



Commissioner of Police of the Metropolis

Email only: [REDACTED]

Dear Madam/Sir

Judicial Review - Letter Before Claim

1. **To:** Commissioner of Police of the Metropolis
2. **The Claimant:** Sex Matters
3. **Reference Details:** Stop and Search Policies
4. **Details of the Matter being Challenged:**
 - 4.1. The Defendant's decision¹ to continue to allow
 - (i) trans identifying male officers to carry out strip searches on women, and
 - (ii) trans identifying males to be strip searched by female officers, under ss54 and 55 of the Police and Criminal Evidence Act ("PACE") 1984 ("the Decision") and PACE - Code C, Annex L (or otherwise).
5. **Language and terminology**
 - 5.1. In this letter, the following terms are used:
 - 5.1.1 "sex", "biological sex" or "natal sex", to denote the immutable sex of a person as observed and recorded at birth;

¹ Sex Matters does not know when this decision was made, save that it was between 16 and 22 April, inclusive; see further §6.1.20.

- 5.1.2 “man”, “male”, “woman” and “female” to denote the sex of a person notwithstanding transgender identification or any gender recognition certificate² (“GRC”);
 - 5.1.3 “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);
 - 5.1.4 “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.
- 5.2 Pronouns are used in accordance with biological sex.
- 5.3 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.

6. **The Issue:**

6.1. **Summary of factual background**

Our understanding of the factual background to this proposed claim is as follows:

- 6.1.1. The Metropolitan Police Service (“MPS”) published *LGBT Liaison Officers Manual of Guidance* in April 2020 (“the Manual”). This states:

9.5 Is a trans person restricted in what role they can perform in the MPS?

Absolutely not. Each individual is assessed on merit and suitability and their trans status is irrelevant. The only area where this ever becomes an issue is the searching of prisoners. Trans Police Officers and Police Staff with searching roles may be required to be exempted from more thorough custody searches or intimate searches unless they hold a Gender Recognition Certificate (GRC).

...

² Which modifies a person’s sex by law.

Searching Trans people

...

In the custody suite, where a more thorough search is likely to be required, an officer of the same gender as the prisoner will be required to conduct such a search. Where there is an objective, honestly held doubt about a persons gender on behalf of the decision maker, every effort must be made to establish the persons' own definition of their gender status.

- **Do not** initiate any conversation about whether the prisoner holds a Gender Recognition Certificate (GRC). However if they volunteer the information they have one, be aware that they have all the rights and entitlements of a person of the acquired gender, regarding the sex of the searching officer and so on.

- **Do** ask the prisoner what gender they consider themselves to be and then treat them in that gender. Ensure they sign the custody record stating this preference.

- **Remember** that not all people who are transsexual will have had full corrective surgery - some may still have genitalia of their previous gender.

- **However** - they must still be treated according to the gender they prefer or present as. Some may express a wish to have two officers (male and female) to search appropriate areas of their body.

- **If** a prisoner is unwilling to elect their gender preference then efforts must be made to establish the predominant lifestyle of the prisoner. So for example if they predominantly live as a woman then that is how they must be treated. If efforts to establish the prisoners preferred gender with their cooperation fail then they you must act in good faith on the basis of what gender the prisoner appears to present to you as. Tell the prisoner which gender you believe them to be, and that you will be dealing with them on that basis unless they tell you otherwise. You must evidence the reason for your decision in the custody record with reference to objective observable facts e.g. physical appearance, manner of dress, name used, etc.

- 6.1.2. At a meeting of National Police Chiefs' Council ("NPCC") Chief Constables on 9 December 2021, an agenda item *Searching by Transgender Officers and Staff* was considered, together with the *Recommended Guidance: Searching by Transgender Employees of the Police Service* ("the 2021 Guidance"). The agenda item provided

background to the draft policy, and stated “*Chief Officers are advised to recognise the status of Transgender colleagues from the moment they transition, considered to be, the point at which they present in the gender with which they identify. Thus, once a Transgender colleague has transitioned, they will search persons of the same gender as their own lived gender*”.

6.1.3. The 2021 Guidance stated:

“Employers should treat people in accordance with their lived gender identity, whether or not they have a [gender recognition certificate¹ (“GRC”)] and should not ask Transgender colleagues if they have a GRC or new birth certificate.

Accordingly, with regards to the issue of searching, Chief Officers are advised to recognise the status of Transgender colleagues from the moment they transition, considered to be, the point at which they present in the gender with which they identify.

...

Thus, once a Transgender colleague has transitioned, they will search persons of the same gender as their own lived gender.” [emphasis added]

- 6.1.4. The meeting minutes noted “*Some forces still require people to have a gender recognition certificate, and this is out of date and no longer required*”.
- 6.1.5. The decision on this agenda item was recorded as “*Chiefs approved the recommendation to adopt a consistent searching policy for transgender officers and staff across all forces*”. In effect, the 2021 Guidance provided for male police officers to be treated as female from the moment they self-identified as female, and to be able to carry out strip searches on women and was approved.
- 6.1.6. On 10 January 2024, the Minister for Crime, Policing and Fire publicly criticised the 2021 Guidance at a House of Commons Home Affairs Committee meeting, so far as it allowed men who self-identified as women (and who did not hold a GRC) to carry out strip searches on women.
- 6.1.7. On 11 January 2024, the NPCC withdrew the 2021 Guidance. The same day, Sex Matters² wrote to the Minister explaining why it is also unlawful for men who identify as women and who hold GRCs to carry out strip searches on women.

6.1.8. Later that month, the NPCC LGBTQ+ portfolio lead advised all Chief Constables

“All searches are dealt with on a case-by-case basis after consideration by a custody sergeant based on the response of the detainee.

All searches are carried out in line with the officer or staff members training and legal authority, taking into account our responsibilities under both the Equality Act 2010 and Police and Criminal Evidence Act 1984.

*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.**” [emphasis added]*

6.1.9. On 9 April 2024, the MPS updated its policy on searching by trans officers and staff (“the Policy”).

6.1.10. The Policy provides that:

- (i) Strip searches under ss54(9) and 55(7) PACE by trans identifying male officers with a GRC can be carried out on women.
- (ii) Trans employees are able to use a search exemption workplace adjustment if they wish to do so.

6.1.11. The Policy appears to operate on the basis that a trans identifying male officer with a GRC can only carry out strip searches on women if evidence of the GRC has been provided to the MPS. If evidence of a GRC is not required, the Defendant is asked to confirm this without delay and to disclose the documents on which it relies on to support this position.

6.1.12. The Policy stated that there was no formal policy for transgender and gender diverse officers and staff, and that this position was being reviewed.

6.1.13. The British Transport Police (“BTP”) published a Search Policy on 20 September 2024, similarly allowing (i) trans identifying male officers to carry out strip searches on women and (ii) trans identifying males to be strip searched by female officers. Sex Matters filed a claim for judicial review against the Chief Constable for the BTP (“CCBTP”) on 18 December 2024.

6.1.14. A copy of the witness statement Maya Forstater – Chief Executive of Sex Matters – in the BTP claim is **attached**. Ms Forstater provides

evidence on the reasons for single sex searches, including information provided by serving and former police officers. A copy of a witness statement from Catherine Larkman – Director and National Policing Lead and Wales Co-ordinator of Women’s Rights Network, a retired police officer serving for over 31 years from Constable to Superintendent – filed in that claim is also **attached**. Ms Larkman provides evidence on police searches from the point of view of suspects and officers.

6.1.15. In reply, CCBTP proposed that the claim be stayed pending the Supreme Court’s judgment in *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16 (“FWS”).

6.1.16. On 13 January 2025, Sex Matters made an application for interim relief that, *inter alia*, if the claim was to be stayed, an order be made that pending the determination of the claim the BTP’s Search Policy shall not be applied.

6.1.17. By Order dated 17 February 2025, Mr Justice Lane directed that the claim against CCBTP be stayed until 14 days after judgment is handed down in FWS; a copy of the Order is **attached**. The judge refused Sex Matters’ application for interim relief. Instead, CCBTP was ordered to

immediately notify the court and the claimant in writing if an officer of the defendant informs the defendant (or the defendant otherwise has reason to believe) that an officer who is covered by the defendant’s policy the subject of the judicial review holds a Gender Recognition Certificate so that, under the policy they would be categorised as a different sex from that on their birth certificate for the purpose of determining whom they may search under Part V of the Police and Criminal Evidence Act 1984.

6.1.18. Mr Justice Lane’s reasoning for making this mandatory order included

1. *The balance of convenience currently does not favour the grant of interim relief. There is force in what the defendant says at paragraph 5 of the response dated 20 January 2025; namely, that interim relief would require the defendant to operate without any policy or in a way that the claimant considers is unlawful, on the present understanding of the law.*

2. *The Article 3 aspect is, however, such that there is plainly weight on the claimant’s side of the balance. **What persuades me against interim relief is that, as matters stand, there are no trans officers that would be authorised under the policy to search a biological female: paragraph 3 of the response. Were that to change, at least***

before the outcome in the Supreme Court is known, then the balance might shift; hence paragraphs 2 and 3 of the order.

[emphasis added]

6.1.19. The Supreme Court handed down judgment in FWS on 16 April 2025. The Court held that for the purposes of the Equality Act 2010, “woman” means a biological woman and “sex” means biological sex, regardless of GRC status. The Court further held that “*where the words of legislation, enacted before or after the commencement of the GRA 2004, are on careful consideration interpreted in their context and having regard to their purpose*” found to be inconsistent with the rule in s.9(1) GRA that a GRC changes a person’s sex in law for all purposes, that rule was disapplied by s.9(3) GRA without the need for express words of disapplication or for such disapplication to arise by necessary implication.

6.1.20. On 24 April 2025, in response to a Freedom of Information Act 2000 request, MPS in its Decision stated:

The MPS is aware of the Supreme Court’s Judgment in the For Women Scotland Ltd v. the Scottish Ministers, handed down on 16th April. It is, of course, considering carefully that ruling and its implications for this policy, and will issue a revised policy once that process has been completed.

6.1.21. MPS stated that there was no equality impact assessment regarding the Policy. It was suggested that the Policy is contained within the ‘Questions and Answers’ provided to officers and staff, rather than being a formal transgender search policy. The MPS *Stop and Search Equality Impact Assessment* was stated to reference the potential impact of transgender searches on sex and gender. A copy of the equality impact assessment was extracted and is set out below. MPS did not state the date of the equality impact assessment.

Sex can be either male or female. Assignment is based on hormones, chromosomes and genitalia.

Gender identity: A person’s internal sense of their own gender. This does not have to be man or woman. It could be, for example, non-binary. Sex and gender need to be carefully considered from both the officers’ viewpoint and the viewpoint of the person being searched. In law, the gender (and accordingly the sex) of an individual is their gender 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 gender is their acquired

gender. This means that if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman, and they must be treated as their acquired gender (PACE Code C, Annex L). The Met has a responsibility to treat both searched subjects and searching officers with respect and dignity and defend officers where appropriate.

(i) Those officers who identify as transgender can go through a process of transitioning and be granted a Gender Recognition Certificate (GRC). If an officer holds a GRC she or he can conduct more thorough and MTIP³ searches in the way that others can. (ii) If a person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex, but has not yet been granted a GRC, then they can apply for an workplace adjustment passport which will preclude them from carrying out more thorough and MTIP searches. (iii) Officers who identify as bi-gender or non-binary or gender fluid can only conduct more thorough and MTIP searches on those who have the same gender assigned at birth (same sex). An officer who has lived their life as a person of different gender to the gender assigned at birth, without undergoing a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex, is not currently permitted to search people of their assumed gender. Consultation with the DPS, the Metropolitan Police LGBT+ Network and other appropriate staff associations is advised.

6.1.22. Sex Matters therefore understands that the Policy permits trans identifying male officers with a GRC to carry out strip searches on women. Moreover, that the Defendant made the Decision on 24 April 2025 not to withdraw this Policy and to continue to rely on it after the FWS judgment was handed down.

6.1.23. Under the Manual, the MPS requires female officers to strip search trans identifying men based on a GRC or gender preference. It is unclear if there are any other undisclosed policies relating this. Any policies or decisions on this do not appear to have been made publicly available. We ask that the Defendant confirms the position on such searches. This claim proceeds on the basis that the Defendant's Decision included a determination to maintain the Manual, Annex L (or other similar policy). In the event that it did not, Sex Matters challenges the failure to do the same following the Supreme Court's judgment in FWS.

³ MTIP = More Thorough Intimate Part

6.1.24. On 22 May 2025, the NPCC announced that it had published “draft interim guidance on searches of members of the transgender community, as well as searches carried out by transgender police officers and staff.” The NPCC stated that the draft interim guidance:

[...] makes clear that thorough police searches, such as those which expose intimate body parts, should be carried out by police officers and staff of the same biological sex as the detained person.

There may be very limited exceptions considered where someone requests to be searched by an officer of their gender.

The guidance is explicit that any search not conducted in line with biological sex must have the written consent of the detainee, the officer carrying out the search as well as the authorising officer.

If any part of this summary of the factual background is disputed or is believed by your authority to be inaccurate, please identify in your response each part of the factual background that is disputed, please explain why it is disputed and please provide full details of the basis for this alternative factual account including copies of any reports or relevant contemporaneous records upon which it is based.

6.2. Grounds of challenge

Law

PACE 1984

- 6.2.1. 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 must be carried out under s.55. Searches under either s.54 or s.55 PACE may only be carried out by a person of the same sex: ss.54(9) and 55(7) PACE.
- 6.2.2. 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. Guidance and instructions must comply with the Equality Act 2010.
- 6.2.3. PACE – Code C, Annex L states that a person being strip searched under PACE should be dealt with on the basis of their sex, which can include sex as modified by a GRC. A person must not be asked if they

have a GRC. If there is any doubt as to whether the person being searched should be treated as male or female, they should be searched according to their gender preference.

GRA 2004

- 6.2.4. The Gender Recognition Act 2004 (“GRA”) contains provision by which a person may obtain a GRC reflecting his or her identification as a person of the opposite biological sex. A person who has been issued with a GRC may obtain a change to their birth certificate accordingly. S.2 GRA prescribes the conditions that an applicant must satisfy to qualify for a GRC.
- 6.2.5. The conditions for a GRC 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 female⁴. 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 only⁵.
- 6.2.6. 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.
- 6.2.7. 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 person being searched or the officer.
- 6.2.8. Finally, there is evidence that some men choose either to dress “as women” or to transition because they derive sexual pleasure from doing so⁶. It is noted that the guidance issued by the Association of Chief

⁴ *AB v Gender Recognition Panel* [2024] EWHC 1456 (Fam) per Macfarlane P at §40.

⁵ See §§75—85 of Maya Forstater’s witness statement (requirements of a GRC) and §§86—94 (effects of those requirements).

⁶ See §§75—94 of Maya Forstater’s witness statement.

Police Officers on the inception of the GRA accepts this proposition, as does the prison service.

6.2.9. S.9 GRA states:

(1)Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).

(2)Subsection (1) does not affect things done, or events occurring, before the certificate is issued; but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards).

(3)Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation.

6.2.10. S.30 GRA states:

(1)Where (apart from this subsection) a relevant gender-specific offence could be committed or attempted only if the gender of a person to whom a full gender recognition certificate has been issued were not the acquired gender, the fact that the person's gender has become the acquired gender does not prevent the offence being committed or attempted.

(2)An offence is a "relevant gender-specific offence" if—

(a)either or both of the conditions in subsection (3) are satisfied, and

(b)the commission of the offence involves the accused engaging in sexual activity.

(3)The conditions are—

(a)that the offence may be committed only by a person of a particular gender, and

(b)that the offence may be committed only on, or in relation to, a person of a particular gender,

and the references to a particular gender include a gender identified by reference to the gender of the other person involved.

Equality Act 2010, s149 Public Sector Equality Duty ("PSED")

6.2.11. Section 149 Equality Act 2010 sets out the PSED as follows: -

- (1) *A public authority must, in the exercise of its functions, have due regard to the need to—*
 - (a) *eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*
 - (b) *advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it*
 - (c) *foster good relations between persons who share a relevant protected characteristic and persons who do not share it.*

...
- (3) *Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—*
 - (a) *remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;*
 - (b) *take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;*
 - (c) *encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.[...]*

...
- (5) *Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—*
 - (a) *tackle prejudice, and*
 - (b) *promote understanding.*
- (6) *Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.*

(7) *The relevant protected characteristics are:*

. . . sex . . .

Submissions

Ground 1: The Decision post-FWS to continue to keep in place the Policy and not to withdraw it, and to continue to apply the Manual, Annex L or a similar undisclosed policy, is (A) incompatible with the ECHR and (B) incompatible with the Equality Act 2010

Ground 1(A): incompatible with the ECHR

Article 3 ECHR

6.2.12. 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.⁷ 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 3.⁸

6.2.13. As set out in *R (Limbuella) v Secretary of State for the Home Department* [2006] 1 AC 396 HL, “*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 Decision to maintain and not withdraw the Policy, because its provisions may then be operated at any time. The Defendant should therefore not wait any longer before withdrawing the Policy.

6.2.14. Any search carried out by any officer has the clear potential to be a degrading and humiliating experience for any person being searched. 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

⁷ *Bouyid v Belgium* (2016) 62 EHRR 32 ECHR and *Perkov v Croatia* (Application 33754/16, 2022 ECHR).

⁸ *R (Limbuella) 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

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.

- 6.2.15. As barely needs stating, the majority of people consider their bodies to be inherently private and a majority avoid being unclothed around members of the opposite sex outside a narrow set of circumstances which are categorised by unequivocally voluntary participation.
- 6.2.16. 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 similar⁹. 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 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.
- 6.2.17. 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 person being searched will have no window into the officer’s mind.
- 6.2.18. There is no reason to suppose that a male police officer would not be perceived as male because he is trans identified. A male may also be in possession of a GRC without having undertaken any such modification. The Policy applies to all males, without the Defendant even requiring confirmation as to possession of a GRC.
- 6.2.19. While in *Chief Constable of West Yorkshire Police v A* [2005] 1 AC 51 HL, Lord Bingham hypothesised as to a transgender officer who was visibly indistinguishable from members of the opposite sex, it is unclear

⁹ Voyeurism (Offences) Act 2019

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.

6.2.20. To the extent that the Defendant considers that there is no Article 3 ECHR violation, s.20 GRA shows that, where Parliament addressed its mind to the matter, it chose to exclude the effect of s.9(1) GRA in respect of criminal liability for offences of a sexual nature. By s.20, if a trans identified male with a GRC commits a “gender-specific offence”, he does not escape conviction on the basis that he is a woman. Accordingly, the Claimant contends that Parliament did not intend the fact of a commission of an offence to be defined by the existence of a GRC. The assertion that an Article 3 breach may be defined substantively by the existence of a GRC (a matter which would likely be unknown to the victim of the contended breach) is illogical and unevidenced, and entirely at odds with the reasoning in FWS.

Articles 3 & 14 ECHR & the risk of sexual assault

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

6.2.22. Sex Matters does not suggest that a majority of male police officers or males being searched 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 males being searched 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 than other biological males (again, whether or not they hold a GRC).

6.2.23. 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 and by the Ministry of Justice HMPSS Operation Guidance^{10/11}. It is not possible to establish the motivation for or the origination of the behaviour of any given man who may fall within the Policy’s definition of transgender (or those who may obtain a GRC), but it would be a 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:

- (i) 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;
- (ii) a lack of awareness that a person may withhold consent and withhold without adverse consequences;
- (iii) 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); and
- (iv) the difficulty of obtaining genuine and informed consent of a person being searched in any circumstance.

6.2.24. There is an inherent risk that physical contact between a person being searched 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 person being searched a woman, or *vice versa*.

6.2.25. Moreover, even where physical contact does 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

6.2.26. Further, under Article 3 the Defendant is 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, and as set out above, in relation to

¹⁰ 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.

¹¹ See §§95-108 of Maya Forstater’s witness statement.

taking preventative steps against violations of the Article and ensuring that those steps may be practically effective.

6.2.27. That duty is impeded by the Decision post-FWS due to:

- (i) The Policy being the basis for enabling trans identified men with a GRC to carry out strip searches on women. This on its own is in violation of Article 3 ECHR. There is no justification for this.
- (ii) The absence in the Policy or otherwise of steps to notify an actual or potential victim of the person being searched or officer's sex.
- (iii) The absence in the Policy or otherwise of proper provisions for disclosing and recording the transgender status of an officer who identifies as trans who has a GRC (both to an actual or potential victim and to their colleagues)¹².
- (iv) The risk that the Policy may serve as the pretext for sexual assault and may prevent the Defendant from properly investigating complaints of sexual assault.

Articles 8 & 14 ECHR

6.2.28. The right to privacy under Article 8 extends to strip and intimate searches¹³ and to protection of a person's physical, moral and psychological integrity;¹⁴ 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.¹⁵ Again, the Defendant has positive obligations regarding prevention of breaches of Article 8 and the efficacy of those preventative measures.¹⁶

6.2.29. We repeat the submissions at §§6.2.12—6.2.27 above with regards to any contended balancing exercise between the rights of a transgender officer and a person being searched.

6.2.30. The Manual, Annex L, or a similar undisclosed policy, which permits strip searches on the basis of a GRC or gender preference can no longer stand post-FWS. The Defendant's decision to continue to rely on it is unlawful. See further below at §§ 6.2.48-6.2.54.

¹² Sex Matters also considers the provision in the Policy to the effect that the sex of a trans identified person with a GRC – whether officer or person being searched – should not be correctly recorded in custody records amounts to a breach of Article 5(1)(a) and (d) UK GDPR.

¹³ *Wainwright v UK* (Application 12350/04, 2006 ECHR).

¹⁴ E.g. *Glass v UK* (Application [61827/00](#)) 2004 ECHR).

¹⁵ *Gaskin v UK* (Application 10454/83, 1989 ECHR).

¹⁶ *LW and Ors v Sodexo* [2019] EWHC 367 (Admin).

6.2.31. Accordingly, the Decision to maintain and not withdraw the Policy or disapply the Manual, Annex L (or a similar undisclosed policy):

- (i) will permit, encourage or sanction violations of Arts 3, 8, and 14 ECHR in that it provides a mechanism for treatment that is degrading, violating of privacy, and seeks to withhold from the person being searched information necessary to avoid such violations, or to give consent, and in particular will do so as regards women being searched;
- (ii) as such, will result in such violations unless withdrawn;
- (iii) further, amounts to an anticipatory breach pursuant to Article 3;
- (iv) is likely to diminish further public confidence in policing amongst those who become aware of and/or subject to them; and
- (v) is therefore unlawful and/or irrational.

6.2.32. The Defendant cannot wait any longer to withdraw the Policy or disapply the Manual, Annex L (or a similar undisclosed policy). Whilst of course he can review his position and take time to do so, the Policy must be withdrawn in the meantime and the Manual, Annex L (or a similar undisclosed policy) disappplied.

Ground 1(B): Equality Act 2010 incompatibility & violations

Indirect sex discrimination contrary to s.19 Equality Act 2010

6.2.33. The Policy (and reliance on the Manual, Annex L or a similar undisclosed policy) is a provision, criteria or practice (“PCP”) for the purposes of s.19 Equality Act 2010. It is applied to all MPS officers who conduct searches and to members the public who are subjected to these searches. Within each of those groups, women are placed at a disadvantage by comparison to men¹⁷. The deficiencies of the Decision, and therefore the active continued reliance on the Policy and on the Manual, Annex L (or a similar undisclosed policy), and seemingly the lack of an equality impact assessment (“EIA”) when the Decision was made, are such that the Defendant would face insuperable difficulty in attempting to satisfy the justification test in s.19(2)(d) Equality Act 2010, which requires him to identify a legitimate aim which he seeks to pursue by way of the Policy and to show that it has used proportionate means to do so.

¹⁷ See §§57—58 above, §§62—68 of Maya Forstater’s witness statement and §§20—35 of Catherine Larkman’s witness statement.

6.2.34. As to appropriateness:

- (i) The Decision to maintain and not withdraw the Policy (and to continue to rely on the Manual, Annex L or a similar undisclosed policy) jeopardises the fundamental human rights of others and places them at an enhanced risk of sexual crime and trespass to the person as well as harassment and sexual harassment. As such, it unduly prejudices the rights of others¹⁸ to an extent which grossly outweighs the desirability of attaining the nebulous and undefined aim of “ensuring dignity”.
- (ii) The Decision to maintain and not withdraw the Policy (and to continue to rely on the Manual, Annex L or a similar undisclosed policy) does not genuinely reflect a concern to attain the aim in a consistent and systematic manner.¹⁹ Indeed, it is internally incoherent. For example:
 - (a) The Policy does not make any provision for the eventuality that a trans identified male with a GRC “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.
 - (c) The Policy facilitates the concealment by a trans identified male officer or person being searched of his sex by imposing upon officers an obligation to recognise and refer to him as a woman at all times and not to tell any person of his sex, such that he may proceed to interact with a woman in the context of a compulsive or purportedly consensual search without her coming to know that he is male.
- (iii) Sex Matters considers these possibilities to amount to deception or concealment which vitiates consent, and a particularly grave threat to women’s fundamental rights.

6.2.35. As to reasonable necessity:

- (i) It is irrational to suggest that the Decision was necessary to ensure the dignity of trans identified people with GRCs when it is not necessary to do so for those without.
- (ii) The Decision is not the only options that could be chosen by the Defendant to “ensure dignity”. One alternative, for example, would

¹⁸ *Ingeniørforeningen I Danmark v Region Syddanmark* (C-499/08) [2011] 1 CMLR 35 at §32.

¹⁹ *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalenlippe* (C-341/08) [2010] 2 CMLR 31 at §53.

be to exempt all trans identified officers from searching duties (and not just upon the officer's request).

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

6.2.36. Accordingly, the Decision permits, encourages and sanctions:

- (i) Indirect sex discrimination contrary to s.19 Equality Act 2010 read with s.29(6) Equality Act 2010 by the Defendant against female members of the public.
- (ii) Indirect discrimination contrary to s.19 Equality Act 2010 read with s.42 Equality Act 2010 by the Defendant against female police officers.

Harassment related to sex & sexual harassment contrary to s.26 Equality Act 2010

6.2.37. For the reasons stated above, the Decision is permissive of violations to the dignity of people being searched 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) Equality Act 2010 or to sexual harassment within s.26(2) Equality Act 2010. 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) Equality Act 2010, and thus to satisfy the requirements of both causes of action. Indeed, the Decision appears recklessly to enhance the likelihood of unlawful harassment or sexual harassment being perpetrated upon women, whether those being searched or officers.

6.2.38. Accordingly, the Decision:

- (i) will permit, encourage or sanction breaches of the Equality Act 2010; and
- (ii) is therefore unlawful and/or irrational.

Ground 2: The decision post-FWS to maintain and not withdraw the Policy is: error of law &/or PACE incompatibility

- 6.2.39. The starting point is that the Defendant's Policy provides for trans identifying men with a GRC to carry out strip searches on women. This on its own is in breach of PACE.
- 6.2.40. The Defendant's Decision to maintain and not withdraw the Policy, thereby deciding that trans identifying men (with GRCs) can continue to carry out strip searches on women post-FWS is unlawful.
- 6.2.41. The Decision to maintain and not withdraw the Policy represents an error of law insofar as it purports to read s.9(1) GRA into ss.54(9) and 55(7) PACE. Section 9(1) GRA does not apply to those sections of PACE since it is displaced by s.9(3) GRA, in accordance with the reasoning of the Supreme Court in FWS.

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

- 6.2.42. The purpose of ss.54(9) and 55(7), which is the context within which its words are to be understood²⁰, is "to afford protection to the dignity and privacy of those being searched in a situation where they may well be peculiarly vulnerable".²¹ 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.
- 6.2.43. 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 of the word as understood at the time and, indeed, today. See FWS:

the ordinary meaning of those plain and unambiguous words [sex, man and woman] corresponds with the biological characteristics that make an individual a man or a woman. These are assumed to be self-explanatory and to require no further explanation. Men and women

²⁰ *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.

²¹ *Chief Constable of West Yorkshire Police v A* [2005] 1 AC 51 HL per Lord Rodger of Earlsferry at §19.

are on the face of the definition only differentiated as a grouping by the biology they share with their group. [71]

6.2.44. Clearly, in 1984 “sex” did not refer to two categories of 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:

- (i) objectionable, absurd, unworkable or impractical;²²
- (ii) unjust, unfair or unreasonable;²³ or
- (iii) incompatible with Convention rights²⁴ (see above).

6.2.45. 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” [104D—E].

6.2.46. Parliament must be taken to have legislated in the knowledge of and having regard to those judicial decisions.²⁵

6.2.47. 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:

- (i) 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

²² *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.

²³ *R (Hampstead Heath Winter Swimming Club) v Corporation of London* [2005] EWHC 713 (Admin) [2005] 1 WLR 2930 per Stanley Burnton J at §33.

²⁴ *R (Wilkinson) v Commissioners of Inland Revenue* [2005] UKHL 30 [2005] 1 WLR 1718 at §18.

²⁵ *R (Robinson) v SSHD* [2019] UKSC 11 [2019] 2 WLR 897 per Lord Lloyd-Jones at §62.

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.

- (ii) 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.
- (iii) 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.
- (iv) 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”[37].
- (v) 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.²⁶ 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 the “*post-operative transsexual who is visually and for all practical purposes indistinguishable*” from a person of their acquired sex (*A* at [11]). In any event it is of only academic interest because it was superseded by the enactment of the GRA later in 2005, and has now been superseded by the decision of the Supreme Court in *FWS*.

- (vi) 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 Equality Act 2010, 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 Equality Act 2010 should not be read as though s.7B(3) SDA had been carried over.²⁷

The effect of ss.9(1) & 9(3) GRA

6.2.48. By s.9(1) GRA, a person to whom a GRC has been issued becomes “for all purposes” the sex stated on the certificate, including for the purposes of an enactment made before the passing of the GRA. However, by s.9(3) GRA the effect of s.9(1) GRA is disapplied by provision made in any other enactment.

6.2.49. Thus s.9(1) GRA applies prima facie to ss.54 and 55 PACE such that the word “sex” in those provisions refers to certificated sex rather than biological sex, unless s.9(3) GRA displaces the s.9(1) rule by reason of provision made by PACE. Neither express words nor necessary implication is required in order for PACE to make provision which engages s.9(3) GRA, since the legality principle does not apply (*FWS* [102]). Rather, s.9(3) is engaged if the terms, context and purpose of PACE, carefully considered, show that it is applicable “*because of a*

²⁶ See *Montgomery v Lanarkshire* [2015] UKSC 11 [2015] 1 AC 1430; *R v McNally* [2013] 2 Cr.App.R.

²⁷ *Okedina v Chikale* [2019] EWCA Civ 1393 at §45.

clear incompatibility or because [the] provisions [of PACE] are rendered incoherent or unworkable by the application of the rule in section 9(1) (FWS [156]). This is not a stringent test (FWS [108]).

6.2.50. By analogy to a deeming provision, s.9(1) GRA read with s.9(3) GRA must be construed so as to ensure that it does not produce effects clearly outside the purpose for which it was included in the legislation and must not be applied so as to produce unjust, absurd or anomalous results (FWS [196]).²⁸ Thus in FWS, s.9(1) GRA was disapplied by s.9(3) in relation to the Equality Act 2010, meaning that the words “sex”, “man” and “woman” in that Act refer to biological sex categories and not to certificated sex, since “[a]ny other interpretation would render the EA 2010 incoherent and impracticable to operate” (FWS [265(xviii)]). Illustrative examples referred to in FWS include:

- (i) The Victims and Witnesses (Scotland) Act 2014 (as amended by the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021), the purpose of which was to enable a victim of sexual crime to choose the sex of their medical examiner. The Supreme Court agreed with Lady Haldane in the Outer House, who had concluded that the word “sex” in s.9(2) of the 2014 Act could only properly or fairly be read to mean biological sex. Lady Haldane said that the 2014 Act was “*legislation where it is clear that “sex” means biological sex*”.²⁹ The Supreme Court added that the clear statutory intention of the 2014 Act was:

to respect the right of a female or male victim of a sexual crime to request same sex care should she or he so wish because it has always been, and still is, well recognised that reasonable objection can be taken to an intimate medical examination by a member of the opposite biological sex. References to sex could only be references to biological sex in context. (FWS [159])

- (ii) Within the Equality Act 2010, the provisions relating to separate and single-sex services in Sch 3 §§26 and 27, which allow a service to be restricted for the use of one sex where, *inter alia*, reasonable objection might be taken to the presence of a person of the opposite sex. As to the idea that these provisions might be

²⁸ *Western Heritable Investment Co Ltd v Husband* (1983) SC (HL) 60, at 71-2, 74, 77; *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).

²⁹ *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*”).

construed to refer to certificated sex, the Supreme Court observed:

While many women in a female-only changing room or on a women-only hospital ward or in a rape counselling group might reasonably object to the presence of biological males, it is difficult to see how the reasonableness of such an objection could be founded on possession or lack of a certificate. This is so especially when the distinction does not track physical appearance or presentation, and the woman is unlikely to have any information about the GRC at the point at which her objection might be raised. (FWS [217])

(iii) Also in Sch 3 §26 Equality Act 2010, the permission given to a service provider to offer services only to persons of the same sex because of the likelihood of physical contact. Here *“it would be readily understandable that a female massage therapist offering massages in her clients’ homes might reasonably object to providing this service to a man in that environment, but for the reasons explained above, hard to see how any reasonable objection to providing the service could depend on whether the trans person ... has or does not have a GRC”*. (FWS [218])

6.2.51. In light of FWS, it is clear beyond sensible argument that s.9(1) GRA cannot lawfully be applied to ss.54(9) and 55(7) PACE, since:

- (i) 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 people being searched by ensuring that they are searched only by members of their own biological sex.
- (ii) 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).
- (iii) 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 purposes” in s.9(1) GRA means only “for all legal purposes”³⁰ and does not compel an individual to treat a person with a GRC as if they were

³⁰ *Forstater v CGD Europe* [2022] ICR 1 at §97.

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.

- (iv) It would be absurd and anomalous because it would destroy the binary biological sex classification upon which ss.54(9) and 55(7) PACE are premised and without which they are empty of effective meaning.
- (v) It would render ss.54(9) and 55(7) PACE incoherent and unworkable because there is no outward means of distinguishing between a person with a GRC and a person without a GRC, the possession of a GRC cannot reasonably be ascertained and disclosure of information relating to a person's possession of a GRC is likely, in the context, to amount to a criminal offence.

6.2.52. In summary, the terms, context and purpose of ss.54 and 55 PACE are incompatible with the application of the rule in s.9(1) GRA so as to amount to "provision made" within s.9(3) GRA. Thus s.9(1) GRA must yield to s.9(3)³¹, and the word "sex" in ss.54(9) and 55(7) PACE must be construed as referring to biological sex and not certificated sex.

Incompatibility of the Decision with s.54(9) PACE

6.2.53. For the reasons given above, the Decision to maintain the Policy is incompatible with the clear meaning of s.54(9) PACE.

6.2.54. As for Ground 1, the seriousness of the breach means that the Defendant cannot wait any longer to withdraw the Policy. Whilst of course he can review the position and take time to do so, the Policy must be withdrawn in the meantime.

Ground 3: The Decision: PSED breaches and, failure of sufficient inquiry

PSED

6.2.55. As McCombe LJ explained in *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 §25(3), [2014] Eq LR 60, §26 ("Bracking"): the duty is upon the decision maker personally and non-delegable: "The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be

³¹ Furthermore, that conclusion is reflected in and fortified by the decision taken by Parliament in 2010 to not carry over s.7B(3) SDA into the Equality Act 2010.

taken to know what his or her officials know or what may have been in the mind of officials in proffering their advice.”

- 6.2.56. The Equality and Human Rights Commission has prepared and issued non-statutory Technical Guidance on the basis of its powers to provide information and advice under s.13 of the Equality Act 2006: *Technical Guidance on the Public Sector Equality Duty (England)* (last updated April 2023) (“the Technical Guidance”). It makes clear that “*Due regard will need to be had to all three of these elements in order to comply with the need to advance equality of opportunity.*” [§3.18]

When the duty applies

- 6.2.57. Pursuant to section 149(1) Equality Act 2010, the PSED applies to a public body or decision maker “*in the exercise of its functions*”. It applies both when a public body is drawing up its policies and in relation to individual decisions: per Black J in *R (JL (A Child)) v Islington London Borough Council* [2009] EWHC 458 (Admin), [2009] 2 FLR 515, §114 cited in *Pieretti v Enfield London Borough Council* [2010] EWCA Civ 1104, [2011] P.T.S.R. 565 (§26) and “*There is no scope for depriving the word “functions” of much of its normal meaning. ... The part of it with which we are concerned is designed to secure the brighter illumination of a person’s disability so that, to the extent that it bears upon his rights under other laws, it attracts a full appraisal.*” As the Technical Guidance makes clear: “*Most public authorities specified in Schedule 19 are subject to the general equality duty in relation to the exercise of all of their functions – that is, everything they are required and permitted to do.*” §A.12 of the Technical Guidance.
- 6.2.58. The statutory imperatives set out at s.149 Equality Act 2010 must be given due regard before and at the time a particular policy that will or might affect people with protected characteristics is under consideration as well as at the time a decision is taken: *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158, [2009] P.T.S.R. 1506 (“Brown”). Compliance should not therefore be treated as a “*rearguard action following a concluded decision*”, but as an “*essential preliminary to such decision, inattention to which is both unlawful and bad government*”: *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 per Sedley LJ at §3. See also Technical Guidance §2.44: “*Due regard is fulfilled before and at the time a particular policy that will or might affect people with protected characteristics is under consideration as well as at the time a decision is taken. Due regard involves a conscious approach and state of mind. A body subject to the duty cannot satisfy the duty by justifying a decision after it has been taken. Attempts to justify a decision as being consistent*

with the exercise of the duty when it was not, in fact, considered before the decision are not enough to discharge the duty.”

6.2.59. Further, the duty is a continuing one: *Bracking* [§5] citing *Brown*. “A relevant body should not assume that because it has once assessed whether the duty is relevant to a particular function that this need not be considered again. The relevance of the duty to a function (or a particular protected characteristic) may change over time. If circumstances change and affect the relevant activity then the applicability of the duty may need to be considered again”: [§5.13] Technical Guidance.

Breach of the PSED

6.2.60. In light of the serious Articles 3, 8 and 14 ECHR violation issues raised above relating to the Policy allowing trans identifying men with a GRC to carry out strip searches on women, 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 exercised “*in substance, with rigour, and with an open mind*”.³²

6.2.61. Due regard must be had of the impact of the Decision not to withdraw the Policy and to continue to rely on the Manual, Annex L or other similar policy post-FWS on eliminating discrimination, harassment and victimisation of women and how to mitigate this impact. Women however will be significantly more impacted by the Decision than biological males. 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 or without a GRC, compared to men in the opposite positions.³³

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

6.2.63. The PSED is ongoing and must be complied with whenever a new decision is made.³⁴

6.2.64. Sex Matters has not seen evidence that the Defendant has taken the necessary steps to comply with the requirements of the PSED when making the Decision. Sex Matters awaits the Defendant’s substantive

³² *Hotak v LB Southwark & Associated Appeals* [2016] AC 811 SC.

³³ *Hotak v LB Southwark & Associated Appeals* [2016] AC 811 SC.

³⁴ *Metropolitan Housing Trust Ltd v TM* [2021] EWCA Civ 1890 and *R (Greenwich Community Law Centre) v Royal Borough of Greenwich* [2012] EWCA Civ 496.

response to this ground and evidence of any steps taken (in particular, as to any equality impact assessment undertaken).

Failure to make sufficient inquiry

6.2.65. When making the Decision, the Defendant has not made sufficient inquiry into, or taken account of relevant considerations as to:

- (i) The absence of clarity or certainty as to the practical operation of the Policy and the Manual, Annex L (or any similar policy). It is unclear how the Policy, the Manual and Annex L can operate post-FWS.
- (ii) The effect that a power imbalance may have on women being searched or female staff objecting to taking part in a strip search with a male (with or without a GRC).
- (iii) The risk of violations of Arts 3, 8, and 14 ECHR, and of breaches of the Equality Act 2010, of the Sexual Offences Act 2003 and of tortious claims in trespass to the person.
- (iv) 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 appeared not to acknowledge 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 Guidance³⁵ and is also referred to in Ministry of Justice HMPSS Operation Guidance³⁶.

6.2.66. 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 Equality Act 2010 or the ECHR.

In your response, please refer to each numbered point in turn and confirm whether the ground is conceded or disputed and, if it is disputed, please provide full details of the basis on which it is disputed.

³⁵ See page 2 "*Dispelling the myths*" where fetish and sexual pleasure were raised in relation to transvestism.

³⁶ See §§95-108 of Maya Forstater's witness statement.

7. Details of the Action that the Defendant is Expected to Take:

- 7.1. To confirm that the Policy is withdrawn (insofar as it permits trans identified men with a GRC to carry out strip searches on women).
- 7.2. To confirm that the relevant sections of the Manual, Annex L (or another similar policy) will be disappplied.
- 7.3. To provide copies of any documents requiring female officers to carry out strip searches on trans identified males.
- 7.4. In the alternative to 7.1 and 7.2, in order to avoid the additional costs of an interim relief application, Sex Matters proposes that the Defendant provides an undertaking (reflecting the Court's Order in the claim against CCBTP of 18 February 2025):
 - (i) Confirming that as far as he is aware, or ought to be reasonably aware, there are no officers within the force who are covered by the Policy;
 - (ii) To immediately notify Sex Matters in writing if an officer of the Defendant informs MPS (or MPS otherwise have reason to believe that an officer who is covered by the Policy) holds a GRC.

In these circumstances, the Defendant is to provide details of MPS's system as to how such information may become known to it and recorded.

- 7.5. If the proposals at 7.1 and 7.2, or 7.4, are not practicable, Sex Matters will consider the Defendant's reasonable alternative proposals that ensure a similar interim outcome to the Order made in the BTP case and apply FWS to the Manual, Annex L (or other similar policy).
- 7.6. To provide evidence that the PSED was complied with when the Decision was made.
- 7.7. To confirm whether the Defendant will be adopting the NPCC draft interim guidance. If not, to provide reasons for this decision.

8. In practical terms, what the Claimant is seeking:

- 8.1. For the Policy to be withdrawn and the Manual, Annex L (or similar policy) to be disappplied. Alternatively, for undertakings that there are no known officers with a GRC subject to the Policy and that Sex Matters will be immediately notified if this changes. If neither of these steps are taken, Sex Matters will be advised about issuing a claim, seeking a stay behind the claim against CCBTP and applying for a mandatory Order.

9. **Details of the Legal Advisors Dealing with this Claim:** Deighton Pierce Glynn, 33 Bowling Green Lane, London, EC1R 0BJ, [REDACTED].
10. **Details of any Interested Parties:** None. If you consider that there is an interested party who should be served with documents in relation to the proposed proceedings, please provide your reasons and details of the party.
11. **Documents and information that you should provide with your response:**

You are asked to provide the following information within fourteen days in accordance with the judicial review pre-action protocol.

You are reminded that in responding to this letter you must comply with your duty of candour.

This duty requires due diligence in: (a) investigating what material is relevant to this claim; and, (b) disclosing that material where it is relevant or assists the Claimant, including on some as yet unpleaded ground. A failure to comply with the duty of candour when providing your response to this letter may result in costs sanctions.

The duty of candour is reinforced by paragraphs 6 and 16(d) of the Judicial Review Pre-Action Protocol which provide that you must enclose any relevant documentation requested by the Claimant with your response and that where you ignore this requirement the court may impose sanctions, for example costs sanctions.

Accordingly, in your response, you are asked to confirm that you have investigated what material is relevant to this claim and to disclose that material in or with your response. In addition, we would ask you to ensure that copies of the following documents are provided with your response in compliance with your pre-action disclosure duties:

- 11.1. Evidence of PSED compliance when making the Decision.
- 11.2. Copies of any documents on whether MPS requires evidence of a GRC in order for the Policy to be implemented.
- 11.3. Copies of any documents requiring female officers to carry out strip searches on trans identified males.
- 11.4. Copies of any published documents concerning the Policy, the Manual, Annex L and similar policy to Annex L made since the Supreme Court's judgment in *For Women Scotland Ltd v The Scottish Ministers* was handed down on 16 April 2025.

11.5. Copies of all internal documents on the Policy, the Manual, Annex L and similar policy to Annex L created since the Supreme Court's judgment in *For Women Scotland Ltd v The Scottish Ministers* was handed down on 16 April 2025. This should include but not be limited to internal and external emails, guidance and memos and intranet documents.

11.6. A copy of the NPCC draft interim guidance.

12. **Details of any other documents that are Considered Relevant and Necessary:**

None other than those identified above.

13. **Alternative Dispute Resolution (ADR):**

We will not delay the issue of the proceedings to engage in ADR given our experience of the timescales involved in participating in ADR (including the time it takes to obtain funding for participation in ADR from the Legal Aid Agency) and the requirement that any claim for judicial review be issued promptly. We will, however, take full instructions on any proposals your authority puts forward regarding the use of ADR and we will, if necessary, consider agreeing a stay of these proceedings in order to facilitate ADR.

If your authority is minded to propose ADR, please provide full details of the form of ADR that is being proposed, contact details of any external ADR provider that is being proposed, details of the outcome of your enquiries into that provider's availability, details of the likely timescales involved, details of the likely costs of mediation and how your authority proposes those costs be met and details of any concessions your authority is prepared to make pending the outcome of the ADR referral.

14. **Address for Reply and Service of Court Documents:** Deighton Pierce Glynn;

[REDACTED]

15. **Proposed Reply Date:** By 4.00pm on 10 June 2025 2025.

16. If your authority considers that more time is needed to respond to any part of this letter, please let us know within the next seven days identifying the relevant part, explaining why more time is needed, the date by which your authority proposes to respond, and full details of any concessions your authority is prepared to make in the interim.

Yours faithfully

DPG

DEIGHTON PIERCE GLYNN