

Gateway reference: 16473

Equality Analysis - Overseas Visitors Charging Regulations and Guidance

What are the intended outcomes of this work?

To assess:-

- 1) if the current regulations on charging, or exempting from charge, certain groups of overseas visitors for NHS hospital treatment and associated guidance have an adverse and unjustifiable impact on any equality group in comparison with the rest of the overseas visitors population, and
- 2) if, in the application of the charging regulations as advised in the guidance, there are unintended adverse impacts on the equality groups within the ordinarily resident population.

It is not intended to explore whether there should be no difference between residents of the UK and overseas visitors when it comes to charges, since Parliament has already decided that the NHS is only automatically free to the people of England – people ‘ordinarily resident’ here. It is also not within scope to explore the issues faced by the protected groups in relation to how they access treatment, their health needs or their health outcomes, either in the overseas population or the ordinarily resident population, when those issues are not to do with charging.

The Government has announced its intention to conduct a major review into charging overseas visitors for their healthcare. As part of that process, an equality analysis will be undertaken on the charging regime.

This current analysis focuses on the current position as set out in the newly consolidated NHS (Charges to Overseas Visitors) Regulations 2011 (“the Charging Regulations”) and newly updated guidance to the NHS on how best to implement their responsibilities under them – *Implementing the Overseas Visitors Hospital Charging Regulations 2011* (“the Guidance”). It will be used to inform a comprehensive equality analysis that will underpin the forthcoming review.

Context

The Charging Regulations consolidate regulations made in 1989 and subsequent amendments. They have been consolidated in line with common practice to tidy and update regulations which, in this case, had been amended piecemeal over more than twenty years. A consolidation of existing regulations does not introduce material change.

However, the Charging Regulations do also introduce some changes to the previous version of the regulations, such as free NHS hospital treatment for failed asylum seekers being supported by the UK Border Agency under section 4 or section 95. Equality issues were considered in the impact assessments for these changes in the consultation exercise held in 2010. These are published here:-

http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_125271

Evidence on whether the exemption from charge categories within the Charging Regulations impact adversely on the equality groups within the non-resident population is scarce. Evidence on whether the *application* of the Charging Regulations in the Guidance impacts adversely on the equality groups within the resident population is also scarce.

We have considered responses to the consultation *Review of access to the NHS by foreign nationals*, which asked for views on the Charging Regulations and the Guidance. The engagement we had with stakeholders - including the BMA and migrant welfare groups - on chapter 4 of the Guidance has also been considered.

Introduction

The Charging Regulations provide for the making and recovery of charges for services provided to persons not ordinarily resident in the UK, using powers set out in section 175 of the NHS Act 2006. They place the legal obligation on relevant NHS bodies (those providing NHS hospital treatment) to make and recover charges for NHS treatment that they provide, and in doing so to:

- Ensure that patients not ordinarily resident in the UK are identified;
- Assess liability for charges in accordance with the Charging Regulations;
- Charge those liable to pay; and
- Recover the charge from those liable to pay.

The regulations specify that charges may only be made for services provided at a hospital or by staff employed to work at or under the direction of a hospital.

The Charging Regulations define an overseas visitor as anyone not ordinarily resident in the UK. "Ordinarily resident" is not defined in either the Charging Regulations or the NHS Act. It takes its meaning from case law and applies to a person who is:

living lawfully in the United Kingdom voluntarily and for settled purposes as part of the regular order of their life for the time being with an identifiable purpose for their residence here that has a sufficient degree of continuity to be properly described as "settled".

Other than 'resident status' within 'other identified groups', none of the equality groups are excluded from potentially being considered ordinarily

resident here. Migrants will be ordinarily resident in the UK if they are here on a lawful, voluntary and settled basis for the time being. A person is not excluded from becoming ordinarily resident here because of their nationality as long as they have, or have been given, a legal right to be in the UK.

The Charging Regulations do not deny anyone access to NHS services, only to apply charges to non-residents for those services, unless an exemption from charge category applies to them. Some services are exempt from charge to all overseas visitors, including treatment provided inside an Accident & Emergency department, treatment for certain infectious and/or sexually transmitted diseases, family planning services and compulsory psychiatric treatment.

Further, the Guidance advises that, unless the treatment a person needs is clinically considered non-urgent, it should be provided to them without delay, even if they have not paid in advance. Chapter 4 of the Guidance has been significantly redrafted to make this point clear after consultation with interested parties followed by a full public consultation.

Chapter 4 of the Guidance advises relevant NHS bodies that they must always provide treatment which is classed by the treating clinician as 'immediately necessary' irrespective of whether or not the overseas visitor has been informed of, or agreed to pay, charges, and it must not be delayed or withheld to establish the patient's chargeable status or seek payment. Treatment is defined as 'urgent', when clinicians do not consider it to be immediately necessary, but they do consider that it cannot wait until the person can be reasonably expected to return home. If payment is not secured before this treatment is scheduled then it should not be delayed or withheld for the purpose of securing payment. 'Non-urgent' treatment is that which clinicians consider can wait until the patient can return home. It should not be provided unless the person liable for charges has paid in full in advance.

The text in Chapter 4 was modified in response to comments received during consultation that interpreted it as being discriminatory in advising an inferior level of care based on cost for those not entitled to free treatment. Chapter 4 now makes clear that, for ordinarily resident patients and chargeable overseas visitors alike, clinicians have an obligation to consider the costs associated with different treatment options and to balance these against the potential for a successful outcome. Therefore, whilst the *quality* of treatment should be the same for all patients in light of their medical circumstances, clinicians will be aware, given the inherent consideration of costs within their duties, of the implications of providing non-urgent treatment to those overseas visitors who are liable for charge and who have not paid in advance.

As well as exempt from charge services, the Charging Regulations also set out groups of overseas visitors that are exempt from charge. Some of these are based on the UK's international obligations, others offer exemption to those with past residency ties to the UK. How these exemptions impact on the protected characteristic groups within the overseas visitor population is dealt with below.

Also included below are the impacts that are felt on the protected characteristic groups within the ordinarily resident population by the *application* of the Charging Regulations.

Disability

People with disabilities are able to benefit from the exemption from charge categories.

Sex

Men and women are treated equally within the Charging Regulations. Both sexes are capable of benefiting from any of the exemption categories.

However, the Guidance advises that for maternity care, which obviously only women receive, it should be treated without exception as immediately necessary, meaning that it must always be provided regardless of if charges have been paid or are likely to be recovered. The Guidance does not advise that any other services, that men could benefit from, should similarly be considered automatically as immediately necessary. This is justified by the significant risks to both mother and baby if health goes unchecked, and the fact that, at least for delivery, it inevitably cannot be delayed.

Race *including ethnic groups, nationalities, Roma gypsies, Irish travellers, language barriers.*

A person of any race is able to benefit from the exemption from charge categories within the Charging Regulations. However, there is anecdotal evidence that non-white people or people for whom English is not their first language are, on some occasions, targeted in the application of the Charging Regulations due to speculation or assumption that they are not resident here. This is clearly unacceptable and longstanding guidance to the NHS has advised that each patient must be treated the same in assessing for charges. In order to tackle this discrimination, the updated Guidance has been reiterated and strengthened in a section titled *Avoiding discrimination in establishing if charges apply*. It now points out NHS bodies' legal equality duties and advises that staff involved in assessing for charges are trained in how to exercise those duties:

5.14 *Article 14 of the European Convention on Human Rights, which is now incorporated into UK law in the Human Rights Act 1998, prohibits discrimination against a person in the exercise of their rights under the Convention, 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. Article 14 is not freestanding and can only be invoked in relation to other convention rights (e.g. Article 8 - the right to private and family life). Not every difference in treatment is discriminatory provided that it can be shown that there is a "reasonable and objective justification" for the difference in question.*

5.15 *Under the Equality Act 2010, relevant NHS bodies, as public authorities, have a general equality duty in the exercise of their functions to have due regard of the need to:*

- *eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act;*
- *advance equality of opportunity between people who share a protected characteristic and those who do not; and*
- *foster good relations between people who share a protected characteristic and those who do not.*

It is therefore important that no person is discriminated against in the application of the Charging Regulations when establishing entitlement to free treatment. Ordinary residence cannot be judged from external appearance, or name, or language, or nationality.

5.16 *It is important to see that all patients are treated the same way, to avoid discrimination. It is not discriminatory to ask someone if they have lived lawfully in the UK for the last 12 months as long as you can show that all patients – regardless of their address, appearance or accent – are asked the same question when beginning a course of treatment. The answer to that question may result in others needing to be asked, but again you will not be breaking any laws as long as those questions are asked solely in order to apply the Charging Regulations consistently.*

5.17 *Relevant NHS bodies need to ensure that all staff involved with the identification and interviewing of potentially liable patients should be properly advised of their role and provided with adequate training on how to exercise the general equality duty.*

This is reiterated elsewhere in the Guidance, where appropriate.

The Guidance also advises NHS bodies to ensure that interpreting services are available.

NB – This extract from the guidance is equally relevant and important to the other protected groups.

Age *including older and younger people.*

Some of the exemption from charge categories are dependant on a person's age. The children of exempt overseas visitors are also exempt in certain circumstances, since it would be unreasonable to expect them be apart from their parent, whilst children in the care of the Local Authority are also exempt since they are clearly vulnerable.

When a child is not entitled to free NHS hospital treatment, the person liable is their parent or guardian.

Those in receipt of UK state retirement pensions can benefit from certain exemptions that younger people cannot. This is no different from other welfare benefits eg pension payments itself, tax rules etc.

Gender reassignment (including transgender) *including transgender and transsexual people.*

Transgender and transsexual people are able to benefit from any of the exemption from charge categories.

Sexual orientation – *including heterosexual people as well as lesbian, gay and bi-sexual people.*

Heterosexual, bisexual, lesbian and gay people are able to benefit from any of the exemption from charge categories.

Religion or belief *including people with different religions, beliefs or no belief.*

With the exception of the exemption for Missionaries, which would not apply to those of no belief, a person of any religion or belief is able to benefit from the other exemption categories.

However, as for race, there is anecdotal evidence that people whose religion can be assumed by their appearance are, on some occasions, targeted in the application of the Charging Regulations due to speculation or assumption that they are not resident here. Again, this is unacceptable. See race.

Pregnancy and maternity

Maternity services are always to be considered immediately necessary, and provided regardless of if the chargeable woman pays in advance. If she has not paid in advance she will be charged afterwards. Chargeable women in need of other services will not enjoy this blanket health safeguard, and will have to be assessed by clinicians as to the urgency of their need, to determine if treatment should happen regardless of advance payment. See sex.

Carers

Carers are able to benefit from the exemption from charge categories.

Other identified groups *including different socio-economic groups, area inequality, income, resident status (migrants) and other groups experiencing disadvantage and barriers to access.*

Resident status

Resident status is relevant when establishing if a person is entitled to free treatment by being ordinarily resident here, or by being exempt from charge

under some of the exemption categories within the Charging Regulations, eg twelve months lawful residence. Migrants will be ordinarily resident in the UK if they are here on a lawful, voluntary and settled basis for the time being. However, those who are not lawfully here or those who do not live on a settled basis here will be chargeable for their treatment. The NHS is only automatically free to the people of England.

Income

Only one exemption differentiates between those with and without resources – Regulation 23(c) exempts those people from certain countries that are without resources, based on a historical international treaty.

Those who are chargeable, but are on a low income, might find it more difficult than those on a higher income to pay their bill. The Guidance advises the NHS to consider accepting payment by instalments where possible, and in cases when the patient is without resources, the NHS body reserves the right to write off the debt. No one will be refused urgent or immediately necessary treatment because they cannot pay.

Conclusion and Next Steps

There are some differences within the Charging Regulations for some of the protected groups within the overseas visitor population. For the most part these are minor and are justifiable based on international obligations or safeguarding welfare. The greatest differential is probably based on residence status, but this is inherent in a residency based healthcare system of entitlement.

In the application of the Charging Regulations, the greatest risk of inadvertently affecting people adversely within the ordinarily resident population lies with the protected characteristic groups of race and religion/belief. The Guidance issued to the NHS aims to prevent this from occurring by stressing their equality duties in the operation of their functions. The Guidance has been significantly strengthened in this manner (see above).

The Department of Health will now conduct an equality analysis on the charging regime, including the collection of data as part of its review of charges for overseas visitors for healthcare in England.