POLICY NOTE

THE NATIONAL HEALTH SERVICE (CROSS-BORDER HEALTH CARE) (SCOTLAND) REGULATIONS 2013

SSI 2013/292

1. The above instrument will be made in exercise of the powers conferred under section 2 (2) of the European Communities Act 1972. The instrument is subject to affirmative resolution procedure because it amends primary legislation. It is required to transpose Directive 2011/24/EU of the European Parliament and of the Council on patients' rights in Cross-border healthcare ("the Directive") into national legislation - The National Health Service (Cross-Border Health Care) (Scotland) Regulations 2013.

Background to the Directive

2. The majority of EU citizens receive healthcare in the Member State where they live, via the health system through which they are covered or insured. However, in some instances, it may benefit the patient to obtain healthcare in another European country - for example, where there may be greater expertise available, lower costs, better availability of certain highly specialised treatments or where waiting times are shorter.

3. Regulation (EC) No. 883/2004 already provides certain levels of reciprocal healthcare cover to EEA citizens. These arrangements apply to tourists requiring necessary care when visiting another Member State (via the European Health Insurance Card), to people living and working abroad or, in certain limited circumstances (i.e. provided that they have received prior authorisation) those who wish to travel specifically to receive healthcare. The Regulation also covers state pensioners, as social security provisions (including those for healthcare) are transferable around the EU at state pension age.

4. While these reciprocal arrangements have existed for many years, current generations of Europeans, accustomed to crossing borders with ease and being able to purchase goods and services from any part of the EU, are proving less willing to accept constraints on how and where they obtain their healthcare.

5. In recent years there have been more than a dozen high profile legal cases in which Member States' interpretation of the rules in respect of obtaining healthcare across borders has been questioned and on which the Court of Justice of the European Union has been asked to make a determination. The development of this case-law based on individual cases (including one in 2006 against the UK, which it lost - case C-372/04 - Yvonne Watts v Bedford Primary Care Trust), could not provide a coherent overall approach to the rules surrounding patient mobility in Europe.

Policy Objectives

6. With so many ad hoc judgements being made in the courts, based on health systems which are very different in organisation and funding, the development of an EU-wide Directive was seen as necessary to clarify the law and the rights of citizens across the EU. This new legislation reflects existing rights under the Treaties, the principles confirmed by established case-law and applies best practice in providing access to these rights. Its main objectives are to:

- Clarify and simplify the rules and procedures applicable to patients' access to Cross-border healthcare;
- Facilitate freedom of movement and support patient choice;
- Provide EU citizens with better information on their rights;
- Ensure that Cross-border healthcare is safe and of high-quality;
- Promote cooperation between Member States

7. The rationale underpinning the Directive is that it should be as easy as possible for patients to access healthcare in another Member State, subject to the same conditions that apply to accessing it at home. The Directive sets out the arrangements under which Member States are obliged to accept citizens from other EEA states, and explains the rules for refusing such treatment. It sets out the arrangements that a Member State must provide to allow its own citizens to access their rights to Cross-border healthcare and provides clarity on the information they are required to provide to citizens of other states considering coming to their country.

8. In order to help facilitate this, the Directive requires the establishment of National Contact Points (NCPs): national bodies charged with providing information, in appropriate formats, to prospective Cross-border patients and facilitating the exchange of information with NCPs in other Member States. The NCP for Scotland will sit within NHS 24.

9. Importantly, the 'home' state retains responsibility for deciding what healthcare is available to its citizens (which in turn becomes available to patients on a Cross-border basis). Therefore, the Directive is not a way for citizens to gain entitlement to treatments that would not normally be available under their home health service.

10. However, this means that Member States are required to be clear and transparent in home legislation or administrative processes as to what entitlements to healthcare home patients have within the national health system. Reimbursement levels are not required to be more than the cost of a patient's treatment if it were provided by the NHS.

11. The Directive comes fully into effect from 25 October 2013 and it is intended that the National Health Service (Cross-Border Health Care) (Scotland) Regulations 2013 will come into force on the same date.

The National Health Service (Cross-Border Health Care) (Scotland) Regulations 2013

12. The Regulations amend the National Health Service (Scotland) Act 1978 ("the NHS Act") to insert new sections 75BA and 75BB that apply to the reimbursement of the cost of EEA treatment incurred on and after 25 October 2013. The EEA (European Economic Area) consists of the member states of the European Union together with Norway, Iceland and Liechtenstein.

Regulation 3 designates NHS 24 as the national contact point for the purposes of the Directive.

Regulation 4 requires the national contact point to make specified information available or accessible to patients from another Member State seeking to purchase a healthcare service in Scotland ("a visiting patient").

Regulation 5 requires the national contact point to make specified information about the rights and entitlements to obtain a healthcare service in another Member State available or accessible to NHS patients ("resident patients").

Regulation 6 requires the national contact point to cooperate with other the national contact points and the Commission of the EU.

Regulation 7 requires the national contact point to consult with certain organisations, patients, health care providers and insurers.

Regulation 8 amends NHS Act by inserting new sections 75BA and 75BB. The new section 75BA of the NHS Act sets out the conditions for reimbursement for qualifying EEA expenditure (defined in subsection (3)) incurred on or after 25 October 2013, the services subject to the conditions of prior authorisation, limitations that may be imposed on the reimbursement and the NHS charges that may be deducted. Subsection (14) provides that section 75BA does not apply where expenditure is incurred on the provision of a service provided by an authorised provider in Iceland, Liechtenstein or Norway before the Directive applies to those states in accordance with the EEA Agreement. The new section 75BB of the NHS Act provides for an application for prior authorisation and sets out when authorisation must be granted and when it may be refused.

Regulation 9 requires a Health Board to ensure that information about their rights and entitlements is available to patients.

Regulation 10 implements article 7(2)(b) of the Directive by requiring a Health Board to provide healthcare, except healthcare which is subject to a condition of prior authorisation, to an individual who is in receipt of a pension under the legislation of the United Kingdom and resides in another EU Member State and to the family member of that pensioner.

Regulation 11 makes provision for the charges prescribed under section 98 of the NHS Act (charges in respect of non-residents) where an NHS service is provided to a visiting patient.

Consultation

13. Following the publication of the European Commission's proposals for a Cross-border Healthcare Directorate in July 2008 a public consultation exercise was carried out in Scotland at the end of that year. Subsequently a 10-week consultation ran between 5 April and 14 June 2013 inclusive on the Scottish Government's proposed method of transposing the Directive. Respondents were generally comfortable with the proposed approach to transposition, as set out in the consultation document, and there was no substantial disagreement with the Scottish Government's overall plans.

Impact

14. A Regulatory Impact Assessment has not been prepared to accompany this instrument. The instrument will have nil or negligible financial effects on the Scottish Government, local government or on business. The effect on Scottish NHS Boards will also be nil or negligible. The impact on business (the legislation does not apply to small business) charities, voluntary bodies or the public sector is estimated to be nil.

Guidance

15. Following the publication of the draft Directive, interim Regulations (The National Health Service (Reimbursement of the Cost of EEA Treatment) (Scotland) Regulations 2010) were introduced, underpinned by Scottish Government guidance for NHS Boards. However, further detailed guidance will be produced to accompany the 2013 Regulations and a copy will be placed in the Scottish Parliament Information Centre.

Monitoring & review

16. The Person-centred team in the Scottish Government's Chief Nursing Officer, Patient, Public & Health Professions Directorate will keep the effect of these regulations under review.

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Scottish Government
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Person-centred Team
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