

# Health, Social Care and Sport Committee

## 9<sup>th</sup> Meeting, 2024 (Session 6), Tuesday, 19 March 2024

### Subordinate legislation

### Note by the clerk

#### Purpose

1. This paper invites the Committee to consider the following negative instrument:
  - [National Health Service \(Common Staffing Method\) \(Scotland\) Regulations 2024](#)

#### Background

2. The Committee first considered this instrument at its meeting on Tuesday, 5 March 2024 and agreed to [write to the Scottish Government](#) following correspondence from the Royal College of Nursing (RCN) with concerns as to the instrument.
3. The Committee received [a response from the Scottish Government](#) on 8 March 2024 responding to the concerns raised by the RCN.

#### Procedure for negative instruments

4. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).
5. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.

6. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.
7. If the Parliament resolves to annul an SSI then what has been done under authority of the instrument remains valid but it can have no further legal effect. Following a resolution to annul an SSI the Scottish Ministers (or other responsible authority) must revoke the SSI (make another SSI which removes the original SSI from the statute book.) Ministers are not prevented from making another instrument in the same terms and seeking to persuade the Parliament that the second instrument should not be annulled.
8. Each negative instrument appears on the Health, Social Care and Sport Committee's agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not *always* possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.
9. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

## Guidance on subordinate legislation

10. Further guidance on subordinate legislation is available on the [Delegated Powers and Law Reform Committee's web page](#).

## Recommendation

11. The Committee is invited to consider any issues which it wishes to raise in relation to these instruments.

### Clerks to the Committee

**14 March 2024**

**SSI 2024/43**

**Title of Instrument:** National Health Service (Common Staffing Method) (Scotland) Regulations 2024

**Type of Instrument:** Negative

**Laid Date:** 09 February 2024

**Meeting Date:** 19 March 2024

**Minister to attend meeting:** No

**Motion for annulment lodged:** No

**Drawn to the Parliament's attention by the Delegated Powers and Law Reform Committee?** No

12. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on [27 February 2024](#) and made no recommendations in relation to this instrument.

**Reporting deadline:** 25 March 2024

### **Purpose**

13. The purpose of the instrument is to specify the minimum frequency at which the common staffing method is to be used in relation to specific types of health care, and the staffing level and professional judgement tools that must be used as part of the common staffing method for specified kinds of health care provision.

14. The policy note states that the instrument is required to specify that the common staffing method must be used no less than once annually in relation to certain types of health care. The Regulations also specify the speciality specific staffing level tools and the professional judgement tool that should be used as part of the common staffing method for specified kinds of health care provision. 10 speciality-specific staffing level tools are named in the instrument alongside the particular kind of health care provision for which each tool is to be used.

15. A copy of the Scottish Government's Policy Note is included in **Annexe B**.

### **Correspondence**

16. The Committee received [correspondence from the RCN](#) regarding the instrument on 23 February 2024 and again on 4 March 2024. The Committee [wrote to the Scottish Government](#) on 6 March 2024 regarding the RCN's concerns and received [a response dated 8 March 2024](#) regarding the instrument.

**Post-legislative scrutiny of the Health and Care (Staffing) (Scotland) Act 2019**

17. The Committee is currently undertaking post-legislative scrutiny of the Health and Care (Staffing) (Scotland) Act 2019. It wrote to the Cabinet Secretary for NHS Recovery, Health and Social Care on [7 November 2023](#) seeking a written update on various aspects in relation to this legislation. The Committee received a response from the Cabinet Secretary on [19 January 2024](#) and is currently considering its next steps in relation to this scrutiny.

## POLICY NOTE

**THE NATIONAL HEALTH SERVICE (COMMON STAFFING METHOD)  
(SCOTLAND) REGULATIONS 2024****SSI 2024/43**

The above instrument was made in exercise of the powers conferred by sections 121J(1) and (3) and 105(7) of the National Health Service (Scotland) Act 1978 (the 1978 Act). The instrument is subject to negative procedure.

**Summary Box**

This instrument specifies the minimum frequency at which the common staffing method is to be used in relation to specific types of health care, and the staffing level and professional judgement tools that must be used as part of the common staffing method for specified kinds of health care provision.

**Policy Objectives**

Section 121J of the 1978 Act - which is inserted by section 4 of the Health and Care (Staffing) (Scotland) Act 2019 (the 2019 Act) - sets out a duty for Health Boards and the Common Services Agency for the Scottish Health Service (commonly known as NHS NSS) to follow a common staffing method when determining staffing provision for specific types of health care. The duty extends to certain Special Health Boards (NHS 24, the National Waiting Times Centre Board and the State Hospitals for Board for Scotland). These Regulations make provision in relation to the common staffing method.

The common staffing method sets out a process by which a Health Board, NHS NSS or Special Health Board determines the staffing provision required for certain types of health care. It includes the use of speciality-specific staffing level tools and a professional judgement tool, along with consideration of a range of other factors which include among others the local context, patient needs, clinical advice and the different skills and experience of employees.

The instrument specifies that the common staffing method must be used no less than once annually. It is only required to be used in relation to certain types of health care, when that health care is provided in specified locations and by specified types of employees, as listed in section 121K of the 1978 Act. Those kinds of health care provision are ones where a validated speciality-specific staffing level tool is available, and, at present, do not include any kinds of health care provided by NHS NSS or NHS 24.

The Regulations also specify the speciality-specific staffing level tools and the professional judgement tool that should be used as part of the common staffing method for specified kinds of health care provision. 10 speciality-specific staffing level tools are named in the instrument alongside the particular kind of health care provision for which each tool must be used. A single professional judgement tool is also named, which is to be used for all kinds of health care provision listed in the instrument. It is important to prescribe the minimum frequency of use of the

common staffing method and the associated tools that must be used. This will enable consistent application across Scotland, make comparisons easier, and give reassurance that data has been obtained from tools that have undergone testing and validation. This is consistent with the policy aim of the Act, in enabling a rigorous evidence-based approach to decision-making about staffing.

### **EU Alignment Consideration**

This instrument is not relevant to the Scottish Government's policy to maintain alignment with the EU.

### **Consultation**

Two consultations were carried out during 2017-2018 as part of proposals for the Health and Care (Staffing) (Scotland) Bill, along with a series of stakeholder engagement events across Scotland. Following the passing of the Bill, statutory guidance to support the 2019 Act 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 guidance went out to public consultation in June-September 2023 and feedback will be used to revise and finalise the guidance, to be published on 01 April 2024, to coincide with commencement of the 2019 Act.

The Nursing and Midwifery Workload and Workforce Planning Programme (NMWWPP) was established in 2004; part of their remit being to develop workload tools and methodology. Development of each tool involved expert working groups comprising a variety of stakeholders. The staffing level and professional judgement tools specified in this instrument were originally developed through this process, endorsed by the Scottish Executive Nurse Directors and professional bodies, and have been recommended for use since April 2013 (with updates to the tools being made since then as required), albeit on a non-statutory footing. The NMWWPP also developed a triangulation process which illustrated the other information that should be considered alongside the staffing level and professional judgement tools when making decisions about staffing. This process formed the basis of the common staffing method. Healthcare Improvement Scotland is now responsible for continued management and development of the tools and the common staffing method and regularly consults with stakeholders as part of this.

### **Impact Assessments**

Impact assessments were carried out as part of the Parliamentary passage of the Health and Care (Staffing) (Scotland) Bill and it was considered that no further impact assessments were necessary in relation to these Regulations.

### **Financial Effects**

The Cabinet Secretary for NHS Recovery, Health and Social Care confirms that no BRIA is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

The staffing level and professional judgement tools have been recommended for use since 2013, and, along with the common staffing method, were being used regularly in many Health Boards prior to the pandemic. Following remobilisation of 2019 Act implementation, Health Boards have put plans in place to run the tools and use the common staffing method. The review process following use of the common staffing method sits within established governance processes within Health Boards. There should therefore be no significant impact as a direct consequence of mandating their continued use through legislation.

Scottish Government  
Chief Nursing Officers Directorate  
February 2024