

Improving Healthcare Together 2020 to 2030 Clinical Commissioning Groups (CCGs) - Legal Duties

1. Background

Surrey Heartlands and South West London CCGs have been considering how to address challenges to local hospital services for the populations of Merton, Sutton and Surrey Downs. The main acute provider, Epsom and St Helier University Hospitals NHS Trust (ESTH) faces the following challenges:

- Delivering clinical quality
- Providing healthcare from modern buildings
- Achieving financial sustainability

The Improving Healthcare Together 2020 -2030 programme was established to engage local people and stakeholders in designing solutions that would improve and transform local healthcare services to respond to these challenges.

The programme has now produced a Decision-Making Business Case which will be considered by the local CCGs' Governing Bodies and which makes proposals for the future configuration of hospital services in respect of the populations of Merton Sutton and Surrey Downs ("the proposals").

In order to inform the Governing Bodies' decision-making process this paper outlines the main legal duties that the CCGs must take into account when making decisions in respect of these proposals.

2. NHS Act 2006 (as amended)

The Health and Social Care Act 2012 introduced significant amendments to the NHS Act 2006 (the "NHS Act"), especially with regard to how NHS commissioners should exercise their functions.

The CCG should have due regard to all of the duties set out in section 14 of the NHS Act when exercising its functions and any guidance issued on the same by the NHS England. Due regard means '*giving appropriate consideration in the circumstances*'.

Within the s. 14 duties, the following are likely to be the key duties to be considered by the CCG when making its decisions on the proposals:

a. Duty to promote NHS Constitution

Section 14P of the NHS Act imposes a duty upon CCGs both to exercise their commissioning functions with a view to ensuring that health services are provided in a way that promotes the NHS Constitution and to promote awareness of it among staff, patients and the public.

Not only must CCGs act in accordance with the NHS Constitution, but they should ensure that people are made aware of their rights under it. They may also do this by contributing, as far as possible, to the advancement of the Constitution's principles, rights, responsibilities and values, through their own actions and through facilitating the actions of stakeholders, partners and providers.

The CCGs should therefore have regard to how the proposals sit alongside the NHS Constitution and whether the proposals promote the principles, rights, responsibilities and values of the Constitution.

b. Duty to exercise functions effectively, efficiently and economically

Under section 14O of the NHS Act each CCG must exercise its functions effectively, efficiently and economically.

In making the decision, the CCGs should undertake some form of financial assessment looking at the relative advantages and disadvantages of proceeding with the proposals and what impact this will have on the local health economy.

c. Duty to secure improvement of services

Section 14R of the NHS Act places CCGs under a duty to exercise their functions with a view to securing continuous improvements in the quality of services provided to individuals, as part of the health service. Quality of services is accepted to comprise of effectiveness, safety and patient experience. The CCGs should therefore demonstrate that they have considered whether the proposals are likely to achieve improvements in the quality of services (i.e. effectiveness, safety and patient experience).

d. Duty to reduce inequalities

Section 14T of the NHS Act sets out that CCGs must, in the exercise of their functions, have regard to the need to:

- i. reduce inequalities between patients with respect to their ability to access health services; and
- ii. reduce inequalities between patients with respect to the outcomes achieved for them by the provision of health services.

It should be noted that this is a two-pronged duty, requiring the CCGs to consider whether the proposals will reduce inequalities in respect of the ability of patients to access services and in respect of the outcomes that those patients achieve.

The proposals in this case may have a detrimental impact in terms of access to some services for some people. If, notwithstanding this, the CCGs are minded to approve the proposals it should be able to demonstrate how it considers that this impact is outweighed by other considerations such as the expected improvement in outcomes.

e. Duty as to patient choice

Section 14V of the NHS Act imposes a duty on CCGs, in the exercise of their functions, to act with a view to enabling patient choice (for example, by commissioning so as to allow patients a choice of treatments, or a choice of providers, for a particular treatment). The CCGs should therefore have regard to how the proposals may promote patient choice or if they are likely to have either a neutral or detrimental impact on this. If patient choice may be reduced as a result of the proposals careful consideration should be given as to why, in the present case, the advantages of the proposals outweigh any such reduction in choice.

f. Duty to promote integration

Section 14Z1 of the NHS Act imposes a duty on CCGs in relation to promoting integration, where it would benefit patients. The CCGs must exercise their functions with a view to securing that services are provided in an integrated way where this would improve the quality of the services, reduce inequalities of access or reduce inequalities in outcomes.

Under this duty, integration is not the aim itself, but a tool to encourage service improvement. This integration can be integration of health services with other health services or health services with health-related services (such as housing services where these have an effect on the health of individuals), or health services with social care services.

g. Duty to involve the public

Section 14Z2 of the NHS Act relates to public involvement by CCGs. This duty applies to any health services which are, or are to be, provided pursuant to commissioning arrangements made by a CCG in the exercise of its functions.

The CCG must make arrangements to secure that individuals to whom the services are being, or may be, provided are involved (whether by being consulted, or provided with information, or in other ways) –

- i. in the planning of the commissioning arrangements by the CCG;
- ii. in the development and consideration of proposals by the CCG, for changes in the commissioning arrangements where the implementation of the proposals would have an impact on the manner in which the services are delivered to the individuals or the range of health services available to them; and
- iii. in decisions of the CCG affecting the operation of the commissioning arrangements where the implementation of the decisions would (if made) have such an impact.

The proposals, if adopted, will have an impact on the manner in which services are delivered to patients within the CCGs' populations and therefore the CCGs should be satisfied that this duty has been complied with in the development of the proposals and their presentation to the Governing Bodies for a decision.

h. Duty to have regard to commissioning guidance published by NHS England

Section 14 Z8 provides that NHS England must publish guidance to CCGs on the exercise of their commissioning functions, and that CCGs must have regard to that guidance.

Relevant guidance for the purposes of these proposals include the following documents:

- [Planning, assuring and delivering service change for patients](#) (NHS England, 2018)
- [Patient and public participation in commissioning health and care: Statutory guidance](#), (NHS England, 2018)
- [Guidance for NHS commissioners on equality and health inequalities legal duties](#), (NHS England, 2015)

The proposals have been subject to the NHS England assurance process, but the CCGs should nevertheless satisfy themselves that the relevant NHS England guidance has been considered in the development of the proposals and the CCGs' decision.

3. Other relevant legislation

a. Equality Act 2010

The Equality Act 2010 protects people from discrimination in the workplace and in wider society. It replaced previous antidiscrimination laws with a single Act, making the law easier to understand and strengthening protection in some situations. It sets out the different ways in which it is unlawful to treat someone who is subject to a “protected characteristic”.

Under section 149 of the Equality Act a public authority must, in the exercise of its functions, have due regard to three main aims (the Public Sector Equality Duty):

- i. to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act;
- ii. to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
- iii. to foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

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:

- i. remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
- ii. 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;
- iii. 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.

Due regard is ‘...*regard that is appropriate in all the particular circumstances in which the public authority concerned is carrying out its function as a public authority. There must therefore be a proper regard for all the goals set out in [s 149]. At the same time, the public authority must also pay regard to any countervailing factors which, in the context of the function being exercised, it is proper and reasonable for the public authority to consider*’.

The CCGs should be able to show that they have considered these equality duties in formulating the proposals and deciding on them. One way to do this is to undertake an Equality Impact Assessment/Analysis, which is a process designed to ensure that a policy or decision does not have a detrimental impact on any disadvantaged or vulnerable people; and/or to identify mitigations to address any such detriment.

b. Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013

Section 244 of the NHS Act outlines the duty for NHS bodies to consult relevant Local Authority Health Scrutiny Committees in respect of the planning and delivery of service changes in certain circumstances. The 2013 Regulations explain that this duty will arise where the CCG:

"has under consideration any proposal for a substantial development of the health service in the area of a local authority, or for a substantial variation in the provision of such service"

This duty will apply to the proposals that the CCGs are being asked to consider, and therefore the Governing Bodies should be satisfied that the CCGs have undertaken consultation with relevant local authorities as required.