

Harry Miller v The College of Policing [2021] EWCA Civ 1926

This England and Wales Court of Appeal decision was an appeal from a High Court finding that while certain police actions taken in response to a complaint had interfered with the appellant's (M) right to freedom of expression, the recording of the complaint as a non-crime hate incident (not crime) should stand. The record of M's actions was compiled in accordance with the College of Policing's Hate Crime Operational Guidance. Subsequently, permission was given to appeal the lawfulness of the Guidance as a point of law of public importance.

Briefly, the appellant (H) had posted 31 tweets asserting that transgender women are men who identify as women, an assertion which deeply offended a transgender woman (B) when shown the tweets by a friend. She complained to the local police who dealt with the complaint in accordance with the Guidance. Among other things, M was visited at work (he happened not to be there) and was told by a police officer that *I need to check your thinking* when he asked why his time was being wasted. The matter was recorded as a non-crime hate incident based entirely on B's complaint.

The Hate Crime Operational Guidance required non-crime hate incidents to be recorded if subjectively perceived (effectively by anyone) *as being motivated by a hostility or prejudice against a person who is transgender and irrespective of any evidence of the "hate" element* – 'perception-based' recording. H claimed this part of the Guidance particularly was contrary to the right of freedom of expression.

And the Court of Appeal agreed, noting there was nothing in the Guidance about *excluding irrational complaints, including those where [as with M] there was no evidence of hostility, and little, if anything to address the chilling effect which this may have on the legitimate exercise of freedom of expression*. The Guidance was subsequently revised apparently to meet criticisms made of the police conduct, but in the Court's view, the revision had not gone nearly far enough to address *the chilling effect of perception-based recording more generally*. Perception-based recording of non-crime incidents was not per se unlawful, but additional safeguards were needed so the incursion into freedom of expression was no more than strictly necessary. The Guidance must be redrafted. (But that was something for the College, not the Court, to do.)

Comment: Currently, New Zealand has nothing resembling the English Guidance developed after the murder of a black teenager in the 1990s which, for reasons of racial bias, it was accepted the police failed to investigate properly. New Zealand is, however, contemplating the introduction of hate speech law and like the Guidance, this too could limit the right of freedom of expression, particularly if perception-based claims are allowed. Subjective feelings are no basis for legal action; convictions for perceived, not actual, hurt impose severe limitations on the right of freedom of expression. Remedies already exist should actual damage occur.