Consultation on the Health and Care (Staffing) (Scotland) Act 2019

Draft Statutory Guidance: Analysis of Responses

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Scottish Government
Riaghaltas na h-Alba

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1. Introduction

1.1 The Health and Care (Staffing) (Scotland) Act 2019

The Health and Care (Staffing) (Scotland) Act 2019 ("the Act") was approved by the Scottish Parliament in 2019 and all requirements of the Act will take effect from 01 April 2024. The aims of the Act are to enable safe and high quality care and improved outcomes for people experiencing health care or care services through the provision of appropriate staffing.

The Act places duties on:

- Health Boards;
- Special Health Boards providing direct patient care (i.e. NHS 24, the Scottish Ambulance Service Board, the State Hospitals Board for Scotland and the National Waiting Times Centre Board);
- NHS National Services Scotland (NHS NSS, which is referred to in the Act as "the Common Services Agency for the Scottish Health Service" or as "the Agency");
- Local authorities;
- Integration authorities;
- Care service providers;
- Healthcare Improvement Scotland;
- The Care Inspectorate (referred to in the Act as "Social Care and Social Work Improvement Scotland"); and
- The Scottish Ministers.

1.2 Consultation on statutory guidance

The Act states that Scottish Ministers can issue statutory guidance to support organisations to meet their duties. Draft statutory guidance was prepared by various working groups comprising representatives from the Scottish Government and external stakeholders, including Health Boards, Special Health Boards, NHS NSS, local authorities, integration authorities, Healthcare Improvement Scotland, the Care Inspectorate, professional bodies, trade unions and professional regulatory bodies. This draft guidance was then published for public consultation, which ran from 22 June to 19 September 2023.

A total of 77 responses were received; of these, 31 were from individuals and 46 were from organisations. A full list of organisations that provided a response can be found in Annex A. Where individuals / organisations gave their permission, their responses have been published on Citizen Space; however all responses have been considered in this analysis, irrespective of whether or not they have been published. We would like to thank participants for their time in providing responses to the consultation.

The consultation asked five questions, some of which were closed questions, i.e. respondents picked from a list of specific answers and others which were open questions, where respondents could add free text. The questions asked were as follows:

- 1a) Do you think the guidance is clear and easy to understand? (answered yes / no);
- 1b) Please detail any specific areas of the guidance that you found unclear or hard to understand (option to indicate specific sections and to add free text);
- 2a) Do you think the guidance is comprehensive, in that it contains sufficient detail to be able to support organisations in meeting obligations placed on them by the Act? (answered yes / no);
- 2b) Please detail any specific areas where you felt information was missing or incomplete (answered as free text); and
- 3) Do you have any other comments on the draft guidance? (answered as free text).

This document will summarise the overall themes from the consultation responses, along with specific themes for each chapter. It will also detail the actions that Scottish Government will take when revising and finalising the statutory guidance, ready for publication on 01 April 2024.

2. Summary of responses

2.1 Questions 1a and 1b

Question 1a) Do you think the guidance is clear and easy to understand?

Answer	Individuals	Organisations	Total
Yes	17	24	41 (53%)
No	13	16	29 (38%)
Not answered	1	6	7 (9%)

Question 1b) Please detail any specific areas of the guidance that you found unclear or hard to understand

Answer	Individuals	Organisations	Total
Section 3	4	7	11
Section 4	3	8	11
Section 5	3	9	12
Section 6	5	9	14
Section 7	3	5	8
Section 8	5	8	13
Section 9	3	6	9
Section 10	3	5	8
Section 11	3	6	9
Section 12	4	7	11
Section 13	3	4	7
Section 14	3	5	8
Section 15	4	10	14
Section 16	4	7	11
Section 17	3	7	10
Section 18	3	4	7
Not answered	23	28	51

16 individuals and 34 organisations entered free text answers providing detail on specific areas of guidance they found unclear or hard to understand.

2.2 Questions 2a and 2b

Question 2a) Do you think the guidance is comprehensive, in that it contains sufficient detail to be able to support organisations in meeting obligations placed on them by the Act?

Answer	Individuals	Organisations	Total
Yes	13	17	30 (39%)
No	15	24	39 (51%)
Not answered	3	5	8 (10%)

2b) Please detail any specific areas where you felt information was missing or incomplete

19 individuals and 37 organisations entered free text answers to this question.

2.3 Question 3

Question 3) Do you have any other comments on the draft guidance?

19 individuals and 39 organisations entered free text answers to this question.

2.4 General themes

2.4.1 Document layout and level of understanding

There were mixed comments regarding the layout of the document and how clear and easy it was to understand. Some respondents said that the guidance was clear, thorough and easy to understand, others felt that it was lengthy, repetitive, difficult to interpret and contained specialised and technical language. The statutory guidance covers all of the requirements of the Act, which does result in it being a lengthy document; we will make it clearer in the introduction which chapters relate to which organisations and which duties, so that readers can more easily identify where to find relevant information. It is acknowledged that the guidance can be repetitive across the chapters; this was done so that readers could read chapters in isolation, without having to constantly refer to other chapters. The guidance was drafted by various working groups comprising individuals who work in health care / care services and is aimed at an audience who work in these sectors, therefore does contain specialist and technical language that may not necessarily be understood by everyone. With regard to this, we will:

- Publish a non-technical summary of the Act, aimed at a non-specialist public audience on the Scottish Government website;
- Continue to work with Healthcare Improvement Scotland on a series of ‘quick guides’ aimed at health care staff, explaining the various duties in the Act;
- Continue to work with NHS Education for Scotland to produce training resources specific to the Act for staff in health care and care services; and
- Provide links in the statutory guidance to external non-statutory resources about the Act to provide readers with further information, such as those produced by Scottish Government, NHS Education for Scotland, Healthcare Improvement Scotland and the Care Inspectorate.

It is also noted that for care services, the requirements of the Act are very similar to existing requirements under other legislation and Care Inspectorate guidance on staffing produced previously will be updated to continue to provide support for care service providers.

There was also a comment that the guidance for health care services seemed weighted towards the acute sector and it was difficult to interpret for non-acute

services. We will consider this for the final version to see what additional information / examples we can add to try to address this concern.

2.4.2 Level of detail

A number of respondents commented that although the guidance contains information on what organisations need to do, it does not contain details on how they should do it and that the guidance is open to interpretation as to how it is applied in specific organisations. The statutory guidance provides information on various requirements introduced by the Act and supports organisations in meeting obligations placed on them. Organisations however need to ensure that they meet their obligations under the Act (including obligations to have regard to statutory guidance) and in doing so will need to consider how the requirements of the Act should be met in their specific organisation.

For health care, the Act covers all services provided by Health Boards, relevant Special Health Boards and NHS NSS, all clinical staff, and all service models. These will vary greatly, e.g. acute services versus community services, large city locations versus remote and rural locations, telephone advice through NHS 24 and provision of secure forensic mental health services by the State Hospital. For care services, the Act covers a wide variety of services including adult care homes, child care, secure accommodation and fostering and adoption services. It is therefore not practicable for the guidance to prescribe how the Act should be implemented in specific organisations . Organisations have the knowledge about how their own services operate and therefore how the requirements of the Act should be met. Support is being provided to organisations by Scottish Government, Healthcare Improvement Scotland and the Care Inspectorate throughout this process.

2.4.3 Organisations in scope of the Act

Respondents felt that the guidance was confusing in that it did not identify clearly enough which sections of the Act and which guidance chapters applied to which organisations. We will therefore revise the introduction to the guidance to make this clearer. Specific comments related to:

- Whether independent health care providers are within the scope of the Act;
- Which duties apply to health care and which duties apply to care services;
- Which types of care services are included; and
- The responsibilities of integration authorities with regard to health care services.

Regarding independent health care providers, these organisations and their staff are not included within the scope of the Act and they have no requirement to follow any

duties relating to health care staffing. The duties relating to health care staffing contained in section 4 of the Act are for Health Boards, specific Special Health Boards and NHS NSS in relation to their staff. Independent health care providers can be contracted by Health Boards, Special Health Boards or NHS NSS to provide services. In these circumstances, there is a requirement on the Boards / NHS NSS to consider the guiding principles for health and care staffing (found in section 1 of the Act) and the need for the independent provider to have appropriate staffing arrangements in place. However, this duty is on the Boards / NHS NSS, not on the independent provider and even when contracted to provide a service to the NHS, the independent provider and their staff do not fall under the scope of the Act.

A number of respondents commented that the guidance was confusing as to which chapters applied to health care and which to care services and that there were more chapters devoted to health care compared to care services. To confirm, the only chapters that apply to care services are chapters 15, 16 and 17. There are less chapters for care services as there are less requirements placed on them in the Act. In addition, the requirements for care services are similar to the legislation they are already required to comply with. We will make this clearer in the final version. There were also queries as to the position of services, such as hospices who could provide both health and care services and which parts of the Act would be applicable which we will also confirm.

There was confusion as to the types of care services that would fall within the definition of a ‘care service’. In the guidance we have stated that the types of care services that are required to comply with the Act are those listed in section 47(1) of the Public Services Reform (Scotland) Act 2010. We recognise that it would be more helpful to list the types of care services rather than refer to another Act and we will do this for the final version of the guidance. For information, the care services in scope are:

- a support service;
- a care home service;
- a school care accommodation service;
- a nurse agency;
- a child care agency;
- a secure accommodation service;
- an offender accommodation service;
- an adoption service;
- a fostering service;
- an adult placement service;
- child minding;
- day care of children; and

- a housing support service.

There were a number of comments regarding clarification of the responsibilities of integration authorities with regard to health care services. Part 2 of the Act is entitled "Staffing in the NHS" and contains the duties to be followed by Health Boards, relevant Special Health Boards and NHS NSS in relation to staffing. The Public Bodies (Joint Working) (Scotland) Act 2014 put in place a legislative framework to integrate health and social care services in Scotland. Under this framework, Health Boards delegate certain health care functions to an integration joint board or a local authority.

The Health and Care (Staffing) (Scotland) Act 2019 does not mention the responsibilities of integration authorities in relation to health care services and respondents asked that where health care functions are delegated who would be responsible for complying with the requirements of the Act. We stated in the guidance "with regard to integration authorities, organisations should be familiar with, and refer to, requirements under the Public Bodies (Joint Working) (Scotland) Act 2014 and the associated statutory guidance to the 2014 Act." Respondents commented that this was not very helpful and they would like more detail on the interaction between the Public Bodies (Joint Working) (Scotland) Act 2014 and the Health and Care (Staffing) (Scotland) Act 2019, with clear wording on which organisation would be responsible for complying with the requirements of the Act in these circumstances. We are considering these comments at present and will keep stakeholders updated.

2.4.4 Staff in scope of the Act

The Act does not list which groups of staff or staff roles are included in the provisions (with the exception of section 12IJ "duty to follow the common staffing method"), however we have published a separate list of staff roles covered by the Act and a link to this was in the introduction chapter of the guidance. There were several comments from respondents highlighting formatting issues with the list and omissions relating to dental and public health roles, which we have corrected. There was a comment about the inclusion of social work services; we confirm that these are not included in the scope of the Act and have updated the staff in scope list to reflect this. There were also comments about independent health care providers; as stated above these individuals are not included within the scope of the Act and we will make that clearer in the revised version of the guidance.

There was one comment questioning why the guidance makes reference to specific roles in health care if all workers are covered. The section 12IA duty refers to ensuring that "suitably qualified and competent individuals, from such a range of professional disciplines as necessary, are working in such numbers as are

appropriate" for the health, wellbeing and safety of patients, the provision of safe and high-quality health care, and in so far as it affects either of those matters, the wellbeing of staff. "This refers only to clinical staff and staff who provide clinical advice and these groups are then detailed in the list of staff roles. Staff groups such as housekeeping, administration, maintenance or catering do not fall within this description and are not within the scope of the Act in terms of ensuring appropriate staffing. It is important to emphasise that this does not mean these groups of staff are not vital to ensuring the running of the NHS, simply that the Act does not make provision in terms of ensuring appropriate staffing in respect of those staff groups. The list of staff roles has a separate section for care services staff which is wider in scope and includes all those involved in the care of the person using the service.

There was also a comment about managerial roles, in that they play a key function in decision making in relation to staffing but that we have not specifically mentioned these roles. A lot of managers will be covered under the staff in scope list as they are, for example, registered doctors, nurses, dentists, allied health professionals etc. Non-clinical managers would not fall within the scope of the Act, in that organisations will not be required to have real-time staffing assessment in place for non-clinical staff, will not be required to report on agency use of non-clinical staff, will not have to ensure adequate time to lead etc. However, it is appreciated that they will still have specific duties under the Act, such as the recording or escalation of staffing risks ("individuals with lead professional responsibility (whether clinical or non-clinical)). We appreciate this can cause confusion and will look at providing improved explanation in the final version of the guidance.

Comments from respondents were made about the inclusion / exclusion of volunteers and students. Regarding volunteers in health care, we have stated in the staff in scope list that these are not within the scope of the Act. As stated above it is our opinion that "professional disciplines" refers to clinical staff and staff who provide clinical advice. We had, incorrectly, assumed that no volunteers would be carrying out such roles but we are revisiting this to see if we need to make specific changes to this guidance, for example the Scottish Ambulance Service utilises volunteers in clinical roles. Again, it should not be concluded from this that volunteers in general do not perform a vital role, it is just that non-clinical roles (both paid and unpaid) are not within the scope of the Act in terms of ensuring appropriate staffing.

The Act is clear in stating that volunteers are included within the definition of "working in a care service" and therefore are included when applying the duties to ensure appropriate staffing and staff training in care services. Concerns were raised by some respondents as to the inclusion of volunteers and whether that should be qualified by stating that only volunteers who meet certain criteria should be included. Other comments stated that the guidance should distinguish between the needs and

expectations of volunteers versus paid staff and whether the inclusion of volunteers would lead them to be engaged in roles that were inappropriate (i.e. replacing paid staff). To provide reassurance, care services already have to follow very similar legislation regarding ensuring appropriate staffing and staff training under the Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011 and these state that references to employees include volunteers, i.e. volunteers are already considered under staffing legislation and the Act therefore should not represent a significant change.

Regarding students, several respondents highlighted that our wording in the guidance document did not match the wording in our staff in scope list online and we will ensure this is corrected for the final version. There were also comments that by the guidance stating that students should be supernumerary, this could cause issues in services using “earn as you learn” models where individuals are counted as part of the staffing complement. This is a misunderstanding; the guidance does not state that students should always be supernumerary, it states that students should be treated as supernumerary when “they are participating in a supernumerary placement or are undertaking protected learning time as detailed within the relevant course outline or conditions of employment”. This is not necessarily all of the time they are at work but will depend on their learning model and contract of employment.

2.4.5 Non-compliance

Respondents commented that the guidance contained no information as to the consequences of organisations being non-compliant with the legislation. With regard to care services, the Care Inspectorate will continue to register, inspect and monitor care services in the same manner as they do currently. Care services are currently required to ensure appropriate staffing and staff training under the Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011. The requirements of the Act are very similar to these and will be regulated in the same way. We will add text to the final version of the guidance to explain this.

Regarding the compliance of Health Boards, Special Health Boards and NHS NSS, there are no specific measures in the Act regarding non-compliance. However, given that the Act inserts a number of duties into the National Health Service (Scotland) Act 1978, powers available to Scottish Ministers in the 1978 Act in relation to failure of organisations to carry out functions are also applicable in respect of these new staffing duties. HIS also have duties under the Act to monitor the compliance of Health Boards, Special Health Boards and NHS NSS. Notwithstanding this, it is important to note that the aims of the Act are not about a binary assessment of compliance / non-compliance or pass / fail but rather about identifying risks and addressing these to implement improvement. This includes consideration of

innovation, different staffing models and service redesign to make best use of existing staff resource.

2.4.6 Duties of Scottish Ministers

Comments were made that, although the Scottish Ministers have duties in the Act, details about these were not included in the guidance. This was deliberate as the guidance is aimed at organisations external to the Scottish Government, providing them with information to support them in being able to understand and implement their relevant duties. However, we appreciate that it would be helpful to explain what duties the Scottish Ministers have and we can include this in the final guidance document.

2.4.7 Implementation

Finally, a number of respondents queried the timing of the implementation of the Act, given the current pressures within health and social care. The Act was approved by the Scottish Parliament in 2019 so there will already be an almost five-year interval by the time it is commenced on 01 April 2024. We would make the following points with regard to the timescale:

- The Scottish Government, Healthcare Improvement Scotland and the Care Inspectorate have been engaging with and supporting organisations since 2019 in preparing for the implementation of the Act. This has included producing educational resources, newsletters and guidance, conducting webinars and engagement sessions, and carrying out a comprehensive testing programme;
- We have been clear that the Act will not by itself solve the issues of staffing in the health and social care sector, but will work alongside other policies and initiatives;
- The Act, alongside the introduction of eRostering (a national electronic rostering system), will allow improved data collection, more robust governance, more efficient and effective rostering practices and pinpoint opportunities for service redesign and innovation;
- When the Act is commenced on 01 April 2024, organisations will be required to comply with all the duties. We do however recognise that this is not a pass / fail situation and as more resources become available and learning takes place over the first year, and years to come, we will expect to see incremental improvements and compliance; and
- For care services the requirements of the Act are similar to existing requirements under the Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011 which care service providers have had to comply with since 2011.

3. Responses on Individual Chapters

3.1 Chapter 4: Guiding principles in health care

Chapter 4 provided information on the guiding principles of the Act and how they apply to Health Boards, relevant Special Health Boards and NHS NSS. A number of respondents commented that there were inconsistencies in definitions and language between this chapter and chapter 15, which details how the guiding principles apply to care service providers. We will look at this to ensure appropriate alignment of these two chapters in the final version. There were also suggestions as to additional links to other relevant publications we could add, which we will also consider.

Comments were made relating to providing more details on how the guiding principles could be applied, for example, details on how staff can raise concerns regarding staffing; how the views of staff and service users will be gathered; how staff wellbeing should be measured; and what patient outcome measures should be used. We will consider adding more examples and links to resources for the final version; however, as explained in section 2.4.2 above, the role of the statutory guidance is not to prescribe how organisations must implement the guiding principles; this will need to be tailored to the specific situation and are for local organisational procedures.

A final comment was made about the applicability of the guiding principles in health care, arguing that although the Act only states that organisations must have regard to the guiding principles when discharging the duty to ensure appropriate staffing, the way the Act is structured means that having regard to the guiding principles should apply to all the duties and we should make this clear in the guidance. We will consider this comment.

3.2 Chapter 5: Planning or securing the provision of health care from others

Chapter 5 addressed the requirements of Health Boards, relevant Special Health Boards and NHS NSS when planning or securing the provision of health care from third parties, e.g. private hospitals, other Health Boards, or independent primary care contractors. Most of the comments on this chapter related to confusion around what this meant in practice and how it would be implemented. It is recognised that there are a wide variety of different contractual models, agreements and arrangements that are used by organisations, and the requirements of the Act need to be applied to all these. We are looking to see how we can provide separate ‘quick guides’ for different services around this duty. To clarify, this requirement only applies at the point of planning and securing a service; it is not retrospective so there is no requirement to review all arrangements already in place. There is also no requirement for ongoing monitoring of the performance of any contractor. It is likely that current procedures for planning and securing health care services from third

parties will already include questions for providers about staffing and these may already fulfil the requirements of the Act, or could be adjusted to do so.

The duty lies with the Health Board, relevant Special Health Board or NHS NSS, not with the third party contractor. Third party contractors could find that they are being asked additional questions about staffing at the point where the Board / NHS NSS is arranging the service but there are no duties under the Act for third parties themselves. Respondents to the consultation asked for details about what information Boards / NHS NSS would require; this is for local procedures so we cannot answer this. Respondents also stated that Boards / NHS NSS should all take the same approach so it is consistent across the country. This is not a requirement of the Act and whilst it may seem desirable that this is the case, we cannot prescribe this.

3.3 Chapter 6: Duty to ensure appropriate staffing in health care

Chapter 6 detailed the duty on Health Boards, relevant Special Health Boards and NHS NSS under section 12IA of the National Health Service (Scotland) Act 1978 to ensure appropriate staffing. The main comments on this chapter related to the provision of more detail on how this should be applied, for example who is able to provide clinical advice, how the wellbeing of staff would be measured etc., and the lack of any information on the numbers of staff that must be present. Regarding the provision of more detail, we will consider adding more examples and links to resources for the final version; however, as explained in section 2.4.2 above, the role of the statutory guidance is not to prescribe how organisations must implement the duty; this will need to be tailored to the specific situation and are for local organisational procedures.

As also explained above in section 2.4.2, the Act covers a vast variety of types of services, locations, staff and service models. Given this, it would be impracticable to prescribe the number and skill mix of staff that would be required in each circumstance, which could, in addition, change on a daily basis, depending on the number of people requiring care and their specific needs. Prescribing numbers was also not the original intention of the legislation. When the Health and Care (Staffing) (Scotland) Bill was introduced to Parliament, the accompanying documentation stated that “The legislation is not intended to set out or prescribe minimum staffing levels or fixed ratios; this would be at odds with the Scottish Government’s established policy approach and could potentially undermine innovation in service provision. Rather, the legislation will support local decision-making, flexibility and the ability to redesign and innovate across multi-disciplinary and multi-agency settings.” There were other respondents who welcomed the guidance not being prescriptive in stipulating numbers of staff or skills mix, and that it did not seek to preclude the use

of innovative new models of care delivery and could be flexible to meet the needs of diverse population groups and demands of different clinical units.

One comment was made that we should make it clearer that the staff of third parties supplying services to Boards / NHS NSS are covered under this duty. This is a misunderstanding; third party staff are not within the scope of the Act and this will be made clearer in the final version.

3.4 Chapter 7: Agency reporting

Chapter 7 detailed the requirements of the Act with regard to Health Boards, relevant Special Health Boards and NHS NSS reporting the use of high-cost agency staff. Themes from respondents' comments were about the scope of this duty, definitions and the template for reporting. Regarding the scope, this duty is specifically about reporting the cost of agency workers, rather than the use of agency workers in general. Comments were made about ensuring agency workers are trained, ongoing assessment of staffing needs and documenting decisions on staffing; these are not requirements of this duty, however, they would be relevant elsewhere in the Act, both for agency staff and NHS employees, for example, in relation to the requirements for real-time staffing assessment and risk escalation.

One comment was regarding confusion about the statement "any staff directly employed by the Board are not included". To confirm, this means that bank workers, who are directly employed by Boards, are not included. However, all agency workers are included, whether they are procured centrally or through local arrangements by individual departments or teams. Another comment stated that in regard to the use of agency workers, patient safety should be paramount and a cost ceiling will make it more difficult to fill gaps. To confirm, the duty does not prohibit the use of workers above the 150% figure, rather it states that the amount to be paid to secure the services of an agency worker should not exceed 150%, but if it does then all instances of this have to be reported quarterly to the Scottish Ministers.

There were a number of comments about how the cost comparison is calculated, i.e. what would be the comparison figure for each band / grade of staff, taking into account their salary, national insurance, pension etc. We confirm that Scottish Government will provide these comparison figures to enable the calculations to be made in the same manner across organisations. There were also comments about the reporting template and how the information required could be captured using existing systems. We have been testing the reporting requirements with various Boards as part of our testing programme and will continue to do so. Specific guidance about how to complete the report will be provided as part of the reporting template. One respondent made the comment that the reports on agency use should be presented to the NHS Area Partnership Forums and the Scottish Partnership

Forum and that this should be stated in the guidance. This is not a requirement of the Act and we do not intend to use the guidance to request that this is done.

3.5 Chapter 8: Real-time staffing assessment and risk escalation

Chapter 8 addressed the duties of Health Boards, relevant Special Health Boards and NHS NSS regarding real-time staffing assessment, risk escalation and arrangements to address severe and recurrent risks. Real-time staffing assessment under the Act requires procedures to be put in place for identifying risks relating to staffing and then mitigating these or escalating as required. It is not about the real-time tracking of numbers of staff; this has caused confusion and we will make this clearer in the final version. It is also not the case that a staffing tool is needed to comply with these duties. Staffing tools are only required for the duty to follow the common staffing method.

A number of respondents raised points about the guidance providing more detail as to how these requirements are implemented, for example, detailing who can provide clinical advice, who would be expected to be a senior decision maker, how arrangements are communicated to staff and who would review any disagreements. As noted above in section 2.4.2, the Act applies to all services and professional groups and cannot be prescriptive in how these requirements are implemented as it will vary with the situation. The detail will be for local procedures; however we will add links to educational resources around these duties. Allied to this there were a number of comments as to the systems that would be used to record risks and the associated mitigation, escalation, clinical advice and any disagreements. eRostering software is currently being rolled out to all Boards / NHS NSS which are subject to these duties and this will provide a platform for this information to be recorded, managed, analysed and reported on. It will also assist with the requirement to provide feedback to staff on decisions that have been made. Reports generated by the eRostering system will also enable organisations to identify severe and recurrent risks, provide information for the annual reports to the Scottish Ministers and could potentially be part of the information used by HIS to assess compliance. We recognise that the eRostering programme will not be completed by 01 April 2024 and we have been designing interim solutions for organisations to use in the meantime.

Respondents made comments about the provision of training to staff and how and when this would happen; this is for local organisational procedures rather than the statutory guidance. One comment stated that the requirement for training for individuals with lead professional responsibility and for senior decision makers should be made wider and include all staff. To confirm, organisations do have requirements to make all staff aware of the procedures for identifying risks and risk escalation, along with encouraging and enabling staff to use these; this is explained in the guidance. There was a comment relating to the use of the word ‘clinical’ as

opposed to ‘professional’ and whether professional would be a better fit for the social care sector. To confirm the word clinical is used as that is the word used in the Act and these duties do not apply to the social care sector, they only apply to Health Boards, relevant Special Health Boards and NHS NSS.

A number of respondents made comments about the guidance around the duty to have arrangements to address severe and recurrent risks. The Act does not provide definitions of the words ‘severe’ or ‘recurrent’ and we did not provide definitions in the guidance either. The view of respondents was that we should be defining these in the guidance in order to promote consistency across the Boards / NSS. We will therefore commit to review this position. Comments were made that the arrangements for these duties should include details of how staff of third party contractors can report risks to the Board / NHS NSS. This is a misunderstanding; third party staff are not within the scope of the Act and this will be made clearer in the final version.

3.6 Chapter 9: Duty to seek clinical advice on staffing

Chapter 9 provided information on the duty to seek and have regard to clinical advice when putting in place arrangements relating to staffing. There was a comment relating to the use of the word ‘clinical’ as opposed to ‘professional’ and whether that would be a barrier to its application in the social care sector. To confirm the word clinical is used as that is the word used in the Act and this duty does not apply to the social care sector, it only applies to Health Boards, relevant Special Health Boards and NHS NSS. Respondents raised a number of queries as to which individuals would be able to give clinical advice, whether clinicians would only be able to provide clinical advice for their own profession, rather than for other professions and what would happen for out-of-hours services.

The Act provides a definition (which is found in section 12IO of the National Health Service (Scotland) Act 1978) of what is ‘appropriate clinical advice', stating that it means advice obtained from the appropriate level and area of clinical professional structures. It refers, by way of an example, to obtaining advice from an individual holding a senior executive role in the provision of nursing services. Who provides advice will depend on the particular circumstances of each case and, as the Act applies to a wide variety of services and professions, the guidance cannot be prescriptive as to which individuals would be appropriate. This will be for local processes to decide; organisations already have clinical governance procedures in place which can be utilised for these decisions. We will however, look at whether we can make the guidance clearer regarding these points. One comment suggested that the ability of clinicians to record their disagreement with a decision that conflicted with the clinical advice given should be linked to whistleblowing. Under the Act, organisations are required to put in place procedures to enable clinicians to record

disagreement with decisions; this is separate from and not linked to any procedures regarding whistleblowing.

There were also comments about the quarterly internal reports that the Nurse Director and Medical Director are required to present to members of the organisation's board, detailing the extent to which they consider the organisation is complying with requirements of the Act. One comment suggested that this information would be better placed in chapter 13, which we will consider. One comment suggested that the format and content of the quarterly internal reports and the annual reports to the Scottish Ministers should be the same. We are providing an annual report template to organisations which they may wish to use for the quarterly report but this is not mandatory. There was also a comment about how these reports will be made public; to clarify there is no requirement in the Act for the quarterly internal reports to be made public; only the annual reports.

3.7 Chapter 10: Adequate time for clinical leaders

Chapter 10 detailed the requirements for Health Boards, relevant Special Health Boards and NHS NSS to ensure sufficient time and resources are given to clinical leaders. Respondents to the consultation welcomed the inclusion of this duty in the Act, recognising the importance of clinical leaders having the time and resources to carry out their leadership role. There were some comments as to the need for more detail as to who exactly is defined as a clinical leader and what constitutes sufficient time and resources. The Act details that clinical leaders are all individuals with lead clinical professional responsibility for a team of staff and a number of examples were provided in the guidance. However, the guidance cannot be prescriptive as to everyone who would be defined as a clinical leader as the Act covers all services and all clinical groups of staff; this will be up to local HR processes. Similarly the guidance cannot define what constitutes sufficient time and resources for individuals as, again, it covers a wide variety of individuals who will have different responsibilities and manage different sizes of teams. Existing HR processes, such as job planning, can be used to determine the requirements for each individual. We have provided links to other publications on leadership and we will consider whether there are any further links we could add.

One comment raised the issue of how this would be implemented and whether providing leaders with sufficient time and resources would negatively impact on other team members in that they would then have to take on additional workload to compensate. It is noted that the duty to ensure adequate time for clinical leaders does not sit in isolation from the other duties in the Act, such as the requirement to identify risks relating to staffing in real-time, which could include risks related to workload. In addition, compliance with this duty will be monitored by HIS as part of

their duties, and will be reported on by Health Boards, relevant Special Health Boards and NHS NSS as part of annual reports to the Scottish Ministers.

3.8 Chapter 11: Staff training and engagement

Chapter 11 addressed the requirements in the Act for staff training and engagement in Health Boards, relevant Special Health Boards and NHS NSS. It is important to note that the training requirements in the Act are not just about training staff about the Act itself but also about training required to be able to perform their role and we will look to make this clearer in the guidance. Regarding training about the Act, there were comments from respondents about the awareness amongst staff about the Act. To confirm, a knowledge and skills framework and training resources are already available on the TURAS platform; links to these will be put in the final guidance document. With regard to training required to undertake the role, we anticipate the systems in place at the moment for ensuring employees are suitably qualified and competent to undertake their role would continue to be used to fulfil the requirements of the Act. With regards to recording of learning in organisations, we anticipate this would also be carried out as it is done currently.

There were a couple of comments as to the definition of an “employee”. Whilst organisations have to raise awareness amongst all staff about the procedures put in place to discharge the duties of the Act, training under section 12II, i.e. the training required for a person to be able to carry out their role, only has to be provided to employees. The Act provides a definition of an employee but there were comments that we should explain this further, giving examples of who is and who is not an employee. We do not feel this is necessary and could become confusing; organisations will be aware of who is legally an employee for the purposes of the Act. Finally there were some comments about implementation and whether there is adequate time in practice for staff training. Similar to the comments about chapter 10 above, compliance with this duty will be monitored by HIS as part of their duties, and will be reported on as part of the annual reports to the Scottish Ministers. In addition, if the lack of time for staff training is identified as a risk, this can be raised under the procedures for identification, escalation and mitigation of risk.

3.9 Chapter 12: Common staffing method

Chapter 12 detailed the requirements to use the common staffing method (CSM). This is the only health care duty that does not apply to all services and all staff groups. Section 12IK of the Act lists the types of health care, locations and employees to which the CSM must be applied; these are the ones which currently have a validated staffing level tool. We stated in the guidance that services out with the list in section 12IK, whilst not mandated to use the CSM, may still find parts of it useful when planning staffing. Some comments indicated that there was still

confusion around this point. To confirm, only those services listed in section 12IK are required by the Act to use the CSM; however, although not a requirement, there is no reason why other services cannot use the guidance to help them when planning staffing. We will look to see how we can make this clearer in the guidance. One comment stated that although the CSM does only apply to particular service settings, we should make it clearer that the chapter will be applicable to, and should be read by, senior management even if they work out with those settings as they will have responsibilities for staffing decisions.; we will include text to explain this in the final version.

There was a comment that we should consider strengthening the text that stated “the CSM is composed of a number of parts that should be used together to make staffing decisions” to make it clearer that any results from staffing tools should not be used in isolation, without consideration of the other parts of the CSM; we will look at the wording of this. There were also comments about quality measurements and why only the Health and Social Care Standards were referenced. The CSM requires an organisation to take into account, in so far as relevant, any measures for monitoring and improving the quality of health care which are published as standards and outcomes under section 10H(1) of the National Health Service (Scotland) Act 1978 by the Scottish Ministers. The Health and Social Care Standards are published under 10H(1) which is why they are specifically referenced. This does not mean that organisations cannot opt to take other measures and standards into account that they deem relevant for the particular circumstances.

There were various comments regarding formatting which we will address. We are also working with stakeholders to produce other educational resources providing more details about how to apply the CSM and links to these will be added to the final guidance document.

3.10 Chapter 13: Reporting in health

Chapter 13 provided details of the reporting requirements for Health Boards, relevant Special Health Boards and NHS NSS. Respondents commented that the proposed annual reporting template was not included in the statutory guidance; we confirm that the template is not part of the guidance but will sit alongside it. We are currently testing the reporting template with all the organisations to ensure it is fit for purpose and to make any improvements prior to the Act coming into force on 01 April 2024. The template has associated instructions on how to complete it and we are looking at producing example reports that organisations can refer to when completing their own reports. There was one comment that asked whether the annual report was only about new services, rather than existing services. This is not the case, the annual report will include all services provided by the Boards / NHS NSS. The reference to new services relates to the requirements around planning and securing services

from third parties. With regards to planning and securing services there was also a query as to whether Boards / NHS NSS will have to continue to report on the performance of third parties past the planning and securing stage. Again this is not the case, reporting on third parties is only at the planning and securing stage, not ongoing.

There was one comment that stated that the annual report should contain a suite of outcome measures that would be the same for each organisation and would allow comparison between organisations and over time. To confirm, the annual report required from organisations is about how they have carried out their duties in the Act over the previous year. It is a combination of assessment against each duty, narrative regarding how the duties have been carried out, with detail on both successes and risks, along with details on how this has improved outcomes for service users. This will provide a rich source of information to inform Scottish Government policies on staffing and identify areas of good practice that can be shared, along with risks, whether local or national.

3.11 Chapter 14: Role of Healthcare Improvement Scotland (HIS)

Chapter 14 outlined the role of HIS under the Act in relation to the monitoring of compliance with staffing duties by Health Boards, relevant Special Health Boards and NHS NSS, the monitoring and review of the common staffing method and the monitoring and development of staffing tools. There was one comment about how staffing tools will be prioritised if HIS can revoke or replace tools. It is important to note that staffing tools are only one element of one duty and their use does not apply to everyone; you do not need a tool to be compliant with the Act. A procedure is put in place by the Act for the monitoring of tools and reviewing/ replacing them. This includes the need for HIS to collaborate with stakeholders in the development of new or revised tools and any new or revised tool will require to be “prescribed” in regulations by the Scottish Ministers before its use becomes mandatory for those types of health care that it covers.

There were some suggestions as to revised wording in the chapter. Firstly that the methods that HIS will use to monitor compliance should be defined. It is not the intention of the Scottish Government to limit the methods that HIS can use through the guidance. Secondly there was a suggestion that the list of stakeholders that HIS must collaborate with should be amended to state that it would only include groups in the settings and staff groups to which the tool applies. The Act requires HIS to collaborate with the following groups in developing tools:

(a) the Scottish Ministers;

(b) Social Care and Social Work Improvement Scotland;

(c) every Health Board;

(d) every relevant Special Health Board;

(e) every integration authority;

(f) the Agency;

(g) such trade unions and professional bodies as HIS considers to be representative of employees of the persons mentioned in paragraphs (c) to (f);

(h) such professional regulatory bodies for employees of the persons mentioned in paragraphs (c) to (f) as HIS considers appropriate;

(i) such other providers of health care as HIS considers to have relevant experience of using staffing level tools and professional judgement tools; and

(j) such other persons as HIS considers appropriate.

We are therefore limited in our flexibility as to who HIS collaborates with.

3.12 Chapter 15: Duty to ensure appropriate staffing and guiding principles in care services

Chapter 15 covered the duties on care service providers to ensure appropriate staffing and staff training. Comments were made by respondents on the timing of the implementation for care service providers, the split between health care and care duties in the guidance and the types of care services included in the Act which have been addressed earlier in this document. As stated earlier, the requirements of the Act are similar to the existing legislation for care service providers; there was a suggestion from respondents that we include a comparison to illustrate this. We will confirm whether this can be done for the statutory guidance but have included a comparison below for information.

Ensuring appropriate staffing

Current legislation (Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011, Regulation 15(a)) states that A provider must, having regard to the size and nature of the care service, the statement of aims and objectives and the number and needs of service users, ensure that at all times suitably qualified and competent persons are working in the care service in such numbers as are appropriate for the health, welfare and safety of service users.

Health and Care (Staffing) (Scotland) Act 2019, Section 7, Duty on care service providers to ensure appropriate staffing, states that any person who providers a care service must ensure that at all times suitably qualified and competent individuals are working in the care service in such numbers as are appropriate for:

(a) the health, wellbeing and safety of service users;
(b) the provision of safe and high-quality care; and
(c) in so far as it affects either of those matters, the wellbeing of staff.

In determining what constitutes appropriate numbers, regard has to be had to:

(a) the nature of the care service;
(b) the size of the care service;
(c) the aims and objectives of the care service;
(d) the number of service users; and
(e) the needs of service users

Section 3(1) says that when carrying out the duty to ensure appropriate staffing under section 7, any person who provides a care service must have regard to the guiding principles for health and care staffing (which are set out in section 1).

Section 1 provides that the guiding principles are:

(a) that the main purposes of staffing for health care and care services are:
    (i) to provide safe and high-quality services, and
    (ii) to ensure the best health care or care outcomes for service users
(b) in so far as consistent with these main purposes, staffing is to be arranged while:
    (i) improving standards and outcomes for service users
    (ii) taking account of the particular needs, abilities, characteristics and circumstances of different service users
    (iii) respecting the dignity and rights of service users
    (iv) taking account of the views of staff and service users
    (v) ensuring the wellbeing of staff
    (vi) being open with staff and service users about decisions on staffing
    (vii) allocating staff efficiently and effectively, and
    (viii) promoting multi-disciplinary services as appropriate

Training

Current legislation, (Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011, Regulation 15(b)) states that a provider must, having regard to the size and nature of the care service, the

statement of aims and objectives and the number and needs of service users, ensure that persons employed in the provision of the care service receive:

(i) training appropriate to the work they are to perform
(ii) suitable assistance, including time off work, for the purpose of obtaining further qualifications appropriate to such work

Health and Care (Staffing) (Scotland) Act 2019, Section 8(1), Training of staff, states that Any person who provides a care service must ensure that individuals working in the care service receive-

(a) appropriate training for the work they are to perform, and
(b) suitable assistance, including time off work, for the purpose of obtaining further qualifications appropriate to their work

It is noted that any training will need to include training on any prescribed staffing method, however there is no such staffing method at present, (see comments on chapter 17).

Respondents made comments that although the legislation covers a wide variety of care services, the examples used do not always reflect this. We will look to see what additional examples we can add to ensure the guidance reflects this variety. There were also comments about the consistency between definitions in different sections of the chapter and between this chapter and chapters 4 and 6 on the guiding principles and duty to ensure appropriate staffing in health care. We will address this for the final version, along with considering what other resources we can reference for the different sectors. It is also noted that training resources have been produced and the Care Inspectorate has a programme of engagement with care service providers, local and integration authorities around the requirements of the Act.

A number of comments requested more detail about how the guiding principles and duty to ensure appropriate staffing could be implemented, for example, details on seeking the views of individuals using services, relatives and staff; feeding back information about decisions on staffing; and on how to manage staff wellbeing. We will look to see if we can add more examples and links to resources for the final version. However, as explained in section 2.4.2 above, the role of the statutory guidance is not to prescribe how organisations must implement the requirements of the Act; this will need to be tailored to the specific situation and are for local organisational procedures.

Regarding the requirements for staff training, respondents commented that there was little information on what phrases such as ‘suitable assistance’ (for the purposes of obtaining further qualifications) and ‘further qualifications appropriate to their work’

meant in practice. The wording of the requirement for training of staff in the Act is effectively the same as the current requirement under the Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011 which care service providers have had to comply with since 2011. Therefore care service providers should already be complying with requirements of the Act when they come into force on 01 April 2024.

Queries were also raised as to any requirements on reporting by care service providers. To confirm, there are no requirements in the Act for care service providers to provide reports directly to Scottish Ministers; providers will continue to complete annual returns for the Care Inspectorate and this will be made clearer in the final version of the guidance.

3.13 Chapter 16: Planning or securing the provision of care services from others

Chapter 16 provided details of the requirements on local authorities and integration authorities when planning or securing the provision of a care service from a care service provider. Comments were made about the use of the word 'commissioning' as a proxy for 'planning and securing' and how these were not necessarily interchangeable; we will address this. There was also confusion as to which care services this applies to; these are listed in section 2.4.3 above and we will make this clearer in the final version of the guidance. Similar to the comments made on chapter 5 around planning or securing the provision of services in health care, respondents to chapter 16 made comments about how this will work in practice for the large variety of different contracts, agreements and arrangements that are made with different care service providers. We are looking to see how we can provide separate 'quick guides' for different services around this duty. To clarify, this requirement only applies at the point of planning and securing a service; it is not retrospective so there is no requirement to review all arrangements already in place. There were queries as to what is meant by the 'planning or securing' stage, is this at the point of, for example, care homes signing up to the National Care Home Contract or is it at the point where an individual is matched to a specific service. We will clarify this for the guidance.

It is likely that current procedures for planning or securing care services from care service providers will already include consideration of staffing so it may be that organisations are already fulfilling many or all of the requirements of the Act.

Comments were raised about the reporting requirements. To confirm, local authorities and integration authorities will have to report annually at the end of each financial year on how they have complied with the duty on planning or securing the provision of care services and any risks that may affect their ability to comply with

the duty (i.e. any risks around planning or securing the provision of care services). Scottish Government have drafted a template for this reporting which is being tested by a number of authorities.

3.14 Chapter 17: Role of Social Care and Social Work Improvement Scotland (the Care Inspectorate)

Chapter 17 of the statutory guidance outlined the role of the Care Inspectorate under the Act in relation to the development, recommendation and review of staffing methods for use by care service providers. The Act enables the Care Inspectorate to develop and recommend to Scottish Ministers a staffing method for use by persons who provider care home services for adults, with the option of developing staffing methods for other care sectors in the future. Scottish Ministers can then make regulations that require the use of these staffing methods. The responses to the consultation indicated that there was confusion as to the requirement on care service providers to use a specific staffing method and we will need to explain this more clearly in the final version of the guidance.

To confirm, there is no prescribed staffing method at present and care service providers will not be required to use a specific staffing method on 01 April 2024. The development of staffing methods is a long-term project and the Care Inspectorate has been working with care service providers to see what methods and tools are in use currently. They have also developed a staffing method framework that can be used by care service providers to inform staffing. This work will continue post 01 April 2024 and the Care Inspectorate is required to collaborate with the following persons in developing any staffing method:

(a) the Scottish Ministers;

(b) Healthcare Improvement Scotland;

(c) the Scottish Social Services Council;

(d) every Health Board;

(e) every local authority;

(f) every integration authority;

(g) such persons as the CI considers to be representative of the providers and users of the care services to whom the staffing methods are to apply;

(h) such trade unions and professional bodies as the CI considers to be

representative of individuals working in those care services; and

(i) such other persons as the CI considers appropriate.

The approach used for such collaboration will be for the Care Inspectorate to design.

Responses from participants also queried the role of the Care Inspectorate in monitoring care service providers compliance with the requirements of the Act and the lack of information in the statutory guidance about this role. To confirm, the Care Inspectorate will continue to register, inspect and monitor care services in the same manner as they do currently. With respect to staffing, from 01 April 2024 they will monitor against the requirements of the Act rather than the requirements of the Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011. We will ensure that the final version of the statutory guidance explains this.

3.15 Chapter 18: Glossary

There were a number of suggestions of amendments and additions that could be made to the glossary which we will consider for the final version of the guidance.

4. Next Steps

We will now take all the comments and suggestions made as a result of the public consultation, along with other feedback on the statutory guidance, such as that from the testing programme and our engagement with individual organisations to produce a final version of the statutory guidance. We will involve external stakeholders in this process as appropriate. The final guidance will be published on 01 April 2024 to coincide with the commencement of the Act.

Annex A: List of organisations that responded to the public consultation

Aberdeen City Health & Social Care Partnership

Aberdeenshire Integrated Joint Board

Angus Health and Social Care Partnership

British Dental Association

British Medical Association Scotland

Busy Bees Nurseries (Scotland) Ltd

Care Inspectorate

COSLA

Dumfries and Galloway Council

East Ayrshire Health and Social Care Partnership

Equality and Human Rights Commission

Family Circle Care Ltd

General Medical Council

Glasgow City Council

GMB Scotland

HC-One Scotland

Health & Social Care Moray

Health care Improvement Scotland

Hospice UK

Independent Health care Providers Network

National Day Nurseries Association

NHS Ayrshire & Arran

NHS Education for Scotland

NHS Grampian

NHS Greater Glasgow and Clyde

NHS Lothian

NHS Lothian Pharmacy and Medicines Service

NHS National Services Scotland

NHS Tayside

Optometry Scotland

Pharmacists' Defence Association

Royal College of Nursing Scotland

The Royal College of Physicians of Edinburgh

Royal College of Podiatry

Scotscare Ltd

Scottish Ambulance Service

Scottish Borders Health and Social Care Partnership Strategic Planning Group's Care Providers Strategic Advisory Group

Scottish Care

Scottish Learning Disability Lead Nurse Group

Scottish Out of School Care Network

Scottish Social Services Council

Social Work Scotland

UNISON Scotland

Unite the Union Scotland

Volunteer Scotland

West Lothian Council

Scottish Government
Riaghaltas na h-Alba

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