

Annex 1

Proposed changes to policy development process and Statement of Principles to better reflect Equality and Inclusion considerations

Paper for Lancashire Commissioning Policies Subgroup January 2017

Background

The current policy development process was introduced to rapidly review and update legacy commissioning policies adopted by Lancashire CCGS in April 2013. The process adopted included undertaking Equality Impact Assessments (EIAs), with support from the CSU Equality and inclusion service. Experience showed that there would be benefit from undertaking a consideration of how well the EIA process and outcomes had been integrated into the process, and how clearly E&I principles were reflected in Lancashire policy documents. Discussion at the December 2016 meeting of the Lancashire policy development subgroup led to an action for the Service Director (clinical portfolio) to work with the E&I team to develop proposals to enhance the E&I aspects of the policy development process.

This paper details the work which was carried out and outlines proposals to clarify how E&I principles and EIAs could be better reflected in policy processes and documents.

Actions undertaken

National guidance documents were reviewed to understand the regulatory and best practise context for this work. Documents reviewed included:

- Equality Act 2010 Statutory Code of Practice
- Equality and human Rights Commission summary guidance on services, public functions and associations (and associated supplement)
- Description of application of the “Brown principles” (Somerset Council) – excerpt included in Appendix

A meeting was then held with Granville Thelwall of the E&I team, to review the proposals previously discussed at the policy group and consider how best to apply them. Further to that meeting, the proposed policy development process was reviewed and a paper was drafted outlining proposed changes to that process. That paper was then shared with the E&I team and IFR Development Manager for their comments.

Proposals

The process above resulted in the following proposed actions:

1. Clarification within the future policy development process document and associated guidance of the points at which E&I data should be sought, EIA undertaken, and the result of EIA reviewed. In summary, this would mean that:

- a. E&I data is sought and reviewed at the start of the policy development and/or review process, in order to identify any protected groups how may be impacted by the policy from the beginning of its development. As well as any data available via contract monitoring processes, such data may include information about protected characteristics which has been submitted as grounds for exceptionality in IFR applications relating to existing policies.
 - b. The EIA undertaken once the first draft policy is produced will be reviewed to identify any impact on protected groups. Where appropriate, impacts may be acknowledged, justified and potentially mitigated against. If the impact is not justified on the basis of the clinical evidence base or as effective use of resources,, the policy will be re-drafted to address it as far as is proportionate and in line with clinical needs.
 - c. A full audit trail of E&I data utilised and any changes made to draft policies in light of EIA results will be kept as part of the policy development process in order to demonstrate compliance with the Public Sector Equality Duty.
2. The Lancashire Statement of principles for the commissioning of healthcare document section 7 on Ethics should be reworded to contain more specific reference to how the CCGs will discharge their Public Sector Equality Duty.

Suggested Changes to Statement of principles document

The Lancashire Statement of principles for the commissioning of healthcare document currently addresses equality issues with section 7 on ethics, as reproduced below:

ETHICS

7.1 The CCG defines ethical healthcare as that which is provided justly and fairly according to need, and in accordance with in accordance with systems of accepted beliefs and in accordance with values of relevant professional bodies such that the health of the population is maximised within the resources available. A healthy population is one in which health and wellbeing are prevalent in a fair and sustainable fashion.

7.2 The CCG's default position is that the treatment or service can be delivered ethically.

7.3 The CCG will commission treatments or services based on the health and healthcare needs of their resident population, as assessed by the CCG. In doing so, they will seek to reduce health inequalities within the population.

7.4 The CCG's commissioning policies, in line with the Equality Act 2010 will not discriminate on the basis of age, disability, gender reassignment, marriage or civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation. The CCG will also not discriminate on social disadvantage, lifestyle, occupation, offending background, trade union membership, financial status or family status (including responsibility for dependents).

7.5 The CCG will also apply the human rights principles of Freedom, Respect, Equality, Dignity and Autonomy when developing and applying commissioning policies ensuring that they respect people's human rights in line with the Human Rights Act 1998 and the NHS Constitution.

7.6 All commissioning policies will be subject to equality impact assessment and ***the CCG may take the results of that assessment into account.***

7.7 The CCG will not commission a service that does not follow the usual pathway, if the sole purpose of commissioning it would be to enable a patient to bypass a policy criterion that other patients are expected to follow.

7.8 The CCG will not commission a service if the sole reason for commissioning it would be because that service is commissioned by another Commissioning Organisation or Commissioning Organisations.

It is proposed that section 7.6 above be amended to read as follows:

All commissioning policies will be developed in line with the “Brown principles” of Equality and Inclusion. Specifically, E&I data will be sought at an early stage of the policy development and/or review process, to ensure that available information is taken into account during that process.

All draft commissioning policies will be subject to equality impact assessment and **the CCG will use the results of this assessment** to influence the content of the policy as well as to identify any protected groups who should be specifically consulted/ engaged with about each draft policy.

Conclusion:

The policy subgroup is asked to consider the proposals above and discuss their implementation, including approving the suggested amendments to the Statement of Principles document.

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Appendix: Excerpt from Somerset Council document describing the Brown principles:

In *R. (Brown) v. Secretary of State for Work and Pensions* [2008] EWHC 3158 the court considered what a relevant body has to do to fulfil its **obligation to have due regard to the aims set out in the general equality duty**. The six 'Brown principles' it set out¹ have been accepted by courts in later cases.² Those principles are that:

- In order to have due regard, those in a body subject to the duty who have to take decisions that do or might affect people with different protected characteristics must be made **aware of their duty** to have 'due regard' to the aims of the duty.
- Due regard is fulfilled before and at the time a particular policy that will or might affect people with protected characteristics is under consideration as well as at the time a decision is taken. Due regard involves a **conscious approach and state of mind**.
- A body subject to the duty cannot satisfy the duty by justifying **a decision after it has been taken**. Attempts to justify a decision as being consistent with the exercise of the duty when it was not, in fact, considered before the decision are not enough to discharge the duty.
- The duty must be **exercised in substance, with rigour and with an open mind** in such a way that it influences the final decision. The duty has to be integrated within the discharge of the public functions of the body subject to the duty. It is not a question of 'ticking boxes'. However, the fact that a body subject to the duty has not specifically mentioned [s.149]³ in carrying out the particular function where it is to have 'due regard' is not determinative of whether the duty has been performed. But it is good practice for the policy or decision maker to make reference to [s.149] and any Code or other non-statutory guidance in all cases where [s.149] is in play. 'In that way the decision maker is more likely to ensure that the relevant factors are taken into account and the scope for argument as to whether the duty has been performed will be reduced'.
- The duty is a **non-delegable** one. The duty will always remain the responsibility of the body subject to the duty. In practice another body may actually carry out the practical steps to fulfil a policy stated by a body subject to the duty. In those circumstances the duty to have 'due regard' to the needs identified will only be fulfilled by the body subject to the duty if (1) it appoints a third party that is capable of fulfilling the 'due regard' duty and is willing to do so (2) the body subject to the duty maintains a proper supervision over the third party to ensure it carries out its 'due regard' duty.
- The duty is a **continuing one**.
- It is good practice for those exercising public functions to keep an **accurate record** showing that they had actually considered [the general equality duty] and pondered relevant questions. Proper record keeping encourages transparency and will discipline those carrying out the relevant function to undertake the duty conscientiously. If 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 by [s.149].

References

1. *R. (Brown) v. Secretary of State for Work and Pensions* [2008] EWHC 3158 at paras 90-96.
2. Including cases about the duty in s.149 of the Act. See, for example, *R. (on the application of Greenwich Community Law Centre) v. Greenwich London Borough Council* [2012] EWCA Civ 496.
3. The equality duty in *Brown* was the Disability Equality Duty in s.49A of the Disability Discrimination Act 1995. Later cases have confirmed that the principles in *Brown* also apply to the duty in s.149 of the Act.