Gateway reference: 17038

Equality Analysis – Immigration Sanctions for those with unpaid debts arising from the NHS (Charges to Overseas Visitors) Regulations 2011

Regulations to charge overseas visitors for NHS hospital treatment using powers within the NHS Act have been in force since 1982. They were amended several times and were most recently consolidated this year as the *NHS (Charges to Overseas Visitors) Regulations 2011* (the "Charging Regulations").

In August, we committed to continue to consider equality issues whilst we take forward a review of access to the NHS by overseas visitors. This document therefore looks again at equality issues in light of the new possible consequence of an immigration sanction for incurring an NHS debt.

What are the intended outcomes of this work?

To assess if, amongst those overseas visitors who are not exempt from charges under the Charging Regulations, there is a disproportionately adverse or unjustifiable impact – including an immigration impact – on any group with protected characteristics, so that these equality considerations, and others that may emerge, can be properly considered in the current review and its resulting recommendations.

The impact on protected groups might be as a result of being:-

- More likely to visit the UK regularly;
- More likely to need medical treatment during the visit;
- More likely to have difficulty in paying the charge incurred.

This is not intended to assess if the Charging Regulations themselves have an equality impact in comparison with the rest of the overseas visitor population. The Department of Health published an equality analysis in August on that and it can be found here: http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_128876.pdf.

Further, the UK Border Agency has published an equality analysis on its amendment to the immigration rules to allow an outstanding debt to the NHS of £1000 or more to be reason normally to refuse a new visa or extension of stay to those subject to immigration control. This can be found here: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/nhs-debtors/.

Those earlier analyses should be read alongside this one.

Context

NHS hospital treatment is only free of charge to those who are ordinarily resident in the UK or if an exemption from charges applies under the Charging Regulations. NHS bodies have a legal duty to identify those overseas visitors (ie people not ordinarily resident here) who are not exempt from charges and to make and recover the charge from them for the full cost of the NHS hospital services they have provided to them. Payment should be made in advance where possible and in all cases where the treatment needed is clinically considered to be non-urgent. However, immediately necessary or urgent treatment must be provided even if the visitor has not paid in advance. This can lead to debts being incurred that the NHS hospital must then pursue to whatever extent they consider reasonable.

Data for 2010/11 show that:

- over £51m worth of treatment was provided to charge exempt overseas visitors[1];
- over £23m[2] was paid by chargeable overseas visitors for NHS treatment; and
- nearly £7m[3] of charges to chargeable overseas visitors were written off as unrecoverable.

In order to allow better recovery of NHS debts, and following a public consultation in 2010, the UK Border Agency amended immigration rules 320, 321, 321A and 322 to allow an unpaid debt of £1000 or more by a person subject to immigration control to be reason normally to refuse a new visa or extension of stay. This came into force on 31 October 2011.

Therefore a chargeable overseas visitor can now not only be faced with a charge for receiving NHS hospital treatment, but, if they then go on to owe a debt to the NHS of £1000 or more and do not clear that debt within three months, they can, under the new immigration rules, be denied a new visa or extension of stay until that debt has been paid, written off or a reasonable payment schedule has been agreed.

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[1] Reported spend from SHAs to the Department of Health on charge exempt overseas visitors (CEOVs) in 2010/11. NB for the purpose of this data collection, CEOVs did not include patients who could be considered part of the resident population including:

(i) people who have been in the UK for more than 12 months;
(ii) people coming to the UK to take up permanent residence;
(iii) people who are lawfully employed by a UK company or UK registered branch of an overseas company or self-employed;
(iv) refugees or asylum seekers who have formally applied for leave to remain for the duration of that application;
(v) students on courses of at least 6 months' duration or otherwise substantially funded by the UK government.

[2] Source: 2010/11 NHS Trust and PCT Audited Summarisation Schedules. This figure does not include data from NHS Foundation Trusts.

[3] Source: 2010/11 NHS Trust and PCT Audited Summarisation Schedules. This figure does not include data from NHS Foundation Trusts.

Impact on protected characteristic groups

From the protected characteristic groups we have identified some within the chargeable overseas visitor population for whom the impact of charges and/or immigration sanctions may be greater than the rest of that population, but we cannot confirm this: NHS bodies do not routinely collect data on the personal characteristics of overseas visitors. However, we will work with NHS bodies to understand how their experience of the charging regime may be affecting different groups differentially.

In summary, our analysis is that

- some protected characteristic groups are more likely to visit the UK regularly;
- some protected characteristic groups are more likely to require NHS services;
- some protected characteristic groups are more likely to have difficulty paying any charge;
- once a charge has been made the charging regulations themselves do not drive discrimination between protected characteristic groups; and
- while there is potential for some indirect discrimination, this is justified by the legitimate aim of protecting the NHS as a provider of free treatment for the 'people of England'. This would become unaffordable if access were to be free by right to all comers, or if those who are chargeable and incur charges did not then pay them.

Groups with Protected Characteristics:

Age

Older people are more likely to need to access NHS hospital treatment than are younger people. Older people might have more difficulty obtaining health insurance and those who have retired may also be less able to pay personally the charge for any treatment, since they are economically inactive.

Disability

Depending on the disability involved, disabled overseas visitors may need to access NHS hospital treatment more frequently than those who are able bodied. They may also be less able to pay the charge for any treatment if they are economically inactive, or might have more difficulty obtaining health insurance.

The Department is currently reviewing whether HIV, which is considered a disability under the Equality Act 2010, should be included in the list of infectious diseases in the Charging Regulations for which no charge may be made to any person; currently only the diagnostic test for HIV and associated counselling is free to all. Equality issues are being considered as part of that review and our analysis of equality impacts will then be updated accordingly.

Pregnancy/Maternity

Pregnant women are more likely to need to access NHS hospital treatment than are non-pregnant women. Indeed, depending on their length of stay, they will inevitably need to access it (or private treatment). They may also be less able to pay the charge for any treatment, if they are economically inactive, or might have more difficulty obtaining health insurance. However, it should be noted that maternity services should always be considered urgent or immediately necessary for these purposes. Consequently, treatment is never denied pending payment and, if necessary, payment is sought after treatment.

All three of these groups are therefore more likely to face an expense during their visit than are, respectively, able bodied/younger/non-pregnant overseas visitors. If they then do not pay the charge incurred – and these groups may find it more difficult than others to pay - they may face an immigration sanction that, again, other overseas visitors are less likely to face (because of being less likely to need treatment and/or, more able to pay, and so less likely to incur the debt in the first place).

Race

Whilst the prevalence of some medical conditions means that BME residents may be more likely to have a greater need to utilise healthcare services than white residents, there is no reason to believe that BME visitors have a greater need to do so than white visitors do.

However, it may be that chargeable BME visitors are more likely than chargeable white visitors to visit the UK regularly to see family, and so may be more disadvantaged by an immigration sanction on any debt unpaid. The discretion afforded to immigration officers in operating the new immigration rules will allow them to grant entry to a person in especially difficult circumstances even when they continue to have an outstanding debt to the NHS of £1000 or more.

Other Identified Groups:

Income

Those who have lower incomes, whilst not necessarily more likely than those on higher incomes to need to access NHS hospital treatment, are perhaps more likely to be unable to pay the charge in the event they do access it. This would mean that they are more likely to face an immigration sanction than are those chargeable overseas visitors with higher incomes. However, in practice NHS Trusts' discretion to write off unrecoverable debts is likely to give some protection to the poorest in this group.

Justification of indirect discrimination

Under the Equality Act 2010, it is unlawful to discriminate against the protected groups. This includes indirect discrimination (section 19), where a policy or practice puts those with a protected characteristic at a disadvantage in comparison with those who do not share the protected characteristic. It also includes discrimination arising from a disability (s15). Neither indirect discrimination nor discrimination arising from a disability occurs if the appropriate person or body can show that the policy or practice is a proportionate means of achieving a legitimate aim.

Therefore, if the assumptions made are correct, it could be argued that the groups identified above are potentially indirectly discriminated against in the application of the charging regulations and immigration sanctions (since the impacts are greater on them than on others within the chargeable overseas visitor population). However, the Government believes that this is a proportionate means of achieving a legitimate aim.

The legitimate aim is to protect the NHS as a provider of free treatment for people who are currently exercising a lawful right to live in this country on a settled basis from unaffordable financial burdens were it to become free by right to all comers, or if those who are chargeable and incur charges did not then pay them. Financial resources are finite and if they are used on those who are not entitled to them for free then less resources are available for those who are entitled to them for free. Other countries also charge visitors for healthcare, so the UK is not alone in seeking to protect its resources primarily for its own residents.

NHS bodies have a legal duty to make and recover charges from those overseas visitors that are not exempt from charge. Given that immediately necessary or other urgent treatment will always be provided regardless of advance payment, due to our humanitarian obligations, it can be difficult for NHS bodies to then recover debts incurred. Many use the services of debt collection agencies if internal efforts to recover the debt have not been successful, but if the overseas visitor returns to their home country then, even when using specialist agencies, it obviously becomes even more difficult to recover it. Indeed in these circumstances, immigration sanctions may be the only effective means of seeking to enforce the debt. The new immigration sanctions are therefore a legitimate aim to assist NHS bodies in recovering debts in order to protect NHS resources.

It is also a legitimate aim to send out a strong deterrent message to those who use NHS resources that they are not entitled to without paying for them that there is an effective sanction in the form of specific immigration restrictions.

The scale of ‘health tourism’ – when the overseas visitor has set out with the objective of receiving NHS hospital treatment without paying for it – remains difficult to quantify, but the UK Border Agency have provided case studies that suggest that people do come to the UK to obtain NHS treatment rather than the stated purpose on their visa, including, recently, a woman who entered the

UK heavily pregnant on a visitor's visa and gave birth to quintuplets, with costs of over £200,000.

In many cases, it is impossible to distinguish a 'health tourist' from other overseas visitors who have incurred an NHS debt. Debts are incurred not only by 'health tourists' but, perhaps more frequently, by overseas visitors who have not ensured they have adequate resources or health insurance to cover their stay, and have then needed NHS hospital treatment for which they cannot pay. As a condition of their entry to the UK, general visitors are required to have sufficient funds available to finance their stay, and that of any dependants, which would include provision for their healthcare needs, typically through personal health insurance. It is important that this requirement be taken seriously; therefore, it is an effective deterrent message that there are specific immigration sanctions to face by those who ignore it, if they then go on to become a financial burden on the UK that remains extant.

Potential indirect discrimination must be justified not only by a legitimate aim, but also a proportionate means of achieving it. The Government believes that applying charges and immigration sanctions for failure to pay those charges are a proportionate measure.

Firstly, it is in itself, proportionate to take measures to avoid an unsustainable drain on resources. The public expects the Government to be prudent and responsible in protecting resources that are funded by the tax payer.

The immigration sanctions assist in this objective and the Government has assured that they are proportionate in their application. After public consultation and engagement with Home Office officials, it has been agreed that:

- only material debts of £1000 or more will be acted on;
- the length of time between incurring the debt and informing UKBA of the debt if it remains unpaid, will be no less than 3 months, allowing the person time to settle their bill before details of their debt are shared for immigration purposes;
- chargeable patients and those who are subsequently pursued for outstanding debts will be advised of the potential immigration sanction, and the UK Border Agency will similar advise travellers and those seeking visas;
- the sanction will not apply where a reasonable payment schedule has been agreed and is being maintained;
- immigration officers will still have discretion not to apply the sanction if the particular circumstances of the case warrant it; and
- this immigration sanction will not apply once the debt is paid, or if the debt is written off as unrecoverable.

Conclusion

The Government recognises that, in the application of charging regulations and immigration sanctions there are potentially impacts on particular protected groups that are not felt by others. However, the Government does not believe that this amounts to indirect discrimination for the reasons outlined above.

The Government will monitor the impact of the immigration sanctions and the sharing of information on NHS debtors by working with the NHS to understand how it may affect different groups differently.