IN THE HIGH COURT OF JUSTICE **CLAIM:**

KING'S BENCH DIVISION

ADMINISTRATIVE COURT

B E T W E E N :

THE KING

on the application of

SEX MATTERS **Claimant**

-and-

CHIEF CONSTABLE OF THE BRITISH TRANSPORT POLICE **Defendant**

STATEMENT OF FACTS AND GROUNDS

EXPEDITION

1. This matter is urgent because there is an imminent prospect of serious suffering contrary to Article 3 of the European Convention on Human Rights. Sex Matters considers it is appropriate for the standard timescale for the Defendant to file the Acknowledgment of Service and Summary Grounds of Defence. Sex Matters thereafter seeks expedited consideration of and progress of the claim. Sex Matters makes an Application on the Claim Form that the papers are placed before a Judge for consideration within 7 days following the deadline for the Reply to the Acknowledgment of Service to be filed and served, with onward expedition towards a substantive hearing. A Form N244 is being filed with this claim to direct attention to this application.

INTRODUCTION

2. This claim for judicial review concerns the British Transport Police's ("**BTP's**") policy document "Transgender and Non-Binary Search Position" (the "**Search Policy**") [**PB/196**], issued internally by BTP on 30 September 2024[1] and publicly available on 30 October 2024 through a Freedom of Information Act 2000 request [**PB/358**]. The Search Policy places detainees and BTP officers at an unwarranted and unnecessary risk of sexual harassment and sexual assault and operates from a series of misconceived and incorrect premises as to the

[1] The Search Policy is dated 12 September 2024. By letter dated 6 December 2024, the Defendant confirmed to Sex Matters that the Policy was finally approved after the completion of an equality impact assessment on 30 September 2024, and that in their view the limitation for challenging the Policy runs from 30 September 2024 [**PB/172**].

law and relevant facts. It raises serious concerns about the welfare of detainees and of BTP officers (particularly female detainees and officers) and of public trust and confidence in policing.

The parties

3. Sex Matters is a human rights charity; its object is to promote human rights where these relate to biological sex, in particular by: contributing to the sound administration of human rights law; eliminating infringements of human rights (where infringement relates to biological sex); and promoting the sound administration of the law in relation to biological sex and equality in the law.

4. The Defendant is the Chief Constable of the BTP, who is responsible for the Search Policy.

Pre-action protocol correspondence

5. Sex Matters sent a pre-action protocol letter to the Defendant on 22 November 2024 [**PB/124**], inviting her to withdraw the Search Policy, and to confirm that detainees would only be searched under statutory powers by an officer or staff member of the same biological sex (and not sex modified by a Gender Recognition Certificate ("**GRC**")); to confirm that the sex of both detainees and officers involved in any search will be accurately recorded and communicated to detainees; and to agree to prepare a fresh policy on consensual searching (i.e. where the detained person indicates a preference to be searched by an officer of a sex in contradiction of the requirements of statutory powers), which takes into account the impact on officers who may be under pressure to undertake these searches. In their letter of 6 December 2024, the Defendant's representatives refused to agree to the above requests, including on a temporary and without prejudice basis [**PB/161**].

Summary of Grounds

6. Sex Matters challenges the Search Policy on the following grounds:

   6.1 Ground 1: the Policy is systemically flawed for being (A) inherently incompatible with, sanctioning or encouraging violations of the Human Rights Act ("**HRA**") / the European Convention on Human Rights ("**ECHR**"); (B) inherently incompatible with, sanctioning or encouraging breaches of the Equality Act 2010 ("**EqA**"); and (C) irrational (§§36—66 below).

   6.2 Ground 2: the Policy amounts to an error of law and/or is incompatible with s.54 and 55 Police and Criminal Evidence Act 1984 ("**PACE**") (§§67—80 below).

6.3 Ground 3: there has been a breach of the Public Sector Equality Duty ("**PSED**") in s.149 EqA and/or failure of sufficient inquiry and/or failure to take into account relevant considerations (§§81—90 below).

Language and terminology

7. In this Statement of Facts and Grounds, Sex Matters uses the terms:

7.1 "sex", "biological sex" or "natal sex" to denote the immutable sex of a person as observed and recorded at birth;

7.2 "man", "male", "woman" and "female" to denote the sex of a person notwithstanding transgender identification or any GRC;

7.3 "trans identified man/male" to denote a man who identifies as a woman, and "trans identified woman/female" to denote a woman who identifies as a man (whether or not he or she is in possession of a GRC);

7.4 "male/man with a GRC" to denote a trans identified man who holds a GRC which reflects his identification as a woman, and "female/woman with a GRC" to denote a trans identified woman who holds a GRC reflecting her identification as a man.

8. Pronouns are used in accordance with biological sex. Further relevant terms are used as defined below.

9. Language in this area is contested; some may find one or more of these usages objectionable. However, sex is relevant and significant for the purposes of the matters addressed and using these terms ensures that the issues may be appreciated with clarity, which is particularly important.

STATEMENT OF FACTS

The nature and effect of strip searches

10. Strip searches are, for the purposes of the Policy which is the subject of this claim, (i) searches involving the removal of items of clothing more intimate than those commonly considered "outerwear" and (ii) searches that involve the exposure of buttocks, genitalia and female breasts including, on occasion, obtaining an internal view of the anus or vagina. The precise definitions used within the Search Policy are set out below.

11. By their nature, strip searches go to the dignity of the subject and are, even when conducted necessarily and appropriately, often violating, humiliating and/or frightening experiences. The report of the Baird Inquiry (July 2024) [**PB/327**], commissioned in response to a

television programme about three women who had been strip searched at a police station in Greater Manchester, stated *inter alia* that:

"The impact of strip searches can be severe. They are a profound invasion of people's privacy and bodily autonomy. They are often experienced as humiliating and degrading. Australian author Amanda George, writing in 1993 about their use on women in Australian prisons, likened strip searches to "sexual assault by the state" (George, 1993).

Baroness Corston, in researching her seminal report on women with vulnerabilities in prison, described strip searching as making them feel embarrassed, invaded, degraded, uncomfortable, vulnerable, humiliated, ashamed, violated, and dirty (Corston, 2007).

Dr Koshka Duff, a distinguished academic at Nottingham University, to whose work I refer, was personally strip searched, having handed a card about legal advice to a young person being stopped and searched. She described it as "degrading and painful" and a "very violating and humiliating experience". She said it left her with multiple injuries and post-traumatic stress disorder (PTSD), and she suffered from panic attacks for months following the experience (Duff and Kemp, 2024).…

Yet a review of the law and practice shows that there is no statutory definition of a strip search. There is something nearer to a description than a definition in PACE Code C, Annex A, paragraph 9, which says "a strip search is a search involving the removal of more than outer clothing, including socks and shoes". However, there is no clarity about what 'outer clothing' comprises – an overcoat and scarf? Or, on a hot July day, a T-shirt worn over a bra?

Body searches are inherently risky practices because they imply either physical contact between persons deprived of liberty and … staff, or nudity, … The risk is high for these practices to be used or applied in such a way as to constitute degrading or inhuman treatment or even torture".

The Search Policy and the Equality Impact Assessment

12. The Search Policy was issued by the Defendant following the withdrawal on 10 January 2024 of the National Council of Police Chiefs' 2021 Guidance, 'Searching by Transgender Officers and Staff' ("**NPCC 2021 Guidance**") [**PB/243**]. That guidance had been criticised by the Minister for Crime, Policing and Fire because it allowed men who self-identified as women (and who did not hold a GRC) to carry out strip searches of female detainees. (On 11 January 2024, Sex Matters wrote to the Minister explaining why it is also unlawful for men who identify as women and who do hold GRCs to carry out strip searches on female detainees [**PB/292**]). Later that month, the NPCC LGBTQ+ Policy Lead advised Chief Constables that *"A thorough review of the NPCC guidance is taking place. Whilst this is being done, local forces will*

work from their own policies in this matter" [**PB/316**]. To date, the NPCC has not issued any further guidance on same sex strip searches[2].

13. Sex Matters will rely upon the full terms and effect of the Search Policy, and for present purposes note the following:

14. Section 2 ("Background") states:

> *2.1 Certain provisions in law explicitly state that searches and other procedures may only be carried out by, or in the presence of, persons of the same sex as the person subject to the search.*
>
> *2.2 In law, the sex of an individual is their sex as registered at birth unless they have been issued with a Gender Recognition Certificate (GRC) under the Gender Recognition Act 2004 (GRA), in which case the person's sex is their acquired sex …*
>
> *2.4 British Transport Police recognises the status of Transgender and Non-Binary detainees/staff from the moment they identify in that gender with or without a GRC. This does not supersede the requirements set by statute that provide a power of search.*

15. Section 3 ("Overview") states that:

    15.1 the Search Policy covers More Thorough ("**MT**") and Exposing Intimate Parts ("**EIP**") searches, whether inside or outside the custody environment (§3.1);

    15.2 MT searches involve the removal of more than jacket, outer coat, gloves, headwear and footwear. EIP searches expose buttocks, genitalia, and (female) breasts (§3.3);

    15.3 statutory searches within ss.9–12 of Code C, Annex A of the Police and Criminal Evidence Act ("**PACE**") specifically require that the officer and the subject must be the same sex. For searches under these powers BTP officers and staff will only search persons of the same sex as either their birth certificate or their GRC (§3.5).

16. Section 4 ("Operational Guidance for the Statutory Searching of Trans and Non-Binary Detainees") provides that:

    16.1 Annex C Code L PACE is expressly disapplied (at §4.5), and replaced by s.6 of the Policy;

    16.2 no person should be asked for a GRC, and nor should information regarding GRC status be disclosed pursuant to a search under s.6 of the Policy (§4.6);

[2] NPCC were initially proposed to be an Interested Party in this matter but following BTP's response to Sex Matters' pre-action protocol letter, and NPCC's failure to provide a substantive response, Sex Matters contacted NPCC to state that it no longer considered NPCC to be an IP. NPCC's response was that it was content with this position [**PB/363**].

16.3 *"appropriate language"* is required (§4.10) which, in the premises, is to be inferred to require the use of the pronouns of the officer or detainee's acquired gender rather than his or her biological sex.

17. Section 5 ("Consensual Searches") states that under certain circumstances (including as to capacity) a detainee or appropriate adult can consent to a search outside the requirements of the legal power, in particular the requirement for a same-sex searcher (§§5.3—5.4).

18. Section 6 ("More thorough searches (MTs) and searches exploring intimate parts") states:

6.3. In law, a person must be searched as the sex stated on their birth certificate or as acquired under a gender recognition certificate when conducting More Thorough and EIP (Strip) searches under statutory powers. (Police and Criminal Evidence Act 1984 and Code of Practice on the Exercise by Constables of Powers of Stop and Search of the Person in Scotland) …

6.8. Where the detainee indicates a preference to be dealt with by officers of a different sex to them for More Thorough and EIP (Strip) searches, the detained person is to be informed that this can only be conducted as a consensual search (Section 5 of this guidance) with both the officers and detained person explicit consent. This consent can be removed at any time from either party and the search conducted under the statutory powers as per section 6.3. If the person is deemed as vulnerable, then an appropriate adult will be required, and their consent must be obtained in conjunction with the detainee.

6.9. If any officer conducting the search is not comfortable with the detained persons request, then that officer will notify the officer authorising the search so an alternative searching officer can be sought if practicable to accommodate the detainee's request subject to consent in 6.11.

19. At s.6 §11, wording is set out for a declaration which is to be signed in the event of a consensual search.

20. Section 7 ("Gender Recognition Act (GRA) – Redactions and Considerations") states that:

20.1 it is an offence for an officer or member of staff to disclose "protected information" within s.22 of the Gender Recognition Act 2004 ("**GRA**") – which is any information relating to a person's application for a GRC to or their previous gender – if the information has been acquired whilst performing official duties (§7.3); and

20.2 disclosure in this context occurs if the protected information is read by others, for example when it is noted in a custody record which is later viewed by an independent custody visitor (§7.4).

21. In summary, the Search Policy provides that:

21.1 trans identified people are defined purely on the basis of self-identification;

21.2 trans identified people who hold GRCs are to be treated and recorded as being of the sex provided by their GRC, rather than their biological sex, for the purposes of being searched and carrying out searches (§2.2);

21.3 a male officer with a GRC may search a female detainee as a female officer would (§3.5);

21.4 a male detainee with a GRC may be searched by a female officer as if the officer was male (§5.2);

21.5 a detainee may request and consent to being searched by an officer of the opposite sex, including by way of strip search (§5.3, §6.3);

21.6 if any officer does not consent to participating in a consensual search of a member of the opposite sex, an alternative searching officer may be sought (§6.8);

21.7 information that a trans identified person – whether detainee or officer – has a GRC (which would include information about their actual sex) must not be recorded in the custody record of a search (§4.6 and section §7); and

21.8 in practice, by effectively prohibiting any disclosure of a GRC, there is no material difference between the ability of a trans identified officer with or without a GRC to search as if an officer of the opposite sex, and *mutatis mutandis* for a detainee.

22. The equality impact assessment ("**EIA**") completed in relation to the Search Policy is also dated 30 September 2024 [**PB/185**]. It has the following features (again summarised without prejudice to reliance upon its full terms and effect):

22.1 it is not indicated that the Search Policy has any relevance to the protected characteristic of sex (albeit sex is briefly mentioned in the comments relating to the protected characteristic of religion or belief on pages 4 and 7, see §22.3 below);

22.2 it is indicated that the Search Policy is relevant to "gender identity/reassignment" (which is not, as expressed, a protected characteristic known to law) and to the protected characteristic of religion or belief, but it does not state what the impact upon those groups might be;

22.3 it is stated that any detainee who objects to being searched by a trans identified officer because of a protected belief "or concerns due to their sex" will be accommodated (all parties must agree to a consensual search), and any officer who objects to searching a trans identified detainee for those reasons is entitled to raise the matter; and

22.4 the EIA only refers to the possibility of detainees or officers with religious or gender critical / sex realist beliefs being able to object to searches by or on "trans" people where that person does not hold a GRC, because a GRC holder is treated as having their sex modified by law.

Policing by consent and the public trust in policing

23. The policing model in the UK is built on the principle of 'policing by consent', as derived from the nine "Peelian principles", which emphasise the need to secure and maintain the respect and willing cooperation of the public, including by using physical force and compulsion to the minimum extent necessary and by demonstrating impartiality and independence without regard to the justice or injustice of particular laws [**PB/232**].

24. Predatory sexual behaviour by police officers is plainly grievously damaging to the public trust in policing that is central to the Peelian principles. In 2012 the Independent Police Complaints Commission, in conjunction with the Association of Chief Police Officers ("**ACPO**"), published a report on "*The abuse of police powers to perpetrate sexual violence"* [**PD/212**] which described such behaviour as a fundamental betrayal of trust. Since then, and particularly in the period since the Covid-19 lockdowns, trust in policing has been undermined repeatedly, and a significant feature of that has been the actions of male police officers towards women and girls.

THE LEGAL AND POLICY FRAMEWORK

25. The legal framework for strip searches in England and Wales is governed by ss.54 and 55 PACE. A search at which any clothing other than *"*outer*"* clothing is removed is conducted under s.54; "intimate" searches, consisting of any examination of an orifice other than the mouth[3] must be carried out under s.55. Searches under either s.54 or s.55 may only be carried out by a person of the same sex: ss.54(9) and 55(7).

26. Chief police officers are responsible for providing operational guidance and instructions for the deployment of transgender officers and staff under their direction and control for duties involving carrying out or being present at searches[4]. Guidance and instructions must comply with the EqA.

[3] PACE Code C, Annex A §1 [**PB/426**].
[4] PACE Code C, Annex L §L5 [**PB/431**].

STATEMENT OF GROUNDS

Matters going to all Grounds

27. Before turning to the detail of each ground, it is convenient to address some factual and legal propositions which are common to all of them.

Consent to searching

28. The Search Policy proceeds on the basis that derogation from ss.54 and 55 PACE is both possible and permissible on the basis of consent (see also the pre-action protocol response at §§8.9, 8.16, 8.22, 8.28, 8.29 [**PB/166-9**]). The Defendant does not identify any statutory provision supporting this. The matters for which consent may be given are narrowly confined in the statute[5]. In fact, this appears to contrary to PACE Code A §1.5:

> *An officer must not search a person, even with his or her consent, where no power to search is applicable. Even where a person is prepared to submit to a search voluntarily, the person must not be searched unless the necessary legal power exists, and the search must be in accordance with the relevant power and the provisions of this Code. The only exception, where an officer does not require a specific power, applies to searches of persons entering sports grounds or other premises carried out with their consent given as a condition of entry.*

29. Consent might potentially amount to a defence against an action in common law brought in trespass against the person. However, that must necessarily be distinguished from the issue arising here, which is the entitlement of the Defendant to premise the Search Policy on a derogation for which there is no necessary legal power. If the Defendant has no such entitlement in law, that would weigh heavily against, and arguably obviate, any defence that may be brought against the Grounds set out below, in particular Ground 2.

30. However, and even if the analysis at §29 above is overstated, the narrow terms in which consent to searching is stated in statute and the relevant Code is relevant. Neither PACE nor its Codes set out how genuine and informed consent could be established, recorded and monitored consistently with the other safeguards indicated. There are fundamental difficulties in obtaining or relying on consent given the inherent power imbalance which arises when a strip or intimate search is carried out. If the Defendant is unable to point to any authority or authoritative guidelines in support of its position, it cannot be taken as read that such consent may in principle be achievable.

[5] See s54A(2)(5) (consent to be examined for presence of marks going to identity); s55(3A) (13A) (a drug offence search may not be carried out unless appropriate consent for that search given in writing) and may then if withheld become the basis of an adverse inference at trial.

The realities of obtaining a Gender Recognition Certificate and of transitioning:

31. Section 2 GRA prescribes the conditions that an applicant must satisfy to qualify for a GRC. They do not include that an applicant has undergone surgery to alter physiological characteristics. Indeed, save that it may be relevant to the question whether the applicant has "lived in the acquired gender throughout the period of two years ending with the date on which the application is made" (s.2(1)(b) GRA), an expressed wish to retain the capacity to have a functional penis, with capacity for erection and genital sexual response, does not preclude a successful application for a GRC recording the applicant's sex as female[6]. There is no set or agreed list of requirements as to what does, or does not constitute *"liv[ing] in the acquired gender"* but it may be granted on the basis of administrative changes to title and name only[7].

32. Notwithstanding any step or steps taken by any person who has "transitioned" or is in the process of doing so, it is overwhelmingly likely that they will retain the musculo-skeletal structure, general strength and other features associated with their biological sex.

33. There is no known or appreciable body of evidence to support the contention that biological males who transition (with or without a GRC or surgery or other treatment) are any less likely than other biological males to perpetrate physical and sexual harassment, abuse or violence, or to be perceived as potential perpetrators by persons who would be required to undertake a strip search either as the detainee or the officer.

34. Finally, there is evidence that some men choose either to dress "as women" or to transition because they derive sexual pleasure from doing so: see §§95—108 of Maya Forstater's witness statement. It is further noted that the guidance of the Association of Chief Police Officers on the inception of the GRA 2005 accept this proposition as does the prison service.

The operation of PACE and the effect of Convention Rights and discrimination law

35. Further, and as is apparent by the absence of proper engagement with sex as a protected characteristic, in the EIA as well as the Defendant's Letter of Response and associated enclosures, the Search Policy is based upon the following erroneous interpretations of the law:

    35.1 That biological sex is determined for the purposes of PACE by the existence of a GRC. As is set out at §§70—79 below, this is wrong. Moreover, although the Search Policy purports to distinguish between transgender officers and detainees who hold

[6] *AB v Gender Recognition Panel* [2024] EWHC 1456 (Fam) per Macfarlane P at §40.
[7] see §§75—85 of Maya Forstater's witness statement [**PB/73-6**] (requirements of a GRC) and §§86—94 (effects of those requirements) [**PB/76-78**].

GRCs and those who do not, the effect of the provisions at §4.5 and ss.7 and 8 of the Policy is to obliterate that purported distinction. It may be presumed, for instance, that officers would not necessarily be aware of a fellow officer's transgender or GRC status and would therefore be effectively disabled from ensuring compliance with purported safeguards under the Policy (although, for the avoidance of doubt, Sex Matters contends that these are absent or wholly inadequate) and/or recording or taking any steps regarding any actual or potential breach of the Policy.

35.2 That in order to prevent discrimination or harassment against a transgender BTP officer, that officer must be permitted to comply with the full occupational requirements of the role (including strip searches). Section 7 EqA provides a protected characteristic of gender reassignment as distinct from sex. Any prohibition on conducting a search would not emanate from an officer's or a detainee's trans status but from the fact of their sex. Further, as regards indirect discrimination prohibition would amount to a proportionate means of achieving a legitimate aim, and as regards and harassment it would be reasonable in the circumstances. Finally, no reason has been advanced as to why officers generally may not be employed without some derogation from the requirement to carry out searches (see observations of Lord Rogers in *Chief Constable of West Yorkshire v A* [2005] 1 AC 51 HL).

35.3 That the situation might correctly be described as a "conflict of rights" between a transgender officer and a detainee. A public authority does not have victim status for the purposes of the ECHR. The carrying out of a strip search, a function of a public authority only made lawful by the fact that is done pursuant to that authority's lawful powers and the operation of PACE, is not a matter in which an BTP officer, acting as an emanation of the state, may assert rights as a "victim" or could be deemed otherwise to have standing for the purposes of the ECHR. The only extent to which a transgender officer may assert relevant rights under the ECHR are in terms of the personal right of privacy in the fact of his or her transgender status. It would not follow that any right to privacy (if proven) gives rise to a right to carry out all elements of the role. So far as the transgender officer's rights to privacy in respect of that status is concerned:

a) to the extent that any such right arises it is a qualified right;

b) it cannot be presumed that any officer would necessarily and automatically have such a right (an expectation of privacy must be reasonable, which is necessarily fact-sensitive); and

c) any conflict of rights said to arise would be determined by what is proportionate to the search subject[8], the qualifications within Article 8(2)[9] and by the intense focus test[10]; the search subject rights' to autonomy, dignity and to giving genuinely informed consent outweigh any right assert asserted by the officer.

35.4 That there is no mechanism pursuant to the HRA or the ECHR case law for the resolution of any such conflict: this is wrong, see §35.3(c) above.

Ground 1: the Policy is systemically flawed for being (A) inherently incompatible with, sanctioning or encouraging violations of the Human Rights Act / the European Convention on Human Rights; (B) inherently incompatible with, sanctioning or encouraging breaches of the Equality Act 2010; and (C) irrational

Ground 1(A): HRA/ECHR incompatibility and violations

Article 3

36. So far as Article 3 is concerned, the minimum level of severity regarding the conduct of law enforcement officers is conduct which diminishes human dignity and which is not strictly necessary[11]. Further, Article 3 extends to a negative duty not to create circumstances which amount to an inherent risk of inhuman or degrading treatment, and a positive anticipatory duty to put in place a regulatory and administrative framework to avoid the risk of treatment contrary to Article 3[12].

37. As set out in *Limbuela* (ibid), "*where the essence of the complaint is that the victims have been subjected to degrading treatment*", the approach should not be to engage in a fine analysis as to whether the duty is strictly positive or negative, but to ascertain whether, in the premises, the public authority is responsible for it (§§92—93). The threshold for degradation is the modern standards of our own society in the modern world, and not the standards of some other society or a bygone age (§78). The duty is engaged (and may thereby be breached) where the prospect of such treatment is imminent (§§72, 78). The duty is therefore engaged by the fact of the Search Policy having been issued, because its provisions may then be operated at any time.

[8] *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 HL at [20]; [68]-[76].
[9] For an examination of this issue in the context of an asserted transgender status and impact on others see *R(E) v Ashworth Health Authority* [2001] EWHC Admin 108 at [40]-[43].
[10] *In Re S [2005]* 1 AC 593 HL at [17].
[11] *Bouyid v Belgium* (2016) 62 EHRR 32 *ECHR* and *Perkov v Croatia* (Application 33754/16, 2022 ECHR).
[12] *R (Limbuela) v Secretary of State for the Home Department* [2006] 1 AC 396 HL; *R (AAA (Syria)) v Secretary of State for the Home Department* [2023] UKSC 42.

38. The starting point is that any search carried out by any officer has the clear potential to be a degrading and humiliating experience for any detainee, and it is for this reason that PACE and its Codes impose thresholds before such a search may be carried out, and safeguards relating to the requirements for authorisation, location, recording, and the manner in which such a search is carried out. This inherent potential is magnified where a search is to be carried out by a member of the opposite sex, and particularly where a search is to be carried out on a woman by a biological male, regardless of how he identifies and whether or not he has a GRC.

39. As barely needs stating, the majority of people consider their bodies to be inherently private and that a majority avoid being unclothed around members of the opposite sex outside a narrow set of circumstances which are categorised by unequivocally voluntary participation.

40. Women, in particular, avoid being unclothed around males because they perceive it to be an affront to their dignity, and to carry an implicit threat of harassment and assault. Many women experience the act of voyeurism (that of being observed naked or exposed for sexual pleasure) to be damaging in itself even without any physical contact. Society accepts that this amounts to a form of sexual harm, as may be evident in the introduction of legislation banning "upskirting" and similar[13]. A great many women will have additional circumstances which may add to their personal experience of degradation and violation and humiliation, for example if they are menstruating[14] or have prior experiences of sexual assault or harassment (overwhelmingly likely to be at the hands of a male) . Women of certain religious beliefs are prohibited by the tenets of their faith from undressing in the presence of males.

41. Further, a great many women will, understandably, be fearful of male police officers, and perceive an element of sexual pleasure being derived from their degradation as a consequence of the numerous incidents in which women have experienced misogynistic violence and harassment, and a wider culture of misogyny. Such a perception may arise regardless of the male officer's intention: a detainee, will have no window into the officer's mind.

42. There is no reason to suppose that a male police officer would not be perceived as male because he is transgender. The Search Policy applies to all males, and every stage of transition, that is, from the point at which his decision to transition is announced and regardless of any modifications to his appearance. A male may also be in possession of a GRC without having undertaken any such modification.

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[13] Voyeurism (Offences) Act 2019.

[14] See Cathy Larkman's witness statement at §26(a): officers may be required to inspect a sanitary towel or tampon [**PB/114**].

42.1 While in *Chief Constable v A*, Lord Bingham hypothesised as to a transgender officer who was visibly indistinguishable from members of the opposite sex, it is unclear what the visual or aural test of indistinguishability is, or by whom it might be carried out. It cannot be said with any confidence that there is a category of trans identified males who are always indistinguishable. Moreover, even if there were, there remain fundamental and immutable differences between males and females. It is no less a violation of a woman to subject her to a search by a male because he does not appear as such obviously at the point of the search: a great many women would consider the element of concealment (regardless of its intent) to exacerbate rather than diminish their sense of violation and degradation.

42.2 If a female detainee is not given accurate information about a male's biological sex in relation to a strip search, then any consent that may be given to the strip search is likely to be vitiated. In any event, the Policy does not provide for a female detainee to be told that a trans identifying male is trans or has a GRC (let alone whether he has had any modifications to his body), so the question of whether she consents cannot be posed to her.

42.3 The prospect of obtaining genuine consent to a strip search by a member of the opposite sex should be viewed with scepticism, in light of the significant imbalance of power between any law enforcement officer and a detainee. In practice, the vast majority of detainees do agree[15].

43. The Search Policy gives no, or no adequate safeguards against these risks, in light of the inherent risk of degrading and humiliating treatment and the likely inadequacy of any provisions seeking to ascertain consent. Nor does the EIA refer to or detail these risks.

44. Similarly, the Search Policy exposes male and female officers to the risk of harm, harassment and humiliation, including forced contact with detainees' genitalia, lewd comments or (particularly in the case of male officers) subsequent allegations of sexual violence or harassment by a search subject[16]: *"In order to fulfil this obligation, there must, at a minimum be an appropriate legislative and administrative framework which makes for the effective prevention of the risk of breaches of Articles 3 and 8… In addition. there must be appropriate preventative operational measures with suitable supervisory control and monitoring. In other words, it is not sufficient for the state simply to point to*

[15] See witness statement of Catherine Larkman at §27 [**PB/115**].
[16] See witness statement of Catherine Larkman at §§33, 44 [**PB/116, 119**].

black letter provisions as fulfilling its positive obligation. There must be mechanisms to ensure that such provisions are effectively implemented"[17].

Articles 3 and 14 ECHR and the risk of sexual assault

45. Strip and intimate searches may, by their nature, require physical contact between detainee and officer. While many such searches might not involve such contact, the possibility cannot be ruled out: notably, the Search Policy does not contain any express prohibition on physical contact.

46. Sex Matters does not suggest that a majority of male police officers or detainees are actual or nascent sex offenders. However, a sizeable number have been, and are likely to continue to be. The regrettable truth for the (female) victims of sexual violence is that prior warnings are all too frequently overlooked. It cannot seriously be disputed that male officers and detainees so inclined can and would use the pretext of a strip or intimate search if given the opportunity to do so. This, clearly, does not apply exclusively to biological males who are transgender or non-binary. Crucially, however, the evidence tends to suggest that biological males who are transgender are no less likely to commit such crimes as other biological males (again, whether or not they hold a GRC). Moreover, the definition of transgender as contained in the Search Policy is so broad that it cannot be stated that this group is distinguishable from the wider cohort of males.

47. Further, there is a subset of biological males who derive sexual pleasure from dressing as and presenting as women and from others treating them as such, known as "autogynephilia"; recognised by ACPO in the 2005 Guidance for the GRA[18] and by the Ministry of Justice HMPSS Operation Guidance[19/20]. It is not possible to establish the motivation for or the origination of the behaviour of any given man who may fall within the Search Policy's definition of transgender (or those who may obtain a GRC), but it would be failure to take into account a relevant consideration not to consider the possibility that transition is associated with a sexual paraphilia. Consent as a defence is likely to be vitiated by one or more of:

    47.1 a lack of appreciation that an act of touching or penetration is sexual for the other party – at least until the act is already underway;

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[17] *LW and Ors v Sodexo* [2019] EWHC 367 (Admin) *at* §§39—46, considering the different authorities. See also *Valasinas v Lithuania* (Application 44558/98, 2001 ECHR); *LW and Ors v Sodexo* [2019] EWHC 367 (Admin) at §§39—46.

[18] See page 2 *"Dispelling the myths"* where fetish and sexual pleasure were raised in relation to transvestism.

[19] See §§95-108 of Maya Forstater's witness statement [**PB/79-81**].

[20] See also *Ashworth* (ibid) and *B (formerly known as V) v L* [2009] IEHC 623 as to prior recognition of this issue by the Court at first instance.

47.2 a lack of awareness that a person may withhold consent and withhold without adverse consequences;

47.3 a lack of awareness as to the sex of the person carrying out the act (where the person would not have consented had they realised);

47.4 the difficulty of obtaining genuine and informed consent of a detainee in any circumstance.

48. There is an inherent risk that physical contact between a detainee and an officer may amount to, or be the pretext for, the commission of a criminal offence of sexual assault or a tortious act of trespass to the person, particularly where the officer is male and the detainee a woman, or *vice versa*.

49. Moreover, even where physical contact did not amount to a criminal offence in terms of the Sexual Offences Act 2003 or a tortious claim (or could be successfully defended in terms of criminal or civil liability), there is an inherent risk that a search subject would perceive the physical contact to amount to an assault.

Positive obligations under Article 3 ECHR

50. Further, the Court is, under Article 3, obliged to undertake a proper inquiry into behaviour amounting to a breach of Article 3: that duty extends to operational (or "one-off") as distinct from systemic breaches. The Defendant has a positive obligation to deter the commission of offences against bodily integrity[21], and as set out above, in relation to taking preventative steps against violations of the Article and ensuring that those steps may be practically effective.

51. That duty is impeded by:

51.1 The absence of steps to notify an actual or potential victim of the detainee's or officer's sex;

51.2 The absence of proper provisions for disclosing and recording the transgender status of an officer who has a GRC (both to an actual or potential victim and to their colleagues)[22];

[21] *Valasinas*, ibid.

[22] Sex Matters also considers the provision in the Search Policy to the effect that the sex of a trans identified person with a GRC – whether officer or detainee – should not be correctly recorded in custody records amounts to a breach of Article 5(1)(a) and (d) UK GDPR.

51.3 The fact that the Search Policy will, for all practical purposes, apply to transgender officers who do not have a GRC as if they did have a GRC, and thereby prevent proper disclosure, notification or recording; and

51.4 The risk that the Search Policy may serve as the pretext for sexual assault and may prevent the BTP from properly investigating any complaints of sexual assault.

Articles 8 and 14 ECHR

52. The right to privacy under Article 8 extends to strip and intimate searches[23] and to protection of a person's physical, moral and psychological integrity[24]; to information relevant to respect for their private life and to that information not being concealed or withheld in a manner as to impede the exercise of that right[25]. Again, the Defendant has positive obligations regarding prevention of breaches of Article 8 and the efficacy of those preventative measures[26].

53. Sex Matters repeats the submissions at §§36—50 above and, as regards any contended balancing exercise between the rights of a transgender officer and detainee, §35 above.

54. Accordingly, the Search Policy:

54.1 will permit, encourage or sanction violations of Articles 3, 8, and 14 in that it provides a mechanism for treatment that is degrading, violating of privacy, and seeks to withhold from detainees' information necessary to avoid such violations, or to give consent, and in particular will do so as regards women detainees;

54.2 as such, will result in such violations unless withdrawn;

54.3 further, amounts to an anticipatory breach pursuant to Article 3;

54.4 is likely to diminish further public confidence in policing amongst those who become aware of and/or subject to this policy; and

54.5 is therefore unlawful and/or irrational.

Ground 1(B): EqA incompatibility and violations

Indirect sex discrimination contrary to s.19 EqA

55. The Search Policy is a provision, criterion or practice ("PCP") for the purposes of s.19 EqA. It is applied to all BTP officers who conduct searches and to all users of the public transport system who are subjected to searches. Within each of those groups it places women at a

[23] *Wainwright v UK* (Application 12350/04, 2006 ECHR).
[24] E.g. *Glass v UK* (Application 61827/00) 2004 ECHR).
[25] *Gaskin v UK* (Application 10454/83, 1989 ECHR).
[26] *Sodexo*, ibid.

disadvantage by comparison to men: see §§40—41 above, §§62—68 of Maya Forstater's witness statement and §§20—35 of Catherine Larkman's witness statement. The deficiencies of the Search Policy and the EIA are such that the Defendant would face insuperable difficulty in attempting to satisfy the justification test in s.19(2)(d) EqA, which requires it to identify a legitimate aim which it seeks to pursue by way of the Policy and to show that it has used proportionate means to do so.

56. The aim of the Policy appears to be that described in the "Key Benefits" statement on p.9 of the EIA:

> *Ensuring the dignity of detained persons. It also ensures dignity of police employees with the power of search both in terms of gender reassignment and gender critical / sex realist beliefs as well as keeping them safe from legal challenge in executing their duties.*

57. Whilst on its face, such a statement is capable of amounting to a legitimate aim within s.19 EqA, the adoption of the Search Policy as the means employed to achieve it are plainly wholly disproportionate, in the sense that they are neither appropriate nor reasonably necessary.

58. As to appropriateness:

    58.1 The Search Policy jeopardises the fundamental human rights of others (§§36—54 above) and places them at an enhanced risk of sexual crime and trespass to the person (§§45—49 above) as well as harassment and sexual harassment (§§61—62 below). As such it unduly prejudices the rights of others[27] to an extent which grossly outweighs the desirability of attaining the nebulous and undefined aim of "ensuring dignity".

    58.2 Strikingly, the EIA barely acknowledges the impact of the Policy on women or on the protected characteristic of sex. If it is suggested that the Defendant is assisted by the accommodation that is made for people with gender critical / sex realist beliefs, this is an entirely inadequate basis upon which to seek to justify the PCP, not least for the reason stated at §22.4 above (and see further §§83—84 and 63 below). So is the fact that a detainee can in theory request an alternative officer to conduct a search (and *vice versa*). The evidence produced by Sex Matters describes the significant barriers and power differentials that face women – both officers and detainees – in asserting their preferences in the context of a strip search.

    58.3 The Search Policy does not genuinely reflect a concern to attain the aim in a consistent and systematic manner[28]. Indeed, it is internally incoherent. For example, there is no

[27] *Ingeniørforeningen I Danmark v Region Syddanmark* (C-499/08) [2011] 1 CMLR 35 at §32.
[28] *Petersen v Berufungsausschuss für Zahnärtzte für den Bezirk Westfalenlippe* (C-341/08) [2010] 2 CMLR 31 at §53.

explanation as to how an officer who is a GRC holder is to be identified or distinguished from a trans identified officer who does not have a GRC, given the absolute prohibition on asking whether a person holds a certificate (see further §89.1 below). By way of further example, the Search Policy does not make any provision for the eventuality that a male GRC holder "passes" and the fact of his sex is not known to the woman who is required to interact with him until after the search has taken place, or perhaps at all. Sex Matters considers this to amount to deception or concealment which vitiates consent, and a particularly grave threat to women's fundamental rights.

59. As to reasonable necessity:

59.1 It is irrational to suggest that it is necessary to adopt the measure to ensure the dignity of trans identified people with GRCs when it is not necessary to do so for those without.

59.2 The Search Policy is not the only option that could be chosen by the Defendant to "ensure dignity". One alternative, for example, would be to exempt trans identified officers from searching duties (see §35.2 above).

59.3 Plainly, the Search Policy is not necessary to keep officers safe from legal challenge in executing their duties. The situation is quite the reverse.

59.4 Further, it is unclear whether there is any legal basis for the derogations from mandatory requirements in s.54(9) and 55(7) PACE.

60. Accordingly, the Search Policy permits, encourages and sanctions:

60.1 indirect sex discrimination contrary to s.19 EqA read with s.29(6) EqA by the Defendant against female members of the public; and

60.2 indirect discrimination contrary to s.19 EqA read with s.42 EqA by the Defendant against female police officers.

Harassment related to sex and sexual harassment contrary to s.26 EqA

61. For the reasons stated in §§36—62 below, the Search Policy is permissive of violations to the dignity of detainees and/or officers or of an environment which is intimidating, hostile, degrading, humiliating or offensive environment for them by reason of unwanted conduct related to sex or of a sexual nature. Where such conduct is done deliberately to cause the proscribed effect, it will amount to harassment related to sex within s.26(1) EqA or to sexual harassment within s.26(2) EqA. Where the proscribed effect is caused inadvertently, by its

very nature it is highly likely to be reasonably experienced as causing the proscribed effect for the purposes of s.26(4) EqA, and thus to satisfy the requirements of both causes of action. Indeed, the Search Policy appears recklessly to enhance the likelihood of unlawful harassment or sexual harassment being perpetrated upon women, whether detainees or officers.

62. Accordingly, the Search Policy:

    62.1 will permit, encourage or sanction breaches of the Equality Act 2010; and

    62.2 is therefore unlawful and/or irrational.

Ground 1(C): irrationality

63. The Search Policy is unworkable and thus irrational.

64. Although the EIA states that detainees who object to being searched by a trans-identified person due to faith or protected belief will have this request accommodated, it is entirely unclear from the Search Policy how this will work in practice. It is clear that the detainee will not be told that an officer holds a GRC (and is in fact of the opposite sex to that which appears to match their presentation) and, in any event, the Policy only provides for opting out of consensual searches, not a statutory search from an officer whose sex has been modified by a GRC. It is also unclear how it will be ascertained that a detainee holds gender critical or sex realist beliefs: it is not stated that they will be asked (and presumably they will not because this would contradict the Policy's intention as to not revealing the fact of an officer holding a GRC). Moreover, there is no prescribed and widely understood terminology and it cannot be presumed that any given officer or detainee would understand the import of any question or answer.

65. The EIA refers to the possibility of consent being required where a strip search is being carried out on a detainee of the opposite sex, but fails to acknowledge the power imbalance which makes it unlikely that female detainees and junior female officers will be able to feel safe to refuse to do so.

66. Strip searches require officers to act quickly, often in highly charged situations. Unless the language and means of operation of the policy are clear and certain, it is for practical purposes unworkable.

Ground 2: the Policy amounts to an error of law and/or is incompatible with ss.54 and 55 PACE

67. The Search Policy represents an error of law insofar as it purports to read s.9(1) GRA into ss.54(9) and 55(7) PACE. This conclusion is compelled by the ordinary principles of statutory construction:

    67.1 that legislation should be construed to serve its statutory purpose;

    67.2 that deeming provisions, such as that in s.9(1) GRA, should not be applied so as to produce unjust, absurd or anomalous results, and should be given no wider effect than is necessary having regard to the purpose of the legislation; and

    67.3 that a literal reading of statutory words may be avoided where it produces absurd or perverse consequences.

68. In any event, even if s.9(1) GRA does bite on s ss.54(9) and 55(7) PACE, it is immediately displaced by s.9(3) GRA.

69. Further or in the alternative the Search Policy is incompatible with ss.54(9) and 55(7PACE since as a matter of law an officer "of the same sex as the person searched" for the purposes of ss.54(9) and 55(7PACE means an officer of the same biological sex as the person searched.

The statutory purpose of ss.54(9) and 55(7PACE & the construction of "sex"

70. The purpose of ss.54(9) and 55(7, which is the context within which its words are to be understood[29], is "*to afford protection to the dignity and privacy of those being searched in a situation where they may well be peculiarly vulnerable*"[30]. The provision seeks to afford dignity and privacy to vulnerable women and men by ensuring that they are not subjected to intrusive and humiliating searching of their clothing and bodies – which may include their anus, vagina, penis or testicles – by members of the opposite sex.

71. Against that background there can be no doubt that when ss.54(9) and 55(7) PACE were enacted in 1984, the intention of Parliament was that the word "sex" in the provision should refer to the binary, immutable biological categories of "boy/man" and "girl/woman". It is incontrovertible that that was the natural and ordinary meaning[31] of the word as understood at the time and, indeed, today. Clearly, in 1984 "sex" did not refer to two categories of

[29] *R (Electoral Commission) v City of Westminster Magistrates Court* [2010] UKSC 40 [2011] 1 AC 496 per Lord Phillips at §15 and per Lord Mance at §103; *Bloomsbury International Ltd v Department for Environment, Food and Rural Affairs* [2011] UKSC 25 [2011] 1 WLR 1546 per Lord Mance at §10.
[30] *Chief Constable of West Yorkshire Police v A* [2005] 1 AC 51 HL per Lord Rodger of Earlsferry at §19.
[31] *Cusack v Harrow LBC* [2013] UKSC 40 [2013] 1 WLR 2022 at §60 (It is the "golden rule" of statutory construction that words should be given their natural and ordinary meaning).

persons consisting of "girls/women and men with GRCs" on the one hand and "boys/men and women with GRCs" on the other. In the first place, no system of gender recognition existed at that time. Second, such a reading would offend against the principles that Parliament does not intend to create statutes which are:

71.1 objectionable, absurd, unworkable or impractical[32];

71.2 unjust, unfair or unreasonable[33]; or

71.3 incompatible with Convention rights[34] (as to which, see §§36—54 above).

72. Moreover, at the time of the enactment of PACE the established common law meaning of "sex" as immutable biological sex had been confirmed in an established line of authority: *Corbett v Corbett* [1971] P 83 HC and *R v Tan* [1983] QB 1053 CA. See, in *Corbett* at 104D—E per Ormrod J:

"the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means. The respondent's operation, therefore, cannot affect her true sex" (at 104D—E).

73. Parliament must be taken to have legislated in the knowledge of and having regard to those judicial decisions[35].

74. The legislative and common law developments which took place subsequent to the enactment of PACE did not result in a change to the position established in *Corbett* insofar as it applies to searching, save for, in an indirect manner, during a period between 2005 and 2010:

74.1 The CJEU decision in *P v S* (Case C-13/94) [1996] ICR 795 to the effect that discrimination against transsexuals fell within the scope of the Equal Treatment Directive 76/207/EEC, and the consequent adoption of the Sex Discrimination (Gender Reassignment) Regulations ("the 1999 Regulations"), did not establish any right for such persons to be defined in law as the opposite sex; they merely required that they not be treated less favourably than others because of their protected characteristic of gender reassignment.

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[32] *R (Edison First Power Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] UKHL 20 [2003] 4 All ER 209 at §116; *McMonagle v Westminster City Council* [1990] 2 AC 716 at 726.
[33] *R (Hampstead Heath Winter Swimming Club) v Corporation of London* [2005] EWHC 713 (Admin) [2005] 1 WLR 2930 per Stanley Burnton J at §33.
[34] *R (Wilkinson) v Commissioners of Inland Revenue* [2005] UKHL 30 [2005] 1 WLR 1718 at §18.
[35] *R (Robinson) v SSHD* [2019] UKSC 11 [2019] 2 WLR 897 per Lord Lloyd-Jones at §62.

74.2 Reg 4 of the 1999 Regulations, which inserted a new s.7B(2)(a) into the Sex Discrimination Act 1975 ("**SDA**"), ensured that employers would not face liability in discrimination law for refusing to employ a trans identified person where the job "*involves the holder of the job being liable to be called upon to perform intimate physical searches pursuant to statutory powers*". In this way Parliament sought to ensure that s.54(9) PACE – and similar legislation – could continue to operate on the basis of biological sex without the risk of discrimination complaints brought under the new gender reassignment provisions in the SDA.

74.3 The decision of the ECHR in *Goodwin v United Kingdom* (2002) 35 EHRR 447, which led to the adoption of the GRA, did not touch upon the rights of trans identified persons to be identified as the opposite sex for the purposes of strip-searching others. That case related to the rights of a surgically transitioned male to change his name and sex marker on government issued official documents and to marry.

74.4 In *Bellinger v Bellinger* [2003] 2 AC 467 the HL reaffirmed the principle in *Corbett*, Lord Nicholls saying that to do otherwise "*would represent a major change in the law, having far reaching ramifications*" (at §37).

74.5 In *Chief Constable of West Yorkshire v A*, the HL concluded that a surgically transitioned man who was "*visually and for all practical purposes indistinguishable from*" a woman suffered sex discrimination when his application for appointment as an officer was rejected in 1998 (before the passing of the 1999 Regulations) on the basis that he was a man and so could not search women pursuant to s.54(9) PACE. Their Lordships decided the case in part on the basis that no woman would "*reasonably object*" to such a search. It is Sex Matters' position that that sentiment is a product of its time. (The judgment at first instance contended that (male) "community leaders" might object if a Muslim woman were searched by a biological male but did not consider whether the woman herself might do so.) It does not reflect the reality that sex is an immutable characteristic which cannot be changed, or the iniquity of a police force deceiving a woman into thinking she is being strip searched by another woman when the officer is in reality a man, thus vitiating her consent. It does not reflect the introduction of "informed consent" into many areas of law, or the expansion of sex by deception as a form of sexual assault amounting to a criminal offence[36]. The proposition that a crime does not arise or a person cannot be harmed by what they are unaware of is legally and ethically unsound. Moreover, *A* is confined to its facts: it relates only to

[36] See *Montgomery v Lanarkshire* [2015] UKSC 11 [2015] 1 AC 1430; *R v McNally* [2013] 2 Cr.App.R.

the "*post-operative transsexual who is visually and for all practical purposes indistinguishable*" from a person of their acquired sex (per Lord Bingham at §11). In any event it is of only academic interest because it was superseded by the enactment of the GRA later in 2005.

74.6 Schedule 6 §3 GRA inserted a new s.7B(3) into the SDA which had the effect that a trans identified person with a GRC could no longer be rejected for a post on the basis that it involved physical searches pursuant to a statutory power (such as s.54(9) PACE). However, when the entire body of domestic discrimination law was consolidated and rationalised in the EqA, s.7B(3) SDA was not carried over. That must be taken to have been a deliberate decision on the part of Parliament, and the EqA should not be read as though s.7B(3) SDA had been carried over[37].

The effect of s.9(1) GRA

75. By s.9(1) GRA, a person to whom a GRC has been issued becomes "for all purposes" the sex stated on the certificate. Since sex cannot, as a matter of fact, be changed, s.9(1) is a deeming provision. Accordingly it should be given no wider effect than is necessary having regard to the purposes of the legislation[38], and it should not be applied so as to produce unjust, absurd or anomalous results[39].

76. Section 9(1) GRA cannot sensibly or lawfully be applied to s..54(9) and 55(7) PACE, since:

76.1 To do so would be wholly incompatible with the purpose of s.54(9) PACE, which is to protect the dignity and privacy of vulnerable detainees by ensuring that they are searched only by members of their own biological sex (see §68—70 above).

76.2 It would be unjust, because it would (for example) force or put intolerable pressure upon vulnerable women to submit to violating, humiliating treatment by male officers which amounts to a sexual offence and a breach of the women's human rights, including their Art 3 ECHR rights (as to which the interpretive obligation is stronger than that which applies to s.9(1) GRA).

76.3 It would be absurd and anomalous because it would extend the effect of s.9(1) GRA into the realm of interpersonal interaction, contrary to its proper extent, so as to effectively force vulnerable women to treat a man as though he is a woman. "For all

[37] *Okedina v Chikale* [2019] EWCA Civ 1393 at §45.
[38] *Western Heritable Investment Co Ltd v Husband* (1983) SC (HL) 60, at 71-2, 74, 77.
[39] *Fowler v Revenue and Customs Commissioners* [2020] 1 WLR 2227 SC at §27 per Lord Briggs; *Moulsdale v HMRC* [2023] 1 WLR 1264 SC §3 per Lady Rose.

purposes" in s.9(1) GRA means only "for all legal purposes"[40] and does not compel an individual to treat a person with a GRC as if they were of the opposite sex, nor to think of that person as the opposite sex, nor to engage in or submit to physical interactions with that person to which they object because of the person's sex.

76.4 It would be absurd and anomalous because it would destroy the binary biological sex classification upon which s.54(9) PACE is premised and without which it is empty of effective meaning.

Absurd or perverse consequences of a literal reading of s.9(1) GRA

77. Even if s.9(1) GRA is not a deeming provision, for the reasons stated at §75 above it leads to absurd and perverse consequences. Hence, it may and should be given a strained interpretation if that is necessary to avoid a clear inconsistency with the intentions of Parliament[41] in enacting PACE (which are reflected in and fortified by the decision taken by Parliament in 2010 to not carry over s.7B(3) SDA into the EqA: see §§74.6—74.6 above).

Section 9(3) GRA displaces s.9(1) GRA

78. Even if, contrary to the submissions made above, s.9(1) GRA *prima facie* applies to ss.54(9 and 55(7)) PACE, it must yield to the broad exemption provided by s.9(3) GRA. By that provision the effect of s.9(1) GRA may be excluded by any other enactment. Such exclusion need not be identified by express words. It is submitted that s.54(9) PACE is a "provision made" within s.9(3) GRA. It is "*legislation where it is clear that "sex" means biological sex*"[42] because the context dictates it, and because any other construction would frustrate the purpose of s.54(9) PACE.

Incompatibility of the Search Policy with s.54(9) PACE

79. For the reasons given above the Search Policy is incompatible with the clear meaning of s.54(9) PACE.

[40] *Forstater v CGD Europe* [2022] ICR 1 at §97.
[41] *Shahid v Scottish Ministers* [2015] UKSC 58, 2016 SC (UKSC) 1 per Lord Reed at §§20–21.
[42] *For Women Scotland v The Scottish Ministers (No 2)* [2022] CSOH 90 per Lady Haldane at §53 (referring to the strongly analogous Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021, "*references to the sex of the forensic medical examiner can only mean, read fairly, that a victim should have access to an examiner on the same biological sex as themselves … There are no doubt many such examples*").

Ground 3: there has been a breach of the Public Sector Equality Duty in s.149 EqA and/or failure of sufficient inquiry and/or failure to take into account relevant considerations

Breach of the PSED

80. The Defendant has failed to comply with the PSED. In light of the serious Articles 3, 8 and 14 ECHR violation issues raised (§§36—54 above), there is a heavy burden imposed on the Defendant to consider the full scope and import of the matter pursuant to the PSED: where the duty engages a protected characteristic (here, the effect upon women), it must be must be exercised "*in substance, with rigour, and with an open mind*"[43].

81. The Defendant has not given due regard to the protected characteristic of sex in the EIA. No due regard is given to the impact of the Policy on eliminating discrimination, harassment and victimisation of women and how to mitigate this impact. Women however will be significantly more impacted by this policy than biological males whether they hold gender critical or sex realist beliefs or not. The fear, humility, indignity and harassment will be experienced on a far greater scale by women who are strip searched by a male with a GRC, or women having to carry out a strip search on a male with a GRC, compared to men in the opposite positions[44] .

82. If these impacts have not been considered and acknowledged, then consideration to how they can be mitigated (if all) cannot take place.

83. The EIA does not state what the effects are on women (and people with religious and gender critical / sex realist beliefs) of being strip searched by or strip searching a male (with or without a GRC).

84. The EIA's contention that persons with gender critical or sex realist beliefs may object to the Search Policy applying to them is also absent from the Search Policy itself, and there is no mechanism for objection identified. An EIA cannot read into the Policy a provision which its authors think should have been included but is not included. This is further indicative of the failure to demonstrate due regard.

85. The EIA has therefore failed to demonstrate due regard to the impact (and mitigation) on women, and those who hold religious and gender critical / sex realist beliefs, of the Search Policy as it applies to trans detainees or officers with a GRC; under the Search Policy, the person of the opposite sex will not be told that the trans person has a GRC or be given the opportunity to object.

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[43] *Hotak v LB Southwark & Associated Appeals* [2016] AC 811 SC.
[44] See *Hotak v LB Southwark & Associated Appeals* [2016] AC 811 HL.

86. The Defendant appears to have proceeded on the basis that "sex" for the purposes of the PSED encompasses a category of females without GRCs and males with GRCs and another category of males without GRCs and females with GRCs. This is, in effect, inconsistent with the actual or potential likely impact of the Search Policy which practically obviates any distinction said to arise between trans identified persons who hold a GRC and those who do not.

87. The Defendant contends that this categorisation is meaningful and relevant by reference to *For Women Scotland v The Scottish Ministers* 2024 SC 117[45], currently pending judgment by the Supreme Court following an appeal heard in November 2024. Sex Matters contends that this definition of "legal sex" is unsustainable for the purposes of the PSED.

88. Should this Court be concerned, it may be appropriate to stay this part of this ground so far as it relates to sex as a protected characteristic pending the judgment by the Supreme Court. However, Sex Matters contends that this may not be necessary: plainly, in having paid no regard to the interests of biological females *qua* women and pursuant to the impact upon them in terms of the protected characteristic of sex, there has been a breach of the PSED even if the position of a minority of biological males whom the Defendant contends is a subset of the legal group have been so considered.

Failure to make sufficient inquiry

89. The Defendant has not made sufficient inquiry into, or taken account of relevant considerations as to:

    89.1 The absence of clarity or certainty as to the practical operation of the Search Policy. It is unclear how the Search Policy can operate, given that it states that the existence of a trans person's GRC cannot be disclosed; at what stage objections to a search can be raised; whether and if so when detainees will be advised that they can raise an objection; and if detainees are advised that they can raise an objection, does this compromise s22 GRA.

    89.2 The effect that a power imbalance may have on female detainees or female staff objecting to taking part in a strip search with a male (with or without a GRC).

    89.3 The effectiveness of the Search Policy, given the unclear language of the document and the need for officers to act swiftly when strip searches are required.

[45] See below [2023] CSIH 37.

89.4 The risk of violations of Arts 3, 8, and 14 ECHR, and of breach of the EqA, of the Sexual Offences Act 2003 and of tortious claims in trespass to the person;

89.5 The potential for misuse of the Policy by those who may derive sexual pleasure from presenting as female (autogynephilia) and/or requiring a female to be searched by them or to search them. The Defendant has denied the possible existence of such a cohort (and has therefore not considered this possibility at all), although it was recognised by ACPO in their 2005 Guidance[46] [**PB/395**] and is also referred to in Ministry of Justice HMPSS Operation Guidance[47] [**PB/437**].

90. The Defendant has breached the *Tameside* duty of sufficient inquiry to take reasonable steps to acquaint herself with the relevant information. No consideration has been given to the possibility of an action that is unlawful by reference to the criminal law, to a tortious trespass against the person, or to the risks arising in terms of breaches of the EqA or the ECHR.

ORDERS SOUGHT

91. The Claimant seeks:

(1) Suitably worded declarations that (i) the policy is systemically flawed and inherently incompatible with (a) the Human Rights Act 1998 / European Convention on Human Rights and/or (b) the Equality Act 2010 and (ii) the Defendant has failed to comply with the PSED; (iii) the policy amounts to an error of law, is ultra vires and/or irrational; (iv) further or different declarations as the Court sees fit;

(2) An Order quashing the Search Policy;

(3) Further or other relief as the Court thinks fit; and

(4) Costs.

17 DECEMBER 2024

AKUA REINDORF KC

BETH GROSSMAN

SASHA ROZANSKY

[46] See page 2 *"Dispelling the myths"* where fetish and sexual pleasure were raised in relation to transvestism.
[47] see §§95-108 of Maya Forstater's witness statement [**PB/79-81**].