

Rewriting the rules on Emergency Care without Parliamentary scrutiny

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thanks to Jenny Shepherd and Peter Roderick for help.

The Health and Care Act 2022 has changed the rules for Emergency Care, which are now dealt with partly through Secondary Legislation. Previously, CCGs were responsible for Emergency Care for everyone present in their area: Health and Social Care Act 2012 Section 13 (3) (1C) *"The power conferred by subsection (1B)(b) must be exercised so as to provide that, in relation to the provision of services or facilities for emergency care, a clinical commissioning group has responsibility for every person present in its area."*

That clause was omitted from the Health and Care Act 2022 (the HCA), despite criticism from Allyson Pollock and Peter Roderick when the Bill was published, and amendments, which were rejected. The HCA makes no direct mention of emergency care. Instead, a Statutory Instrument (SI, secondary legislation) introduced after the Act was passed deals with this issue. It refers to NHS England guidance which was only introduced after the SI and was never mentioned in Parliament.

I've tried to understand the new situation through some questions

- 1) What difference does it make whether the rules are in the Act or in Secondary Legislation?
- 2) Which Statutory Instruments refer to Emergency Care and when did they come into force?
- 3) Were these SIs debated in Parliament?
- 4) Are ICBs responsible for ensuring that emergency care is provided for every person present in their area who needs it?
- 5) What does "ensuring" mean in that sentence?
- 6) How do the Statutory Instruments invoke the NHS England guidance "Who Pays?" (2022)
- 7) What is the status of this guidance?
- 8) What does it say about emergency care?
- 9) What does this have to do with "usually resident" and what does that phrase mean?
- 10) What if the person is not "ordinarily resident" in the UK?
- 11) What happens after emergency care?

As I understand it:

1) Secondary Legislation can be altered by the Secretary of State, without going back to Parliament.

2) Currently, there are 10 SIs which refer to the HCA. The only one of these referring explicitly to emergency care is:

The National Health Service (Integrated Care Boards: Responsibilities) Regulations 2022
UK Statutory Instruments 2022 No. 635
<https://www.legislation.gov.uk/ukxi/2022/635/>

It came into force on 1 July 2022

3) I can find no reference to this SI in Hansard for the period 1 May 2022 - 15 Aug 2022. There was debate on another SI, No. 736, The National Health Service (Integrated Care Boards: Exceptions to Core Responsibility) Regulations 2022 [here](#) and [here](#).

4) sort of, but not certain! The HCA introduced an undefined concept of "core responsibility". More on that in 7) below. Emergency care is not mentioned in the HCA, so there is no explicit

requirement in the Act to ensure that emergency care is provided even for those persons for whom the ICB has core responsibility. Instead, there is an indirect requirement, because [Section 21](#) of the Act states, in part:

Duties of integrated care boards as to commissioning certain health services

(1) An integrated care board must arrange for the provision of the following to such extent as it considers necessary to meet the reasonable requirements of the people for whom it has responsibility—

...

(c) medical services other than primary medical services (for primary medical services, see Part 4),

...

(f) nursing and ambulance services,

...

(i) such other services or facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as the board considers are appropriate as part of the health service, and

(j) such other services or facilities as are required for the diagnosis and treatment of illness.

Taken together, those could be interpreted to mean the ICB has a duty to commission emergency care for "the people for whom it has responsibility", even though the word "emergency" is not mentioned. But it's hedged by "to such extent as it considers necessary to meet the reasonable requirements" and "as the board considers are appropriate". In fact this general language, without an explicit requirement to ensure emergency care, was also contained in previous legislation before the Health and Social Care Act 2012 introduced the unambiguous language quoted earlier.

The SI 635 does **not** change the provision of care for the group for which the ICB has core responsibility. It does however change the provision for those for whom the ICB does **not** have core responsibility. It does so through regulation 3(1) and point 2 of its Schedule:

3.—(1) For the purposes of sections 3 and 3A of the NHS Act 2006 (duties and powers of ICBs to commission certain health services), in addition to the group of people for whom it has core responsibility (see section 14Z31 of that Act), an ICB has responsibility for the persons listed in paragraph 2 of the Schedule.

[Schedule] 2. The list of persons referred to in regulation 3(1) is as follows—

(a) every person present in the ICB's area who is not a person for whom the ICB has core responsibility, in relation to the provision of emergency ambulance services or accident and emergency services, whether provided at a hospital accident and emergency department, an urgent treatment centre or elsewhere (but excluding any services provided after the person has been accepted as an in-patient, or at an out-patient appointment);

This appears to address the issue - up to the point that the person becomes an in-patient - only for those persons for whom the ICB does not have core responsibility.

Bizarrely, it gives stronger guarantees to those persons who are not in the ICB core group, than to those who are. Further, if the guarantees in SI 635 were extended to cover the core group on the same basis, why not just restore the requirement as it stood in the Health and Social Care Act 2012, as quoted above?

5) Aside from the problem identified in 4), the context for the SI is, as in 3(1) "duties and powers of ICBs to commission certain health services". That is, the ICB has a duty to commission emergency care, whether at an A&E, UTC or "elsewhere", at least for those who are outside their core responsibility, whereas for those in their core group, the ICB must commission medical, ambulance and nursing services -- which might mean emergency care. But commissioning emergency care is not the same as ensuring that emergency care is actually provided when needed. Who is responsible if care was commissioned but not available? The ICB? Whoever they commissioned to provide it? The SoS?

6) The reference to "Who Pays?" is not contained in the text of the SI but comes in its undated Explanatory Memorandum:

https://www.legislation.gov.uk/ukxi/2022/635/pdfs/ukxiem_20220635_en.pdf

11. Guidance

11.1 NHS England will publish an updated "Who Pays?" document (which should be available at the time this instrument comes into force) which will serve a number of functions: it will provide guidance on the position under the 2022 Act on responsibilities for commissioning and for paying for NHS services, it will specify situations where responsibility for payment differs from that for commissioning and sets the rules for determining the group of people for whom each ICB has core responsibility.

7) I can find no reference to "Who Pays?" in Hansard for the period 1 May 2022 - 15 Aug 2022. It appears to be guidance issued by NHS England without Parliamentary scrutiny, outrageously allowing NHSE to make up the rules and publish them as they see fit. The document is here: <https://www.england.nhs.uk/publication/who-pays-determining-which-nhs-commissioner-is-responsible-for-commissioning-healthcare-services-and-making-payments-to-providers/>

It was first published on 14 June and updated on 1 July. It includes a section (pp13-14) explaining core responsibility.

10.2 ... Where an individual is registered on the list of NHS patients of a GP practice, the ICB with core responsibility for the individual will be the ICB with which that GP practice is associated. Where an individual is not registered with a GP practice, the ICB with core responsibility for the individual will be the ICB in whose geographic area the individual is "usually resident".

There is a whole Appendix dealing with "usually resident", see 9) below.

8) Emergency care is dealt with in section 17 (pp 37-39), 19.10 (pp48-49), 22.4 (pp50-53), 23.3 (p54-55), and 24.1 (p60 - emergency dental)

In section 17, Who Pays? states:

The ICB Responsibilities Regulations (Schedule, paragraph 2a) set out the position on responsibility for commissioning emergency ambulance services, A&E services and services provided in urgent care centres, minor injuries units and walk-in centres. The effect of the Regulations is that – rather than commissioning responsibility being based on the normal GP registration rule at paragraph 10.2 – an ICB is responsible for commissioning these services for everyone present in its geographical area, regardless of GP registration. (By contrast, for those admitted to hospital as inpatients, the general rule at paragraph 10.2 does apply.)

This brushes aside the ambiguity in 4) above.

Who Pays? distinguishes between commissioning and paying for emergency care. For ambulance services, the ICB in whose area the journey begins must pay. For all other emergency services, it's the ICB where the patient is registered or "usually resident". But if the patient is usually resident in Scotland, Wales or Northern Ireland, and receives emergency treatment in England, the English ICB pays, until the patient is admitted as an in-patient, at which point the NHS in Scotland etc pays.

9) Who Pays? Appendix 2 explains "usually resident", the concept used to determine who has core responsibility for a person who is not registered with a GP. The concept is wide. "Where the patient gives an address, they should be treated as usually resident at that address." If they decline to give an address, "Individuals remain free to give their perception of where they consider themselves resident." The bottom line is: "Where a patient cannot, or chooses not to, give either a current or recent address, and an address cannot be established by other means such as through reference to GP registration history, they should be treated as usually resident in the place where they are present."

10) In complete contrast to "usually resident", in which the NHS wants the patient to tell them which ICB to charge, people who cannot prove that they are "ordinarily resident" in the UK are charged for their own treatment, although there are exceptions. This is the minefield of the migrant charges, for which NHS England has guidance running to 137 pages. Emergency care in A&E is not chargeable, but once a patient who cannot prove they are "ordinarily resident" is admitted to hospital they will be charged, **even in an emergency**. The case of [Simba Mujakachi](#) is a dramatic example, eventually ending in a [massive campaign victory](#).

11) Even for those who are "ordinarily resident", the situation changes after admission to hospital. SI 635 no longer applies, so the ICB in which the patient is being treated is no longer responsible for commissioning their care. The phrase in the Schedule ends "excluding any services provided after the person has been accepted as an in-patient, or at an out-patient appointment".

Explicit commitment needed

The complexity of this system, the ambiguity as to exactly what emergency care the ICB must commission for those in the core group, the difference between emergencies in A&E and those after admission, all mean that even while we oppose the entire Act and call for its repeal, it is relevant to demand ICBs make an explicit commitment in their Constitutions.

The Constitution of NHS West Yorkshire ICB includes

1.1.2 The Integrated Care Board (ICB) will arrange the provision of a comprehensive universal health service for all residents, and those who reside elsewhere who need care while temporarily in the area; as well as those residents of the area who may need health care while temporarily elsewhere.

The Constitution of NHS Buckinghamshire, Oxfordshire and Berkshire West ICB includes

1.3.2 The Buckinghamshire, Oxfordshire, and Berkshire West ICB is responsible for all people who are:

...

c) Present in the geographical area and require urgent and emergency care services