The Committee will meet at 10.45 am in the Adam Smith Room (CR5).

1. **Decision on taking business in private:** The Committee will decide whether to take item 5 in private.

2. **Consideration of the work of the Committee during the parliamentary year 2017-18:** The Committee will take evidence from—

   Graeme Dey, Minister for Parliamentary Business and Veterans; Steven Macgregor, Head of Parliament and Legislation Unit; Luke McBratney, Team Leader, Constitution and UK Relations Division, Scottish Government; Paul Cackette, Acting Solicitor to the Scottish Government, Scottish Government Legal Directorate.

3. **Instruments not subject to any parliamentary procedure:** The Committee will consider the following—

   Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (Commencement No. 1, Transitional and Saving Provisions) Regulations 2018 (SSI 2018/368 (C.23)).

4. **Health and Care (Staffing) (Scotland) Bill:** The Committee will consider the Scottish Government's response to its Stage 1 report.

5. **Consideration of the work of the Committee during the parliamentary year 2017-18:** The Committee will consider the evidence it heard earlier.

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Edinburgh
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The papers for this meeting are as follows—

**Agenda Items 2 and 5**

DPLR Committee Annual Report 2017-18

Briefing Paper (private)  
DPLR/S5/18/37/1(P)

**Agenda Item 3**

Briefing on Instruments (private)  
DPLR/S5/18/37/2(P)

**Agenda Item 4**

DPLR Committee Stage 1 Report on the Health and Care (Staffing) (Scotland) Bill

Briefing Paper  
DPLR/S5/18/37/3
DELEGATED POWERS AND LAW REFORM COMMITTEE

37th Meeting, 2018 (Session 5)

Tuesday 11 December 2018

Health and Care (Staffing) (Scotland) Bill: Stage 1

Response from the Scottish Government to the Health and Sport Committee’s Stage 1 report

BACKGROUND

1. The Delegated Powers and Law Reform (DPLR) Committee reported at Stage 1 on the delegated powers in the Health and Care (Staffing) (Scotland) Bill (the “Bill”) on 25 September 2018, in its 40th Report, 2018 Session 5.

2. The Health and Sport Committee considered the Bill as lead committee and on 26 November 2018 published its Stage 1 report. The Scottish Government responded to the lead Committee’s report on 5 December 2018.

3. This paper sets out the provisions in the Delegated Powers Memorandum on which the DPLR Committee raised recommendations in its Stage 1 report and the Government’s response to those recommendations.

4. The Stage 1 debate on the Bill was held on 6 December 2018.

5. The Committee is invited to note the Scottish Government’s response.

DELEGATED POWERS PROVISIONS

Section 4 – NHS duties in relation to staffing (insertion of new sections 121A to 121E)

Provisions

6. Section 4 inserts new sections 12IA to 12IG into the National Health Service (Scotland) Act 1978 to place duties on Health Boards and the CSA to ensure appropriate staffing and to follow a common staffing method.

DPLR Committee consideration and recommendations

7. The Committee noted that there is no provision on the face of the Bill about the consequences of a Health Board or the CSA failing to comply with the duties in new sections 12IA to 12IE. The Committee noted that new section 12IF will require Health Boards and the CSA to have regard to any guidance issued by the Scottish Ministers about the duties imposed by sections 12IA to 12IE. Paragraphs 22 and 23 of the Delegated Powers Memorandum notes some areas which the guidance will cover but do not mention whether the guidance will cover
the consequences for a Health Board or the CSA if it fails to meet the duties in sections 12IA to 12IE.

8. The Committee sought an explanation of whether, as there is no provision on the face of the Bill about the consequences of a failure to meet the duties in sections 12IA to 12IE, the guidance issued under 12IF is expected to cover the consequences of such a failure and, if so, what those consequences would be. The Committee also sought an explanation of why it is considered appropriate that such provision is made in the guidance rather than on the face of the Bill.

9. The Scottish Government indicated that the existing powers contained in the 1978 Act for Scottish Ministers to take actions where there are issues about discharge of Health Board duties will apply to the duties placed on Health Boards by this Bill. The guidance will not set out any sanctions for, or consequences of, failure to comply with the new duties in the Bill that are not already in place. The guidance will signpost and reference the existing performance and review mechanisms in the 1978 Act.

10. The Committee noted the Scottish Government's response and agreed to highlight it to the Health and Sport Committee for its consideration of the Bill.

Health and Sport Committee and Scottish Government response

11. In its Stage 1 report, the Health and Sport Committee made the following recommendations:

We welcome confirmation from the Cabinet Secretary that health boards will be expected to report on how they have ensured appropriate staffing and the outcomes from running the tools as well as the application of the tools. We note Audit Scotland have on a number of occasions stressed the importance of new policies including clear monitoring provisions at the outset. Clear monitoring should allow both ease of scrutiny and the means to spread and incorporate learning and best practice. We would welcome confirmation from the Scottish Government prior to stage 2 how these aspects are met by this Bill. (paragraph 177)

We have noted the powers of sanction in the 1978 Act and believe it would be helpful for us and health boards to understand the process in the context of noncompliance. While we hope use of the powers never becomes necessary we would welcome a breakdown of the steps that could follow. (paragraph 178)

12. The Scottish Government responded as follows:

A number of measures are already in place to monitor Health Boards’ compliance with their legal duties and it is therefore expected that non-compliance with the duties in the Bill would be managed in line with the existing performance and monitoring process and escalation levels. Healthcare Improvement Scotland provide public assurance about the
quality and safety of health care, including monitoring and inspecting services provided by Health Boards. They also provide improvement support where required and ultimately have the power to close wards where necessary improvements are not made.

The Care Inspectorate regulate a range of care services. It undertakes strategic inspection of local authority social work services and scrutiny of care services, and can take action where problems are found.

The Scottish Government and HIS are currently revising the escalation process to deal with issues, concerns and service failures and how these are more effectively escalated and resolved between Scottish Government, HIS and Health Boards for the protection of the public.

If successful resolution is not achieved the steps that could follow if there is an issue with Health Boards’ compliance with their duties are set out clearly in the 1978 Act. Ministers have powers to hold inquiries into NHS services under section 76; may declare a Health Board to be in default of their obligations under section 77; and have defined powers of direction and intervention under section 78A where there has been some sort of failure in provision of service. There is also the power of direction in section 2(5) of the 1978 Act which can be used generally or for specific matters – this could involve directing a particular Board to undertake specific actions before the use of the other powers mentioned above is contemplated. These powers will all apply to the duties placed on Health Boards by this Bill, as will the existing powers of Health Improvement Scotland to monitor, inspect, and in extremis to shut down services.

Section 10 – Functions of SCSWIS in relation to staffing methods (insertion of section 82A(3) – development of staffing methods)

• Power conferred on: the Scottish Ministers
• Power exercisable by: guidance
• Parliamentary procedure: not applicable

Provisions

13. Section 82A(3) of the 2010 Act, to be inserted by section 10 of the Bill, gives the Scottish Ministers power to issue guidance about the collaboration between Social Care and Social Work Improvement Scotland (SCSWIS) and the bodies listed in section 82A(2) in the development of staffing methods under section 82A of the 2010 Act. It contains a corresponding duty for SCSWIS and those that SCSWIS is to collaborate with to have regard to such guidance.

Committee consideration

14. The Committee asked the Scottish Government for an explanation of why it is not considered appropriate or necessary to include a duty on Scottish Ministers to publish the guidance so that it is available to those persons or bodies which SCSWIS considers it appropriate to collaborate with.
15. In its response the Scottish Government noted that it intends to publish all guidance issued under the powers in the Bill. The response further noted that the Scottish Government intends to publish all guidance under the Bill in one document.

16. The Scottish Government stated that for clarification, and to make publication a legal requirement in the guidance issued under this power, that it will bring forward an amendment at Stage 2 requiring the Scottish Ministers to publish any guidance issued under this power.

Recommendation

17. The Committee welcomes the Scottish Government’s commitment to bring forward an amendment at Stage 2 to require the Scottish Ministers to publish any guidance issued under this power.