

Guidance notes: Developing Equality and Health Inequalities Impact Assessments (EHIA's)

These guidance notes have been prepared to help those producing Equality and Health Inequalities Impact Assessments (EHIA's). **Please read these guidance notes and the EHIA template.**

1. What is the purpose of an EHIA?

The purpose of an EHIA is to assess the potential impact of a policy, practice or programme of work on groups with a protected characteristic, and whether and to what extent our equality duties and duties in relation to health inequalities are affected and facilitate legal compliance.

2. The legislative background

- a. Section 149 of the Equality Act 2010 imposes a duty to **have due regard** to the need to eliminate discrimination and advance equality of opportunity, which applies to almost all public bodies including NHS England and NHS Improvement. Both NHS England and NHS Improvement must be able to show that they have considered the potential adverse impacts, and positive, if any, of the proposals on groups with a "protected characteristic" (e.g. disability, gender, ethnicity), when compared with those without that characteristic, and the extent to which that **any adverse** impact can be minimised. There is no statutory duty, in England, to conduct a full Equality Analysis, but an analysis of the potential impacts on protected groups and how any potential disproportionate adverse impacts have been considered and, if possible, mitigated, is appropriate to ensure compliance with the duty (see appendix 1).
- b. A number of important principles have been established about what **due regard** means. These principles, and case law, impact on when and how EHIA's should be produced. Guidance from the Equality and Human Rights Commission and case law also make it clear that those making the decision about a proposal must consider the PSED (see appendix 3).
- c. The Health and Social Care Act 2012¹ requires Monitor and NHS England to exercise their functions with a view to reducing health inequalities, and the NHS TDA is under a legal obligation (by direction of the Secretary of State) to collaborate with Monitor to ensure improvement in the quality of care. NHS England and NHS Improvement have agreed that they will work together to reduce health inequalities and meet their respective legal duties in this regard.
- d. Completing an Equality and Health Inequalities Impact Assessment (EHIA) form will assist NHS England and NHS Improvement to meet, and provide the evidence that we are complying with, these legal duties. As many colleagues may not be familiar with the legal duties, appendices 1 and 2 set out the duties for reference purposes.

¹ The National Health Service Act 2006 was amended by the Health and Social Care Act 2012.

Groups by reference to protected characteristics and health inequalities	
The protected characteristics	Some groups who face health inequalities
<ul style="list-style-type: none">• Age: older people; middle years; early years; children and young people.• Disability: includes physical impairments; learning disability; sensory impairment; mental health conditions; long-term medical conditions.• Gender reassignment.²• Marriage and civil partnership: people who are married or in a civil partnership.• Pregnancy and maternity.³• Race and ethnicity.• Religion and belief: people with different religions or beliefs, or none.• Sex: men; women.• Sexual orientation: lesbian; gay; bisexual; heterosexual.	<p>Many groups who share protected characteristics have been identified as facing health inequalities. Others who face health inequalities</p> <ul style="list-style-type: none">• Looked after and accommodated children and young people.• Carers: unpaid family members.• Homeless people: people on the street; staying temporarily with friends/family; in hostels/B&Bs.• People involved in the criminal justice system: offenders in prison/on probation, ex-offenders.• People with addictions and substance misuse problems.• People who have low incomes.• People who have poor literacy.• People living in deprived areas.• People living in remote, rural and island locations.• People in other groups who face health inequalities⁴.
Additional information is provided in the footnotes where terms may be unfamiliar.	

² The EHRC explains that the Equality Act 2010 says that you must not be discriminated against because you are transsexual, when your gender identity is different from the gender assigned to you when you were born. The EHRC also explains that all transsexual people share the common characteristic of gender reassignment. To be protected from gender reassignment discrimination, you do not need to have undergone any specific treatment or surgery to change from your birth sex to your preferred gender. This is because changing your physiological or other gender attributes is a personal process rather than a medical one. [Source: EHRC website, <https://www.equalityhumanrights.com/en/advice-and-guidance/gender-reassignment-discrimination>, September 2019]

³ Pregnancy is the condition of being pregnant or expecting a baby. Maternity refers to the period after the birth, and is linked to maternity leave in the employment context. In the non-work context, protection against maternity discrimination is for 26 weeks after giving birth, and this includes treating a woman unfavourably because she is breastfeeding [Source: EHRC website, <https://www.equalityhumanrights.com/en/equality-act/protected-characteristics#pregmat>, September 2019]

⁴ This could include a range of other groups for example veterans.

Appendix I: The PSED [Section 149] ⁵
<p>(1) A public authority must, in the exercise of its functions, have due regard to the need to—</p> <ol style="list-style-type: none"> eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act; advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
<p>149 (2) A person who is not a public authority but who exercises public functions⁶ must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).</p>
<p>149 (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:</p> <ol style="list-style-type: none"> remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; 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; 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.
<p>149 (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.</p>
<p>149 (5) Having due regard to the need to foster good relations 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) tackle prejudice; and b) promote understanding.</p>
<p>149 (6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.</p>
<p>149 (7) The relevant protected characteristics are: a) age; b) disability; c) gender reassignment; d) pregnancy and maternity; e) race; f) religion or belief; g) sex; and h) sexual orientation.</p>
<p>149 (8) A reference to conduct that is prohibited by or under this Act includes a reference to: (a) a breach of an equality clause or rule; (b) a breach of a non-discrimination rule.</p>
<p>149 (9) Schedule 18 (exceptions) has effect.</p>
<p>Are NHS England and NHS Improvement subject to the PSED?</p> <p>Yes, not only are NHS England and NHS Improvement subject to the PSED but so are CCGs, individual NHS Trusts, NHS organisations, most public bodies and most organisations that exercise public functions.</p>

⁵ See Schedule 5, paragraph 182 of Health and Social Care Act 2012.

⁶ 'A public function is a function that is a function of a public nature for the purpose of the Human Rights Act 1998.' Equality Act 2010, Section 150.

Appendix 2: Key legal duties with respect to reducing health inequalities ⁷
<p>Secretary of State: Duty as to reducing inequalities (s. 1C) In exercising functions in relation to the health service, the Secretary of State must have regard to the need to reduce inequalities between the people of England with respect to the benefits that they can obtain from the health service." ⁸</p>
<p>Bodies covered by the Secretary of State for Health's duties on health inequalities: Public Health England, Health Education England, the , the Medicines and Healthcare Regulatory Agency, NHS Blood and Transplant Authority, NHS Business Services Authority, NHS Litigation Authority, Health Research Agency.⁹</p>
<p>NHS England: Duty as to reducing inequalities (s.13G) The Board must, in the exercise of its functions, have regard to the need to: (a) reduce inequalities between patients with respect to <u>their ability to access health services</u>, and (b) reduce inequalities between patients with respect <u>to the outcomes achieved for them by the provision of health services.</u></p>
<p>NHS England: Duty as to promoting integration (s.13N) (1). The Board must exercise its functions with a view to securing that health services are provided in an integrated way where it considers that this would— (a) improve the quality of those services (including the outcomes that are achieved from their provision), (b) reduce inequalities between persons with respect to their ability to access those services, or (c) reduce inequalities between persons with respect to the outcomes achieved for them by the provision of those services.</p>
<p>NHS England: Duty as to promoting integration (s.13N) (2) The Board must exercise its functions with a view to securing that the provision of health services is integrated with the provision of health related services or social care services where it considers that this would— (a) improve the quality of the health services (including the outcomes that are achieved from the provision of those services), (b) reduce inequalities between persons with respect to their ability to access those services, or (c) reduce inequalities between persons with respect to the outcomes achieved for them by the provision of those services.</p>

⁷ These legal duties were introduced by the Health and Social Care Act 2012, in the case of NHS England and CCGs the duties amend the National Health Service Act 2006. Monitor's duties stand as part of the Health and Social Care Act 2012

⁸ This duty covers all of the Secretary of State for Health's NHS and public health functions, and relates to the whole population of England including those not registered with general practice, or who are not patients. The duty encompasses all health inequalities dimensions, not just income or socio-economic inequalities.

⁹ Guidance for NHS commissioners on equality and health inequalities legal duties, 2015, NHS England, <https://www.england.nhs.uk/about/equality/equality-hub/legal-duties/>

Appendix 2: Key legal duties with respect to reducing health inequalities ⁷
<p>NHS England: Duty as to promoting integration (s.13N) (3)</p> <p>The Board must encourage clinical commissioning groups to enter into arrangements with local authorities in pursuance of regulations under section 75 where it considers that this would secure—</p> <p>(a) that health services are provided in an integrated way and that this would have any of the effects mentioned in subsection (1)(a) to (c), or</p> <p>(b) that the provision of health services is integrated with the provision of health-related services or social care services and that this would have any of the effects mentioned in subsection (2)(a) to (c).</p>
<p>NHS England’s Board has a number of related duties which are summarised below.</p> <p>a. To include in an annual business plan an explanation of how it proposes to discharge its duty to have regard to the need to reduce inequalities (s.13T).</p> <p>b. To include in an annual report an assessment of how effectively it discharged its duty to have regard to the need to reduce inequalities (s.13U).</p> <p>c. To conduct an annual assessment of CCGs, including an assessment of how well each CCG has discharged their duty to have regard to the need to reduce inequalities, and publish a summary of the result (s.14Z16).</p>
<p>Monitor: General Duties [Monitor] (s 62)</p> <p>(4) Monitor must exercise its functions with a view to enabling health care services provided for the purposes of the NHS to be provided in an integrated way where it considers that this would—</p> <p>(a) improve the quality of those services (including the outcomes that are achieved from their provision) or the efficiency of their provision,</p> <p>(b) reduce inequalities between persons with respect to their ability to access those services, or</p> <p>(c) reduce inequalities between persons with respect to the outcomes achieved for them by the provision of those services.</p>
<p>Monitor: General Duties [Monitor] (s 62)</p> <p>(5) Monitor must exercise its functions with a view to enabling the provision of health care services provided for the purposes of the NHS to be integrated with the provision of health-related services or social care services where it considers that this would—</p> <p>(a) improve the quality of those health care services (including the outcomes that are achieved from their provision) or the efficiency of their provision,</p> <p>(b) reduce inequalities between persons with respect to their ability to access those health care services, or</p> <p>(c) reduce inequalities between persons with respect to the outcomes achieved for them by the provision of those health care services.</p>
<p>Monitor: General Duties [Monitor] (s 62)</p> <p>(6) Monitor must, in carrying out its duties under subsections (4) and (5), have regard to the way in which—</p> <p>(a) the National Health Service Commissioning Board carries out its duties under section 13N of the National Health Service Act 2006, and</p> <p>(b) clinical commissioning groups carry out their duties under section 14Z1 of that Act.</p>

Appendix 2: Key legal duties with respect to reducing health inequalities ⁷
<p>CCGs: Duties as to reducing inequalities (s 14T) Each clinical commissioning group must, in the exercise of its functions, have regard to the need to—</p> <p>(a) reduce inequalities between patients with respect to their ability to access health services, and (b) reduce inequalities between patients with respect to the outcomes achieved for them by the provision of health services.</p>
<p>CCGs: Duty as to promoting integration (s.14Z1) (1) Each clinical commissioning group must exercise its functions with a view to securing that health services are provided in an integrated way where it considers that this would—</p> <p>(a) improve the quality of those services (including the outcomes that are achieved from their provision), (b) reduce inequalities between persons with respect to their ability to access those services, or (c) reduce inequalities between persons with respect to the outcomes achieved for them by the provision of those services.</p>
<p>CCGs: Duty as to promoting integration (s.14Z1) (2) Each clinical commissioning group must exercise its functions with a view to securing that the provision of health services is integrated with the provision of health-related services or social care services where it considers that this would—</p> <p>(a) improve the quality of the health services (including the outcomes that are achieved from the provision of those services), (b) reduce inequalities between persons with respect to their ability to access those services, or (c) reduce inequalities between persons with respect to the outcomes achieved for them by the provision of those services.</p>
<p>NHS England and NHS Improvement and the health inequalities duties The Health and Social Care Act 2012 introduced specific legal duties on health inequalities for the Secretary of State, NHS England, and Monitor. The NHS Trust Development Authority has no specific duty to reduce health inequalities in the same way as NHS England and Monitor – that duty applies to the Secretary of State (under the NHS Act 2006) and the TDA (as a Special Health Authority) is also bound by this duty in so far as it exercises delegated functions of the Secretary of State. NHS England and NHS Improvement have been working in an aligned way with effect from 1 April 2019 and both must have regard to the way in which the other carries out its legal duties relating to reducing health inequalities.¹⁰</p>

¹⁰ NHS Improvement is the operational name for the organisation that brings together Monitor, NHS Trust Development Authority (NHS TDA), Patient Safety including the National Reporting and Learning System, the Advancing Change team and the Intensive Support Teams. [Source: Monitor, [Annual report and accounts](#) 1 April 2018 to 31 March 2019]

Appendix 3: Supporting information on due regard and Equality and Health Inequalities Impact Assessments (EHIA's)

1. Coverage

The PSED applies to the “exercise of functions” by public bodies subject to the duty. This includes, for instance, any decision made, any policy developed, any programme implemented and any practices driving activity. It also applies to functions and services provided by others on behalf of the public body subject to the Duty. Both new policies and decisions and existing policies and decisions, when reviewed, come within the PSED.¹¹

The overall aim of the PSED is to make sure that public authorities take equality into account as part of their decision making process. It is not possible to consider equality issues retrospectively and comply with the PSED. Taking action, for example, deciding a policy or publishing something, without demonstrating how you have paid due regard to the PSED leaves the public body open to legal challenge.

2. “Having due regard”

Equality analyses / equality impact assessments are important ways of demonstrating compliance with the PSED. It is important that any conclusions arising from your equality analyses/impact assessments are able to influence your policies and practices. Having “due regard” to the PSED simply involves considering the aims of the Duty in a way that is proportionate to the issue at hand. Decision makers should ensure that they give real consideration to these aims and think about the impact of proposals with rigour and with an open mind, in such a way that might influence the final decision. They should do this before and during policy formation and when a decision is taken. Addressing equality in this way should be considered business as usual, not an exceptional activity.

Case law has established that what is important is not the preparation of a particular document, but that officials give proper, informed consideration to equality issues at the right time and that they keep a record of that consideration. Key case law principles are set out in the Brown principles. Key steps to consider based on Brown principles:

- understanding and awareness of the duties;
- inequalities taken into account before and whilst decision is being considered;
- sound evidence and information underpins decision making;
- duty is considered continuously throughout the decision-making process;
- keep sound record and evidence that the duty has been considered.

¹¹ In the EHIA template, we have used the term proposal to cover the terms initiative, policy, practice, proposal or programme. We have used the term proposal in the rest of this appendix.

The Brown principles

In response to a legal challenge, *Brown v Secretary of State for Work and Pensions* (2008)¹², about the public sector equality duty, the court set out a set of principles which lawyers suggest are also relevant to the health inequalities duty.

These are set out below.

- a. 'Decision-makers must be made aware of their duty to have 'due regard' and to the aims of the duty.'
- b. "Due regard" must be fulfilled before and at the time a particular decision is considered.
- c. The duty must be exercised in substance, with rigour and an open mind.
- d. The duty is non delegable.
- e. The duty is a continuing one.
- f. It is good practice to keep an adequate record showing the duty had been considered.

3. Evidence of having due regard

In order to demonstrate compliance with equalities legislation and, specifically, the PSED, you will need to provide any evidence you have that demonstrates the impact or potential impact your work may have on people sharing protected characteristics. This evidence could be in the form of policy papers, project documentation or background research that takes into account what you know about the equality implications of your work. The important thing is that any conclusions arising from your equality analysis are able to influence your work and the material produced. You may also have evidence from earlier consultations and stakeholder engagement. Carrying out an equality impact analysis can produce valuable evidence to develop new approaches that can be used in other settings, from talking to stakeholders, primary research conducted where gaps are identified, or even where data sets have been matched by analysts.

4. Guidance from the Equality and Human Rights Commission (EHRC)

The EHRC has published Technical Guidance on compliance with the PSED.¹³ According to the EHRC, this technical guidance 'provides an authoritative, comprehensive and technical guide to the detail of the law' which will 'be invaluable to lawyers, advocates, human resources personnel, courts and tribunals, and everyone who needs to understand the law in depth, or apply it in practice.' Chapter 5 focuses on decision-making and the duty and sections 5.34 – 5.38 focus on the role of decision-makers. Normally the decision-makers will be those responsible for making decisions about a proposal. The decision-maker that makes decisions about the proposal, that is the subject of the EHIA, will need to consider the EHIA before making their decision about the proposal.

¹² See <http://www.moray.gov.uk/downloads/file89347.pdf>

¹³ Technical Guidance on the Public Sector Equality Duty: England

(<https://www.equalityhumanrights.com/en/publication-download/technical-guidance-public-sector-equality-duty-england>)