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6 December 2024

Dear Sirs

R (Sex Matters) v Chief Constable of British Transport Police

1. **To:** Sex Matters
2. **From:** Chief Constable of British Transport Police
3. **Reference Details:** [REDACTED]
4. **The details of the matter being challenged**
 - 4.1. It is understood that the Claimant challenges the guidance documents produced by the British Transport Police ('BTP') entitled *Transgender and Non-Binary Search Position*, dated 12 September 2024; hereafter referred to as "the Guidance".
5. Save where specifically stated otherwise, references hereafter to paragraphs are references to the paragraph numbers within the Letter of Claim.
6. **Summary of Factual Background**
 - 6.1. Paragraph 5.1.1 is agreed.
 - 6.2. Insofar as paragraphs 5.1.2 – 5.1.12 accurately reflect the content of the documents and meetings referred to, they are agreed.
 - 6.3. Insofar as paragraph 5.1.13 accurately quotes the Guidance it is agreed. It is noted that the Letter of Claim does not include the totality of the Guidance and the Defendant defers to the original document. Any emphasis added by the Claimant is not admitted.

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- 6.4. Save that the Guidance relates only to searches involving the removal of more than an individual's jacket, outer coat, gloves, headwear and footwear, and to searches that expose buttocks, genitalia and (female) breasts (as per paragraphs 3.4 and 5.1 of the Guidance) it is admitted that paragraph 5.1.14 broadly summarises the Guidance.
- 6.5. Insofar as paragraph 5.1.15 reflects the content of the Equality Impact Assessment (EIA) dated 30 September 2024, it is admitted. As regards subparagraph iv) insofar as any criticism is inferred, the statement that "where there is a GRC, the GRC holder is treated as having their sex modified" is an accurate reflection of the law.
- 6.6. Paragraphs 5.1.16 to paragraph 5.1.17 are admitted insofar as they accurately quote from and/or summarise the content of the documents referred to.
- 6.7. No admissions are made as to paragraph 5.1.18 which is a matter of conjecture. The Claimant is put to strict proof of the assertions made therein.

7. Law and policy

- 7.1. Paragraphs 5.2.1 – 5.2.23 are admitted insofar as they accurately quote from the cited authorities. No admissions are made as to any emphasis (implicit or implied) included in the letter of claim. As regards paragraph 5.2.9 and the references to Annex L, the Claimant is referred to paragraph 4.5 of the Guidance which states "It is BTP policy that the guidance contained within Annex L Police and Criminal Evidence Act and Annex B Code of Practice in the Exercise by Constables of Powers of Stop and Search of the Person in Scotland is not to be used for Strip and Intimate Searches. BTP officers will use the guidance in section 6 [of the Guidance, to] assist with deciding how to conduct these searches".
- 7.2. It is noted that, prior to the implementation of the GRA, the courts consistently found that an individual's sex was to be determined by reference to the biological gender of the individual when they were born. That position was maintained notwithstanding the decision of the European Court of Human Rights in *Goodwin v UK (2002) 35 EHRR* in which a failure to give legal recognition to gender reassignment, even for post-operative transsexuals, was found to violate Articles 8 and 12 ECHR. In *Bellinger v Bellinger [2003] 2 AC 467* the House of Lords declined to give effect to the decision in *Goodwin* and declared the marriage of a transgender female with a male to be void. The House of Lords, however, made a declaration that s.11(c) of the Matrimonial Causes Act 1973 was incompatible with Articles 8 and 12 ECHR.
- 7.3. In *The Chief Constable of West Yorkshire Police v A [2004] UKHL 21*, the House of Lords was asked to determine the legality of A being rejected for appointment to the police because, as a transexual, she would be unable to carry out all the duties of a police

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constable as she could not satisfy the requirement of section 54(9) PACE that personal searches of detained persons be carried out by a constable “of the same sex as the person searched”. A alleged that the rejection was discriminatory on the grounds of sex. The House of Lords agreed. Within the judgment, at [42] the House of Lords considered the impact of the Gender Recognition Bill that was at the time passing through parliament, observing it was:

“a comprehensive scheme for recognising the reassigned gender of a trans person in defined circumstances. They are wider than the post-operative conditions with which the domestic and European case law had been concerned. Once recognised, the reassigned gender is valid for all legal purposes unless specific exception is made.”

7.4. At [60], it was specifically recognised that A was a “stop-gap” decision, observing:

*“Until the matter is resolved by legislation, there will of course be questions of demarcation and definition. [...] The Gender Recognition Bill provides a definition and a mechanism for resolving these demarcation questions. But **until then** it would be for the employment tribunals to make that judgment in a borderline case.”*

- 7.5. The Gender Recognition Act 2004 (“GRA”) subsequently came into force on 1 July 2004. The GRA provides that, as a matter of law, a trans person who holds a Gender Recognition Certificate (“GRC”) is to be legally recognised as being of the sex specified on the GRC (the “acquired sex”). The legislation makes clear that legal recognition of the acquired sex is dependent upon the issue of a GRC and is not dependent upon the physical attributes of the individual, subject to specified exceptions (none of which apply to the circumstances envisaged in this claim).
- 7.6. The power to undertake strip searches is found in ss54, 54A, 54B and 55(5) and (7) Police and Criminal Evidence Act 1984 (“PACE”). These provisions provide that a search must be conducted by an officer of the “same sex” as the person being searched. PACE provides no discretion in respect of this requirement. Any search undertaken otherwise than in accordance with these provisions would be unlawful and expose BTP and the searching officer to a civil claim and/or criminal prosecution.
- 7.7. The Claimant’s reliance on *For Women Scotland Ltd v Scottish Ministers* [2023] SC1H 37 is noted. That case is the subject of appeal to the Supreme Court, with judgment presently awaited.

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- 7.8. The Defendant would observe that the passages cited at paragraph 5.2.18 is a quotation of the first instance decision and not the decision of the Inner House. The key findings of the Inner House appear to have been disregarded.
- 7.9. At [33], it was observed it “is axiomatic that Parliament does not legislate in a vacuum and must be taken to be aware of legislation already on the statute book. When the EA [Equality Act 2010 (“EA 2010”)] was passed in 2010 it must be assumed that Parliament was fully cognisant of the purpose, terms and effect of the GRA.” The same may accordingly be said of Parliament being fully cognisant of PACE at the time the GRA was adopted. The court went on to observe, at [40] that “Section 9(1) [GRA] is stated as a broad and generally applicable principle. This is confirmed by section 9(2) which specifies that 9(1) operates “for the interpretation of enactments passed and instruments ... made, before the certificate is issued (as well as those passed or made afterwards)” and at [41] that “In our view it is clear that the intention was that on receipt of a GRC a person’s sex was to be that of their acquired gender, man or woman.”
- 7.10. The court further found at [42] that “Section 9(3) requires to be understood as allowing for the possibility that further exceptions might arise **in subsequent enactments**. Section 9(1), read with sections 9(2) and (3), essentially means that the person with the GRC acquires the opposite gender **for all purposes** unless there is a **specific exception in the GRA**; or unless the terms and context of a **subsequent enactment** require a different interpretation to follow. Should that occur, however, **it is to be expected that the inapplicability of section 9(1) would be clearly stated**, or at the very least, (and this is essentially what the claimers say in respect of section 212 of the EA) that the terms of the subsequent legislation are such that they are incompatible with, and would be rendered meaningless or unworkable by, the application of the general principle stated in section 9(1).
- 7.11. It is to be noted that *Scottish Ministers* concerns the interpretation of statute that post dates the GRA (i.e. the interpretation of gender in the EA 2010) and not the retrospective impact of the GRA.
- 7.12. It is noted that the Equality and Human Rights Commissioner (‘EHRC’) intervened in the Supreme Court appeal. Commenting on the same, Baroness Falkner, Chairwoman of the EHRC observed that “The central issue raised by this appeal is how ‘sex’, ‘man’ and ‘woman’ are defined in the EA 2010. On that point, our position is that when Parliament passed the EA 2010, it intended those who have acquired a Gender Recognition Certificate (GRC) to be treated as their certified sex. So a trans woman with a GRC is legally recognised as a woman under the EA 2010, and a trans man with a GRC is legally recognised as a man”.

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8. Grounds

Ground 1: Violation of Articles 3 and 8 ECHR and Article 10

- 8.1. As to paragraph 5.2.24, it is admitted that a strip search of a female by a male officer is capable of amounting to a breach of her rights under Article 3 ECHR. It is noted that a strip search by a male officer of an individual born a biological male who has acquired a GRC providing that they are legally female (including by provision of medical evidence of gender dysphoria) is also capable of amounting to a breach of her rights under Article 3 ECHR.
- 8.2. Parliament has made clear through primary legislation its intention that an individual who obtains a government issued GRC is to be treated in law as being legally of the sex specified on that GRC. This is consistent with the findings of the European Court of Human Rights in *Goodwin* that a failure to properly recognise in law the transition of an individual from one sex to the other amounted to a breach of that individual's Article 8 and 12 rights.
- 8.3. The process of obtaining a GRC is complex. Per s2 GRA, an applicant must demonstrate they have or have had gender dysphoria; that they have lived in the "acquired gender" for two years immediately before applying; that they intend to live in that gender until death; and they have provided medical evidence of gender dysphoria and a statutory declaration in relation to their marriage status. It is averred that, through these stringent requirements, parliament has ensured particular safeguards to prevent abuse of application process.
- 8.4. As observed in the Scottish Ministers case referred to above, Parliament must be taken to have been aware of the legislation that was in force prior to the implementation of the GRA, including PACE. Absent a specific definition of sex in PACE, the definition is as stated in the GRA. Consistent with this, paragraph 6.3 of the Guidance confirms "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 EUP (Strip) searches under statutory powers". It follows that a male who is issued with a GRC stating that they are a female is to be considered a female. Any female searched by that officer is, for the purposes of PACE and UK legislation, being searched by a female officer.
- 8.5. Paragraph 5.2.24 is accordingly denied insofar as it seeks to aver that the existence of a government issued GRC makes no material difference.
- 8.6. Paragraph 5.2.25 is denied. In the situation suggested, the female is being searched by a female. BTP is required by PACE to prevent a person being searched by the opposite legal

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gender. There is no exception under the GRA, PACE or any other primary legislation that requires a person issued with a GRC to be considered, for the purposes of a strip search, to be of a different gender to that specified on that GRC.

- 8.7. Paragraph 5.2.26 is denied for want of relevance. No assessment of the Article 8 rights of the trans detainee or officer is required in circumstances where in law they are to be regarded as being of their acquired gender.
- 8.8. Paragraphs 5.2.27–5.2.28 are denied. Such a disclosure is prohibited by virtue of section 22 GRA and would give rise to a civil liability under the Data Protection Act 2018. The obligation under PACE is to ensure that any strip search is undertaken by an individual of the same legal gender as the person searched. There is no requirement in law to provide information regarding the biological sex of an individual.
- 8.9. In recognition of the sensitivities around this, the Guidance provides for opportunity to consent to a search outside of the requirements of the legal power usually relied upon for the purposes of that search, provided that the person is capable of giving consent or, in the case of a vulnerable individual, with the consent of an appropriate adult. This is echoed in the EIA, which provides that “Members of the public who object to being searched by a trans officer due to any faith or protected belief will have this request accommodated. Similarly, any officer who does not wish to search a member of the trans community is entitled to raise this on grounds of their beliefs or concerns due to their sex. However, all employees must abide by the Code of Ethics and Standards of Professional Behaviour’ Authority, Respect & Courtesy and Equality & Diversity”.
- 8.10. It is accordingly averred the Guidance is entirely consistent with the legislative position; with appropriate opportunities for individuals to request any search they partake in is done outside of the legislative framework. In determining whether there has been a breach of the Articles 3, 8 or 10 ECHR the sex of the individual possessing a GRC will be determined by reference to their acquired sex. No violation of those rights has occurred in law by virtue of that individual’s sex or gender.
- 8.11. Ultimately, this case gives rise to significant conflict between the rights of transgender people; and the rights of women to be protected from violence by men. The Human Rights Act and the ECHR do not assist in resolving that issue. It is averred that the Guidance properly reflects legislation as it is written, with safeguards to allow opportunity for departure from the strict legislative position. How properly to resolve the competing rights of all affected by the possibility of statutory searches is a matter for Parliament to determine. This is not a matter properly amenable to judicial review and resolution by the courts.

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Ground 2: Error in law / ultra vires / frustrating the legislative purpose

- 8.12. Paragraphs 5.2.30 to 5.2.35 are denied.
- 8.13. PACE is clear that any strip or intimate search must be undertaken by a person of (legally) the same sex.
- 8.14. At the time of drafting the GRA, it is clear the intention of Parliament was to provide straightforward clarity as to a person's sex. They are the later of either the sex identified on their birth certificate, or the sex identified on their GRC. That intention can clearly be seen in the fact that the legislation provided for a wider definition than that provided for in the European jurisprudence. The GRA accordingly had retrospective effect as to the definition of gender and/or sex in PACE.
- 8.15. The intentions of Parliament in this regard were further made clear by the amendments made to PACE after the coming into effect of the GRA, including amends made to the specific sections subject of this claim. Despite the scrutiny given to those sections, Parliament has not at any point sought to legislate for any departure to the legal position provided for the interpretation of sex and/or gender in the GRA.
- 8.16. It is accordingly denied that this is a situation which the context clearly and necessarily dictates the need to read the word 'biological' into s54(9) PACE. Parliament has determined it should not be. The Claimant's proposed wording frustrates the legislative purpose of the GRA. Regardless, BTP has introduced a safeguard within the Guidance that allows for the possibility of a consensual non-legislative search by an individual of the opposite sex wherever it is operationally practicable to do so. It is averred that this provides appropriate safeguards to prevent interference with any individual's ECHR rights.
- 8.17. It is further denied that the Guidance frustrates the purpose of s22 GRA. Appropriate safeguards are provided for in s22(4), in particular subsections (b) and (f).

Ground 3: Indirect discrimination and harassment

- 8.18. Paragraphs 5.2.36 to 5.2.37 are denied.
- 8.19. The statements at paragraph 5.2.36 i) to iv), whilst not disputed, are misguided. The Claimant's reliance thereon infers an individual in possession of a GRC retains, for the purposes of the EA 2010, their birth sex rather than their acquired sex. Such an interpretation is inconsistent with the intention of Parliament, as was found in the *Scottish Ministers* case. For the purposes of determining whether an individual has been indirectly

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discriminated against or harassed, the courts are required to interpret sex consistently with the GRA in the absence of any specific exception.

- 8.20. The Claimant's observations at paragraph 5.2.37, in particular the suggestion that the Guidance exposes women to a particular risk of behaviour that has its origin in sexual arousal, coercion or sexual fetish, are rejected.
- 8.21. As has been outlined previously, parliament has imposed stringent safeguards in respect of the ability of an individual to obtain a GRC. It is not enough simply that a man identifies themselves as a female to obtain one. In addition, various further safeguards are in place which appear to have been disregarded by the claimant. These include:
- a) Vetting of police officers and supervision to ensure proper scrutiny of compliance with the standards of behaviour by their superiors.
 - b) The requirement for senior officer approval of strip searches
 - c) Requirements in terms of the number of persons to be present during a strip search.
- 8.22. Where a woman objects to being searched by a Transgender officer, or a female officer objects to searching a transgender woman, the Guidance and the EIA both provide that the woman will be given the opportunity to request that the search is done by another officer and that request will be accommodated where operationally practicable. In the alternative, a consensual search involving persons of the opposite sex may be undertaken. This is intended to reflect the societal unease around this issue though ultimately, the fallback position must be as stated in law.
- 8.23. As was found in *Scottish Ministers*, an individual who has obtained a GRC will be treated for the purposes of the EA 2010 as being of their acquired sex. Section 7 EA 2010 provides that gender reassignment is a separate protected characteristic. At s7(1), a person with this protected characteristic is defined as one who "is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purposes **of reassigning the person's sex** by changing physiological **or other attributes of sex**". A person obtaining a GRC falls within this definition.
- 8.24. To treat an individual in possession of a GRC other than in accordance with their acquired sexuality and without their explicit consent would result in their being discriminated against both directly and indirectly. In terms of detainees, they will be compelled to be searched by an individual of the opposite sex to which they identify, potentially in breach of their Article 3 rights. The same is true of an officer, who may find themselves unable to comply with the occupational requirements of their role if they are unable to undertake strip searches.

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8.25. The Guidance is specifically targeted at transgender individuals preventing them from being directly or indirectly discriminated against in the context of a search. Given the legislative definition of gender, it is denied that the Guidance is capable of being considered to indirectly discriminate against or promote the harassment of women in the manner alleged.

Ground 4: Breach of the PSED and/or failure of sufficient inquiry and/or failure to take into account relevant considerations

8.26. Paragraphs 5.2.38 is denied.

8.27. In undertaking any EIA, one must define sex in accordance with the relevant legislation. As above, that position requires a person's sex to be defined as their birth sex or, in the case of an individual in possession of a GRC, their acquired sex.

8.28. The Guidance and EIA explicitly recognise the societal discomfort regarding this legislative position and provides opportunity for individuals to request either an alternative officer (as is frequently allowed for in other circumstances to assist, for example, in de-escalating situations) or by allowing for a consensual search.

8.29. It is denied that the Guidance is unclear in how the process of a search in case of objection would work in practice. Detailed guidance is provided for at section 6 of the Guidance. It is denied that the Guidance and EIA fail to consider the position in the case of a statutory search. Whilst an individual subject of a proposed search cannot 'opt out' of a statutory search by an officer whose sex has been modified by a GRC, the Guidance and EIA explicitly provide for the opportunity for a detainee or officer to request that an alternative officer undertake the search, or otherwise a 'consensual' search by an officer of the opposite legal gender.

8.30. The Claimant is put to strict proof of the power imbalance referred to at subparagraph iii). As highlighted previously, requests for searches to be undertaken by different officers are regularly made and accommodated.

8.31. The reference to being required to strip search a male (with or without a GRC) is misguided. The EIA applies equally to men and to women. Legally, the sex of a person in possession of a GRC is their acquired sex. References to an individual by their birth sex rather than their legally recognised acquired sex could amount to direct or indirect discrimination against individuals affected on the basis of the protected characteristic of gender reassignment.

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8.32. In the circumstances, the EIA properly reflects the likely (or actual) effective of the Guidance in accordance with the true legislative position. It is accordingly adequate, and paragraph 5.2.39 is denied.

8.33. As to paragraph 5.2.40, the Defendant repeats its response to Ground 1. In determining whether an individual's Article 3, 8 or 10 ECHR rights have been infringed, the courts are required to recognise an individual's acquired sex. No breach of Article 3, 8 or 10 ECHR would occur in law based on (exclusively) an individual being required to search or being searched by an individual of the same (legal) sex.

8.34. Paragraphs 5.2.41 and 5.2.42 are repetitive of issues already raised and responded to above and are denied.

Concluding Remarks on Grounds for Judicial Review

8.35. As has been highlighted previously, the Defendant recognises the significant difficulties in accommodating the conflicting views and rights of those affected by searches involving persons in possession of a GRC. In the absence of national guidance from the NPCC, the Defendant has been required to prepare guidance for her officers setting out the legal position as it has been determined by Parliament.

8.36. The Administrative Court, though judicial review, is not the appropriate forum to seek to re-interpret the legislation as written, whether this be by reading the word 'biological' into PACE as suggested by the Claimant or otherwise. The Defendant accordingly avers it is for Parliament to decide whether the legislative definition of sex in this context should be changed, and permission for judicial review should be refused.

9. Details of the Action the Claimant requests the Defendant Take

9.1. The actions requested at paragraphs 6 and 7 are refused. The Guidance and EIA are entirely accordant with UK legislation and the ECHR as it is written. As stated previously, the Defendant is required to apply the law as it is written. Any changes sought to PACE, the GRA or EA 2010 are matters to be addressed by Parliament and not the Defendant or Administrative Court.

10. Details of the Legal Advisers Dealing with this Claim: Weightmans LLP, 100 Old Hall Street, Liverpool, L3 9QJ, reference 9008076-901855

11. Details of any Interested Parties: The NPCC

12. Pre-Action Disclosure

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12.1. The request for disclosure of “any evidence of compliance with the PSED, save for the EIA referenced herein” is not understood. The purpose of the EIA is to ensure compliance with the Defendant’s PSED. Absent any specificity to what is sought, the Defendant is unable to respond to this request.

12.2. The Guidance was not discussed with the EHRC before or after it was issued.

12.3. In support of its position, the Defendant relies upon and provides by way of pre-action disclosure:

- a) ACPO – The Gender Recognition Act 2004 – Guidance for Police Officers and Staff dated July 2005
- b) Association of Chief Police Officers Guidance by ACC Morgan dated 23 May 2012
- c) Letter of DCC Cooke to all Chief Constables (undated but understood to be from 2019).
- d) Op Blackthorn briefing paper to Chief Officer Group dated 31 January 2024 with Annex A (Equality Impact Assessment)*
- e) Operation Blackthorn – Strategic Board Meeting Minutes dated 5 September 2023 (Annex B)
- f) NPCC Paper: Searching by Transgender Officers and Staff dated 9 December 2021 (Annex C)
- g) Women’s Rights Network Report, “State Sanctioned Sexual Assault” dated 7 January 2024 (Annex F)
- h) Chief Officer Group Meeting Minutes dated 31 January 2024 – BTP Position on Searching by Transgender Officers
- i) Chief Officer Group Agenda for 28 February 2024
- j) Chief Officer Group Actions and Decisions dated 28 February 2024
- k) Chief Officer Group Agenda for 24 April 2024
- l) BTP Transgender and Non-Binary Search Position (the Guidance) dated 12 September 2024
- m) Equality Impact Statement dated 30 September 2024

* Annexes D (a separate policy considered as part of Op Blackthorn that is not subject of this claim) and E (Version 1 of the Guidance) have not been disclosed for want of relevance.

The defendant does not waive privilege in respect of any legal advices received in connection with the Guidance. References to Legal Advice have been redacted and/or removed.

13. Details of any other documents that are Considered Relevant and Necessary

13.1. None other than those identified above.

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14. Alternative Dispute Resolution (ADR)

14.1. The Claimant's position is noted. The Defendant has no proposals in respect of ADR.

15. Address for Reply and Service of Court Documents:

15.1. Weightmans LLP, 100 Old Hall Street, Liverpool, L3 9QJ; Email:

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16. Limitation

16.1. It is the Defendant's position that the date of the final decision to put into force the Guidance was 30 September 2024, this being the date that of the EIA was concluded and thereafter authorisation to circulate the same and bring it into force.

16.2. The Defendant has previously confirmed that it will not raise any limitation defence in the event the claim is issued within three months of 30 September 2024.

17. Injunction and/or expedition

17.1. The Claimant's comments at paragraph 14.3 are noted and rejected. The Guidance is consistent with the current legislation such that injunctive relief and/or expedition is unwarranted. The Defendant further rejects the request that the Guidance be withdrawn on a without prejudice temporary basis. To do so would leave the Defendant in the unsatisfactory position of having no appropriate guidance for officers, indirectly discriminating against transgender and neurodivergent individuals affected by the situations envisaged by the Guidance.

Yours faithfully



Weightmans LLP

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