

**NHS LIVERPOOL CLINICAL COMMISSIONING GROUP
GOVERNING BODY**

TUESDAY 12TH MAY 2015

Title of Report	Equality and Diversity Summary Update Report
Lead Governor	Dave Antrobus Lay Member
Senior Management Team Lead	Derek Rothwell Head of Contracts and Procurement
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Summary	The purpose of this paper is to update Liverpool CCG on progress made against their Equality Objectives Plan that were approved by the Governing Body in July 2014 and highlight potential legal risks associated with Equality Act requirements and outline key next steps
Recommendation	That Liverpool CCG Governing Body: ➤ Notes the contents of the report
Impact on improving health outcomes, reducing inequalities and promoting financial sustainability	Meeting the requirements of the Equality Act 2010 supports the CCG to improve health outcomes and reduce health inequalities by considering and acting upon the needs of groups who experience inequality in relation to access and health outcomes
Relevant Standards or targets	Equality Act 2010- Public Sector Equality Duty and Specific duty to set Equality Objectives Equality Delivery Systems 2- NHS England assurance process NHS England's new Workforce Race Equality Standard

EQUALITY OBJECTIVES REPORT

1. PURPOSE

The report provides a brief update of:

- Activity and progress made so far on the Liverpool Clinical Commissioning Group (LCCG) Equality Objective Plan (appendix 1), including details of how the CCG intends to implement the Equality Delivery Systems 2 for 2015/16 (Appendices 2 and 3)
- NHS England new Race Equality Standard
- Key legal risks for Commissioners (Appendices 4 and 5)
- Key next steps

2. RECOMMENDATIONS

That LCCG Governing Body is recommended to

- Note progress made within the Equality Objective report and Plan (Appendix 1) for LCCG
- Note the Equality Delivery Systems 2 approach for 2015/16 (Appendices 2 and 3)
- Note the new NHS Race Equality Standard
- Note key risks associated with Public Sector Equality Duty and decision making and Fair consultation. The High court judgement Sandwell (Appendix 4) and Supreme Court judgement R v London Borough of Haringey, (Appendix 5)
- Note key next steps

3. BACKGROUND

The paper provides Liverpool CCG Governing Body with an update on progress made against their Equality Objectives Plan that was approved by the Governing Body in July 2014.

The Equality Act 2010 (Specific Duties) requires organisations to set strategic Equality Objectives every 4 years. A refreshed plan will be developed in the July 2015.

LCCG is required to pay due regard to the Public Sector Equality Duty (PSED) as defined by the Equality Act 2010. Failure to comply has legal, financial and reputational risks. The PSED is with LCCG everyday

as it makes commissioning decisions and monitors the performance of its providers.

The PSED instructs CCGs to ensure that (throughout its functions) across nine protected characteristics, including race, sex, disability, age, religion and belief, sexual orientation and transgender they pay due regard to:-

- Eliminate discrimination
- Advance equality of opportunity
- Foster Good Community relations

Under the Equality Act 2010 there are nine protected characteristics:

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation

The key functions that enable LCCG to make commissioning decisions and monitor the performance of their providers have to demonstrate (in an auditable manner) that the needs of protected groups have been considered in:

- Commissioning processes
- Consultation and engagement
- Procurement functions including PQQ and Invitation to Tender
- Contract specifications
- Quality contract and performance schedules, and
- Governance systems

The requirements to consider the PSED is also reaffirmed in the recent guidance produced by NHS England entitled 'Guidance for NHS Commissioners on Equality and Health Inequalities Legal Duties'. The document has been developed in consultation with the NHS Commissioning Assembly health inequalities sub-group and the Department of Health.

LCCG plays a key role in addressing equality and health inequalities; as commissioners, as employers and as local and national system leaders, in creating high quality care for all.

Health commissioners have two separate key duties, one on equality and one on health inequalities. Both require informed consideration by decision makers, but it is important to appreciate that they are two distinct duties. The duty on health inequalities is not addressed in the paper below, but in summary it derives from the National Health Service Act 2006 as amended by the Health and Social Care Act 2012. The duty requires LCCG to:

- Have regard to the need to reduce inequalities between patients in access to health services and the outcomes achieved (section 14T);
- Exercise their functions with a view to securing that health services are provided in an integrated way, and are integrated with health-related and social care services, where they consider that this would improve quality and reduce inequalities in access to those services or the outcomes achieved (section 14Z1). (health-related services can be any services which impact on health, including those outside health and social care);
- Include in an annual commissioning plan an explanation of how they propose to discharge their duty to have regard to the need to reduce inequalities (section 14Z11);
- Include in an annual report an assessment of how effectively they discharged their duty to have regard to the need to reduce inequalities (section 14Z15).

4. Update of progress against the CCGs Equality Objectives

The Equality Objectives Plan (Appendix 1), aims to improve access and outcomes for protected groups and ensure that LCCG has processes in place to mitigate legal and financial risks. The four Objectives were approved by the governing Body in July 2014. They are as follows:-

1. To make fair and transparent commissioning decisions;
2. To improve access and outcomes for patients and communities who experience disadvantage;
3. To improve the equality performance of providers through robust procurement and monitoring practice

4. To empower and engage our workforce

Activities and progress against the Equality Objectives plan include:

- E&D team has met with the LCCG programme leads/managers on a one-to-one basis to develop equality analysis reports and actions linked to 'Healthy Liverpool'
- Equality Analysis processes have been developed, to ensure LCCG decision making meets the legal requirements of The Equality Act, as set out in the Sandwell judgement below (Appendix 4).
- Support for the development of documentation for 'Healthy Liverpool Community Grant'.
- Ensuring E&D requirements were met during the Widening Access to Psychological Therapies commissioning and procurement process
- Ensuring that E&D requirements were met during the BME Community Development commissioning and procurement process
- Supporting the patient experience group to understand and apply the PSED, to support commissioners to detect barriers communities and patients may face in relation to access and health outcomes
- Promoting improved performance of LCCG' s Providers via the quality contract schedule in terms of equality requirements.
- Equality Act training is being rolled out for all LCCG staff.

5. Equality Delivery Systems (EDS) 2 (2015 / 2016)

EDS 2 is an assessment which enables communities to grade LCCG's performance on equality against 4 Goals and 18 outcomes. Information about EDS 2 can be found in Appendix 2. The assessment does not equate to compliance but supports LCCG to meet its duties.

LCCG will work closely with its partners at Healthwatch Liverpool and community groups to assess LCCG against the following key EDS 2 outcomes:

- Section 1.1 - Services are commissioned, procured, designed and delivered to meet the health needs of local communities

- Section 2.1 - People, carers and communities can readily access hospital, community health or primary care services and should not be denied access on unreasonable grounds
- Section 4.2 - Papers that come before the Governing Body and other major Committees identify equality-related impacts including risks, and say how these risks are to be managed

The process took place between March 2015 and July 2015. The implementation plan and brief is attached in Appendix 3

Currently LCCG has self-assessed itself as 'developing' and intends to stretch this grade to 'achieving' status over the next 12 months as per the EDS 2 grading guidance provided in Appendix 2

6. New NHS national Workforce Race Equality Standard

The NHS Equality and Diversity Council recently mandated the Workforce Race Equality Standard.

The Standard aims to address the lack of Black and Minority Ethnic (BME) representation at senior levels in the NHS, and to galvanise cultural and organisational change. The Standard, underpinned by commissioning and regulatory action, will also help to address the treatment of BME staff including adverse outcomes throughout recruitment and promotion, access to non-mandatory training, over-representation in disciplinary procedures, bullying and harassment. The new standard supports the vision set out in the Five year Forward View and the need to ensure NHS workforces experience inclusive and non-discriminatory opportunities.

7. Legal and financial risks associated with PSED

The Equality Act 2010 is a statutory act and contained within it is the Public Sector Equality Duty (PSED) - this demands that decision makers clearly understand whether or not the PSED is being met and any mitigation that needs to take place to counter any discriminatory measure within clinically commissioned services. Failure of the decision

makers to identify the PSED and its related information is an unlawful act in and of itself.

In addition, the Equality Assessment (EA) process must give clear guidance to decision makers. Any process that is unable to demonstrate guidance in a clear and succinct manner will be unfit for purpose and will lead to an unlawful decision. The 'Sandwell' case reinforces the importance of meeting PSED and ensuring decision makers make decisions in light of PSED. Failure to do so is unlawful (Appendix 4)

And finally, The Supreme Court decision in R v London Borough of Haringey highlights the need that :-

- when consultation on a clear proposal is being made then the alternatives that have been rejected also need to be explained to the public (Appendix 5)

It is essential therefore that the CCG continues to embed the E & D agenda across the organisation to support commissioning and operational decisions.

8. Next steps

- Continue supporting programme managers to embed EA reports across all of LCCGs work
- Embed all the necessary EA stages in to programme management systems
- Briefing session on how to 'identify indirect discrimination'.
- Training to Governing Body on understanding the role of decision makers and the Equality Act 2010 is in progress
- Identify high risk work and priorities for specialist E&D support, including Healthy Liverpool Programme

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North West Commissioning Support Unit

APPENDIX 1 Liverpool CCG Equality Objective Plan (can we state which of below are completed)

Liverpool CCG Equality Objectives	Key areas of work	lead responsible officer	target dates	Public Sector Equality Duty	Equality Delivery System (EDS)
1. To make fair and transparent commissioning decisions	<p>1. Embed equality analysis into business planning / options appraisal process in relation to Everyone Counts and other key priorities and plans completed</p> <p>Planning for Patients in Liverpool 2013/14(in progress)</p> <p>2. Embed equality analysis into committee reporting structures (Equality and Guidance document).</p> <p>3. NWCSU to continue to build skills and knowledge of the team. Leadership and report into relevant committees (In progress)</p> <p>4. Ensure systems are in place to ensure intelligence of patient barriers and or gaps are reflected and addressed in priorities and plans and everyone counts</p>	Heads of service	<p>March 2014 onwards (ongoing)</p> <p>April 2014 onwards(ongoing)</p> <p>March 2014 onwards (ongoing)</p> <p>October 2015</p>	<ul style="list-style-type: none"> Eliminate Discrimination Advance Equality of Opportunity Foster Good Community Relations 	goals 1, 4 (
2. To improve access and outcomes for	1.Ensure LCCG and key providers undertake EDS 2 and Healthwatch Liverpool continue to play key assurance		March 2014 (complete)	<ul style="list-style-type: none"> Eliminate Discrimination Advance 	goal 2

<p>patients and communities who experience disadvantage</p>	<p>role with 7 key providers including Alder Hey, Merseycare, Liverpool Heart and Chest, Liverpool Women's, Royal, Liverpool Community Health Services and Aintree and to share intelligence about unequal access and outcomes and enable LCCG to improve health and wellbeing outcomes c</p> <p>2. Ensure LCCG works closely with protected groups and their representatives in the commissioning and quality agenda to address disadvantages and gaps in priorities and plans</p> <p>3. Everyone counts</p> <ul style="list-style-type: none"> • Ensure cancer messages are available for all with focus on BME groups • Learning disability self- assessments action plan and Implementation of Winterbourne Recommendations (repatriation) • implementation of Integrated Care Model • improve long term conditions across men women and communities • proactive care models around dementia • review of end of life services <p>4. undertake an equality analysis of current consultation and engagement activity and across protected groups and action any gaps or issues that need to be addressed</p>	<p>Heads of service</p>	<p>EDS2 April 2014 onwards () complete</p> <p>March 2015 (ongoing)</p> <p>October 2015 (ongoing)</p>	<p>Equality of Opportunity</p> <ul style="list-style-type: none"> • Foster Good Community Relations 	

<p>3. To improve the equality performance of our providers through robust procurement and monitoring practise</p>	<p>1. Raise profile of equality agenda at key providers Clinical Quality Performance Groups to :</p> <ul style="list-style-type: none"> • Enter into a dialogue with Providers • Develop and implement plans to address key areas of disadvantage. <p>2. Review the Equality requirements of the Quality contract schedule to ensure instructions are clear, focussed and addresses Public sector Equality Duty)</p> <p>3. maintain the Equality provider forum across the 7 key providers</p> <p>4. connect equality implications of Keogh and Francis reports via quality schedule (EDS2 and above CQPG plan above) Mapped to EDS2</p> <ul style="list-style-type: none"> • Provider action Plans mapped to Provider Equality Plan <p>(</p> <p>5. explore options to improve analysis of patient experience across protected groups where needs are greatest</p>	<p>Heads of Service</p>	<p>April 2014 onwards (complete)</p> <p>March 2014 onwards (complete)</p> <p>April 2014 (ongoing)</p> <p>May 2015 (complete)</p> <p>June 2015 (ongoing)</p>	<ul style="list-style-type: none"> • Eliminate Discrimination • Advance Equality of Opportunity • Foster Good Community Relations 	<p>goals 1,2,4</p>
<p>4. To empower and engage our workforce</p>	<p>1. refresh and standardise key workforce policies in conjunction with LCCG</p> <p>2.HR and Remuneration committee to ensure robust commitment to equality and workforce issues</p> <p>3 Publish and act upon NHS England equality related workforce recommendations (Completed)</p>	<p>Heads of service</p>	<p>April 2014 (complete)</p> <p>April 2015 onwards (complete)</p>	<ul style="list-style-type: none"> • Eliminate Discrimination harassment and victimisation • Advance Equality of Opportunity • Foster Good 	<p>goal 3</p>

			April (complete)	2014	Community Relations	
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Appendix 2 Equality Delivery System 2 (EDS)

The Equality Delivery System (EDS) is a tool-kit that can help NHS organisations improve the services they provide for their local communities, consider health inequalities in their locality and provide better working environments, free of discrimination, for those who work in the NHS. Used effectively, it supports NHS organisations to:

- meet the public sector Equality Duty of the Equality Act 2010;
- deliver on the NHS Outcomes Framework and the NHS Constitution;
- and, if they are providers, meet the Care Quality Commission's "Essential Standards of Quality and Safety"

The EDS has four key goals, with 18 specific outcomes. NHS organisations need to listen to and engage with patients, carers, voluntary organisations and people who work in the NHS in order to grade their equality performance, identify where improvements can be made and act on their findings. The EDS goals and grades are:

EDS Grades

- ▲ **Excelling – Purple**
- ▲ **Achieving – Green**
- ▲ **Developing – Amber**
- ▲ **Undeveloped – Red**

EDS Grades

Excelling- can demonstrate all protected groups are considered in commissioning processes and there is evidence to demonstrate that these groups fare equally compared with people overall

Achieving – can demonstrate the 5 or more protected groups are considered in commissioning processes and there is evidence to demonstrate that these groups fare equally compared with people overall

Developing – can demonstrate 3 or more protected groups are considered in commissioning processes and there is evidence to demonstrate that these group fare equally compared with people overall

Undeveloped – can only demonstrate up to 2 protected groups are considered in commissioning processes and there is evidence to

The EDS supports organisations to have a structured way of measuring the four goals, a clear way of setting outcomes for the year ahead and engaging effectively with staff, patients and local communities when grading their performance and setting objectives.

Where to get more information

Guidance that explains how public authorities can meet the requirements of the equality duties is on the Equality and Human Rights Commission website at:

<http://www.equalityhumanrights.com/advice-and-guidance/public-sector-equality-duty/guidance-on-the-equality-duty/>

Guidance for NHS organisations on equality objectives is published on the NHS Employers website at:

<http://www.nhsemployers.org/EmploymentPolicyAndPractice/Equalityanddiversity/e-d-in-practice/get-to/IdentifyingTheObjectivesAndOutcomes/Pages/Identifying-the-objectives-outcomes.aspx>

For more information on the Equality Delivery System contact: edc@nhs.net

Appendix 3

EDS 2 implementation Plan NHS Liverpool CCG

Introduction

Equality Delivery Systems (EDS 2) is one way in which a CCG can demonstrate that it is undertaking work that supports its delivery against the Public Sector Equality Duty (PSED). The Assessment is also part of the NHS England Assurance Process.

It is important to note that EDS 2 does not equate to compliance with the Equality Act, which is part of a commissioner's everyday routine as they make commissioning decisions and monitor the performance of their providers.

EDS 2 has recently changed and a key change area is local engagement. This results in the requirement for local communities to agree with the grades, and have a key input to the process.

Implementation Plan

There are six stages to the proposed Plan (see timeline below):

Stage	Action	Status	Responsibility and Timescale
1	CCG agrees stretch targets	Completed	CCG 2014
2	Target specified community groups to complete a questionnaire against the EDS 2 stretch targets	In progress	March 2015
3	Arrange and conduct telephone meetings with selected organisation to work through the questionnaire	In Progress	CCG and CSU March / 2015
4	Feedback from telephone meetings/ workshops and other sources of data is triangulated with CCG evidence		CCG and CSU May/ june 2015
5	Panel is convened to grade the CCG in light of the evidence, and make		Panel -July 2015

	any recommendations			
6	Grades and recommendations are reported back to the appropriate committee.			July 2015

Stretch targets

Initially, 3 stretch targets have been identified, which aligns with LCCG priorities and equality Objectives:

Section 1.1 - Services are commissioned, procured, designed and delivered to meet the health needs of local communities
 Section 2.1 - People, carers and communities can readily access hospital, community health or primary care services and should not be denied access on unreasonable ground.

Section 4.2 - Papers that come before the Governing Body and other major Committees identify equality-related impacts including risks, and say how these risks are to be managed

EDS2: The Goals and Outcomes

Goal	Number	Description of outcome
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Better health outcomes	1.1	Services are commissioned, procured, designed and delivered to meet the health needs of local communities
	1.2	Individual people's health needs are assessed and met in appropriate and effective ways
	1.3	Transitions from one service to another, for people on care pathways, are made smoothly with everyone well-informed
	1.4	When people use NHS services their safety is prioritised and they are free from mistakes, mistreatment and abuse
	1.5	Screening, vaccination and other health promotion services reach and benefit all local communities
Improved patient access and experience	2.1	People, carers and communities can readily access hospital, community health or primary care services and should not be denied access on unreasonable grounds
	2.2	People are informed and supported to be as involved as they wish to be in decisions about their care
	2.3	People report positive experiences of the NHS
	2.4	People's complaints about services are handled respectfully and efficiently
A representative and supported workforce	3.1	Fair NHS recruitment and selection processes lead to a more representative workforce at all levels
	3.2	The NHS is committed to equal pay for work of equal value and expects employers to use equal pay audits to help fulfil their legal obligations
	3.3	Training and development opportunities are taken up and positively evaluated by all staff
	3.4	When at work, staff are free from abuse, harassment, bullying and violence from any source
	3.5	Flexible working options are available to all staff consistent with the needs of the service and the way people lead their lives
	3.6	Staff report positive experiences of their membership of the workforce
Inclusive leadership	4.1	Boards and senior leaders routinely demonstrate their commitment to promoting equality within and beyond their organisations
	4.2	Papers that come before the Governing Body and other major Committees identify equality-related impacts including risks, and say how these risks are to be managed
	4.3	Middle managers and other line managers support their staff to work in culturally competent ways within a work environment free from discrimination

Appendix 4

Judicial Review and Sandwell MBC; lessons for decision makers.

A Judicial Review (JR), Judicial reviews are a challenge to the way in which a decision has been made, rather than the rights and wrongs of the conclusion reached.

Judicial Reviews set precedents and each judgement can be used as an extremely strong indicator of how rules, codes of practice and legislation will be viewed by the courts.

Whilst there have been numerous Judicial Reviews commenting on issues such as consultation and equality and setting bench marks for organisations to work against, the recent case involving Sandwell MBC produced a particularly clear and concise view from the judge as to the role of consultation and Public Sector Equality Duties.

The crux of the case:

- The case essentially revolves around a policy on who should receive council tax rebate, whilst the Government produced guidelines, at the last minute, during Council discussion, Sandwell MBC introduced a 'new rule'. A rule stating that anyone not living in the borough for the previous 2 years before a claim, would automatically be disqualified from claiming. The rule was introduced in the 'belief' that Sandwell Council will be overrun by displaced Londoners and European migrants – all wanting to claim rebates.
- 3 women, fleeing domestic violence had left Sandwell borough for 2 years, upon their return found that they were no longer eligible for Council tax rebate. They believed this to be discriminatory.
- With the help of the Equality Human Rights Commission a Judicial Review was filed on the following grounds:
 - Sandwell MBC had no legal powers to make such a rule.
 - Failure to understand a material consideration (if all local authorities adopted the same scheme then no one could move boundaries)
 - Lack of consultation
 - Barriers to free movement under EU rules
 - It was indirect discrimination under:
 - section 19 Equality Act 2010
 - section 14 of European convention on Human Rights
 - article 21 of Treaty on the Functioning of the European Union ("TFEU"), and the provisions which protect freedom of migrant workers
 - Article 45 of TFEU, and article 7(2) of EU Regulation 492/2011 which provides that a migrant worker "shall enjoy the same social and tax advantages as national workers").
 - article 45 of TFEU, which prohibits any discrimination on the grounds of nationality

- The public sector equality duty under section 149 of the Equality Act 2010 was engaged; but the Council failed to conduct any Equality Impact Assessment (EIA) on the requirement, or address at all the characteristics protected by the Equality Act and affected by the requirement.

The Judge agreed all grounds and, as a consequence, the Councils' decision making was deemed unlawful. As a result not only did Sandwell have to immediately change its policy but also work out whom over the past was affected by that decision and reverse the decision with all its incumbent costs.

The purpose of the brief is to highlight the most pertinent grounds for LCCG, which are::

- Lack of consultation
- Indirect discrimination
- Meeting Public Sector Equality Duties.

Consultation:

The Judge reminds everyone that the 'Gunning Principles'¹ are in play, they are:

- (i) Consultation must take place when the proposal is still at a formative stage;
- (ii) Sufficient reasons must be put forward for the proposal to allow for intelligent consideration and response;
- (iii) Adequate time must be given for consideration and response; and
- (iv) The product of consultation must be conscientiously taken into account [before final decision].

The Judge's view was that as the policy was amended by Councillors on the 'floor', and it had ramifications for the people of Sandwell, as there was no opportunity to consult on this new rule prior to the decision, then none of the Gunning Principles were met.

Implications:

Decision makers can only make 'lawful decisions' when consultation has been carried out **BEFORE** the decision to create/amend/change a policy, criterion or practice that would have a substantial effect on service users or the public.

There have been a number of Judicial Reviews that have 'augmented' the Gunning principles, one being 'R (Milton Keynes Council) v Secretary of State for Communities and Local Government 2011) which clarifies 'fair consultation' as to 'all interested parties' and not who the decision maker just 'picks and chooses'.

Simply making a decision to change a provision or service that will affect people and then 'informing them' after the decision is made would be unlawful under the 'Gunning Principles' and would be appropriate for Judicial Review.

¹ The 'gunning principles' are in fact rules created by Stephen Sedley QC and adopted by Mr. Justice Hodgson in R v Brent London Borough Council, ex parte Gunning (1985)

Indirect Discrimination

The Equality Act² at section 19 states:

(1) A person (A) discriminates against another (B) if A applies to B a **provision, criterion or practice** which is discriminatory in relation to a relevant protected characteristic of B's.

Sandwell MBC created a criterion with its new rule, but failed to understand who it would affect beyond 'foreigners', even here it failed to understand that European Union Citizens are protected under EU law, so even excluding them from an apparent benefit was indirect discrimination.

However, the more immediate failing was that it failed to spot that such a rule would discriminate against women who by and large are more victims of sexual abuse and violence in domestic settings, than men. Often as a consequence of violence, they leave the area and are relocated to safe houses whilst court cases are heard. This rule impacts on women more than men, in these circumstances, so the failure to recognise that and adjust the policy accordingly would count as a breach of section 19 above.

Implications:

Section 19 is part of the equality act 2010 entitled '**prohibited behaviours**', the first point of the Public Sector Equality Duty is to "eliminate discrimination....prohibited by or under this [Equality] Act".

The organisation and system failure was on Sandwell's inability to 'think the policy through and its ramifications on different people' as the policy was developing. The Judge noted that a manager had in fact noted that victims of domestic violence were falling foul of this rule, but the manager had failed to identify this as indirect discrimination and failed to note that it was unlawful and consequently the manager took no action.

The Judge also noted that the evidence suggested that only 5 people had been turned down on this rule, even though the number was small, the fact that one person could fall foul was enough to be unlawful.

For LCCG it is vital that 'thinking through' and 'evidence' is used to try and ascertain whether a policy or function would be discriminatory.

Section 149: Public Sector Equality Duty (PSED).

Because there was no consultation (therefore Sandwell MBC could not determine the views of different people/groups to see if there were any worrying implication identified by the people) and because there was no accurate assessment of the impact of the policy on different groups and then the inability because of this, to adjust the policy accordingly, means that by default PSED (1a and 3a,b) cannot be met, and by default again, the decision makers have made an unlawful decision by agreeing to the policy – **without knowing whether the policy meets the PSED.**

² The Equality Act 2010 is statutory legislation – organisation have to comply.

Implications:

A clear point is made by the Judge, PSED have to be met and or fully addressed **BEFORE** a decision can be made. **The assessment on whether PSED are met cannot be after the decision.**

Any decision to; create a new service, significantly adjust a service or remove a service, made without the PSED being addressed and understood by decision makers is unlawful. There should be a clear record of the assessment (often referred to as an Equality Impact Assessment³ or an Equality Analysis Report).

In the Judge's mind the EIA and PSED should have the power to change a policy/provision if it is found not to meet the Equality Act 2010 requirements.

On the evidence, I cannot but find that the Council was in breach of its section 149 duty. That duty is important; and, had the Council been rigorous in satisfying its obligation to have due regard to the relevant characteristics, then, again, it may not have proceeded with the unlawful course that it followed.

Clearly for CCGs the EIA and PSED process has to be a clear and capable of influencing processes prior to final decision by the decision makers.

LCCG needs to ensure:

- Issues that have to be consulted on must follow 'Gunning principles' **before** a decision is made and a policy/ function adopted or significantly changed.
- Equality Impact Assessment, looking at 'prohibited behaviour' across the protected characteristics, is finalised and presented to the decision makers **before** decision makers make final decision.
- PSED have been clearly understood and addressed by the decision makers **before** decision is made.

Implications: Decision making can be an 'unwieldy' process so it is vital that CCGs are clear on the steps they take from formulating an idea to implementing a service or provision and where the regulatory and statutory procedures fit in to this process. Failure to do this can make the decision unlawful.

A clear line of sight from start to finish has to be maintained, especially where a project is undergoing many stages in it shaping. There is little use of an EIA at the start of the process if by the end of the process the project turns out to be completely different from what was assessed at the beginning. Its vitally important that throughout the decision making process, if programmes and further changes are made then the legal implications are tested and checked otherwise decisions may fall outside the accepted legal parameters.

³ The law does not prescribe a set procedure/process – but makes explicit that there has to be 'due regard' to PSED. For transparency and evidence/ audit trail organisation adopt some 'formal process' which they often term EIA (equality Impact Assessment)

Appendix 5

Emergency Briefing:

Supreme Court Judgement October 2014. Lessons for everyone.

R v London Borough of Haringey

Lady Hale (deputy president), Lord Wilson, Lord Kerr, Lord Clarke & Lord Reed-
presided over this judgement.

The Supreme Court is the highest Court of the land, and they made a landmark decision⁴ in October 2014 on the 'fairness of consultation' and the necessary steps and stages that make up 'fair consultation'.

The crux of the case:

- In 2013 a new government proposal under 'austerity' measures meant Councils were no longer reimbursed for the full amount of Council Tax Rebate (CTR) that they give to residents on low incomes to help pay the rent. This in effect meant that the Council would have a shortfall of 15-20% to find if it wished to maintain the full rebate for residents or to pass on this cost to those that claim CTR. meaning that most residents would now have a council tax rebate of 90% but would have to find the remaining 10% from their income – no matter how small or limited that income was.
- Haringey Council 'consulted' with its population on the adoption of a new Council Tax Rebate System.(CTRS) essentially passing on the cost to the resident
- In so doing Haringey had made an assumption of what was the best way forward and only presented that option
- As part of the consultation exercise a member of the public had written in to ask 'why couldn't the council 'carry the costs' by other means rather than passing them on to the poor?'
- The Appellant was negatively impacted by the proposed CTRS and felt Haringey was not disclosing the 'full story' so she could not make an 'informed judgement' and took Haringey to Judicial Review
- 'The appellant won at review but Haringey appealed.
- Haringey won at appeal and the appellant appealed to the Supreme Court.
- The appellant won at Supreme Court and the Supreme Court found that Haringey had acted unlawfully in how it conducted its consultation by way of the information it imparted as part of that consultation.

⁴JUDGMENT R (on the application of Moseley (in substitution of Stirling Deceased)) (AP)
(Appellant)

v
London Borough of Haringey (Respondent)

The main findings:

1. Haringey's Cabinet member for finance on looking at the proposed government initiative, wrote:

“Needless to say it is my belief that this represents one of the most appalling policies of the government and it is not insignificant that the unemployed will now be facing the prospect of having to pay 20% local taxation levels, which they last were subjected to paying under the Poll Tax.”

Lord Wilson comments:

“There was nothing wrong with [the] Councillor’s expression of indignation. But it did betray an assumption that the shortfall would have to be reflected by provisions in the CTRS which reduced the level of relief below the level previously provided by way of CTB rather than that Haringey should absorb it in other ways.”⁵

Lord Wilson comments that the head of Revenues, Benefits and Customer Services for Haringey in a written report to Councillors had identified the option of absorbing the costs but rejected it on the grounds this would require a reduction in services.

2. Haringey statutory obligation, set out in the Finance Act covering CTRS states that a draft scheme has to be developed and then consulted on, “such... persons as it considers are likely to have an interest in the operation of the scheme”.

Lord Wilson identifies two clear groups; council tax payers in general, as any change to CTR may be of interest to them especially if it effects the level of services and the more obvious, those already in receipt of the benefit.

3. In looking at the wording of the consultation, designed by the Head of Resources, Benefits and Customer Services Lord Wilson identifies this paragraph (already made in bold by Haringey) in the publicity and consultation material:

“At present the Government gives us the money we need to fund Council Tax Benefit in Haringey. We will receive much less money for the new scheme and once we factor in the increasing number of people claiming benefit and the cost of protecting our pensioners, we estimate the shortfall could be as much as £5.7m.

This means that the introduction of a local Council Tax Reduction Scheme in Haringey will directly affect the assistance provided to

⁵ Section 9 of the Judgement

anyone below pensionable age that currently involves council tax benefit.”

And upon which Lord Wilson says:

“...the shortfall did not necessarily have that consequence. Why was he [Head of resources, benefits and customer services] not there recognising that at least there were other options, albeit not favoured by Haringey, for meeting the shortfall? Note also [that his] use of the indefinite article, in his reference to “the introduction of a local [CTRS] in Haringey”. It suggests that any CTRS introduced in Haringey, not just the scheme proposed, would need to meet the shortfall by a reduction from existing levels of CTB.”⁶

Lord Wilson adds that the reduction in government funding did not inevitable have that effect and that in the consultation documents there was no reference to opinions for meeting the shortfall other than by a reduction in relief from Council tax.

“I consider, that the reader of the first question was in effect presented with an assumption”⁷

4. Lord Wilson also notes that in fact a member of the public, as part of the consultation process, wrote in to the Council saying

“I am aware that central government has cut its council tax benefit grant to... Haringey and all other councils by 10%. Other councils are absorbing the cut and continuing [to] implement the current CT benefit scheme. Why cannot Haringey do the same? There is no consultation taking place about that central issue.”

Lord Wilson recognises that this comment cuts to the quick of the debate and provides for a better story when consulting, and that Haringey had responded inappropriately to the member of the public, further cementing their error.

5. A public authority’s duty to consult those interested before taking a decision can arise in a variety of ways. Most commonly, as here, the duty is generated by statute. Not infrequently, however, it is generated by the duty cast by the common law upon a public authority to act fairly. The search for the demands of fairness in this context is often illumined by the doctrine of legitimate expectation.

6. Fairness - Lord Wilson describes three attributes: .

- First, the requirement “is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested”

⁶ Section 17 of the judgement

⁷ Section 21

- Second, it avoids “the sense of injustice which the person who is the subject of the decision will otherwise feel” Such are two valuable practical consequences of fair consultation.
- But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant; It was “Required, as we are, to make a taxation-related scheme for application to all the inhabitants of our Borough, should we make one in the terms which we here propose?”

7. When the instruction to consult ***is based in statue***, then:

“fairness will require that interested persons be consulted not only upon the preferred option but also upon arguable yet discarded alternative options”⁸

Lord REED adds

“The purpose of public consultation in that context is in my opinion not to ensure procedural fairness in the treatment of persons whose legally protected interests may be adversely affected, as the common law seeks to do. The purpose of this particular statutory duty to consult must, in my opinion, be to ensure public participation in the local authority’s decision-making process”⁹

And that:

“Meaningful public participation in this particular decision-making process, in a context with which the general public cannot be expected to be familiar, requires that the consultees should be provided not only with information about the draft scheme, but also with an outline of the realistic alternatives, and an indication of the main reasons for the authority’s adoption of the draft scheme. That follows, in this context, from the general obligation to let consultees know “what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response”¹⁰

Going on to say that:

“In the present case....it is difficult to see how ordinary members of the public could express an intelligent view on the proposed scheme, so as to participate in a meaningful way in the decision-making process, unless they had an idea of how the loss of income by the local authority might otherwise be replaced or absorbed”.¹¹

And that:

⁸ Section 27 of the judgement

⁹ Section 38 of the judgement

¹⁰ Section 39 of the judgement

¹¹ Section 41 of the judgement

“..enough must be said about realistic alternatives, and the reasons for the ... authority’s preferred choice, to enable the consultees to make an intelligent response in respect of the scheme on which their views are sought.”¹²

Lady Hale (deputy president), Lord Wilson, Lord Kerr, Lord Clarke & Lord Reed all agreed that on these grounds the consultation was unlawful.

Implications:

In making this decision the Lords not only accepted the ‘Gunning principles’ but also clarified other supporting judgements.

The net result is that:

- Any significant change in service needs consultation not only due to the common law principles of ‘fairness’ and ‘legitimate expectation’ but in the NHS’ case the ‘Health and Care Act’ (section 1) lists a ‘duty to consult’¹³ – this is in effect a **statutory instruction**.
- As we can see in this case, from this point forward the legal threshold for any ‘statutory instruction’ to consult is to ensure **that any options that have been discussed** are clearly displayed to the public, with **relevant supporting information** such that an intelligent decision can be made.
- A ‘statutory instruction’ to consult demands that consultees ‘participate in a meaningful way in the decision making’
- No ‘assumptions’ can be made as to the ‘preferred choice’ and that any preferred choice has to be explain ‘why it is the preferred choice and show a necessary logical connection.’
- Wording is particularly important, Lord Wilson seized on the term ‘This means that’ saying that officers and decision-makers have made an assumption and then passed that assumption on.
- Lord Wilson notes that Haringey had considered ‘protected characteristics’ and made appropriate adjustment to the proposed scheme covering ‘disability and elderly’. However, not all protected characteristics were given protection and the appellant was a single mother. The CTRS had a particular negative impact on single mums.

¹² Section 42 of the judgement

¹³ 14Z2 Public involvement and consultation by clinical commissioning groups

What LCCG need to do: is all this covered within plan – if so why is it here?

- Fairness is central to consultation, so any consultation has to clearly spell out and present all ***the options that could be taken and why one is preferred.***
- Enough detail has to be given to the public to ensure they can make an informed choice.
- Ensure that there are no assumptions in the thinking and that assumption are not being passed off as ‘rigid rules’
- Ensure that there is a clear line of sight that shows how the public are participating in the decision making.
- Recognise that LCCG is under a ‘statutory duty’ to consult and this now has a higher ‘test threshold’ (see above point)– ensure that LCCG systems and practice are geared up for this
- Ensure that wording used in consultation, explains the ‘story’ of what is happening rather than simply asserting ‘this is best’
- Respond and listen to any comment that comes in from the public that suggests alternate methodology.
- Be able to identify comments and concerns by protected characteristic
- Ensure that Equality Analysis’ are fully engaged with the process.
- Decision- makers have to be given clear guidance to ensure they do not make assumptive statements on preferences in public or documentation.