

Chief Constables' Council

Title:

Searching by Transgender Officers and Staff

09_12_2021 / Agenda Item:

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Force/Organisation:	West Midlands Police
Date Created:	26/11/21
Coordination Committee:	DEI
Portfolio:	LGBT+
Attachments @ para	3.1 Recommended Guidance: Searching by Transgender Employees of the Police Service 3.2 Legal Advice
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1. INTRODUCTION / PURPOSE OF PAPER

- 1.1 This purpose of this paper is to propose adoption of a consistent searching policy for transgender officers and staff across forces nationally. There is currently an inconsistent application of the relevant policies which leaves police forces vulnerable to criticism and open to legal challenges. With police forces aiming to become more inclusive in terms of their officers and staff, it is timely to initiate the discussion with Chief Constables.
- 1.2 Guidance was previously issued by Deputy Chief Constable Julie Cooke (previous NPCC LGBT+ Lead) on 10 September 2021.
- 1.3 This paper will also provide Chief Officers with an overview of the current national position and seek support from forces to commit to introduce and apply specific guidance for the deployment of their transgender employees in searching duties. The Police and Criminal Evidence Act 1984, Note L5 from Annex L, CODE C 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, searches and procedures. The guidance and instructions must comply with the Equality Act 2010.

2. BACKGROUND



2.1 Individuals are not required to possess a Gender Recognition Certificate (GRC) to have the protected characteristic of gender reassignment (as per the Equality Act 2010). 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 PACE 1984 and the Equality Act 2010 and not limited to the provisions of the Gender Recognition Act 2004.

2.2 Annex L, Code C of PACE was introduced in July 2012. Research indicates that as of December 2020 there is a clear variance of approach across forces, outlined below:

- 11 forces permitted searching on the basis of lived gender.
- 18 forces had no policy or a draft policy.
- 7 forces required an individual to possess a GRC before being allowed to search in accordance with their lived gender.
- 1 force decided on a case by case basis.
- 2 forces did not permit transgender employees to conduct strip searches and have only cisgender employees perform them.

2.3 The current arrangement leaves policing in a position whereby forces are adopting different policies; with the inconsistent approach creating potential risk.

3. PROPOSAL

3.1 Adopt the policy outlined in Appendix A, which recommends a case by case approach led by the employee and that also takes into account the detainee's response. Thus, protections provided on the basis of gender reassignment and sex are balanced. This provides forces nationally, and individuals, clarity and consistency of approach.

3.2 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.

3.3 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.

3.4 The reason for a case by case basis is that 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.

3.5 Any policy could be subject of legal challenge however the recommended guidance has been reviewed by external counsel and who advised that the guidance is robust, sensible, practical and defensible (Appendix B).

3.6 Following the guidance allows forces to meet obligations under the Equality Act 2010 while complying with the Police and Criminal Evidence Act 1984.

3.7 It removes a potential employment barrier for transgender individuals to consider the Police Service as an employer of choice for transgender individuals.

3.8 Taking further active steps to increase inclusivity should increase trust and confidence in the police.

3.9 If you have any questions please contact me via ET_NATIONAL_LGBTLEAD@west-midlands.pnn.police.uk

4. CONCLUSION

4.1 There is a need for a standardised searching policy for transgender officers for police forces.

5. DECISIONS REQUIRED

6. Approve the recommendation to adopt a consistent searching policy for transgender officers and staff across all forces.

Deputy Chief Constable Vanessa Jardine, NPCC Lead for LGBT+

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.