Recording Non-Crime (Transphobic) Hate Incidents: R (Miller) v College of Policing and Chief Constable of Humberside

Introduction
For the past two decades, the police in the United Kingdom have recorded non-crime hate incidents. Defined broadly as non-crime incidents which is perceived by the victim or any other person to be motivated by hostility or prejudice against a person who is a member of a protected group, the practice of recording such incidents, and the use of the so-called ‘perception test’ or ‘Macpherson test’, have been recognised internationally as crucial to combating hate crime. The European Council on Racism and Intolerance’s General Policy Recommendation 11 regarding the role of the police in combating racist offences and monitoring racist incidents in the, include a recommendations that a system for recording and monitoring racist incidents be put in place, and that the perception test to be used in this regard. Having operated relatively unproblematically, both the recording of non-crime hate incidents, and the perception test, were put under scrutiny by the High Court recently. This article will consider the potential impact of the decision in R (Miller) v College of Policing and Chief Constable of Humberside with respect to such incidents, particularly in the context of the recording of non-crime transphobic (hate) incidents. The decision has the capacity not only to impact on, and inform, not just policy and practice in England and Wales, but across the UK and Europe, where the test has been adopted and adapted.

The Hate Crime Operational Guidance
The recording of non-crime hate incidents, and definitions associated with such recording, was based on recommendations made in the Macpherson report, published in the aftermath of the murder of Stephen Lawrence in London. The Report observes that the failure to recognise the central place that race and race relations should have played in the investigation of the murder played a part in the policing deficiencies under scrutiny in the Report. A result of what the Report calls ‘institutional racism’, this failure underpinned the investigation, and, in this context, the particular failure of many police officers to recognise Stephen Lawrence’s murder as a racially motivated crime. In order

1 [2020] EWHC 225.
3 ibid para 6.21.
4 The Inquiry defined institutional racism as The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.’ William Macpherson, The Stephen Lawrence Inquiry (Cm 4262-I, The Stationery Office 1999) para 6.34.
5 ibid para 6.45.
to mitigate against institutional racism impacting on the investigation or prosecution of a crime in the future, the Macpherson Inquiry recommended the adoption of a definition of a racist incident to be used across policing practices:

‘A racist incident is any incident which is perceived to be racist by the victim or any other person.’\(^6\)

Importantly, the Inquiry recommends that the definition be inclusive of crimes and non-crimes, and that both ‘must be reported, recorded and investigated with equal commitment.’\(^7\) Though the definition has been changed following the publication of the Report, the essence of its requirements remain the same: that it is a victim-oriented definition which requires the incident to be recorded as racist where it is perceived by the victim or any other person to be so motivated. This position is now supported and adopted by the European Commission on Racism and Intolerance, which in its General Policy Recommendations 11 on combating racism and racial discrimination in policing, defines a racist incident as ‘any incident which is perceived to be racist by the victim or any other person.’\(^8\) Thus, there are two elements to the recording of non-crime hate incidents. First, what occurred should qualify as a non-crime incident. The definition of a non-crime hate incident is set out in the Hate Crime Operational Guidance published by the College of Policing as:

‘any non-crime incident which is perceived by the victim, or any other person, to be motivated (wholly or partially) by a hostility or prejudice.’\(^9\)

The second requirement is that the victim or some other person must have perceived the non-crime incident to be motivated by prejudice or hostility. Again, the Hate Crime Operational Guidance (HCOG) sets out the perception test:

‘For recording purposes, the perception of the victim, or any other person (see 1.2.4 Other person), is the defining factor in determining whether an incident is a hate incident, or in recognising the hostility element of a hate crime. The victim does not have to justify or provide evidence of their belief, and police officers or staff should not directly challenge this perception. Evidence of the hostility is not required for an incident or crime to be recorded as a hate crime or hate incident.’\(^10\)

The recording of non-crime hate incidents, and indeed the validity of the perception test more generally, were considered in the recent decision of Miller. Given the recent

\(^6\) ibid chapter 47, para 12.
\(^7\) ibid chapter 47, para 13.
\(^8\) European Commission on Racism and Intolerance, ECRI General Policy Recommendation Number 11: Combating racism and racial discrimination in policing (ECRI 2007).
\(^9\) College of Policing, Hate Crime Operational Guidance (College of Policing 2014), 60.
\(^10\) College of Policing, Hate Crime Operational Guidance (College of Policing 2014), 5.
recommendations of the Law Commission to extend the protection of hate crime legislation to a broader set of protected groups, the manner in which hate crime will be recorded for both hate crimes and non-crime hate incidents now requires scrutiny in the context of *Miller*.

**The Decision in *Miller***

*Miller* was a decision of the High Court in 2020. Miller made a number of tweets which Mrs B reported to the police as she considered them offensive and transphobic.\(^{11}\) The police recorded the tweets as a non-hate crime incident as per the Hate Crime Operational Guidance on what was simply described by the Court as the relevant computer system.\(^{12}\) In doing so, the police created a Crime Report Print, in which Mrs B was referred to as the victim, and Miller as the suspect. Further, the Court noted, the matter was so recorded on the ‘say so of Mrs B and without any critical scrutiny of the tweets or any assessment of whether what she was saying was accurate.’\(^{13}\) Mrs B in her statement said that the comments made by Miller on his twitter account ‘are designed to cause deep offence and show his hatred for the transgender community.’\(^{14}\) In response, the Court stated:

> ‘[T]here was no evidence that the tweets were ‘designed’ to cause deep offence, even leaving aside the Claimant’s evidence about his motives. Mrs B’s report was inaccurate. The tweets were not directed at the transgender community. They were primarily directed at the Claimant’s Twitter followers … It can be assumed that the Claimant’s followers are broadly sympathetic to his gender critical views, as are those others who read his tweets.’\(^{15}\)

The investigating officer noted in his statement that when an hate incident is assigned to him, he first ensures that it has been correctly classified (and, for example, should not be classified as a hate crime). Where he is happy that the classification is accurate, he ‘at a bare minimum … would speak to people involved.’\(^{16}\) Following a review of the tweets in the case, that while there was no criminal offence, he was satisfied that ‘there was a perception by the victim that the tweets were motivated by a hostility or prejudice against transgender people.’\(^{17}\) Having reviewed the tweets, he decided that given the impact on Mrs B, and the risk of matters escalating to criminal offences, he should speak with Miller. In response to this, the Court notes: ‘PC Gul does not say what criminal offences he had in mind or why he thought there was a “risk”.’\(^{18}\) PC Gul went to Miller’s place of work to discuss the issue with him, and as he was not there, left his card, after

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\(^{11}\) Some of the tweets are reproduced in the judgment at [2020] EWHC 225, [24], [26], [28], [30], [32], [34], [36], [39], [40], [42], [44], [46], [48], [50], [52], [54], and [56].

\(^{12}\) [2020] EWHC 225, para [69].

\(^{13}\) ibid, para [70].

\(^{14}\) ibid, para [16].

\(^{15}\) ibid, para [74]. The Court gives no definition as to the term ‘gender critical views’.

\(^{16}\) ibid, para [76].

\(^{17}\) ibid, para [77].

\(^{18}\) ibid, para [80].
which Miller phoned him. There was a disagreement between the evidence of PC Gul and that of Miller as to the content of the conversation which took place between them when they talked on the phone. However, the court made a number of findings of fact as to what occurred:

(a) PC Gul visited the Claimant’s place of work in his capacity as a police officer, albeit he did not think he was exercising any powers of a police officer;
(b) he left a message requesting that the Claimant contact him;
(c) they subsequently spoke on the telephone;
(d) during that call PC Gul misrepresented and/or exaggerated the effect that the Claimant’s tweets had had and the number of complaints the police had received;
(e) PC Gul warned the Claimant that if he ‘escalated’ matters then the police might take criminal action;
(f) he did not explain what escalation meant;
(g) ACC Young (who made a public statement following the issuance of a complaint from Miller and media attention regarding same) also publicly referred to escalation;
(h) when the Claimant complained, the police responded by again referring to escalation and criminal proceedings.

The Court specifically found as a matter of fact that the only people who definitely read the tweets were Mrs B and the friend who told her about them; and that the only person who complained to the police was Mrs B. The court also found that the effect of the conversation between Millar and PC Gul was that Miller had been warned not to exercise his freedom of expression in relation to ‘transgender issues’.

The Court highlighted that tweets are, for the purposes of the Communications Act 2003, messages sent over a public electronic communications network. The tweets published by Miller were not directed at Mrs B, and indeed was of the view that they were not directed at anyone in particular. The Court is at pains at various points in the judgment to note that there is no evidence to support an assertion that the tweets from Miller upset members of the trans community. An example of such a statement from the Court is: ‘There is certainly no evidence that before Mrs B became involved anyone found the tweets offensive or indecent or in any way remarkable. They were merely moments lost in the Twittersphere.’ This is an issue that the Court returns to time and again during the course of its judgment, placing considerable emphasis on the fact that, as only one member of the transgender community reported the tweet, there was no evidence that the tweet had upset any other members of the community.

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19 Chambers v Director of Public Prosecutions [2013] 1 WLR 1833. Section 127(1)(a) of that Act makes it an offence to send via such a network ‘a message or other matter that is grossly offensive or of an indecent, obscene or menacing character’.
20 [2020] EWHC 225, para [59].
It was argued on behalf of Miller that both Hate Crime Operational Guidance and the actions of the Humberside Police were unlawful because (1) the principle of legality was violated, due to the absence of a statutory authorisation for the infringement of Miller’s freedom of expression and/or that said interference was disproportionate; (2) the interference with Article 10 was not ‘prescribed by law’ as per the requirements of Article 10; and/or (3) such an interference is not necessary in a democratic society as is required by Article 10(2). Counsel also noted that operation of the so-called perception test was particularly egregious in the context of any such incident being included on Enhanced Criminal Record Certificates, which would potentially have consequences for future employment. In response, the College of Policing refuted those claims made by Miller, arguing that there was no violation of Miller’s freedom of expression, and if there was, it was done so in compliance with Article 10 as a proportionate measure. It noted particularly that the record created has no consequence for Miller given the fact that recording is an administrative process associated with an intelligence function and has no sanction associated with it, and that there is no realistic possibility that the record would be disclosed. For the police, similar arguments were made, and it was further argued that the ‘significant impact’ that Miller argued the procedure had on his life, when subject to careful analysis, was ‘unrealistic, exaggerated and/or caused by the Claimant’s own actions rather than the fact of recording.’ Both defendants noted that the recording of the non-crime hate incident had absolutely no chilling effect on the claimant, and he had continued tweeting as he had been previously. He further rejected the argument that what Miller had engaged in was political speech, but instead argued that it was a “vehement attack” on the legitimacy of transgenderism as a concept.” Indeed, he noted that less protection is afforded to expression which is ‘abusive or attacking toward a group sharing a characteristic protected by Article 14 ECHR/Equality Act 2010.’ The contact between Miller and PC Gul were, he argued ‘a discrete and separate decision to that being challenged.’

Considering the lawfulness of HCOG at common law, Knowles J found that recording and retaining data is a power held by the police at common law, and that there is no need for a statutory authorisation for same where the data is collected in a non-intrusive way – even where the collection and retention of such data interferes with Convention rights. Knowles J stated clearly that collecting details of ‘hate crimes and non-crime hate incidents forms one aspect of the police’s common law duty to keep the peace and to prevent crime, and is lawful on that basis.’ In his consideration of the relevance of the principle of legality to the case, Knowles J was clear that that principle – at least in the UK – is simply a tool of statutory interpretation. The broader impact of the decision with

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21 ibid, para [147].
22 ibid, para [149].
23 ibid.
24 ibid, para [147].
25 ibid, para [162].
respect to police recording practices, the perception test, and policing practices will now be considered.

**Article 10-compliant police recording practices**

Ultimately, the Court found that HCOG was Article 10 compliant. However, this finding was based on a narrow interpretation of HCOG, and did not extend to confirming that any recording of non-crime hate incidents was Article 10 compliant. Rather than rehearse the reasoning of the Court, it is perhaps more useful at this point to outline what Knowles J found ensured that HCOG was Article 10 compliant. First, he stated, the act of recording should have no ‘formality, condition, restriction or penalty’ associated with it. There should be no consequences arising out of the act of recording for the individual about whom the record relates to. Any action which arises from the recording of such information is an operational decision made by the police, and a decision to act upon the record should be made in a manner which is compliant with the common law and statutory powers of the police.

Second, the recording of a non-crime hate incident should not be subject to a disclosure on a criminal record check of the individual to whom the record relates, such as a criminal record certificate or an Enhanced Criminal Record Certificate (ECRC). Thus, if the record is made and held on the Police National Computer in the UK, which would result in disclosure as part of a criminal record certificate, then the practice would not be Article 10 compliant. The Court was of the view that any disclosure of such information would not be made due to HCOG, but rather would be made as a result of the rules regarding disclosure, which are set out in statutory form and have been upheld as human rights compliant. HCOG, as the Court noted ‘does not require any particular operational response to the recording of a non-crime hate incident.’

That said, the Court also found that disclosure is permissible:

> ‘where the need to protect the public is at its greatest, ie, where the individual may be in contact with vulnerable individuals and, because of the rest of relevance, where those vulnerable individuals may belong to the group against whom it is complained the applicant was hostile.’

An important safeguard here with reference to ECRC disclosures, Knowles J found, is that an applicant may request to have the information that is held on them removed from the record of the police, and can appeal against the decision as to what information is disclosed.

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26 ibid, para [183].
27 ibid, para [236].
Third, any recording practice should be publicly accessible, and fall within a statutory or common law power of the police to ‘collect, use, retail and disclose information, for the purposes of preventing and detecting crime.’

**Article 10-compliant perception test**

The Court found that the perception-based test did not contravene the principle of foreseeability which is a requirement of Article 10, because if someone ‘behaves in a way which carries the possibility that another person may subjectively conclude that it exhibits non-criminal hostility or prejudice in relation to one of the five protected strands then it will be recorded.’ The Court continued:

‘[A] reasonable reader of HCOG would be able to foresee, with a reasonable degree of certainty (and with advice if necessary), the consequences of making a given statement, precisely because any statement that is reported as being motivated by hostility towards one of the monitored strands is to be recorded as a non-crime hate incident. Those who exercise their freedom of speech in a way that may come to the attention of the authorities via a complaint will generally have a pretty good idea of their motivation, and whether it is foreseeably going to be interpreted by others as motivated by hostility or prejudice. In my judgment it is sufficiently certainly the case that perception based reporting does not render HCOG uncertain.’

What is not clear, however, is what Knowles J believed was the threshold for recording of a non-crime hate incident. Are the two – that is, the ‘hate’ element, on the one hand, and the non-crime incident element on the other – to be recorded based on the perception of the victim? Is every incident – no matter how mundane or vexatious, and no matter how far removed from policing practices – to be recorded, or does the ‘non-crime incident’ need to pass a certain threshold of seriousness for the incident to be recorded? On this, the National Standard for Incident Recording issued by the Home Office is instructive.

Further, it was commonly understood that the perception test required that the crime be so recorded once the victim was of the view that the crime was hate motivated, and that there was no discretion on the part of the police in this regard. However, Knowles J gave an example which seems to indicate that he is of the view that such an absolute approach to recording would be inappropriate:

‘Suppose, for example, that a fat and bald straight non-trans man is walking home from work down his quiet residential street when abuse is shouted at him from a passing car to the effect that he is fat and bald. If that person went to the police

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28 ibid, para [191].
29 ibid, para [196].
30 See below for discussion.
and said the abuse were based on hostility because of transgender [sic] it cannot be the case that HCOG would require it to be recorded as such as a non-crime hate incident when there is nothing in the facts which remotely begins to suggest that there was any connection with that protected strand. Vitally important though the purposes which HCOG serves undoubtedly are, it does not require the police to leave common sense wholly out of account when deciding whether to record what is or is not a non-crime hate incident.31

In support of this assertion, Knowles J relied on statements from two witnesses for the defence which indicates that there is some discretion as to whether to record the incident or not.32 Again, however, it is unclear whether this finding relates to discretion with reference to the recording of non-crime incidents, or whether he believes such a ‘common sense approach’ should be taken to the operation of the perception test, or both.

**Article 10-compliant policing practices**

As well as considering the lawfulness of HCOG, Knowles J assessed the lawfulness of police practices when recording non-crime hate incidents. Insight can be gleaned here from what he considered acceptable from an Article 10 perspective concerning the manner in which police services operationalise HCOG, or follow up on a report made to them which is recorded as a non-crime hate incident. Thus, although HCOG itself was Article 10 compliant, the question was whether the police service breached Miller’s Article 10 rights when exercising their operational discretion under HCOG.

Knowles J found that the actions of PC Gul amounted to an interference with Miller’s Article 10 rights. It seems that the following aspects of his treatment collectively amounted to an interference with Miller’s Article 10 rights:

- PC Gul went to Miller’s place of work;
- He misstated the facts of the case to Miller in his conversation (exaggerating the effect of the tweets and the number of complaints made);
- He warned Miller that if matters escalated he would be subject to prosecution;
- Miller was subject to further warnings by the police to the effect that if he continued to tweet, he would be at risk of criminal prosecution;
- The term escalation was never explained to Miller.

In later statements Knowles J emphasised two aspects of the treatment: the warning of criminal prosecution, and the fact that PC Gul visited Miller’s place of work:

31 ibid, para [203].
32 Some would argue that the entire purpose of the perception test is to circumvent the use of discretion on the part of potentially biased agents of the State.
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.\textsuperscript{33}

Thus, to operationalise HCOG in a manner which is compliant with Article 10, it is clear that the police should not threaten the individual with criminal prosecution (or perhaps even mention criminal prosecution), and if they need to speak with the individual, they should restrict themselves to visiting the individual at their home, or at another neutral venue. That said, later, Knowles J considered this response in the context of whether it was proportionate: he noted that given the ‘importance of not restricting political debate’, turning up to the workplace of Miller and warning him about criminal prosecution was not a proportionate – that is, a rational or necessary – response. Thus, it is unclear whether the response of the police was unlawful \textit{per se}, or unlawful in the context of the speech being specially protected political speech.

Further, Knowles J highlighted the fact that a Crime Report was created which referred to the Claimant as a suspect. Thus, again, in order to operationalise HCOG, where a crime report is made, such loaded terms should not be used.

In making a decision to record a report under HCOG, Knowles J stated the police should be clear that the incident involved hostility or prejudice. He was of the view that there should be some ‘rationality’ to the belief of the individual reporting the incident that it involved prejudice or hostility before the incident was recorded. Police officers should, in line 1.2.4 of HCOG, carefully consider whether the individual reporting (Mrs B in this case) were doing so in response to a media story, or for political purposes, categories he felt Mrs B might fall into. It further seems from Knowles J’s opinion that in deciding whether or not to record (at least tweets) as non-crime hate incidents, both the number of complaints made in relation to the tweets, and the accuracy of the statement of the individual recording should be considered. That said, Knowles J did not give any advice as to how an individual police officer can assess whether any incident has been the subject of other reports across the United Kingdom, an issue which particularly applies to incidents that occur online.

\textbf{Discussion: Recording non-crime hate incidents, and perceptions of transphobia}

A number of issues arise in this case: the first is the legitimacy of the ‘perception test’, which was incorporated into policing practices as one of the outcomes from the Macpherson report. The second aspect is the recording of non-crime incidents on the

\textsuperscript{33} ibid, para [259].
police recording systems and the manner in which such non-crime incidents are recorded. The third aspect is the elevation of speech which concerns trans people’s lives to ‘specially protected’ speech for the purposes of Article 10.

In analysing the judgment, first, it seems from the decision that Knowles J is of the view that, in order to operationalise the perception test in a manner consistent with Article 10, the police need to ensure that there is a ‘rationality’ to the belief of the individual reporting that the incident in fact involved prejudice or hostility. It is not clear how this ‘rationality’ should be determined but at first glance, it does appear that some level of investigation needs to take place prior to any determination being made that the perception is rational. Indeed, Knowles J explicitly states: ‘I am prepared to accept that Mrs B had the perception that the tweets demonstrated hostility or prejudice to the transgender community.’\textsuperscript{34} Knowles J’s position which seems to require rationality is, I believe, contrary to the underlying philosophy and justification for the perception test, and how it has operated since its inception.

Second, whilst it is important that the views of the victim are considered in the context of whether the incident involved prejudice or hostility, this does not absolve the police service from their usual functions of recording the incident. The National Standard for Incident Recording (NSIR) issued by the Home Office sets out the key principles, activities, and behaviours to support ‘effective contact management service delivery.’\textsuperscript{35} There is clear guidance in the NSIR on what to record in an incident report. An incident is defined in the report as ‘A single distinct event or occurrence which disturbs an individual’s, group’s or community’s quality of life or causes them concern.’\textsuperscript{36} This is evidently a very low standard, significantly lower than a criminal offence. Effective risk management, NSIR states, involves the ‘identification, assessment and prioritisation of risks.’\textsuperscript{37} In managing incidents, NSIR states, the aim is to restore situations to normality with minimal impact, which involves ‘initial support followed by investigation; analysis and diagnosis; resolution and recovery.’ Key to this management is ‘effective risk management and appropriate deployment of police … as well as ensuring accurate recording and classification.’\textsuperscript{38} It is very clear that reports which fall into the National Incident Category List (NICL) are on a wide spectrum of seriousness, including those incidents which are ‘a minor annoyance’ to the individual reporting, to road traffic incidents resulting in death or injury.\textsuperscript{39} The NSIR states clearly that a report of an NICL

\textsuperscript{34} ibid, para [281].
\textsuperscript{35} National Policing Improvement Agency, \textit{The National Standard for Incident Recording} (Home Office 2011), 3.
\textsuperscript{36} ibid, 4.
\textsuperscript{37} ibid, 3.
\textsuperscript{38} ibid, 4.
\textsuperscript{39} As set out in Chapter 2 of NSIR, which includes three key categories including Transport, Anti-Social Behaviour, and Public Safety and Welfare. The types of incidents which might usually be reported by victims of non-crime hate incidents might, for example, fall within the second of these categories. The Anti-Social Behaviour category is is sub-divided into three categories: Personal, Nuisance, and Environmental. The first of these categories, the document states can range on a spectrum from ‘a minor annoyance’ to ‘risk
incident ‘will usually be recorded regardless of whether a deployment is or is not required.’

However, the recording of an incident will not necessarily create a ‘lengthy incident record.’

The response to an incident should be guided by three considerations, NSIR states: (1) What can go wrong; (2) How likely is it; (3) What are the consequences.

Incidents can have qualifiers, which are intended to ‘add value’ by capturing aspects of the incident, which might, NSIR states, ‘influence the overall response to an incident.’

The tweets, constituting at the very least, a ‘minor annoyance’ were clearly a non-crime incident for the purposes of NSIR. Whether as a matter of fact the behaviour of the police fell within or outside these guidelines would be a matter for the Court to determine, but it seems that, quite apart from the operation of HCOG, the NSIR fully permits, and indeed requires, the recording and investigation of very low level incidents.

Leaving aside the validity of the NSIR, a third further complicating factor to this case is the fact that the Court considered the issue through the lens of the Malicious Communications Act 1998 and the Communications Act 2003. Knowles J took exception to any suggestion that Mrs B was a victim of Miller. However, viewing the incidents through the lens of an incitement offence such as stirring up hatred might be more appropriate here given the facts, which would also remove the requirement for there to be a direct victim. Further, there is no requirement to name or predict the eventual crime which might be committed in the context of escalation in this context. Thus, rather than focusing the case as the Court did on the Malicious Communications Act 1998 or the Communications Act 2003, it might more usefully have considered the statements by Miller in the context of incitement to hatred legislation. Further, Knowles J was very clear – and indeed laboured the point – that the tweets in question were not ‘directed at [Mrs B] or the transgender community’ which makes one wonder if he thought it was ever possible to direct tweets at a community as a whole. Framing the tweets outside the 1998 and 2003 Acts would have meant that this issue would not have concerned Knowles J as of harm, deterioration of health and disruption of mental or emotional well-being.’ National Policing Improvement Agency, The National Standard for Incident Recording (Home Office 2011), 14.

Indeed, the Court goes into an analysis of the two pieces of legislation at some length to support the conclusion that ‘the suggestion that there was evidence that Claimant could escalate so as to commit either offence is not remotely untenable’, a conclusion which seems to indicate that Knowles J can predict the future. However, he looks at the content of the existing tweets and their compliance with the legislation to determine potential escalation which rather misses the point. For example, in considering the relevance of section 127 of the Communications Act, Knowles J notes that there was no evidence that anyone was ‘remotely concerned’ by the tweets, rather than applying the objective test required by Director of Public Prosecutions v Collins [2006] 1 WLR 2223 which requires the court to apply ‘the standards of an open and just multiracial society and taking account of the context and all relevant circumstances to determine as a question of fact whether a message was grossly offensive.’ [2020] EWHC 225, para [269]. Rather than applying the standards of an open and just multiracial society, I would suggest the standards of an open and just gender inclusive society. By definition, because the offence was recorded as a non-crime hate incident, the police were de facto of the view that they did not amount to an offence under that legislation.

[2020] EWHC 225, para [78]
it did. Even if the 1998 and 2003 Acts were correctly applied, at least one tweet dead named an English person, and thus Mrs B might well have been considered as reporting a hate incident as a witness, and not a victim.

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Further, the Court goes into an analysis of the two pieces of legislation at some length to support the conclusion that ‘the suggestion that there was evidence that Claimant could escalate so as to commit either offence is not remotely untenable’, a conclusion which seems unsupported by the analysis which follows. In that analysis, Knowles J looks at the content of the existing tweets and their compliance with the legislation to determine potential escalation which, I believe, rather misses the point. For example, in considering the relevance of section 127 of the Communications Act, Knowles J notes that there was no evidence that anyone was ‘remotely concerned’ by the tweets, though he did not refer to any Twitter metadata or replies to support this statement. Further, the Court did not apply the objective test required by Director of Public Prosecutions v Collins\(^48\) in applying section 127 which requires the court to apply ‘the standards of an open and just multiracial society and taking account of the context and all relevant circumstances to determine as a question of fact whether a message was grossly offensive.’\(^49\) I would suggest that in this context, and adapting Collins, the standard of an ‘open and just gender inclusive society’ should be applied in cases such as this. By definition, because the offence was recorded as a non-crime hate incident, the police were \textit{de facto} of the view that the tweets did not amount to an offence under that legislation. Thus, the question is not whether the incident itself fell within the boundaries of an offence, but rather whether the incident required further investigation under NSIR.

\(^{46}\) [2006] 1 WLR 2223  
\(^{47}\) [2020] EWHC 225, para [269]  
\(^{48}\) [2006] 1 WLR 2223  
\(^{49}\) [2020] EWHC 225, para [269]
The final and most concerning aspect of the judgment is Knowles J’s examination of the context of the tweets. In considering the actions of the police, Knowles J emphasised the context of the tweets within what he described as ‘an ongoing debate that is complex and multifaceted’. Indeed, he dedicates nearly three pages of his judgment to rehearsing the position of those with so-called ‘gender-critical’ views and their concerns regarding the stifling of free speech. He does not, however, consider the rights of the trans community to be protected from transphobic attacks at any point in his decision, or explore what the standards of an ‘open and just society’ might be in the context of trans people. He accepted as a fact evidence that ‘some involved in the debate are readily willing to label those with different viewpoints as “transphobic” or as displaying “hatred” when they are not’. I would respectfully disagree. Simply because those from the majority population have strongly felt beliefs in relation to a minority population does not make that position valid, or any less ‘phobic’. It is not the role of the dominant group to determine what is or is not experienced as harmful or hostile by the targeted minority. To argue that is the case is equivalent to suggesting that white people commenting on Black lives have ownership over determining what is and is not racist. Similar arguments have been, and still are, made in relation to the validity of homosexuality. Indeed, the fact that legislation has been introduced or is being considered in a number of jurisdictions to ban so-called conversion therapy is evidence of this. Although there are people who still hold these views, it is clearly accepted that the views themselves, which question the legitimacy of homosexuality as a sexual orientation, are homophobic. In the same way, I believe, arguments that trans people’s gender identities are not legitimate are transphobic.

However, the Court was of the view that:

'It is clear that there are those on one side of the debate who simply will not tolerate different views, even when they are expressed by legitimate scholars whose views are not grounded in hatred, bigotry, prejudice or hostility, but are based on legitimately different value judgments, reasoning and analysis, and form part of mainstream academic research.'

To state that transphobic views are acceptable because they are held and reproduced by as many as 100 academics employed at universities places an unusually high level of trust in those individuals’ perspectives, particularly in the absence of any cited scholarly research to support those positions. It should also be noted that the concerns expressed by the vast majority of those who share the views quoted extensively in the judgment of the Court are not born out by research or experience in other jurisdictions where a system of self-identification is in place. For example, there is no evidence that cis women have had their rights eroded or their safety compromised by trans women in Ireland in

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50 ibid, para [241].
51 ibid, para [251].
52 ibid, para [250].
the five years since gender recognition legislation was introduced. This line of reasoning, if upheld, has huge significance for the protection of the trans community in the UK.

Finally, of most concern is the acceptance by the Court of the argument made by counsel for Miller that gender critical speech – that is, speech which questions the rights and very legitimacy of trans people – is specially protected under Article 10. Special protection is afforded under Article 10 to ‘political speech and debate on questions of public interest’ as per Vajnai v Hungary. The Court held that ‘debates’ concerning a ‘topic of current controversy, namely gender recognition’ have special protection under Article 10. I respectfully but firmly and unequivocally disagree. There are, of course, degrees of hateful speech, which at one end of the spectrum is protected and at the other end is not. However, it is a separate matter to treat speech about a particular category of persons as deserving of special protection. If existing gender recognition legislation allows for the recognition of trans identities, I see no reason as to how the legitimacy of trans identities can be subject to specially protected debate. Transphobic speech should have no more or less protection under Article 10 than racist, homophobic, Islamophobic, antisemitic, or disablist speech. The statement by the Court that racist language is always hateful and offensive, whereas ‘expressions often described as transphobic are not in fact so’ is deeply concerning. It portrays a particular perspective on trans rights on the part of Knowles J which is not shared by the trans community, their allies, or those advocating for trans rights. In this, I echo the statement of Panti Bliss from her infamous Noble Call at the Abbey Theatre:

‘And so now Irish gay people, we find ourselves in this ludicrous situation where not only are we not allowed to say publicly what we feel oppressed by, we’re not even allowed to think it, because the very definition, our definition, has been disallowed by our betters. And for the last three weeks, I have been denounced from the floor of the Oireachtas to newspaper columns to the seething morass of internet commentary, denounced for using hate speech because I dared to use the word homophobia. And a jumped up queer like me should know that the very word homophobia is no longer available to gay people. Which is a spectacular and neat Orwellian trick because now it turns out that gay people are not the victims of homophobia, homophobes are the victims of homophobia.’

This position is echoed in the judgment of Knowles J when he questions whether Mrs B was correct to consider whether the tweets were transphobic:

‘Professor Stock’s evidence demonstrates how quickly some involved in the transgender debate are prepared to accuse others with whom they disagree of

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54 See, Panti Bliss (aka Rory O’Neill), Panti’s Noble Call at the Abbey Theatre available at https://www.youtube.com/watch?v=WXayhUZWnl0
showing hatred, or as being transphobic when they are not, but simply hold a different view. Mrs B’s evidence would tend to confirm Professor Stock’s evidence.’

Of course, there are legislative standards in this regard, under, for example, section 146 of the Criminal Justice Act 2003, which provides for the aggravation of a sentence where the crime is motivated by hostility towards persons who are transgender. But where HCOG definitively and expressly provides that the perception of the victim is what determines whether a non-crime hate incident is or is not transphobic, it is not the place for anyone – even the Court – to question that perception.

Rather than focus on Article 10 rights, counsel and the Court might well have considered other Convention rights, and particularly the due process rights of Miller protected under Article 6 of the Convention, as well as his right to a good name, protected under Article 8 of the Convention. In this regard, in my view the question as to whether the incident was included on Mr Miller’s Enhanced Criminal Record Certificate is key: in fact the court never made a definitive finding of fact on this issue which is unfortunate. The Court could also have compared the recording of non-crime hate incidents under HCOG to the recording of non-crime incidents under NSIR. In this analysis (and presuming NSIR would withstand scrutiny), the issues might have been clearer. Including a requirement of rationality to the perception test, before a non-crime hate incident can be recorded, has the capacity to set back decades of policing practice which sought to address institutional bias on the part of police officers by introducing the perception test.

Finally, throughout the judgment, the court dead-names individuals and uses terms which display – at best – ignorance, such as ‘the abuse were based on hostility because of transgender.’ Indeed, the Court explicitly refuses to acknowledge the operation of the Gender Recognition Act 2004 in the statement:

‘Where [the words man or woman], or related words, are used in this judgment, I am referring to individuals whose biological sex is as determined by their chromosomes, irrespective of the gender with which they identify. This use of language is not intended in any way to diminish the views and experience of those who identify as female notwithstanding that their biological sex is male (and vice versa), or to call their rights into question.’

Thus, aside from the legal precedent, I believe the judgment of the court in this case is clear evidence for the need for judicial training in the area of gender identity, gender identity, and sex characteristics, so as to avoid such inappropriate statements in the future.

55 [2020] EWHC 225, para [280].
56 ibid, para [203].
57 ibid, para [17].
Conclusion
As far as I understand it, Miller has been granted leave to appeal the decision of Knowles J with reference to HCOG to the Supreme Court. This should be welcomed, as clarification on the range of issues which arose in the case is required. If this permission is not granted, the finding of the Court might be viewed as narrowly only applying to discussions regarding the trans community and their right to gender recognition, as opposed to applying across all protected groups, thus creating a hierarchy of victims in policing practice. This, I would argue, would be a deeply concerning and dangerous precedent. Moreover, by exceptionalising transphobic hate speech in the way that the Court did, creating a class of speech with respect to a minority community which is treated differently to speech in relation to other minority communities, is deeply concerning.