

Appendix 4

Updated Legal Issues Briefing

Consideration is being given to changing eligibility for community care services by restricting the FACS bandings eligible for services to substantial and critical. Needs currently eligible to be met in Stockton on Tees are those under substantial, critical and moderate bands. This is an updated briefing, further to the version considered by the Committee in August 2009.

Summary

1. Eligibility criteria can be restricted and resources can be taken into account in determining eligibility criteria, but resources cannot be the sole criterion for determining eligibility criteria and where reliance is placed on resources there must be cogent evidence.
2. Eligibility criteria must not unlawfully discriminate. In determining eligibility criteria councils must have due regard to racial, gender and disability equality duties. As part of the review process an Equality Impact Assessment is being completed, and this will be available as part of the decision making process. The Equality Act 2010 replaces existing anti discrimination laws and extends the areas where discrimination will be unlawful to include age, sexual orientation, religion or belief, pregnancy and maternity and gender reassignment. Most of the Equality Act 2010 is now in force, however, it creates a new public sector Equality Duty which is not expected to be in force until April 2011. The Government is currently consulting on how this should be implemented. Until then the local authority must continue to have regard to existing equality duties discussed below.
3. When determining or revising eligibility criteria, proper consultation should take place with service users, carers and appropriate local agencies and organisations at a time when proposals are still at a formative stage.
4. Any revised eligibility criteria should state explicitly how they approach

preventative issues.

5. If eligibility criteria are restricted, services should not be withdrawn or significantly reduced without reassessment and provided the reassessment shows that needs remain in the banding which has been removed.
6. There should not be any blanket policy not to provide certain services.

1. Establishing/Restricting Eligibility Criteria

Resources

It is a function of councils to balance competing claims on the public purse and allocate limited resources. Ensuring a lawful process is followed is critical. This includes particularly following the guidance issued under S.7(1) Local Authorities Social Services Act 1970. The previous guidance, *Fair Access to Care Services: Guidance on eligibility criteria for adult social care (2003)*, was superseded during the course of the Committee's review. New guidance was published, following consultation, in April 2010 and is called *Prioritising need in the context of Putting People First: a whole system approach to eligibility for social care*.

There is increased emphasis on preventative and universal services. The guidance cautions against raising eligibility criteria without having such services in place.

The revised guidance aims to integrate the application of eligibility criteria within the personalisation agenda.

A full copy of the guidance has been provided to Members previously and is available on request from the Scrutiny Team.

It was established in 1997 in the case of *R v Gloucester ex p Barry* that local authorities can take resources into account when determining eligibility criteria. Subsequent caselaw has reinforced the position that resources cannot be the sole criterion and

where reliance is placed on resources there must be cogent evidence.

Para 44 of the guidance requires councils to take account of their resources, local expectations and local costs. Account should also be taken of agreements with the NHS including transfers of care and hospital discharge, together with agreements with other agencies as well as other local and national factors.

Discrimination

Paras 29-32 of the guidance says that when drawing up eligibility criteria for adult social care, councils should have regard to relevant discrimination legislation. This includes: Sex Discrimination Act 1975, the Disability Discrimination Act 1995, the Human Rights Act 1998, the Race Relations (Amendment) Act 2000 and age discrimination outlined in the NSF for Older People.

The statutory duties are:

Sex Discrimination Act 1975 - S.76A - a general duty to have due regard to the need to eliminate unlawful discrimination and harassment and the need to promote equality of opportunity between men and women.

Human Rights Act 1998 generally makes it unlawful for a public authority to act in a way which is incompatible with rights under the European Convention on Human Rights, and requires legislation to be interpreted so as to give effect to Convention rights.

Race Relations Act 1976 (amended by Race Relations (Amendment) Act 2000 - S71 - provides a duty, when exercising functions, to eliminate unlawful discrimination and to promote equality of opportunity and good relations between persons of different racial groups and S19B makes discrimination by a public authority unlawful.

Disability Equality Duty

S. 49A Disability Discrimination Act 1995 provides:

Every public authority shall in carrying out its functions have due regard to:

- a) the need to eliminate discrimination that is unlawful under this Act
- b) the need to eliminate harassment of disabled persons that is related to their disabilities
- c) the need to promote equality of opportunity between disabled persons and other persons
- d) the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons
- e) the need to promote positive attitudes towards disabled persons, and
- f) the need to encourage participation by disabled persons in public life.

The Disability Rights Commission has produced a statutory Code of Practice "The Duty to Promote Disability Equality" which must be taken into account by public authorities and the courts but does not have the force of law.

Para 1.10 of the Code emphasises that equality for disabled people may mean treating them more favourably

Para 1.113 requires public authorities to adopt a proactive approach

Para 2.34 considers "due regard" and its meaning that requires public authorities to do more than simply give consideration to disability equality.

The Code encourages a full impact assessment.

Once an impact assessment has been carried out public authorities need to consider changes to reflect its findings.

The process of restricting eligibility criteria in Harrow was successfully challenged because the council did not have due regard to its duties under the Disability Discrimination Act 1995. The Judge in that case (R v London Borough of Harrow [2007]) said:

"These are important duties nonetheless including the need to promote equality of opportunity and to take account of disabilities even where that involves treating the disabled more favourably than others. There is no evidence that this legal duty and its

implications were drawn to the attention of the decision takers who should have been informed not just of the disabled as an issue but of the particular obligations which the law imposes. It was not enough to refer obliquely in the attached summary to "*potential conflict with the DDA*" - this would not give a busy councillor any idea of the serious duties imposed upon the Council by the Act. The Council could not weigh matters properly in the balance without being aware of what its duties were....It is important that Councillors should be aware of the special duties the Council owes to the disabled before they take decisions. "

Harrow had carried out an equality impact assessment dealing with age, race, disability and carers. It observed that users with a less severe disability were less likely to meet critical criteria and may have their services withdrawn. It stated "a potential conflict with the DDA 1995. A change in criteria could be seen as limiting access for some people to services"

The challenge under Judicial Review was that Harrow failed to consider its duties under the Act and Code. The Disability Equality Duty was not mentioned in the documents. No effort was made proactively to seek the views of the disabled or to refer to the duty in the planning stages of the consultation. There was no reference to the duty at preliminary meeting. The equality impact assessment was referred to in the report to the Cabinet decision meetings. The assessment addressed different groups of service users and found that there was a risk of impact and that it should be monitored in future but it did not address the DED. The assessment did not have explicit regard to promotion of equality of disabled people. The report did not mention what measures could be taken to avoid disadvantage to the disabled. DED was mentioned at Cabinet in an oral question but the answer simply referred back to the equality impact assessment already carried out.

It is essential therefore in view of this case that these issues are considered and recorded at an early stage and that a proper Equalities Impact Assessment is completed and taken into account.

Consultation

Consultation is an essential part of the process of establishing or restricting eligibility criteria under FACS.

Para 45 of the guidance says that although final decisions remain with councils, they should consult service users, carers and appropriate local agencies and organisations about their eligibility criteria.

One of the grounds of challenge in the Harrow case was that their consultation process (on the issue of restricting eligibility criteria to meet critical needs only) was flawed and unlawful. This ground was rejected by the judge who found the proposals were still at a formative stage when consultation was undertaken.

The consultation process in Harrow was comprehensive. There was pre-consultation at the formative stage with various interested bodies and a draft consultation document was produced (although it was subsequently amended). The ensuing consultation process involved sending the document to 7000 relevant service users and organisations and a variety of meetings and other consultations took place. At that stage, not even a provisional view had been taken on the proposal.

The principles of proper consultation from established case law, including *R v North and East Devon HA ex p Coughlan* 2001 are that:

- to be proper, consultation must be undertaken at a time when proposals are still at a formative stage;
- it must include sufficient reasons for consideration and proposals to allow those consulted to give intelligent consideration and intelligent response;
- adequate time must be given for this purpose;
- and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.

The Cabinet Office's Code of Practice on Written Consultation (2000) states that 12 weeks should be the standard minimum period for a consultation exercise and that the timing of the consultation should be built into the planning process for a policy or service from the start.

The case of R (Berry) v Cumbria CC [2007] found that a consultation process which gave consultees only 6 weeks in which to respond was inadequate and also too small a group of consultees were invited to take part in the consultation.

2. Prevention

The revised guidance places much greater emphasis on early intervention and prevention and the availability of high quality information and universal services than does the current guidance, following the approach of Putting People First. This is particularly relevant in the context of councils raising eligibility thresholds.

Any revised eligibility criteria should state explicitly how they approach preventative issues. Paras 36 of the guidance suggests the type of preventative strategies that Councils could put in place, including tools to identify individuals where risks are relatively low but likely to increase over time. Consideration should be given to benefits of preventative action to support carers with reference to Carers and Disabled Children Act 2000.

The guidance recognises the need to take a holistic approach to prevention. In addition reference should be made to multi agency involvement to tackle widespread social disadvantage or where there is evidence of social exclusion or geographical isolation of particular groups e.g. through "Supporting People" or health promotion approaches. The need to make effective use of Joint Strategic Needs Assessments is highlighted.

3. Withdrawing services

If the moderate banding is lawfully removed clients in that banding will no longer be eligible for services **providing they have been reassessed and the reassessment shows their needs would still fall into the moderate band. Services should not be withdrawn or significantly reduced without a review and reassessment.**

Para 105 of the guidance refers to not withdrawing services unless it is safe and

appropriate to do so. The reassessment should consider whether needs would significantly worsen or increase in the foreseeable future if services are withdrawn such that independence is undermined. The timing of reassessments should be carefully considered. Reassessments could take place at the annual reviews, however, this could lead to some inequalities as some service users could have services withdrawn several months before others.

The European Convention on Human Rights will be engaged and particular attention should be paid to the individual's Article 3 (prohibition of torture, inhuman and degrading treatment and punishment) and Article 8 (respect for private and family life, home and correspondence) rights. If it appears that any of the individual's convention rights are interfered with then consideration will need to be given to whether interference with Article 8 rights can be justified. (such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others). There is no justification for interfering with Article 3 rights.

The guidance emphasises at para 109 that councils should exercise considerable caution and sensitivity when considering the withdrawal of services - councils should check any commitments they gave to service users at the outset about the longevity of service receipt.

Individuals not or no longer eligible for services should be provided with information and advice about other sources of support and made aware of complaints procedures and informed that if circumstances change they can request reassessment. Assistance should be given to help the individual find the right person in the relevant agency or organisation if other services are needed.

Equipment

It would be unlawful to have a blanket policy not to provide specific services e.g. equipment as this would fetter the council's discretion. In general terms, the guidance reinforces the need for councils to plan for outcomes for individuals, rather than specific

services.

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