

Health and Care (Staffing) (Scotland) Bill

Explanatory Notes

Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Health and Care (Staffing) (Scotland) Bill ("the Bill"), introduced in the Scottish Parliament on 23 May 2018.
2. The following other accompanying documents are published separately:
 - a Financial Memorandum (SP Bill 31–FM);
 - a Policy Memorandum (SP Bill 31–PM);
 - statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 31—LC).
3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or a part of a section does not seem to require any explanation or comment, none is given.

Overview of the Bill

5. The aim of the Bill is to be an enabler of high quality care and improved outcomes for service users in both the health service and care services by helping to ensure appropriate staffing for high quality care.

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6. The policy intention of the Scottish Ministers is to enable a rigorous, evidence-based approach to decision-making relating to staffing requirements that ensures appropriate staffing for the delivery of safe and effective care, which takes account of service user health and care needs and promotes a safe environment for both service users and staff. A more detailed explanation of the Bill's purpose can be found in the Policy Memorandum, which also explains the thinking and policy intentions that underpin it.

7. The Bill creates a new statutory duty on geographical Health Boards, the Common Services Agency for the Scottish Health Service ("the Agency"), the four Special Health Boards that deliver clinical health care services (the State Hospitals Board, NHS 24, the National Waiting Times Centre Board and the Scottish Ambulance Service Board) and all care service providers registered with Social Care and Social Work Improvement Scotland (SCSWIS), known as the Care Inspectorate, to ensure that there are appropriate numbers of suitably qualified staff providing care, alongside guiding principles to be taken into account when carrying out this duty.

8. The Bill also includes a requirement for these same health bodies to follow a staffing methodology, including the use of staffing and professional judgement tools, when determining staffing levels in certain specified healthcare settings. The Bill makes a number of associated changes to the National Health Service (Scotland) Act 1978 ("the 1978 Act").

9. The Bill also includes a function for SCSWIS to work in collaboration with the care sector to develop and validate appropriate methodologies and tools for care home settings for adults, in the first instance, with powers for Scottish Ministers to require use of such methodologies and tools and to extend the SCSWIS's function to cover other care settings in the future. The Bill makes a number of associated changes to the Public Services Reform (Scotland) Act 2010 ("the 2010 Act").

10. The Bill is structured in four Parts:

- Part 1 sets out the guiding principles for health and care staffing and sets out duties to have regard to these principles in health care and care services, including in the planning and securing of such services;
- Part 2 relates to staffing in the NHS;

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- Part 3 relates to staffing in care services;
- Part 4 contains standard provisions on an ancillary power to make regulations, commencement and short title.

Commentary on sections

Part 1 – Guiding principles for staffing

Section 1 – Guiding principles for health and care staffing

11. Section 1 sets out guiding principles for the provision of health and care staffing, specifically that the primary purpose of staffing for health and care services is to provide safe and high-quality services, where possible while also meeting, in so far as consistent with that primary purpose, the principles set out in subsection (1)(b).

12. Subsection (2) defines certain terms used in Part 1 of the Bill. A care service is a service mentioned in section 47(1) of the 2010 Act – that Act constitutes the main legislation governing such services, whose providers are required to register with SCSWIS. Therefore all registered providers of care services will have to have regard to the staffing principles in delivering their service, even where no specified staffing tools and methodologies are in place for their particular kind of care service.

Section 2 – Guiding principles in health care staffing and planning

13. This section places a duty on all geographical Health Boards and the Agency, in carrying out the duty to ensure appropriate staffing introduced by section 12IA of the 1978 Act (as inserted by section 4 of the Bill), to have regard to the guiding principles in section 1. It also places a duty on all geographical Health Boards and the Agency to have regard to these guiding principles when commissioning health care from third parties, and to have regard to the need for such third parties to have appropriate staffing in place. The effect is to make these matters relevant considerations for Health Boards and the Agency in their decision-making in planning services, and in selecting and contracting with service providers.

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Section 3 – Guiding principles in care service staffing and planning

14. Section 3 makes equivalent provision to section 2 for care services, setting out that any person providing a care service must also have regard to the principles set out in section 1 when carrying out the duty to ensure appropriate staffing imposed by section 6 of the Bill. It also places a duty on local authorities and integration authorities (as defined in the Public Bodies (Joint Working) (Scotland) Act 2014) to have regard to the guiding principles, and the duties imposed by this Act on care service providers, when commissioning care services. As with section 2 for the NHS, this means that the new legal framework becomes a relevant part of the planning of such services, as well as their delivery.

Part 2 – Staffing in the NHS

Section 4 – NHS duties in relation to staffing

15. This section makes a number of changes to the 1978 Act to introduce duties on ensuring appropriate staffing for all geographical Health Boards, and the Agency, by inserting new sections 12IA to 12IG in subsection (2). Subsections (3) and (4) make minor changes to the 1978 Act as a result of the new sections introduced.

16. New section 12IA makes equivalent provision for the NHS to the existing staffing duty on care service providers in Regulation 15 of the Social Care and Social Work Improvement Scotland (Requirements for Care Service) Regulations 2011 (S.S.I. 2011/210) (“the 2011 Regulations”) – restated by section 6 of the Bill (see paragraphs 29 to 30 below). It introduces a duty on all geographical Health Boards and the Agency to ensure that a sufficient number of suitably qualified and competent individuals are working at all times for two related purposes: for the health, wellbeing and safety of patients, and for the provision of high-quality care.

17. In referring to individuals generally, rather than to employees of Health Boards, the drafting of section 12IA would allow for the possibility of compliance via the securing of third party agency staff (although the expectation is that this would only be done where strictly necessary, reflecting current best practice). In contrast, the duties imposed by sections 12IB (see subsection (2)(c)(v)) and 12ID relate to employees only, as defined in section 12IG.

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18. New section 12IB sets out a duty for all geographical Health Boards and the Agency to follow a common methodology when determining staffing provision for certain types of health care. The method includes the use of a staffing level tool and professional judgement tool (designed to provide quantitative information in order to assist in determining the appropriate staffing level based on patient needs) and consideration of health care quality measures, as well as a number of other factors to be taken into account when making decisions about staffing requirements. Subsection (2) provides further information on what constitutes the common staffing method, including all the separate steps – set out in paragraphs (a) to (d) – which are to be followed.

19. The final step, set out in subsection (2)(d), requires all geographical Health Boards and the Agency to consider patient needs, identify and mitigate any risks and to seek appropriate clinical advice (as defined in section 12IG), before then deciding on staffing levels and service redesign as a result of following this common staffing method.

20. Subsection (3) allows the Scottish Ministers to make regulations to specify the exact planning tools that Health Boards and the Agency are to use as part of the common staffing method, and the frequency at which the tools are to be used. These regulations will be subject to the negative parliamentary procedure. Currently these planning tools are accessed via an IT platform hosted by the Scottish Standard Time System, accessible to all NHS sites in Scotland and registered users.

21. Subsection (4) allows the Scottish Ministers to make regulations to vary the detailed steps in the common staffing methodology set out in subsection (2). These regulations will be subject to the affirmative procedure in the Scottish Parliament, by virtue of section 4(4) of this Bill amending section 105(3) of the 1978 Act.

22. New section 12IC specifies the types of health care provision, in conjunction with the location where it is provided and the type of employee carrying out the provision, that are covered by the section 12IB duty to follow the common staffing method. The list of types of health care mirrors those areas for which a staffing level tool already exists, or is currently under development. Since part of the common staffing method requires the use of a staffing tool, the method can only be followed where such a tool exists. The Scottish Ministers may modify any aspects of the types of health care here listed by regulations made under subsection (3). In this

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way, for instance, new areas can be added to reflect the development of new staffing levels tools in the future. These regulations will be subject to the affirmative parliamentary procedure, by virtue of section 4(4) of this Bill amending section 105(3) of the 1978 Act.

23. New section 12ID introduces a requirement which all geographical Health Boards and the Agency must follow in turn to show that they have complied with the duty in section 12IB(1) to follow the common staffing method: namely a requirement that it seeks the views of staff, and gives consideration to those views, when applying the method to the types of health care set out in new section 12IC. It also introduces a duty to train staff on how to use the method, ensure they have adequate time to use it, and provide feedback on decisions made from using it, including how any views provided by staff have been taken into account.

24. A duty for all geographical Health Boards and the Agency to report annually on how they have carried out their duties under section 2 and new sections 12IA, 12IB and 12ID is set out in new section 12IE. Such a report is to be published as soon as possible after the end of the relevant financial year, i.e. 31 March, with flexibility afforded on the manner of publication (it could for instance be carried out through existing reporting structures rather than in separate form).

25. Section 12IF empowers Scottish Ministers to publish guidance regarding the duties introduced by new sections 12IA to 12IE. All geographical Health Boards and the Agency must have regard to any such guidance when exercising these duties: in other words they must follow such guidance unless they can show that it is reasonable in all the circumstances not to. In addition, the guidance may include information about the duties introduced by section 2 of this Bill and the guiding principles.

26. Prior to publishing the guidance, the Scottish Ministers must consult a number of bodies – geographical Health Boards, Special Health Boards, Healthcare Improvement Scotland (HIS), the Agency, integration authorities, trade unions and health professional bodies, as well as any other person considered appropriate.

27. Definitions of “employee” and “health care” are provided in new section 12IG, as a result of which the existing section 12H(3) is repealed. These definitions apply to the existing section 12H, as well as to the new

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sections 12IA to 12IF. The definition of “employee” is narrowly framed and would exclude staff from third party agencies. Section 12IG also defines “appropriate clinical advice”, which must be taken account of (as per section 12IB(2)(d)(iii)) as part of the common staffing method.

Section 5 – Application of duties to certain Special Health Boards

28. This section applies the provisions set out in sections 2 and 4 of the Bill to certain Special Health Boards – the State Hospital Board, NHS 24, the National Waiting Times Centre Board and the Scottish Ambulance Service Board– by amending their governing secondary legislation. The relevant duties are to be applied to these Special Health Boards in particular because they provide clinical health care services to patients (as opposed to providing general support services). In the case of the Scottish Ambulance Service, the requirement to use the common staffing method under section 12IB does not apply, since no existing staffing level tools are relevant to the health care which they provide, and so the duties in relation to reporting and following guidance under sections 12IE and 12IF are more limited.

Part 3 – Staffing in care services

Section 6 – Duty on care service providers to ensure appropriate staffing

29. This section restates in primary legislation the existing duty on care service providers in regulation 15 of the 2011 Regulations, which were made under the power in section 78 of the 2010 Act for the Scottish Ministers to impose appropriate requirements on care services. Section 6(1) places a duty on a person who provides a care service to ensure that they have a sufficient number of qualified and competent individuals working in their service to be able to provide care that ensures, at all times, both the health, wellbeing and safety of their service users and the provision of high quality care.

30. Subsection (2) then lists the factors which providers must have regard to in ensuring they have the appropriate number of staff to achieve those aims. These criteria are also relevant for SCSWIS in its enforcement and inspection role under sections 59 to 74 of the 2010 Act, and ultimately for the courts (given the potential for care services to appeal to the sheriff under section 75 of the 2010 Act).

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Section 7 – Training of staff

31. Subsection (1) replicates a further aspect of regulation 15 of the 2011 Regulations, setting out that a care service provider must ensure staff have received appropriate training for their role, as well as providing assistance to employees to obtain relevant qualifications. This includes providing time off work.

32. Subsection (2) provides that the training duty in subsection (1) includes the use of any staffing method prescribed by the Scottish Ministers under the new section 82B power inserted into the 2010 Act by section 10 of the Bill.

Section 8 – Ministerial guidance on staffing

33. This section allows the Scottish Ministers to publish guidance on carrying out duties introduced by the previous sections. Before issuing guidance, the Scottish Ministers must consult the persons mentioned in subsection (2). Care service providers must have regard to any guidance issued when carrying out the duties introduced by sections 6 and 7 of the Bill: in other words they must follow such guidance unless they can show that it is reasonable in all the circumstances not to.

Section 9 – Interpretation of sections 6 to 8

34. This section defines key terms for the purposes of the previous sections. This includes a broad definition of “working in a care service” which includes working paid or unpaid, and working as a volunteer, since volunteers are used widely within the care sector.

Section 10 – Functions of SCSWIS in relation to staffing methods

35. Section 10 amends the 2010 Act by introducing powers for SCSWIS to develop staffing methods for use by those providing care home services for adults, in the first instance, but with the possibility of extension to other care services through future regulations under inserted section 82A(1)(b). If such methods are developed, SCSWIS may recommend them to the Scottish Ministers, who can, through separate regulations under inserted section 82B(1), mandate their use by care services.

36. New section 82A(1) gives this statutory function to SCSWIS to develop staffing methods. In doing so, it must work together with the

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persons listed in subsection (2). In turn, in undertaking this collaborative development of staffing methods, subsection (3) provides that SCSWIS and the other persons listed in subsection (2) must have regard to any ministerial guidance on this section, and also have regard to the guiding principles for health and care staffing set out in section 1 of the Bill.

37. Subsection (4) provides that a staffing method which is developed and recommended to Ministers must include staffing level tools related to workload and professional judgement (see the explanation of the relevant health tools in paragraph 20 above on what is envisaged here). Subsection (5) then sets out particular examples of what may be taken into account by SCSWIS when developing the staffing method.

38. New section 82B sets out that the Scottish Ministers can require the use of a staffing method developed by SCSWIS by regulations – this can be either as developed and recommended by SCSWIS or with modifications by Ministers as appropriate). These regulations may also specify the types of settings and employees to which the requirement to use a staffing method applies; specify the exact tools that must be used for the purpose of section 82A(4); and the frequency with which such tools are used.

39. New section 82C provides key definitions for the purposes of these new sections in the 2010 Act. The term “care services” here is restricted to exclude individual providers who do not have any employees: for example a registered child minder, where a single person delivers the service without any additional staff.

Section 11 – Care services: consequential amendments

40. This section effects amendments to relevant care service legislation which are consequential to the substantive provisions of Part 3 of the Bill.

41. Subsection (1)(a) amends section 60(3)(a) of the 2010 Act by inserting reference to the new section 82B power for the Scottish Ministers to require the use of a staffing method. The effect of this, once regulations under section 82B are made, will be to allow the requirement to use a staffing method to be considered by SCSWIS as a condition of registration for an applicant providing care services.

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42. Subsection (1)(b) amends section 104(2) of the 2010 Act to provide that regulations made under the new section 82B are subject to the affirmative parliamentary procedure.

43. As a result of the duty which is introduced into primary legislation by section 6, subsection (2) repeals the similar existing provision set out in secondary legislation, in regulation 15 of the 2011 Regulations.

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Part 4 – General provisions

Section 12 – Ancillary provision

44. Subsection (1) of this section gives the Scottish Ministers a freestanding regulation-making power to make any incidental, supplementary, consequential, transitional, transitory or saving provision that they consider appropriate for the purposes of, or in connection with, giving full effect to the Bill. Subsection (2) allows such regulations to modify any enactment (including the Bill itself).

45. Subsection (3) provides that regulations under subsection (1) which amend the text of primary legislation will be subject to the affirmative parliamentary procedure. Otherwise they will be subject to the negative parliamentary procedure.

Section 13 – Commencement

46. Subsection (1) of this section provides that this section and sections 12 and 14 come into force on the day after Royal Assent. The remainder of the Bill, once enacted, comes into force on the day or days appointed by the Scottish Ministers in regulations made under subsection (2).

47. Subsection (3)(a) provides that these commencement regulations may also include transitional, transitory or saving provision. It should be noted that these aspects are not “free-standing” powers, but powers that are ancillary to commencement regulations, to make provision associated with transition etc. in connection with bringing the substantive powers into force.

48. Subsection (3)(b) provides that the regulations may make different provision for different purposes – this would include, for example, the possibility of appointing different days for the commencement of different sections.

Section 14 – Short title

49. This section provides that the Bill, once enacted, will be referred to as the Health and Care (Staffing) (Scotland) Act 2019.

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