

**IN THE MATTER OF A PROPOSED JUDICIAL REVIEW
BETWEEN**

INDEPENDENT CUSTODY VISITING ASSOCIATION

Proposed Claimant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Proposed Defendant

OPINION

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21st December 2017



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A) INTRODUCTION

1. We are asked to advise the Independent Custody Visiting Association (“ICVA”) on the legality of continuing failures by police forces in England and Wales to meet the needs of menstruating women detained in police custody.
2. Anyone detained in the custody of the State must be treated with dignity. The Police and Criminal Evidence Act 1984 (“PACE”) governs the treatment of all persons in police detention, together with its Code of Practice, Code C on the treatment of detainees. The management of police custody must take into account the safety and dignity of each detainee, including the need for women having their period to have access to safe, appropriate and hygienic sanitary protection.
3. Evidence gathered by ICVA, and by others with responsibility for monitoring the treatment of detainees, including Her Majesty’s Inspectorate of Constabulary, Fire and Rescue Services (“HMICFRS”) and its predecessors, suggests that women are routinely failed both by individual forces and by gaps in the national guidance given by the Secretary of State and the College of Policing.

B) SUMMARY

4. We consider, for the reasons set out below, that there is substantial evidence that the needs of menstruating women are frequently overlooked in police custody, placing the dignity of women and girls at significant risk while in police detention.

5. Treatment which fails to meet the needs of women for access to appropriate and hygienic sanitary protection and to safe and private facilities for changing will, in our view, breach the right to respect for private life in Article 8 of the European Convention on Human Rights (“ECHR”), as protected by the Human Rights Act 1998 (“HRA 1998”), whether taken alone, or together with the right to enjoy Convention rights without discrimination in Article 14. In some circumstances, depriving women of sanitary protection is likely to amount to degrading treatment incompatible with Article 3.
6. Failures identified, on the evidence available to us, appear plainly inconsistent with the non-statutory guidance offered by the College of Policing to all forces, replicated in a number of local force policies. However, this specific guidance is not found in Code C to PACE, which requires all detainees to be treated with dignity. In our view, this failure to provide clear and reliable national statutory guidance to individual forces, staff and officers may be unlawful and incompatible with ordinary public law standards.
7. Taken together with the guarantees provided in international instruments which bind the UK, including in the Convention for the Elimination of All Forms of Discrimination Against Women (“CEDAW”), the *Bangkok Rules* on the treatment of women prisoners and the guidance of the European Committee on the Prevention of Torture, it is our view that the evidence of consistent failures by forces across England and Wales in the provision of women with sanitary protection, leaves both individual forces and the Secretary of State at significant risk of a successful legal challenge.
8. In our opinion, the current poor practice by a number of forces in England and Wales – together with the failure of the Secretary of State to provide clarity in statutory guidance – is unlawful.
9. We advise that the ICVA should write to request that the Secretary of State for the Home Department:
 - a. Conduct a full review of the current national policy and practice on detention, women and sanitary protection, including for compliance with Section 149, Equality Act 2010 and the public sector equality duty (“PSED”); and

- b. Amend Code C to make express provision for the treatment of menstruating women as a group of detainees requiring special provision, including to ensure access to appropriate sanitary protection, to private and hygienic facilities for changing, to women officers and/or staff; and to ensure that menstruation is considered with sensitivity during strip-searching and the removal of clothing to manage risk (we make specific recommendations for amendments, below at paragraph 93).
10. This request should also be made directly to the Minister for Women and Equalities, who retains cross-Government responsibility for implementation and enforcement of the Equality Act 2010 and for Government policy on women's rights and equality.
11. In the event that the Government should refuse to consider the changes to Code C proposed, or a full public sector equality review, it is our view that an individual claimant or group of claimants, or the ICVA acting in its own right, would have strong grounds to pursue a judicial review against the Secretary of State. In so far as the current practice is unlawful, in our view, individual women treated without dignity in custody are likely to have sustainable damages claims.
12. No woman or girl should be left in a cell, in indignity by police officers for want of a difficult conversation or an inexpensive box of tampons.

C) FACTUAL BACKGROUND

13. ICVA received a report during 2016 highlighting a woman in a police cell who had her clothes removed and was dressed in a paper suit. Her underwear had been removed although she had her period. The Custody Visitor asked that she be given underwear in order that she could have some sanitary protection. This was refused due to a risk of self-harm. It appears no tampon was offered as an alternative; use of a pad being impossible without underwear. No consideration appeared to have been given to the possibility of increased observations or constant observation as an alternative either to the removal of this woman's underwear and her pad or to the option of providing a tampon to her. Instead, she was left in a state of vulnerability sufficient to cause concern for her well-being, bleeding in a paper suit, alone in a cell.

14. The Chief Operating Officer of ICVA was concerned this case should be drawn to the attention of the public and to the Board of the ICVA. This case, although extreme, was not an isolated one in the experience of the ICVA and its Visitors. In *Sanitary Custody*, the Sherry Ralph, wrote:

“Custody suites typically only have one absorbency of tampon and towel available, and a limited supply thereof. One senior officer described the packs that they have to buy as “woeful”. This means that, more often than not, a female detainee could have something that wasn’t absorbent enough, was uncomfortable, or wasn’t able to change the sanitary wear as often as they might wish to do so. [...]

Ok, so assuming we have had a female staff member booking us in, and the sanitary wear given is appropriate for need, hurrah! Sadly no, we’re not done yet people! There are more issues yet to go before you have full dignity in custody when menstruating.

Let’s go on to changing your sanitary wear – now, I don’t want to go into too much detail here, but suffice to say it’s not always the most discreet thing to do! [...]

So, have I found this blog uncomfortable to write due to my own awkwardness talking about periods and all they entail? Yes, I undoubtedly have.

*Do I think that it’s so important an issue for the dignity of women in custody that we **all** need to overcome any awkwardness and talk openly about the issue until sanitary protection in custody is varied and freely available? Yes, yes, I really do.”¹*

15. This narrative of seeming failure is echoed in the joint inspection reports of Her Majesty’s Inspectorate of Custody (“HMIC”) and Her Majesty’s Inspectorate of Prisons (“HMIP”), now Her Majesty’s Inspectorate of Custody Fire and Rescue Services (“HMICFRS”). In 2016-7 reports, for example:

- a. **Sussex:** HMIC/HMIP concluded that the needs of female detainees were not being met adequately by this force:
 - i. Women were not asked routinely whether they wished to speak to a female officer or if they wished to receive a feminine hygiene pack.²
 - ii. The expectation within the force was that packs would only be provided if proactively requested by the detainee.³

1 Chief Operating Officer’s Blog, [Sanitary Custody](#), September 2017.

2 HMIP/HMIC, [Report on an unannounced inspection visit to police custody suites in Sussex](#), 7th – 18th November 2016, 2.25.

- iii. Tampons were not available as a result of long-standing safety concerns. HMIC/HMIP considered the current arrangements disproportionate to the risks assessed and that they adversely affected the care and welfare of female detainees.⁴
 - iv. The level of privacy afforded to detainees in custody was generally inadequate. Notably, aside from one block at Crawley, none of the cell toilets were obscured on CCTV across the force, despite previous recommendations arising from critical inspections.⁵ A male detainee had reported that he had not used the toilet in the cell as it had not been explained to him that he would not be observed.⁶
 - v. Concern was expressed about the disproportionate, default use of removal of corded clothing. Recommended that detainees clothing should only be removed on the basis of an individual risk assessment.⁷
 - vi. HMIC/HMIP recommended that female detainees should automatically be asked about a female officer and sanitary protection on booking in, consistent with existing force policy.⁸ CCTV of toilets in cells should be obscured.⁹ Booking-in areas should be sufficiently private to facilitate effective communication.¹⁰
- b. **West Midlands:** Although the risk assessment template used during booking-in was praised, this did not always translate into meeting diverse needs in practice:
- i. The needs of female detainees, those with restricted mobility and foreign nationals who do not speak English were not met adequately.¹¹
 - ii. Female officers were not available on every shift.¹²
 - iii. The selection of sanitary protection offered was poor.¹³

3 Ibid, 5.3.

4 Ibid, 5.4.

5 Ibid, 2.23, 5.5.

6 Ibid, 6.2.

7 Ibid, 5.20, 5.23.

8 Ibid, 5.12.

9 Ibid, 5.13.

10 Ibid, 5.14.

11 HMIC/HMIP, *Report of an unexpected inspection visit to police and custody suites in the West Midlands*, 30th Jan – 10th Feb 2017.

12 Ibid, p5.3.

13 Ibid, 5.4.

- iv. The levels of privacy offered to detainees was poor.¹⁴ Older booking in facilities provided little possibility of discreet communications.¹⁵
 - v. The use of paper suits to replace detainees' clothing was not routine but they were sometimes used to off-set the risk of self-harm, which was considered to be "demeaning and ineffective", and also contrary to the force policy.¹⁶ It was recommended that more effective alternatives to using paper suits should be used, to minimise the risk of self-harm.¹⁷
 - vi. It was recommended that female staff be made available at all times and the selection of products should be improved.
- c. **Essex:** Failed to ensure that their booking-in areas provided sufficient privacy to facilitate effective communication between staff and detainees.¹⁸ There were no clear local procedures or policies in place to meet the specific needs of women, children or young people or those with disabilities.¹⁹ Anti-rip clothing for detainees at risk of self-harm was used too often and usually without an individual risk assessment. HMIC/HMIP recommended that anti-rip clothing should not be used routinely but be based on individual and dynamic risk assessment.²⁰ Not all cells had hand-washing facilities but detainees could use the corridor sink on request, subject to staff availability.²¹

16. This echoed similarly inconsistent practice in 2015-6:

- a. **Lancashire:** HMIC/HMIP expressed significant concerns about the treatment of women:
 - i. Women searched were a particular concern. One detainee had clothing removed in front of a male member of staff. Another individual was

14 Ibid, 5.4.

15 Ibid, 2.21, see also p49.

16 Ibid, 5.14.

17 Ibid, 5.17.

18 HMIC/HMIP, [Report of an unexpected inspection visit to police and custody suites in Essex](#), 27th Feb-10th March 2017, p43. See also, 2.16, 2.33, 5.2.

19 Ibid, p 43 (Recommendation from previous report, not achieved (Marked 3.15).

20 Ibid, 5.12, 5.15.

21 Ibid, 6.20.

left naked in a cell with CCTV. Another woman was brought into custody in underwear, with no clothing provided for some time.²²

- ii. Women were not asked routinely either about sanitary packs or whether a female officer was required;²³
- iii. Privacy in the booking in process was difficult;²⁴
- iv. CCTV in cells was not pixellated at all. As a consequence all of the cell toilets could be viewed in the control area. This was “completely inappropriate”;²⁵
- v. There was little recorded justification for strip-searching or the forcible removal of clothing, which seemed “almost routine”;²⁶
- vi. There was poor practice identified including a small number of very concerning cases of a lack of regard for the dignity of detainees, including one female detainee brought in underwear and not provided with anything to cover herself for some time; and another female detainee stripped and left in the cells for almost three hours;²⁷
- vii. Hand-washing not routinely available in cells; on corridor subject to request and staff availability.²⁸
- viii. Towels, toiletries and sanitary items were available at all suites. However, at one station, the sanitary protection was stored unhygienically.²⁹

b. **South Wales:** HMIC/HMIP expressed a range of concerns, including:

- i. Women were not always given an opportunity to speak to a female member of staff;
- ii. Women were not routinely offered sanitary products or asked if they were pregnant;
- iii. CCTV operated in all cells. Detainees were not routinely informed that the toilets were obscured. One woman told the Visitor that she

22 HMIC/HMIP, [*Report of an unexpected inspection visit to police and custody suites in Lancashire*](#), 1st May – 10th June 2016. See for example, 6.17.

23 Ibid, 5.4.

24 Ibid, 2.27.

25 Ibid, 2.31, 2.47, 5.2.

26 Ibid, 2.34.

27 Ibid, 5.2.

28 Ibid, 6.19.

29 Ibid, 6.20.

had not used the toilet at all while in the cell as she was concerned about officers viewing the CCTV footage;

- iv. Toilet paper not routinely provided;
 - v. No hand-washing provided in all cells. At Swansea, there were washing facilities on the cell corridors, but these had to be accessed on request to the staff.³⁰
- c. **Avon & Somerset:** Women and girls were not routinely offered a female officer to help with their needs. The custody computer system no longer prompted custody sergeants to ask this question.³¹
- d. **Greater Manchester:** Women were not always given the opportunity to speak to a female member of staff, and were not routinely offered access to sanitary products or asked if they were pregnant. Some individual custody sergeants cleared the custody suite to deal with booking in, but this was not consistent. No detainees were offered access to washing facilities throughout the time of the inspection.³²
- e. **Met Detention South:** Women were not always informed of the option to speak to a woman member of staff. They were not made aware of the availability of sanitary protection, despite prompts to do so as part of the electronic booking process.³³
- f. **Lincolnshire:** Women were not given the opportunity to speak to a female member of staff, nor were hygiene products offered routinely.³⁴

30 HMIC/HMIP, [Report of an unexpected inspection visit to police and custody suites in South Wales](#), 11th – 22nd April, 2016. See 5.2, 5.3, 6.5, 6.17.

31 HMIC/HMIP, [Report of an unexpected inspection visit to police and custody suites in Avon & Somerset](#), 1st - 12th April, 2016. See 5.4.

32 HMIC/HMIP, [Report of an unexpected inspection visit to police and custody suites in Greater Manchester](#), 5th – 14th January, 2016. See 4.2, 4.3.

33 HMIC/HMIP, [Report of an unexpected inspection visit to police and custody suites in Met Detention South](#), 3rd – 9th November 2015. See 4.1, 4.33, 4.36.

34 HMIC/HMIP, [Report of an unexpected inspection visit to police and custody suites in Lincolnshire](#), 23rd – 29th September 2015. See 4.1, 4.33, 4.36.

- g. **West Yorkshire**: All women and children usually offered a gender-suitable contact and there was a template in use to show actions taken to meet individual needs, including for sanitary protection. However, not all booking-in areas were sufficiently private. The lack of privacy to make disclosures could have an adverse impact on the experience and welfare of women in custody.³⁵
- h. **Dorset**: Women were not consistently assigned a female officer and were not asked about sanitary protection. Recommendation that all female detainees are offered sanitary protection.³⁶

17. The current arrangements for the management of custody and the treatment of detainees in England and Wales appear to be failing menstruating women in police custody in a number of ways:

- a. Women are not consistently presented with an opportunity to identify their need for sanitary protection. The custody process is completed in often busy and crowded custody suites, with little privacy for conversations between any woman seeking assistance and the custody sergeant responsible for her care. Where good practice is adopted – by finding a quiet area, clearing the custody suite or conducting the booking-in in a separate room – this was not consistent.
- b. Women are not routinely offered access to a nominated female employee. Many women may find it deeply difficult and uncomfortable to discuss periods and their need for sanitary protection with a male officer, no matter how conscientious or competent he may be in the discharge of his duties.
- c. Sanitary protection is not consistently offered as a matter of course to all women detainees on their arrival at a custody suite.
- d. When offered, the sanitary protection offered is not of a consistent quality or quantity to routinely meet the needs of women detainees. A range of products

35 HMIC/HMIP, [Report of an unexpected inspection visit to police and custody suites in West Yorkshire](#), 8th – 22nd July 2016, 5.2, 5.3, 6.21.

36 HMIC/HMIP, [Report of an unexpected inspection visit to police and custody suites in Dorset](#), 6th – 25th September 2015. See 2.13, 4.3.

– including both tampons and pads for different flow – is not available in most forces.

- e. The facilities offered to women detainees for the purposes of changing their sanitary protection is not routinely private or sanitary. For example:
 - i. the area near or around the in-cell toilet is not routinely pixellated and/or no alternative facility is provided for the changing of sanitary protection;
 - ii. where pixellation is provided, the area which is not viewable is insufficiently broad to give women confidence that they cannot be viewed changing their sanitary protection;
 - iii. it is not routinely communicated to detainees when such pixellation is provided;
 - iv. nor is it clear what purpose the generation or retention of any such footage might serve;
 - v. hand-washing facilities are not easily accessed in all cells and nor is hand-sanitizer consistently provided.
- f. Finally, the process of risk assessment on arrival in custody and throughout any detention fails adequately to consider the needs of menstruating women detainees, such as is necessary in order to meet the obligation on individual forces and the State to treat all detainees with dignity.

18. Some forces' performance is clearly far better than others, with some examples of good practice. For example:

- a. Staffordshire staff used initial risk assessment effectively, including appropriate prompts for the handling of female detainees.³⁷
- b. In North Yorkshire, all female detainees are routinely provided with a hygiene pack on arrival.³⁸

19. This is an issue of particular sensitivity which may be unlikely to give rise to proactive complaint by individual prisoners. Most women are familiar with the discomfort and

37 HMIC/HMIP, [Report of an unexpected inspection visit to police and custody suites in Staffordshire](#), 3rd – 12th April 2017. See p.21.

38 HMIC/HMIP, [Report of an unexpected inspection visit to police and custody suites in North Yorkshire](#), 24th – 29th August 2015. See 4.29. However, see also, 2.13, 2.14, 2.15, 4.1- 4.3.

embarrassment associated with sanitary protection which fails, including where leaks occur in public. The vulnerability of women in custody, including those in detention for the first time, young women and girls, may make asking for help, even after a heavy bleed and/or a leak, very difficult. A complaint is likely to compound any initial indignity faced by being in custody without access to adequate sanitary protection.

20. Clear safeguards for the proactive protection of the needs of menstruating women in custody are important and recognised in the guidance offered by the College of Policing and reflected in some local policies (see below at paragraphs 29 - 37). It is unlikely to be reasonable or sufficient, as in the case of some of the forces above, for officers to wait for a woman to ask for help.
21. However, the evidence of failure to meet the standards which should be applied to all women detainees, and reflected in national and local guidance considered below, appears in forces across the regions of England and Wales.

Women, periods and custody

22. There is a significant body of work available which illustrates the physical and psychological impacts on women of poor access to sanitary protection during menstruation. These impacts undermine the enjoyment by women of their wider human rights, including in this instance, the right to equal treatment in the criminal justice system. Briefly, Human Rights Watch recently summarised the position thus:

“Practical barriers to managing menstruation may prevent equal enjoyment of human rights, as detailed above. However, cultural norms related to menarche and menstruation may also act to further entrench discriminatory practices, policies, of laws. Taboos and stigma around menstruation are rooted in perceptions that menstruation is something dirty, to be ashamed of, and to be hidden. This can create or reinforce discriminatory practices against women and girls, hampering gender equality and impacting women’s and girls’ dignity.”³⁹

39 Human Rights Watch and Watch, *Understanding Menstrual Hygiene and Human Rights*, August 2017.

D) LEGAL OVERVIEW

The Police and Criminal Evidence Act 1984: Code C Guidance

23. Part IV of the Police and Criminal Evidence Act 1984 (“PACE”) governs the treatment of persons while they are in police custody. Section 39 makes the Custody Officer responsible for ensuring that any detainee is treated in a manner consistent with a statutory Code of Practice on the treatment of detainees.

24. The Secretary of State is required to issue a Code of Practice in connection with the detention, treatment, questioning and identification of persons by police officers (s. 66(1)(b)). Code C, last revised in February 2017, provides a detailed set of directions on the handling of an individual’s time in police custody. For example, it provides:

1 The powers and procedures in this Code must be used fairly, responsibly and with respect for the people to whom they apply and without unlawful discrimination. Under the Equality Act 2010, Section 149 (Public Sector Equality Duty), police forces must, in carrying out their functions, have due regard to the need to eliminate unlawful discrimination, harassment, victimisation and other conduct which is prohibited by the Act, to advance equality of opportunity between people who share a relevant protected characteristic and people who do not share it, and to foster good relations between those persons.

3.7 Risk assessments must follow a structured process which clearly defines the risk to be considered and the results must be incorporated in the detainee’s custody record. The custody officer is responsible for making sure those responsible for the detainee’s custody are appropriately briefed about the risks.

3.10 Risk assessment is an ongoing process and assessments must always be subject to review if circumstances change.

8.4 Access to toilet and washing facilities must be provided.

8.5 If it is necessary to remove a detainee’s clothes for the purposes of investigation, for hygiene, health reasons or cleaning, replacement clothing of

a reasonable standard of comfort and cleanliness shall be provided. A detainee may not be interviewed unless adequate clothing has been offered.

8C The Detention and Custody Authorised Professional Practice produced by the College of Policing provides more detailed guidance on matters concerning detainee healthcare and treatment and associated forensic issues which should be read in conjunction with sections 8 and 9 of this Code.

25. Part 3 of Code C deals with the processing of detainees on arrival in the custody suite. It includes provision for healthcare assessment and risk assessment. This section makes no reference to sanitary protection or the facilities to which female detainees may require access.
26. Code C makes no specific arrangements for the treatment of women detainees while they are in custody. It does however, make specific provision for the handling of the treatment of “special groups” while in detention. Currently these include juveniles, persons who require translation and persons who are blind, seriously visually impaired or unable to read.⁴⁰ Specific arrangements are made for those groups, including in respect of the contacting of parents or guardians, or for making arrangements for an appropriate adult.
27. Code C as amended contains a significant Annex L, which provides for the establishment of gender for the purposes of searching. These provisions refer to the dignity of the individuals concerned as a primary concern.⁴¹ This is the only reference made in Code C to the dignity of women in police custody.
28. No specific guidance is given on risk assessment and strip searching an individual who may be menstruating (which might equally apply to the substitution of that clothing with non-rip alternatives).

40 Code C, 3.12 – 3.20A. See also, Code C, 10.11A - 10.12, 11.15 – 11.17A for example.

41 Code C, Annex L, 5.

The College of Policing: Detention and Custody Authorised Professional Practice (APP)

29. Although the APP does not form part of Code C, as outlined above, Code C provides that they should be “read together”. This guidance was last updated in April 2017 and provides more specific direction on how women in custody should be treated.
30. Part 5 of the APP, *Detention & Custody: Detainee Care*, covers clothing and access to toilet facilities.
31. Section 5.1 (Clothing) makes provision for the removal of clothing and the use of anti-rip suits. It makes clear that as a default, detainees are to be made comfortable in their own clothing. If a decision to remove clothing is taken, an individual risk assessment must be conducted. Any risk should be balanced against the need to treat any individual prisoner with dignity. The guidance makes clear that alternatives to the replacement of clothing with a non-rip suit should be considered:

“Detainees should be able to remain clean and comfortable while in custody. Changes of clothing, especially underwear, should be facilitated as required. Forces should ensure that alternative clothing is readily available within their custody suites.

Officers must justify removal of clothing for safety or investigative purposes and record this in the risk assessment and custody record. Any item of clothing can be used as a ligature. Belts, ties, cords and shoelaces are obvious and more readily available.

Officers should make the decision to remove such items after conducting a risk assessment. The custody officer must balance any risk with the need to treat detainees with dignity.

If a detainee is believed to be at risk of suicide or self-harm, seizing and exchanging clothing may not remove the risk but may increase the distress caused to the detainee and, therefore, increase the risk of them self-harming. Leaving a detainee in their own clothing can help to normalise their situation. Constant observation or observation within close proximity (level 3 or 4) may be a more appropriate control measure in these circumstances.

*Clothing may be taken from a detainee in the course of an investigation as evidence or for hygiene purposes. In all cases replacement clothing must be provided.”
(Emphasis added)*

32. Section 5.3 deals with toilet and sanitary facilities and makes express provision for access to sanitary protection, adequate toileting privacy and hand-washing facilities:

“Detainees should be able to access and use a toilet in privacy. Forces should provide hand washing facilities. A decision to provide or withhold toilet paper should depend on the detainee’s risk assessment. The default position should be that detainees are supplied with toilet paper unless there is evidence that they may try to harm themselves.

The potential risk posed by toilet paper is that detainees may either plait long rolls of paper to make a strong ligature, or soak the paper and force it down their throats causing death by choking. Risk can be minimised by not supplying rolls of toilet paper and supplying a number of single sheets of toilet paper when required.

Hygiene packs should be routinely offered to women on arrival and available on request. Staff should take into consideration the additional needs of detainees who, for example, are menstruating or have an additional medical need on an individual basis.

Detainees who require a shower should, where appropriate, be offered the opportunity to do so.” (Emphasis added)

33. Specific APP guidance is given on the treatment of female detainees. In *Detainee Care: Equality and Individual Needs*, guidance is provided on the need for care in the assessment of the vulnerabilities of women in custody:

“The Corston Report (2007) A Review of Women with Particular Vulnerabilities in the Criminal Justice System found that, owing to the high level of complex needs, socio-economic and family consequences of imprisonment, and the different range of offences committed by women, there are fundamental differences between male and female offenders. In the light of this, it is apparent that a different and distinct approach is needed for women.” (Emphasis added)

34. The guidance provides clear instruction on the factors to be considered by officers in the management of female detainees:

“When identifying the needs and vulnerabilities of detained women, it is important to consider:

- *the legal rights of girls under the age of 18*
- *physical and medical welfare needs*
- *child/dependent welfare issues (particularly for lone parents and foreign nationals)*
- *access to female staff*

- conditions under which women are searched (with respect for privacy and dignity)
- adequacy of clean replacement clothing
- pregnancy, known or possible (particularly when considering modes of restraint, transport and the potential requirement for additional and different types of food and/or drinks)
- mental health (in particular depression and suicidal thoughts)
- increased risk of self-harm
- domestic violence and abuse issues
- increased likelihood of drug addiction and/or alcoholism
- the effects of being separated from a child (where the detainee has a baby or infant).” (Emphasis added)

35. Officers are referred to the Equality Act 2010 and express guidance is given on menstruation, as a relevant consideration for the welfare of the detainee:

“If a woman is experiencing menopause or menstruation, officers may need to consider this if it is likely to have an effect on the detainee’s welfare.”
(Emphasis added)

36. Express guidance is given on female detainees routinely having access to female officers throughout their time in custody:

“Female detainees should have access to a female member of custody staff responsible for checking on their welfare needs. Forces should provide this access promptly and as soon as practicable.”

If a female member of custody staff is unavailable, a female police officer or female member of police staff (preferably designated as a detention officer) who is on duty at the station or unit should be assigned this role.” (Emphasis added)

Local Police Policies: Detention

37. A number of local police detainee care policies are modelled on the APP guidance above. For example, the Hampshire Constabulary Procedures provide as follows:

- a. Custody: Detainee Reception (321010) (Last updated 5th December 2016):

3.7 Feminine Hygiene Kits

3.7.1 All female detainees must be offered a feminine hygiene kit. This offer will be made, where possible by a female member of staff,

discretely (i.e. on the way to the cell) and as soon as practicable after the booking in procedure.

3.7.2 This offer must be repeated regularly throughout a female detainee's time in custody.

3.7.3 A record must be made, in the custody record, of the making of this offer.

3.7.4. A feminine hygiene kit comprises of a sanitary towel, a tampon, a sterile wipe and a disposable sanitary towel bag all contained in a sealed plain bag labelled Feminine Hygiene Kit.

3.7.5. Each custody centre must make arrangements to have a suitable container available within the custody area where used sanitary towel bags may be disposed of.

b. Custody: Post Reception Detainee Care (32102) (Last updated 14th July 2016):

3.17.5 All female detainees who are provided with a feminine hygiene kit (in accordance with Procedure 32101 – Custody Detainee Reception, at 3.7) must be discretely offered additional kits at regular intervals. Where possible such offers will be made by a female member of staff.

Expectations for Custody: HMIC/HMIP

38. The Custody Inspectorates – historically HMIC and HMIP – also produce guidance on their inspection expectations for the treatment of detainees in custody. Inspections are now the responsibility of HMICFRS. This guidance helpfully cross refers to the international law standards which will govern inspection, including in CEDAW (considered below). The current iteration of this document, *Expectations for Police Custody*, published in 2016, is relatively brief and reflects the provisions of Code C. It provides as follows (*Emphasis added*):

Expectations – Respect

8. Detainees are treated with dignity and their diverse needs, while in custody, are met.

Indicators

- *Police officers and staff interact with detainees courteously and all detainees are treated with dignity from the first point of contact.*

- *Detainees are able to disclose confidential information, and any situation or condition that makes them vulnerable, in private.*
- *Police officers and staff listen to detainees and are alert to and understand the impact of detention, particularly for those detainees identified as vulnerable. Effective support to cope with their detention is provided.*
- *Police officers and staff engage positively with detainees during their detention, particularly those who are vulnerable and high risk.*

9. Staff show an understanding of equality and diversity and know how to respond to the specific needs relating to:

- *[...]*
- **Women**
- *[...]*

There are arrangements that enable these detainees to be treated according to their individual needs.

Indicators

[...]

- *There are sufficient female custody staff members and appropriate facilities to respond to the welfare needs of detained women. Women are strip searched only in the presence of two competent female staff.*

[...]

- *Staff have a good understanding of the needs that can arise from diverse groups and are aware that they should, for example:*
 - *appropriately respond to detainees' religious observations*
 - *search detainees in a manner that is sensitive to their culture and Religion and which takes account of their gender/transgender [...]**(Emphasis added)*

39. The 2012 iteration of *Expectations for Police Custody* provided greater detail on the expected treatment of female detainees and access to hygiene packs, reflecting more closely the APP guidance, above:

7. Detainees are able to be clean and comfortable while in custody.

Indicators References

- *Detainees are provided with a mattress, pillow and clean blankets.*
- *Hygiene packs for women are available, and are routinely offered on arrival and on request.*
- *Detainees are able to use a toilet in privacy, and toilet paper and hand washing facilities are provided.*
- *Detainees who require a shower are offered the opportunity to do so.*

- *Detainees whose clothing is seized are provided with suitable alternative clothing, as soon as practicable.*
- *Changes of clothing, especially underwear, are facilitated.*
- [...]

Evidence

Detainees

Ask if they need/have received the means to be clean and comfortable while in custody. (Emphasis added)

Public law, policies and guidance

40. Individual forces are bound to apply the standards in the statutory guidance found in Code C by virtue of PACE 1984 (ss. 66-67). The Secretary of State has the power to revise the Code at any time, subject to the approval of both Houses of Parliament.⁴² However, individual forces and their officers are required to exercise their statutory powers of detention consistently with the non-statutory guidance provided in the APP and in the local police policies above, unless there is identified a sufficient reason to justify a departure from it (see for example, *R (Coughlan) v Chief Constable of Greater Manchester Police* [2005] 2 All ER 890).⁴³ Where the actions of individual forces depart from the guidance in the APP; it is incumbent on them to explain why. Without good reason, their conduct will be unlawful (see *R (Mavalon Care Ltd v Pembrokeshire County Council* [2012] A.C.D. 45).

41. Where guidance – whether in statutory or non-statutory provision – creates an unacceptable risk of a violation of individual rights; that guidance may be unlawful. Whether guidance is insufficiently precise, misleading or otherwise creates a risk of violation which is “unacceptable” remains a matter for a judge on judicial review to determine (although the threshold where the judge will intervene may be a high one) (see *R (Delezuch) v Chief Constable of Leicestershire Constabulary v Association of Chief*

42 Section 67(7) and (7)A, PACE 1984.

43 See also *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at [26], per Lord Dyson and [202], per Baroness Hale, and [313], Lord Phillips. Police witnesses have previously expressed a view that APP guidance would be the “go-to” guidance preferred on the ground by officers, even in the existence of alternative statutory guidance from the Independent Police Complaints Commission (see *R (Delezuch) v Chief Constable of Leicestershire Constabulary v Association of Chief Police Officers, Independent Police Complaints Commission* [2014] EWCA Civ 1635, at [41]).

Police Officers, Independent Police Complaints Commission [2014] EWCA Civ 1635, at [54], [62]).⁴⁴

The Human Rights Act 1998

Article 3: The right to be free from inhuman and degrading treatment

42. Article 3 protects individuals against inhuman and degrading treatment. It provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

43. Although the threshold of treatment required before an Article 3 violation will be established is a high one, conditions of detention have been found to amount to inhuman and degrading treatment in a variety of contexts involving State custody. The removal of a detainee’s clothes can in some circumstances amount to degrading treatment a breach of Article 3 ECHR. Any such action must be justified on security or other public order grounds and must be conducted in an appropriate manner with due respect for an individual’s dignity. In *Iwanczuk v Poland* (2004) 38 E.H.R.R. 8, a remand prisoner sought to cast his vote in a parliamentary election but was forced to strip to his underwear, before being ridiculed by prison guards. This violated Article 3, the search never having been justified from that.⁴⁵ Other instances of degrading treatment have included the shaving of the head of a prisoner in circumstances designed to humiliate him (he was about to appear in court).⁴⁶

44. The Court has recognised that certain categories of prisoner or detainee may require a place of detention which offers conditions and treatment suited to their particular medical and other needs. In *Price v UK*, (2001) 34 E.H.R.R. 1285, the Court considered the treatment of a disabled person committed for civil contempt. She was left overnight in a police cell where she was dangerously cold and slept in her wheelchair. She was moved

44 *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2005] 1 WLR 2219, as explained and followed in *R (Tabbakh) v Staffordshire and West Midlands Probation Trust* [2014] 1 WLR 4620. See also *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148.

45 (2001) 38 E.H.R.R. 148.

46 *Yankov v Bulgaria* (2003) 38 E.H.R.R. 854.

to prison where conditions were entirely unsuitable for her condition. It was significant that she was unable to use the toilet without the assistance of male officers.

45. The Court has recognised that there are instances where treatment and conditions might be aggravated by the presence of discrimination.⁴⁷ (Discrimination on the grounds of gender, a ground requiring particularly weighty reasons by way of justification, is considered below at paragraphs 50 - 52).
46. Violations of Article 3 are rare and its protection is unlikely to be engaged in most cases involving failure to provide sanitary protection. However, in cases such as those which sparked the ICVA consideration of these proceedings – and, for example, where a woman is left without her clothes, offered no pad or tampon, bleeding heavily, including where she may be surrounded by male officers – the elements of humiliation, mental distress and serious discrimination is likely, in our view, to be sufficient to amount to inhuman and degrading treatment for the purposes of the Convention. This is supported in the guidance of the Council of Europe Committee for the Prevention of Torture, Inhuman and Degrading Treatment (CPT), considered below at paragraphs 68 – 70.

Article 8: The right to respect for private life

47. Article 8 ECHR protects the right of respect for private and family life. It 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.*

47 See *Moldova and Others v Romania (No 2)* (2005) 44 E.H.R.R. 302 at [111]. Gratuitous remarks made by the domestic judge in this case which were purely discriminatory were treated as an “aggravating factor” in the finding of a violation of Article 3. See also *Smith v Grady v UK* (1999) 29 E.H.R.R. 93 at [121], where the Court could ‘not exclude’ the possibility that discrimination against gay men and women could, “in principle, fall within the scope of Article 3”.

48. The concept of private life is broad and autonomous. It includes respect for physical integrity and personal autonomy.⁴⁸ Conditions of detention may give rise to a violation of Article 8 in circumstances where the severity of the degradation experienced does not breach Article 3. Analogy can be drawn by the engagement of Article 8 in cases involving access to medical treatment⁴⁹ and enforced changes to an individual's appearance.⁵⁰ In our view, a failure to provide women detainees with adequate sanitary protection while in custody would clearly engage Article 8 and the right to private life.

49. Article 8 is not an absolute right. Even when Article 8 rights are engaged, interferences can be justified where they are “in accordance with law”; they serve a “legitimate aim” and are necessary and proportionate to protect national security, public safety or the economic well-being of the country, or the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. If Article 8 is engaged, the responsibility is on individual forces or the Secretary of State to point to any lawful justification for failure to adequately provide for the needs of menstruating women in police custody.⁵¹

Article 14: Equality

50. Article 14 provides that:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

51. In *Thlimmenos v Greece* (2000) 31 E.H.R.R. 12 at [44], the Court made clear that this involved different aspects of discriminatory treatment, including direct and indirect forms:

48 See *X and Y v Netherlands* (1985) 8 E.H.R.R. 235; *Laskey, Jaggard & Brown v UK* (1997) 24 E.H.R.R. 39 at [44].

49 *X v Netherlands*, App No 8239/78, 16 DR 184 (a blood test required checking for drink driving).

50 *Sutter v Switzerland* App No 8209/78, 16 DR 166 (compulsory hair cut).

51 *R (HC) v Secretary of State for the Home Department* [2014] 1 WLR 1234, [86] – [89]. In this case, the Court held that no justification could be found for the failure to treat 17 year olds as children for the purposes of Code C. An amendment to Code C was required.

“The court has so far considered that the right under Article 14...is violated when States treat differently persons in analogous situations, without providing an objective and reasonable justification. However, the court considered that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against...is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”

52. A difference in treatment for the pursuit of a legitimate aim may be capable of justification where there is a reasonable relationship of proportionality between the aim pursued and the differential treatment.⁵² However, as is well known, gender or sex is a “suspect category” of discrimination, where justification will be subject to close scrutiny and will require particularly weighty reasons. Discrimination on the basis of sex will rarely be justifiable and will always require compelling reasons:

“The advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference in treatment on the ground of sex could be regarded as compatible with the Convention.”⁵³

The Equality Act 2010: The Public Sector Equality Duty

53. Section 149 of the Equality Act 2010 (“EA 2010”) enacts the PSED. So far as is material to this advice, it provides that:

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

- (3) *Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—*
 - (a) *remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that*

52 *Belgian Linguistics Case* (1968) 1 E.H.R.R. 49.

53 *Abdulaziz v UK* (1985) 7 E.H.R.R. 417 at [78].

- characteristic;*
- (b) *take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;*
 - (c) *encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.”*

The “*protected characteristics*” include “*sex*” (section 149(7), EA 2010).

54. In *R (on the application of Brown) v Secretary of State for Work and Pensions*, [2009] P.T.S.R. 1506, the Administrative Court considered what a relevant body must do to fulfil its obligation to have due regard to the aims set out in the PSED:

- a. Those in public authorities who have to take decisions that do or might affect the protected classes – including women - must be aware of their duty.⁵⁴
- b. The “*due regard*” duty must be fulfilled in *advance* of a particular policy that will or might affect the protected classes being adopted. It is an essential preliminary to lawful public decision making.⁵⁵ Attempts to justify a decision as being consistent with the exercise of the duty when it was not, in fact, considered before the decision will not be enough to discharge the duty.⁵⁶
- c. Compliance with the duty involves a conscious approach and state of mind.⁵⁷ Such can only occur where the decision maker is aware of the duty.⁵⁸
- d. The PSED is a continuing one and will apply to both the application of Code C and its effects as applied.
- e. It is good practice for the policy or decision maker to keep an adequate record showing that they had considered the PSED and any relevant questions.⁵⁹ If

54 See also *R (Watkins – Singh) v Governing Body of Aberdare Girls’ High School* [2008] A.C.D. 88, [114], per Silber J.

55 *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213, [274], per Arden LJ; *R (C) v Secretary of State for the Home Department* [2009] Q.B. 657, [49], per Buxton LJ.

56 *R (C) v Secretary of State for Justice* [2009] Q.B. 657, [49], per Buxton LJ.

57 See for example, *R (Harris) v LB Haringey* [2011] P.T.S.R. 931, [27], per Pill LJ; *R (Bailey) v LB Brent* [2012] EqLR 168, [74]-[75], [83]; *R (Hurley and Moore) v Secretary of State for Business Innovation & Skills* [2012] A.C.D. 50, [72], per Elias LJ.

58 Building on previous case-law in *R (Chavda) v Harrow LBC* [2008] A.C.D. 31. See also: *R (Baker) v Secretary of State for Communities and Local Government* [2008] LGR 239; *R (Hurley and Moore) v Secretary of State for Business Innovation & Skills* [2012] A.C.D. 50, [73], per Elias LJ; *R (Rahman) v Birmingham City Council* [2011] EqLR 705.

59 *R (Baker) v Secretary of State for Communities and Local Government* [2008] LGR 239, [38], per Dyson LJ.

records are not kept it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty imposed.⁶⁰

55. There is a close link between a failure to discharge the PSED and the question whether a public authority has discharged the burden of establishing justification for any discrimination (including in connection with Article 14 ECHR (see below)).

56. If a public authority has failed to have due regard to the relevant statutory duty, then respect afforded by a court to the exercise of any judgment by that authority is correspondingly reduced. For example, in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213⁶¹ the failure to have due regard to the potentially discriminatory effects of a policy when it was being formulated meant that "*the kind of evidential material which ought to be available for deciding the issue of justification does not exist*" (per Elias J at [132]). The Minister's failure to respect the statutory obligation to have due regard:

"adds to the difficulties... in now attempting to justify the imposition of... the criteria. He has to justify an act of discrimination committed in the carrying out of his functions when, in breach of an express duty, he failed even to have due regard to the elimination of that form of unlawful race discrimination. He has to justify something which he did not even consider required any justification. In these circumstances the court should consider with great care the ex post facto justifications advanced at the hearing" (per Elias J at [133]).

57. The PSED plays an important function in ensuring equality of treatment in the delivery of public services, including in respect of the exercise of the compulsory powers of the State, in detention and custodial settings. For example, in the recent decision in *R (on the application of Coll) (Appellant) v Secretary of State for Justice (Respondent)* [2017] 1 WLR 2093 at [42], the Supreme Court held that a failure by the Secretary of State to make adequate provision for women's Approved Premises was unlawful, including because the PSED had not been complied with. In her leading judgment, with which the court agreed, Baroness Hale explained:

60 *R (BAPIO Action Limited) v Secretary of State for the Home Department* [2007] EWHC 199 (Admin), [69]; *R (Luton BC and O'rs) v Secretary of State for Education* [2011] EqLR 481, [113].

61 This concerned s. 71 RRA but the principle is applicable in this context.

“[The] finding that the Secretary of State was in breach of the public sector equality duty also means that the Ministry is not in a position to show that the discrimination involved in the different provision made for men and for women is a proportionate means of fulfilling a legitimate aim. It may or may not be. But it is for the respondent to show that the discrimination is justified. Given that the Ministry has not addressed the possible impacts upon women, assessed whether there is a disadvantage, how significant it is and what might be done to mitigate it or to meet the particular circumstances of women offenders, it cannot show that the present distribution of APs for women is a proportionate means of achieving a legitimate aim.”

International Law Standards for Custody

58. Where an international law instrument binding on the UK is relevant to the interpretation of Convention law, domestic Courts may refer to the relevant instrument as an interpretative tool for reaching a determination on an issue of proportionality or the scope of the right protected.

59. The rights guaranteed by the ECHR – reflected in the Convention rights protected by the Human Rights Act - must be interpreted within a wider international law context. For example, in *Neulinger v Switzerland* (2010) 28 BHRC 706 the Strasbourg Court observed that (at [131]):

*“the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken . . . of ‘any relevant rules of international law applicable in the relations between the parties’ and in particular the rules concerning the international protection of human rights.”*⁶²

The International Covenant on Civil and Political Rights

60. International Covenant on Civil and Political Rights (“ICCPR”) provides express protection against torture, inhuman and degrading treatment, for the protection of dignity in custody and for equal access to protection for women and men:

a. Article 3 of the ICCPR provides:

62 Referred to by Lady Hale, with whom Lords Brown and Mance agreed, in *ZH (Tanzania) (FC) v Secretary of State for the Home Office* [2011] 2 AC 166, [21]. This approach was also adopted by Lady Hale, with whom Lord Sumption agreed, in *P v Cheshire West and Chester Council* [2014] A.C. 896, at [36]. Most recently, see *R (DA and Ors) v Secretary of State for Work and Pensions* [2017] P.T.S.R. 1266, at [37], citing the Supreme Court’s judgment in *R (SG) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449.

State Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

b. Article 7, ICCPR provides:

No one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment.

c. Article 10, ICCPR provides:

All persons deprived of their liberty will be treated with humanity and with respect for the inherent dignity of the human person.

d. Article 26, ICCPR provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

The Convention on the Elimination of all forms of Discrimination against Women (CEDAW)

61. The UK is a party to the Convention on the Elimination of all forms of Discrimination against Women (1979) (“CEDAW”). CEDAW provides a comprehensive framework for the elimination of discrimination against women and is monitored by the Committee on the Elimination of Discrimination against Women, including in its General Recommendations and individual State Reports. The preamble to CEDAW makes clear that *"the role of women in procreation should not be a basis for discrimination"*. Article 2 provides that States parties must take all appropriate measures to guarantee the substantive equality of men and women in all areas of life to ensure the effective protection of women against any act of discrimination. Article 3 makes clear that the State may be required to take appropriate, positive measures to ensure that women can enjoy their human rights and fundamental freedoms on an equal basis.

62. General Recommendation No. 28 (2010) on the core obligations of States parties under Article 2 of the Convention confirms that the obligations of States are to respect, protect

and fulfil women's rights to non-discrimination and the enjoyment of de jure and de facto equality.⁶³

63. In 2017, General Recommendation No. 35 confirmed that specific legislative and policy responses may be necessary to meet the particular discrimination against women with multiple vulnerabilities and facing intersectional discrimination, including women in custody:

*“In general recommendation No. 28 and general recommendation No. 33, the Committee confirmed that discrimination against women was inextricably linked to other factors that affected their lives. The Committee, in its jurisprudence, has highlighted the fact that such factors include [...] being deprived of liberty, [...]. Accordingly, because women experience varying and intersecting forms of discrimination, which have an aggravating negative impact, the Committee acknowledges that gender-based violence may affect some women to different degrees, or in different ways, meaning that appropriate legal and policy responses are needed.”*⁶⁴ (Emphasis added)

The Bangkok Rules

64. The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ('the *Bangkok Rules*') were adopted by the UN General Assembly in December 2010 and address standards providing for the specific characteristics and needs of women offenders and prisoners.⁶⁵ Although these provisions are particularly designed to govern the treatment of women prisoners, their provisions are illustrative of the differential treatment which international law considers must be provided to protect and preserve the dignity of all women in State detention. The Commentary which accompanies the rules provides that:

*“Section I of the present rules, covering the general management of institutions, is applicable to all categories of women deprived of their liberty, including criminal or civil, untried or convicted women prisoners, as well as women subject to “security measures” or corrective measures ordered by a judge.”*⁶⁶ (Emphasis added)

63 General Recommendation No. 28, at [9].

64 General Recommendation No. 35, at [12].

65 UN General Assembly, 'The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders', A/C.3/65/L.5, 6th October 2010.

66 UNODC, [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders with their Commentary](#), at [14].

65. The *Bangkok Rules* recognise the earlier General Assembly Resolution on the treatment of women in detention, General Assembly Resolution 61/143 of 19 December 2006, which urged States to to, inter alia, take positive measures to address structural causes of violence against women and to strengthen prevention efforts that addressed discriminatory practices and social norms, including with regard to women who need special attention in the development of policies to address violence, such as women in institutions or in detention.

66. Rule 5 of the *Bangkok Rules* recognises the needs of women who are menstruating, including a requirement that States ensure that sanitary protection is provided, together with a regular supply of water for washing to such detainees:

“The accommodation of women prisoners shall have facilities and materials required to meet women’s specific hygiene needs, including sanitary towels provided free of charge and a regular supply of water to be made available for the personal care of children and women, in particular women involved in cooking and those who are pregnant, breastfeeding or menstruating.” (Emphasis added)

67. The UNODC Commentary to Rule 5 provides:

“Ready access to sanitary and washing facilities, safe disposal arrangements for blood-stained articles, as well as provision of hygiene items, such as sanitary towels/pads, are of particular importance. These should be available to women under conditions in which they do not need to be embarrassed asking for them (for example either dispensed by other women or, better yet, accessible whenever needed). The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) considers that the failure to provide such basic necessities can amount to degrading treatment.”⁶⁷ (Emphasis added)

The European Committee for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment (CPT)

68. The European Committee on the Prevention of Torture, Inhuman or Degrading Treatment or Punishment (“CPT”) is the Council of Europe independent, specialist monitoring body for places of detention. It has particular regard to the prohibition on torture, inhuman and degrading treatment in Article 3, ECHR, it examines States treatment of individuals in

67 CPT Standards, 2006 Edition, Extract from the 10th General Report, CPT/Inf (2000) 13, at [31].

custody through a programme of visits and reporting on places of detention, including in police custody.

69. The CPT Standards on Police Custody provide:

*“Persons in custody should be allowed to comply with the needs of nature when necessary in clean and decent conditions, and be offered adequate washing facilities.”*⁶⁸

70. The CPT Standards on Women Deprived of their Liberty recognise that the health and hygiene needs of women in custody will be different to those of male detainees. Specific provision is made for the hygiene needs of menstruating women to be met in all forms of custody:

*“The specific hygiene needs of women should be addressed in an adequate manner. Ready access to sanitary and washing facilities, safe disposal arrangements for blood-stained articles, as well as provision of hygiene items, such as sanitary towels and tampons, are of particular importance. The failure to provide such basic necessities can amount, in itself, to degrading treatment.”*⁶⁹ (Emphasis added)

Other international jurisprudence

71. There is limited guidance in international jurisprudence on the treatment of menstruating women in custody, consistent with their rights as protected in CEDAW and the ICCPR. The judicial guidance available confirms that positive steps to meet the needs of women and to preserve their dignity in custody are not only justified but required.

72. In 2006, the Inter-American Court of Human Rights considered a failure to meet women prisoners need for sanitary protection and hygienic washing facilities, alongside other forms of gross treatment in prison conditions:

“Within gross imprisonment conditions we can mention (supra para. 197(51) and 197(52)): location in overcrowded cells that do not allow an adequate mobility nor did they ensure reasonable hygiene and health conditions, without access to natural or artificial lighting; precarious feeding conditions; lack of adequate medical attention and of supply of medicines, despite the fact that there inmates that were injured and others that acquired illnesses in the prison; lack of warm clothes, even for

68 [CPT/Inf\(92\)3-part1](#).

69 [CPT/Inf\(2000\)13-part](#) at [30] – [31].

those who were in the prison of Yanamayo where the temperatures drop several degrees under zero; severe regimen of solitary confinement; lack of attention to women's physiological needs when they were denied materials of personal hygiene, such as soap, toilet paper, feminine pads, and underwear in order to be able to change; lack of attention to pre and post natal health needs; prohibition to talk among themselves, read, study, and carry out manual labor. The damages and suffering experienced by women in general and especially the pregnant women and by the inmates that were mothers were especially gross.”⁷⁰ (Emphasis added)

73. Most recently, the European Court of Human Rights considered the *Bangkok Rules* in the context of the imposition of harsher sentences on male offenders. In one of only a handful of decisions from the Court which refer to women and menstruation, the Grand Chamber in the cases of *Khamtokhu and Aksenchik v Russia* (2017) 65 E.H.R.R. 6 considered the rules relevant to their conclusion that it was within the Russian State's margin of appreciation to distinguish between women and men for the purposes of the imposition of life sentences.⁷¹

E) OPINION

Public law legality/rationality

i) Failure to adequately implement existing policy and guidance

74. In so far as forces are required to comply with the guidance in both Code C and the APP unless there is good reason otherwise (see above), it is arguable that a number of forces are acting unlawfully:

- a. Forces which fail to routinely offer women detainees access to a hygiene pack and a female officer during booking-in, are in our view, likely to be acting unlawfully. Although the APP guidance is not part of the statutory code, it should be read together with it and should not be departed from without good reason. The APP guidance requires that a hygiene pack be “routinely offered” to women on booking in. Female officers or staff are to be made available. It appears difficult to suggest that the requirements of this guidance have been

70 [Miguel Castro v. Peru](#). Merits, Reparations and Costs. Judgment of November 25th, 2006. Series C No. 160, at [319].

71 At [82] – [88].

fulfilled in circumstances where neither has been done and there is no evidence that any alternative has been considered. While the reasons for departing from the policy might be justified on a case by case basis, there appear to be forces where, by default, women are expected to request assistance before any offer is made. Such a general practice would, in our view, be an unlawful departure from the existing guidance offered in the APP (and relevant local policies). We consider general justifications, below.

- b. Conditions where “*detainees should be able to remain clean and comfortable while in custody*” (APP Guidance, 5.1, Code C, 8C) must reasonably, in our view, include adequate and suitable sanitary protection. By failing to provide suitable or adequate products, it is questionable whether this guidance is being disregarded. Leaving women in circumstances where the only products offered are incapable of performing the function for which they are intended is unlikely to meet the standards for basic comfort and cleanliness which the guidance is intended to protect. Equally, while it appears some forces are failing adequately to pixellate toilet areas, to the detriment of all inmates, this has a particular resonance for women detainees having their period. APP Guidance Section 5.3 provides expressly for toileting privacy. There appears to be no good reason for failing to implement this measure when other alternatives are open to officers for risk management purposes (e.g. observations etc).
- c. Finally, the failure to take menstruation into account in the process of risk assessment for other purposes appears entirely to disregard the guidance offered by the APP Guidance (Equality and Individual Needs, Section 2), which expressly provides “*if a woman is experiencing...menstruation, officers may need to consider this if it is likely to have an effect on the detainee’s welfare*”. While this language is tortuously qualified, in our view, a failure to adequately consider alternatives to the removal of sanitary protection when clothes are removed for the purposes of a strip search or for risk management will amount to a failure to take into account this guidance. Being left bleeding in a cell without sanitary protection can only logically and rationally have an effect on one’s welfare.

75. If individual forces consider there is “good reason” to depart from this guidance, there is limited evidence in the material considered in the inspection reports. Beyond risk-management, we expect that resource considerations are the primary driver behind many of these failings. The domestic courts will be slow to interfere with decisions which involve difficult assessments on the allocation of sparse resources. However, where an obligation is owed whether in existing statutory protection, guidance or by virtue of the operation of the HRA 1998, resource alone is unlikely to be sufficient to defeat a public law challenge (see, for example in *R (Walker) v Secretary of State for Justice* [2010] 1 AC 553, where it was unlawful to neglect to fund adequate offending behaviour courses in prisons).

76. We consider justification below, on the evidence available, in the context of Article 8 ECHR, at paragraphs 80 - 81.

ii) Unacceptable risk of rights violation as a consequence of policies and guidance

77. Although there is a high threshold to cross before guidance is considered to create an “unacceptable” risk of a violation of individual rights, we consider it may be arguable in this case that the current framework of guidance falls foul of this standard:

- a. There is a clear inconsistency in the detail between Code C – which provides for the dignity of all detainees without specific consideration of the position of menstruating women – and the APP guidance on hygiene packs and the consideration of menstruation and its impact on the treatment of women detainees appears in practice to give rise to failures in forces across England and Wales. This inconsistency is misleading and creates sufficient space for the dismissal of women’s needs as inherent to the obligations of the UK and the fulfilment of the policies reflected in both sets of guidance. This is compounded by further failings in the language used in some of the APP Guidance (Should officers be left to determine when it is relevant to a woman’s welfare that she is having her period, and only then for it to be relevant to risk-assessment?) In our view, on the facts, it is arguable that the inconsistency and inadequacy in the overlapping Guidance documents applied

leads to an “unacceptable” risk of a violation of Articles 3, 8, 14 in practice (as outlined further, below).

- b. In the alternative, a failure to provide *any* specific guidance on the particular implications of menstruation for the purposes of risk assessment leaves individual officers without an adequate framework for decision making. For the reasons outlined below, in our view, this arguably creates an unacceptable risk of degrading treatment in violation of Article 3. (In so far as expert evidence supports that this may increase the likelihood that vulnerable women left without their clothes and without sanitary protection may self-harm, it may create an unacceptable risk of a violation of Article 2.)

An HRA 1998 claim

Article 8

78. In our view, a failure to provide for women to be able to access adequate sanitary protection in police custody will clearly engage the right to respect for private life guaranteed by Article 8. Indeed, it is unthinkable that it would not engage this right.

79. In respect of failures to provide sanitary products or facilities, including private and hygienic conditions for changing or access to female officers, we consider that it will be difficult to identify any clear and proportionate justification, in accordance with the law. Not least, the APP Guidance provides to the contrary. Forces *should* be providing sanitary protection routinely to women in hygiene packs which are suitable for use, a fact accepted in the Guidance.

80. A challenge based squarely on the range and quality of the suitability of the products provided may be more difficult to sustain. Courts will only require a specific method or means to be used, where such is necessary in order to provide effective protection for private life.⁷² The evidence in this case does appear to support the conclusion that where

⁷² Where a prisoner challenged a failure to provide for paid postage mail, this was incompatible with the prisoner’s rights to communicate with his family and in violation of Article 8. See *X v Germany*, App

some products are provided, they may not be fit for purpose (for example, material stored in unhygienic circumstances, only pads available for women whose underwear has been removed or products simply incapable of dealing with heavy flow periods). In some circumstances, particularly where individuals are in the custody of the State, public authorities may be required to take positive steps to protect individual rights, including through the expenditure of resources.⁷³ The resources available to public bodies will be relevant to the assessment of proportionality but will not be conclusive.

81. Where a risk assessment has identified that a woman should be stripped and she is left without sanitary protection; forces currently consider that this is justified by reference to the risk which she may pose to herself or others. We consider that this position will be difficult to sustain. In principle, the prevention of self-harm is clearly a legitimate aim. However, there are alternative means to meet such risks in practice, without exposing a woman already assessed to be vulnerable to the further risk incurred in the indignity of a free-flowing period. The proportionality of the step of removing sanitary protection will be fact sensitive. However, in our view, it is difficult to envisage circumstances where the risk management alternatives might be rejected in circumstances where a woman is menstruating and the only other option is to leave her without sanitary protection. The reports of the HMIC/HMIP which consider the default use of non-rip replacement clothing as a risk management technique, support the conclusion that such a practice is disproportionate. The Inspectorates jointly call for an individual assessment which makes use of alternative means of effective risk management, even before the specific consideration due to menstruating women is taken into account. We consider that even in cases of risk management, the removal of a woman's sanitary protection without replacement being provided will be a disproportionate and unjustifiable interference with the right to respect for private life.

Article 3

82. For the reasons outlined above, we deal with Article 3 briefly. We consider that in some cases, the indignity involved in mismanagement of menstruation in police custody would

No 8383/78, 17 DR 227. However, Article 8 did not extend to a paid telephone system where postal communication was available and adequate. See *AB v Netherlands* (2003) 37 E.H.R.R. 48 at [92].

73 See *X v Germany*, App No 8383/78, 17 DR 227.

engage Article 3 and would pose a significant risk of breach. The CPT is clear that a failure to provide sanitary protection can amount to degrading treatment in violation of Article 3. This would include, in our view, any circumstances where vulnerable women at risk of self-harm are left without sanitary protection for any period of time longer than that required to conduct a brief search for dangerous items which pose a risk (other than the sanitary protection itself). The likelihood that Article 3 will be breached is heightened in circumstances where the women involved are especially vulnerable, including to mental health risks, or where the humiliation involved in bleeding freely is compounded by other circumstances (including, for example, very heavy bleeding, nudity and/or the observation of male staff or officers). If Article 3 is engaged, the prohibition on inhuman and degrading treatment is absolute and no justification is possible.

Article 14

83. It is our view, as above, that the failures outlined – to provide sanitary protection, to provide adequate or appropriate sanitary protection or to fail to consider menstruation as part of the risk assessment process – are likely to amount to violations of the substantive protection offered by Article 8 and, in some cases, Article 3. It is unlikely that an additional Article 14 challenge will add significant weight to the case for change.
84. However, the enjoyment of each of the Convention rights should be without discrimination. It is worth noting the guidance in *Thlimmenos v Greece* (2000) 31 E.H.R.R. 12 at [44] (above), on both direct and indirect types of discrimination. In our view, ill-treatment arising by virtue of the fact of menstruation is inevitably based upon the gender of a detainee.
85. In our view, failing to provide women with sanitary protection would plainly amount to direct discrimination, which would require compelling reasons by way of justification. The APP Guidance provides for all detainees to be clean and comfortable. That women having their period are not clean and comfortable may arise from a direct failure to provide women with access to essential sanitary items. The assessment of any kind of justification, will be informed by the consensus on the need for sanitary protection to be provided as a default in the international law materials cited above (see, for example, *R (SG and Ors) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449, cited in *R*

(DA and Ors) v Secretary of State for Work and Pensions [2017] P.T.S.R. 1266 [37] – [38] (albeit in that case considering the very different context of state benefits and discrimination)).

86. For the reasons outlined above, we consider that justification either by individual forces or by the Secretary of State of any decision which leads to a woman being left without access to adequate or appropriate sanitary protection while in custody will be very difficult.

The Public Sector Equality Duty: Section 149, Equality Act 2010

87. The Secretary of State is clearly aware of the PSED and its relevance to the treatment of detainees in police custody. However, although Code C was amended as recently as February 2017, and it refers officers directly to the PSED and the Equality Act 2010, there is no indication that any specific assessment of the impact of detention on menstruating women has ever been conducted either by individual forces or by the Secretary of State.

88. While it appears that many forces are aware that steps ought to be taken to meet the needs of menstruating women in custody, inspection reports suggest that these steps are not routinely taken or are generally ignored. Although there is no specific duty on the State to conduct routine impact assessments of policy and its implementation, there is evidence emerging here that women are more likely to face discomfort and indignity in police cells by virtue of the fact that they are having their period. That the national statutory Code for the treatment of detainees makes no specific provision for women's needs linked to menstruation and that individual forces are failing to meet the professional standards set in the APP, in our view, creates sufficient basis for an arguable breach of the PSED by both the Secretary of State and by individual forces.

89. In so far as this treatment might be drawn to the Secretary of State's attention, and a review of the policy and guidance offered to officers requested, any decision on whether to take action will be subject to the PSED. If the Secretary of State refuses to act on evidence that women are being treated in a manner which amounts to discrimination on the grounds of their sex, that decision will be subject to close scrutiny. Such a refusal

would, on our view, based on the currently available evidence, be open to challenge as a violation of the s.149 duty (see *Coll*, above, at paragraph 57).

F) CONCLUSIONS/NEXT STEPS

90. For the reasons outlined above, it is our view that the continued failure by police forces to provide menstruating women in custody with appropriate access to sanitary protection is likely to violate the provisions both Articles 8 and 14 of the HRA 1998. In some cases – including where a vulnerable woman is left to bleed heavily without her clothing or any sanitary protection, in the care of male officers – we consider that Article 3 would be engaged and a case based on violation of the right to be free from inhuman and degrading treatment would have significant prospects of success. Allied claims in public law, and in respect of the PSED, are also, in our view, sustainable. These claims would be underpinned by international law standards for the treatment of women in custody.
91. It is our view that, in order to avoid further litigation risk and cost both to ICVA and to the public purse, the Secretary of State should be invited to (a) conduct a full review of the current national policy and practice on detention, women and their periods, including for compliance with the PSED and (b) to amend Code C to make express provision for the treatment of menstruating women as a group requiring special provision to be made for their detention.
92. Such amendment to Code C would in our view be relatively simple to achieve and could avoid the uncertainty for forces of ongoing risk of complaint and litigation. The changes we propose would incorporate many of the provisions on the treatment of women in detention currently in the non-statutory APP guidance and reflected in many existing local police policies. They would help further disseminate good practice already undertaken by some forces and would address some significant concerns already addressed by HMICFRS and its predecessors. It would serve to better reflect the UK's international obligations to women and girls if these standards were incorporated in the binding statutory Code clearly applicable to all forces.

93. Specifically, the Secretary of State should be asked to consider a revised Code C which provides:

- a. During the booking-in process:
 - i. detainees should be asked by a custody sergeant about their needs in private;
 - ii. women should automatically be provided with a female point of contact and an opportunity to speak to them at any time during detention;
 - iii. a hygiene pack should be provided automatically to all women detainees, and it should be made clear to detainees that further sanitary products are available from custody officers and the designated female point of contact;
 - iv. A fresh pack should be offered without request before the expiry of every 6 hour period in custody;
- b. Adequate hand-washing facilities must be made available to all women detainees to allow for the regular hygienic changing of sanitary protection;
- c. Cells subject to CCTV monitoring should routinely provide for sufficient pixellation of toilet areas to allow for sanitary protection to be changed unobserved by officers, or alternative arrangements made for detainees to change in private;
- d. If the technology available does not provide for such adequate pixellation, alternative arrangements should be made for menstruating women to have access to private facilities for changing sanitary protection;
- e. Detainees should be made aware that they will not be observed when changing their sanitary protection and/or using the toilet;
- f. In conducting a strip search (or in any circumstances where a detainee's clothes are removed), sensitivity to the needs of menstruating women should be shown. Tampons should only be rarely removed, and only ever where proportionate and necessary in light of the purpose of the search.
- g. In the very rare event that the removal of sanitary protection is necessary, an appropriate replacement should be provided to the woman detainee as soon as any search is complete, with replacement clothing if required, together with access to private and hygienic conditions to allow the sanitary protection to be used.

- h. Where the removal of a detainee's clothes is considered necessary to meet any assessed risk of self-harm, or any other risk, the removal of sanitary protection should be subject to specific and individual risk assessment.
 - i. It will rarely be justified to leave a menstruating woman in custody without access to appropriate sanitary protection. Alternative tools for risk management, including close or constant observation, should be used to meet any risk of self-harm connected with the presence of sanitary protection.
- 94. These proposals mirror and expand upon existing non-statutory guidance. They will not require any radical re-haul of forces' understanding of how women detainees *should* be treated, in light of the guidance offered by the APP and some local policies. They *will* provide new clarity on the relevance of menstruation to risk assessment when officers are considering removing the clothes of a detainee. However, this guidance would be consistent with the current approach to risk assessment, encouraging the approach least intrusive to the rights of the individual detainee.
- 95. Making clear these safeguards form part of the Code C responsibilities of custody officers will, in our view, significantly increase the likelihood that individual women and girls are treated with dignity in custody. Incorporating standards on sanitary protection into the Code should make it easier for women to secure a remedy when they are humiliated or degraded for no reason other than that they have their period while in custody. Providing clear new guidance on removal of sanitary protection and risk assessment now will significantly reduce both the risk that women will be treated in a manner which amounts to inhuman and degrading treatment and the risk that the existing guidance may be found to be unlawful in a later legal challenge.
- 96. Meaningful change will require individual forces to be effectively resourced and trained in order to ensure that women's rights in custody are taken seriously. As part of a review of Code C against the PSED, the Home Secretary should be invited to identify the resources necessary to ensure that every police force has access to a reliable supply of sanitary protection of various types, including tampons, and to ensure that during every booking-in exercise, every woman detainee is provided automatically and without request with a quality hygiene pack and the means to privately and hygienically change her protection if needed. The Minister for Women and Equalities should be involved in this

review, in light of her responsibility for Government policy on women and the effectiveness of the PSED. No woman or girl should be left in indignity by police officers for want of a difficult conversation or an inexpensive box of tampons.

97. In the event that the Secretary of State should refuse to consider the changes to Code C proposed, or to conduct a full PSED review, it is our view that an individual claimant or group of claimants, or the ICVA acting in its own right, would have strong grounds to pursue a claim for judicial review against the Secretary of State.

98. In any event, while the statutory guidance remains ineffectual and forces' performance inconsistent or poor, in our view, it will clearly remain open to any woman or girl subject to ill-treatment in custody to raise a complaint to the IPCC and to bring an HRA 1998 claim for damages against any individual force failing to meet the standards outlined above.

99. We would be happy to advise further in due course, to assist in the preparation of pre-action correspondence, and to advise on issues of limitation, funding and costs management, if so instructed.

Caoilfhionn Gallagher QC

Angela Patrick

DOUGHTY STREET CHAMBERS

21st December 2017



**IN THE MATTER OF A PROPOSED
JUDICIAL REVIEW**

BETWEEN

**INDEPENDENT CUSTODY VISITING
ASSOCIATION**

Proposed Claimant

and

**THE SECRETARY OF STATE FOR THE
HOME DEPARTMENT**

Proposed Defendant

OPINION

**Caoilfhionn Gallagher QC
Angela Patrick**

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