

## **EXPLANATORY MEMORANDUM TO**

### **THE NON-CRIME HATE INCIDENTS DRAFT CODE OF PRACTICE ON THE RECORDING AND RETENTION OF PERSONAL DATA 2023**

#### **1. Introduction**

- 1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Act.
- 1.2 This memorandum contains information for the Secondary Legislation Scrutiny Committee.

#### **2. Purpose of the instrument**

- 2.1 The Non-Crime Hate Incidents Draft Code of Practice on the Recording and Retention of Personal Data (hereinafter referred to as ‘the code’) is designed to provide guidance to assist police officers and staff in England and Wales in deciding whether a non-crime hate incident (NCHI) record needs to be made, and whether and how the personal data of the person who is the subject of an NCHI report should be processed. For the avoidance of doubt, the ‘subject’ is the person being complained about.
- 2.2 The code introduces new safeguards and provides additional clarification for police officers and staff in order to better protect personal data and the fundamental right to freedom of expression. The code will address the concerns raised by Parliamentarians during the passage of the Police, Crime, Sentencing and Courts (PCSC) Act by enabling parliamentary scrutiny of the enhanced processes surrounding the recording of NCHIs and the processing of personal data in these records. The code will also address the Court of Appeal judgment in *Miller v College of Policing* (see paragraph 6.3) by providing clarity to ensure that police officers and staff understand when and how it is proportionate to record an NCHI, taking into account the right to freedom of speech.
- 2.3 The code is, in and of itself, the statutory instrument being laid before Parliament.
- 2.4 The first iteration of the code is subject to the affirmative resolution. The code will enter into force 31 days after it is approved by Parliament. Any future iterations of the code will be subject to the negative procedure; this means it will be signed off by the relevant Minister and then laid before Parliament where it becomes law unless it is actively annulled.

#### **3. Matters of special interest to Parliament / Matters of special interest to the Select Committee on Statutory Instruments**

- 3.1 None.

#### **4. Extent and Territorial Application**

- 4.1 The territorial extent of the code is England and Wales.
- 4.2 The territorial application of the code is England and Wales.

## **5. European Convention on Human Rights**

- 5.1 The Home Secretary, Suella Braverman MP has made the following statement regarding Human Rights:

“In my view the provisions of the Non-Crime Hate Incidents Code of Practice on the Recording and Retention of Personal Data are compatible with the Convention rights.”

## **6. Legislative Context**

- 6.1 Sections 60 and 61 of the Police, Crime, Sentencing and Courts (PCSC) Act 2022 provide the Secretary of State with the ability to publish a new Government code of practice relating to the recording and retention of personal data in NCHI records.
- 6.2 These provisions were included because the Government recognises that there are sensitivities surrounding the recording and retention of such information by the police. The Government also recognises the considerable strength of feeling on this issue amongst Parliamentarians in relation to the lack of democratic oversight that has been afforded to the process in recent years – the only guidance in existence prior to the publication of the code was the College of Policing’s non-statutory Authorised Professional Practice (APP) guidance on hate crime, which includes guidance on NCHIs for officers and staff and covered the procedures they should follow when responding to NCHIs. The code will provide the desired democratic oversight because it is subject to Parliamentary scrutiny.
- 6.3 The code addresses concerns that NCHI recording infringes on the right to freedom of expression; the code emphasises this fundamental right and will ensure that it is taken into consideration by police officers and staff during the recording process. The code provides detailed information on freedom of expression, and clear case studies to illustrate how this right should be taken into account in practice. The Court of Appeal ruled, in its [Miller v College of Policing](#) judgment provided on 20 December 2021, that the recording of NCHIs is lawful provided that there are robust safeguards in place so that the interference with freedom of expression is proportionate. The Court stated that safeguards protecting free speech in the College of Policing’s then-APP must be made more explicit to help police officers proportionately implement recording, to ensure lawfulness of the scheme - in response, the College of Policing published updated APP in July 2022 to address the judgment. The code is vital in further enshrining the right to freedom of expression into the recording process.
- 6.4 The College of Policing will publish an updated version of the APP once the code has been approved by Parliament. The APP will align with the code and ensure coherence

and consistency in terms of the code's operational application across England and Wales.

- 6.5 The code also ensures that the process for recording and retaining NCHI-related data is in line with the Human Rights Act 1998, case law, the Data Protection Act 2018, UK General Data Protection Regulation, and all other relevant legislation.

## **7. Policy background**

- 7.1 NCHIs are recorded by the police to collect information on 'hate incidents' that could lead to more serious harm or indicate heightened community tensions, but which do not amount to a criminal offence. The police regard the recording of NCHIs as an essential tool to record patterns of individual behaviour or local incident 'hotspots'.
- 7.2 NCHI recording stems from the murder of Stephen Lawrence in 1993. The 1999 Stephen Lawrence Inquiry Report called for "a comprehensive system of reporting and recording of all racist incidents and crimes". NCHI recording has since expanded to cover all five protected characteristics cover by hate crime laws in England and Wales: race, religion, disability, sexual orientation and transgender identity.
- 7.3 The recording of NCHIs is not currently governed by any specific law, although all data recorded as part of an NCHI record is currently subject to relevant data protection legislation. The College of Policing produce non-statutory Authorised Professional Practice (APP) which provides operational guidance for police officers and staff in England and Wales (see paragraph 6.2). In 2021, a legal judgment (see paragraph 6.3) called for more robust safeguards in this guidance. As a result, the College published updated interim guidance in July 2022 and will provide an updated version that aligns with the code once the code has been approved by Parliament (see paragraph 6.4).
- 7.4 In recent years, NCHI recording has attracted public concern in relation to potential infringements on the right to freedom of expression and a lack of democratic oversight of the process for making these records. Accordingly, the Government legislated for a new Government code of practice relating to the recording and retention of NCHIs in the PCSC Act. The code introduces new safeguards and provides additional clarification for police officers and staff in order better to protect personal data and the fundamental right to freedom of expression. The code will ensure that police officers and staff understand when it is appropriate to record an NCHI and how to balance the need to uphold the fundamental right to freedom of expression with deciding whether to include personal data in an NCHI record.
- 7.5 In particular, the code introduces the Additional Threshold Test, which clarifies that personal data may only be included in an NCHI record if the event presents a real risk of significant harm to individuals or groups with a particular characteristic(s) and/or a real risk that a future criminal offence may be committed against individuals or groups with a particular characteristic(s). For the purposes of the code, "particular

characteristics” mean race, religion, sexual orientation, disability or transgender identity, as defined in hate crime legislation.

## **8. European Union Withdrawal and Future Relationship**

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act 2018.

## **9. Consolidation**

9.1 There is no consolidation with any other statutory instruments or other legislation.

## **10. Consultation outcome**

10.1 A formal consultation was not carried out for the purposes of developing the code.

10.2 However, policy officials have engaged with key policing stakeholders throughout the drafting process, including the College of Policing, the National Police Chiefs’ Council, the Metropolitan Police Service Commissioner, and the Chief Constables for Greater Manchester Police and Lancashire Police.

## **11. Guidance**

11.1 The code is, in and of itself, a guidance document for police officers and staff that clearly outlines the considerations that must be taken into account by officers and staff when deciding a) whether an NCHI should be recorded, and b) whether and how personal data should be included in the record.

11.2 As set out in paragraph 6.2, operational guidance (known as APP) relating to the recording and retention of NCHIs is published by the College of Policing. An updated version will be produced when the code is approved by Parliament. This operational guidance will ensure that the principles provided by the NCHI Code are operationalised, thus creating consistency across all polices forces in England and Wales. The operational guidance will not be subject to Parliamentary scrutiny.

## **12. Impact**

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 The impact on the public sector is minimal and expected to be absorbed within current budgets.

12.3 A full Impact Assessment has not been prepared for the code because the impact of the code introduction is considered to be minimal. An Economic Note has instead been produced outlining the costs and benefits relating to the introduction of the code. The main cost associated with introduction of the code is cost of police time related to familiarisation with the new code, which is expected to be absorbed within current workloads.

## **13. Regulating small business**

13.1 The legislation does not apply to activities that are undertaken by small businesses.

## **14. Monitoring & review**

- 14.1 The Home Office will keep the code under review to ensure it remains fit for purpose and will update the code if necessary.
- 14.2 In the event that the code is updated, the revised code will be laid before Parliament and be subject to the negative procedure.
- 14.3 The College of Policing will ensure that the principles set out in the code are operationalised in APP. The APP will be updated to align with the code.

## **15. Contact**

- 15.1 The Hate Crime Team at the Home Office can be contacted by email: [hatecrimepolicy@homeoffice.gov.uk](mailto:hatecrimepolicy@homeoffice.gov.uk) with any queries regarding the code.
- 15.2 Paul Regan, Deputy Director of the Neighbourhood Crime Unit at the Home Office, can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Suella Braverman MP, the Home Secretary, can confirm that this Explanatory Memorandum meets the required standard.





