

**EXPLANATORY MEMORANDUM TO**  
**THE NATIONAL HEALTH SERVICE (CHARGES TO OVERSEAS VISITORS)**  
**(AMENDMENT) REGULATIONS 2015**

**2015 No. 2025**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

**2. Purpose of the instrument**

- 2.1 The Regulations amend the National Health Service (Charges to Overseas Visitors) Regulations 2015 (S.I. 2015/238) (the 2015 Regulations). The Regulations:
- Correct an error in Regulation 8 (Interpretation of this Part) of the 2015 Regulations identified by the JCSI in their 2<sup>nd</sup> report of 2015/16;
  - Correct a drafting error by updating Regulation 15(d) of the 2015 Regulations to include reference to the relevant provisions in the Care Act 2014;
  - Extend the exemptions from charges to include as exempt (i) services provided for the diagnosis and treatment of specified diseases to include Middle Eastern Respiratory Syndrome (MERS); and (ii) victims of modern slavery; and
  - Remove from Schedule 2 to the 2015 Regulations, countries with which reciprocal healthcare agreements will terminate on 31st December 2015.

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 In their second report of 2015/16, the JCSI reported the 2015 Regulations (S.I. 2015/238). To rectify the drafting error identified by the JCSI, regulation 4 of the Regulations amends regulation 8 of the 2015 Regulations to include within the scope of the definition of Female Genital Mutilation (FGM), mutilation which would have constituted an offence under the Female Genital Mutilation Act 2003 but for having been performed outside the United Kingdom prior to the coming into force of that Act. Regulation 4 also omits the definition of “girl” from regulation 8 of the 2015 Regulations following identification by the JCSI that this definition is unnecessary
- 3.2 In addition to the need for an amendment identified by the JCSI, the Department also became aware that further amendments to the 2015 Regulations were either required or desired. This rectification is being made at the first opportunity which allowed for the appropriate package of additional amendments to be contained within one instrument.
- 3.3 As this Statutory Instrument rectifies a defect in S.I. 2015/238, it is being issued free of charge to all known recipients of that Statutory Instrument

### *Other matters of interest to the House of Commons*

- 3.4 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

## **4. Legislative Context**

- 4.1 The Regulations amend the 2015 Regulations, which set out the requirement on certain NHS bodies to make and recover charges for relevant services provided in respect of overseas visitors. The 2015 Regulations also provide exemptions, both in respect of the type of services provided (under Part 3) and the circumstances in which overseas visitors are exempt (under Part 4). Schedule 1 to the 2015 Regulations provides a list of diseases for which no charge is to be made for treatment under regulation 9 of the 2015 Regulations. Schedule 2 to the 2015 Regulations specifies the countries or territories with which reciprocal agreements may provide for no charge to be made in respect of relevant services provided to an overseas visitor under the terms of that agreement.

## **5. Extent and Territorial Application**

- 5.1 This instrument extends to England only.
- 5.2 This instrument applies to England only.

## **6. European Convention on Human Rights**

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy background**

- 7.1 The 2015 Regulations set out which NHS services are exempt from charge, and which groups of overseas visitors are exempt from charge for relevant NHS services. The 2015 Regulations came into force on 6th April 2015, replacing earlier Regulations, and amongst other things, introduced a new exemption for services needed to treat certain types of violence, namely torture, FGM, domestic violence and sexual violence. In respect of FGM, the intention was that services provided to any woman, girl or trans man to treat a physical or mental condition that had arisen as a consequence of FGM, wherever or whenever that had taken place, would be exempt from charge, provided they had not travelled to the United Kingdom for the purpose of seeking that treatment. As has been set out in paragraph 3.1, the 2015 Regulations inadvertently excluded from the definition of FGM, victims who had suffered from FGM outside the United Kingdom prior to the coming into force of the 2003 Act. The Regulations correct that error. The Department considers that it is unlikely that an individual has been charged as a consequence of this error as a relatively short period of time has elapsed and it is not anticipated that many overseas visitors who are victims of FGM would be identified as falling within the excluded element of the definition. Further, relevant NHS bodies have been notified of the error and the intended amendment. In the event that charges have been made in respect of services provided to an overseas visitor who, but for the drafting error, would have been exempt from charge, any outstanding charges will not be made, or, where they have been made, will not be recovered under new regulation 6A of the 2015 Regulations. Even where an overseas visitor fell into this category, the Department

considers that it is unlikely that the relevant NHS body would have recovered any charge made. In the event that the Department becomes aware that charges have been made and recovered prior to the coming into force of the Regulations, the Department will consider the particular facts of the case and consider whether a refund of those charges may, and should, be made. Should such circumstances arise, this consideration will be undertaken on a case by case basis. Where charges that should be cancelled under new regulation 6A are, in fact, recovered after the coming into force of the Regulations, those charges will now be repayable under regulation 5 of the 2015 Regulations, following the amendment to that regulation.

- 7.2 The 2015 Regulations also amended an existing exemption from charge category for overseas visitors receiving support under section 4 of the Immigration and Asylum Act 1999 (the 1999 Act). This change provided that failed asylum seekers receiving support under section 4(2) of the 1999 Act would be exempt, but not other individuals receiving support under section 4 of the 1999 Act. The change also extended the exemption to include failed asylum seekers receiving support from a Local Authority under section 21 of the National Assistance Act 1948 (the 1948 Act). However, eligible failed asylum seekers in England have, since 1st April 2015, received support from the Local Authority under provisions in Part 1 of the Care Act 2014 (the 2014 Act), and not the 1948 Act (which continues to have application in Wales). The Regulations accordingly update that exemption by inserting a reference to the 2014 Act. Eligible failed asylum seekers in Wales may receive support under the 1948 Act and then receive relevant NHS services in England, accordingly, the reference to the 1948 Act is retained. Relevant NHS bodies have been notified of the intended amendment. As is set out in respect of victims of FGM who were erroneously excluded from the scope of the exemption under the 2015 Regulations, any outstanding charges for services provided in respect of an overseas visitor who would have been exempt but for the failure to include failed asylum seekers supported under Part 1 of the Care Act 2014 in respect of accommodation within the scope of regulation 15(d), will not be made, or, where they have been made, will not be recovered. In the event that the Department becomes aware that charges have been made and recovered prior to the coming into force of the Regulations, the Department will consider the particular facts of the case and consider whether a refund of those charges may, and should, be made. Should such circumstances arise, this consideration will be undertaken on a case by case basis. Where charges that should be cancelled under new regulation 6A are, in fact, recovered after the coming into force of the Regulations, those charges will now be repayable under regulation 5 of the 2015 Regulations, following the amendment to that regulation.
- 7.3 The 2015 Regulations contain an exemption from charge category for overseas visitors who are victims, or suspected victims, of human trafficking, as considered by a competent authority of the UK. An overseas visitor may not have been trafficked to the UK but nevertheless be a victim of slavery, servitude or forced or compulsory labour. However, in that case, they do not benefit from the exemption category in the 2015 Regulations.
- 7.4 Following the coming into force of the Modern Slavery Act 2015, and the inclusion of potential victims of modern slavery within the formal process by a competent authority to consider the facts of whether a person is such a victim, the Department considers that it is right that victims of modern slavery are exempt from charges for NHS treatment that apply to overseas visitors due to the particularly vulnerable and potentially powerless situation they are in. Therefore, the Regulations extend the

exemption for victims of human trafficking to include victims, and suspected victims, of modern slavery. Regulation 6 of the Regulations substitutes a new regulation 16 into the 2015 Regulations. New regulation 16 provides an exemption for victims and potential victims of modern slavery. Overseas visitors who would have been exempt from charge for relevant services as a victim, or potential victim, of human trafficking will continue to be exempt under new regulation 16. The new regulation also sets out that where a competent authority considers there are reasonable grounds to believe that an overseas visitor is a victim of modern slavery, the overseas visitor is exempt from charge while a conclusive determination remains outstanding. This regulation refers to decisions of “a competent authority” as opposed to “the competent authority” as there is currently more than one designated competent authority of the United Kingdom and it is possible that different competent authorities will consider an individual’s claim at different stages of the process.

- 7.5 The definition of modern slavery contained within new regulation 16 makes reference to both the Council of Europe Convention on Action against Trafficking in Human Beings (agreed at Warsaw on 16th May 2005) (the Trafficking Convention) and the Convention for the Protection of Human Rights and Fundamental Freedoms (agreed at Rome on 4th November 1950) (the ECHR). The Trafficking Convention is unincorporated and non-justiciable in the United Kingdom, whereas the ECHR is incorporated into United Kingdom legislation by the Human Rights Act 1998. In addition, unlike the Trafficking Convention, article 4 of the ECHR does not contain a relevant definition. Accordingly, a slightly different approach to references to meanings derived from the two conventions is adopted.
- 7.6 In line with the expansion of the existing exemption from charges for victims of human trafficking to victims of modern slavery, the Regulations also make amendments as a consequence of this change to the 2015 Regulations to substitute “modern slavery” for “human trafficking”.
- 7.7 The Regulations add Middle Eastern Respiratory Syndrome (MERS) to the list (Schedule 1 to the 2015 Regulations) of infectious diseases the treatment of which no charge is to be made in respect of services provided to an overseas visitor. MERS is caused by a coronavirus. Severe Acute Respiratory Syndrome (SARS), which is also caused by coronavirus is already included within schedule 1. Different coronaviruses cause MERS and SARS, however, the diseases are almost indistinguishable from each other. Including MERS in Schedule 1 to the 2015 Regulations will mean that the exemption from charge for treatment of two very similar diseases are both covered by the 2015 Regulations.
- 7.8 The United Kingdom has a number of reciprocal healthcare agreements with countries outside the European Economic Area. Following a review of these agreements, including the level of free treatment offered under their terms, to what extent they appeared to be in operation in those countries and the consequent value to the United Kingdom and its citizens, the decision has been taken by the UK Government that some agreements are no longer appropriate, required or fully reciprocated and should therefore be terminated.
- 7.9 Termination notices have been served by the Department of Health on twelve countries, so that reciprocal agreements will end at midnight on 31 December 2015.
- 7.10 This means that overseas visitors from those countries will no longer be able to benefit from the exemption from charge in accordance with the reciprocal agreement and will

be liable for charge under the 2015 Regulations from that date unless a different exemption applies to them or the service they access. The amendment to schedule 2 of the 2015 Regulations by the amendment in regulation 8 of the Regulations simply removes reference to countries with which reciprocal healthcare agreements are no longer in force. The amendment to Schedule 2 to the 2015 regulations is, therefore, a ‘tidying’ amendment. The countries are:

Armenia

Azerbaijan

Belarus

Georgia

Kazakhstan

Kyrgyzstan

Moldova

Russia

Tajikistan

Turkmenistan

Ukraine

Uzbekistan.

### **Consolidation**

- 7.11 This is the first amendment to the 2015 Regulations. Accordingly, we do not consider it necessary to consolidate the 2015 Regulations at this stage. Consideration will be given to consolidation if and when further amendments are made.

## **8. Consultation outcome**

- 8.1 A consultation was not held for these amendments specifically, but the Department of Health consulted both in 2010 and in 2013 on issues related to access to the NHS by overseas visitors and their financial contribution towards it. The Government responses to those consultations, and the consultation documents themselves, can be found here:

[http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH\\_125271](http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_125271)

<https://www.gov.uk/government/consultations/migrants-and-overseas-visitors-use-of-the-nhs>

- 8.2 We considered it unnecessary to conduct a further consultation exercise in respect of the changes that are made to the 2015 Regulations by these regulations because the areas of policy not included within previous consultations are simply:
- a. in relation to previous errors or exclusions (regulations 2-5);
  - b. included for the protection of public health (regulation 7); and
  - c. to remove references to countries listed in schedule 2 to the 2015 Regulations where, following the review and decision by the UK Government, those countries are no longer party to reciprocal healthcare agreements, rendering their inclusion in schedule 2 as superfluous (regulation 8).

## **9. Guidance**

- 9.1 Guidance to the NHS known as ‘Guidance on implementing the overseas visitor hospital charging regulations 2015’<sup>1</sup> will be updated in light of these change to the Regulations, as will guidance to the public on the NHS Choices website. We currently anticipate that the updated guidance will be published at the time that the Regulations come into force. Stakeholders, including relevant NHS bodies have been notified of the proposed changes.

## **10. Impact**

- 10.1 There is no impact on business. There may be a small impact on some charities or voluntary bodies supporting victims of modern slavery, who might have to change their advice to them on entitlement to free NHS care. This is not expected to be onerous.
- 10.2 The impact on the public sector is small. NHS bodies providing hospital services will have a small number of new obligations in respect of the making and recovery of charges from overseas visitors. A small number of overseas visitors (victims and suspected victims of modern slavery) will now not be charged for NHS hospital treatment, but many of those who were previously charged may not have been in a position to pay relevant charges and would have been provided with immediately necessary and urgent treatment in any event.
- 10.3 An Impact Assessment has not been prepared for this instrument.
- 10.4 In terms of impact on equality, a full Equality Analysis on the 2013 Consultation was undertaken by the Department in December 2013, and this was built on in light of the 2015 Regulations in February 2015. It can be found here:  
<https://www.gov.uk/government/publications/changes-to-the-overseas-visitors-hospital-charging-regulations>
- 10.5 Regulations 4-6 provide for more overseas visitors to be entitled to free NHS treatment and so, in terms of charging, be equal with an ordinary resident of the UK. Therefore they have a ‘positive’ impact on equalities. Regulation 3 provides for what is effectively the cancellation of charges in certain circumstances, which will, likewise, have a ‘positive’ impact on equalities.

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<sup>1</sup> Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/474278/Implementing\\_overseas\\_charging\\_regulations\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/474278/Implementing_overseas_charging_regulations_2015.pdf). Hard copies of the guidance are available from the named contact at paragraph 13 of this Explanatory Memorandum.

- 10.6 There is a negative equality impact in terms of nationality, since those visiting from the twelve countries with which the UK is terminating reciprocal healthcare agreements will now be charged for their treatment. However, this change is a result of the decision to terminate the agreements. The amendment to Schedule 2 to the 2015 Regulations simply removes now superfluous references. In any event, the Department considers this is justified since not all countries enjoy this benefit and investigation has shown that the agreements do not offer good value for the United Kingdom, particularly as they are often not fully reciprocated by the other country (please see paragraph 7.8-7.10 above). The impact of this has been mitigated by providing a six month notice period to the countries concerned and updating UK Government websites.
- 10.7 It is anticipated that those overseas visitors who are already in the UK and who are affected by the change should be small in number. The impact on those foreign nationals planning to visit the UK where reciprocal agreements are ending has been mitigated by providing a six month notice period to the countries concerned and updating UK Government websites. In addition, it should be noted that an overseas visitor subject to immigration control visiting the United Kingdom for more than six months is required to pay the health surcharge unless it is waived or they are exempt. This will provide an alternative exemption under regulation 10 of the 2015 Regulations. Accordingly, an overseas visitor who ceases to benefit from the terms of a reciprocal healthcare agreement by virtue of a prolonged stay in the UK is likely to be included within the surcharge provisions. If they are not subject to immigration control and are no longer included within the terms of a reciprocal agreement because they have settled in the UK, the overseas visitor may now be ordinarily resident in the United Kingdom and will, therefore, not be subject to charge.

## **11. Regulating small business**

- 11.1 The legislation does not apply to small businesses.

## **12. Monitoring & review**

- 12.1 A formative evaluation of the Cost Recovery Programme is being undertaken during the first two years of its implementation. The evaluation will determine whether there has been an early change in culture and behaviour amongst NHS staff as the programme is rolled out, enable lessons to be learned about what has worked in improving cost recovery, and will provide continuous feedback. The research is being carried out in two stages. Stage 1 included a baseline survey and evaluation of the programme between January - March 2015. Stage 2 of the programme will commence in January 2016 to evaluate elements of the programme implemented from April 2015, following changes to the Regulations. A final report will be completed in summer 2016.
- 12.2 A full review of the Cost Recovery Programme post-implementation is planned for 2017/2018. This will be undertaken to understand the extent to which the Programme's objectives have been achieved, and whether the costs and benefits are in line with expectations.

### **13. Contact**

- 13.1 Craig Keenan at the Department of Health Tel: 0113 2546438 or email: [Craig.Keenan@dh.gsi.gov.uk](mailto:Craig.Keenan@dh.gsi.gov.uk) can answer any queries regarding the instrument. Postal address: Room 2N15, Quarry House, Leeds, LS2 7UE.