These notes relate to the Health and Care (Staffing) Scotland) Act 2019 (asp 6) which received Royal Assent on 6 June 2019

HEALTH AND CARE (STAFFING) SCOTLAND) ACT 2019

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – Guiding Principles for Staffing

Section 1 – Guiding principles for health and care staffing

9. Section 1 sets out guiding principles for the provision of health and care staffing, specifically that the primary purposes of staffing for health and care services are to provide safe and high-quality services; and to ensure the best health care outcomes for service users, while also meeting, in so far as consistent with those primary purposes, the principles set out in subsection (1)(b).

10. The multi-disciplinary nature of health services and care services is acknowledged in subsection (1)(b)(viii), which sets out that staffing for health and care services are to promote multi-disciplinary services as appropriate, with subsection (2) defining 'multi-disciplinary services' as health care or care services delivered together by individuals from such a range of professional disciplines as necessary in order to meet the needs of, and improve standards and outcomes for, service users.

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

Section 2 – Guiding principles etc. in health care staffing and planning

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

13. Subsections (3) and (4) place a duty on Health Boards and the Agency to report to Scottish Ministers on how they have complied with subsections (1) and (2). This also requires them to report on how the services contracted have improved outcomes for patients. Subsections (5) and (6) require the Scottish Ministers to collate these reports and lay this collated report before the Parliament, setting out the steps taken by Health

Boards and the Agency to comply with subsections (1) and (2), and the steps that Ministers will take in response to the recommendations and conclusions of the report.

Section 3 – Guiding principles etc. in care service staffing and planning

14. Section 3 makes equivalent provision to section 2 for care services, setting out that any person providing a care service must also have regard to the principles set out in section 1 when carrying out the duty to ensure appropriate staffing imposed by section 7 of the Act.

15. Section 3 also places a duty on local authorities and integration authorities (as defined in the Public Bodies (Joint Working) (Scotland) Act 2014 ("the 2014 Act") to have regard to the guiding principles, and the duties imposed by this Act, and Chapters 3 and 3A of the 2014 Act, on care service providers, when commissioning care services. As with section 2 for the NHS, this means that the new legal framework becomes a relevant part of the planning of such services, as well as their delivery.

16. Subsection (3) allows the Scottish Ministers to issue guidance to local authorities and integration authorities which they must have regard to in carrying out their duties outlined above. Before issuing the guidance, the Scottish Ministers must consult the persons mentioned in subsection (4). Subsection (5) requires that the guidance is published.

17. Subsection (6) creates a duty on local authorities and integration authorities to report to Scottish Ministers on how they have complied with subsection (2) and any risks that may affect their ongoing ability to do so.

Part 2 – Staffing in the NHS

Section 4 – NHS duties in relation to staffing

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

19. New section 12IA makes equivalent provision for the NHS to the existing staffing duty on care service providers in Regulation 15 of the Social Care and Social Work Improvement Scotland (Requirements for Care Service) Regulations 2011 (S.S.I. 2011/210) ("the 2011 Regulations") – restated by section 7 of the Act (see paragraphs 54 to 55 below). It introduces a duty on all geographical Health Boards and the Agency to ensure that an appropriate number of suitably qualified and competent individuals, from such a range of professional disciplines as necessary, are working at all times for two related purposes: for the health, wellbeing and safety of patients, for the provision of safe and high-quality health care (and, in so far as it affects either of these, the wellbeing of staff). Subsection (2) lists a number of factors that Health Boards and the Agency must have regard to when determining appropriate numbers of staff - this applies to all staff groups and all types of health care, including those not covered by the common staffing method in 12IJ.

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

21. New section 12IB makes provision for situations where a Health Board, relevant Special Health Board or the Agency secures the services of an agency worker. Subsection (2) sets out that the amount that Health Boards and the Agency pay to secure the service of

an agency worker should not exceed 150% of the amount that would be paid to a full-time equivalent employee of the Health Board, relevant Special Health Board or the Agency to fill the equivalent post for the same period. When, despite subsection (2), a Health Board does pay an amount higher than 150% within a quarterly reporting period, they must report to Scottish Ministers the number of occasions in that period when an amount higher than 150% was paid; the amount paid on each occasion (expressed as a percentage of the amount that would be paid to a full-time equivalent employee) and the circumstances that have required the higher amount to be paid. Scottish Ministers must then publish the information from Health Boards on the amount spent on all agency workers, and the reports received by them.

22. New sections 12IC and 12ID place a duty on Health Boards and the Agency to have arrangements in place for real-time, dynamic assessment of staffing requirements and identification of risks to the health, wellbeing and safety of patients and staff or the provision of safe and high quality health care caused by staffing levels (and to staff wellbeing if it impacts on those matters).

23. These provisions set out that there must be a procedure for any member of staff to identify such a risk, a procedure for the notification of any such risk to an individual with lead professional responsibility (whether clinical or non-clinical) in that area and a procedure for the mitigation of such risks by an individual with lead professional responsibility (whether clinical or non-clinical) in that area. This individual must seek and have regard to appropriate clinical advice, as necessary, when mitigating the risk. Where this is not possible, section 12ID puts a duty on Health boards and the Agency to have in place a procedure for the escalation of the risk to the appropriate decision maker within the organisation, who must seek, and have regard to, appropriate clinical advice in reaching any decision, where necessary. Decisions must be notified to all those involved in identifying the risk, those involved in attempting to mitigate the risk, those involved in reporting the risk, and those who gave clinical advice. Any of these individuals may record disagreement with the decision reached, and request a review of the final decision on a risk – unless that decision has been taken at Board level.

24. Health Boards and the Agency must encourage and enable staff to use the procedures in section 12IC to identify and notify risks, and raise awareness amongst staff about the procedures in section 12ID. Health Boards and the Agency must also train individuals with lead professional responsibility, and other senior decision makers, in how to implement the arrangements for the identification, mitigation and escalation of risks and to ensure that they are given adequate time and resources to do so.

25. New section 12IE places a duty on Health Boards and the Agency to have arrangements to address severe and recurrent risks. They must put and keep in place arrangements to collate information relating to every risk escalated to a level to be determined appropriate by the Health Board or Agency, and identify and address those risks which are considered to be either (or both) severe or liable to occur frequently. These arrangements must include a procedure for the recording of such risks; the reporting of them, as necessary, to a more senior decision-maker – including to the Board, where appropriate; the mitigation of the risk, where possible – with appropriate clinical advice sought in doing so; and the identification of actions to prevent the risk occurring again in future, so far as possible.

26. New section 12IF places a duty on Health Boards and the Agency to put and keep in place arrangements for seeking and having regard to appropriate clinical advice in relation to decisions on staffing and when putting in place arrangements in relation to staffing under sections 12IA to 12IE, and 12IH to 12IL, and for recording and explaining decisions where they conflict with that advice. These arrangements must include a procedure, where the Health Board or Agency has reached a decision which conflicts with the clinical advice it has received, for the identification of risks caused by that decision; for the mitigation of any such risks, so far as possible; for the notification of any such decision, and the reasons for it, to any individual who gave clinical advice

on the matter; and for any such individual to record disagreement with the decision. They must also include a procedure for individuals with lead clinical professional responsibility for particular types of health care to report, on a quarterly basis at least, about the extent to which they consider that the Board or the Agency are complying with their duties under sections 12IA to 12IE, 12IH to 12IL. Individuals with lead clinical professional responsibility are to enable and encourage other employees to give views on the operation of this section and to record such views in their quarterly reports. Health Boards and the Agency must have regard to the reports they receive. Individuals with lead clinical professional responsibility are to be made aware of how to implement these arrangements and are to be given adequate time and resources to implement them.

27. New section 12IG places a duty on the Scottish Ministers to take all reasonable steps to ensure that there are sufficient numbers of registered nurses, registered midwives, medical practitioners (and such other types of employees as the Scottish Ministers prescribe by regulations) available to Health Boards, relevant Special Health Boards and the Agency to allow them to comply with their duties under section 12IA. In meeting this duty, Scottish Ministers must have regard to the number of people training for healthcare professions and the variation in staffing needs caused by differences in the geographical areas for which Health Boards are responsible. Subsection (3) requires Scottish Ministers to lay an annual report before Parliament setting out the extent to which their compliance with the duty to ensure sufficient numbers of staff has enabled Health Boards, relevant Special Health Boards and the Agency to comply with the general duty.

28. New section 12IH places a requirement on Health Boards and the Agency, when complying with the duty in section 12IA, to ensure that all individuals with lead clinical professional responsibility for a team of staff receive sufficient time, and resources, to discharge that responsibility and their other professional duties. Subsections (a)-(c) sets out that this includes supervising the meeting of the clinical needs of patients; managing, and supporting the development of, their staff; and contributing to the delivery of safe, high-quality and person-centred health care- although this is not an exhaustive list.

29. New section 12II places a requirement on Health Boards and the Agency, when complying with the duty in section 12IA, to ensure that employees working for them receive training which the Board considers appropriate for the provision of safe and high quality health care and the health, wellbeing and safety of patients – and such time or resources, as the Board considers adequate, to undertake this training.

30. New section 12IJ sets out a duty for all geographical Health Boards and the Agency to follow a common methodology when determining staffing provision for certain types of health care. Ministers may prescribe in regulations the minimum frequency at which this common staffing method is to be used – these regulations will be subject to the negative parliamentary procedure. Health Boards and the Agency will have the discretion to use it more often if they wish.

31. Subsection (2) provides further information on what constitutes the common staffing method, including all the separate steps – set out in paragraphs (a) to (e) – which are to be followed. The method includes the use of a staffing level tool and professional judgement tool (designed to provide quantitative information in order to assist in determining the appropriate staffing level based on patient needs) and consideration of health care quality measures, as well as a number of other factors to be taken into account when making decisions about staffing requirements, including the consideration of patient needs, the experience gained from using the real-time assessment and mitigation arrangements under sections 12IC, 12ID and 12IE, and the seeking of appropriate clinical advice (as defined in section 12IO).

32. The final step, set out in subsection (2)(e), requires all geographical Health Boards and the Agency, having followed the steps described in subsections (2)(a) to (2)(d), to decide on any changes required to the staffing establishment (staffing levels) and the

way in which it provides care (service redesign) as a result of following this common staffing method. Subsection (4) provides a definition of staffing establishment.

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

34. Subsection (5) allows the Scottish Ministers to make regulations to vary the detailed steps in the common staffing methodology set out in subsection (2). These regulations will be subject to the affirmative procedure in the Scottish Parliament, by virtue of section 4(4) of this Act amending section 105(3) of the 1978 Act.

35. New section 12IK specifies the types of health care provision, in conjunction with the location where it is provided and the type of employee carrying out the provision, that are covered by the section 12IJ duty to follow the common staffing method. The list of types of health care mirrors those areas for which a staffing level tool already exists, or is currently under development. Since part of the common staffing method requires the use of a staffing level tool, the method can only be followed where such a tool exists. Subsection (2) sets out that that any references to registered nurses, registered midwives and medical practitioners in the health care settings listed in the table in section 12IK(1) include individuals providing care for patients and acting under the supervision of, or discharging duties delegated to the individual by the registered nurse, registered midwife or medical practitioner. This could for example include health care workers, and means that they are covered by the common staffing method in section 12IJ. Subsection (3) clarifies that student nurses, student midwives and medical students are not included in these references to registered nurses, registered midwives and medical practitioners in the health care settings listed in the table in section 12IK(1). As a result, they are not covered by the common staffing method in section 12IJ.

36. The Scottish Ministers may modify any aspects of the types of health care listed by regulations made under subsection (4). In this way, for instance, new areas can be added to reflect the development of new staffing levels tools in the future. This can include professions not currently covered by section 12IC, including allied health professions included in the register of members maintained by the Health and Care Professions Council under section 60 of the Health Act 1999. These regulations will be subject to the affirmative parliamentary procedure, by virtue of section 4(4) of this Act amending section 105(3) of the 1978 Act.

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

38. New section 12IM(1) places a duty on all geographical Health Boards and the Agency to report annually on how they have carried out their duties under section 2 and new sections 12IA (Duty to ensure appropriate staffing), 12IC (Duty to have real-time staffing assessment in place), 12ID (Duty to have risk escalation process in place), 12IE (Duty to have arrangements to address severe and recurrent risks), 12IF (Duty to seek clinical advice on staffing), 12IH (Duty to ensure adequate time given to clinical leaders), 12II (Duty to ensure appropriate staffing: training of staff), 12IJ (Duty to follow common staffing method) and 12IL (Training and consultation of staff). Subsection (3) of inserted section 12IM sets out that this information must include information about any challenges or risks faced by Boards whilst carrying out the duties

under sections 12IA, 12IJ and 12IL, and steps that will be taken to address them. Boards must publish this report and submit it to Scottish Ministers within one month from the end of the relevant financial year, i.e. 31 March, with flexibility afforded on the manner of publication (it could for instance be carried out through existing reporting structures rather than in separate form).

39. Subsection (2) of inserted section 12IM requires the Scottish Ministers to collate the reports provided by the Health Boards and the Agency under subsection (1) into a combined report to be laid before the Parliament, alongside a statement setting how Scottish Ministers have taken this information into account when developing their policies for the staffing of the health service. Subsection (4) of section 12IM places a similar requirement on Scottish Ministers to publish a report, as soon as reasonably practicable after the end of each financial year, setting out how each Health Board and the Agency has carried out its duties under sections 12IA, 12IJ, and 12IL. Subsection (5) of 12IM specifies that the report produced under subsection (4) must also set out any risks or challenges faced by the Health Board or Agency in carrying out these duties and steps that Ministers will take as a result, while subsection (6) of 12IM requires Ministers to lay this report before the Parliament. Subsection (6) of new section 12IM also requires Ministers to lay before the Parliament a summary and evaluation of the information submitted to them by Health Boards and the Agency under subsection (1).

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

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

42. Definitions of "employee" and "health care" are provided in new section 12IO, as a result of which the existing section 12H(3) is repealed. These definitions apply to the existing section 12H, as well as to the new sections 12IA to 12IN. The definition of "employee" is narrowly framed and would exclude staff from third party agencies. It also includes those employed by a local authority where an integration scheme under Part 1 of the Public Bodies (Joint Working) (Scotland) Act 2014 applies. This means that, where local authorities are delivering health care functions delegated to them under Part 1 of the 2014 Act, the requirement to comply with the common staffing method flows through to cover the local authority employees delivering the health care. Section 12IO also defines "appropriate clinical advice", which must be taken account of sections 12IA, 12IC, 12ID, 12IE, 12IF, and 12IJ(2)(c)(vii) as part of the new staffing duties; and 'relevant Special Health Boards,' to whom duties apply as a result of section 5.

Section 5 – Application of duties to certain Special Health Boards

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

and so the duties in relation to reporting and following guidance under sections 12IM and 12IN are more limited.

Section 6 – Role of Healthcare Improvement Scotland in relation to Staffing

44. Section 6 amends the National Health Service (Scotland) Act 1978 by inserting new sections 12IP to 12IW, as well as making consequential amendments to sections 10C and 10I of the Act. It creates new functions for Healthcare Improvement Scotland (HIS) in relation to staffing.

45. New section 12IP sets out that HIS must monitor the discharge, by every Health Board, relevant Special Health Board and the Agency, of their duties under the Act. This does not extend to the duty under section 12IB.

46. New section 12IQ places a duty on HIS to monitor the effectiveness of the common staffing method, as set out in section 12IJ(2), and the way in which Health Boards, relevant Special Health Boards and the Agency are using it. HIS must, from time to time as it considers appropriate, carry out reviews of the common staffing method. Subsection (3) sets out who HIS must consult in carrying out such a review, and requires HIS to have regard to the guiding principles set out in section 1 of the Act in undertaking this task. Subsection (4) provides Scottish Ministers with a discrete power to direct HIS to carry out a review of the common staffing method.

47. Following a review, HIS may recommend changes to the common staffing method by submitting to Scottish Ministers, and publishing, a report setting out the summary of the review, its recommendations for changes to the common staffing method and reasons for those recommendations. HIS may take into account the development of a new or revised staffing level tool or professional judgement tool under section 12IR(2) in recommending changes. The Scottish Ministers may then respond to HIS' recommendations by amending the common staffing method using their regulation-making power under section 12IJ(5).

48. New section 12IR places a duty on HIS to monitor the effectiveness of any staffing level tool or professional judgement tool, including any new or revised tool developed under section 12IR(2), which has been prescribed by the Scottish Ministers under section 12IJ(3). It also provides HIS with a power to develop, and recommend to Scottish Ministers, new or revised staffing level tools and professional judgement tools for use in relation to any kind of health care provision. The Scottish Ministers may then, by regulations under section 12IJ(3)(a) or (b), prescribe the use of said tools. Subsection (3) lists those whom HIS must collaborate with in developing such tools. In undertaking this collaboration, HIS must take into account such guidance published by professional and improvement organisations as it considers appropriate as well as relevant clinical evidence and research. HIS and those who it collaborates with must have regard to the guiding principles set out in section 1 of the Act in doing so. Subsection (5) allows the Scottish Ministers to direct HIS to develop a new or revised staffing level tool or professional judgement tool.

49. Subsection (6) provides a power for the Scottish Ministers to make regulations requiring assumptions to be made by HIS, in the process of making a recommendation to the Scottish Ministers on the development of new or revised staffing level tools and professional judgement tools, on certain matters (for example staff absence and bed occupancy levels).

50. New section 12IS places a duty on HIS, when developing a new or revised staffing level tool or professional judgement tool, to consider whether the tool should apply to more than one professional discipline. It also gives HIS a power to recommend to the Scottish Ministers that an existing staffing level tool or professional judgement tool, prescribed under section 12IJ(3), should apply to more than one professional discipline.

51. New section 12IT requires Health Boards, relevant Special Health Boards and the Agency to give HIS such assistance as it requires in performing its functions under sections 12IP to 12IS.

52. New section 12IU gives HIS a power, in pursuing its functions under new sections 12IP to 12IS, to serve a notice on a Health Board, relevant Special Health Board or the Agency, which it must comply with, requiring it to provide HIS with information about any matter specified in the notice, by a specified date. The notice must explain why the information is required and what function HIS is performing.

53. New section 12IV sets out that HIS, every Health Board, relevant Special Health Board and the Agency must have regard to any guidance issued by the Scottish Ministers about the operation of sections 12IP to 12IU, and that prior to issuing such guidance, the Scottish Ministers must consult with those listed in section 12IR(3).

54. New section 12IW defines key terms for the purposes of sections 12IP to 12IV. Subsections (3) and (4) of section 6 make consequential amendments to the 1978 Act to bring these functions within the ambit of HIS' "health service functions" for the purposes of the Act, and to extend the existing powers of HIS to inspect services to the pursuance of these new functions.

Part 3 – Staffing in Care Services

Section 7 – Duty on care service providers to ensure appropriate staffing

55. This section restates in primary legislation the existing duty on care service providers in regulation 15 of the 2011 Regulations, which were made under the power in section 78 of the 2010 Act for the Scottish Ministers to impose appropriate requirements on care services. Section 7(1) places a duty on a person who provides a care service to ensure that an appropriate number of suitably qualified and competent individuals are working in their service at all times for two related purposes: for the health, wellbeing and safety of service users, for the provision of safe and high-quality care (and, in so far as it affects either of these, the wellbeing of staff).

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

Section 8 – Training of staff

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

58. Subsection (2) provides that the training duty in subsection (1) includes the use of any staffing method prescribed by the Scottish Ministers under the new section 82B power inserted into the 2010 Act by section 12 of the Act.

Section 9 – Annual report on staffing in care services

59. Section 9 requires Scottish Ministers must publish and lay before the Scottish Parliament an annual report setting out a summary of how the duties imposed by sections 3,7 and 8 on those who provide, plan and secure services are being discharged; the effect that staffing levels in care services have on the discharge of those duties; the steps taken by Ministers to support staffing levels in care services in order to assist the discharge of those duties; how the matters in subsection (1)(a) to (c) have been taken into account in determining the future supply of registered nurses, medical practitioners

and such other care professionals as are considered relevant to the discharge of the duties in sections 3 and 7; and the steps that Ministers have taken to ensure that funding is available to any person who provides a care service in order to assist the discharge of the duties in sections 3, 7 and 8. Subsection (3) sets out the matters which Scottish Ministers must have regard to in preparing the report.

Section 10 – Ministerial guidance on staffing

60. This section allows the Scottish Ministers to publish guidance on carrying out the duties introduced by sections 3(1), 7 and 8. Before issuing guidance, the Scottish Ministers must consult the persons mentioned in subsection (2). Care service providers must have regard to any guidance issued when carrying out those duties: in other words they must follow such guidance unless they can show that it is reasonable in all the circumstances not to.

Section 11 – Interpretation of sections 7 to 10

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

Section 12 – Functions of SCSWIS in relation to staffing methods

62. Section 12 amends the 2010 Act by introducing powers for SCSWIS to develop staffing methods for use by those providing care home services for adults, in the first instance, but with the possibility of extension to other care services through future regulations under inserted section 82A(1)(b). If such methods are developed, SCSWIS may recommend them to the Scottish Ministers, who can, through separate regulations under inserted section 82B(1), mandate their use by care services.

63. New section 82A(1) gives this statutory function to SCSWIS to develop staffing methods. In doing so, it must work together with the persons listed in subsection (2). In turn, in undertaking this collaborative development of staffing methods, subsection (3) provides that SCSWIS and the other persons listed in subsection (2) must have regard to any ministerial guidance on this section, and also have regard to the guiding principles for health and care staffing set out in section 1 of the Act. Subsection (4) requires that any guidance issued under subsection (3) is published.

64. Subsection (5) provides that a staffing method which is developed and recommended to Ministers must include staffing level tools related to workload and professional judgement (see the explanation of the relevant health tools in paragraph 30 above on what is envisaged here). Subsection (6) sets out that a staffing method developed and recommended for use by persons who provide care home services for adults or other prescribed care services may include a requirement for providers to put and keep in place risk management procedures that are appropriate to the care services provided. Subsection (7) then sets out particular examples of what may be taken into account by SCSWIS when developing the staffing method.

65. New section 82B sets out that the Scottish Ministers can require the use of a staffing method developed by SCSWIS by regulations – this can be either as developed and recommended by SCSWIS or with modifications by Ministers as appropriate. These regulations may also specify the types of settings and employees to which the requirement to use a staffing method applies; specify the exact tools that must be used for the purpose of section 82A(5); and the frequency with which such tools are used.

66. New section 82C provides a power for the SCSWIS to review and redevelop any staffing methods prescribed for use under section 82B, and to make recommendations to Scottish Ministers on those staffing methods which need to be replaced or revised. Subsection (3) requires SCSWIS in doing so to collaborate with the list of persons in section 82A(2) and have regard to Ministerial guidance; and applies the same rules on

the content of a revised staffing method as apply to the development of a new staffing method. Subsection (4) enables Scottish Ministers to direct SCSWIS to revise a staffing method.

67. New section 82D enables SCSWIS to carry out reviews on the effectiveness of the operation of the general duty to ensure appropriate staffing in section 7 of the Act. Subsection (2) enables SCSWIS to publish a report to Scottish Ministers on that subject.

68. New section 82E requires SCSWIS, when developing a staffing level tool as part of a staffing method under 82A, or a revised staffing methodology under 82C, to consider if the tool or method should be multi-disciplinary i.e. apply to more than one professional discipline. Subsection (2) allows for SCSWIS to recommend to Scottish Ministers that a staffing level tool which has previously been prescribed as part of a staffing method under section 82B should apply to more than one professional discipline.

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

Section 13 – Care services: consequential amendments

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

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

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

73. As a result of the duty being introduced into primary legislation by sections 7 and 8, subsection (2) repeals the similar existing provision set out in secondary legislation, in regulation 15 of the 2011 Regulations.

Part 4 – General Provisions

Section 14 – Ancillary provision

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

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

Section 15 – Commencement

76. Subsection (1) of this section provides that this section and sections 14 and 16 come into force on the day after Royal Assent. The remainder of the Act, once enacted, comes into force on the day or days appointed by the Scottish Ministers in regulations made under subsection (2).

77. Subsection (3)(a) provides that these commencement regulations may also include transitional, transitory or saving provision. It should be noted that these aspects are not

"free-standing" powers, but powers that are ancillary to commencement regulations, to make provision associated with transition etc. in connection with bringing the substantive powers into force.

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

Section 16 – Short title

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