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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

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



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Contents

Introduction	1
Bill Overview	2
Consideration of the Delegated Powers Provisions in the Bill	3
Annex A	7
Annex B	9

Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

- (a) any—
 - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - (ii) [deleted]
 - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
- (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
- (c) general questions relating to powers to make subordinate legislation;
- (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
- (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;
- (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;
- (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
- (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.
- (i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meetings on 19 June and 18 and 25 September, the Delegated Powers and Law Reform Committee considered the delegated powers in the Health and Care (Staffing) (Scotland) Bill (“the Bill”).ⁱ The Scottish Government has provided the Parliament with a memorandum on the delegated powers provisions in the Bill.ⁱⁱ
2. The Committee submits this report to the lead Committee for the Bill (the Health and Sport Committee) under Rule 9.6.2 of Standing Orders.
3. This Scottish Government Bill was introduced by the Cabinet Secretary for Health and Sport on 23 May 2018.

ⁱ The Bill as introduced is available [here](#).

ⁱⁱ The Delegated Powers Memorandum is available [here](#).

Bill Overview

4. This Bill contains 14 sections. Sections 1 to 3 deal with the guiding principles for staffing in health care and care services. Sections 4 and 5 deals with staffing in the NHS. Sections 6 to 11 deal with staffing in care services. Sections 12 to 14 deal with ancillary provisions, commencement and the Bill's short title.
5. In brief, the Bill does the following:
 - Creates guiding principles to be taken into account by Health Boards, the Common Services Agency, the Special Health Boards delivering clinical health care services and all care service providers.
 - Places a duty on the above bodies to ensure there are appropriate numbers of suitably qualified staff providing care.
 - Creates a staffing method to be used in health service areas specified in the Bill, including the use of staffing and professional judgement tools.
 - Gives Scottish Ministers the power to change the list of specified health services required to use the staffing method.
 - Creates a function for Social Care and Social Work Improvement Scotland to work in collaboration with the care sector to develop appropriate tools and methodologies for staffing in care home settings for adults.
 - Gives Scottish Ministers the power to require care services to use the tools and methodologies developed by Social Care and Social Work Improvement Scotland.
 - Gives Scottish Ministers the power to extend Social Care and Social Work Improvement Scotland's staffing methodology and tool development function to cover other care service areas.
 - Repeals regulation 15 of the Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011 as the duties it creates are being restated in the Bill.

Consideration of the Delegated Powers Provisions in the Bill

6. At its meeting of 19 June 2018, the Committee agreed to write to the Scottish Government to raise questions in relation to two of the delegated powers in the Bill. The Committee's questions, and the response received from the Scottish Government to those questions, are reproduced in Annex A.
7. At its meeting on 18 September, the Committee raised a further issue in regard to the delegated powers provisions in section 4. This section inserts new sections 12IA to 12IG into the National Health Service (Scotland) Act 1978 to place duties on Health Boards and the Common Services Agency for the Scottish Health Service (CSA) to ensure appropriate staffing, follow a common staffing method and have regard to guidance on those duties.
8. The Committee noted that there was 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's questions, and the response received from the Scottish Government to those questions, are reproduced in Annex B.
9. The Committee's recommendations in regard to the delegated powers provisions in the Bill are set out below.

Section 4 – NHS duties in relation to staffing (insertion of section 12IB(4) – duty to follow common staffing method)

- **Power conferred on: the Scottish Ministers**
- **Power exercisable by: regulations made by Scottish statutory instrument**
- **Parliamentary procedure: affirmative**

Provision

10. Section 12IB(4) of the 1978 Act, to be inserted by section 4(2) of the Bill, contains a power enabling the Scottish Ministers to change the description of the common staffing method set out in new section 12IB(2).

Committee consideration

11. The Committee sought an explanation of why such a wide power was being taken with no provision on the face of the Bill guiding the Parliament as to the circumstances in which the power is expected to be used by Scottish Ministers.
12. The Committee was content with the explanation given by the Scottish Government, and considered that the power in new section 12IB(4) to be acceptable in principle and that it is subject to the affirmative procedure.

Recommendation

13. **The Committee found the power in new section 12IB(4) to be acceptable in principle, and is content that it is subject to the affirmative procedure.**

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

Provisions

14. 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.

Committee consideration

15. 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.
16. 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.
17. 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.

Recommendations

18. **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.**
19. **The Committee was content with the delegated powers provisions in:**
- **Section 4 – NHS duties in relation to staffing (insertion of section 12IB(3) – duty to follow common staffing method)**
 - **Section 4 – NHS duties in relation to staffing (insertion of section 12IC(3) – common staffing method: types of health care)**

- **Section 4 – NHS duties in relation to staffing (insertion of section 12IF – Ministerial guidance on staffing)**

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

20. 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

21. 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.
22. 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.
23. 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

24. **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.**

25. The Committee was content with the remaining delegated powers in the Bill:
- Section 8 – Ministerial guidance on staffing
 - Section 10 – Functions of SCSWIS in relation to staffing methods (insertion of section 82A(1) – development of staffing methods)

- Section 10 – Functions of SCSWIS in relation to staffing methods (insertion of section 82B(1) – regulations: requirement to use staffing methods)
- Section 12 – Ancillary provision
- Section 13 – Commencement

Annex A

LETTER FROM SCOTTISH GOVERNMENT OF 30 JULY 2018

RE: HEALTH AND CARE (STAFFING) (SCOTLAND) BILL

I am writing in response to your letter dated 19 June 2018 asking for more information regarding the Health and Care (Staffing) (Scotland) Bill. The Committee's questions are in bold.

Section 4 – NHS duties in relation to staffing (insertion of section 12IB(4) – duty to follow common staffing method)

The Committee asks the Scottish Government for a further explanation of why such a wide power is being taken with no provision on the face of the Bill guiding the Parliament as to the circumstances in which the power is expected to be used by Scottish Ministers.

The common staffing method set out in inserted section 12IB is based on the best currently available evidence in workload measurement, and takes account of the extensive experience and learning from the use of the current suite of staffing level tools. In light of this experience the common staffing method set out in the Bill was revised from the method which is currently used by Health Boards, with the addition of steps such as consideration of staff views, and the taking into account of appropriate clinical advice. These steps were added to improve the process of decision making about staffing requirements as a result of experience gained by using the current method over time.

The Scottish Government anticipates that changes to the common staffing method contained in inserted section 12IB may become necessary in the future in order to ensure the method remains contemporary and in line with any future evidence in workload measurement that becomes available. It may also be necessary as a result of the development of staffing level tools, including multi-disciplinary tools, which include different professional groups such as allied health professionals. This may require the common staffing method to be adapted to ensure that it meets the needs of these professional groups.

It is not possible to accurately predict what future experience and evidence might highlight in terms of improvements that could be made to the common staffing method. In particular, since multi-disciplinary tools, with the exception of the emergency care tool, have not yet been developed, there is currently no body of evidence or experience to call upon to determine what type of changes, if any, might be necessary to improve the common staffing method in the future in light of the experience of developing and operating further multi-disciplinary staffing level tools.

The Scottish Government does not, therefore, wish to place restrictions on the use of the power which could potentially prevent changes to the common staffing method, which are identified, in light of future experience, as necessary to improve the information used by Health Boards when making decisions about staffing requirements.

Any proposed changes to the common staffing method would be developed in partnership with relevant stakeholders before any amending regulations are brought to Parliament for consideration and approval. These amending regulations would be subject to the

affirmative procedure, so the Scottish Parliament will be able to scrutinise their appropriateness accordingly.

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

The Committee asks 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.

We thank the Committee for raising this issue in relation to guidance. The Scottish Government intends to publish all guidance issued under the powers in this Bill. The broad intention is that there will only be one guidance document to cover the legislation, covering both the health and the care provisions of the Bill, in order to support the Government's approach to progressing the integration of health and social care. For clarification, and in order to make publication a legal requirement in this particular case, the Scottish Government will therefore bring forward an amendment at stage 2 requiring the Scottish Ministers to publish any guidance issued under inserted section 82A(3), which will also ensure consistency of approach across the Bill.

Annex B

LETTER TO CABINET SECRETARY FOR HEALTH AND SPORT (18 SEPTEMBER 2018)

The Delegated Powers and Law Reform Committee today considered the delegated powers provisions in the Health and Care (Staffing) (Scotland) Bill. In particular, the Committee considered section 4 of the Bill, which inserts new sections 12IA to 12IG into the National Health Service (Scotland) Act 1978 to place duties on Health Boards and the Common Services Agency for the Scottish Health Service (CSA) to ensure appropriate staffing and to follow a common staffing method.

The Committee notes that there is no provision on the face of the Bill about the consequences of a Health Board or CSA failing to comply with the duties in new sections 12IA to 12IE. The Committee notes 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.

The Committee would be grateful for 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 would also be grateful for an explanation of why it is considered appropriate that such provision is made in the guidance rather than on the face of the Bill.

RESPONSE FROM CABINET SECRETARY FOR HEALTH AND SPORT (20 SEPTEMBER 2018)

I would like to thank the Delegated Powers and Law Reform Committee for their consideration of the Health and Care (Staffing) (Scotland) Bill. You note that, in relation to sections 12IA to 12IG, there is nothing on the face of the Bill about consequences of failure of Health Boards and the Common Services Agency to comply with the duties in the Bill.

The Bill inserts the provisions relating to Health Boards into the National Health Service (Scotland) Act 1978. As such, the existing powers contained in the 1978 Act for Scottish Ministers to take action where there are issues about discharge of Health Board duties will apply to the duties placed on Health Boards by this Bill. For example, there is a power of direction in section 2(5) of the 1978 Act which can be used generally or for specific matters (which could involve directing a particular Board). There are also powers in section 78A where there has been failure in provision of a service.

The guidance will not set out any sanctions, or consequences of failure to comply, that are not already in place. However, we expect that the guidance will reference and signpost the existing provisions in the 1978 Act outlined above.

The guidance will also reference and signpost existing performance and review mechanisms, clarifying that assessment of compliance with the duties in the Bill will be included in these processes. These measures are already in place to monitor Health

Board compliance with performance requirements, and it is therefore expected that non-compliance with the duties in this Bill would be managed through, and in line with, existing performance and monitoring process and escalation levels within Scottish Government and through Healthcare Improvement Scotland (HIS).

If following improvement support and intervention there are still areas of noncompliance this can ultimately lead to the powers of intervention in the 1978 Act detailed above being applied.

The Financial Memorandum sets out the provision of additional resource to support Boards to apply the common staffing methodology, and tools, consistently.

