

Due Regard – Guidance for Managers and Service Deliverers



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The **Equality Act 2010** replaces most previous anti-discrimination legislation, and aims to simplify the process and harmonise protection across the 9 protected characteristics. Further details about this can be found in the [EDHR Training Manual](#) (pages 6-9 and page 69).

A key feature of the Act, is encouraging public sector organisations to think of how equality influences key functions and features:

- Policy development and reviewing
- Delivery of services
- Whilst commissioning and procuring services
- How the Trust acts as an employer

The formal duty known as the Public Sector Equality Duty which came into force as of April 2011, contains 3 main objectives (or general equality duty) which public authorities must give 'due regard' to when exercising their functions. The 3 general equality duties are:

- Elimination of discrimination, harassment and victimisation and any other conduct that is prohibited by or under the Act.
- Advance equality of opportunity between people who share a relevant protected characteristic and people who do not share it.
- Foster good relations between people who share a relevant protected characteristic and those who do not share it.

NB – That only the first general duty applies to the protected characteristic of Marriage and Civil Partnership.

The Act provides further clarification as to what having due regard for advancing equality of opportunity means:

- Removing or minimising disadvantage suffered by people due to their protected characteristics.
- Taking steps to meet the needs of people with certain protected characteristics where these are different from the needs of other people.
- Encouraging people with certain protected characteristics to participate in public life or in other activities where their participation is disproportionately low.

The Act also provides further clarification as to what giving due regard to fostering good relations as:

- Tackling prejudice and promote understanding.

Within the Act there are Specific Duties, which underpin the general duty and provide a framework to achieve the general duties and aid transparency. The duties place obligations on public authorities to:

- Assess the likely impact of proposed policies and practices, on your ability to comply with the general duty.
- Assess the impact of any policy or practice you have decided to review. (this can be new or policies on a review cycle).
- Monitor the impact
- Publish an assessment report (for these purposes an Equality Impact Assessment form will do this) setting out:
 - the purpose of the policy or practice that has been assessed
 - a summary of the steps taken to assess the likely impact of the policies and practices
 - a summary of the evidence considered as part of the assessment process
 - the results of the assessment; and
 - any decisions taken following the assessment

The **Human Rights Act 1998** comprises of a number of articles describing the fundamental legal rights of UK citizens. The Act has been embedded into the NHS Constitution to ensure Human Rights considerations play an every day part of NHS practices. These rights are not equal in status and fall into three categories:

Absolute Rights these cannot be withdrawn or made subject to conditions.

Limited Rights These can be affected by circumstances. For example, the right to liberty and security (Article 5) can be limited by the legal requirement to incarcerate those who have broken the law or who have been detained under the Mental Health Act.

Qualified Rights these require a balance to be struck between the rights of the individual and their responsibilities to other individuals, society or public interest. Legitimate reasons for interfering with these rights include maintaining public safety and preventing crime or disorder.

The Trust should promote and protect the human rights of their patients, service users and employees in a way that is compatible with the Human Rights Act and the European Convention on Human Rights, as well as the NHS Constitution.

Using the FRED A principle can ensure that Human Rights issues are embedded into the decision making process. When giving due regard to the Human Rights Act, consider the policy or practice allows individuals to be treated with: **F**airness, **R**espect, **E**quality, **D**ignity and **A**utonomy. Examples of things you may want to consider can be found at the end of this document.

What does ‘due regard’ actually mean?

Simply that the general duty should be consciously thought about as part of the decision-making process in any policy and practice.

Due regard comprises of two elements ‘proportionality’ and ‘relevance’ – in all decisions and functions there has to be appropriate weight to the obligations under the Act in proportion to the relevance of the obligations to a particular decision or function.

For example, a policy that deals with the storage of a medical gases is unlikely to be relevant to Equality, but a policy dealing with how people access a service will have a high relevance to Equality.

What do I assess and when should I start the assessment?

The term ‘policies and practices’ is a broad term that includes:

- Policies
- Provisions
- Criteria
- Practices
- Activities
- Decisions
- Informal Customs

Taking due regard from the earliest stage of development or review will produce better outcomes. This is because considerations will be fully built into the remit of the policy.

Paying due regard at the end of the development or review process, will generally mean that there is a lack of flexibility in the document to fully consider the general duties. Opportunities to advance equality will also be missed, in both scenarios could be open to challenge.

Challenges can take place in courts or enforcement by the Equality and Human Rights Commission.

It makes sense!

Using an evidence based approach to influence our policies and service delivery, will not only make us more accessible but gives us a real opportunity to do things in a more effective and efficient way.

Using good quality information can help uncover potential problems, and gives a sound basis for addressing historical problems. Addressing these issues provides clear justification for spending public money. The duties encourage public authorities to deliver services by understanding the needs of the communities it serves.

For example it would be difficult to justify building of a specialist Dementia unit in an area with a young population and low incidents of Dementia related conditions.

Who should take the lead for due regard?

The author of the policy or practice is the lead, simply due to the fact that they are experts in the subject matter and should understand the implications of their proposed ideas. The expectation is that consideration of relevant equality information will be used as an integral part of the research process for the policy or practice.

This is not to say that they are on their own! The Equality, Diversity and Human Rights Team will be happy to offer expert advice to assist you in undertaking due regard.

Evidence is everything!

Over the years there have been many legal challenges to the decisions public authorities have made. Many of them have been centred around public authorities not clearly demonstrating how they have determined that their decision has not unfairly impacted on any particular communities.

In the case of *R v Birmingham City Council* [2011] EWHC9444 (Admin), R challenged the councils decision to withdraw funding to provide Black and Minority Ethnic people with a specialised service for legal help, for issues relating to physical disabilities or mental health benefits issues that was provided by the community and voluntary sector. The court ruled that the assessment on the impact on BME communities did not recognise the fact that they would suffer a vast detrimental impact which amounted to unjustifiable discrimination. The Equality Impact Assessment processes was deemed flawed and the decision unlawful. Without having a clear systematic process of recording what information has been used to inform our decisions, and the issues due regard have raised – it will, in practical terms be impossible to adequately defend any policy or practice that may be challenged in the future. The Equality Impact Assessment will help us demonstrate that we have given due regard to equality issues throughout the development process, and allows documentation of relevant factors that support your decisions.

If you have determined that a policy or practice does/does not have an impact on a protected characteristic. It is not sufficient to just tick 'yes' or 'no' without providing evidence as to how (what evidence you have used) to determine that there is/is not an impact on a protected characteristic.

Some things you need to take into account

1. The Public Sector Equality Duty is **not** delegable – This means even if a public authority commissions a service from the private sector, the public authority will still have overall responsibility for that commissioned service meeting the aims of the duties.
2. Any opportunity to advance equality should be taken in policies and practices.
3. Not all policies or practices will impact groups equally! For example if a policy's aim is to mitigate or address a historical/organisational disadvantage (e.g. specific leadership programme for women, as there is an under representation of women in senior management).
4. Bear in mind that a policy may impact on other policies or an overall strategic aim, and due regard will need to be looked at across the service for any cumulative effects. For example if a local authority is making changes to four different policies: funding and delivering social care, day care, respite for carers and community transport. Small changes in each of these policies may each slightly disadvantage disabled people so the cumulative impact of changes to these areas could have a significant impact on disabled people's participation in public life. The actual and potential impact on equality of all these proposals, and appropriate mitigating measures, will need to be considered. This will ensure that inequalities between people with different protected characteristics are identified and do not widen.
5. Use reliable evidence to shape your policy, your evidence might identify that there is the potential for discrimination – how can your policy and procedures address these?
6. If there is a Government or regulatory requirement to implement a policy, whilst the government or regulatory body will assume responsibility for the overall guidance – the public authority will take responsibility for the localisation/implementation of that policy.
7. The Public Sector Equality Duty is an ongoing duty, do not think that conducting an impact assessment of a policy or practice during its development will be sufficient. Things change e.g. demographic, financial situations, leadership, ways of delivering equality – how would this affect the way the policy or practice impacts on equality?
8. Even something that impacts on a small group of people will be considered a high risk to equality, due to the disproportionate outcome that group will suffer.

Steps you should follow when giving due regard:

1. Prioritise and assess the relevance to equality

Consider:

- Does the policy or practice affect service users, employees or the wider community?
- Is the policy likely to affect people with particular protected characteristics differently?
- Is it a major policy, significantly affecting how services are delivered or accessed?
- Does the policy relate to issues that have been raised during engagement as being important to people with particular characteristics?
- Does the policy relate to areas where there are known inequalities?
- Does the policy relate to any [Equality Objectives](#) that have been set out?

2. Gather relevant evidence

When you have decided that your policy or practice is relevant to equality take steps to gather relevant information:

Consider:

- What are the aims/purpose of the policy or practice?
- What context will the policy or practice operate within?
- Who should benefit?
- What are the intended results/outcomes?
- Which aspects of the policy or practice are most relevant to equality?
- Which protected characteristics is the policy or practice most relevant to?
- What evidence have you got that backs up your findings/assertions? Does this promote transparency?

Relevant information will vary from policy to policy but consider:

- Comparisons with similar policies of other health bodies to help identify relevant Equality issues.
- Analysis of surveys or enquires or complaints from the public to help you understand the needs or experiences of different groups of people.
- Recommendations from inspections or audits to help you identify any concerns about equality issues from regulators.
- Information about the local community, including census findings to help you establish the number of people with different protected characteristics (this includes in-house Workforce Reports)

- Recent research from national, regional and local sources that included information on relevant equality issues.
- Results of engagement activities that help you understand the needs or experiences of people with different protected characteristics.

What if there are gaps in the information you have?

- If you do not have equality information about people with some protected characteristics, consider whether you need to fill those gaps. This could mean undertaking short studies, surveys or some additional engagement work.
- Consider collecting equality information as part of your mainstream information collection and analysis, rather than collecting information on an ad-hoc nature.
- Consider pooling resources with other organisations to develop a shared database of evidence.

3. Analyse your equality information

Consider what questions will help you to understand the potential impact of the policy on equality:

- Do policy outcomes and service take-up differ between people with different protected characteristics?
- What are the key findings of your engagement?
- If there is a greater impact on one group, is that consistent with the policy aims?
- If the policy has negative impacts on people with particular characteristics, what steps can be taken to mitigate or remove these effects?
- Does any part of the policy discriminate unlawfully?
- Will the policy deliver practical benefits for certain groups?
- Does the policy miss opportunities to advance equality of opportunity and fostering good relations?
- Do other policies need to change to enable this policy to be effective?

4. Engagement

You have a duty to involve persons you consider:

- to represent the interests of persons who share one or more of the protected characteristics; **and**
- have an interest in the way that you carry out your functions.

You can also use your discretion to involve other persons you consider appropriate.

Engagement should take one of two forms:

Consultation – listening to persons and taking their opinions onboard.

Involving – working integrally with persons who take an active part in the decision making processes.

You must include a mechanism of feedback for participants, detailing what elements of their engagement has informed the decision making process. In addition to why certain elements of the engagement could not be incorporated into the policy and practice.

5. Make your decision

Proportionality – the consideration given to equality should be proportional given the importance of the policy to: eliminating discrimination, harassment or victimisation, advancing equality of opportunity or fostering good relations.

In some cases, the policy will be critical to equality, in other cases, it will be less so.

In all decisions, financial and other considerations will also be important, but ensure that appropriate weight is given to equality. What is appropriate will be for you to decide, and the weight given to different factors could be challenged in court.

As a result of the assessment you might:

Continue with the policy – your assessment demonstrates that the policy shows no potential for discrimination and you have taken all appropriate opportunities to advance equality of opportunity and foster good relations.

Justify and continue with the policy - there may be other factors (such as other policy aims or financial constraints) which make it reasonable for you to decide to continue the policy despite its adverse equality impact. This is only an option where the policy does not unlawfully discriminate or where the policy can be objectively justified. But if challenged, you will have to satisfy a court that you have given due regard to the general duty.

Change the policy – make changes to ensure that the policy does not adversely affect protected groups or does not miss opportunities to advance equality and foster good relations.

Stop the policy – if the policy shows unlawful discrimination that cannot be objectively justified, consider stopping the policy or face the risk of being challenged.

6. Use the Equality Impact Assessment Toolkit to document your findings and decisions

- Document your reasons and the information that you have relied on
- Documenting the impact of your policy on equality and the decisions taken will enable you to show that you have complied with the general duty
- Case law has stated that records serve to demonstrate that a genuine assessment has been carried out at a formative stage

7. Publish the following:

The arrangements made to comply with the specific duty of assessing and monitoring the impact of policies. Assessment reports containing the following information:

- The purpose of the policy being assessed
- A summary of the steps taken to carry out the assessment
- A summary of the equality information taken into account
- The results of the assessment
- Any decision taken in relation to those results

8. Monitor the actual impact:

Remember that assessing the impact on equality is an ongoing process that does not end once a policy has been agreed and implemented.

You have a specific duty to monitor the impact of policies on equality.

Things to Think About

Age

- Is it easy for someone of any age to find out about our service and to use your service, where services are open to all ages?
- Does your service make assumptions about people simply because of their age?
- Does your service give out positive messages about all ages in the leaflets and posters that it uses?
- When you are recruiting staff, have you thought about age and how you can recruit from a wide range of age backgrounds?
- How easy is it for people of all ages to apply for positions in your area and to be accepted by the team they would be working in?
- Do younger or older people in your staff team feel equally valued?
- Do you monitor age to make sure that you are serving a representative sample of the population (or relevant within your relevant age group)?
- What actions will you take to make sure that your staff treat people of all ages with dignity and respect?
- Are your training and development methodologies appropriate for employees of all ages?
- Have you considered including age equality into staff objectives and appraisal?

Disability

- How do people with disabilities find out about your service?
- What actions do you take to ensure that your staff members are treating people with disabilities with respect and dignity?
- What do you do to make sure that people with a disability are using and benefiting from your service?
- What do you do to make sure that people with a disability are able to apply and work in the Trust free from discrimination?
- Does your printed information take account of communication needs of people with various disabilities and is it easy to understand?
- Have you decided what core information you need available in large print, Easy Read, audio tape or Braille?
- Is your service physically accessible to people with mobility problems or who use a wheelchair?
- Do your staff know how to support someone with a hearing or visual impairment?
- Do staff know how to access a sign language interpreter, or an interpreting service for deaf and hearing impaired people, how to use an Induction Loop and where to get advice on material in different formats?
- Do you routinely record the communication needs of patients/service users with a disability for referring to when sending out appointments / letters etc?

- Have you put in place a procedure to record the uptake for sign language interpreters, appointment letters / leaflets in Braille etc?
- Is your service religiously and culturally sensitive to meet the needs of disabled people from minority ethnic groups? If not what approaches would you develop to approach this?
- Have staff received Disability Awareness Training in general and more specifically in meeting the needs of people with a learning disability, people with mental health difficulties or people with hearing or sight impairment?
- Have you considered incorporating disability equality objectives into staff appraisal?

Gender

- Is it easier for either men or women to find out about and use your service, for example because of where you display leaflets about your opening times?
- If your service is for men and women, do you routinely monitor the uptake of our service with gender breakdown and take appropriate action?
- Have staff received Gender Equality Training?
- Do your staff stereotype or make assumptions about whether men or women will be likely to fill certain jobs or access certain services?
- Could bias be displayed as a result of those assumptions?
- Have you considered incorporating gender equality objectives in staff appraisal?
- Do you monitor the uptake of your services by gender?
- Does the person have any caring responsibilities which might influence how and when they can use the service?

Gender Identity

- How accessible is your service for a person from the Trans community?
- Are their potential health inequalities for persons who have gone through gender reassignment?
- How will the service support the trans community (both workforce/service users)?
- Will any resultant documentation (e.g. patient information) be inclusive to trans communities?
- Does your service give a positive message about people who are going through or whom have gone through gender reassignment?

Marriage and Civil Partnership

- Are services offered equally to married and civil partners?
- Are there benefits available to married people that are not offered to civil partners?

Maternity and Pregnancy

- Is the service accessible to pregnant service users?
- Is the service accessible to parents who have just had a child?
- Do you make adequate provision for parents that wish to feed/breastfeed their child in private?

Race – including Gypsy and Traveller Communities

- How do you make sure that people from a wide range of backgrounds use your service?
- Does your printed information take account of different languages and cultures and is it easy to understand?
- Have you publicised your service among minority ethnic communities by making it available at different appropriate venues as well as visiting them and talking about your service?
- Have you decided what core information you need available in other languages?
- How do you liaise with people when English is not their first language?

- Do staff know how to access an interpreter for booking appointments or for meetings, and where to get information for patients and their carers in other languages and formats?
- Do you routinely record the language that a person speaks so that you can send them letters in the right language or ring them instead if they cannot read?
- Is there a procedure to record the uptake of interpreting and translated material?
- Are assessment materials and methods relevant to people from different cultures?
- Do you record the ethnicity of patients so that you know how well your service is being used by people from minority ethnic backgrounds?
- How do you ensure staff treat people from minority ethnic backgrounds with respect and dignity?
- Have you identified any specific dietary or any religious needs of customers' / patients/ colleagues or any other specific requirements that you need to be sensitive to?
- Have you considered incorporating race equality objectives in staff appraisals? I.e. C2C.
- Are your recruitment assessments relevant to people from different cultures?

- How will you mainstream these actions into the core business of your service?
- Have you highlighted the potential health inequalities within BME communities, and what training is required to ensure that staff are adequately briefed.

Religion or Belief

- How do you ensure your services are welcoming to people of all backgrounds?
- Is your printed information religiously appropriate/ sensitive?
- Is your service publicised among various religious communities and groups by making it available in different appropriate venues?
- Do you currently record patient's/staff's religion in order to assist you in identifying users and non users of your service from various religious backgrounds?
- How do you ensure staff treat people from different religions / beliefs / no beliefs with respect and dignity?
- Is your service religiously and culturally sensitive to meet needs of people from various religious backgrounds?
- Does the service acknowledge difference in health belief for example blood transfusion for Jehovah's Witness patients?
- Do you understand different belief systems and the impact of these in the work they do for example, when caring for those patients who are dying?
- Do our staff and patients know of the places that they can go to meet their prayer needs?
- Have you identified any specific dietary or other needs related to a person's religion which you need to be sensitive to?
- Are there any other religious sensitivities you need to bear in mind e.g. when visiting people in their homes?
- Have you considered incorporating religion and belief equality objectives in staff appraisal?
- Have you considered obtaining a list of various festivals to be made available to your staff members to avoid arranging appointments / visits etc on any particular religious festivals / days / times?
- Have your staff members received training on religion and belief?
- Have you taken into account different religious needs when deciding on the opening times of your service?

Sexual Orientation

- How does your service give positive messages and a warm welcome to people who are gay, lesbian or bisexual?
- Does information about your service use visual images that could be people from any background or are they images mainly of heterosexual couples?
- Does the language you use in your literature include reference to gay, lesbian and bisexual people?
- When carrying out assessments, do you make it easy for someone to talk about their sexuality if it is relevant, or do you assume that they are heterosexual?
- Does a person's sexual orientation influence how they might use a service?
- Would staff in your workplace feel comfortable about being 'out' or would the culture of the department make them feel that this might not be a good idea?
- Have your staff had training in Sexual Orientation and Equality?
- How will you make sure that staff treat lesbian, gay and bisexual people with dignity and respect?
- Have you included this area of equality in staff objectives and appraisal?

HUMAN RIGHTS

How will you use a human rights based approach to support the planning and delivery of policies and services? You might find the following prompts useful (to focus your thinking) though you will also have actions that are particular to your service:

General Points:

- Does your policy or service promote and support individuals' self-respect?
- Have you considered how your policy or service may impacts on vulnerable groups who are particularly at risk of having their human rights abused, e.g. asylum seekers, older people, people with mental health difficulties, Travellers and Gypsies, people with learning disabilities?
- Have you built in the necessary systems and processes to protect human rights, e.g. consent forms for patients, appropriate storage of personal records?
- Have your staff members received training in their responsibilities under the Human Rights Act?
- What actions will you undertake to ensure that your staff members are treating people with respect and dignity?
- How will you mainstream human rights into the core business of your service?

Article 2 – The Right to life:

- Not take away a person's life, except in a few very specific and limited circumstances, such as lawfully defending someone from violence.
- Take reasonable steps to protect a person's life in nearly all circumstances.

Article 3 – The right not to be tortured or treated in an inhuman or degrading way:

- Inhuman treatment means treatment causing severe mental or physical harm.
- Degrading treatment means treatment that is grossly humiliating and undignified.
- Physical or mental abuse.
- Leaving patients in their own excrement.
- Excessive use of force or restraint.
- Washing or dressing patients without regard to privacy or dignity.
- Staff not being protected from violent or abusive patients.

Article 5 – The right to liberty and security:

- The right to liberty is not a right to be free to do whatever you want. The right to liberty is a right not be locked in a cell or a room, or have any other extreme restriction placed on movement.
- The right to liberty is a limited right. It can be limited in a number of specific circumstances, for example the lawful detention of someone who has mental health issues.
- Informal detention of patients who do not have the capacity to decide whether they would like to be admitted into hospital. Eg learning disabled or older patients.

Article 6 – The right to a fair trial:

- The need for a hearing to be held by people of equal professional standing especially if a person's professional status might be removed.
- A reasonable opportunity to present their case and relevant documents before a decision is made.
- Be present at some stage during the decision making process.
- Be given reasons to enable them to understand the decision that has been made.

Article 8 – The right to respect for private and family life, home and correspondence:

- Family life is interpreted broadly. It does not just cover blood relatives.
- Private life is also interpreted broadly. It covers more than just privacy, including issues such as personal choices, relationships, physical and mental well-being, access to personal information and participation in community life.
- Maintenance of appropriate safeguards over employee's or patient's personal data, under the requirement of the Data Protection Act and Caldicott procedures.
- Interfering with patient's/employee's communications such as intercepting telephone calls, emails, letters, interfering with Internet use without consent.
- Refusing patients visitors on unreasonable grounds.

Article 9 – The right to freedom of thought, conscience and religion:

- The right to hold religious beliefs, and the freedom to hold none, is absolute, but the right to manifest these is subject to certain restrictions, depending on the particular circumstances.
- Inflexible dress codes.
- Not meeting religious needs of a patient.

Article 10 – The right to freedom of expression:

- Includes the right to hold and express opinions and to receive and impart information and ideas to others. This right to freedom of expression is a qualified right, which means that formalities, conditions, restrictions or penalties may be imposed on the exercise of this right if they are prescribed by law.
- Managing open workplace/patient discussions where there are widely different opposing views being expressed.
- Whistle-blowing procedures.

Article 11 – The right to freedom of assembly and association:

- This article protects the rights of the individual to join political parties, trade unions, professional associations and clubs of any kind. It also sets out the right to protest in a peaceful way against the state or an employer, as long as the individual does not commit any wrongful act and conducts themselves peacefully without violence or the threat of violence. It also ensures the right not to associate with, or to take part in, an assembly against one's will.

Article 14 – Prohibition of discrimination:

- The enjoyment of the rights and freedoms in the Act 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.

Sources for Evidence:

Brighton and Hove – State of the City Report

<http://www.bhlis.org/resource/view?resourceId=975>

Public Health Observatories - Health Profile, West Sussex

<http://www.apho.org.uk/resource/view.aspx?RID=117319>

Public Health Observatories – Health Profile, Mid Sussex

www.apho.org.uk/resource/view.aspx?RID=117325

Public Health Observatories – Health Profile, East Sussex

<http://www.apho.org.uk/resource/view.aspx?RID=117288>

2011 Census Information:

<http://www.ons.gov.uk/ons/guide-method/census/2011/index.html>

Mid Sussex Community Partnership:

<http://www.midsussex.gov.uk/7583.htm?pageID=3100>

A wealth of information can be gleaned from a relevant authorities Joint Strategic Needs Assessment document.