

About the Law Centre

Law Centre (NI) is a public interest law non-governmental organisation. The Law Centre works to promote social justice and provides specialist legal services to advice organisations and disadvantaged individuals through our advice line and our casework services. Through our two regional offices in Northern Ireland, the Law Centre provides advice, casework, training, information and policy services to over 400 member organisations in Northern Ireland. Our areas of work are community care, employment, immigration, mental health and social security.

Introduction

At the outset, we think it would be helpful to hold a further meeting of the stakeholder group to discuss these proposals in detail. Our response seeks to provide as best a view as possible within the timescale provided for comment.

We note that the proposed amendments are generally in line with the recent changes implemented in England. However, given the differences in Northern Ireland's legislation and the different position concerning access to primary care in Northern Ireland (discussed below) we are of the view that the Scottish and/or Welsh positions (in addition to being more progressive) are also more appropriate comparators.

This response considers each of the DHSSPS proposals in turn.

A & E Services

The proposed amendment to the existing wording to limit entitlement to "emergency care" only is problematic for a number of reasons. Many individuals present in Northern Ireland (including European Union nationals) are unable to access primary care from a GP. Unlike in England, Scotland and Wales where GPs have the discretion to register patients, in Northern Ireland arrangements entail registration through Business Services Organisation. The current interpretation of what constitutes lawful residence under ordinary residence provision means access to GP and other initial health care services is more difficult for some individuals in Northern Ireland.

In many instances, the only alternative option for these individuals is to seek assistance from A & E. If access to services in an A & E Department is restricted to "emergency care", then this may set the threshold for access to health care too high to ensure that individual human rights are protected; particularly freedom from inhuman and degrading treatment under Article 3, the right to family life under Article 8 and freedom from discrimination under Article 14 (which must be exercised in conjunction with other convention rights).

From a practical perspective, it may result in individuals presenting at A&E to seek medical assistance and being advised to return at a later time when their condition has worsened to such an extent so as to require “emergency care”. This will potentially result in individuals having to use their own judgement as to when to return which could result in emergency care not being provided when needed.

To give a Law Centre example, a Romanian Roma family currently without access to a GP have a seven year old child with one kidney. As a result, whenever the seven year old suffers an infection it is essential she receives antibiotics which currently must be obtained through Accident and Emergency services. Under the proposed amendment the young girl is likely to be turned away until the need for medication/care becomes an emergency. Such an approach makes no sense in health care or prevention terms and is likely to be unlawful.

Sexually Transmitted Diseases

We note that DHSSPS are proposing to extend entitlement to treatment for sexually transmitted diseases beyond treatment provided in a sexual health clinic or following a referral from a sexual health clinic. We note that the intention of this proposal is to encourage those with minor infections to attend with a GP for treatment so as to alleviate pressure on the specialist service.

As entitlement to primary care in Northern Ireland is determined by application of the “ordinary residence” test, individuals unable to satisfy this test may be unable to access treatment at their local GP surgery and will have no alternative but to seek the required treatment from a specialist service.

Treatment requirements imposed by a court

This appears to be a sensible extension. We have no other specific comments to make at this time.

European Union Rights

We agree that the current Regulations concerning EU entitlement require updating and rewording. It would be useful if explicit references could be provided on the entitlement rights of all classes of European Union nationals and not just cross border workers. This would ensure consistency of approach amongst healthcare providers and make the legislation more user friendly. To comment meaningfully we would need to see the specific wording of the amendment.

Refugees

We welcome the proposed change to extend the exemption to anyone who makes a formal application to be granted refuge in the UK, regardless of the legal route that is applied. However, this needs to be further extended so as to include those who have made an application for, or who have been granted discretionary leave. Scottish guidance makes specific provision for such applicants.¹

A further category that may need to be considered is victims of domestic violence who have made an application for indefinite leave to remain.

War Pensioners

This is a welcome improvement.

European Convention on Social and Medical Assistance and European Social Charter

This appears to be reasonable. However, to comment meaningfully we would need to see the specific wording of the amendment.

Legal Guardians of Children

This appears sensible though we would need to see the wording of the amendment to comment meaningfully.

Diseases for which no charge is to be made for treatment

We welcome this extension.

Failed Asylum seekers

We would urge DHSSPS to rethink its approach on access for refused asylum seekers. Legislation in force in Scotland and Wales provides for free healthcare for asylum seekers until they leave the jurisdiction, regardless of the status of their asylum application. This is a pragmatic and a humanitarian approach which also makes sense on the grounds of public health.

The legislative frameworks in Scotland and Wales are different. Northern Ireland's secondary legislation is very similar to legislation in force in Wales until 2009, when a simple amendment was inserted into existing regulations to ensure continued access to free healthcare for asylum seekers. This serves as a useful 'tried and tested' model for reform.

¹ Scottish guidance para 3.1 http://www.sehd.scot.nhs.uk/mels/CEL2010_09.pdf

The Scottish position is governed by the NHS (Charges to Overseas Visitors) Regulations 1989. These regulations (in their original form) exempt asylum seekers from charges. The exemption applies to all persons who have lodged an asylum application, whether or not the application is pending, refused or under appeal.

The 1989 Scottish Regulations were not subject to the same amendments implemented in England. Specifically, Scotland never introduced an equivalent to the English 2004 Regulations which restricts access to free healthcare to those asylum seekers whose applications for asylum have “not yet been determined”. However, practitioners were concerned that the English restrictions might be applied in Scotland therefore pushed for guidance on this issue.

In February 2008, the Scottish Government issued guidance which confirmed that “for all practical purposes... failed asylum seekers who have previously been resident in Scotland remain in Scotland will remain in the care of the NHS in Scotland until arrangements for their return home can be made”.²

The Scottish Refugee Council (among other NGOs) were concerned that there was still some scope for ambiguity within this guidance. In April 2010, the guidance was updated and brought further clarity.³ The guidance confirms that:

*Anyone who has made a formal application for asylum, whether pending or unsuccessful, is entitled to treatment on the same basis as a UK national who is ordinarily resident in Scotland while they remain in the country.*⁴

In explanatory paragraphs, the guidance also clarifies that “... the spouse/civil partner and any dependent children of anyone exempt under the above criteria are also exempt”.⁵

Our recommendation that Northern Ireland should look to the other devolved administrations is reinforced by the fact that Health and Social Care Reform Act 2009 provides integrated health and social care services to ‘people in Northern Ireland’ rather than the English legislation where NHS services care provided to ‘people of England’. This is a critical distinction when considering the impact of the English Court of Appeal decision on access to health care of YA. As a result, adopting ideally the legislative amendment in Wales will create absolute clarity and avoid any possibility of a legal challenge against primary legislation.

² Scottish Government Healthcare Policy & Strategy Directorate (Feb 2008) CEL 9 (2008) Overseas Visitors – Shortened Guidance, paras 7-8 http://www.sehd.scot.nhs.uk/mels/CEL2008_09.pdf

³ Scottish Government Healthcare Policy & Strategy Directorate (April 2008) CEL 9 (2010) Overseas Visitors’ Liability to Pay Charges for NHS Care and Other Services http://www.sehd.scot.nhs.uk/mels/CEL2010_09.pdf

⁴ Scottish Guidance page 9

⁵ Scottish Guidance page 18

Temporary Absences

We agree with this proposal and have no additional comments to make at this time.

Unaccompanied children under local authority care

Whilst we welcome DHSSPS's proposal to extend access to free healthcare to unaccompanied children under local authority care, we would question why exemption from charges has not been applied to all children in Northern Ireland. Under the provisions of the Nationality Immigration and Asylum Act 2002, children are entitled to access the full range of social services regardless of their or their parent's immigration status.

In any event the words 'while in the care of social services' should be deleted. If interpreted narrowly this may deny health care for immigration reasons and might deny health care to minors who are receiving services but who are not subject to a Care Order. The majority of separated children that the law centre has been involved in have not had a Care Order. We would question why provision for access to free healthcare does not mirror that already in place for the provision of social care in Northern Ireland.

Maternity care

As an additional issue, we note that there is currently no proposal to extend access to free antenatal, perinatal and post natal care to all pregnant women present in Northern Ireland regardless of their circumstances or immigration status.

Given the human rights issues arising in the context of pregnancy we would question why no proposal has been forthcoming in this regard.

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