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Health and Care (Staffing) (Scotland) Bill: Stage 3 Consideration

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This briefing looks at parliamentary consideration of the Health and Care (Staffing)(Scotland) Bill prior to Stage 3.The aim of the Bill is to ensure that, through effective staff planning, safe and high quality care will be delivered across health and social care services. There will be a duty to ensure that there are appropriate numbers of suitably qualified staff, organised through an evidence-based approach, and arranged with reference to a set of overarching guiding principles.

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About this briefing

This briefing summarises some of the main themes that have arisen through the passage of the Health and Care Staffing (Scotland) Bill. It also covers some of the amendments made at Stage 2 and some of those lodged at Stage 3. It is not an exhaustive or comprehensive analysis of all amendments lodged and debated.

The Bill was introduced in the Scottish Parliament on 23 May 2018 by the then Cabinet Secretary for Health and Sport, Shona Robison. The Bill covers staff planning in health and social care services, with the aim that staffing in both sectors is organised and planned to ensure appropriate staff are put in place by providers of care to deliver safe and high-quality care.

The Bill as amended at stage 2 makes reference to national workforce planning as well as planning carried out by health boards and social care providers and commissioners of health and care services. It makes explicit references to multi-disciplinary working and a range of health professionals. It includes more references to the patient and carer voice and to outcomes for individuals in how staffing is arranged. More detail on the amendments at Stage 2 is provided.

About the Bill

In its Programme for Government 2017/18 1 , the Scottish Government committed to introduce a safe staffing bill during the 2017/18 Parliamentary year to 'deliver on the commitment to enshrine in law the principles of safe staffing in the NHS, starting with the nursing and midwifery workforce planning tools'.

It is currently the responsibility of NHS boards to workforce plan and ensure high quality care, and for care services to engage properly qualified and skilled staff in appropriate numbers to ensure the health, welfare and safety of users of services. More information about the Bill as introduced can be found in the SPICe Briefing - The Health and Care (Staffing) Scotland Bill.

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The Bill is organised in four Parts:

- Guiding Principles,
- Staffing in the NHS,
- Staffing in Care Services and
- General Provisions.

The Bill does not address national workforce supply. National workforce planning is covered by work being developed through the three National Workforce Plans covering NHS Staffing, Social Care and Primary Care.

The Bill explicitly covers nursing settings where workforce planning tools are already in place, that have been mandated for use in the NHS since 2013, and were developed over the previous ten years.

For social care, where no tools yet exist, the Bill enables the Care Inspectorate, the Scottish regulator for social care, to lead on developing workforce planning tools with social care stakeholders, starting with the development of a tool for care homes for older people.

The Bill places further duties on health boards, commissioners of health and care services and on care providers in respect of workforce planning.

Part 1 - Guiding Principles for Staffing

Part 1 of the Bill sets out a series of Guiding Principles that should underpin how workforce (staff) planning is organised. These are that those undertaking workforce planning should:

(i) take account of the particular needs, abilities, characteristics and circumstances of different service users,

(ii) respect the dignity and rights of service users,

(iii) take account of the views of staff and service users,

(iv) ensure the well-being of staff,

(v) be open with staff and service users about decisions on staffing, and

(vi) allocate staff efficiently and effectively.

Part 2 - Staffing in the NHS

Part 2 of the Bill seeks to amend Section 12I of the National Health Service (Scotland) Act 1978. [1] These provisions extend and provide more detail to the duties on health boards concerning staff governance and workforce planning.

The amendments to the 1978 Act contained in Part 2 of the Bill provide detail on the 'common staffing method'.

Part 2 of the Bill contains most detail on the proposed common staffing method which is based on the existing nursing and midwifery tools. The modified staff planning method includes additional requirements that:

- staff are engaged in the process and informed of outcomes
- transparent risk-based prioritisation and decision making is carried out
- there is the provision of senior clinical professional advice (in addition to use of the Professional Judgement tool)

Part 3 - Staffing in Care Services

Part 3 of the Bill aims to enable the social care sector to build on the existing mechanisms contained in Regulation 15 of the Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011 [2] . It provides a function for the Care Inspectorate to lead the development and validation of methodologies and workload and workforce planning tools, in collaboration with the sector, to be used in care home for adult settings where necessary (PM para. 86 [3]). It also places the general 'appropriate staffing' duty on care service providers (Section 6), giving them an equivalent responsibility to Health Boards. The PM states that: The purpose of including care services in the legislation is to enable the sector to build on and strengthen existing mechanisms by placing Regulation 15 into primary legislation and creating a cohesive legislative framework across health and care settings.

However, restating these duties on care providers in primary legislation makes no difference in legal terms. The Bill places no (additional) sanctions on either sector, and it does not deal with the regulatory background. What the Bill does demonstrate, however, by seeking to introduce some equivalence between the health and care sectors, is how different they are in legal and regulatory terms, in addition to their profound differences in structure, governance and organisation. Aspects of these differences were raised in most submissions that commented on Part 3.

Part 3 of The Bill seeks to provide:

- A power for the Care Inspectorate to work in consultation with the care sector to develop staffing methods. Initially this will only be for care homes for adults;
- A regulation-making power for the Scottish Ministers to enable the Care Inspectorate‘s power to be extended to other care settings in the future, if the need arises;
- A regulation-making power for the Scottish Ministers to require the use of any staffing methods developed by the Care Inspectorate;
- The power for Scottish Ministers to issue guidance to care service providers setting out further detail around the duties contained within the Bill.

para.130 PM [3]

Part 3 of the Bill does not provide any detail on how the methodologies and workforce planning practices should be developed. The Care Inspectorate will lead the work to develop the methodologies in collaboration with the sector. As introduced, the Bill only covers the development of workforce planning methods for care homes, although the guiding principles for staff planning extend across all care services.

Parliamentary scrutiny of the Bill

The Health and Care (Staffing) (Scotland) Bill [4] was introduced in May 2018. The Health and Sport Committee was designated as the lead committee for parliamentary consideration of the Bill. The SPICe Briefing [5] of the Bill provides more information on the Bill as introduced, and the views of stakeholders. Its stage 1 report [6] , recommending that the general principles of the Bill be approved, was published on 26 November 2018. The Cabinet Secretary provided two written responses to the stage 1 report on 5 December and 27 January 2019.

The Bill completed stage 1 with the stage 1 debate on 6 December [7] . The general principles of the Bill were agreed without a vote.

At Stage 2, at meetings on 29 January and 5 February, the committee considered of a range of proposed amendments including those dealing with:

- reference to outcomes for service users when workforce planning
- inclusion of multi-disciplinary services and staff
- The accountability and responsibility of providers and commissioners of health and care services in ensuring that there is appropriate staffing, and
- reporting and scrutiny of compliance and risk relating to staffing decision-making
- linking national workforce planning and staff supply with planning by health boards and care services
- the role of NHS Healthcare Improvement Scotland
- staff wellbeing and consultation
- assessment of real-time staffing needs and pressures and introduction of staffing-related risk escalation procedures
- designated persons to have professional responsibility for decisions made about staffing within health boards
- use of agency staff
- non-caseload holding senior nursing staff, to dedicate time to management of a location
- staff training, beyond training in the use of workforce planning tools

A number of amendments were not moved on the basis that discussion was had prior to Stage 3.

Opposition members voted together on either endorsing or rejecting amendments. This possibly reflected some earlier scepticism about the Bill. Through Stage 1 the Committee heard some robust evidence against the need for the Bill, particularly from social care stakeholders and in relation to the health and social care integration agenda.

> “ (L)egislation should not create a rigid compliance framework that undermines the new integrated environment for health and social care... ...The current legislative framework for social care is set out in regulation 15 of the Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011, which has regulations and a scrutiny framework. The Care Inspectorate inspects all the services that are provided and the new health and social care standards that came in this year, which are a key focus of inspections, very much focus on outcomes, particularly outcome 3, which is: “I have confidence in the people who support and care for me”...At a more local level, across the multidisciplinary teams, there are a range of outcome measures. People’s person-centred plans are developed using their personal outcomes and with their carers. Under the Carers (Scotland) Act 2016, we are required to do planning with carers as well. A range of checks and balances are in place to measure outcomes, safety and quality across the services. (Patricia Cassidy (Chief Officers Group for Health and Social Care in Scotland). OR. 11 September 2018)”

This was a reiteration of earlier concerns raised about the requirement for legislation.

The Care Inspectorate had initial hesitation about further legislation during the consultation phase, because they stated that legislation was already sufficient to ensure safe and effective staffing in social care settings. This view was shared by COSLA, and UNISON. The Care Inspectorate stated:

> “ However, we would not support a further statutory requirement in the care sector where there are already existing and well-understood statutory requirements around staffing. (Care Inspectorate)”
>
> Scottish Government, 2017[8]

However, it became clear when they appeared before the Committee alongside Healthcare Improvement Scotland (HIS) during Stage 1 that they clearly supported the Bill and saw that their role was complementary to that of NHS Healthcare Improvement Scotland (HIS) in both the development of new tools and methodologies as well as providing public scrutiny and assurance. The Bill as introduced only listed HIS as one of a number of collaborators in any development of staffing tools. This changed at Stage 2. The Bill as amended includes a number of sections relating to the role of HIS.

The Scottish Government described how the Bill, by including the social care sector provided coherence in the context of health and social care integration, and provided a more aligned legislative framework for workforce planning across sectors.

> “ Some people have asked me why we need legislation to have good workplace tools because good management would normally involve such tools. That question has also come through in submissions to the committee. (David Stewart. OR. 11 September 2018)”

> “ We believe strongly that a whole-system approach to staffing levels must be taken that reflects changing models of delivery, moving care closer to home, integrating health and social care and delivering the Scottish health and social care delivery plan. The grounding of the bill, as introduced, could work against delivery of Scottish Government’s “Health and Social Care Delivery Plan”. The grounding of the bill, as introduced, could work against delivery of health and social care policy through the bill, for example, taking only a partial approach to staffing. (Dr Sally Gosling. OR. 11 September 2018 ”

This was followed by publication of the Bill as amended at stage 2.

Stage 3 proceedings (final consideration) are scheduled to take place over two meetings of the Parliament on 2 May and 8 May.

These and all relevant documents including submissions, OR, staff survey summary, details of evidence sessions, correspondence, amendments and updated Bill documents are available on the **Health and Sport Committee's Bill webpage** [9] , which also has links to the **Scottish Parliament's relevant Bill page**. [10]

Consideration at Stage 1

The key themes emerging from submissions to the Health and Sport Committee's call for views and of the discussion at Stage 1 can be summarised under the following themes:

- **Outcomes focus**

  It was argued that there was lack of an outcomes-focus in relation to how services are designed and how they delivered for individuals and communities. The Bill's focus is on processes to establish appropriate staffing that are more task than outcomes-based;

- **The 'Professional Voice'**

  Witnesses questioned how well staff planning requirements will be supported by the Bill against other urgent priorities and costs. They argued that there is an absence of the 'professional voice' and no privileging of professional judgement in planning processes, whether nursing or other professions (clinical, AHPs etc). Professional judgement should be applied from the ward (or setting) level up, not from the top down;

- **Accountability and Assurance**

  There was deemed to be a lack of clarity around accountability, especially in the care sector where providers and commissioners have responsibility for fulfilling the duties in the Bill. In the NHS sector, without a named accountable senior manager (Nurse Director) there is a risk that accountability could be felt at ward level (Senior Charge Nurse)

- **Staff well-being**

  It was queried how staff well-being, as noted in the Guiding Principles, would be assured and achieved;

- **Integration of health and social care and multi-disciplinary working**

  It was felt by some that there is not sufficient recognition of the principles of health and social care integration and the progress made towards them in the Bill. Nor was it felt that the Bill reflects the team-based, multi-disciplinary approach that is part of the transformation. This approach is less concerned with settings and more concerned with the outcomes for communities and individuals. The teams comprise staff and professionals from many disciplines who are employed by different agencies. These teams are also fluid; providing appropriate care as and when required. The Bill was not viewed by some as supporting these developments;

- **The current workforce tools for NHS settings**

  There was discussion and evidence that the mandated tools are not all fit for purpose, and a review of them only started after the Bill was introduced. The platform on which they sit is also designed as a payroll and time management system, and the administration of the workforce tools is not prioritised. (A bespoke platform is being developed);

- **Compliance and sanctions**

  As with the Patient Rights (Scotland) Act 2011, there are no clear sanctions for NHS services if the outcomes of the workforce planning processes are not adhered to. However, the Care Inspectorate has the power to revoke registration of a care service if it falls below expected standards;

- **Public scrutiny and monitoring**

  It was felt that this was inadequately covered by the Bill. It proposes that reporting on the application of the tools is done through existing annual reporting mechanisms, and not covering whether their application resulted in appropriate and safe staffing.

- **Real-time staffing decisions**

  The current tools and methodologies do not assist with day to day dynamic staffing decisions, only workforce establishment so it was felt that the Bill needs to take better account of this reactive decision-making. The Policy Memorandum assumes that appropriate application of tools by trained staff will address current issues in day to day staffing, such as the use of or need for agency staff.

- **Skewing of resources**

  There is a risk of resources being skewed towards settings (mainly acute, nursing settings) where the tools are in use already and away from developing multi-disciplinary settings.

- **Recruitment and Retention and National workforce supply**

  Concerns were expressed by witnesses that the Bill focuses on the duties of Boards and care providers to ensure appropriate staffing, and that there is no account taken of national workforce planning or supply of staff, or what happens if they cannot comply with their duties.

These themes dominated the discussions during the evidence sessions and are covered in more depth in the stage 1 report [6] .

The Health and Support Committee published a Stage 1 Report [6] with a number of recommendations relating to the issues raised and indicated above, organised under the different Parts of the Bill. It included a stand alone section relating to the wider context of the Bill in terms of recruitment and retention challenges in both the health and care sectors:

> “ We recognise the concerns of witnesses about how the outcomes of the Bill can be achieved without a link to wider national workforce planning. If there is insufficient labour available nationally to fill vacancies then clearly resolution should lie initially at the national level. We are unclear what the implications for a health board, or social care service, will be if they are unable to meet the requirements of the Bill due to circumstances such as above and would welcome information from the Scottish Government on how the Bill recognises and addresses such a situation.”

However it concluded:

“ Although it is already the duty of health boards and care service providers to ensure appropriate numbers of staff the guiding principles of this Bill are unobjectionable. Having the right people with the right skills in the right place at the right time to ensure the highest quality of care and outcomes are delivered across health and social care is a principle we share. Although we have heard many concerns about the Bill, including possible unintended consequences the Committee supports the general principles as set out above. [6] ”

Consideration at Stage 2

Amendments lodged reflected the concerns and issues raised throughout stage 1, as summarised above. The following summarises some of the main changes in the Bill as amended.

Group 1 - Guiding Principles for Health and Care Staffing (81, 82,83 Monica Lennon, 8-12, 1,2 Alex Cole-Hamilton, 14 JF)

The first group of amendments focused on improved outcomes for service users (Monica Lennon [ML]), staff wellbeing (Alex Cole-Hamilton [ACH]), ensuring the right staff in the right place and the right time, and recognition of multi-disciplinary services and staffing (Alex Cole-Hamilton/Jeane Freeman [JF]). **1, 2,81, 82, 83 were agreed by division, 8,10 - 14 agreed without division**

Group 2 - Duties of Commissioners (84 - 89,110) Miles Briggs (MB), Monica Lennon, David Stewart)

The second group considered **Section 2** of the Bill - the duties of commissioners of health and care services. These amendments sought to strengthen and broaden the guiding principles when carrying out staff planning. Amendments also sought to create clarity on the extent of responsibility and accountability of commissioners and providers of care, especially in the face of recruitment issues, financial constraints and issues beyond the control of commissioners. These were lodged by opposition members but not moved or were withdrawn following debate but the Cabinet Secretary agreed to discuss amendments for Stage 3. (86,88,110,) Other amendments in this grouping proposed improvements to how staffing levels and duties in the Bill could be scrutinised, lodged by Monica Lennon. Amendment 89 would require reporting on compliance with the duties as well as risks. The Cabinet Secretary argued that this would duplicate existing statutory duties.These were agreed by division. (85,87,89). The intention of some of these is to oblige the Scottish Ministers to link the workload planning with national workforce planning. This amendment linked with one lodged by Alison Johnstone (90) to ensure an adequate supply of healthcare staff. **84 withdrawn, 85,87, 89 agreed by division, 86, 88,110 not moved.**

Group 3 - Ministerial Guidance on staffing by care services (13, 68-71,) Jeane Freeman (JF)

The next set were related to **sections 3 and 8** . The others related to guidance on staffing by care services, and who should be consulted about such guidance which was to include service users and third sector bodies, as well as the Scottish Social Services Council. **13 agreed without division. 68 - 71 agreed to without division**

Groups 4 and 5 - Duty to Ensure Appropriate Staffing, Real time staffing assessment and risk escalation process (3 - 5 ACH, 15,16 JF) (17 (JF), 17A - 17I (DS), 39, 41, 48-65 (JF), 107 (DS),123 (MB)

Section 4 amendments related to staffing in the NHS. The Group 5 amendments placed an explicit duty to have real-time assessments of compliance with the duty to ensure appropriate staffing. This reinforced the duty to ensure appropriate staffing - to introduce dynamic assessment of compliance with that duty. Another new aspect was the explicit duty to have a risk escalation process in place when real-time risks due to staffing are

identified. In its first iteration, the Bill required the reporting of adherence to the common staffing method, an annual or biannual, largely administrative process to set nursing staffing establishments for each clinical area or community setting. These amendments provided the basis for arrangements for real-time risk assessment and escalation. Amendment 123 inserted the role of designated persons. **4 agreed to without division, 3,5 agreed to by division. 15 disagreed by division 16,17 agreed without division 17B - I not moved, 17A withdrawn, 39, 41, 48-65 agreed without division, 107 not moved, 123 not moved**.

Group 6 - agency workers (80) Anas Sarwar

This introduced a cap on the amount a health board can pay per agency shift, and to explain any amount higher than 150% of an equivalent NHS shift. **80 withdrawn**

Groups 7 - 9 Appropriate Staffing (90,91,124) Alison Johnstone

A duty was included for Scottish Ministers to ensure that there are sufficient numbers of registered nurses, midwives, medical practitioners and other types of employees that regulations might prescribe, to enable boards to comply with their duties to ensure appropriate staffing. This will include having regard to training numbers, but also to the information provided by boards on how they have carried out their duties.

The amended Bill states that there must be a non-caseload holding senior registered nurse in each rostered location.

The amended Bill also introduces a duty to ensure staff training for the work they are to perform, not just in the common staffing method as in the Bill as introduced. Boards must also provide assistance, such as time off work for the purpose of gaining further qualifications. This is linked to the duty to ensure appropriate staffing. **All agreed by division**

Groups 10 - 13 amendments covered details on the Common Staffing Method.

The duty to follow the common staffing method has been amended to strengthen the patient and carer voices as well as taking into account training and consultation of staff and impacts on other health professions and staff.

Section 4 of the Bill includes a table of types of health care, location and relevant employees. This table illustrates the settings and staff already covered by the existing workforce planning tools, and the 'common staffing method'. Amendments made explicit reference to other health professionals registered by the Health and Professions Council - the regulator covering health professionals other than doctors and nurses and midwives.

Group 14 - reporting on staffing by health boards and the Scottish Ministers 37,38,40 JF, 108, 109 ML

The duties on reporting on compliance with the duties have been amended to include that Ministers acknowledged any risks or challenges for health boards in carrying out their duties. Reporting must also be carried out within a month of the end of the financial year, than , as previously, as soon as reasonably practicable. Following receipt of reports from health boards on compliance, the Scottish Ministers must collate them and lay a combined report before the Scottish Parliament, with a statement linking the findings with national workforce planning for the health service. **37 - 40 were agreed without division. 108, 109 agreed to by division**

Group 16 - HIS 66, 66A (JF)

A new section, 5A has been included in the Bill as Amended placing a range of duties on Healthcare Improvement Scotland in relation to the monitoring of health board compliance, review of the common staffing method and monitoring and development of staffing tools which extend to multi-disciplinary staffing methodologies. **Agreed to without division**

Groups 17 - 21

There were fewer amendments lodged in relation to staffing in care services, **Part 3** of the Bill. They covered duties to cover staff wellbeing (ACH), all of which were agreed to without division except 7 which expands the duty of staff wellbeing is included under the duty to ensure appropriate numbers of staff. Under those to be consulted in relation to Ministerial Guidance, the Scottish Social Services Council was included as were carers' representatives as defined in the the Carers (Scotland) Act 2016. The inclusion of the Carer voice is included in the list of those who should be taken account of in developing new staffing methods.

Later in "Chapter 3A new sections have been added about the review and redevelopment of staffing methods by the Care Inspectorate (SCSWIS) to partially mirror the new role of HIS, and to consider multi-disciplinary staffing tools.

Many of these amendments were not moved and others were agreed to without division or withdrawn.

Stage 3

The Cabinet Secretary is seeking to reverse some of the amendments made at Stage 2, such as those relating to:

- reporting on compliance under the Guiding principles,
- the duty to ensure that a senior registered nurse in each rostered location should be non-caseload holding (to be replaced by a 'Duty to ensure adequate time given to clinical leaders' (18)

This has presumably followed discussion with Alison Johnstone, because she has added an amendment (18A) to Jeane Freeman's new amendment.

Anas Sarwar has lodged an amendment in Part 2, that was withdrawn at stage 2: staffing in the NHS, relating specifically to Agency workers. The amendment sets limits to how much agency staff can be paid, and if that is exceeded the process by which boards must report on the amounts paid in excess of 150% of the amount normally paid to an equivalent employee.

David Stewart is seeking to introduce a new duty on health boards 'to have arrangements to address severe and recurrent risks' in relation to the duty to ensure appropriate staffing (establishment - ie posts and in real-time).

Under Part 3 Staffing in Care Services, Monica Lennon has lodged a series of amendments to enhance the rights of staff working in social care.

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