the force and the College of Policing to court.[13]

Miller contended that the actions of Humberside Police and the HCOG that informed them were against his fundamental right to freedom of expression under common law and/or Article 10 of the European Convention on Human Rights (ECHR).

The questions before the court were:

1. Are the provisions of the HCOG concerning the recording of "non-crime hate incidents" unlawful at common law?;
2. Do the provisions of the HCOG concerning the recording of "non-crime hate incidents" contravene Article 10 ECHR?; and
3. Did Humberside Police's treatment of the Appellant, including the recording of his tweets pursuant to the HCOG, contravene his rights under Article 10 ECHR?

Harry Miller's Counsel argued that HCOG could not justify interference with the right to freedom of speech, on the following grounds:

- The recording of an incident, and subsequent interaction with police, will inevitably have a dissuasive, chilling effect on free expression;

[13] Miller's application to appeal directly to the Supreme Court was declined.

- Recording NCHIs on the basis of subjective perception increases the likelihood of speech rights being infringed and means applying the policy will be so unpredictable that it cannot have the quality of law, under either the common law or human rights law;
- The legitimate purpose underlying NCHIs cannot justify disproportionate interference with discussion of political controversies, which are strongly protected by human rights law.

Arguments of Harry Miller's Counsel

The following legal arguments from Submissions are presented to outline the questions at stake in the Harry Miller case and questions of free speech more broadly, as discussed in the courts. In his argument, Miller's Counsel outlined the apparent infringement of free speech with a discussion of freedom of expression at common law:

> As Lord Bingham observed … "the fundamental right of free expression has been recognised at common law for very many years". Bingham emphasis[ed]: "democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions … government is not an activity about which only those professionally engaged are entitled to receive information and express opinions."

On the principle of legality, "it is a well-established principle of legal policy that by the exercise of state power a person's freedom of speech should not be interfered with, except under clear authority of law", an aspect of the broader principle of legality formulated by Lord Hoffmann. Counsel added:

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 does not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost … [therefore] "what is required before an interference with fundamental rights will be authorised is that Parliament has made its intentions crystal clear"… Parliament cannot itself override fundamental rights by "general or ambiguous words" [and] cannot confer on another body, by general or ambiguous words, the power to do so.

Court of Appeal

The Judge dismissed the first two challenges (of unlawfulness at common law and the NCHI contravening Article 10) but held that the actions of Humberside Police did contravene Miller's rights to free expression under Article 10. Miller is therefore appealing the first two findings at the Court of Appeal.

Given the importance of the Judge's comments it is worth quoting in detail from the summary of the case by Mr Justice Knowles. He began the judgment promisingly, quoting some of the common law's most powerful defences of freedom of expression, including this from Lord Hoffmann:

> a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right-thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute.

While the judge held that HCOG was within the police's common law power to record information for community policing purposes, and affirmed the policy rationale of the guidance, the application of HCOG to Harry Miller's case was firmly rejected as unlawful:

> [T]he undisputed facts plainly show that the police interfered with the Claimant's right to freedom of expression. PC Gul's actions in going to the Claimant's place of work and his misstatement of the facts, his warning to the Claimant, coupled with the subsequent warnings by the police to the Claimant that he would be at risk of criminal prosecution if he continued to tweet (the term "escalation" was never defined or explained) all lead me to conclude that the police did interfere …
>
> The effect of the police turning up at his place of work because of his political opinions must not be underestimated. In this country we have never had a Cheka, a Gestapo or a Stasi. We have never lived in an Orwellian society.

Mr Justice Knowles also affirmed that gender critical views are well within the scope of free speech protection.

The Court held that the actions of Humberside Police did contravene Harry Miller's rights under Article 10. However, the Court also held that the HCOG provisions concerning the recording of NCHIs themselves were not unlawful at common law and did not contravene Article 10 of the ECHR.

Outline of appeal

Miller is appealing on the following five grounds, claiming the Judge was wrong:

1. To decide that the impugned provisions in Chapter 6 of the HCOG are lawful in the absence of express statutory or established common law authorisation;
2. Not to have found that the approach in the Guidance [HCOG] to the mandatory recording of "non-crime hate incidents" (in the absence of any evidence of hate) is disproportionate and unreasonable at common law;
3. To hold that the impugned provisions in Chapter 6 of the HCOG do not involve any interference with the right to freedom of expression under Article 10(1) ECHR;

4. To hold that the impugned provisions in Chapter 6 of the HCOG satisfy the Convention requirement of "foreseeability", hence wrong to conclude that any interference with Article 10(1) ECHR arising from those provisions is "prescribed by law" for the purposes of Article 10(2) ECHR; and

5. To hold that the impugned provisions in Chapter 6 are "necessary in a democratic society" [and] that (i) no less intrusive measure could have been used without unacceptably compromising the achievement of the objectives of the policy and (ii) the impact of any infringement of Article 10 is proportionate to the likely benefit of the impugned provisions.

Conclusions and recommendations

A return to the common sense of the common law

We recommend that the concept of Non-Crime Hate Incidents be removed from the Hate Crime Operational Guidance (and the College of Policing Authorised Professional Practice), and Police Scotland's Hate Crime Standard Operating Procedure, within a broader review. The Home Office Counting Rules and the National Standard for Incident Recording will also need to be revised.

Instead, officers should decide whether reported activity constitutes a crime and not record it if it does not (unless the data indicates a genuine threat of escalation to physical violence or another *non-speech* crime). This means if the police do not have a genuine reason to believe that the so-called "hate speech" is liable to escalate into a violent or other serious crime (not including escalation to "hate speech" criminal offences themselves) they would not make a record.

This would return police to a "traditional" common law position whereby it is left to their good sense whether to record non-criminal behaviour for their own future investigative purposes, without being drafted into an unnecessary national surveillance programme. The one exception to this would be that guidance should continue to request that a record be created if the speech indicates a genuine risk of escalation to serious (non-speech) crime. This would be:

a) in line with previous (pre-HCOG) police practice, under which police might record any behaviour that indicates a member of the public might be about to commit an actual crime; and

b) should deal with any chance that the reforms we propose would allow a violent or other serious crime that might be about to be committed to go undetected.

This solution would allow for the exercise of the common sense and good judgment of the British police, instead of overriding it.

Reform of Enhanced Criminal Records Checks

One of the dangers that NCHIs present to UK citizens is that, unbeknown to the "perpetrator", a record of an NCHI could appear on a DBS check carried out by a prospective employer. The prospective employee might have no idea of the NCHI's existence and be completely unprepared to defend him or herself against the allegation. Job opportunities could be lost. This is wrong.

Under section 113B(4) of the Police Act 1997, an appointed police officer must be requested to provide information he or she "reasonably believes to be relevant for the purpose" of the record check. There are some safeguards against irrelevant or unfair disclosure contained in the Statutory Disclosure Guidance and the detailed Quality Assurance Framework. However, in light of the potential unjustifiable harm to people's job prospects and of the recent guidance on recording, we believe a stronger, targeted safeguard is needed.

We propose that the Home Office amend the Statutory Disclosure Guidance. Under s.113B(4), the relevant chief officer must "have regard to" this guidance. At paragraph 13 of the guidance, we propose that the following wording be added:

> Information concerning non-crime hate incidents, or concerning any other speech that is perceived by any person as hostile or offensive, does not constitute relevant information unless the conduct in question later resulted in a criminal charge.

We accept that this change would result in greater limits on disclosure of non-criminal hate speech than on disclosure of other incidents. This is a justifiable outcome. The potential for vexatious reporting, or for over-cautious reporting by police – in both cases, resulting in unjustified harm to someone's reputation and career prospects – is the greater risk.

Criminal hate speech

There remain, finally, those cases where the "hate speech" itself went beyond the bounds of an NCHI and could be categorised as criminal. We do not imply approval of any criminalisation of speech (unless it directly calls for physical violence), but our focus in this instance is on NCHIs. However, because NCHIs have appeared as an indirect result of the criminalisation of forms of speech, this fact points to the importance of rolling back this criminalisation, which is a subject of forthcoming publications of the Free Speech Union.

Appendix: Hate Crime Standard Operating Procedure (Police Scotland)

The Police Scotland document Hate Crime Standard Operating Procedure (2018)14 contains similar provisions to the HCOG.

4. Definitions

    4.1 All officers and staff must have a clear understanding of what constitutes a hate crime and a hate incident.

    4.2 Police Scotland will record all hate crimes and hate incidents in terms of the following definitions:

    Hate incident – Any incident which is perceived by the victim, or any other person, to be motivated (wholly or partly) by malice and ill-will towards a social group but which does not constitute a criminal offence (non-crime incident)…

5. Motivation

    5.1 In Scotland, hate crime and hate incidents are taken to mean any crime or incident where the perpetrator's actions are motivated wholly or partly, by malice and ill-will towards the individual, on the basis of their actual or presumed sexual orientation, transgender identity, disability, race or religion.

    5.2. If the perpetrators [sic] actions prior to, at the time of the incident or immediately after the incident, demonstrates [sic] malice and ill-will towards the victim, on the basis of their actual or presumed sexual orientation, transgender identity, disability, race or religion, then this provides evidence of motivation.

    5.5 Perception

        5.5.1 For recording purposes, the perception of the victim or any other person is the defining factor in determining whether an incident is a hate incident or in recognising the malice element of a crime. [The victim does not] have to provide evidence of their belief and police officers or staff members should not directly challenge this perception. Evidence of malice and ill-will is not required for a hate crime or hate incident to be recorded and thereafter investigated as a hate crime or hate incident by police.

Finally, "9. Investigation of Hate Crimes and Hate Incidents" demonstrates that the police can record incidents as NCHIs even when no accusation has been made by an apparent victim:

    9.2 Initial Investigation – Victim and Witness Considerations. … If investigating a hate crime or hate incident and the enquiry officer perceives the crime or incident to be motivated by malice and ill-will, even though the victim or other person has not highlighted this as an issue, it must be recorded as a hate crime or hate incident (as applicable).

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