


Please cite the Published Version

Little, Catherine, Stephens, Paula and Whittle, Stephen  (2002) The Praxis and Politics of Policing: Problems Facing Transgender People. QUT Law Review, 2 (2). ISSN 2201-7275

DOI: <https://doi.org/10.5204/qutlr.v2i2.101>

Publisher: Queensland University of Technology, Faculty of Law

Version: Published Version

Downloaded from: <https://e-space.mmu.ac.uk/625047/>

Usage rights:  In Copyright

Additional Information: This is an Open Access article published in QUT Law Review.

Enquiries:

If you have questions about this document, contact openresearch@mmu.ac.uk. Please include the URL of the record in e-space. If you believe that your, or a third party's rights have been compromised through this document please see our Take Down policy (available from <https://www.mmu.ac.uk/library/using-the-library/policies-and-guidelines>)

THE PRAXIS AND POLITICS OF POLICING: PROBLEMS FACING TRANSGENDER PEOPLE

CATHERINE LITTLE,^{*} PAULA STEPHENS^{**} AND
STEPHEN WHITTLE^{***}

I INTRODUCTION: FRAMING THE PROBLEM

The praxis and politics of policing in relation to transgender people raises two central issues, firstly, their employment rights as applicants and/or employees of the police service, and secondly, as members of the community being policed and in receipt of the services of the police. The main focus of this paper is the employment status of transgender people in the police service in England and Wales (UK), which is currently in an anomalous position. There have been very few cases in this area. The cases are, *M v Chief Constable of West Midlands Police*¹ and *A v Chief Constable of West Yorkshire Police*,² both of which involved the refusal of employment to a male to female transgender person, and the case of *Ashton v Chief Constable of West Mercia Police*³ in which a male to female transgender person claimed unfair dismissal following transfer to a clerical post in the police service after undergoing gender reassignment.

The first two cases involved transsexual (male to female) women who had undergone gender reassignment and who then applied to become police officers. Both were initially offered training positions, but then the offers were withdrawn. The police services involved stated the reason for the withdrawal was that the two women could not fulfil the full duties required of a police officer, in particular the searching of suspects. In the UK, searching by police officers is regulated by the *Police and Criminal Evidence Act (PACE) 1984*. The regulations include provision for the sex of officers to be the same as the sex of suspects in certain types of search (which will be looked at in detail further in this paper). The argument of the police services was quite simple, they would have what appeared to be normal police women on duty who because of their legal status as men would not be able to perform searches. If they searched women the police service would be liable if a complaint was made, and because of their appearance it would not be appropriate for them to search men. The case of *Ashton v Chief Constable of West Mercia Police* was more complex, but in

* Principal Lecturer, The School of Law, Manchester Metropolitan University, c.little@mmu.ac.uk.

** Research Assistant, Manchester Metropolitan University.

*** Reader in Law, The School of Law, Manchester Metropolitan University
s.t.whittle@ntlworld.com.

¹ (1996) (IT Case No. 08964/96) (unreported).

² (1999) (IT Case No. 1802020/98) (unreported).

³ (1999) (IT Case No. 2901131/98) (unreported).

essence the police officer was moved to an entirely unsuitable civilian role because the police service felt she could not fulfil her duties as an officer on exactly the same basis.

These cases pose some interesting issues for the debates around gender diversity in policing and the need to develop a theoretical framework that goes beyond binary oppositions generated by a lack of recognition of diversity. They also raise the question about the suitability of transgender people to participate in policing as police officers. The argument used to exclude transgender people from policing is that, should they be employed, they would not be able to conduct lawful searches. Thus, transgender people become categorised as “other”, a “third sex”, being neither male nor female for the purposes of conducting searches.

The refusal to employ transgender people in the police service, in the UK, falls within the ambit of general sex discrimination law, details of which are outlined in this paper. This is very different from the position in Australia where transgender discrimination has distinct provisions either of its own, or under sexual orientation law. These arguments justifying the exclusion of transgender people from policing are similar to those presented in the resistance of the police to the incorporation of women and equal opportunities. The essence of discrimination against a transgender person is summarised by a statement made in the case of *M v Chief Constable of West Midlands Police*:⁴

As a legal male, although presenting as a female, searching a female, even by consent would not be genuine, because the person being searched would not know the applicant was a transsexual. If the fact had to be spelt out each time, the force would lose credibility in the community. Within the force, there would be a loss of effectiveness - another officer would always be involved in a search, wasting time and resources.⁵

This statement goes against the grain of current rhetoric on equal opportunities and the management of diversity in policing in the UK.

In Australia, the question of transsexual or transgender police officers appears not to have arisen. The state police forces were contacted and asked whether they had any policy of employing trans police officers and whether they did in fact employ any such officers. Five forces replied, the Northern Territory, Tasmania, South Australia, Queensland and Victoria. All said they had no policy and all said they did not currently employ any trans officers. All of them said they would recruit on the basis of their equal opportunities policies and merit, and so would not automatically exclude trans people from the force. Then again, the very fact that the matter has not yet arisen may imply that trans people do not feel comfortable applying to work in a force that does not have a specific policy of inclusion for trans officers. What is certain is that Australian police forces are not truly representative of all members of the communities they work in. Yet, as states increasingly provide protective legislation to transgender and transsexual people, it is surely the case that it will not be long before a trans person applies to a force.

This paper addresses the approach to equal opportunities and diversity, in particular gender diversity, by police forces in the UK. It will show that police “canteen culture” and the “common sense” approach to an understanding of gender excludes trans people

⁴ (1996) (IT Case No. 08964/96) (unreported).

⁵ Ibid 9, 10.

now, as it did women in the past, from serving as police officers. Then it will consider the legal changes that have taken place since the decision of the European Court of Justice (ECJ) in *P v S and Cornwall County Council*⁶ which provided anti-discrimination protection in employment to transsexual people, and specifically the mechanisms which were then put in place, in 1999, to exclude transsexual people from becoming police officers. The paper then considers the basis of the legal challenges that are being made to this statutory provision, which appear to directly contradict the ECJ's decision, in particular the arguments that are being made in relation to the statutory powers relating to searches, and the same-sex searching requirements of the *Police and Criminal Evidence Act 1984*. It will be shown that the exclusion of trans people from policing because they could not fulfil all the duties of a police officer are based upon imaginary and therefore discriminatory notions. The statistics and figures of the Home Office prove that police officers are very rarely called upon to perform intimate searches, and therefore trans police officers could easily be accommodated within operational mechanisms and organisation. The final part of the paper looks specifically at recruitment policies, procedures and practice and shows that it would take only some small adjustment to make it much more possible for members from minority groups to apply, be seriously considered and even appointed. It is hoped that the lessons learnt from the UK experience will encourage forces in Australia to consider how they could recruit trans police officers, rather than how they could avoid doing so.

II THE POLICE APPROACH TO EQUAL OPPORTUNITIES AND DIVERSITY

On the whole the police approach to equal opportunities in England and Wales, has arisen and developed as a response to external pressures rather than from a genuine commitment to reform from within. Pressure in the form of increasing and high profile sex and race discrimination cases, led Her Majesty's Inspectorate of Constabulary (HMIC) to issue a circular⁷ instructing all police force areas to introduce (where not already in existence) and implement an equal opportunities policy and internal grievance procedures. The circular stated:

The effects of equal opportunities policies will be to secure for the organisation the best recruits from the widest available range of candidates; to ensure that the best use is made of the skills and abilities of all employees; and less directly, to reinforce the professionalism and image of the organisation itself.⁸

More recently the approach to equal opportunities has been to develop and manage diversity to ensure that the police service represents the diverse communities that it polices. The approach now is to do more than simply take measures to further the advance of women, ethnic minorities or any other group.⁹ Thus, the purpose of equal opportunities is about the creation of fairness, where every member of the police service, irrespective of difference, can 'flourish, develop and give their best'.¹⁰

⁶ *P v S and Cornwall County Council* ECJ [1996] IRLR 347.

⁷ Home Office Circular No 87/1989 'Equal Opportunities in the Police Service'.

⁸ *Ibid* para 2.

⁹ Her Majesty's Inspectorate of Constabulary, *Developing Diversity in the Police Service: Equal Opportunities Thematic Inspection Report* (1995).

¹⁰ *Ibid* 9, 10.

Interest in policing and equal opportunities has heightened in the UK since the murder of the black teenager Stephen Lawrence and the subsequent inquiry by Sir W Macpherson into the police investigation of his death.¹¹ This has primarily arisen as a result of the public debates about police institutional racism and organisational/occupational police culture. The impact of the Macpherson Report on developing the diversity approach to managing equal opportunities in policing has been considerable. Her Majesty's Inspectorate of Constabulary for England and Wales has driven the policing agenda to ensure all force areas are becoming more effective in dealing with cultural diversity within policing. Though scholars of policing have welcomed the Macpherson Report, one rather negative effect of its publication is that resources have concentrated solely on race issues. A consequence of the dominance of the public debate on race and policing has been to stifle, if not silence, the debate around gender diversity in policing.

III GENDER DIVERSITY AND POLICING

Research on gender discrimination in the police service has been dominated by studies on women's experiences, concluding that despite the existence of anti-discrimination law and policy, discrimination is still widespread.¹² The volume of research on gay and lesbian officers has been rather more limited¹³ and virtually none exists on the experiences of transgender officers.

It is hardly surprising that studies on gender relations and gender discrimination, or more specifically on women in policing, have developed in the way they have. Policing studies have been dominated by male discourse generated predominantly by male academics writing about policemen. Such discourse has not only failed to take account of women's experiences but has also failed to consider men and masculinities as problematic. Consequently, this has meant that feminist academics have been marginalised in policing studies and studies on women in policing have developed almost as a sub-category of mainstream policing studies.¹⁴

The earlier literature on women and policing reflects a view that the role of women in policing should be limited, or that they should have a specific role to perform, one that does not involve the use of force. Some of the studies on the performance and physical capability of policewomen questioned if policing was a suitable job for women.¹⁵ The common sense, taken for granted assumption that women are not suitable for police

¹¹ Sir W Macpherson, *Report on the Inquiry into the Stephen Lawrence Murder* (London: Home Office, 1999).

¹² S Jones, *Policewomen and Equality: Formal Policy v Informal Practice* (London: Macmillan Press Ltd, 1986); F Heidensohn, *Women in Control? The Role of Women in Law Enforcement* (Oxford: Clarendon Press, 1992); J Brown, 'Aspects of Discriminatory Treatment of Women Police Officers Serving in Forces in England & Wales' *British Journal of Criminology* (Spring 1998) Vol 38 No 2; J Brown & F Heidensohn, *Gender and Policing: Comparative Perspectives* (London: Macmillan Press Ltd, 2000).

¹³ M Burke, *Coming Out of the Blue* (London: Cassell, 1993).

¹⁴ F Heidensohn, *Women in Control? The Role of Women in Law Enforcement* (Oxford: Clarendon Press, 1992)..

¹⁵ D J Bell 'Policewomen: Myths and Reality' (1982) Vol 10 No 1 *Journal of Police Science & Administration*; J Balkin 'Why Policemen Don't Like Policewomen' (1988) Vol 16 No 1 *Journal of Police Science & Administration*.

work is a theme that has dominated both the literature on women in policing, and police cultural norms.

In the world of policing, policemen and policewomen are perceived as the antithesis of one another and must engage in the activities associated with their gender in order to maintain their masculinity or femininity. The experiences of policewomen are often explained in the context of a 'masculine police culture'¹⁶, a culture which perpetuates the underlying gender constructions of man/woman, male/female, feminine/masculine, and treats the definition of these concepts as taken for granted assumptions. Focus on these oppositional categories gives rise to the assumption that these categories are unified, that is, all men, and all women, are alike and should behave in accordance with their gender role. The emphasis being on natural, biological differences.

Police cultural oppositions are based on gender dichotomies with aspects of police work being associated with either female or male characteristics. Hunt has suggested that binary police cultural oppositions based on female/male dichotomies can be identified thus:

female	male
formal	informal
academy	street
inside	outside
management	street cop
administration	crime fighting
social service	rescue activity
paperwork	crime fighting
formal rules	informal rules
legal money	clean and dirty money (corruption)
marital sex	illicit sex
domestic women	whore/dyke
emotional	instrumental
intellectual	physical
clean	dirty ¹⁷

What is suggested by Hunt, is that certain aspects of police work are associated with being female or male and that there are implications for a woman or man who does not adhere to their specific gender role. Thus the woman who becomes disassociated from Hunt's category of domestic woman, by implication becomes a whore or a dyke. This may arise as a consequence of the perception of women generated by male dominated police cultural norms.

Police organisational culture is also based on hegemonic masculinity. The effect of such a culture is to create the existence of rigid in-group/out-group distinctions.¹⁸ The consequences of this dichotomous relationship based primarily on gender and ethnic difference is the structural marginalisation and exclusion of those members of the out-

¹⁶ D Smith and J Gray, *Police and People of London: the PSI Report* (Aldershot: Gower, 1985); M Young, *An Inside Job* (Oxford: Clarendon Press, 1991).

¹⁷ J Hunt, 'The Logic of Sexism Among Police' (1990) Vol 1(2) *Women and Criminal Justice* 11.

¹⁸ N Fielding, 'Cop Canteen Culture' in T Newburn and E A Stanko (eds), *Just Boys Doing Business? Men, Masculinities and Crime* (London: Routledge, 1994).

group. In the context of gender divisions, members of the out-group include female, gay, lesbian and transgender police officers, that is, those that do not comply with (white) male normative heterosexuality. Those in the out-group are constructed as “other”, that is, different from the cultural norm. Discrimination, sexual and non-sexual harassment of officers in the out-group manifest exclusion and marginalisation.

The focus on gender difference to the expense of other factors, such as gendered identities and subjectivities which take account of the fluidity of masculinities and femininities, means that it is difficult theoretically to locate the experiences of discrimination against gay, lesbian and transgender officers in the police service. This is fundamentally because of the failure to recognise and consider the diversity of gender in the context of policing. Consideration of such factors illustrates the diversity of gender rather than the unitary categories of the binary divide.

In the context of police cultural norms, the acceptance of a trans police officer is particularly challenging. Ashton, the male to female transsexual police officer, in *Ashton v West Mercia Police* had a successful and typical male career prior to gender reassignment. What had changed following Ashton’s gender reassignment that would mean she would no longer be a good police officer? Presumably, she could still perform the required tasks of a police officer. The emphasis on the legal status of a trans person, as determined by the birth certificate, resulted in the failure of Ashton’s case. Ashton’s legal status, based on a biological category was the determining factor in the case. Ashton’s gender reassignment was also a transgression of the boundaries of the socially constructed masculine police officer.

A Deconstructing the Boundaries: Challenging Gender Difference and Definitions of “Other”

The construction of gender as based on difference, either biological or socially constructed difference (role theory), poses a problem in attempting to locate gay, lesbian and transgender officers in the police service into a theoretical framework. Their position is better understood from the viewpoint of gendered subjectivities and identities, which gives primacy to ways of thinking and valuing. Furthermore, the focus on ‘identity in the context of masculinities/femininities emphasises how power works through constraining feelings, thoughts and actions’.¹⁹ The cultural values of policing and the acceptance of them by the individual officer (agency) within the structural constraints of policing allows for a better understanding of diversity. Police officers, both male and female, negotiate strategies for dealing with the cultural norms and values of policing. For women officers this can entail choosing to “become one of the boys”. Although police culture can be a controlling force officers can and do challenge that culture. The very nature of undergoing gender reassignment is in itself challenging to police culture. The taking of a sex and/or race discrimination case is another way of challenging the cultural values inherent within policing.

The sexuality of officers has been commented upon in studies of women in policing²⁰ as a means of illustrating the social control of women in a male-dominated organisation,

¹⁹ M Alvesson and Y D Billing, *Understanding Gender and Organisations* (London: Sage Publications, 1997) 97.

²⁰ J Hunt, ‘The Logic of Sexism Among Police’ (1990) Vol 1(2) *Women and Criminal Justice* 11; M Young, *An Inside Job* (Oxford: Clarendon Press, 1991); P Levine, ‘Walking the Streets in a Way

and as an aspect of male/female interaction in the workplace.²¹ However, that social control extends to all those, that is, gay, lesbian and transgender officers who are identified as “other to” male normative heterosexuality which is at the centre of police cultural norms based on hegemonic masculinity. Thus, a focus on gendered subjectivities and identities rather than gender-difference, which is based on comparing men and women in terms of biological and socially constructed difference, is more helpful because it assists in acknowledging the existence of gender diversity. The current emphasis on binary oppositions of gender suppresses/silences the voice(s) of gay, lesbian and transgender police officers by constructing them as other.

IV EMPLOYING THE TRANS POLICE OFFICER

In 1999, after the decision of the European Court of Justice in *P v S and Cornwall County Council*,²² in which it was held that a (male to female) transsexual woman had been discriminated against contrary to the provisions of the European Communities Equal Treatment Directive, the UK Government passed the *Sex Discrimination (Gender Reassignment) Regulations 1999*. The Regulations are intended to prevent discrimination against transgender people, because of their gender reassignment, both in pay and treatment in employment and vocational training. However, in some circumstances the Regulations make provisions, (notably s 7(2) b) whereby it may not be unlawful to discriminate on grounds of gender reassignment, in particular where the job may involve conducting intimate searches pursuant to statutory powers (eg the *Police and Criminal Evidence Act 1984*).

Supposed to end discrimination in the workplace, in effect the Regulations, as regards transgender people who may wish to join Police Services, formalised discrimination in a way that directly contradicts the clear instruction of the European Court of Justice (ECJ) in *P v S and Cornwall County Council*. The regulations have, in effect, resulted in a loss of many of the rights which had been won by transgender people through the decision of the ECJ.

Advocate-General Tesouro pointed out, in his opinion to the ECJ, that for the purposes of the Equal Treatment Directive, sex is important as a social convention. Discrimination is frequently to do with the social roles of women rather than their physical characteristics. Similarly discrimination suffered by transgender people is linked to moral judgements, which have nothing to do with their abilities in the sphere of employment.²³ The Advocate-General continued that as the Court has a duty to ensure that the general principles of Community Law are upheld, and as these include a respect for certain fundamental rights, one of which is the elimination of discrimination based on sex as expressed in the directive, then the directive must be held to cover changes from one sex to another as much as it covers whether a person is discriminated against because they are a man or woman.²⁴

No Decent Woman Should: Women Police in World War One' (March 1994) *Journal of Modern History* 66.

²¹ S E Martin, *Breaking And Entering: Policewomen on Patrol* (Berkeley: University of California Press Ltd, 1980) 208.

²² Above n 6.

²³ Advocate-General's Opinion in *P v S and Cornwall County Council* ECJ [1996] IRLR 347, para 20.

²⁴ *Ibid* para 14.

V THE *SEX DISCRIMINATION (GENDER REASSIGNMENT) REGULATIONS 1999*: THE SPECIFICS OF INSTITUTIONALISED DISCRIMINATION IN POLICE EMPLOYMENT

The Regulations contain, in ss 4 and 5, several new insertions amending s 7 of the SDA (ss 7B(2)(a), (b), (c) and (d)) and s 19 of the SDA which introduce new ‘Genuine Occupation Qualifications’ (GOQ’s) relating to transgender people. Despite Advocate-General Tesouro’s clear and express dismissal of the treatment of transgender people as belonging to a “third sex” these new GOQ’s, without a doubt, intimate that transgender people are neither male nor female for a period of time or permanently in those circumstances where they have to perform intimate physical searches, or seek employment in a private home. The decision of the ECJ made it quite clear that transgender people are not to be regarded as belonging to a third sex.²⁵ The exclusion of transgender people from all “sex-specific” tasks is fundamentally in breach of EC non-discrimination legislation as it is, ipso facto, incompatible with the overall purpose of the Equal Treatment Directive, and the comparative approach adopted by the ECJ.

The *Sex Discrimination (Gender Reassignment) Regulations 1999* by the inserted s 7B(2)(a) creates a GOQ where

- (a) the job involves the holder of the job being liable to be called upon to perform intimate physical searches pursuant to statutory powers.

Presumably this is intended to allow police services not to employ or continue the employment of transgender people. The ambit of this and s 7B(2)(b) is very broad allowing employers to exclude transgender people whether before, during or after completion of gender reassignment treatment. Further s 7B(2)(b) in effect allows discrimination, by an emanation of the state, which was specifically barred by the decision in *P v S and Cornwall County Council*.

This section is clearly contrary to EC law as it stands. It seeks to bar transgender employees from carrying out physical searches on *either* sex, hence treating transgender officers as belonging to a third sex, a point the Advocate-General to the ECJ was clear to make clear; transgender people are not a third sex.

No justification of such sex discrimination on grounds of transgender could be invoked pursuant to Article 2.2 of the Equal Treatment Directive, as neither being a man nor being a woman constitutes a GOQ for employment in a profession carrying out intimate searches. For example in the police services, *both men and women become police officers and they carry out searches*. In excluding transgender people from any employment requiring the carrying out of such searches, the Regulations seek to justify the initial discrimination against transgender employees by relying on the fact of the discrimination itself. In order to justify sex discrimination under Article 2.2 of the Equal Treatment Directive, which allows exceptions to equal treatment in certain circumstances, however, an objective factor independent from the discrimination has to be relied upon (other than the non-recognition of a transgender person’s change of legal status). Even presupposing that a justification could be adduced for barring transgender people from performing intimate physical searches this would not justify the exclusion of transgender employees from a sector of employment (“job”) altogether (rather than

²⁵ Ibid para 25.

solely from tasks of a sex specific nature). The mandatory nature of the principle of equal treatment in EC law requires strict adherence to the principle of proportionality to ensure that ‘derogations remain within the limits of what is appropriate for achieving the aim in view’.²⁶

As the case of *Johnston v Chief Constable of the RUC* established (this was an early case involving the employment of women as police officers in Northern Ireland), such reconciliation may require, inter alia, the re-allocation of tasks and would not allow the taking into account of financial or organisational concerns as material factors. Crucially to the inserted s 7B(2)(a) of the SDA, ‘the article 2(2) exception can only be invoked in relation to particular duties not general activities’.²⁷

The operational requirements of policing, including searching pose some interesting issues for transgender officers, particularly s 55 searches under the *Police and Criminal Evidence Act 1984*. The question of an officer’s duties is both one of operational requirements and those which are contained in the contractual employment arrangements between an officer and the police service. Where there are no standard practices, the details are matters for police managers to decide according to their resources and objectives allowing for local practice and history of the particular service and the nature of the locality policed.

The duties of the police are very diverse, and it is clear that not all police constables perform, or are expected to perform, exactly the same duties or all possible duties. Police services are made up of different types of people in order to relate in different ways, and to different issues, in the community. Different officers have different strengths. The idea that they should be homogenic is not now considered to be desirable – note the concern about racism in the police and the need to attract recruits who can reflect different backgrounds and life experiences within, and to, the police, to ensure cultural diversity. It is also increasingly recognised within the police service itself and generally that the public interest requires the same approach to be adopted in relation to sexual orientation. Our police services are in general and increasingly required to be dynamic institutions adapting and responding to changing legislative, operational, social and cultural realities.

Police powers however are different from police duties, in that whereas a duty might be considered part of the contractual obligations of a police officer, a power enables an officer to fulfil those duties. There are three relevant police powers in relation to searching:

The power to stop and search under the *Police and Criminal Evidence Act 1984* (PACE) s1. Code A para 3.5 which requires that any search involving more than the removal of outer clothing must be by an officer of the same sex and must not without consent be in the presence of an officer of the opposite sex; searches of a detained person at a police station as part of the “logging in” process under PACE s 54 must not involve an intimate search but must be conducted by a constable of the same sex ; and, under PACE s 55 persons of the opposite sex may not carry out intimate searches.

²⁶ *Johnston v Chief Constable of the RUC*, Case 222/84 [1987] ECR 1651, para 38.

²⁷ Ibid.

There is also a requirement in Code A para 3.1 that ‘every reasonable effort *must* be made to reduce to a minimum the embarrassment that a person being searched may experience’.

It is these police powers which have been used in effect to attempt the avoidance of employing transsexual police officers, using the “same sex” requirements to problematise the issue.

Similar provisions apply in Australia, however they often have a “get-out” clause. For example, the Australian Capital Territory in s 54 of the *Crimes (Forensic Procedures) Act 2000* only requires that intimate searches or searches involving the removal of clothing be conducted by an officer of the same sex as the suspect, ‘if practicable’.

A *PACE Section 1 and Code A 3.5.*

These provisions govern the powers to stop and search by patrolling police officers and arise only where an officer has reasonable grounds for suspecting the person is in possession of certain identified prohibited articles. It is the Code and not the Act that specifies the precise manner in which the search is to be carried out. Section 67, ss 10 and 11 provide that a breach of the code requirement does not, of itself, amount to a crime or civil offence. Such breach may be used, however, to show that any of the well established criminal or civil offences relating to the individual rights over his person and property have been infringed, for example assault or trespass.

Article 3.5 of the Code restricts searches in public to ‘superficial examination of outer clothing’. Any officer of either sex carries out such a search on suspects. More thorough searches involving removal of the ‘outer jacket, gloves, headgear or footwear’ should be conducted out of the ‘public view, for example in the police van or at the station’. Again any officer of either sex can carry out such a search on suspects. Such searches, ie non-sex specific searches, constitute the overwhelming majority of searches carried out by patrolling officers.

It is only where the officer considers it necessary to remove more than an outer coat, jacket, gloves or footwear that there is a requirement that the officer be of the same sex and may not be in the presence of anyone of the opposite sex without consent. This again should be conducted out of public view the example being given of the police van or the police station.

B *PACE s 54*

Section 54 searches are made as part of the “logging in” when a person is detained at a police station. They must be made at the police station and a constable of the same sex must conduct them.

C PACE s 55

PACE s 55 searches are the only searches that could truly be described as intimate searches, ie those involving the searching of intimate areas of the body. These searches must be carried out by a person of the same sex. However, a 'suitably qualified person other than a police officer' must carry out intimate searches unless an officer of the rank of superintendent or above authorises otherwise. A suitably qualified person is a registered doctor or nurse, and such a person must carry out all searches for drugs. It is only in the case of harmful articles (ie dangerous weapons) that a constable may carry out the search, and then only if it is not practicable for a suitably qualified person to perform the search. Para 3.1 of the Code states that 'every reasonable effort must be made to reduce to a minimum the embarrassment that a person being searched may experience'.

D PACE s 1 Searches: A General Overview

The available Home Office statistics²⁸ from 1996, show that during that year there were 814,500 searches of persons or vehicles using police powers under s1 of PACE. The statistics do not record the gender of those who were searched, nor of the officers who searched suspects. Neither are the statistics broken down into the categories of superficial searches, which may be performed by any officer, or more thorough searches, including the removal of outer clothing which are required under PACE to be performed by someone of the same sex as the suspect.

Thus with around 125,000 "front line" police officers, who are primarily police constables, we can say that on average each officer would perform an average of 6.5 searches per annum under PACE s 1. However, very few of these would be "sex specific" searches and even where sex specific searches are called for, as these must take place out of the public view, they will take place in a police van or station where there are likely to be several officers available to perform the search.

As regards the gender of police officers, 14.6% of officers are women.²⁹ However if we extrapolate from the prison population figures, it must sensibly be considered the case that the majority of suspects are undoubtedly male. In 1997 there were 46,370 sentenced males in England and Wales as compared to 2,080 sentenced females.³⁰ This means that only 4.3% of those in prison were female. If a similar proportion of those searched in 1996 were female then of the 814,500 searches under PACE s 1, only around 35,000 of those searches would be of women. This means that there is a general disproportion of same gender officers to suspects, and we must assume that provisions already exist in the day-to-day management of a police service to ensure that appropriate officers are available if more thorough s 1 searches are required.

²⁸ Home Office Research and Statistics Directorate *Home Office Statistical Bulletin*, Iss 27/97, (4 December 1997).

²⁹ Home Office, *Police: Serving the Community*, (1997) 4.

³⁰ P White, *The Prison Population in 1997: A Statistical Review*, Home Office Research and Statistics Directorate, Research Findings No 76.

E *PACE s 1 Searches: The West Yorkshire situation*

According to the Home Office statistics,³¹ from 1996, there were 14,447 s 1 searches carried out in the West Yorkshire region. The West Yorkshire police service had a total police workforce of 5,142 as of March 31st 1996.³² Of these 4,754 were of the rank of sergeant or constable, which are those officers most likely to be involved in PACE s 1 searches. As such, in West Yorkshire, each front line officer averages 3 PACE s 1 searches per annum.

708 officers of that rank were women, 14.8% of the service. If we estimate that of the 14,447 s 1 searches, only 621 were likely to be of women, then in fact each female officer is not likely to reach an average of 1 search per annum. Taken further, if the number of s 1 searches which require a same sex officer are a much smaller number than the total number of s 1 searches, then a police service such as the West Yorkshire Police service must already be making day to day operational adjustments to ensure that an officer of the same gender is available. There is already likely to be a requirement for proportionally (and numerically) more of the thorough type of search of male suspects, than there are proportionally male officers available.

It is therefore apparent that in many circumstances where a more thorough PACE s 1 search is required, that because a disproportionate number of suspects are male (as opposed to the proportion of police officers who are male), female officers are disqualified from undertaking these searches, and hence other arrangements must be made. Generally as these searches have to be undertaken out of the public view, there are several police officers present either in a police van or at a police station, and these arrangements are quite easily made.

F *PACE s 54 Searches*

A study by Tom Bucke and David Brown³³ showed that only 3% of detained suspects were strip-searched, the majority being searched in a non-intrusive manner. In only 3% of these cases according to Bucke and Brown, was a nurse or doctor present. However, it would be the case that all of these searches would take place in a police station, under PACE s 54.

Given that searches under s 54 take place in the police station, there are likely to be several officers available who could carry out the search. Again there would be a higher proportion of men detained and searched under s 54, as opposed to a smaller proportion of male officers available and visa versa for women and female police officers.

G *PACE s 55 Searches*

Intimate searches are governed by PACE s 55. These are searches involving a physical search of body orifices. They may only be carried out if there are reasonable grounds to believe a suspect may have concealed on him or her something which could be used to

³¹ Above n 26.

³² West Yorkshire Police, 'Strength and Workforce Distribution', 11/05/98.

³³ T Bucke and D Brown, *In Police Custody: Police Powers and Suspects Rights under the Revised PACE codes of Practice* Home Office Research and Statistics Directorate, Home Office Study 174, 7.

cause physical injury, or in the case of suspected couriers or dealers only, a Class A drug. All PACE s 55 searches must be carried out in a specified institution. A 'suitably qualified person other than a police officer' must carry out intimate searches unless an officer of the rank of superintendent or above authorises otherwise. A suitably qualified person is a registered doctor or nurse, and such a person must carry out all searches for drugs. In the case of harmful articles, a constable (authorised by an officer of the rank of superintendent or above) may carry out the search, if it is not practicable for a suitably qualified person to perform the search.

According to the Home Office, in 1996,³⁴ only 132 PACE s 55 intimate searches were carried out, throughout England and Wales, of which only four were carried out by a police officer alone. Another 30 were performed in the presence of a suitably qualified person. This means that 98 (74%) were carried out by a doctor or nurse rather than a police officer. The statistics for the West Yorkshire Police Service region in 1996 record only five such searches being carried out in, and only one of these was carried out by a police constable. These figures are consistent with the Bucke and Brown study mentioned above.³⁵

The day to day operational implications for a police service which employs a transgender person as an officer, such as they relate to the requirements of PACE and its Codes, are minimal. Police services already have to make operational allowances for the disproportionate ratio of male and female officers to suspects. It is highly likely that many female police officers will rarely, if ever, have the experience of being called upon to search suspects when the sex of the officer is relevant to the search which is taking place. Searches are a limited part of a constable's duties, and the requirements for strip or intimate searches are such that they can be easily accommodated to operational requirements.

The conclusion must be that there is a possible "Francovich" action,³⁶ whereby an individual can sue the state for damages if government has not met its obligations under European Community law, and the individual has suffered loss as a consequence. This could be brought by a serving police officer who is dismissed, or a transgender person who is not appointed to serve because of this section.

The only solution would be to remove s 7B(2)(a) completely from the regulations. However, in the meantime, until decided upon by the ECJ, for the protection of transgender people who do serve in police services or similar professions there could be included in any supplementary guide to the Regulations a statement such as:

Where a transsexual person might incur a civil or criminal liability for assault, if they perform a search of an intimate nature, which statutory powers require to be performed by a person of the same sex as that of the person being searched, then it is the transsexual person's responsibility to bring the possible legal anomaly of their status to their employer. If they do not do so, then the employer will incur no vicarious liability as regards any intimate search that the employee carries out.

³⁴ Above n 26, Table 7.

³⁵ Above n 31, 9.

³⁶ *Francovich v Italian Government* ECR I-5357 [1993] 2 CMLR 66.

As said earlier, in Australia, the “searching” provisions provide much more flexibility than those contained in PACE, so there appears no reason whatsoever not to employ suitably qualified transsexual and transgender people to be serving police officers. However, before Australians could hope to see real diversity within their police, they must first encourage and enable people from minority groups such as the transgender community to apply. Applications can only turn into real jobs if there is then sufficient flexibility in the recruitment process to ensure that arbitrary and irrelevant features of the individual are not a bar. The next section of this paper looks at the recruitment literature and criteria of London’s Metropolitan Police Force and how this could be altered, without altering its substance, to encourage the application and appointment of transsexual people.

VI DIVERSIFYING RECRUITMENT TO INCLUDE TRANSGENDER PEOPLE

In order to maintain law and order the police must acquire the consent of the public.³⁷ In pursuit of this, the service requires the trust and confidence of the community in which it operates. Section 8 of the *Police Act 1996* requires police authorities annually to set out what consultation has taken place between each force and its local community. Thus, the service has a legal requirement obligating it to interact with the diverse people it serves.³⁸

Unless dialogue translates into the context of employment policy, so that transgender people and others are able to police their communities as Constables in the service, the social perspectives and understanding of transgender people (and other diverse people) will never be fully realised.³⁹ Although in a racial context, the views of Inspector Paul Wilson giving evidence to the Stephen Lawrence Inquiry are just as applicable to transgender people. He pointed to the fact that:

"...predominantly white officers only meet members of the black community in confrontational situations, (consequently) ...they tend to stereotype black people in general. This can lead to all sorts of negative views and assumptions about black people."⁴⁰

Thus, dialogue alone will not shift police attitudes to transgender people. It is an employment issue, without which negative stereotyping and institutional transphobia will continue to thrive. As Her Majesty's Inspectorate points out:

"... there is a direct and vital link between performance and the way an organisation obtains the best people and develops the knowledge, skills and attitudes of those newcomers and of existing staff."⁴¹

³⁷ Her Majesty’s Inspectorate of Constabulary, ‘Policing London ‘winning consent’’, (2000) London: Home Office.

³⁸ Home Office, ‘Winning the race - embracing diversity’, (2001) London: Home Office Communication Directorate.

³⁹ Her Majesty’s Inspectorate of Constabulary, ‘Police integrity’ (1999) London: Home Office.

⁴⁰ Sir William McPherson, ‘The Stephen Lawrence Inquiry’ (1999) London: The Stationery Office.

⁴¹ Her Majesty’s Inspectorate of Constabulary, ‘Developing diversity in the police service’ (1995) London: Home Office.

VII BARRIERS TO THE RECRUITMENT OF TRANS PEOPLE TO THE POLICE SERVICE

In seeking to examine the barriers that exist to the recruitment of transgender people, one of the authors of this paper was asked to advise the Metropolitan Police Service. The report was to comment on the limitations of the “searching” exception, and advise on how dual, triple and multiple discrimination impacted on the MPS's ability to attract new recruits.⁴² Hence it was considered that any policy that discriminated against transgender people was also a barrier to the recruitment of male, female, ethnic, gay and lesbian officers also.⁴³

In recounting one example, it was observed that, while applicants to the service were told there were no set qualifications needed to become a police officer,⁴⁴ they were nevertheless asked to provide a list of all qualifications or examinations taken, or due to be taken.⁴⁵

Since many qualifications are gender specific and require dates in order to be verified, this requirement may not simply facilitate age or sex discrimination against transgender people, but also disproportionately affect all minority people who, through decades of social and economic exclusion, may have been afforded the least opportunity of access to education and work related training.

The advice, in this respect, was that application forms should focus on achievements rather than qualifications. These would not only be less reliant on historical gender markers and chronological details, but additionally, would embrace a broader area of experience more relevant to members of those diverse groups the service sought to represent.⁴⁶

VIII CRITERIA FOR ENTRY TO THE SERVICE

Generally, on examination of a range of recruitment literature, it was apparent that no common standard existed for appointment to the office of Constable. Candidates were selected according to the range of criteria determined individually by forces, services or constabularies. Thus it was possible, (for example), for transgender people to serve in the West Mercia Constabulary,⁴⁷ whilst a ban existed on recruitment in West Yorkshire.⁴⁸ The prospect of appointment was therefore a lottery, devised not by matching personal skills, attributes and abilities to the requirements of the job, but by the differing criteria of a particular force in a postcode area. This has been further highlighted by recent newspaper reporting in the UK regarding the employment of a male to female transgender person by the North Yorkshire Police. Sergeant Nicola Lamb appeared at a press conference with the Chief Constable of North Yorkshire who

⁴² P Stephens, ‘Report to the Metropolitan Police Service Gender Project - assessing the impact of the MPS application form on gender diversity in the service’ (2001) (unpublished).

⁴³ Ibid 1.2.2.

⁴⁴ Metropolitan Police Service (2000), ‘Application pack - Application form Guidance Notes’ London: Metropolitan Police Service, s 2.

⁴⁵ Metropolitan Police Service, ‘Application for appointment as Police Constable’ (2000) London: Metropolitan Police Service, s 2.

⁴⁶ Above n 39, 2.3.2.3.

⁴⁷ See West Mercia Constabulary, ‘Managing diversity policy statement’ (2001) <<http://www.westmercia.police.uk/local.htm>>.

⁴⁸ See *A v West Yorkshire Police* (1999) (Case No. 1802020/98) (unreported).

announced the existence, in his force, of two transgender police officers.⁴⁹ However, whilst North Yorkshire Police is ‘celebrating gender diversity’ in its force, its neighbouring force West Yorkshire is currently appealing at an Employment Appeal Tribunal, the decision in *A v Chief Constable West Yorkshire Police*.⁵⁰

Similarly, the report to the MPS considered the application process extremely bureaucratic, inflexible and disadvantageous to a service that sought to represent the diverse community. Information sought by the application process was duplicated on numerous occasions, making forms and the medical questionnaires superfluous, time consuming and difficult to complete. It is believed such a process served only to demotivate those under-represented from making application.⁵¹ This issue is one that was recognised by Her Majesty's Inspectorate of Constabulary, who pointed out that ‘Officers who had recently joined the MPS, and were still in their probationary period found recruitment to be a slow bureaucratic process’.⁵²

It was equally apparent that some aspects of the application forms and medical questionnaires were unlawfully serving as a barrier to the recruitment of diverse groups. The medical criteria applied, specifically sought to expand the definition of “disability” apparently facilitating indirect discrimination. The MPS thus tended to indirectly favour young, physically fit applicants possessing a minimum time frame of legal responsibility and life experience.⁵³ Arguably, the service therefore attempted to construct the society it sought to reflect rather than the society that actually exists. This was despite HMIC's belief that:

Positive and sensitive policing has a particular role in the quality of life of all communities. It is not, however, the sole determinant of quality of life. The police service serves society: it does not construct it.⁵⁴

It is considered that the police service should assess (in terms of its 21st century ‘intelligence-led and technology-based’ *fair and responsive* policing role) whether it is ineffectual to exclude any group of people from serving, whether of ethnic background, disabled, gay, lesbian, trans, - or those who self- identify with a combination of those labels. As Her Majesty's Inspectorate pointed out in the preface of its publication ‘Developing Diversity in the Police Service’:

In today's diverse society, policing calls for a wider range of skills and abilities than ever before. All police forces need to use and develop their existing staff - police officers, civilian colleagues and special constables alike - and to attract and nurture talent from within the communities they serve. Striving for real equality of opportunity within the Service will make efficient use of our human resources and demonstrate our commitment to fair and responsive policing.⁵⁵

⁴⁹ *The Guardian*, 21 July 2001.

⁵⁰ Above n 44.

⁵¹ Above n 40, 2.1.4 .

⁵² Her Majesty's Inspectorate of Constabulary, ‘Policing London ‘winning consent’’ (2000) London: Home Office 5.15.

⁵³ Above n 40, 2.1.4.

⁵⁴ Her Majesty's Inspectorate of Constabulary, ‘Winning the race - embracing diversity’ (2001) London: Home Office Communication Directorate 1.7.

⁵⁵ Her Majesty's Inspectorate of Constabulary, ‘Developing diversity in the Police Service’ (1995) London: Home Office, Preface.

IX CONCLUSION

The employment of transgender people in the police service is important for two reasons, firstly, their employment rights are recognised in law, and secondly, if there is supposed to be a police service, which represents the diverse community it serves, then it is essential to have transgender police officers. This paper has attempted to address the complexities that arise in the context of policing for trans people who either apply to the police service for employment, or who have been dismissed as a consequence of their gender reassignment.

Many of the problems faced by trans people in the field of employment generally, are gradually being addressed through use of the ECJ and ECHR, and are becoming incorporated into national law in the UK. The problem will remain for policing as long as the legal status of trans people, as fixed by their biologically determined sex recorded at birth, continues to be the argument used to prevent trans people acting as police officers. The legal sex of a person is rigidly defined in law as biological sex, and this also poses problems for trans people in other aspects of their lives. The ECHR in the cases of *Goodwin & I v United Kingdom Government*,⁵⁶ has just held, as this paper is being completed, that the refusal to change the birth certificates of transsexual people is a breach of Article 12 of the European Convention on Human Rights. However, should there be a change in the law, which allows for the alteration of the birth certificate to record the sex of a person following gender reassignment, the problems for policing may not immediately vanish.

One of the problems that is likely to remain in policing for transgender officers relates to the continuing existence of a police organisational culture in which those who cannot ascribe to the white hetero-normative culture will remain part of the “out-group”. Changing the culture of the police organisation is as difficult as changing the law to recognise the new status of a trans person. In order that trans people can be accepted into policing it is necessary for the police service to demonstrate a commitment to their employment. As this paper demonstrates there seems to be an inequitable situation in relation to the recruitment of trans people into the police service, that is, the post-code lottery. What appears to be the situation is that some police force areas are more committed to the recruitment of trans people than others and where they are it seems it is possible to overcome the problems in relation to searches.

The average number of intimate body searches conducted by police officers on routine duty is in reality, a very small part of their overall role. There are many aspects of the police role that require general “people” skills rather than anything else. The argument that policing is an unsuitable job for a woman, based on the need for physical strength, is now a dead argument. There are still existing barriers to women’s progression in policing but these are linked to police culture rather than the argument that women are somehow biologically incapable of doing the job. In order that trans people be accepted into policing there needs to be a change to police organizational culture and this will only occur if there is a commitment to change at the senior level.

⁵⁶ *Christine Goodwin v UK Government*, application No. 28957/95 (1995) ECHR; *I v UK Government*, application No. 25608/94 (1994) ECHR.

The starting point for instigating change that will allow for the recruitment of trans officers is a clear statement in the equal opportunities policy of each police service area. This alone is not enough, as this paper has highlighted, there are some of the barriers to the recruitment of trans officers operating in the recruitment process. A reassessment of the qualities required to be a police officer and a focus on achievements of applicants would be a step forward in the recruitment of trans officers. If there is a genuine commitment to developing diversity in the police service, and providing a police service that can police a diverse community, then the issues raised by this paper need to be addressed.