16th April 2023

Andy Marsh
Chief Executive Officer
College of Policing

cc: Nick Herbert, Chair, College of Policing
Kishwer Falkner, Chair Equality and Human Rights Commission

Dear Andy Marsh,

We have responded to the **consultation on the Authorised Professional Practice Recording and retention of non-crime hate incidents (APP)**, which has prompted us to write to you with detailed comments, as the consultation draft is concerning and the scope for detailed answers on the form is limited.

The new APP is being introduced because the previous version was found to be unlawful by the Court of Appeal in the case of *Harry Miller v College of Police [2021]*. The new APP should acknowledge this, refer to the case and learn the lessons from it.

As the new Statutory Code recognises "Gender-critical belief" is protected under the Equality Act, as recognised in the case of *Forstater v CGD [2022]*. The Code summarises this as "belief that a person's biological sex is more important than self-identified gender, and that biological sex should be prioritised when decisions are made about access to single-sex spaces". Expressions of this belief include statements of basic biological fact such as that "trans women" are men, that no woman has a penis or that men cannot be lesbians, and the use of sexed pronouns. This belief is not a monitored strand, but is protected against discrimination under the Equality Act.

In order to fulfil its obligation under the Public Sector Equality Duty to foster good relations between groups of people who share a protected characteristic and those who do not, the College of Police

should act to address the misconception that recognising and talking about basic facts about the two sexes is “anti-trans” and “hateful”.

However, the new APP reinforces the problem it was meant to address. In particular, the example given under section 2.17 describes a poster as “anti-trans” without explaining its content.

Dame Victoria Sharp said at §123 of the Court of Appeal judgment in Miller:

> “It is not for this Court to attempt any redraft since, subject to the views of my Lord and my Lady as to the outcome of this appeal, that is a matter for the College. It is to be noted however that though the judge said the police have a common-sense discretion not to record irrational complaints and the police say they exercise such a discretion, nothing is said about this in the Revised Guidance. [...] The Guidance **should truly reflect what the police are expected to do and should not mislead by omission either the police who have to use it or the public**. I do not think the tension is an impossible one to resolve. The Guidance and the revised version already provide for limited exceptions which demonstrate that a derogation from perception-based recording of non-crime hate incidents can operate where the principle of perception based recording is abused. And as I say, as the position of the College is that such a common-sense discretion exists and is exercised, no doubt a Guidance which better reflects in suitable terms what the College says is in fact the position, is achievable.”

We do not believe the draft APP reflects the common-sense approach. It continues to mislead by omission, specifically by omitting almost all of the examples given in the new Statutory Code of Practice and by not providing a clarification that statements of truth about the material reality of sex are not in themself “hateful” or anti-trans, although they are commonly perceived that way by some people.

The case example under section 2.17 replicates precisely the kind of overly vague perception-based assessment of hostility that Humberside Police undertook with the complaints received about Harry Miller. It should be replaced with Example C from the new Statutory Code (which describes in a scenario that corresponds with the Miller case).

Example C in the Statutory Code states:

> “On Twitter, an individual (the subject) expresses their belief that a person’s biological sex is more important than self-identified gender, and that biological sex should be prioritised when decisions are made about access to single-sex spaces. The tweet is not directed at any individual. However, another individual (the complainant) believes it to be transphobic and reports it to the police. The reviewing officer assesses that the perception of hostility is irrational – the expression of a view that conflicts with those of other people is not an indication of hostility without further evidence. The subject’s views are an example of a person exercising

their freedom of expression to outline a personally held belief and a reasonable person would accept the discussion as a contribution to a lawful debate, even if they found it offensive or disagreed with it. An NCHI is not recorded, and the personal data of the subject is not recorded. The personal data of the subject (in the form of the subject's twitter handle) that was initially recorded by the call taker is also removed from the policing system."

The APP example flips the scenario around and portrays a complainant who believes that biological sex is important as irrational:

> **"**The local authority and the police respond to community concerns reported to them about anti-transgender posters that were posted at the scene of an LGBT+ Pride event. The local authority removed the posters and the police recorded the complaint as a non-crime incident, adding a hate and prejudice qualifier on the grounds of hostility towards transgender identity. This was because the posters were assessed as containing threatening material. A person sees an online article about this and reports a hate crime on the grounds of religious hostility, saying that by removing the posters, the local authority have offended their philosophical faith around biological gender. The police review the complaint and decide that the actions of the local authority do not amount to a crime, and that it is irrational to record a non-crime hate incident. The complainant is asking the police to record legal activity by the local authority. Furthermore, this activity is not motivated by hostility. To record the complaint as a non-crime hate incident would not be rational."

We are not aware of any situation comparable to this "example" case in-real life. It appears to have been invented without any basis in actual cases. There have, however, been several cases of people who have faced police questioning, or the recording of non-crime hate incidents, because of irrational or malicious reporting of their gender-critical beliefs (Harry Miller, Sarah Phillimore, Miranda Yardley, Kellie-Jay Keen, Caroline Farrow, Kate Scottow, Marion Millar and Jennifer Swayne – see Annex).

The fabricated case example is confusing and poor for several reasons:

- **It is unnecessarily complicated**, with two stages: first, the posters are recorded as hate incidents, and second, the report of the removal of the posters is treated as irrational.
- **It is confusing about the nature of protected characteristics of religion**, suggesting that "philosophical faith around biological gender" might be a protected characteristic under the Crime and Disorder Act 1998.
- **It appears to be addressing gender-critical belief (i.e. the ordinary recognition that there are two sexes, and that sex matters) but mangles this into the incoherent neologism "philosophical faith around biological gender"**. "Faith" refers to religion, not philosophical belief, and "biological gender" is meaningless.

- **It involves the added and unnecessary complication of a corporate entity (the Council) being reported for a hate incident rather than an individual.**

There is no need to replace the clear, simple example provided in the Statutory Code, which is based on real cases, with an invented example that is confusing. It would be better to present a clear illustration of an irrational complaint.

It is hard to avoid the conclusion that the substitution of this case for Example C by the College of Policing is motivated by reluctance to represent a transgender complainant as irrational and a gender-critical subject as the victim of a vexatious or irrational complaint, even though this is exactly what happened in the Miller case.

The new case equates gender-critical belief with being **"anti-transgender**" and describes the posters as containing a "threat" without being specific about the nature of that threat. The example risks encouraging police forces to depart from common sense and return to recording irrational perceptions of hostility when the complainant is simply experiencing disagreement with their own beliefs about gender identity or their desire to access facilities for the opposite-sex.

The perception that disagreement about whether gender identity should override sex as "threatening" is widespread in some sectors of society, and have been encouraged by lobby groups. For example, when the Equality and Human Rights Commission intervened in the case of *Forstater v CGD [2021]* to argue that people who express the ordinary belief that sex matters are protected from discrimination by the Equality Act 2010, more than 40 organisations signed a letter of complaint saying:

> "It was a kick in the teeth to trans people to see the EHRC appear to put their organisational weight behind a movement that has only contributed to rising hate for trans people in communities, creating a policy environment where it is harder for trans people to access their rights."[1]

The APP should ensure that police forces which receive similar complaints (either externally or internally) are able to put them into context and understand that organisations promoting this view do not respect the right to freedom of belief and freedom of expression of people with gender-critical views.

The APP should reflect the findings of Mr Justice Julian Knowles in the Miller case in the High Court, in relation to complaints that are trivial, irrational or malicious. At §250 he states:

> "I take the following points from this evidence. First, there is a vigorous ongoing debate about trans rights. Professor Stock's evidence shows that some involved in the debate are readily

[1] https://www.consortium.lgbt/ehrc-open-letter/

willing to label those with different viewpoints as 'transphobic' or as displaying 'hatred' when they are not. 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."

And at §280:

> "I hesitate to be overly critical of Mrs B, given she has not given evidence, but I consider it fair to say that her reaction to the Claimant's tweets was, at times, at the outer margins of rationality. For example, her suggestion that the Claimant would have been anti-semitic eighty years ago had no proper basis and represents an extreme mindset on her behalf. Equally, her statement that if the Claimant wins this case, transgender people will have to 'kiss their rights goodbye' was simply wrong. The Equality Act 2010 will remain in force. The evidence of Professor Stock shows that the Claimant is far from alone in a debate which is complex and multi-faceted. Mrs B profoundly disagrees with his views, but such is the nature of free speech in a democracy. Professor Stock's evidence demonstrates how quickly some involved in the transgender debate are prepared to accuse others with whom they disagree of 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."

As Dame Victoria Sharp states, the new APP should not mislead by omission either the police who have to use it *or the public*. We recommend that in order to be effective the new guidance should explicitly address the misperception held by some actors about what constitutes a hate crime or hate incident in relation to transgender identity. This is particularly important as this does not just relate to people engaged in debate or scholarly research but also people using and managing everyday single-sex spaces.

The College of Policing should pay attention to the report by LGBT+ anti-violence charity Galop, which found that four out of five respondents to a survey perceived themselves to have experienced a "transgender hate crime" in the past year (although only a minority had reported it to the police).[2] The most commonly perceived "hate crimes" were "invasive questions" (67%) and "deadnaming" (55%). These are not crimes or hateful. "Discrimination" and "outing" (i.e. having someone recognise one's sex) are not hate crimes either. Several of the other purported "hate crimes" are described vaguely.

[2] http://www.galop.org.uk/transphobic-hate-crime-report-2020/

Top ten categories of “hate crime”, Galop survey

Invasive questions	67 %
Deadnaming	55 %
Verbal abuse	55 %
Online harassment	45 %
Discrimination	43 %
Being treated as ‘diseased’	37 %
Outing	63 %
Threat of physical assault	28 %
Offline harassment	20 %
Threat of outing	17 %

Addressing the misperception that it is “hateful” for someone not to share a trans person’s belief that they are the opposite sex (or not to agree to treat them as such) would reduce the number of trivial and irrational hate incident reports, and the pressure on police forces to record and act on them. It would also help reassure transgender people and the organisations that seek to support them that when other people recognise their sex this is not a “threat” or an act of “hate”.

Yours sincerely



Maya Forstater
Executive Director

Helen Joyce
Director of Advocacy

Naomi Cunningham
Chair

Annex: Examples of departures from a common-sense approach in relation to complaints about "gender critical" belief

Sarah Phillimore is a barrister and a campaigner on sex and gender issues. She was contacted by an account on Twitter informing her that she had a "record for life" of "hate", as her tweets had been reported and recorded by the police under "Hate Crimes Operational Guidance". She requested information from the police and received 12 pages of tweets they had recorded as a transphobic and religiously aggravated "non-crime hate incident". Phillimore says:"The tweets I posted contained nothing that any reasonable person could describe as 'hatred' – for example one is discussing that my dog likes to eat cheese!" [3]

Miranda Yardley, a transsexual, was prosecuted for a transgender hate crime after a complainant, who worked on behalf of the charity Mermaids, alleged harassment by potentially exposing her and her transgender child to bullying and abuse. Helen Islan frequently campaigns on transgender issues via social media on the basis that she is the mother of a transgender child. The defendant had tweeted a message linking Islan's full name to her Twitter handle and stating that the "self-interest of Helen Islan is in justifying to herself her decisions to trans her daughter". The information was contained in a screenshot of a Google search which had also brought up an image of Helen Islan and her children. The CPS unsuccessfully applied for reporting restrictions to prevent the complainant's full name being published (on the basis that this was necessary to send a message to future victims of "transgender hate crime" that the courts would protect them by granting anonymity). The judge stated that there was no evidence of harassment, that issues of freedom of speech enshrined in Article 10 of the ECHR were clearly engaged and that it was a case that the CPS should never have brought.[4]

Caroline Farrow was reported to police after she referred in a tweet to the child of Mermaid's CEO Susie Green, who was taken to Thailand at the age of 16 to have sex reassignment surgery. Farrow wrote: "Susie Green is in breech of Samaritans policy about how suicide should be discussed and broached in the media. What she did to her own son is illegal . She mutilated him by having him castrated and rendered sterile while still a child".[5] Farrow said she was told by police that the complaint was about misgendering. Susie Green later withdrew the complaint and Mermaids issued a statement: "The tweets are a lot more serious than about misgendering. They were allegations of serious misconduct and vile and spiteful personal attacks."[6] Sexual-reassignment surgery on under-18s is illegal in the UK, and was subsequently made illegal in Thailand..

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[3] https://www.crowdjustice.com/case/the-police-recorded-me-as-hate/
[4] https://www.2harecourt.com/2019/03/04/gudrun-young-secures-no-case-to-answer-in-controversial-first-prosecution-for-transgender-hate-crime/
[5] https://www.dailymail.co.uk/news/article-6846643/Devout-Catholic-mother-44-reported-police.html
[6] https://www.theguardian.com/society/2019/mar/20/catholic-journalist-investigated-by-police-after-misgendering-trans-woman

Linda Bellos OBE, a leading feminist and campaigner for racial equality, was prosecuted for an offence of using threatening, abusive or insulting words or behaviour contrary to section 5 of the Public Order Act 1986. The alleged offence arose out of a public event where Bellos stated that "if any one of those bastards comes anywhere near me I will take my glasses off and clock 'em". She has said she was referring to the attack on Maria MacLachlan at Speakers' Corner. The event was live-streamed on Facebook by Venice Allan. Giuliana Kendal, a transwoman who had watched the live-streaming of the debate, complained to South Yorkshire Police that she found the remarks threatening as a transwoman. South Yorkshire Police launched a full investigation, including interviewing Bellos under caution. In May 2018 the CPS decided there was no realistic prospect of conviction, taking into account the context in which the words were uttered and the fact that Bellos would have a defence of freedom of speech under Article 10 of the ECHR. Kendal then embarked on a private prosecution of both Bellos (under section 5 Public Order Act) and Allen (under section 127 of the Communications Act 2003). Eventually in November 2018 the case was dropped after the CPS exercised their statutory powers to take over the prosecution and then discontinued it.[7] Bellos and Allan had to instruct criminal-defence lawyers and attend court on three occasions.

Kate Scottow was prosecuted under s.127 of the Communications Act and found guilty of using a public communications network to "cause annoyance, inconvenience and anxiety". In court the judge told Scottow that "we teach our children to be kind" and took particular exception to Scottow's use of "Mandy McGirlDick" as a Twitter handle. As Kim Thomas wrote in the *Spectator*, "Scottow's tweets were, admittedly, uncivil. But nothing she wrote was worse than what can be seen every day on Twitter and other social media platforms, where thousands of cruel insults and threats are regularly posted without any comeback at all."[8] The conviction was overturned on appeal almost two years after her arrest. In quashing Scottow's conviction (*Scottow* v *CPS* [2020] *EWHC 3421 (Admin))*, the judges Bean and Warby were particularly scathing regarding the overreach of the law that had taken place.[9]

Kellie-Jay Keen was contacted by West Yorkshire Police in February 2018 after she posted tweets about Susie Green, CEO of trans charity Mermaids.The tweets referred to Mrs Green taking her 16-year-old child to Thailand for sex reassignment surgery, which is a matter of public record. Keen was interviewed in February 2018 and then in December 2018 by her local force, Wiltshire Police. Although Susie Green had withdrawn her complaint by the time of the second interview, the case was nonetheless referred to the Crown Prosecution Service (CPS). Keen was interviewed under caution again in February 2023 after complaints about a sign held up at a women's rights event in Brighton.[10]

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[7] https://www.dailymail.co.uk/news/article-7978797/amp/Mother-two-called-transgender-woman-man-racist-series-offensive-tweets.html and https://www.2harecourt.com/2018/11/30/gudrun-young-successfully-defends-leading-feminist-anti-racist-campaigner-linda-bellos-obe/

[8] Thomas, Kim (2020) I stand with Kate Scottow https://www.spectator.co.uk/article/i-stand-with-kate-scottow

[9] https://www.judiciary.uk/wp-content/uploads/2020/12/Scottow-v-CPS-judgment-161220.pdf

[10] https://www.dailymail.co.uk/news/article-11790255/Womens-rights-protesters-line-streets-outside-police-station-Kellie-Jay-Keen-quizzed.html

Jennifer Swayne was arrested by Gwent Police on suspicion of criminal damage and displaying threatening or abusive writing likely to cause harassment, alarm or distress after putting up posters she described as feminist, which said “nothing hateful”. Gwent Police submitted a file to the Crown Prosecution Service, which decided not to charge Ms Swayne. The force said it had received six calls between October and January about posters in Newport containing allegedly offensive material. The stickers said “3 women are killed by men each week" and "domestic violence kills”. The force said: “The content of the stickers is directed towards the transgender community”. [11]

Marion Millar faced prosecution for a hate-crime charge in Scotland, after being accused of sending homophobic and transphobic tweets. Police had tweeted “We received a report of controversial stickers having been placed on lampposts within the Viewforth Avenue area of Kirkcaldy,” The controversial stickers said simply “Women Won’t Wheesht” and advertised the website of feminist group For Women Scotland (FWS).[12] Millar was arrested and charged after tweeting a picture of a purple, white and green suffragette ribbon tied to a wire fence which someone interpreted as a noose, and a veiled threat. Prosecutors later dropped the case.[13]

Cathy Kirby, a Norfolk teacher, was visited twice at her Norwich home by police officers after transactivists lodged a series of complaints claiming her posts on Twitter were transphobic. Although no further criminal action was taken against her, the teacher later discovered that the ‘non-crime hate incident’ had been placed on her records. She says she was never told which of her tweets were considered 'transphobic', but believes one related to a post about changes to the rainbow Pride flag, which saw extra colours added, to represent trans people. “I made a comment on Twitter calling out the new Pride flag, saying that I didn’t particularly like the trans colours being added because I felt the original was fine as it already represented trans people,” she said.[14]

[11] https://www.bbc.co.uk/news/uk-wales-61111160
[12] https://www.scotsman.com/news/opinion/columnists/scotland-is-in-trouble-if-police-are-dragged-into-culture-wars-as-snp-government-stokes-division-susan-dalgety-3253807
[13] https://www.theguardian.com/uk-news/2021/oct/28/scottish-prosecutors-drop-transphobia-case-against-marion-millar
[14] https://www.edp24.co.uk/news/23377104.norfolk-teacher-got-sinister-police-record-trans-views/?ref=twtrec