Access to services: the Immigration Act 2014 and key equality impacts [September 2014]

1. About this briefing and further information

The Race Equality Foundation is working closely with other members of CORE - the race equality coalition – and with JCWI and MAX (the Movement Against Xenophobia). We, and many others, identified a range of concerns during the passage of the Immigration Bill, now the Immigration Act 2014. The Act received royal assent on 14th May 2014. Whilst some key provisions are now in force, others (e.g. the piloting of the housing provisions) are in the process of being implemented and the planned associated changes to healthcare are yet to be implemented. This briefing:

- overviews the Act, its key provisions and sources of further information (part 2);
- provides more information about the Act's provisions on access to services (part 3);
- provides information about the Department of Health (DoH) plans being developed for charging for primary and possibly other forms of healthcare in the longer-term (part 4);
- sets out our key concerns about racial profiling, race discrimination, other forms of discrimination and the adverse impact on public health (part 5);
- explains why it is so important to address the concerns identified **before** these new provisions are rolled out (part 6).

Appendix 1 provides some basic information on the arrangements for charging for certain services prior to the Immigration Act 2014; and identifies where readers can find out more about these pre-existing provisions[1]. We have also produced a separate document on the Immigration Act's implementation timetable which we have also published.

2. Overviewing the Immigration Act and key information sources

The Immigration Act 2014 received royal assent on 14th May 2014. A government factsheet says that the provisions are designed to make it *'more difficult for illegal immigrants to live in the UK.'* According to the Government[2], the Act is intended to: a) introduce changes to the removals and appeals system, making it easier and quicker to remove those with no right to be here; b) end the abuse of Article 8 of the European Convention on Human Rights – the right to respect for family and private life; and c) prevent illegal immigrants accessing and abusing public services or the labour market. The Act's provisions span six Whitehall departments and include a range of measures which are intended to create a *'hostile environment for illegal migrants*[3]*.* The Act is divided into 7 parts: part 1, removals and other powers; part 2, appeals etc.; part 3, access to services etc.; part 4, marriage and civil partnership; part 5, oversight; part 6, miscellaneous issues; and part 7, final provisions. The focus of this briefing is part 3 of the Act, access to services, so you may wish to access separate guidance on the Act's other provisions. Guidance of the provisions on citizenship,

[1] Please note the main guidance is over 90 pages in length and there is extensive supporting guidance.
[2] https://www.gov.uk/government/collections/immigration-bill
[3] http://www.telegraph.co.uk/news/uknews/immigration/9291483/Theresa-May-interview-Were-going-to-give-illegal-migrants-a-really-hostile-reception.html

removals, detention and bail, biometrics and the appeals provisions is available from the Immigration Law Practitioners Association (ILPA) and Free Movement. Guidance and information on the provisions on marriage and civil partnership have been produced by the solicitors Kingsley Napley, the UK Lesbian & Gay Immigration Group and JCWI. Given our extensive equalities and human rights concerns, we aim to provide detailed briefings on the housing pilot and the health care charging proposals from late October/November 2014. For more information please follow the underlined blue hyperlinks and/or please contact:

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3. The Immigration Act 2014 – access to services

Key provisions on access to services cover: a) private rented housing (residential tenancies); b) bank accounts; c) work and penalty notices; d) driving licences; and e) the NHS and charges. The Act also redefines who is to be considered ordinarily resident in the UK. Summary information is provided below but please see JCWI's guide for more details.

- *Private rented housing*[4]*:* Private landlords will be required to check the immigration status of their tenants, to prevent those with no right to live in the UK from accessing private rented housing. These provisions are being piloted from 1st December 2014 in the West Midlands. The exemptions[5] are set out in Schedule 3 of the Act. Breaches may lead to a penalty notice and a fine of up to £3000 per adult. Landlords can object to the penalty notice and do have a right of appeal. Landlords or agents must adhere to the Codes of Practice on how to make the checks and how not to discriminate.
- *Bank accounts:* Banks and building societies must not open a current account for somone who is not in the UK or requires leave to enter or remain but does not have it. They must carry out a status check to identify whether the person is 'disqualified' using a specific anti-fraud organisation or data-matching authority designated by the Home Secretary. They are allowed to open an account if they cannot carry out the status check due to factors out of their control (e.g. operational difficulties for an extended period of time encountered by the status check bodies). A disqualified person cannot be part of a joint account or a third party signatory.
- *Work and appeals against penalty notices:* The provisions, in the Immigration, Asylum and Nationality Act 2006, on appeals by employers against penalty notices[6] for a breach of the illegal working provisions are amended. An employer must first give a 'notice of objection' to the Secretary to State who will determine the objection via administrative review. This makes it easier for the Secretary of State to recover penalties by removing the need for court proceedings (which allow the employer to raise a defence). The

[4] The housing private rented sector pilot: This housing pilot, which will be rolled out in the West Midlands from 1st December 2014, please visit the Home Office website, the MAX website and Nearly Legal.
[5] The exemptions are: social housing; hospitals & hospices; accommodation relating to healthcare provision; hostels & refuges; accommodation from, or involving, local authorities; accommodation provided because of immigration provisions; mobile homes; tied accommodation; student accommodation; and certain long leases.
[6] Changes to the Civil Penalty Scheme came into force on 16th May 2014. The maximum penalty for a first time breach in a 3 year period is £15,000 per illegal employee. For a second or subsequent breach in a 3 year period the penalty is £20,000 per illegal employee.

Secretary of State can enforce the penalty as if it were a debt under a court order, register it with the civil court and take enforcement action immediately.

- *Driving licences*: Powers have been introduced to: a) check driving licence applicants' immigration status before issuing a licence; and b) revoke licences where immigrants are found to have overstayed in the UK. Someone who fails to surrender their licence without reasonable excuse will be guilty of a criminal offence. There is a right of appeal to court (magistrates' court or Sheriff's court in Scotland) but the court is not allowed to: a) determine whether the appellant should have been granted leave; b) take into account the fact that an appellant may have been granted leave after the revocation notice.
- *Immigration health charge:* This gives the Secretary of State the power to issue an order, to require migrants seeking leave to enter or remain (or entry clearance) to pay an immigration health charge. The order will provide details of the amount, method of payment and consequences of non-payment and for exemptions from the charge[7].
- *Ordinary residence redefined:* 'Ordinary residence' is being redefined to exclude anyone subject to immigration control (a much more restrictive interpretation than that which allowed most people living in the UK for a 'settled purpose' to access free NHS care).

4. The Immigration Act 2014 and the associated healthcare proposals

In July 2014, the DoH published a plan - Visitor and Migrant NHS Cost Recovery Programme Implementation Plan 2014-16 – setting out a 2 year implementation plan. The DoH says that '*a commitment to provide immediately necessary and urgent treatment'* will underpin the new regime, *'even if payment is not received in full in advance from chargeable patients. Anyone in genuine need will be able to receive treatment, but we will be working with the NHS to ensure that where people are not entitled to free NHS care, every effort is made to recover the charges.'* During the passage of the Bill, the Government said that it would ensure that public health was not undermined. The DoH has said that the new system of charging and recovering costs will be piloted in 2014/15 for implementation in 2015/16. The DoH also says that the *'programme is intended to 'help the NHS recover costs from visitors and migrants from both the European Economic Area (EEA) and outside. It also covers EEA member states.'* There will also be new registration requirements.

The DoH has said that GP and nurse consultations in primary care will remain free, to ensure that everyone will continue to have access to prevent risks to public health such as HIV, tuberculosis (TB) and sexually transmitted infections. **It is important to note that the proposed new charges are not yet in force.** Four implementation phases were identified, in July 2014, by the DoH. The phases were due to run from 2014/15 to 2015/16: *a) Phase 1: Improving the existing systems; b) Phase 2: Aiding better identification of chargeable patients; c) Phase 3: Implementing the migrant health surcharge; and d) Phase 4: Extension of the current charging*. The exemptions for GPs and nurse consultations are welcomed but the planned new charging regime, if implemented, would mean in due course that in:

- *NHS hospital settings:* the introduction of charges for A&E care, outside EHIC collection (supposedly without compromising rapid access to emergency care for those in immediate or urgent need);

[7] It has been suggested, but not confirmed that the rate may be, £150 for international students and £200 for other categories.

- *NHS services outside NHS hospitals:* the extension of charges to the majority of NHS services including community services, dentistry, optics and pharmacy **and extending current charges to treatment provided by all commissioned providers of NHS services.**

In phase 4, the DoH also has said that it will consider '***extending charging in secondary care into A&E services and also to non-NHS providers of NHS care;*** *introducing charging for primary medical services (with the exception of GP and nurse consultations but including community services) and other primary care services such as pharmacy, optics and dentistry.'* The DoH suggests that *'the majority of people who would be affected by this extension are tourists and short term migrants – people here for less than six months.'* The DoH will also be exploring how to improve recovery of the money the UK is owed by other EEA countries and **how to create a new 'integrated IT system' of NHS registration which would incorporate information about chargeability status.**

Exemptions: The Implementation Plan[8] states that where vulnerable groups are not currently exempt, the DoH is *'considering strengthening exemptions, or other ways of ensuring necessary treatment is provided, for victims of domestic violence, human trafficking and vulnerable children.'* The plan also states that *'the Government committed to ensuring that any new system takes into account international law and our humanitarian obligations… vulnerable groups such as asylum seekers, refugees, humanitarian protection cases, victims of human trafficking and children in Local Authority care will continue to have free access to the NHS and will not be subject to the surcharge.'* The DoH is also considering how to *'strengthen exemptions, and other ways of ensuring that necessary treatment is provided for vulnerable groups.'* We understand that the DoH will draft statutory regulations to introduce the new migrant health levy in the autumn 2014. Regulations will also be required to cover the exemptions for vulnerable groups from the charging regime. We hope that these planned exemptions will build effectively on the existing exemptions in the hospital charging regulations (see appendix 1).

5. Equality impacts of the Act and the proposed healthcare changes

A broad range of race equality, migrant, human rights and health VCOs – including the Race Equality Foundation, Equanomics-UK, other members of CORE, the Entitlement Working Group (EWG), ILPA JCWI and MAX - argued during the Immigration Act's passage of that these measures were unjust, unworkable, expensive and potentially unlawful. As the operational details have begun to emerge, our concerns have increased. The red-tape and sheer complexity of what is being planned seems at complete odds with this Government's stated commitment to getting rid of unnecessary legislation and unnecessary regulations. We were, and remain concerned, that these new requirements to prove eligibility for public services, especially housing and healthcare, will lead to racial profiling and impact disproportionately on BME communities, whether or not individuals are: a) recent migrants; or b) undocumented migrants. Women, people with long-term health issues, those with poor literacy and vulnerable people within our communities will also be adversely affected by new restrictions on these services. We believe that there are serious adverse consequences for

[8] Pages 10 and 23 of the Implementation Plan

public health for migrant and BME communities, and wider communities, that must be addressed. Implementing the Act and the planned health care charges is likely to:

- create a toxic and racist environment for access to housing and healthcare, aggravating existing race discrimination in private rented housing , increasing homelessness and adding to existing barriers to healthcare access;
- encourage racial profiling and racism across a wide range of services leading to racial disproportionalities similar to those in relation to stop and search;
- result in the loss of universal A&E and primary care access which has been a cornerstone of the NHS system and of public health interventions;
- impact, not only on undocumented people and short-term migrants, but wider migrant and BME communities worsening public health and undermining human rights for migrants and wider BME communities;
- reduce access to healthcare for those directly targeted by the NHS proposal and also people from wider BME communities who are likely to face new barriers to access;
- place a greater burden on all patients to prove their eligibility to free NHS services, including when seeking emergency healthcare;
- increase the potential for the spread of serious infectious diseases[9] (HIV, TB), which already disproportionately affect BME people and vulnerable groups;
- be in effect a charter for racial and other forms of harassment and abuse where people encounter rogue decision-makers (e.g. rogue landlords);
- give a wide range of landlords and ordinary employees in the NHS and other services access to sensitive information and raise serious data protection questions;
- make a range of service providers and individuals into unpaid immigration officials;
- encourage a climate that will make it more difficult for the most vulnerable including those who have been trafficked to seek and gain help;
- placing unqualified people in the private sector (e.g. landlords in the private rented sector) and staff in the public sector (e.g. NHS) in an immigration checking role;
- encourage the demand for identity papers on a widespread scale to prove entitlement for public services disproportionately impacting on migrants and wider BME communities.

6. The need to address these concerns before these new provisions are rolled out

The health care proposals, if implemented, will extend charges to A&E and certain primary care settings and possibly beyond in due course. **It is important to note that these provisions have not yet been implemented.** This means that people should not be denied services unless or until these provisions are implemented. We believe that it is essential that our concerns about the adverse impact on public health, equalities and health inequalities are addressed **before the provisions are implemented.** We hope to work constructively with the Department of Health and others to address these concerns.

[9] Opportunistic testing for infectious disease in hospital as well as GP settings is key to diagnosis. Such testing may be reduced if some migrants have to pay for hospital and A&E services.

Appendix 1: The NHS charging regime before the Immigration Act 2014

1. Background

The regime for hospital charging, that predates the Immigration Act 2014, is described in detail in the DoH's **Guidance on Implementing the Overseas Visitors Hospital Charging Regulations**. The 90 page document, and associated guidance, was published in 2011 and updated in 2013 and 2014.

2. The statutory powers to charge overseas visitors

a. *'The statutory provisions which enable overseas visitors to be charged for NHS treatment are found in section 175 of the National Health Service Act 2006 ("the 2006 Act"). Section 175 allows the Secretary of State for Health to make regulations for making and recovery of charges in relation to any person who is not ordinarily resident in Great Britain for any NHS services provided to them. They also give him powers to calculate such charges on any appropriate commercial basis. These powers are devolved to the relevant NHS bodies in England.'* [10]

b. *'The section 175 regulatory powers have so far only been used in relation to NHS hospital services. The Charging Regulations made under those powers place a legal obligation on the trust providing treatment to identify those patients who are not ordinarily resident in the United Kingdom; establish if they are exempt from charges by virtue of the Charging Regulations; and, if they are not exempt, make and recover a charge from them to cover the full cost of their treatment.'*[11]

3. What relevant NHS bodies have to do and exemptions

a. The Charging Regulations place a legal obligation on a relevant NHS body to make and recover charges for NHS treatment provided by that relevant NHS body, and in so doing to: i) ensure that patients who are not ordinarily resident in the United Kingdom are identified; ii) assess liability for charges in accordance with the Charging Regulations; iii) charge those liable to pay in accordance with the Charging Regulations; and iv) recover the charge from those liable to pay.

b. However the DoH has acknowledged that these regulations have not been implemented effectively by hospitals and anecdotal feedback suggests that many hospitals do not have an effective administrative infrastructure in place to deal with charging.

c. There are exemptions. Some key exemptions are set out under regulation 6 (pages 17 – 19 of the guidance), the exemptions under regulation 6 fall into 7 groups: i) A&E services; ii) family planning services; iii) exemptions for certain diseases; iv) treatment for all sexually transmitted diseases, including HIV treatment; v) treatment given to those detained, or liable to be detained, or subject to a community treatment order or other legislation authorising detention in a hospital because of mental disorder; vi) other treatment which is imposed by, or included in, an order of the Court; vii) services provided other than in a hospital or by a person who is employed to work for, or on behalf of, a hospital.

d. Under this charging regime, services provided in the community will be chargeable **only where** the staff providing them are employed by or on behalf of an NHS hospital.

[10] Source: Guidance page 10, chapter 2.1
[11] Source: Guidance page 10, chapter 2.2