Neutral Citation Number: [2025] EWHC 504 (Admin)

Case No: AC-2024-LON-001467

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/03/25

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

- -

Between :

THE KING **(on the application of VRP,** **a protected party, by her litigation friend SR**	**Claimant**
- and -	
THE ROYAL BOROUGH OF KINGSTON UPON THAMES	**Defendant**

- -
- -

Ms K Monaghan KC and Ms S Steinhardt (instructed by **Miles & Partners LLP**) for the **Claimant**
Mr B Tankel (instructed by **South London Legal Partnership**) for the **Defendant**

Hearing date: 6 February 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 7 March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HEATHER WILLIAMS

Introduction

1. The Claimant is a 19-year-old woman with severe physical, learning and Autistic disabilities. In consequence, she needs full-time one-to-one care. From November 2022, she was referred to the Defendant's Adult Social Care services. At present, the Defendant makes direct payments to her parents who use these to arrange provision of her care needs. However, they anticipate that there will come a time when they are not able to do this, and the Claimant will fall under the direct care of the Defendant. Her parents express concern that the Defendant does not operate a system for the provision of adult social care that ensures, or has the object of ensuring, same-sex personal and intimate care for women service users. Allied to this, they believe that the Defendant should record the sex (as well as the gender) of service users, when carrying out its functions under the Care Act 2014.

2. By order of 17 May 2024, MacDonald J anonymised the names of the Claimant and her litigation friend and directed that pursuant to section 11 of the Contempt Court Act 1981, there must be no publication of the identity of the Claimant or her litigation friend or of any matter likely to lead to their identification, in any report of, or otherwise in connection with, these proceedings.

3. Permission to apply for judicial review was granted by Foster J on 16 August 2024.

4. Reflecting the approach taken by the parties in articulating their respective cases, references to "sex" in this judgment are to biological sex, rather than to gender, which I refer to specifically where it is material to do so.

5. Section 3 of the Claim Form recorded that the challenges were to: (1) the Defendant's policy "of not recording the sex of services users when carrying out assessments for social care under the Care Act 2014 and/or its refusal to record the Claimant's sex in her care plan or other data"; (2) the Defendant's policy of recording the gender of service users as a mandatory category when carrying out assessments for social care under the Care Act 2014; and (3) the Defendant's failure "to operate a system that allows for same-sex personal care and/or its refusal to contemplate commissioning such services". The pleading stated that these matters were the subject of a decision made on 29 January 2024. This date was a reference to a letter to the Claimant's father from Rachel Lukwage, Corporate Head of Service Localities / Community Learning Disability & Transitions Teams, setting out the outcome of a Stage 1 Adult Social Care Complaint Review undertaken in response to his letter of 27 April 2023.

6. However, the position has evolved quite considerably from the time when the claim was first pleaded. The Claimant no longer pursues the second challenge, as it is accepted that the Defendant is obliged to record the gender of service users in light of directions issued by NHS England, pursuant to powers conferred by sections 254 and 259 of the Health and Social Care Act 2012. As regards the matters raised by the first and third challenges, it is now common ground that: the system operated by the Defendant *allows for* same-sex personal care to be provided to service users; the Defendant does not *refuse* to record service user's biological sex; the Claimant's sex has been recorded in her care plan; local authorities do have the power to provide

personal care to service users on a same-sex basis; and it is permissible for social workers to ask the sex of service users.

7. In light of this changing picture, the apparent measure of agreement and a lack of clarity on this in the parties' skeleton arguments, I considered it was particularly important to have a clear list of agreed issues in this case. A list had not been provided, as required by CPR 54A PD para 14.7. Accordingly, I directed that an agreed list of issues was to be filed no later than 2pm on 5 February 2025.

8. An agreed list of issues was duly provided. To a significant extent the contents of this document supersede the Claimant's pleaded claim. Whilst no formal application was made to amend the Statement of Facts and Grounds ("SFG"), Mr Tankel did not raise any objection to this, realistically accepting that he and his client had prepared for the hearing on the basis of the case that was identified in the list of issues (and perhaps also mindful of the fact that the Defendant's position has also moved significantly).

9. I will reproduce the relevant parts of the agreed list of issues relating to liability (with the cross references to passages in the skeleton arguments and the pleadings omitted). The following abbreviations are contained within the text: "C" for Claimant; "D" for Defendant; and "PSED" for the public sector equality duty imposed by section 149 of the Equality Act 2010. I adopt the PSED abbreviation in this judgment and I will refer to the alleged duty described at para 1 of the list as "the Combined Duty", to distinguish it from other duties that are referred to in this case.

> "**THE DUTY**
>
> 1. Do any of the pleaded duties under the Care Act 2014, the Human Rights Act 1998 and/or the Equality Act 2010 in combination give rise to a duty to operate a system that ensures or which has the objective of ensuring the provision of same-sex personal/intimate care for female service users by default, unless there is a request or preference or it is assessed to be in the service user's best interests to have care delivered on some other basis.
>
> *C avers that they do.*
>
> *D contends that they do not. Instead, the outcome required in any given case will depend upon a consideration of the application of all the principles at section 1 of the Care Act 2014 to the particular facts of the case. In any event, D contends that the outcome under the additional provisions relied upon by C would be no different than that under s.1 of the Care Act 2014 where the result of an assessment is same-sex care on the facts of most cases.*
>
> **GROUND 1A**
>
> 2. Does the statutory duty (if it exists) or the constituent duties thereof (in particular, the PSED), require D to ensure that the biological sex of its service users are recorded and, if so, is that requirement met?

C contends that it does, because not doing so precludes D from being able to comply with its duty to have in place a system that ensures same-sex care. Further, because D is not recording the protected characteristic of sex when this is relevant to the performance of a public function, it cannot have the information available to it to answer the statutory questions raised by section 149 Equality Act 2010.

C contends that, taking D's evidence at its highest, it does not record the sex of the service user but assumes it.

D accepts that it should record the biological sex of service users in any case in which it is relevant to the exercise of its functions under Part I of the Care Act 2014.

D contends that it always does record biological sex where it is relevant to Care Act functions but does not necessarily do so in terms.

……

GROUND 3A

6. Is D's system for the assessment, support planning and commissioning of personal care adequate to fulfil its duty (if it exists) to have in place a system that ensures or which has the objective of ensuring the provision of same-sex personal/intimate care?

C contends that D's practices, even taking its evidence at its highest, unlawfully fail to meet its duties and obligations.

D contends that, if such a duty exists, then D discharges it because its system always provides same-sex intimate care where appropriate (which in practice is in all cases).

GROUND 3B

7. What was the status and legal effect of D's letter dated 29 January 2024?

8. Did the position set out in D's letter of 29 January 2024, and/or does its system for the assessment, support planning and commissioning of personal care, unlawfully discriminate against C contrary to section 19 Equality Act 2010?

C contends refusal to implement a system for same-sex personal care as contained in its letter of 29 January 2024 and/or its system for the provision of personal or intimate care, puts female service users at a particular disadvantage compared to male service users and puts her at that disadvantage.

> *If D's letter of 29 January 2024 communicates a refusal to provide same-sex care, D does not seek to defend it. D contends that its system does not discriminate because it does not commission C's care. In any event, D contends that its system does not put anyone at a particular disadvantage. D seeks to contend that, if it does, then it is nevertheless a proportionate means of achieving a legitimate aim of providing adult social care because of the need to balance competing factors as set out in relation to Ground 1. This gives rise to the following procedural issues: (1) whether justification is pleaded and (2) whether if it is not D should be permitted to amend its Detailed Grounds to do so."*

10. Ms Monaghan KC confirmed at the outset of her submissions that the pleaded Ground 1B contention that the Defendant had misdirected itself in law and/or fettered its discretion (which arose from a passage in the 29 January 2024 letter that referred to "the assumption that transgender employees would never be excluded from providing a service of the council"), was no longer pursued in light of the Defendant's acceptance that local authorities do have the power to provide personal care to service-users on a same-sex basis and that the Equality Act 2010 does not preclude this.

11. I asked Ms Monaghan to identify the Defendant's policies that were now relied upon for the purposes of the Ground 1 and Ground 3 challenges. She said that for the purposes of Ground 1, this was the absence of a policy *requiring* the recording of the biological sex of its services users, as absent such a policy, the Defendant cannot discern if same-sex care is being provided. In relation to Ground 3, she identified the challenge as directed to the absence of a policy *requiring* there to be same-sex care, save where there has been the expression of a contrary choice or where the service user's best interests indicate otherwise.

12. The agreed list of issues also addressed relief. The Claimant submits that a declaration should be granted and the Defendant resists this. I asked Ms Monaghan to provide a draft of the declaration sought, so that there was clarity as to the Claimant's case in this regard. The wording provided was:

> "It is declared that the Defendant's practice in relation to the assessment, support planning and commissioning of personal care is unlawful in that it fails in the following ways to adequately ensure that female service users with an assessed need for personal/intimate care, receive their care from a carer of the female sex. Those are: (i) the failure to set out any policy or practice in writing; (ii) the failure to routinely record the sex of service users; and (iii) the failure to ensure that care workers are allocated to service users according to their sex."

13. As confirmed in the list of issues, the Claimant also contends that the "decision of 29 January 2024" should be quashed. The Defendant's position is that such relief should be granted: "only to the extent that it can be described as a 'decision' and is not aligned with D's actual practices".

14. The Claimant relies upon the following evidence: three witness statements made by her mother SR on, respectively, 26 April 2024 ("SR1"), 28 October 2024 ("SR2") and 3 December 2024 ("SR3"); and a statement dated 3 December 2024 made by Lou Crisfield, a partner at Miles & Partners LLP ("Crisfield 1").

15. The Defendant relies upon a statement from Siobhan Reilly, the allocated social worker for VRP from November 2022 to June 2023 ("Reilly 1") and two statements from Katie O'Driscoll, the Defendant's Assistant Director for Operations for Adult Social Care made on 15 October 2024 ("O'Driscoll 1") and 3 February 2025 ("O'Driscoll 2").

16. The structure of this judgment is as follows:

The material facts:

The Claimant: para 17

The concerns of the Claimant's parents and the start of the assessment process: paras 18 – 26

The FOIA request: paras 27 – 28

Finalisation of the Claimant's needs assessment: paras 29 – 33

Ms Reilly's account of the provision of same sex care: para 34

The 29 January 2024 letter: paras 35 – 43

O'Driscoll 1: paras 44 – 58

O'Driscoll 2: paras 59 – 61

Crisfield 1: para 62

The legal framework:

The Care Act 2014: paras 63 – 67

The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014: paras 68 – 76

The Equality Act 2010: paras 77 – 88

The Human Rights Act 1998: paras 89 – 107

The parties' submissions:

The Claimant: paras 108 – 114

The Defendant: paras 115 - 121

Analysis and conclusions:

The material facts

The Claimant

17. The Claimant has severe learning and Autistic disabilities. She has no vocal language and is unable to read or write. She communicates through an iPad app, some Makaton signs, and behaviours. She is also physically disabled. She cannot write, type, dress herself, wipe herself after using the toilet, deal with menstrual care, eat unsupervised, prepare any snacks, shower or bath herself, and she has no understanding of danger. As a result, it is accepted that she has a need for full-time one-to-one care, including intimate personal care. It is also agreed that she lacks capacity to manage her finances. Her care is currently provided by her parents and by carers employed by her parents, funded by direct payments from the Defendant.

The concerns of the Claimant's parents and the start of the assessment process

18. The Claimant's mother explains in SR1 that she and her husband had always assumed that any intimate care provided to their daughter would be by biologically female carers, in order to protect her dignity and privacy and keep her as safe as possible from potential abuse. However, this assumption was called into question a few years ago when the school that she was then attending indicated that it was changing its policy on the provision of intimate care from same-sex to cross-gender. After objections were raised, the school reverted to its original policy of providing same-sex intimate care. However, the incident prompted the Claimant's parents to check other paperwork relating to her care and they noticed that the Disabled Children's Team in the Defendant's Achieving for Children ("AFC") collected data on service users' gender, but not on their sex. Their request that her sex be recorded was unresolved at the time when the Claimant moved to Adult Social Care upon reaching the age of 18.

19. On 13 October 2022, the Claimant's case was referred to the Defendant's Adult Social Care as part of its transition planning. On 15 November 2022, her case was allocated to Ms Reilly, who read through the papers provided by the AFC and so became aware of her parents' request.

20. As part of the assessment process, Ms Reilly held a remote introductory meeting with SR on 12 December 2022. She then had an in-person meeting with the Claimant and her family at their home, on 16 December 2022. Issues relating to sex and gender were discussed at this meeting in some detail. Ms Reilly had sent a blank copy of the

assessment form to the Claimant's parents in advance of the meeting, so that they could review it. Ms Reilly says that during the visit she was in no doubt as to the Claimant's biological sex, as she is visibly biologically female. In Reilly 1 she observes that as the social worker will physically meet the service user on one or more occasions during the assessment process, this is an opportunity to note any external indicators of biological sex.

21. Having reviewed the forms provided, the Claimant's parents were concerned that they did not record sex but asked for the service user's "gender". On 31 December 2022, the Claimant's father emailed Ms Reilly asking that the Claimant's biological sex be recorded on the Defendant's system and explaining his concerns that the recording would be of her gender.

22. The Claimant's mother says in SR1 that she felt unable to complete the "gender" aspect of the form as whilst she was aware of the Claimant's biological sex, she understood "gender" to refer to an inner feeling which may or may not correspond with concepts of masculinity and femininity and this was something that the Claimant was not able to decide upon or express any feeling about. She explains:

> "This was an important consideration for us as parents who wanted to ensure that [VRP] would always have access to same-sex intimate care. We felt that if a service user's sex was not recorded, then it would not be possible for the Council to plan for or commission services to provide same sex intimate care."

23. In SR2, the Claimant's mother indicates that safeguarding is a key matter for her and her husband; and that if the Defendant can only provide same-sex care on request or where a preference had been expressed, then the scenario of a learning disabled female adult such as their daughter being provided with care from a male carer, was a real possibility. She considers that her daughter can only be adequately safeguarded if the Defendant recognises that same-sex care means that the carer and the service user have the same biological sex. In SR3, the Claimant's mother emphasises that whilst VRP has very limited mental capacity, she has strong feelings about what happens to her and to her body and her responses indicate that she knows, for example, that someone touching her genitalia is somehow different to someone touching her shoulder.

24. The Defendant's Adult Social Care team uses a client data system known as the Integrated Adults System ("IAS"). It is supplied by Liquid Logic. Everything relevant to the Defendant's interaction with a service user should be recorded on this system, including the needs assessment, the care plan, case notes and important emails. On 3 January 2023, Ms Reilly added an "alert" to the IAS recording:

> "[VRP] is female and wishes to be supported by biological females with any personal care tasks. Her family don't feel she has capacity to make an informed decision about her gender therefore it is noted as unspecified on our records."

25. Ms Reilly informed the Claimant's parents of this on 6 January 2023. She explained that she had had to do this by a note, as there was no category that recorded "sex" on

the system. She also indicated that, in light of the matters raised by them, she had recorded the Claimant's gender as "unspecified". She explained the options on the Defendant's drop-down menu in relation to gender were: "male / female / other-self defined / unknown / unspecified". The Claimant's father responded on 16 January 2023, reiterating his concerns, in particular, that once he and his wife were dead or incapacitated, so that it fell to the Defendant to arrange the Claimant's care, it would not feel under any obligation to provide same-sex intimate care. On 18 January 2023, Ms Reilly replied saying: "my understanding is that within the sector, the general expectation is that females will only have personal care delivered by female members of staff".

26. On 30 January 2023 the Claimant's Education Health and Care Plan ("EHCP") annual review took place. On 31 January 2023, Ms Reilly visited the Claimant at school.

The FOIA request

27. On 27 March 2023, the Claimant's father made a request to the Defendant under the Freedom of Information Act 2000 ("FOIA"), which included the following:

> "Do you have policies or procedures that have the objective of ensuring that users of your services (commissioned or provided directly) of the female sex who require assistance with intimate care receive this from carers of the female sex? If so, please provide copies."

28. The Defendant responded to the request on 19 April 2023, answering this question "no". In response to another question, it indicated that its social care management system did not include a field for the characteristic of "sex" and, "We are required by the Department of Health to record only the characteristic of gender". Mr Tankel accepts that at first blush the response in the negative to the question inquiring whether the Defendant had procedures that have the objective of ensuring that female service users who require assistance with intimate care receive this from carers of the same-sex, conflicts with the Defendant's case in these proceedings that as a matter of practice such same-sex care is invariably provided. He suggests that the question may have been answered in the way that it was because the request for copies, suggested that the question related to *written* policies or practices, which the Defendant acknowledges it does not have.

Finalisation of the Claimant's needs assessment

29. On 17 April 2023, Ms Reilly sent the draft Care Act assessment to the Claimant's parents. In two places, the draft contained the proposed entry, "[VRP] is biologically female". Under "special factors" the text said: "[VRP] is female and wishes to be supported by biological females with personal care tasks". On 24 April 2023, SR contacted Ms Reilly indicating that she did not consent to any recording of the Claimant's gender, including as "unspecified".

30. On 27 April 2023, there was a further meeting between SR and Ms Reilly to discuss this further. On 17 May 2023, the Claimant's father wrote to Ms Reilly indicating proposed amendments to the draft assessment. On 1 June 2023, Ms Reilly updated the

Claimant's gender on the IAS from "unspecified" to "female" and she amended the alert to incorporate some of these comments. It now said:

> "[VRP] is female and her parental advocates have required on her behalf under the Equality Act, same sex care exemptions apply: that she is supported with personal care only by carers who are biologically female."

31. Ms Reilly was due to start maternity leave from or around 29 May 2023 but extended her time at work to ensure a full handover of her cases. She says that those managing her were aware of the issues raised relating to the Claimant's biological sex being recorded, the request for same-sex intimate care and the concern regarding the recording of VRP's gender. After Ms Reilly went on maternity leave the case was allocated to a locum social worker, Ms Mathabo Kuaho (who is no longer employed by the Defendant). The needs assessment was completed by this stage, save for confirmation of the proposed amendments and Ms Kuaho's principal task was to carry out the support planning that was consequent upon the needs assessment.

32. On 28 September 2023, the EHCP was amended. On 4 October 2023, the final Care Act 2014 needs assessment was sent to the Claimant's parents, recording her biological sex as female and her gender as "unknown".

Direct payments

33. On 17 October 2023, the Claimant transitioned to the Defendant's Adult Social Care services and care was provided via direct payments. As I have explained earlier, this means that when carers are used, the Claimant's parents select the carers who are to provide care for their daughter. In SR1 and SR2, the Claimant's mother emphasises that she and her husband cannot predict that direct payments will continue indefinitely or that VRP will always live at home. Furthermore, inevitably, there will come a point where they are incapacitated or no longer alive. Her parents want to be sure that when the Claimant has to rely on direct provision from the Defendant's Adult Social Care team, she will receive services that meet her need for same-sex intimate care.

Ms Reilly's account of the provision of same-sex intimate care

34. Ms Reilly explains that her default assumption is that anyone whose gender is recorded as female is biologically female and that anyone whose gender is recorded as male is biologically male. She says that as far as she is aware, the gender of all the service users that she has worked with has corresponded to their sex, but that the assessment process provides many opportunities to confirm or contradict that assumption. Whilst the Defendant does not have a formal policy for the provision of same-sex intimate personal care, even where no specific request has been made "my expectation would be that wherever possible, female clients receive personal care support from female carers". Ms Reilly regards this as being "industry standard" within social care. She says that where families (usually those of young women) specifically request same-sex intimate care "then I expressly mention it in the assessment and support plan", albeit this would be the default position for female service users in any event. She goes on to say that she is not personally aware of any instance where it has not been possible to arrange same-sex intimate care for a female service user, where that has been requested. She stresses that in addition to the

wording of the alert, the needs assessment states that the Claimant is female and there are references to her being female throughout her records on the IAS.

The 29 January 2024 letter

35. By email sent on 27 April 2023, the Claimant's father made an information request under data protection legislation. The majority of the email disputed that there was a lawful basis for the Defendant to process data relating to the Claimant's gender, given that she was unable to consent to this. He disputed the legality of "gender" being a mandatory field in the Defendant's documentation. It is unnecessary for me to refer to that aspect of the email in any detail, as this is no longer a live issue in these proceedings (para 6 above). However, the email also referred to the Defendant's duties under section 1 of the Care Act 2014 (para 63 below) and continued:

> "It is our contention that in failing to record the sex of your clients, you have failed to ensure that the personal data you are processing is sufficient to properly fulfil the stated purpose, meeting your statutory obligations, and therefore you are failing in your legal duty to comply with GDPR Principle (c).
>
> Your obligations include the promotion of [VRP's] wellbeing related to personal dignity, and protection from abuse, include ensuring, for example, any services you commission or provide directly, that her intimate care needs are dealt with by somebody of the same sex as her (which is only possible if those involved have a record of the sex of both the carer and the client).
>
> …..
>
> Please confirm that you accept that in failing to record sex you are failing to ensure that the personal data you are processing is adequate; or example how you can promote [VRP's] wellbeing relating to dignity and protection from abuse if you are unable to ensure same sex intimate care (which you cannot do unless you have a record of the sex of both the carer and the client)."

36. The 29 January 2024 letter from Ms Lukwage was written in response to the 27 April 2023 email. She began by apologising for the delay, indicating that it had been necessary to liaise with colleagues from the legal department and the Inclusion team before responding to ensure that the response was aligned with both legal and Equality, Diversity and Inclusions perspectives. It is unnecessary for me to refer to the parts of the letter that solely related to the recording of service users' gender. The letter said the following in relation to the recording of service users' sex ("ASC" is used as an abbreviation for Adult Social Care):

> "ASC is of the view that collecting sex data would not either align with the view that 'sex' is defined as biological for the purposes of Equality or your intended outcome of reassurance from ASC that intimate care to your daughter would only be

> provided by the same biological sex recorded at birth as the person receiving care."

37. As Mr Tankel frankly acknowledged, that passage is not easy to understand.

38. The letter went on to identify what were described as "Equality Issues". The writer said that "on the assumption that transgender employees would never be excluded from providing a service of the Council", the substantive issues were whether the Equality Act 2010 and the European Convention on Human Rights ("ECHR"): support a service user refusing a transgender employee from delivering a same-sex service; and whether they would be breached if a public authority accommodated a service user's refusal of a transgender employee delivering a same-sex service. As I have already indicated at para 11 above and return to at para 87 below, this is not a matter of dispute before me; both parties accept that same-sex personal/intimate care for female service users can be lawfully provided pursuant to Equality Act exceptions.

39. In the course of addressing the equality issues that she had identified, Ms Lukwage said:

> "I have reviewed the EHRC paper relating to establishing a separate or single sex service…the ASC has no expressed intention of limiting the provision of personal care on that basis. ASC has no plan to facilitate or support an introduction of single sex services for the provision of adult social care in the current market.
>
> In the absence of the Council policy/strategy on the delivery of single sex services, ASC is of the view that the purpose for the proposed collection of sex data for your daughter is solely to meet her preferences for the delivery of personal care by biological females.
>
> In regard to the preference and provision of personal care, please be advised that ASC will align its approach with the Care Act 2014 and Care Act Statutory Guidance Chapter 10.
>
> There is no legal duty to meet the person's preferences when arranging care but subject to its other legal obligations, ASC will use its best endeavours to do so. In exercising its function under the Act, ASC will have regard to your daughter's view, wishes, feelings and beliefs. However, please be advised that in regard to the matters above, the Authority is also under a duty to comply with its duties under the Equality Act and other relevant legislation."

40. Insofar as the last sentence of this passage appears to imply that restricting the provision of personal/intimate care of the Claimant to carers of the same-sex would, or could, fall foul of the Equality Act 2010, I reiterate that this is not the Defendant's position in these proceedings. It is accepted that such same-sex care may be lawfully provided to her.

41. Under the sub-heading "Final Outcome" the letter said:

> "There is no requirement on public bodies to collect information on legal sex. The vital question that the ASC needs to address is what the information collected will be used for. As highlighted in the findings, gender data is collected for monitoring purposes in a manner which limits the risks of allegations of discrimination and claims to the council and service providers. There are therefore no plans to collect the 'sex' data item at this stage as ASC has no intention for single sex provisions. Also, ASC is of the view that recording of gender would not be for Equality purposes but solely for consideration of personal preference of intimate care being provided by biological females.
>
> The Equality Act 2010 places a duty on all public authorities to have due regard to eliminate unlawful discrimination, advance equality of opportunity and foster good relations. There are considerations that ASC needs to take when asking service users to state their sex especially in regard to people's privacy under Article 8 of the [ECHR]. Forcing individuals to disclose their sex assigned at birth would be potentially a violation of their human rights."

42. Viewed in context, it is apparent that the reference to "recording of gender" in the last sentence of the first paragraph of this passage, was intended to say, "recording of sex". For the avoidance of doubt, the Claimant's parents had not suggested and do not suggest that service users should be *required* to disclose their biological sex (as the second paragraph of this passage appears to assume).

43. The Claimant's parents were very concerned by the contents of this letter. A Pre-Action Protocol letter was sent on 8 April 2024 and the claim was filed on 26 April 2024.

O'Driscoll 1

The IAS records

44. Ms O'Driscoll says that she would expect practitioners to gain an understanding of a service user's needs by familiarising themselves with the relevant parts of their care record, prior to undertaking a social care intervention; and this would not be limited to the formal assessment documentation. She explains that within the IAS, for each service user there is a client record front page which has key information about the user, such as their name, date of birth, address, contact details and certain demographic information such as gender and ethnicity. Some of the fields, including the gender field, are mandatory (meaning that the person inputting the data cannot progress to the next section of the form until this is completed). So far as gender is concerned, Ms O'Driscoll believes that this is because of the statutory reporting duties that I have referred to (para 6 above). I have itemised the drop-down options in respect of gender at para 25 above. O'Driscoll 1 says that social workers will use the

wider needs assessment to capture any more detailed description of a person's gender or sex, that it might be necessary to record.

45. Ms O'Driscoll indicates that in June 2024 Liquid Logic introduced an upgraded version of the IAS, which, among other changes, divided the sex and gender reporting fields into two different sections on the client record front sheet. However, she says that the Defendant cannot implement this particular update immediately because it is currently in the process of moving its data management over to a cloud-based system and delivering a system upgrade in the middle of such a migration would make troubleshooting any issues relating to the update very difficult. Ms O'Driscoll says that she has been informed by the Defendant's ICT team that it has been decided to wait until after the migration is complete before introducing this update. When I explored this with Mr Tankel, he said that the sex reporting field was definitely going to be introduced by the Defendant, but that it would not be a mandatory reporting field, meaning social workers could decide whether or not to include an entry.

46. Ms O'Driscoll considers that completing a new "sex" field would not necessarily add materially new information in most cases as all data relevant to the functions that the local authority is required to carry out should in any event be captured within the existing record. However, she acknowledges that the new "sex" field will be of some practical use in cases where an individual's sex and gender are not aligned, as it will provide a quick-reference indicator to anyone familiarising themselves with a case. She says that if someone specifically wanted their biological sex to be recorded, she cannot see any reason why the "sex" field would not be used in that individual case. She characterises this as a change in data recording, rather than any material change in substantive social work practice.

The assessment process and support plan

47. Ms O'Driscoll explains that the assessment process is the first stage of any social work intervention. VRP comes within the Transitions Team, which deals with adults aged 18 – 25. She says that the initial assessments are very thorough, as they are likely to be a person's first such assessment. The assessment process will include reading any pre-existing paperwork, meeting the service user at least twice and discussions with their family or whoever else is the most relevant person for advocating on their behalf. As part of this process, individuals are supported to expresses their needs, wishes and aspirations and the aim is to work collaboratively with the individuals and their families. What is said during these discussions is recorded as fully as possible.

48. Ms O'Driscoll says that, in the nature of things, a service user's sex will usually be readily identifiable from: their name; their use of pronouns; the description of their needs (for example, references to the need for assistance with menstrual care or putting on a bra); and from the fact that, unless there is some indication in the paperwork to the contrary, it is in practice assumed that a person described as "female" is biologically female (and the same for those described as "male"). Like Ms Reilly, Ms O'Driscoll observes that it can usually be safely assumed that where "male" or "female" is entered in the mandatory gender field, this will also be the individual's biological sex. She says that this assumption is borne out by experience and that within the team, the two concepts are used interchangeably. The exception to this is where there is some indication in the paperwork to the contrary, which she

would expect to be apparent on the face of the assessment, as such information is likely to be highly relevant to their support planning (the only exception would be where the service user had positively asked for this not to be mentioned).

49. O'Driscoll 1 explains that the support plan will usually be produced by the same social worker who carried out the assessment and where that is not the case, she would expect a proper handover to have occurred, supervised by a more senior person within the team. Thus, whoever completes the support plan will have considered the previous documentation.

Same-sex intimate care

50. Ms O'Driscoll goes on to indicate:

> "19. If it became apparent that it was important to the individual that a part of any future support needed to include same sex care provision, we would ensure that this was captured in their assessment and support plan. Kingston attaches significant weight to such preferences being paramount to maintaining an individual's wellbeing, respecting their personal dignity, and giving them choice in and control over their daily life and care support…
>
> 20. The above goes for same sex care generally. It is all the more the case for personal and indeed intimate personal care…
>
> 21. Kingston does not have a formal, written policy on same sex intimate care. It works within its understanding of the legislative framework, statutory guidance and best practice. Central to each of these are the concepts of personalisation and promoting wellbeing.
>
> 22. …the normal operation of the commission process would always, as far as I am aware, result in same sex intimate person care being provided, especially for vulnerable young women. In addition, if an adult or their carer expresses a particular preference for same-sex care, we would meet it. This is a natural consequence of the Council's understanding of its duties under the relevant legal framework and of what is required in order to promote a person's wellbeing."

51. Ms O'Driscoll says that she has discussed the matter with Ms Reilly, Ms Okwabi (team manager) and Ms Knapp (senior support worker) and none of them could recall any occasion where the Defendant was unable to provide same-sex care, where it was

requested. She comments that same-sex intimate care cannot be *guaranteed* to service users in all circumstances, as there could be exceptional situations where this was not in the service user's best interests, for example, where there was an urgent need for care and there were no same-sex carers available.

Statistics regarding service users and carers

52. Ms O'Driscoll indicates that 52.4% of the Defendant's service users are female. As of 1 October 2024, 733 people are receiving personal care as part of their care and support plan and 64% of this number are female. In 2022/2023, 80% of the professional carers in the Defendant's area were female. Accordingly, the majority of adults receiving care and support via the Defendant, will have their care delivered by a female carer.

The Defendant's commissioning arrangements

53. O'Driscoll 1 also details the commissioning arrangements that apply when the Defendant arranges the care. The Defendant does not directly employ the carers, who are provided by outside agencies commissioned by Kingston via a brokerage service. Any care agency providing personal care is required to be regulated by the Care Quality Commission ("CQC"). Ms O'Driscoll says it is her understanding that regulated domiciliary care agencies are required by law to try to meet requests for same-sex care where such requests are made.

54. Ms O'Driscoll indicates that there are various stages during the ordinary operation of the commissioning process that would naturally result in same-sex care being provided, especially, but not only, where a service user or their family had requested this. There is the regulatory aspect that I have just mentioned. In addition, the service user's needs will have been assessed and a support plan prepared and a copy of these documents will be sent to the brokerage service. The care plan will contain details of the service user's preferences and there is a specific section in the plan for the social worker to advise the brokerage service of such needs. Ms O'Driscoll says that in her experience, care agencies always provide same-sex intimate care by default, especially where the service user is female.

55. Domiciliary care services are commissioned via the Defendant's Care at Home Framework. Once the brokerage team has identified a provider, they will advise the proposed provide of any special requirements in the package of care. This would include, where relevant, any request for same-sex care. Once the provider accepts the package, brokerage will send a confirmation email along with the Individual Placement Agreement ("IPA") and a copy of the care plan. Ms O'Driscoll also details the arrangements that apply to commissioning supported living placements and when a placement in a care home is being arranged. She notes that the Defendant's standard terms and conditions require all providers to follow the requested support plan or, if they are unable to meet the request, to notify the Defendant (and that this would include specific requests for same-sex care). The brokerage identifies the care provider and then it is for that agency to carry out its own assessment to identify which of its carers are capable of providing support to the particular service user in question. This will generally be the result of discussions between the family and the

care agency. The local authority has relatively limited involvement in the selection of individual carers. Ms Driscoll also says that families are encouraged to have a lot of direct communication with the care providers about the specifics of the care that is required.

Regulation and quality assurance

56. In addition to the regulation by the CQC that I have already referred to, Ms O'Driscoll notes that all carers providing personal care to adults are required to undertake an enhanced Disclosure and Barring Service ("DBS") check. In addition, the Defendant has its own quality assurance ("QA") process. Its QA team carry out spot checks on services and, if specific concerns are raised, targeted visits are undertaken. Where there are concerns about individual care delivery or a provider not meeting the client's needs, the Defendant's Provider Quality Assurance Framework ("QAF") is followed with a view to delivering the required improvements. Further, where a care and support plan is being delivered, the service user, or those acting on their behalf, can raise concerns with the care provider and/or with the local authority. Ms Driscoll describes the Defendant's processes for dealing with such concerns at paras 46 – 49 of Driscoll 1.

The sex of the carers

57. Ms O'Driscoll clarifies that the Defendant does not record the biological sex of outside carers and nor does it require the companies from which it commissions care to do so. As with service users, her team would ordinarily assume that if a carer was provided on the basis that she is a "female" carer, then this means the person in question is biologically female. She says that care agencies would be alive to the risk of placing someone who is known to be biologically male but declaring that they are female, in a setting with a vulnerable female; and that families / service users can request to change carers if there are concerns.

Development of written guidance

58. O'Driscoll 1 concludes with an indication that the Defendant is in the process of reducing its existing way of working to written practice guidance. Ms O'Driscoll says that this is not expected to involve any material change in policy or practice. At the hearing, Mr Tankel indicated that the finalisation of this document was still some months away, given the difficulties of comprehensively capturing current practice in writing and of sufficiently identifying the exceptional circumstances that could arise; and the need to consult with various different interests. Mr Tankel said he preferred to refer to it as an operational scheme, rather than a policy.

O'Driscoll 2

59. O'Driscoll 2 gives some further detail about the steps taken by the Defendant to guard against unsuitable carers and unsuitable care packages. The Defendant undertakes contract monitoring, which includes: seeing that care providers have up to date DBS checks for all staff; reviewing whether staff have provided sufficient references and that gaps in employment have been fully explored; sampling the providers' policies and procedures and staff appraisals; and checking that complaints have been acted upon. The QAF includes Quality Assurance and Contract

Management officers routinely visiting providers to monitor the services delivered, both via announced and unannounced visits. The Defendant also holds Provider Forums on a regular basis, based on themes gathered from the quality concerns and other sources of information.

60. Ms O'Driscoll indicates that the Defendant does not accept the premise (if it is a part of the Claimant's case) that there should be an absolute bar on cross-sex provision. At para 17, she says:

> "Without wishing to speculate on hypothetical cases, if there was a case in which cross-sex care was otherwise the right decision, and there was no evidence or reason to suspect that a particular carer posed a risk, then, all things being equal, and given the measures we have in place for mitigating risk generally, it is unlikely that the Council would step in to prevent cross-sex care solely because of the higher risks that are posed by men generally."

61. O'Driscoll 2 then explains that care providers have framework contracts with the Defendant, to which they have been appointed following a competitive tendering process in accordance with procurement law. Specific placements are then governed by the IPA, which contain a standard set of the Defendant's terms and conditions. There are hundreds of such IPAs in place. The Defendant's standard terms and conditions for specific placements are exhibited to O'Driscoll 1 and the equivalent documents relating to supported living placements and care homes are exhibited to O'Driscoll 2. Ms O'Driscoll observes:

> "20. The contracts contain clear statements of the Council's expectations. The provision of cross-sex care is such a departure from the norm as understood across the sector that I would expect a provider to contact the relevant social worker, or the duty social worker, if they found themselves having to provide cross-sex care on a particular occasion, perhaps because of an ad hoc staffing issue. If a supplier were routinely finding themselves unable to provide same-sex care, then I would regard that as a contractual issue that would need to be addressed via the processes I have described above."

Crisfield 1

62. Crisfield 1 exhibits various reports which are described as showing the significantly heighted risk posed to the claimant and to other disabled women where their intimate care is provided by a male carer. It is unnecessary for me to refer to this supporting material, as the Defendant does not take issue with the contents of Ms Crisfield's summary, which says:

> "2. The reports contain statistics that highlight the following trends, as follows:

a. the overwhelmingly higher propensity for males to commit sexual crimes than females

b. the higher incidence of sexual abuse of females than of males

c. the higher incidence of sexual abuse of disabled females than of non-disabled females

d. the higher incidence of sexual abuse of disabled females than of disabled men

e. the higher incidence of sexual abuse of people with learning difficulties than of people with other types of disability

f. the higher rates of sexual misconduct in male health and social care professionals compared to females

g. the fact that the difference in propensity for sexual crime between males and females is not diminished or changed when a person identifies as a different gender to their sex."

The legal framework

The Care Act 2014

63. Section 1 of the Care Act 2014 identifies the general duty upon local authorities. As relevant, it provides:

> "**1 Promoting individual well-being**
>
> (1) The general duty of a local authority, in exercising a function under this Part in the case of an individual, is to promote that individual's well-being.
>
> (2) '*Well-being'*, in relation to an individual means that individual's well-being so far as relating to any of the following –
>
> a. personal dignity (including treatment of the individual with respect);
>
> b. physical and mental health and emotional well-being;
>
> c. protection from abuse and neglect;
>
> …..

(3) In exercising a function under this Part in the case of an individual, a local authority must have regard to the following matters in particular –

a. the importance of beginning with the assumption that the individual is best-placed to judge the individual's well-being;

b. the individual's views, wishes, feelings and beliefs;

c. …

d. the need to ensure that decisions about the individual are made having regard to all the individual's circumstances…

e. the importance of the individual participating as fully as possible in decisions relating to the exercise of the function concerned and being provided with the information and support necessary to enable the individual to participate;

f. …

g. the need to protect people from abuse and neglect;

h. …"

64. Section 9 addresses the assessment of an individual's needs. As relevant it provides:

"**9 Assessment of an adult's need for care and support**

(1) Where it appears to a local authority that an adult may have needs for care and support, the authority must assess –

a. whether the adult does have needs for care and support, and

b. ff the adult does, what those needs are.

(2) An assessment under subsection (1) is referred to in this Part as a '*needs assessment'*.

(3) …

(4) A needs assessment must include an assessment of –

a. the impact of the adult's needs for care and support on the matters specified in section 1(2),

b. the outcomes that the adult wishes to achieve in day-to-day life, and

> c. whether, and if so to what extent, the provision of care and support could contribute to the achievement of those outcomes.
>
> (5) A local authority, in carrying out a needs assessment, must involve –
>
> a. the adult,
>
> b. any carer that the adult has, and
>
> c. any person whom the adult asks the authority to involve or, where the adult lacks capacity to ask the authority to do that, any person who appears to the authority to be interested in the adult's welfare."

65. Where a local authority is satisfied on the basis of the assessment that an adult has needs for care and support, section 13(1) requires it to determine whether any of the needs meet the eligibility criteria referred to in subsection (7). Section 13(3) states that where at least some of the adult's needs for care and support meet the eligibility criteria, the local authority must consider what could be done to meet those needs, ascertain whether the adult wants to have those needs met by the local authority and establish whether the adult is ordinarily resident in the local authority's area. For present purpose, it is unnecessary to detail the eligibility criteria. Section 18(1) places a duty on the local authority to meet the adult's needs for care and support which meet the eligibility criteria if the adult is ordinarily resident in the authority's area (or is present in the areas and of no settled residence) and the other requirements of subsection (1) are met.

66. Section 5 of the Care Act 2014 requires the local authority to promote the efficient and effective operation of a market in services for meeting care and support needs, with a view to ensuring that any person in its area wishing to access services in the market has a variety of providers to choose from, has a variety of high quality services to choose from and has sufficient information to make an informed decision about how to meet the needs in question.

67. The Secretary of State for Health and Social Care has issued the Care and Support Statutory Guidance, pursuant to section 78(1) of the Care Act, which states that a local authority *must* act under the general guidance of the Secretary of State when exercising functions given to it by this Part of the Act. The statutory guidance provides that in undertaking its activities under the Act, a local authority "should consider how to ensure that the person is and remains protected from abuse of neglect" (para 1.14(g)). It goes on to say that all of the matters listed in section 1(3) must be considered in relation to every individual when the local authority carries out its functions, so that a person's life is looked at holistically (para 1.15). It goes on to acknowledge that the relevance of the listed factors will differ in their application to particular individuals: "every person is different and the matters of most importance to them will accordingly vary widely" (para 1.16). The text clarifies that neither these principles nor the requirement to promote wellbeing, require the local authority to take any particular action; that will "depend entirely on the circumstances" (para 1.17).

The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014

68. Care providers are subject to the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 ("the 2014 Regulations"). Regulation 8(1) provides that a registered person must comply with regulations 9 to 20A in carrying on a "regulated activity". Regulation 3(1) indicates that the activities specified in Schedule 1 are regulated activities for these purposes. Those activities include "the provision of personal care for persons who, by reason of old age, illness or disability are unable to provide it for themselves, and which is provided in a place where those persons are living at the time the care is provided" (para 1(1)). In turn, the definition of "personal care" in regulation 2(1) includes:

> "(a) physical assistance given to a person in connection with-
>
> (i) eating or drinking…
>
> (ii) toileting (including in relation to the process of menstruation),
>
> (iii) washing or bathing,
>
> (iv) dressing,
>
> (v) oral care, or
>
> (vi) the care of skin, hair and nails…"

69. Accordingly, a carer's provision of personal and intimate care of the kind that is the focus of these proceedings is a "regulated activity".

70. Part 3 of the 2014 Regulations addresses "Requirements in relation to Regulated Activities". Regulation 4 sets out the requirements that apply where the service provider is an individual or a partnership; and regulation 5 for where it is a body other than a partnership. Regulation 9 includes the following:

> "**9. Person-centred care**
>
> (1) The care and treatment of service users must –
>
> a. be appropriate,
>
> b. meet their needs, and
>
> c. reflect their preferences.
>
> (2) …..
>
> (3) Without limiting paragraph (1), the things which a registered person must do to comply with that paragraph include –

a. carrying out, collaboratively with the relevant person, an assessment of the needs and preferences for care and treatment of the service user;

b. designing care or treatment with a view to achieving service users' preferences and ensuring their needs are met;

c. enabling and supporting relevant persons to understand the care or treatment choices available to the service user and to discuss, with a competent health care professional or other competent person, the balance of risks and benefits involved in any particular course of treatment;

d. enabling and supporting relevant persons to make, or participate in making, decisions relating to the service user's care or treatment to the maximum extent possible;

e. providing opportunities for relevant persons to manage the service user's care or treatment;

f. involving relevant persons in decisions relating to the way in which the regulated activity is carried on in so far as it relates to the service user's care or treatment;

g. providing relevant persons with the information they would reasonably need for the purposes of sub-paragraphs (c) to (f);

h. making reasonable adjustments to enable the service user to receive their care or treatment

i. ….."

71. Regulation 10 states:

"(1) Service users must be treated with dignity and respect.

(2) Without limiting paragraph (1), the things which a registered person is required to do to comply with paragraph (1) include in particular –

(a) ensuring the privacy of the service user;

(b) supporting the autonomy, independence and involvement in the community of the service user;

(c) having due regard to any relevant protected characteristic (as defined in section 149(7) of the

Equality Act 2010) of the service user."

72. A "registered person" for these purposes is the person who is the service provider or registered manager in respect of the relevant regulated activity (regulation 2(1)).

73. Regulation 11(1) provides that care and treatment of service users must only be provided with the consent of the relevant person. Regulation 11(3) says that if the service user is 16 or over and is unable to give consent because they lack capacity to do so, the registered person must act in accordance with the Mental Capacity Act 2005; that is to say in the service user's best interests. Regulation 12(1) stipulates that care and treatment must be provided in a safe way for service users. Regulation 13(1) states that service users must be "protected from abuse and improper treatment in accordance with this regulation". Regulation 13(2) requires that systems and processes are established and operated effectively to prevent abuse of service users. Regulation 13(3) – (7) address this is in more detail.

74. Regulation 16(1) stipulates that any complaint received must be investigated and necessary and proportionate action taken in response to any failure identified. Regulation 18(1) provides that sufficient numbers of "suitably qualified, competent, skilled and experienced persons must be deployed in order to meet the requirements of this Part". Regulation 19(1) states (amongst other matters) that persons employed for the purposes of carrying out a regulated activity must be of good character and have the "qualifications, competence, skills and experience which are necessary for the work to be performed by them".

75. Regulation 22(1) provides that it is an offence for a registered person to fail to comply with any of the requirements in (amongst other provisions) regulation 11. Regulation 22(2) says that a registered person commits an offence if the registered person fails to comply with regulations 12 and 13(1) – (4) (amongst others) and this results in avoidable harm to a service user or them being exposed to a significant risk of such harm occurring.

76. Statutory guidance for registered providers published by the Department of Health and Social Care includes the following:

> "When providing intimate or personal care, providers must make every reasonable effort to make sure that they respect people's preferences about who delivers their care and treatment, such as requesting staff of a specified gender / sex."

The Equality Act 2010

77. "Sex" is one of the protected characteristics listed in section 4 of the Equality Act 2010. Section 11 provides that 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."

78. In turn, section 212 of the Equality Act 2010 says that "man" means "a male of any age"; and "woman" means "a female of any age". The parties proceeded on the basis that, as things stand, the protected characteristic of "sex" in the Equality Act 2010 refers to biological sex. I note that following a hearing in November 2024, the Supreme Court is currently considering whether a trans-woman who holds a Gender Recognition Certificate is "female" for the purposes of the 2010 Act: *For Women Scotland Ltd v The Scottish Ministers* UKSC 2024/0042.

79. The concept of indirect discrimination is defined by section 19. Sub-section (3) lists the relevant protected characteristics for these purposes; the list includes both "sex" and "disability" ("Disability" is defined by section 6, but it is unnecessary to include the specifics of the definition for present purposes.). Subsections (1) and (2) of section 19 provide:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

80. Discrimination, including indirect discrimination, is prohibited in respect of the provision of services and the exercise of public functions by section 29 of the Act. Section 29(2) says that a service-provider (A) must not, in providing the service, discriminate against a person (B) in the terms on which A provides the service to B or by subjecting B to any other detriment. For these purposes, a reference to the provision of a service includes a reference to the provision of a service in the exercise of a public function; and a "public function" is one that is a function of a public nature for the purposes of the Human Rights Act 1998 (section 29(3) and (4)).

81. Whilst it is unnecessary to set out all the components of the definition, section 26 of the Equality Act addresses the concept of harassment. It includes where a person (A) engages in unwanted conduct related to a relevant protected characteristic that has the purpose or effect of violating the other person's (B) dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. Sex and disability are both relevant protected characteristics for these purposes.

82. As relevant, section 149 of the Equality Act identifies the PSED as follows:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to –
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) …..
>
> (2) …..
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to -
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) take steps to meet the need of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> (c) …..
>
> (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities."

83. Relevant protected characteristics for the purposes of the PSED include both sex and disability. The duty on the decision-maker is to have "due regard" to the matters identified in section 149, it is not a duty to achieve those outcomes; and "due regard" is the level of regard that is appropriate in all the circumstances: per Dyson LJ (as he then was) in *R (Baker) v Secretary of State and the London Borough of Bromley* [2008] LGR 239 at para 31.

84. In a very well-known passage, McCombe LJ summarised the principles relating to the PSED that he drew from the authorities in *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 ("*Bracking*"), para 26. I will set out the aspects that are material to the Claimant's submissions in this case:

> "(1) As stated by Arden LJ in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213 [2006] EWCA Civ 1293 at [274], equality duties are an integral and

> important part of the mechanisms for securing the fulfilment of the aims of anti-discrimination legislation.
>
> (2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWHC 199 (QB) (Stanley Burnton J (as he then was)).
>
> …..
>
> (5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) as follows:
>
> (i) The public authority decision maker must be aware of the duty to have 'due regard' to the relevant matters;
>
> (ii) The duty must be fulfilled before and at the time when a particular policy is being considered;
>
> (iii) The duty must be "exercised in substance with rigour, and with an open mind". It is not a question of 'ticking boxes'; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;
>
> (iv) The duty is non-delegable; and
>
> (v) Is a continuing one
>
> (vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.
>
> (6) '[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria' (per Davis J (as he then was) in *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin) at [84], approved in this court in *R (Bailey) v Brent LBC* [2011] EWCA Civ 1586 at [74-75])."

85. At para 26(8) McCombe LJ cited passages from paras 77, 78 and 89-90 of Elias LJ's judgment in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Divisional Court). For present purposes, I note the following. Firstly, that provided there had been a rigorous consideration of the duty "it is for the decision maker to decide how much weight should be given to the various factors informing the decision"; similarly, "the court cannot interfere with the decision simply because it would have been given greater weight to the equality

implications of the decision than did the decision maker". Secondly, the decision maker "must be clear precisely what the equality implications are when he puts them in the balance". Thirdly, as to the extent to which the PSED entailed a duty of inquiry, Elias LJ said: "If the relevant material is not available, there will be a duty to acquire it and this will frequently mean than [sic] some further consultation with the appropriate groups is required".

86. The PSED applies not only to formal policy and decision making, but also to the systems and practices that an authority operates, as shown, for example, by *R (DMA) v Secretary of State for the Home Department* [2021] 1 WLR 2374 at paras 268 – 271.

87. As I have indicated (paras 6, 11 and 38 above) the Defendant no longer contends that a system of providing same-sex intimate care for service users of the female sex would infringe the Equality Act 2010. Accordingly, I will simply mention that aspect very briefly and for completeness. Schedule 3 of the Act contains exceptions that apply to the provision of services and the exercise of public functions. Paragraphs 26 and 27 of Schedule 3 identify various circumstances where the provision of separate services for persons of each sex or the provision of a service to persons of only one sex would not contravene the Act. There is an overarching requirement that this is a proportionate means of achieving a legitimate aim. Additionally, paragraph 28 provides that section 29 is not contravened so far as gender reassignment discrimination is concerned in relation to the provision of separate services for persons of each sex, the provision of separate services differently for persons of each sex and the provision of a service only to persons of one sex, if the conduct in question is a proportionate means of achieving a legitimate aim. Whilst I am primarily concerned with the position of service users, rather than that of the carers, I also note that para 1 of Schedule 9 contains the following exception to the discrimination in work provisions of the Act:

> "(1) A person (A) does not contravene a provision mentioned in sub-paragraph (2) by applying in relation to work a requirement to have a particular protected characteristic, if A shows that, having regard to the nature or context of the work –
>
> (a) it is an occupational requirement,
>
> (b) the application of the requirement is a proportionate means of achieving a legitimate aim, and
>
> (c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it)."

88. The provisions that are then listed in sub-paragraph (2) include those prohibiting discrimination in relation to employees, applicants and contract workers.

The Human Rights Act 1998

89. Section 6(1) of the Human Rights Act 1998 states that it is unlawful for a public authority to act in a way that is incompatible with a Convention right.

90. Article 3 of the ECHR provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

91. Article 8 of the ECHR provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

92. The positive obligations that Article 3 imposes upon public authorities were characterised by the European Court of Human Rights ("ECtHR") in *X v Bulgaria* (2021) 50 BHRC 244 as follows:

> "178. It emerges from the Court's case-law…that the authorities' positive obligations under Article 3 of the Convention comprise, firstly, an obligation to put in place a legislative and regulatory framework of protection; secondly, in certain well-defined circumstances, an obligation to take operational measures to protect specific individuals against a risk of treatment contrary to that provision; and thirdly, an obligation to carry out an effective investigation into arguable claims of the infliction of such treatment. Generally speaking, the first two aspects of these positive obligations are classified as 'substantive', while the third aspect corresponds to the State's positive 'procedural' obligation."

93. The distinction between the two substantive positive obligations was summarised by Lewis LJ in *AB v Worcestershire County Council* [2023] EWCA ("*Worcestershire CC*") 529 in the following way:

> "14. Thus, Article 3…also imposes certain positive obligations on the state. These include putting in place a legislative and regulatory system for protection (often referred to as the 'systems duty'). They also include an obligation to take operational measures to protect specific individuals from a risk of being subjected to treatment contrary to Article 3 (often referred to as 'the operational duty')."

94. Unfortunately, the absence of consistent terminology in some of the Strasbourg and domestic decisions has led to a degree of confusion. I will use the terminology adopted by Lewis LJ of a systems duty and an operational duty in this judgment. The Claimant's arguments appeared, at times, to conflate these two positive duties.

However, during the course of her oral submissions and in response to questions from the Court, Ms Monaghan clarified that it was the systems duty that was relied upon. Accordingly, I will not unnecessarily lengthen this judgment by including references to citations that I was taken to that relate to the operational duty, such as passages in *Z v United Kingdom* (2002) 34 EHRR 3 and in *Worcestershire CC*. (It is in any event plain that the instant case would not meet the criteria for the operational duty to arise; in particular there is no "real and immediate risk" to the Claimant of conduct causing her inhuman or degrading treatment or a breach of her Article 8 rights, not least as the current arrangement, intended to remain in place for as long as they are able to do so, is that her parents, rather than the Defendant, arrange her carers).

95. The judgment of Johnson J in *R (MG) v Secretary of State for the Home Department* [2022] EWHC 1847 (Admin), [2023] 1 WLR 284 contains a helpful exposition of both the systems duty and the operational duty. For the reasons I have indicated, I will focus on the former. That case was concerned with Article 2 as well as Article 3 and thus there are references in the passage that I will cite to the protection of life. However, Johnson J noted at para 5 that the parties before him were agreed that there was no practical difference between the content of the positive obligations that arise under Article 2 on the one hand, and Article 3 on the other hand. (In the passage cited below "IDT" is an abbreviation for inhuman or degrading treatment and "*Banel*" is a reference to *Banel v Lithuania* (Application No 14326/11) (unreported) 18 June 2013.) Ms Monaghan clarified that she relied upon what is described by Johnson J as the "lower level" systems duty. In relation to the systems duty, he explained that the authorities established:

> "(1) The state must put in place a system that protects life and safeguards against IDT: *Van Colle v Chief Constable of the Hertfordshire Police* [2009] 1 AC 225 per Lord Bingham of Cornhill at para 28 and *MC v Bulgaria* (2003) 40 EHRR, para 149.
>
> (2) This systems obligation operates at different levels: *Smith v Ministry of Defence* [2014] AC 52 per Lord Hope of Craighead DPSC at para 68.
>
> (3) At a 'high level', the state must ensure that there are effective criminal law provisions to deter offences against the person, a police force to investigate such offences, and a court and judicial system to enforce those criminal law provisions: *Osman v United Kingdom* (1998) 29 EHRR 245, para 115.
>
> (4) In certain situations, public authorities fall under a 'lower level' duty to adopt administrative measures to safeguard life: *Smith* at para 68;
>
> (5) Such additional administrative measures are required in the context of any activity in which the right to life may be at stake: *Öneryildiz v Turkey* (2004) 41 EHRR 20, para 71.

(6) In particular, the lower level duty arises whenever a public body undertakes, organises or authorises dangerous activities: *Öneryildiz* at para 71. It also arises in the context of public health and social care: *Calvelli v Italy* (Application No 32967/96) (unreported) 17 January 2002; *Dodov v Bulgaria* (2008) 47 EHRR 41. It also arises where a public body is responsible for the welfare of individuals within its care and under its exclusive control – particularly young children who are especially vulnerable: *Kemaloğlu v Turkey* (2012) 61 EHRR 36, para 35.

(7) The context in which such additional measures are required therefore include hospitals (*Calvelli*)…

(8) The contexts in which the Strasbourg court has found that the systems duty applies are not exhaustive of the situations in which it may apply: *Banel* at para 65.

(9) Where the lower-level system obligation arises, the public authority must implement measures to reduce the risk to a reasonable minimum: *Stoyanovi v Bulgaria* (Application No 42980/04) (unreported) 9 November 2010 at para 61. The content of this duty depends on the particular context and what is required adequately to protect life. It may involve ensuring that competent staff are recruited, that they are appropriately trained, that suitable systems of working are in place, that sufficient resources are available and that high professional standards are maintained. It may also involve regulatory measures to govern the licensing, setting up, operation, security and supervision of the activity in question, together with procedures (depending on the technical aspects of the activity) for identifying shortcomings in the processes concerned and any human error: *Öneryildiz* (2004) 41 EHRR 20, paras 89- 90.

(10) In interpreting and applying the systems obligation, the court must not impose an impossible or disproportionate burden on public authorities and must have regard to the operational choices made by public authorities in terms of priorities and resources: *Osman* at para 116."

96. Ill-treatment must reach a minimum level of severity for it to fall within the scope of Article 3. The assessment of that level is relative and depends on all of the circumstances of the case, principally the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and/or state of health of the victim: per Lewis LJ at para 59 in *Worcestershire CC*.

97. Mr Tankel relied upon *Söderman v Sweden* (Application No 5786/08) 12 November 2013 as an articulation of the positive obligations arising under Article 8. I will refer to some of the passages he cited as illustrative of the systems duty that Article 8 imposes, but it must be borne in mind that this was a case where the applicant alleged that the Swedish State had failed to comply with its Article 8 duty to provide her with remedies against her stepfather's violation of her personal integrity in secretly filming her naked in her bedroom when she was a child. Given the nature of the complaint, the Court's focus was upon the extent to which Article 8 required the provision of criminal and civil remedies, rather than upon other measures that may be required as facets of the systems duty.

98. The ECHR confirmed that in addition to the negative undertaking in Article 8, there were positive obligations "inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves" (para 78). Citing a number of its earlier judgments, the Court continued:

> "80. Regarding the protection of physical and psychological integrity of an individual from other persons, the Court has previously held that the authorities' positive obligations – in some cases under Articles 2 or 3 of the Convention and in other instances under Article 8 taken alone or in combination with Article 3 – may include a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals…"

99. After referring to the operational duty, the Court went on to note that in cases of rape and sexual abuse, the State's positive obligations under Articles 3 and 8 to safeguard the individual's physical integrity may also extend to questions relating to the effectiveness of the criminal investigation and to the possibility of obtaining reparation and redress (para 83). In relation to "less serious acts between individuals, which may violate psychological integrity", the obligation of the State under Article 8 to maintain and apply in practice an adequate legal framework affording protection does not always require that there is in place an effective criminal-law provision covering the specific act, the legal framework could also consist of civil-law remedies capable of affording sufficient protection (para 84).

100. Ms Monaghan relied upon the finding that the Secretary of State had breached the Article 8 systems duty in *LW v Sodexo* [2019] 1 WLR 5654 ("*Sodexo*"). The claim was brought by three female prisoners and a transgender prisoner in the process of transitioning to male, who had been subjected to strip searches conducted in breach of PSI 07/2016 (the Prison Service Instruction relating to strip searching). Their claim against the operator of the prison settled as Sodexo accepted there had been a systemic failure to implement the PSI at the prison and it admitted breaches of its Article 8 positive obligations in terms of a failure to adequately train its officers. However, the claimants continued their claim against the Secretary of State, seeking a declaration that he had failed to provide adequate and effective safeguards to protect them against violations of Article 3 and 8.

101. The parties in *Sodexo* agreed that the issue before the Court was whether the framework that had been adopted provided "adequate and effective safeguards against breaches of Articles 3 and 8 in all the circumstances"; and that in answering this question, the Court had to consider both "the legal and policy framework that is in place to prevent such breaches" and "the practical steps that are taken to prevent such breaches" (paras 6(c) and 78). In setting out the applicable legal framework, Julian Knowles J cited from para 125 of Lord Reed JSC's judgment in *R (T) v Chief Constable of Greater Manchester Police* [2015] AC 49:

> "The European court has said repeatedly that, although the purpose of article 8 is essentially to protect the individual against arbitrary interference by public authorities, it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of relations between individuals…The court developed the concept of the positive obligation precisely to express the principle that the state cannot fulfil its duty under article 1 of the Convention to 'secure' the rights guaranteed by simply remaining passive…"

102. Julian Knowles J summarised the position as follows:

> "46. In order to fulfil this obligation, there must, at a minimum, be an appropriate legislative and administrative framework, which makes for the effective prevention of the risk of breaches of articles 3 and 8…In addition, there must be appropriate preventative operational measures with suitable supervisory control and monitoring. In other words, it is not sufficient for the state simply to point to black letter provisions as fulfilling its positive obligations. There must be mechanisms to ensure that such provisions are effectively implemented. The claimants were right to submit that reliance on the *mere* existence of a legislative and administrative framework, without consideration of whether that framework is effectively implemented, would render the rights guaranteed under the Convention theoretical and illusory." (Emphasis in original.)

103. The Judge also cited a passage from para 53 of Davis LJ's judgment in *R (BK) v Secretary of State for Justice* [2015] EWCA Civ 1259 (another case concerning strip searching in prison and alleged breaches of Articles 3 and 8 systems duties), where he said:

> "…With regard to the latter [the Article 3 systems duty]…the obligation on the state is to provide a framework with adequate and effective safeguards against arbitrariness and abuse of force: no less but no more."

104. The claimants' Article 3 claim failed as they had not established that Sodexo had breached the negative Article 3 obligation in the conduct of the strip searches (paras 80 – 82). The Judge noted that the Article 8 challenged failed in *BK* because of the absence of any evidence that there had been systemic failings. Davis LJ had said:

> "67. …I can overall, see no sufficient basis for departing from the conclusion of the Divisional Court that what happened here was an aberration. There thus is, in my view, no sufficient evidence of systemic or significant failings indicative of a policy which does not comply with article 3 or which does not operate fairly in the generality of cases involving targeted strip-searching of female prisoners.
>
> 68. For corresponding reasons, the argument under article 8 – which, of course, necessarily bring into play issues of proportionality – also, in my view fails."

105. As Julian Knowles J went on to explain, the difference in *Sodexo* was that the prisoner operator had admitted systemic breaches of the PSI and of Article 8 and that this had stemmed from inadequate training of staff (paras 84 and 86). The Judge went on to find that the admitted failings of Sodexo demonstrated the ineffectiveness of the administrative and legal framework relied upon by the Secretary of State (paras 87 and 110 - 114). In short, Julian Knowles J concluded that the measures put in place by the Secretary of State were not adequate and effective to prevent the breaches of Article 8 in relation to the strip-searching of the claimants over the relevant time period, because they were not adequate or effective in ensuring that the operator had proper and suitable systems in place for training its staff on strip-searching (para 115).

106. Whilst I return to this topic from para 125 below, I take the opportunity to note at this juncture that the circumstances in *Sodexo* were markedly different to the present case. Conduct that breached the Article 8 negative duty had taken place on a number of occasions (the strip searches in breach of the PSI) and it was accepted that this stemmed from systemic failings by the operator of the prison that, in themselves, breached the low level Article 8 systems duty. For the avoidance of doubt, Ms Monaghan did not rely upon any other cases regarding the Article 3 and/or Article 8 low level systems duty.

107. I mention for completeness that Ms Monaghan touched briefly on Article 14 ECHR during the course of her submissions. However, as she acknowledged, none of the pleaded arguments refer to or rely upon Article 14. Whilst, as I indicated earlier (para 8 above), I have accorded the Claimant some latitude in advancing a case that considerably finesses (or, it might be said, departs from) the claims set out in the Claim Form and the SFG, I do not propose to go further and permit a claim or basis of claim to be introduced that has not been pleaded at all. Nor is it flagged in the list of issues, which indicates at para 1 that reliance is placed upon "the *pleaded duties* under…the Human Rights Act 1998" (emphasis added).

The parties' submissions

The Claimant

108. Ms Monaghan's central argument was that the Claimant (and other women like her) have a *right* to have an assessed need for personal and intimate care met by the provision of same-sex care and that, as a result, the Defendant (and other social services authorities like it) have a corresponding duty to put in place a system that ensures same-sex care. As I have indicated, the Claimant's case is that the Combined Duty arises from the combined effect of the duties imposed by section 1 of the Care Act 2014, the PSED and the entitlement not to suffer indirect discrimination (as defined by section 19 of the Equality Act 2010), and the positive obligations arising in respect of Articles 3 and 8 ECHR. Unlike earlier written iterations of this argument (prior to the agreed list of issues), Ms Monaghan accepted during her oral submissions that the Combined Duty would admit of the kind of exceptions identified by Mr Tankel at para 48 of his skeleton argument, such as where no same-sex carer is available and there is an urgent need to provide care.

109. The second stage of Ms Monaghan's argument is that the Defendant is in breach of the Combined Duty as it operates a system that: (a) fails to take appropriate steps to avoid the risk of physical and psychological abuse (Article 3); (b) fails to secure service users' right to privacy and autonomy (Article 8); (c) fails to have regard to the need to protect people from abuse (the wellbeing principle under section 1 of the Care Act 2014); (d) fails to have due regard to the need to promote equality of opportunity or to eliminate discrimination and harassment (the PSED); and (e) is indirectly discriminatory contrary to section 19 of the Equality Act 2010.

110. In terms of the constituent elements that give rise to the Combined Duty, Ms Monaghan submitted that pursuant to Article 8 ECHR, the Claimant is entitled not to be touched in her intimate areas or seen in a state of undress by those of the male sex and is entitled to have her wishes about who touches her intimately respected. Ms Monaghan said that, in turn, this means that she is entitled to a system that will ensure that intimate care is provided to her by a carer of the same-sex and that the Defendant's argument that the risk of care being provided by a male carer can be discounted, fails to afford proper respect to this right. As regards Article 3 ECHR, it is emphasised that women represent the overwhelming majority of those who are subject to sexual abuse, that disabled women are at a particular risk, and that given the overwhelming majority of perpetrators of such abuse are male, an adequate system of same-sex personal and intimate care is reasonable and necessary.

111. Additionally, reliance is placed on the Claimant's entitlement pursuant to section 19 of the Equality Act 2010 not to suffer indirect discrimination. Here the PCP relied upon is the Defendant's "system for the assessment, support planning and commissioning of personal care" and/or the Defendant's refusal to implement a system for same-sex care. It is said that this puts female service users at a particular disadvantage in comparison to male service users as the women will have a particular need for same-sex services for personal and intimate care by reason of their vulnerability to sexual abuse and the greater risk that male carers present of perpetrating such abuse, and also for reasons of personal dignity and privacy. Ms Monaghan acknowledged that the Claimant's care needs are not currently being met by carers arranged by the Defendant, but she submitted that the PCP nonetheless "puts, or would put [her] at that disadvantage" because it creates the identified risks for her that could materialise at any point in the future.

112. Ms Monaghan also relied on the PSED as importing a positive duty to implement a system that has due regard to the need to eliminate discrimination against women and against disabled women in particular and to the need to take steps to meet the needs of women and disabled people that are different from the needs of others. She said that by operating a system of not recording the sex of service users when carrying out assessments for social care and drawing up care plans, the Defendant was unable to give effect to service users' right to same-sex care and would not have the information available to identify, evaluate and address any discriminatory impacts on a protected group, as the PSED requires.

113. The Defendant's evidence that same-sex personal and intimate care was provided in practice was criticised by Ms Monaghan as unsatisfactory. She said that the local authority's evidence was inconsistent in the descriptions of what occurred in practice and she highlighted the differences between the Defendant's current position (on the one hand) and the contents of the FOIA response and the 29 January 2024 letter (on the other), which underscored the dangers that arose from the absence of any clear written policy on the part of the Defendant. If the Defendant was in fact already doing what was sought in practice, it was reasonable for it to be required to set this out in writing, which was a modest step that would bring the considerable benefit of certainty.

114. Ms Monaghan also maintained that the 29 January 2024 letter contained unlawful decisions that should be quashed, as to the Claimant having no entitlement to the Defendant recording her sex and no entitlement to same-sex personal and intimate care.

The Defendant

115. Mr Tankel confirmed that the Defendant no longer relied upon the proposition that the application for judicial review was premature; his client would welcome the clarity afforded by the Court's judgment.

116. As I have indicated in setting out the agreed issues, the Defendant disputes that it was under the Combined Duty and, in the alternative, that it has breached this duty, if it exists. Mr Tankel submitted the evidence showed that in practice the Defendant was already providing same-sex personal and intimate care to female service users, both when requested and by default. He contended that there was no legal obligation requiring the Defendant to spell this out in a written policy.

117. Mr Tankel submitted that section 1 of the Care Act 2014 did not assist the Claimant. In each case the Defendant undertook a careful and detailed assessment, which was fact sensitive and focused upon the individual service user's particular needs and preferences, as required by the statutory provisions. To recognise the Combined Duty would be to put a gloss on the statutory wording and it would not be in keeping with the statute's focus, which is upon a bespoke, multi-factorial assessment of the individual's needs.

118. Mr Tankel disputed that the Article 3 threshold was reached in circumstances where the evidence showed that the risk of a female service user receiving cross-sex personal or intimate care was low and the risk of abuse taking place in that context was lower still. Furthermore, the complaint was not about abuse per se, but about the

extent to which there was a heightened risk of abuse over and above the risk of abuse that was also faced by male service users. He also argued that if the Article 3 systems duty did apply, it was satisfied, as this was a highly regulated area under which the Defendant already had an appropriate system in place. He relied upon the nature and depth of the assessments undertaken under the Care Act 2014; the Defendant's commissioning processes, its contractual arrangements with care providers and the contract monitoring and QA that took place, along with the opportunity to raise complaints (as described by Ms O'Driscoll); and the regulation of care agencies by the CQC and the detailed requirements upon those providing personal care imposed by the 2014 Regulations (paras 68 – 75 above). He said that there was "a whole world of regulation and compliance intended to address" the kinds of concerns raised on behalf of the Claimant. Mr Tankel relied upon similar points in relation to Article 8, also emphasising that this was a qualified right and considerations of proportionality were in play.

119. Mr Tankel contended that the Equality Act 2010 did not assist the Claimant. There was no relevant PCP, simply an absence of a specific, articulated policy of the kind that was sought. Furthermore, if that absence could amount to a PCP, it had not been applied to the Claimant and/or had not put her at a disadvantage, as her biological sex had been recorded, the Defendant had indicated that the preference expressed for same-sex care would be adhered to and in any event the Defendant was not arranging her care at this juncture. He also disputed that female service users more generally were put at a disadvantage, as under the Defendant's system, service users received the care most appropriate to them. If it was necessary to do so, Mr Tankel indicated that he relied upon the Defendant's approach constituting a proportionate means of achieving the legitimate aim of providing adult social care in a way that balanced the potentially competing factors in an individual case. At para 48 of his skeleton argument, Mr Tankel gave examples of where same-sex care would not necessarily be the right answer.

120. Mr Tankel submitted that the Defendant discharged the PSED by undertaking the detailed assessment process described in the evidence in relation to each service user. This enabled all relevant information, including same-sex care preferences and biological sex (where relevant) to be recorded. He said the evidence showed that although there was not currently a drop down field on the IAS system for recording sex (as opposed to gender), the biological sex of a service user would be abundantly clear from their notes on the system. Furthermore, the Defendant was entitled to treat gender as a proxy for sex unless there were indications to the contrary.

121. As regards the 29 January 2024 letter, Mr Tankel submitted it conveyed a decision on the complaint made by the Claimant's father, but it was not a decision to adopt the policy or policies that the Claimant challenged in these proceedings.

Analysis and conclusions

Existence of the Combined Duty

122. In light of the way that the argument is put, it is necessary to examine each of the component duties that are relied upon as giving rise to the alleged Combined Duty, that is to say a duty on the Defendant to operate a system that ensures, or which has the objective of ensuring, the provision of same-sex personal and intimate care for

female service users, save where there is a request or preference or it is assessed to be in the service user's best interests to have care delivered on some other basis.

Duty to promote well-being and protect from abuse under the Care Act 2014

123. The material provisions under the Care Act 2014 emphasise that the duty to promote an individual's well-being is tailored to that individual's needs, feelings, beliefs and best interests (paras 63 – 64 above). This is reinforced by the provisions of the Statutory Guidance that I have highlighted (para 67 above). In the circumstances, I accept Mr Tankel's submission that the legislation requires a fact-sensitive needs assessment that is tailored to the particular person. Whilst it is right to note that "personal dignity" and "protection from abuse and neglect" are recognised as central aspects of a person's well-being (para 61 above), the statutory provisions envisage that these and other aspects of a person's well-being will be promoted via the detailed needs assessment and care support plan created in each case. This is further reinforced by the evidence of Ms Reilly and Ms O'Driscoll, both as to the detailed and personalised nature of these assessments and their confirmation that, where relevant, a service user's sex will be recorded in their documentation held on the IAS (paras 20, 24, 34, 44 and 46 – 50 above). I consider the Defendant's evidence as to its current practice in greater detail from para 128 below, however, in short, no basis has been shown to doubt that evidence. The careful recording of the Claimant's sex further supports the Defendant's case in this regard (paras 24, 29 – 30 and 32 above).

124. Accordingly, I do not consider that the Care Act 2014 duties afford any specific support for the existence of the alleged Combined Duty. As Mr Tankel points out, if Parliament had wished to do so, it could have included a provision imposing the Combined Duty (or something similar to it) in the Care Act. Equally, the lengthy Statutory Guidance contains nothing that is indicative of or supportive of the existence of the Combined Duty. I also note that if the alleged duty was accepted by the Court as generally applying to female service users, it could potentially conflict with the multi-factorial assessments that the Care Act envisages taking place in each case.

Systems duty under Articles 3 and 8

125. As I understand it, Article 3 is relied upon by the Claimant in respect of the heightened risk of physical and psychological abuse, including sexual abuse, that arises from the provision of cross-sex personal and intimate care and/or a system that fails to take steps to guard against the provision of such care on a cross-sex basis. For the avoidance of doubt, there is no evidence that an abusive situation of this nature has arisen in the Defendant's provision of Adult Social Care; rather (as Mr Tankel emphasises), it is the increased risk of such abuse were cross-sex care provided in comparison to the lower risk in a system of same-sex care, that is said to give rise to the Article 3 low level systems duty. Given the relatively high threshold that conduct must reach to amount to "inhuman or degrading treatment" and given that the evidence does not suggest the risks of this occurring are other than at a low level (para 118 above), I do not find that an Article 3 positive obligation is triggered by these circumstances. However, and in any event, if such a duty does exist, it is met by the existing arrangements, practices and safeguards, as I go on to discuss in relation to Article 8. Before doing so, I note as significant in relation to any duty arising under Article 3, that the *likelihood* of the risk occurring is relevant to the question of what is

required of the public authority; the duty is not an absolute one, where the lower level systems duty arises the public authority mut implement measures to reduce the risk to "a reasonable minimum" (*MG* at para 95 above).

126. Article 8 is relied upon more broadly in terms of preserving the service user's dignity and bodily integrity when receiving personal and intimate care from a carer provided via the Defendant pursuant to its Care Act 2014 obligations. I accept that these circumstances give rise to an Article 8 lower level systems duty on the part of the Defendant to have in place an appropriate administrative framework, that is effectively implemented to guard against the risk of breaches of the Article 8 negative obligation. Consistent with the agreed approach in *Sodexo*, the question for me is whether there are "adequate and effective safeguards" against such breaches in all the circumstances.

127. For the reasons that I will go on to identify, I am satisfied that there are such "adequate and effective safeguards" in place and that, accordingly, neither Articles 3 or 8 assist the Claimant's Combined Duty argument.

128. As I have referred to at para 123 above, the Care Act 2014 framework and the evidence as to the way that it is operated in practice by the Defendant, indicates that, where it is relevant to do so, a service user's sex will be captured as part of their detailed needs assessment and care support plan, that this will be made available to those involved in the provision of their personal and intimate care and that any such recorded preference will be respected. Furthermore, the Defendant's evidence indicates that in practice – and save for in the kind of exceptional situations that I refer to in para 133 below – same-sex personal and intimate care *is* provided to service users: see paras 34, 48, 50 and 51 above. The Claimant has provided no evidence to gainsay this and I accept the Defendant's evidence in this regard. Ms Monaghan referred to three aspects in support of her suggestion that I should regard the Defendant's evidence as unsatisfactory. For the reasons that I identify in the paragraphs immediately following, I do not accept that this is the case or that these matters undermine the clear and specific accounts given by Ms Reilly and Ms O'Driscoll, which I have already set out in detail.

129. Firstly, Ms Monaghan suggested that there were internal inconsistencies in the Defendant's evidence. In this regard she was only able to point to para 17 of O'Driscoll 2 (para 60 above), which she contended indicated a more flexible approach to cross-sex care, than is set out in the other evidence. I do not agree that there is any inconsistency. In the relevant passage, Ms O'Driscoll specifically qualifies the text that follows by indicating that she is referring to "a case in which cross-sex care was *otherwise the right decision*" (emphasis added).

130. Secondly, Ms Monaghan referred to the FOIA response (para 28 above). However, I accept Mr Tankel's point that the terms of the question indicate that the response was referring to the (acknowledged) absence of a written policy or procedure in this area; neither the question nor the answer were addressed to what happens in practice in terms of the provision of same-sex intimate care.

131. Thirdly, Ms Monaghan relied upon the 29 January 2024 letter. It will be recalled that the letter was written in response to a complaint that was primarily about alleged non-compliance with data protection legislation (not an issue raised in these proceedings)

and in that context, primarily about the recording of the service user's gender (para 35 above), which, again, is no longer a live issue. The response was a less than helpful one in a number of respects. As I have already noted, the passage that I have quoted at para 36 above does not make sense and the author decided to focus a substantial part of the response upon the position of a (hypothetical) transgender carer – a situation which, I am told, has never arisen in practice - and, in doing so, it is now in effect accepted that the author misunderstood the provisions of the Equality Act 2010 regarding the provisions of same-sex services (paras 11 and 38 above).

132. I return to the 29 January 2024 letter at para 154 below, for present purposes I am simply focusing upon whether its contents should cause me to doubt the Defendant's evidence that has been provided in these proceedings. They do not. The author stated that the Defendant's approach was aligned with its Care Act 2014 duties; the Defendant's evidence confirms this. The letter indicated that the authority would use its "best endeavours" to comply with the preference that had been expressed on behalf of the Claimant for same-sex care; that is consistent with the Defendant's case. The qualification that was then expressed in the letter related to the legal misunderstanding of the position under the Equality Act 2010, rather than to any suggestion that same-sex care was not in fact provided in practice. Finally, the reference to Adult Social Care having no plan to "introduce single sex services" appears to be a reference to there being no intention to commence a formalised single sex service; whereas there is no clear reference in the letter to what currently happened in practice in terms of the provision of same-sex care by the Defendant, nor any suggestion that the current practice was going to change.

133. In addition to the Defendant's evidence, which indicates that same-sex care is provided for female service users, both when requested and as a matter default, there is no evidence at all that difficulties have arisen in practice in the Defendant's provision of this. As I have already foreshadowed, the position is factually quite different to that in *Sodexho* – the main case relied upon by the Claimant in relation to the systems duty (as opposed to the doomed attempt to rely upon the operational duty, which was, rightly, not pursued). In *Sodexo,* there were admitted breaches of the Article 8 negative obligation and a related breach of the systems duty by the operator of the prison, which provided the basis, in turn, for the finding that the Secretary of State did not have in place adequate and effective safeguards (paras 100 – 106 above).

134. The Claimant is not assisted by the Defendant's indication that it does not guarantee the provision of same-sex care to female users in all circumstances. The Claimant's revised formulation of the Combined Duty (as set out at para 1 of the agreed list of issues) rightly recognises that there may be exceptions where other preferences are expressed or cross-sex care is in the service user's best interests, as does Ms O'Driscoll (para 51 above). In her oral submissions, Ms Monaghan accepted that the examples given at para 48 of Mr Tankel's skeleton argument were indeed instances where same-sex care would not necessarily be the right answer. This also underscores the importance of fact-sensitive, individualised evaluation. The examples identified by Mr Tankel included: where there was an urgent need for care to be provided and a female carer was unavailable; a female service-user who exhibited violent and challenging behaviour, such that female carers were not physically strong enough to protect her, themselves and/or others in the vicinity; and a transgender service user who has a preference for intimate care from a carer of their adopted sex.

135. I also bear in mind the legal framework and the system of regulation that I have referred to in some detail earlier. In her two statements, Ms O'Driscoll explains the commissioning process and how the information that is given to the care provider would naturally result in same-sex care being provided (paras 54 – 55 above). She also explains the contract monitoring and QA processes undertaken by the Defendant (paras 56, 59 and 61 above) and how the provision of cross-sex care would be a substantial departure from the norm that is understood across the sector (para 61 above). In addition, there is the external regulation on the care providers. I have referred in detail to the relevant terms of the 2014 Regulations (paras 68 – 75 above). Further, the statutory guidance for registered care providers expressly states that the provider must make every reasonable effort to respect people's preferences as to the sex of a carer who delivers personal or intimate care (para 76 above). Ms O'Driscoll also explains that care providers are regulated by the CQC and carers are required to undergo DBS checks (paras 53 and 56 above).

136. Ms Monaghan referred to certain aspects of the Defendant's standard terms and conditions that apply to specific supported living placements and care homes pursuant to its framework agreements (the "Statement of Requirements – Appendix B Supported Living and Outreach Flexible Framework"), exhibited to O'Driscoll 2. The equivalent document exhibited to O'Driscoll 1, setting out the standard terms and conditions relating to "Care at Home" is more relevant for present purposes.

137. The Care at Home standard terms and conditions is a detailed, 30 page document, of which I will simply give a flavour. Para 3.1.3 states that providers must deliver care against the service users' care plans and in accordance with the key Care Act 2014 Outcomes (which are listed). The specifics of the Care Act concept of "well-being" are articulated at para 3.1.5. The prescribed "Aims and Objectives" in part 4.1 of the document include putting the "health, safety, quality of life and preferences of the Service User at the centre of care provision" and to "ensure that the Service User is treated with dignity and respect at all times. Their privacy and individuality will be respected in all aspects of service delivery" (and para 4.5.9 is to similar effect). Part 4.3 addresses "Service Requirements", which include that the services must be "person centred, flexible and responsive ensuring that all Service Users are able to exercise choice and control over the services that they receive"; and that "Personal care tasks must be undertaken with great sensitivity". Following a referral, a care provider is expected to undertaker "their own full and comprehensive care plan" to compliment the plan prepared by the local authority and this is to be reviewed a minimum of every six months (paras 4.51. – 4.5.4). The document indicates that care providers who fail to maintain adherence to the performance requirements will be managed in accordance with the framework agreement; and there are detailed sections of the document dealing with "Unsatisfactory Behaviour", complaints and feedback, and the "Performance Framework".

138. Accordingly, the contents of the Defendant's Care at Home standard terms and conditions document reinforces its position that effective and detailed regulation exists, with service users' dignity and preferences at the heart of care delivery. However, as Ms Monaghan drew attention to in the Supported Living terms and conditions document, the text under the heading "Sustainability, Equalities, Social Values and Other Impacts" says that "[t]he Service will respond positively to the needs of diverse individuals, specifically needs relating to the characteristics protected

by the Equalities [sic] Act 2010". The protected characteristics are then listed, but with a reference to "gender" in place of "sex". Whilst this means that neither of these terms and conditions documents contain an accurate list of the Equality Act protected characteristics, I do not consider that this of itself undermines the detailed regulatory framework or monitoring system that I have described. There is no evidence that it has done so in practice and it has to be set against the considerable emphasis in the terms and conditions upon the matters that I have highlighted.

Indirect discrimination

139. For the reasons that I will explain, I do not consider that the Defendant's current way of delivering personal and intimate care to female service users amounts to indirect discrimination within section 19 of the Equality Act 2010.

140. Insofar as the Claimant still relies upon an alleged refusal to provide same-sex care as constituting the relevant PCP, that proposition is simply not borne out by the evidence; as I have already discussed, the Defendant does not refuse to provide same-sex care, its evidence is that this is what in fact happens in practice.

141. The alternative way that the PCP is put, namely the Defendant's "system for the assessment, support planning and commissioning of personal care" is so wide as to be less than helpful. A PCP is a means of identifying whether a particular practice, criterion or policy (or sometimes the combined effect of more than one such measure) is causing disadvantage to a group that has a particular protected characteristic. If the PCP is couched in such wide and imprecise terms it is difficult to assess or show this. The Claimant's real complaint (as the formulation of the Combined Duty makes clear) is that the Defendant does not have in place a system that ensures, or which has the objective of ensuring, same-sex care and this is said to particularly disadvantage female service users because they have a greater need for same-sex care for reasons of dignity and privacy and because they are at greater risk of abuse than male service users if cross-sex care is provided. For present purposes, I will assume, without positively deciding that a more specific PCP to this effect could be formulated.

142. However, the Claimant's argument would still fall at the first hurdle because the evidence indicates that the Defendant does, in practice, have a system of ensuring same-sex care for female service users, save in appropriately exceptional situations. Accordingly, the Claimant is unable to establish the PCP that would need to be relied upon.

143. Secondly and in event, the same evidence shows that the Defendant's female service users are not put at a disadvantage by this PCP, because in practice they are afforded same-sex personal and intimate care, save in appropriate exceptional situations, and all service users receive the care assessed as appropriate to them.

144. Thirdly and in any event, a more specific PCP of the nature I have described has not been "applied" to the Claimant, within the meaning of section 19(1), as she does not currently receive direct care from the Defendant.

145. Fourthly, even if a relevant PCP was being applied to her, there is no evidence that the Claimant has or will suffer a particular disadvantage; to the contrary, the evidence is that the preference for same-sex care has been recorded and will be respected.

146. In the circumstances, there are multiple reasons why the indirect discrimination claim is not made out and thus it is unnecessary to consider whether the Defendant can belatedly raise a justification defence. Furthermore, the reliance upon section 19 of the Equality Act 2010 does not assist the Claimant in establishing the Combined Duty.

The PSED

147. I will return to the significance of the PSED when I address the Claimant's Ground 1A, but in any event I do not consider that it assists with establishing the existence of the Combined Duty. As is well-known, it is a duty of means (to have "due regard" to the specified matters), it is not a duty to achieve any particular outcome (para 83 above). Accordingly, it does not in itself support the existence of the alleged substantive duty to ensure the provision of same-sex personal and intimate care.

Conclusion

148. For the reasons that I have explained, none of the constituent duties relied upon by the Claimant assist in any significant way in establishing the existence of the novel Combined Duty. Accordingly, I answer the question posed by para 1 of the agreed list of issues in the negative.

Ground 1A

149. This ground relates to the alleged duty upon the Defendant to record the sex of its service users. The argument is primarily put on the basis that this obligation is ancillary to the Combined Duty, as the absence of a requirement to record service users' sex would mean that the Defendant was not in a position to discharge that duty. As I have rejected the existence of the Combined Duty, the main foundation of the Claimant's argument falls away.

150. However, given that this aspect was argued by Ms Monaghan with particular emphasis upon the PSED, I have also considered whether the PSED, of itself, requires the Defendant to ensure that the biological sex of its service users is recorded and, if so, whether that requirement is being met.

151. I accept that the Defendant's records should indicate the sex of service users in any case where this is relevant to the exercise of its functions under Part 1 of the Care Act 2014. However, for the reasons I have already indicated, I am satisfied that the Defendant's evidence indicates that this does occur in practice, in that either the service user's sex is specifically recorded in their notes or, in any event, their sex is clearly apparent from the material on IAS regarding the particular service user; that this material is supplied to care providers and also reflected in the documentation that they compile; and that same-sex care is in fact appropriately provided to the Defendant's female service-users. Moreover, that this position currently exists, undermines the underlying premise of the Claimant's argument that appropriate same-sex care will not be provided unless there is a system requiring the recording of sex in each case.

152. As I conclude that the Defendant is not currently in breach of the PSED, the delay in introducing the sex reporting field on IAS is not of direct materiality, although I agree

that this is likely to be of some practical benefit in those cases where a service user's sex and their gender are not aligned, as Ms O'Driscoll acknowledges (para 46 above).

153. Accordingly, I do not accept the existence of the duty that is alleged at para 2 of the agreed list of issues. Furthermore, the evidence indicates that the Defendant is complying with the PSED and its duties under the Care Act 2014 in terms of the information about sex that is recorded.

Ground 3A

154. The issue identified at para 6 of the agreed list of issues is entirely predicated on the existence of the Combined Duty. Accordingly, it does not arise in light of my conclusion that this duty does not exist.

Ground 3B

155. I have already explained why I do not consider that the Defendant's system in respect of personal care unlawfully indirectly discriminates against the Claimant (paras 138 – 144 above).

The 29 January 2024 letter

156. It is unnecessary for me to decide whether the 29 January 2024 letter in fact contained each of the three alleged policies or decisions that were initially challenged in the Claim Form (para 5 above), as matters have moved on since then. It is no longer alleged that the Defendant has a general policy of not recording the sex of service users when carrying out Care Act 2014 assessments and it is accepted that, contrary to the pleaded assertion, the Claimant's sex is recorded in her care plan. The second challenge (regarding gender recording) has fallen away altogether. The third challenge has been reformulated, it being accepted that the Defendant's system *allows* for same-sex personal care. The reformulated policy challenge (para 11 above) and the grounds in the agreed list of issues, have been formulated, or re-formulated, in light of the Defendant's evidence, rather than by reference to the specifics of the 29 January 2024 letter. In short, whilst it is an unsatisfactory letter in a number of respects (para 131 above), it is not a document that sets out the policies that are now challenged in these proceedings. Further, in so far as the Claimant's parents were concerned about the letter's apparent misunderstanding of the Equality Act 2010 provisions relating to the provision of same-sex services, I have recorded in this judgment what is now the parties' agreed position in that regard (paras 11, 38, 40 and 87 above).

157. In the circumstances, I do not consider that it is appropriate to grant the relief sought in respect of this letter.

Relief

158. The grant of the declaratory relief sought by the Claimant (para 12 above) does not arise, as I have not upheld any of the grounds of challenge.

Summary of my conclusions and the outcome

159. The evidence before the Court indicates that performance of the Defendant's responsibilities under the Care Act 2014, the regulatory framework in place and the Defendant's arrangements with its care providers, do result in practice in same-sex personal and intimate care being provided to female service-users, save in the kinds of (accepted) exceptional circumstances that I have outlined. The Claimant has not adduced any evidence to the contrary. The Claimant herself is not currently in receipt of personal care provided by the Defendant and thus there is no suggestion that the Defendant has failed to provide same-sex care in her case.

160. For reasons that I have explained at paras 123 – 124 above, the Care Act 2014 does not require the Defendant to go further than the duties that are there set out, which are centred on the identification of and promotion of service users' well-being on an individualised basis. For the reasons I have identified at paras 125 – 137, the Defendant's systems and practices adequately and effectively safeguards against breaches of Articles 3 and/or 8 ECHR in respect of the provision of same-sex personal and intimate care. The Claimant's case on indirect discrimination fails for the multiple reasons I have set out at paras 138 – 144 above, each of which is fatal in itself to that contention. The evidence indicates that the Defendant is complying with its obligations under the PSED (para 149 above).

161. I have fully taken into account the no doubt deeply held concerns of the Claimant's parents, but in the circumstances no legal basis has been shown for the Court to recognise the alleged Combined Duty - namely a novel duty for which there is no supporting authority, to operate a system that ensures or which has the objective of ensuring, the provision of same-sex personal and intimate care for female service users (save where there is a preference or it is assessed to be in the service user's best interests to have care delivered on some other basis) – in addition to the Defendant's existing legal responsibilities.

162. Whilst written practice guidance in this area (which the Defendant is in the process of compiling) is no doubt desirable, that is a long way from the Court finding that the current absence of written guidance reflecting the alleged Combined Duty, is unlawful.

163. Accordingly, this application for judicial review is dismissed.

164. The parties had the opportunity to address consequential matters in writing when a draft of this judgment was provided.