NPCC Guidance

ADVICE

INTRODUCTION

1. I am instructed to advise as to the lawfulness of guidance issued by the National Police Chiefs' Council ("NPCC") entitled, "Searching by Transgender Employees of the Police Service" ("the Guidance"). I am instructed that the Guidance was issued in December 2021, but has now been removed from the NPCC website.

2. In particular I am instructed to consider:

   a. What is the lawfulness of the Guidance in its current state?

   b. If unlawful, is it rescued by any amendment to make it clear that only trans identifying male officers with a GRC could strip search women?

   c. Or is there reasonable argument that issues such as strip searching – accepted to be humiliating and degrading – should be one of those areas where the legal fiction created by a GRC is disapplied as for a proportionate and legitimate aim?

   d. If it is your view that the Guidance in either iteration would merit challenge by way of judicial review, please advise as to the best way to bring such an action i.e. who would be considered to have the necessary standing.

3. Briefly, my view is that the Guidance is not lawful. I set out my reasoning below.

THE GUIDANCE

4. I have been provided with a document from the Chief Constables Council of the NPCC entitled, *"Searching by Transgender Officers and Staff"*. The purpose of the document is said to be,

   "to propose adoption of a consistent searching policy for transgender officers and staff across forces nationally".

5. At Appendix A to the document is what is described as recommended guidance. I am instructed that the NPCC decided to adopt the recommendation. Appendix A is, accordingly, the Guidance which I am instructed to consider. It is attached to this Advice for ease of reference.

STATUTORY FRAMEWORK

Equality Act 2010

6. The Equality Act 2010 ("EqA") provides for a number of protected characteristics. The relevant protected characteristics for the purposes of this Advice are those of gender reassignment and of sex.

7. Section 7 EqA defines the protected characteristic of gender reassignment. It provides:

   (1) A person has the protected characteristic of gender reassignment if the 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.

   (2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.

   (3) In relation to the protected characteristic of gender reassignment—

   (a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person;

(b) a reference to persons who share a protected characteristic is a reference to transsexual persons.

8. The protected characteristic is therefore defined by reference to a *"process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex".* It is not necessary to have completed the process, or even to have begun it – the section includes those who are *"proposing to undergo"* such a process. But the section does not encompass an individual unless (a) there is a process aimed at *"reassigning sex"* by *"changing physiological or other attributes of sex";* and (b) the individual is undergoing, has undergone, or is proposing to undergo that process.

9. Section 11 EqA deals with sex. It provides:

In relation to the protected characteristic of sex—

(a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;

(b) a reference to persons who share a protected characteristic is a reference to persons of the same sex.

10. Section 212 EqA provides that "man" means *"a male of any age",* and "woman" means *"a female of any age".*

11. Chapter 2 of the EqA identifies conduct which is prohibited by the Act. For the purposes of this Advice the relevant sections are as follows:

    11.1 Section 13 ("direct discrimination") makes it unlawful to treat a person less favourably because of a protected characteristic.

    11.2 Section 19 ("indirect discrimination") makes it unlawful to apply a provision, criterion or practice ("PCP") to another person, where the PCP puts those sharing a protected characteristic at a disadvantage, unless the PCP is a proportionate means of achieving a legitimate aim.

11.3 Section 26 ("harassment") makes it unlawful to engage in unwanted conduct related to a relevant protected characteristic where that conduct has either the purpose or the effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

12. Section 29(6) EqA makes it unlawful to do anything that constitutes discrimination or harassment in the exercise of a public function. Policing is a public function.

13. Sections 39 and 40 EqA make it unlawful for an employer to discriminate against, or to harass, an employee. Although as a matter of strict employment law a police officer is not an employee but rather the holder of the office of constable, section 42 EqA provides that a police officer is to be treated as an employee for the purposes of the Act.

14. Paragraph 1 of Schedule 9 to EqA provides that an employer will not discriminate in circumstances where they apply a requirement to have a particular protected characteristic where it is an occupational requirement which is a proportionate means of achieving a legitimate aim. Subparagraph 1(3) provides that such a requirement could include a "requirement not to be a transsexual person".

15. Section 149 EqA creates a duty for public authorities and those who exercise public functions, in the exercise of their duties, to:

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.

16. The duty is known as the public sector equality duty ("PSED").

Gender Recognition Act 2004

17. Section 1 of the Gender Recognition Act 2004 ("GRA") provides that any person aged at least 18 may make an application for a gender recognition certificate ("GRC") under subsection 1(1)(a) on the basis of:

(a) living in the other gender, or

(b) having changed gender under the law of a country or territory outside the United Kingdom.

18. Sections 2 and 3 GRA set out certain requirements which must be met under subsection 1(1)(a) for the application to be granted. Section 2 provides that a GRC will be granted where the applicant:

(a) has or has had gender dysphoria,

(b) has lived in the acquired gender throughout the period of two years ending with the date on which the application is made,

(c) intends to continue to live in the acquired gender until death, and

(d) complies with the requirements imposed by and under section 3.

The requirements under section 3 relate to evidence to be provided from a specialist doctor or psychologist.

19. Section 9 GRA sets out the effect of the grant of a GRC:

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).

20. Section 22 GRA prohibits anyone who has acquired information in an official capacity about a person's GRC and/or their *"gender before it becomes their acquired gender"* from disclosing that information. *"Acquired gender"* means the gender in which the person is living (section 1(2) GRA).

Police and Criminal Evidence Act 1984

21. Section 66 of the Police and Criminal Evidence Act 1984 ("PACE") empowers the Secretary of State to issue codes of practice in relation to a number of matters, including the detention, treatment and questioning of persons by police officers. The Secretary of State has issued such a code of practice, known as "Code C".

22. Given that it was made pursuant to statute, Code C falls within the definition of "subordinate legislation" at section 21(1) Interpretation Act 1978.

23. Paragraph 1.0 of Code C states:

The powers and procedures in this Code must be used fairly, responsibly, with respect for the people to whom they apply and without unlawful discrimination.

24. Paragraph 4.1 of Code C states:

The custody officer may search the detainee or authorise their being searched to the extent they consider necessary, provided a search of intimate parts of the body or involving the removal of more than outer clothing is only made as in Annex A. A search may only be carried out by an officer of the same sex as the detainee...

25. Annex A to Code C sets out a number of requirements for intimate and strip searches, including the following:

6. When an intimate search… is carried out by a police officer, the officer must be of the same sex as the detainee…

11(a). a police officer carrying out a strip search must be the same sex as the detainee…"

26. Annex L to Code C is entitled: *"Establishing gender of persons for the purpose of searching and certain other procedures"*. It includes the following:

3. 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.

4. When establishing whether the person concerned should be treated as being male or female for the purposes of these searches, procedures and requirements, the following approach which is designed to maintain their dignity, minimise embarrassment and secure their co-operation should be followed:

(a) The person must not be asked whether they have a GRC (see paragraph 8);

(b) If there is no doubt as to as to whether the person concerned should be treated as being male or female, they should be dealt with as being of that sex.

(c) If at any time (including during the search or carrying out the procedure or requirement) there is doubt as to whether the person should be treated, or continue to be treated, as being male or female:

(i) the person should be asked what gender they consider themselves to be. If they express a preference to be dealt with as a particular gender, they should be asked to indicate and confirm their preference by signing the custody record or, if a custody record has not been opened, the search record or the officer's notebook. Subject to (ii) below, the person should be treated according to their preference except with regard to the requirements to provide that person with information concerning menstrual products and their personal needs relating to health, hygiene and welfare described in paragraph 3.20A (if aged under 18) and paragraphs 9.3A and 9.3B (if aged 18 or over). In these cases, a person whose confirmed preference is to be dealt with as being male should be asked in private whether they wish to speak in private with a member of the custody staff of a gender of their

choosing about the provision of menstrual products and their personal needs, notwithstanding their confirmed preference (see Note L3A);

(ii) *if there are grounds to doubt that the preference in (i) accurately reflects the person's predominant lifestyle, for example, if they ask to be treated as a woman but documents and other information make it clear that they live predominantly as a man, or vice versa, they should be treated according to what appears to be their predominant lifestyle and not their stated preference;*

(iii) *If the person is unwilling to express a preference as in (i) above, efforts should be made to determine their predominant lifestyle and they should be treated as such. For example, if they appear to live predominantly as a woman, they should be treated as being female except with regard to the requirements to provide that person with information concerning menstrual products and their personal needs relating to health, hygiene and welfare described in paragraph 3.20A (if aged under 18) and paragraphs 9.3A and 9.3B (if aged 18 or over). In these cases, a person whose predominant lifestyle has been determined to be male should be asked in private whether they wish to speak in private with a member of the custody staff of a gender of their choosing about the provision of menstrual products and their personal needs, notwithstanding their determined predominant lifestyle (see Note L3A); or*

(iv) *if none of the above apply, the person should be dealt with according to what reasonably appears to have been their sex as registered at birth.*

5. Once a decision has been made about which gender an individual is to be treated as, each officer responsible for the search, procedure or requirement should where possible be advised before the search or procedure starts of any doubts as to the person's gender and the person informed that the doubts have been disclosed. This is important so as to maintain the dignity of the person and any officers concerned.

27. Guidance Note L5 to Annex L states:

Chief officers are responsible for providing corresponding operational guidance and instructions for the deployment of transgender officers and staff under their direction and control to duties which involve carrying out, or being present at, any of the searches and procedures described in paragraph 1. The guidance and instructions must comply with the Equality Act 2010 and should therefore complement the approach in this Annex.

28. Consistently with Code C, section 54 PACE ("searches of detained persons") provides (at subsection (9)) that,

"The constable carrying out a search shall be of the same sex as the person searched."

LAWFULNESS OF THE GUIDANCE

29. The Guidance is directed at decisions as to who may be searched by transgender police officers. It rightly notes that those decisions must be informed by PACE, the EqA and the GRA.

30. The Guidance provides that, *"once a Transgender colleague has transitioned, they will search persons of the same gender as their own lived gender."* According to the Guidance, a police officer is to be treated as having transitioned from *"the point at which they present in the gender with which they identify."* Police forces are expected to treat officers *"in accordance with their lived gender identity, whether or not they have a GRC"*.

31. The starting point, when considering the question of search, is PACE, and in particular the provisions in Code C and elsewhere to the effect that searches may only be carried out by officers *"of the same sex as the detainee".* In order to be lawful, the Guidance must be consistent with that requirement.

32. Given that Code C is subordinate legislation, its provisions fall to be interpreted by reference to rules of statutory construction – as, perhaps obviously, do those of section

54. That task requires a court to *"ascertain the meaning of the words in a statute in the light of their context and purpose"* (*Kostal v Dunkley* [2021] 3 WLR 697 at para 109).

33. The context of the provisions in question here seems to me to be that of Code C, an instrument which begins with the affirmation that, *"The powers and procedures in this Code must be used fairly, responsibly, with respect for the people to whom they apply and without unlawful discrimination"* (para 1.0, see above). The context, therefore, is the treatment of detainees (including those subject to search powers) by the police; and legislation prohibiting discrimination (i.e. the EqA). The purpose of the Code might be said to be to ensure the fair, responsible, respectful and non-discriminatory treatment of those subject to detention, questioning and search. Consistent with that, the purpose of the provisions dealing with same-sex searching might be said to be to preserve, so far as possible, the privacy and dignity of detainees in a non-discriminatory way.

34. How, then, should the words *"the same sex as the detainee"* be interpreted in this context? In particular, is the Guidance right to rely on an officer's *"lived gender"* or whether the officer *"present[s] in the gender with which they identify"* to determine whether they fulfil the requirement of being *"the same sex as the detainee"*?

Authorities

Chief Constable of West Yorkshire Police v A and another (No. 2) [2005] 1 AC 51

35. In *A*, the House of Lords considered s.54 PACE, which provides (see above) that, *"The constable carrying out a search shall be of the same sex as the person searched"*. The Claimant was described as a *"male-to-female transsexual"*. She had undergone gender reassignment surgery but her biological sex at birth was male, and at that time (the case pre-dated the GRA) nothing could change that position as a matter of law. Her application for appointment as a police officer was rejected on the basis that she was unable to search women because she was legally a man; and she could not fulfil the role of a police officer if she was not able to conduct searches.

36. Lord Bingham held that the Claimant could not lawfully search a woman because she remained legally male and therefore not *"of the same sex as the person searched"*. He also concluded (at para. 5) that,

"Since it is a requirement laid down in paragraph A 3.1 of the Codes of Practice prescribed under section 66 of the 1984 Act that "Every reasonable effort must be made to reduce to the minimum the embarrassment that a person being searched may experience", it was plain that Ms A, who appeared in every respect to be a woman, could not, even if legally a man, be permitted to search a man."

37. Although those words no longer appear in Code C, they seem to me to support the proposition that a purpose of this part of the Code is to preserve, so far as possible, the privacy and dignity of the detainee.

38. The Claimant relied on the EU law prohibition on unfavourable treatment on grounds of gender reassignment, which was itself based on the EU law principle of equality. Applying that principle, Lord Bingham held (at para 11) that those who have *"changed their gender… are entitled to be treated, so far as possible, equally with non-transsexual men or women"*, and that it was possible to give effect to the principle,

"only by reading "the same sex" in section 54(9) of the 1984 Act, and "woman", "man" and "men" in sections 1, 2, 6 and 7 of the 1975 Act [the Sex Discrimination Act, precursor to the EqA]*, as referring to the acquired gender of a postoperative transsexual who is visually and for all practical purposes indistinguishable from non-transsexual members of that gender. No one of that gender searched by such a person could reasonably object to the search".*

39. In short, Lord Bingham held that a *"postoperative transsexual"* should be treated, in effect, as having their *"acquired gender".*

40. As noted above, *A* was decided before the GRA had come into force, but the Bill which subsequently became the Act was before the Court. Lady Hale, at para 42, said,

"The Gender Recognition Bill is currently before Parliament. This lays down 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 has been concerned. Once recognised, the reassigned gender is valid for all legal purposes unless specific exception is made. It will no longer be a genuine occupational qualification that the job may entail the

carrying out even of intimate searches. In policy terms, therefore, the view has been taken that trans people properly belong to the gender in which they live."

41. Taking into account the observations of both Lord Bingham and Lady Hale, the Court appears to have treated Ms A as equivalent to a person who would, under the GRA, have a GRC. That view is reinforced by para 60, in which Lady Hale observed,

    "Until the matter is resolved by legislation, there will of course be questions of demarcation and definition. Some of these… will be sensitive and difficult… One can well envisage a person who claims to have gender dysphoria but who has not successfully achieved the transition to the desired gender… 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."

42. The Court in *A* was not considering the case of someone who had *"not successfully achieved the transition to the desired gender"* (noting that such a person would now be entitled to the protection of the EqA if they were proposing to undergo a process for the purpose of reassigning the person's sex by changing physiological or other attributes of sex – I address that issue below). Lady Hale appears to have considered that the GRA would provide the applicable touchstone for determining who would or would not be treated as having *"successfully achieved the transition"* – she considered that questions of demarcation and definition (i.e. the questions which are raised by the Guidance) would be *"resolved by legislation"*.

43. *A* does not seem to me, therefore, to support the proposition that police officers should be treated for the purposes of Code C, *"in accordance with their lived gender identity, whether or not they have a GRC"*.

<u>*Fair Play for Women Ltd v Registrar General for Scotland*</u> [2022] CSIH 7

44. The national census held in Scotland in 2022 required respondents to answer the question *"What is your sex?"* by choosing either *"Female"* or *"Male"*. A public body known as the National Records of Scotland issued guidance on the census. The guidance addressed the *"What is your sex"* question by stating, *"If you are transgender*

the answer you give can be different from what is on your birth certificate. You do not need a Gender Recognition Certificate (GRC)." Fair Play for Women Ltd, a campaign group, sought judicial review of the guidance.

45. The question for the Court was whether the guidance authorised or encouraged giving a false answer to the question *"What is your sex?"* That in turn required consideration of the meaning of the word *"sex"* for the purposes of the Census Act 1920 – the statutory provision which underpinned the question – and in particular whether it *"can only mean sex as recorded on a birth certificate or GRC".*

46. The Court of Session held (at para 20) that *"there is no universal legal definition of the word 'sex' which applied by default"*, and that the meaning of the word depends upon context. See para 21: *"There are some contexts in which a rigid definition based on biological sex must be adopted."* Marriage was given as one such context (see Bellinger v Bellinger [2003] 2 AC 467):

"marriage is a legal status which affects rights in other fields such as immigration, social security, pensions, and housing. There are other circumstances in which matters affecting status, or important rights, in particular the rights of others, may demand a rigid definition to be applied to the term 'sex' of the kind proposed by the reclaimers. Examples include R v Tan, where being a male was an essential prerequisite for the commission of a particular criminal offence. Some of these limitations have been carried over to apply even where a person has successfully obtained a GRC under the GRA. Examples may be seen in secs 9 and 12 of that Act, as illustrated in R (McConnell) v Registrar General for England and Wales [[2020] 3 WLR 683 – GRC does not affect status as mother or father of a child]. The point which these examples all have in common is that they concern status or important rights."

47. The Court of Session's conclusion was that the interpretation of the word *"sex"* in a statutory provision, being context-specific, would depend upon the nature of the rights in issue. See para 23:

"it may be necessary to apply a biological definition of sex in prescribed circumstances involving status, proof of identity or other important rights".

For Women Scotland Ltd v Lord Advocate [2022] CSIH 4

For Women Scotland Ltd v Scottish Ministers [2023] CSIH 37

48. The Court of Session in the first case held that a statutory exception which allowed the Scottish Parliament to make particular provision for the inclusion of women, on the basis of their protected characteristic of sex, was (see para 36):

"limited to allowing provision to be made in respect of a 'female of any age'. Provisions in favour of women, in this context, by definition exclude those who are biologically male".

49. In the second case the Court of Session concluded that the exclusion of those who are biologically male must be understood subject to the GRA (see e.g. para 37):

"where a full gender recognition certificate has been issued to a person that their acquired gender is female, the person's sex is that of a woman, and where a full gender recognition certificate has been issued to a person that their acquired gender is male, the person's sex becomes that of a man."

Application to the Guidance

50. The Guidance interprets the word *"sex"* in Code C of PACE in a way which seems to me to be broader than the interpretation of the same word in the EqA read with the GRA. The EqA defines "sex" by reference to whether an individual is male or female (see sections 11 and 212). The two *For Women Scotland Ltd* decisions make it clear that whether a person is male or female for the purposes of the EqA is to be decided by reference to their biological sex, save where the individual has a GRC, in which case they are to be treated (for these purposes) as though their biological sex corresponded to their acquired gender.

51. Nothing in *A* seems to me to be inconsistent with that. At its highest, *A* might be read as suggesting that the grant of a GRC is the only test by which it could be determined that a person's sex or gender could be treated as having changed. At its lowest, it might be said not to deal at all with questions of changes of gender identity in the absence of

a GRC. Whichever of those approaches is taken, *A* does not seem to me to detract from the approach I set out at para 50 above.

52. It is necessary to consider, therefore, whether the term *"sex"* in Code C should be interpreted differently from the way that the term is used in the EqA. There is no absolute bar to a different interpretation, as *Fair Play for Women Ltd* makes clear. Nevertheless, the much stronger case seems to me to be that the same interpretation should be applied as in the EqA. I say that for two reasons:

    52.1 Firstly, the very first paragraph of Code C begins by recognising the obligation not to discriminate contrary to the EqA. It would be surprising if the operation of an instrument expressly intended to comply with the EqA adopted different interpretations in relation to the same key terms.

    52.2 Secondly, the provisions in Code C are aimed at the respect, privacy and dignity of the detainee (see, *inter alia,* Lord Bingham's comments in *A,* addressed at paras 35 and 36 above). That would appear to fall within the category of *"important rights"* which the Court of Session held in *Fair Play for Women Ltd* would require a strict interpretation of the term *"sex"*.

53. I think the better view, therefore, is that Code C (and section 54(9)) PACE are to be interpreted such that references to *"sex"* are to biological sex, save where the individual has a GRC.

54. That being so, I consider that the Guidance is inconsistent with the statutory framework in the following respects:

    54.1 The Guidance provides that, *"Employers should treat people in accordance with their lived gender identity, whether or not they have a GRC"*. For most purposes that is a matter of policy on which I do not seek to comment. For the purposes of powers of search, however, for a police employer to instruct or permit an officer to search a detainee of the opposite biological or GRC-acquired sex would seem to me to amount to an unlawful breach of PACE, irrespective of the lived gender identity of either the officer or the detainee.

54.2 Similarly, where the Guidance provides that Chief Officers should *"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"*, insofar as that is intended to suggest that an officer may search a detainee of the opposite biological or GRC-acquired sex, that would seem to me to amount to an unlawful breach of PACE, irrespective of the gender in which the officer presents. For the same reasons, the further passage of the Guidance which provides that *"once a Transgender colleague has transitioned, they will search persons of the same gender as their own lived gender"* seems to me to be unlawful insofar as *"transitioned"* has the meaning used in the Guidance as set out at the beginning of this paragraph.

54.3 The section of the Guidance which provides that, *"A Transgender colleague's birth certificate or subjective discussions regarding how well their gender presentation matches their gender identity are not relevant to the equality protections enshrined in the Equality Act 2010"* seems to me to be partly right and partly wrong. It is undoubtedly correct that subjective discussions about presentation are irrelevant for these purposes. A birth certificate may be relevant, however, to the extent that biological sex as recorded at birth is relevant as noted above.

54.4 I am not critical of the passage in the Guidance which provides, *"It is recognised that some colleagues may have a gender identity that does not easily fit with the binary regime contemplated when PACE 1984 was enacted, for example non-binary, gender fluid or agender. A discussion may be necessary with such a colleague to establish how they can participate in conducting searches. That conversation will be held sensitively (at a suitably senior level) and before the colleague is put in a position where they may be required to participate in searches"*. I do not read this passage as suggesting that gender identities such as those listed here would affect the legal right to search in accordance with Code C. If that were the meaning of the passage, I would consider that to be unlawful.

54.5 Finally, I address the final part of the Guidance, which provides, *"If the refusal is based on discriminatory views, consideration should be given for the incident be*

recorded as a non-crime hate incident unless the circumstances amount to a recordable crime. This is in accordance with the College of Policing's Authorised Professional Practice on internal hate crime and incidents." It is beyond the scope of this Advice to address how discriminatory conduct on the part of those being searched should be dealt with, or what should be dealt with as a hate crime. I limit myself to observing that, in order for this part of the Guidance to be effective, it will be necessary for there to be a proper understanding of the requirements of both PACE and the EqA.

Further analysis – the EqA

55. I have further considered whether the above interpretation of Code C is consistent with the obligations of Chief Officers under the EqA. The demands of the EqA are complex in this field, given that they prohibit discrimination and harassment both against police officers (discrimination in employment) and detainees (discrimination in public functions). I am satisfied that the analysis above is consistent with the demands of the EqA.

56. Firstly, a detainee searched by a police officer of the opposite sex might well be treated as having been subjected to harassment related to sex contrary to sections 26 and 29(6) EqA. It would be readily understandable that they might view their treatment as having the effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

57. A claim of direct discrimination on grounds of sex might also arise depending on the facts of the case, for example if a female detainee searched by a biologically male officer were to complain that she had been subjected to less favourable treatment than a putative male detainee searched by the same officer.

58. Against that must be considered the position of an officer who is unable to perform some or all searches because of their sex – a decision which might not take into account the gender in which they present, or what they consider to be their lived gender. A number of issues arise:

58.1 Firstly, the EqA provides protection only for the defined protected characteristics, which include sex and gender reassignment, but do not include lived gender, gender presentation or gender identity.

58.2 It is important in this regard to note that, as set out above, protection for the protected characteristic of gender reassignment does not require the individual to hold a GRC. It requires the individual only to propose to undergo, to be undergoing or to have 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 (s.7 EqA). There will therefore be officers who have the protected characteristic of gender reassignment for the purposes of the EqA, but do not have a GRC. Equally, officers who do not fall within the protected characteristic of gender reassignment will not benefit from protection under the EqA even if they have a gender identity which is different from their sex.

58.3 A policy which prevents officers from conducting searches, or restricts the searches they are able to carry out, may amount to a PCP which puts those with the protected characteristic of gender reassignment at a disadvantage. It would be unlikely to amount to indirect discrimination, however, because a policy which ensures compliance with PACE and protects the dignity of detainees is likely to be considered a proportionate means of achieving a legitimate aim. Protection of the dignity of detainees would be likely to be treated as a weighty aim. For essentially the same reasons, paragraph 1 of Schedule 9 (see para 14 above) is likely to exclude a discrimination claim.

58.4 If such a policy were to be challenged on grounds of harassment, it might be said that, given the demands of PACE and the importance of protecting the dignity of detainees, a carefully drafted policy could not reasonably be said to have the effect of violating an officer’s dignity or creating an adverse environment, perhaps in particular where thought is given to addressing discriminatory conduct on the part of detainees. See, in a different context (a case including a claim of harassment related to sexual orientation and marital status brought by a priest whose permission to officiate at services was revoked by the Church of England following

his same-sex marriage), *Pemberton v Inwood* [2018] ICR 1291 per Underhill LJ at para 89:

> *"I have no difficulty understanding how profoundly upsetting Canon Pemberton must find the Church of England's official stance on same sex marriage and its impact on him. But it does not follow that it was reasonable for him to regard his dignity as violated, or an "intimidating, hostile, degrading, humiliating or offensive" environment as having been created for him, by the Church applying its own sincerely held beliefs in his case, in a way expressly permitted by Schedule 9 to the Act. If you belong to an institution with known, and lawful, rules, it implies no violation of dignity, and is not cause for reasonable offence, that those rules should be applied to you, however wrong you may believe them to be. Not all opposition of interests is hostile or offensive."*

59. My conclusion, therefore, is that the interpretation of Code C set out at paras 50-54 above is consistent with the requirements of the EqA.

The Equality Impact Assessment

60. There is a further difficulty with the Guidance, in relation to the NPCC's compliance with the PSED.

61. I have been provided with a copy of an Equality Impact Assessment ("EIA") dated 9 September 2022. It indicates that a review is due on 9 September 2023. I am not instructed whether a further review has taken place or whether a further document has been published. It would be helpful to know that.

62. The EIA records that the Guidance was agreed on 19 December 2021. It follows that no EIA was undertaken prior to agreeing the guidance. Unless some other form of assessment was undertaken, therefore, it appears that the NPCC did not, as it should have done, *"give advance consideration to [equality issues] before making a policy decision which may be affected by them"* (*R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213). Of course an assessment has now been made, but that assessment

itself gives rise to concerns, in particular in relation to its consideration of potential adverse impacts of the policy on those with the protected characteristic of sex.

63. The EAI identifies the following *"Details of positive and/or adverse impact or other issue"* in relation to sex:

"a) A lack of standardised definitions within policing, across government departments and in law for sex, gender and related terms may leave parts of the guidance open to interpretation. Clarity gives confidence.

b) The title of the guidance may suggest it does not include non-binary colleagues or those with other gender identities.

c) Colleagues whose gender expression (presentation) which is not stereotypical may be ***more likely to encounter discrimination and hostility*** *if they are assumed to be transgender or non-binary. This guidance, which recommends forces recognise the gender identity of the officer or staff member from the moment they start their transition, may mean colleagues are wrongly identified as being transgender or non-binary and subject to hostility"* (emphasis in the original).

64. Notably, no consideration at all has been given to the position of detainees, for example as to the position of women who are searched. The issues identified above, for example in relation to searches which may risk being unlawful as contrary to PACE due to being conducted by an officer of the opposite sex to the detainee, are not considered at all. No consideration is given to the possibility of concerns of harassment on the part of those who have been searched; nor, more generally, as to impacts on the privacy and dignity of detainees.

65. In short, the only impacts considered are impacts on officers. No impacts have been considered in relation to members of the public. That seems to me to represent a significant flaw in the assessment and to suggest that the requirements of s.149 EqA have not been met.

ANSWERS TO QUESTIONS

a. What is the lawfulness of the Guidance in its current state?

66. I consider that the Guidance is unlawful for the reasons set out at para 54 above. I further consider that the failure to conduct an adequate EIA (or other consideration of equality impacts) is evidence of a failure to comply with the requirements of s.149 EqA (the PSED).

b. If unlawful, is it rescued by any amendment to make it clear that only trans identifying male officers with a GRC could strip search women?

67. I consider that the Guidance should make clear that a woman or girl may only be searched by an officer who is female by reference either to her biological sex at birth or to a GRC. That would require a number of changes to the existing Guidance, as analysed at para 54 above.

c. Or is there reasonable argument that issues such as strip searching – accepted to be humiliating and degrading – should be one of those areas where the legal fiction created by a GRC is disapplied as for a proportionate and legitimate aim?

68. Police forces are bound by the GRA. I do not identify any mechanism whereby a GRC could be "disapplied" for these purposes. It might be possible, however, to treat "not being transsexual" as an occupational requirement for the purposes of Sch. 9 para 1 (see paras 14 and 58.3 above). The point is not straightforward, however – see, for example the observations of Lord Bingham at paras 4-5 and 11 of *A* (see paras 36 and 38 above).

69. The question whether a policy preventing transsexual officers from undertaking searches would be lawful could be answered only after considering whether the policy would be a proportionate means of achieving a legitimate aim. It is possible to identify a legitimate aim (maintaining so far as possible the privacy and dignity of detainees), but would seem to me to require an EIA to determine whether such a policy would be a proportionate means of achieving that aim. If such an EIA is undertaken I will be happy to advise further.

d. If it is your view that the Guidance in either iteration would merit challenge by way of judicial review, please advise as to the best way to bring such an action i.e. who would be considered to have the necessary standing.

70. I am not clear as to the current status of the Guidance, as to whether it remains in place or whether it has been withdrawn. If it remains in place, or if it were to be re-issued in its present form, I consider that there would be reasonably good prospects of obtaining permission to seek judicial review of it, both on substantive and procedural (PSED) grounds.

71. If individual forces have adopted policies along the lines of the Guidance, it might be possible to bring claims in respect of those, although that would appear to be a significantly more costly and less efficient approach.

72. As to who would have standing, an individual who has been or is likely to be affected by the Guidance (for example due to being searched by an officer not of the same sex) would be entitled to bring a claim. Note that any claim must be brought promptly, and in any event not later than three months after the grounds to make the claim arose (CPR 54.5(1)). The appropriate course would be to send a letter of claim before proceeding to issue.

73. As to who else might have standing to bring a claim, an organisation which takes a serious interest in the rights of those detained by the police, or of women, or both, would be likely to have good prospects of being found to have standing. This is an issue of significant public interest. The greater the public interest, and the more genuine the claimant's engagement with the issue, the more likely it is that they will be found to have standing to bring the claim (see e.g. *R (Adiatu) v HM Treasury* [2020] EWHC 1554 (Admin) at para 136-7).

CONCLUSION

74. I consider that there are reasonably good prospects that a Court would find the Guidance to be unlawful. If those instructing me wish to give further consideration to bringing a claim, I will of course be happy to advise further.

75. In the meantime, if anything remains unclear or if I can be of further assistance, please do not hesitate to get in touch

Appendix A

Recommended Guidance: Searching by Transgender Employees of the Police Service

[The terms used in this guidance are reflective of the language used in the Equality Act 2010, Annex L, Code C of the Police and Criminal Evidence Act (1984) and case law.]

Introduction

This guidance relates to determining whom a Transgender officer or staff member (including those who identify as non-binary) may search, in relation to:

• Code C; paragraph 4.1 and Annex A paragraphs 5, 6, and 11 (searches, strip and intimate searches of detainees under sections 54 and 55 of PACE);

• Code A; paragraph 3.6 and Note 4 in stop and search scenarios (Any search involving the removal of more than an outer coat, jacket, gloves, headgear or footwear, or any other item concealing identity, may only be made by an officer of the same sex as the person searched and may not be made in the presence of anyone of the opposite sex unless the person being searched specifically requests it);

• Code D; paragraph 5.5 and Note 5F (searches, examinations and photographing of detainees under section 54A of PACE) and paragraph 6.9 (taking samples);

• Code H; paragraph 4.1 and Annex A paragraphs 6, 7 and 12 (searches, strip and intimate searches under sections 54 and 55 of PACE of persons arrested under section 41 of the Terrorism Act 2000).

Background

Note L5 from Annex L, CODE C, Police and Criminal Evidence Act 1984 (PACE), provides statutory guidance in relation to searching by transgender police officers, police staff and special constables (henceforth described as transgender colleagues) as follows:

L5 Chief officers are responsible for providing corresponding operational guidance and instructions for the deployment of transgender officers and staff under their direction and control to duties which involve carrying out, or being present at, any of the searches and

*procedures described in **paragraph 1**. The guidance and instructions must comply with the Equality Act 2010 and should therefore complement the approach in this Annex.*

Guidance

Who transgender colleagues may search, in line with their legal authority and training (as a police officer, or powers conferred or designated under s38 or s39 of the Police Reform Act 2002), is determined by an interaction between the Police and Criminal Evidence Act (1984), and the Equality Act (2010), with the correct application of occupational requirement, and not limited to the provisions of the Gender Recognition Act (GRA) (2004).

Employers should treat people in accordance with their lived gender identity, whether or not they have a 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.**

A Transgender colleague's birth certificate or subjective discussions regarding how well their gender presentation matches their gender identity are not relevant to the equality protections enshrined in the Equality Act 2010.

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

It is recognised that some colleagues may have a gender identity that does not easily fit with the binary regime contemplated when PACE 1984 was enacted, for example non-binary, gender fluid or agender. A discussion may be necessary with such a colleague to establish how they can participate in conducting searches. That conversation will be held sensitively (at a suitably senior level) and before the colleague is put in a position where they may be required to participate in searches.

Considerations around welfare of staff

If a colleague has made the decision to transition, they should be given the option of being exempt from conducting searches. This decision should be reviewable over the course of an

individual's transition. This ensures compliance with Section 2(2)(e) of the Health & Safety at Work Act (1974)

In these circumstances and with their consent, the colleague should be advised there may be circumstances when their supervisor may inform others of any restrictions on their operational capabilities.

If the person being searched objects to being searched by any colleague, it may be advisable for them to be replaced by another team member to search that person. This is regularly done in practice, regardless of the reasons for objection, to de-escalate any potential conflict. If such a decision must be made, it is essential to support the affected colleague and consider the adverse impact on other colleagues.

If the refusal is based on discriminatory views, consideration should be given for the incident be recorded as a non-crime hate incident unless the circumstances amount to a recordable crime. This is in accordance with the College of Policing's Authorised Professional Practice on internal hate crime and incidents.

(All emphases are in the original).