



RCN Scotland's response to the Scottish Government consultation on a Human Rights Bill for Scotland

<https://consult.gov.scot/equality-and-human-rights/a-human-rights-bill-for-scotland-consultation/>

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Overall, there were nearly 600 fewer nursing students starting university in autumn 2022 than the Scottish government's recommended intake target of 4,536 (SFC, 2022). There are particular shortfalls of new nursing students in learning disabilities where there are 40% fewer students than planned (66 fewer students), in mental health nursing with 16% fewer students (139 fewer students), and in adult nursing where 12% fewer students than planned began degree courses in autumn (page 24).

These figures give real cause for concern that there will not be enough new nurses coming through to ensure full and safe staffing in future.

The Health and Care (Staffing) (Scotland) Act 2019 is due to be implemented from 1 April 2024. It places similar safe staffing duties on the NHS and on "any person who provides a care service." The core of each duty is:

to ensure that that at all times suitably qualified and competent individuals... are working in such numbers as are appropriate for

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

The Scottish Ministers have a duty under the Act to take all reasonable steps to ensure the NHS has enough nurses, midwives and medical practitioners (i.e., doctors) to fulfil this duty.

Act 1978 by section 4 “to ensure appropriate staffing: number of registered healthcare professionals etc.”

We also suggest that the Human Rights Bill is drafted to make it clear that there is an interdependency between the enjoyment and enforceability of the Article 12 right and the provisions of the Health and Care (Staffing) (Scotland) Act 2019.

Our second concern

Our second concern is that there is no consideration in the consultation of the enforcement of the Article 12 right against the state by its employees. This right would apply to all state employers and employees but here we are concerned with employers and employees in the NHS and contracted health and care providers. That is where most of our members work.

There is no appreciation either of how this right (or others) interact with employment law more widely, or with the employment tribunal system.

The likely problem can be illustrated as follows: An employee of the NHS or of a contracted health and care provider believes that they have been denied the enjoyment of their Article 12 right by their employer. The employee argues that their physical and mental health is suffering because the employer arranges their work on a basis that, whilst technically legal, makes it impossible in practice for them to enjoy the highest attainable standard of physical and mental health. This would not be an individualised claim to do with, for example, bullying by a colleague. It would be a claim that the employer’s system was at fault, regardless of individual behaviour.

For example, an NHS nurse has to regularly work unpaid extra hours at the end of their shifts to properly complete paperwork and handover to the next shift. This is because (a) the Health Board cannot staff its establishment (that is the number of staff posts it needs, and is funded for, to be considered fully staffed) so that everyone on every shift is in a similar position, and (b) there is an unofficial -but demonstrable- management expectation that working these extra hours is the norm. In our example, this means that the nurse has insufficient time outwith their contracted working hours to travel to and from work safely and affordably; source and prepare healthy food; look after their children; exercise; attend counselling; and so on.

If it was established that there was a direct line between the employer’s actions and the breach of the employee’s Article 12 right the employee would be entitled to a remedy. But it is hard to see what that would look like in this situation. What would happen if the remedy required action on the part of the Health Board or the Scottish Government which neither had any chance of being able to deliver? For example, if the Health Board consistently failed to staff its establishment or if the Scottish Government chose not to fund sufficient student nursing placements to contribute to the filling of registered nursing vacancies. There would be a serious risk that no real remedy could be delivered. If that were to be the case, then, once again, the Article 12 right would be unenforceable in any meaningful sense.

