

# **HEALTH AND CARE (STAFFING) (SCOTLAND) BILL**

## **[AS AMENDED AT STAGE 2]**

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### **SUPPLEMENTARY DELEGATED POWERS MEMORANDUM**

#### **INTRODUCTION**

1. This supplementary memorandum has been prepared by the Scottish Government in accordance with Rule 9.7 of the Parliament’s Standing Orders. It describes provisions in the Bill conferring power to make subordinate legislation which were either amended or introduced at Stage 2.

2. The Memorandum has been prepared by the Scottish Government. It does not form part of the Bill and has not been endorsed by the Parliament. It should be read in conjunction with the original Delegated Powers Memorandum published to accompany the Bill as introduced.

#### **DELEGATED POWERS AMENDED AT STAGE 2**

##### **Section 10 – Functions of SCSWIS in relation to staffing methods (insertion of section 82B(2)(aa) – regulations: requirement to use staffing methods)**

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

##### *Provision*

3. Section 82B(1) of the Public Services Reform (Scotland) Act 2010 (“the 2010 Act”), to be inserted by section 10 of the Bill, contains a power enabling the Scottish Ministers to require care service providers to use staffing methods developed and recommended by Social Care and Social Work Improvement Scotland (“SCSWIS”). Scottish Ministers may require the use of the methods either as recommended by SCSWIS or with modifications. Section 82B(2) provides further detail as to what may be prescribed, covering the types of care settings, the staff groups to whom this staffing method would apply, the tools to be used and in section 82B(2)(aa) the minimum frequency at which the staffing method is to be used.

##### *Reason for taking power*

4. At this moment in time there are no appropriate staffing methods that have been agreed for use in care settings. It is therefore not possible to set out a staffing method for care settings on the face of the Bill in the way that has been done for health. Taking this power enables Parliament to have an opportunity to scrutinise the method before it is required for all the defined care service providers. It also enables methods to be adjusted in the future in light of experience. Stage 2 saw a change from the possibility that regulations would set the frequency of use of the section 82A(4) staffing level tool to the minimum frequency of use of the section 82(1) staffing method. This enables Scottish Ministers to ensure that the staffing method when introduced is used at a minimum

prescribed frequency. The new power does not limit the number of times that a care provider may use the staffing method and ensures they have discretion to use it more often if they wish.

### ***Choice of procedure***

5. The power is subject to affirmative procedure by virtue of section 11 of the Bill which amends section 104 of the 2010 Act. This procedure is considered appropriate given that the regulations will require the use of staffing methods by care service providers for the first time. This is expected to attract a high level of interest not only from the public (especially those who receive care, including the families of those receiving care) but also from those who manage and deliver care.

## **NEW DELEGATED POWERS INTRODUCED AT STAGE 2**

### **Part 1 – Guiding Principles for Staffing**

#### **Section 3 – Guiding principles in care service staffing and planning (insertion of section 3(3) - new guidance power in relation to commissioners of care services)**

**Power conferred on:** the Scottish Ministers

**Power exercisable by:** guidance

**Parliamentary procedure:** not applicable

### ***Provision***

6. Section 3(3) of the Bill gives the Scottish Ministers a power to issue guidance about the operation of subsection (2) of section 3. It places a corresponding obligation on every local authority and every integration authority to have regard to any such guidance. Section 3(4) requires the Scottish Ministers to consult SCSWIS, such persons as they consider to be representative of the providers, commissioners and users of care services, such trade unions and professional bodies as they consider to be representative of individuals working in care services, such persons as they consider to be representative of carers (within the meaning of section 1 of the Carers (Scotland) Act 2016), and such other persons as they consider appropriate. Section 3(5) requires Scottish Ministers to publish guidance issued under section 3(3).

### ***Reason for taking power***

7. It is considered helpful for Ministers to issue guidance as a resource to those implementing staffing methods under the Bill which can set out best practice, examples, case studies, and take into account a wide range of possible practical scenarios and circumstances. Guidance is considered appropriate in these circumstances, where the content is operational and practical in nature. The level of detail that is required in the guidance is beyond that which would normally be contained in primary legislation.

8. The staffing methods could vary greatly depending on the care service affected, and guidance provides the necessary flexibility in the circumstances. The guidance power in section 3(3) ensures Scottish Ministers may specifically focus guidance on how local authorities and integration authorities when planning and securing services have reference to the section 1 guiding principles and the staffing duties imposed on care service providers by sections 6 through to 8.

There is an ability to allow guidance to be updated regularly to reflect how practice evolves so it represents a more responsive and flexible way of supporting relevant authorities rather than, say, a power to make subordinate legislation.

## **Part 2 – Staffing in the NHS**

### **Section 4 – NHS duties in relation to staffing (insertion of section 12IAC(1)(d) – duty to ensure appropriate staffing: number of registered healthcare professionals etc.)**

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

#### *Provision*

9. Section 12IAC(1)(d) of the National Health Service (Scotland) Act 1978 (“the 1978 Act”), to be inserted by section 4(2) of the Bill, contains a power enabling the Scottish Ministers to prescribe types of health care employees, in addition to those already listed in section 12IAC(1)(a)-(c), that Scottish Ministers must ensure there are available in sufficient numbers to every Health Board and Agency. This is to enable Health Boards and the Common Services Agency for the Scottish Health Service (“the Agency”) to comply with the duty to ensure appropriate staffing in section 12IA. In doing so Scottish Ministers must have regard to the number of people training, and any information provided by a Health Board or the Agency. Under subsection (3), Scottish Ministers are required to report on their compliance with subsection (1).

#### *Reason for taking power*

10. To enable Scottish Ministers to extend their responsibility for ensuring adequate provision for the Health Service of health care employees other than registered nurses, midwives and medical practitioners and subsequently to report on the issue to Parliament.

#### *Choice of procedure*

11. A large proportion of clinical staff is already covered in the provisions, and therefore prescribing additional staff groups would be a relatively non-controversial and straightforward matter. Given the nature of the provision, it is considered that a power subject to negative procedure is appropriate and strikes the appropriate balance between flexibility and the need for scrutiny of provision of this nature.

**Section 4 – NHS duties in relation to staffing (insertion of section 12IAD(2) – duty to ensure appropriate staffing: senior registered nurses)**

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

***Provision***

12. Section 12IAD(2) of the 1978 Act, to be inserted by section 4(2) of the Bill, contains a power enabling the Scottish Ministers to prescribe the role, qualifications, training, experience and other requirements to meet the definition of senior registered nurse.

***Reason for taking power***

13. As there is presently no definition of senior registered nurse in the Bill, this power will enable Scottish Ministers to define the role for the purposes of section 12IAD(1), which provides that a senior registered nurse in each location is non-caseload holding. This will ensure consistency across Health Boards and the Agency in complying with section 12IAD(1).

***Choice of procedure***

14. Defining the requirements of a senior registered nurse for the purposes of section 12IAD(1) would be a straightforward matter. It is considered that a power subject to negative procedure is appropriate and strikes the appropriate balance between flexibility and the need for scrutiny of provision of this nature.

**Section 4 – NHS duties in relation to staffing (insertion of section 12IB(1) – duty to follow common staffing method)**

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

***Provision***

15. Section 12IB(1) of the 1978 Act, to be inserted by section 4(2) of the Bill, contains a power enabling the Scottish Ministers to prescribe the minimum frequency at which the common staffing method is to be used (rather than the frequency at which the tools are to be used as part of the common staffing method).

***Reason for taking power***

16. The power enables Scottish Ministers to ensure that the common staffing method when introduced is used on a minimum prescribed basis. The new power does not limit the number of times that Health Boards or the Agency may use the common staffing method and ensures they have discretion to use it more often if they wish.

***Choice of procedure***

17. Prescribing the minimum frequency of use of common staffing method is a relatively narrow and non-controversial matter. Given the nature of the provision that can be made and the nature of the common staffing method, it is considered that a power subject to negative procedure is appropriate and strikes the appropriate balance between flexibility and the need for scrutiny of provision of this nature.

**Section 5A – Role of Healthcare Improvement Scotland in relation to staffing (insertion of section 12IJ(4) – HIS: monitoring and development of staffing tools)**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: direction**

**Parliamentary procedure: not applicable**

***Provision***

18. Section 12IJ(4) of the 1978 Act, to be inserted by section 5A(2) of the Bill, contains a power enabling Scottish Ministers to direct Healthcare Improvement Scotland (“HIS”) to carry out a review under section 12IJ(2) of the effectiveness and use of the common staffing method as listed in section 12IJ(1).

***Reason for taking power***

19. Should Scottish Ministers become concerned at the effectiveness of the common staffing method through its own monitoring or through other information this power enables them to ensure such concerns can be investigated should the need arise. Given the nature of the provision it is considered that a power of direction is appropriate and fits with similar provision for Scottish Ministers to direct HIS under in section 10A(3) of the 1978 Act.

**Section 5A – Role of Healthcare Improvement Scotland in relation to staffing (insertion of section 12IK(5) – HIS: monitoring and development of staffing tools)**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: direction**

**Parliamentary procedure: not applicable**

***Provision***

20. Section 12IK(5) of the 1978 Act, to be inserted by section 5A(2) of the Bill, contains a power enabling Scottish Ministers to direct HIS to develop a new or revised staffing level tool or professional judgement tool required for the common staffing method in relation to a specific health care provision.

***Reason for taking power***

21. In ensuring that tools are used to their maximum potential, Scottish Ministers may need to direct HIS to develop in areas and for staff outside of those commonly expected. This could include the use of multi-disciplinary teams and areas arising from the health and care integration agenda. Given the nature of the provision it is considered that a power of direction is appropriate and fits

with similar provision for Scottish Ministers to direct HIS under in section 10A(3) of the 1978 Act.

**Section 5A – Role of Healthcare Improvement Scotland in relation to staffing (insertion of section 12IK(6) – HIS: monitoring and development of staffing tools)**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: negative**

***Provision***

22. 12IK(6) of the 1978 Act, to be inserted by section 5A(2) of the Bill, contains a power for Scottish Ministers to lay regulations requiring assumptions on certain matters to be made by HIS, in the process of making a recommendation to Scottish Ministers on the development of new or revised staffing level tools and professional judgement tools. Such matters might include, for example, staff absence and bed occupancy levels.

***Reason for taking power***

23. The common staffing method does not require certain assumptions, such as predicted absence; bed occupancy, or level of deprivation, to be taken into consideration, as they are factored into existing staffing level tools and professional judgement tools. This power enables Scottish Ministers to specify the factors that must be included in any future tools, to ensure it includes certain assumptions, for example, levels of predicted absence within the workforce and average bed occupancy rates where this is believed relevant.

***Choice of procedure***

24. Requiring the inclusion of certain assumptions in the staffing level tools and professional judgement tools is a relatively non-controversial and straightforward matter. Given the nature of the provision that can be made and the nature of the tools, it is considered that a power subject to negative procedure is appropriate and strikes the appropriate balance between flexibility and the need for scrutiny of provision of this nature.

**Section 5A – Role of Healthcare Improvement Scotland in relation to staffing (insertion of 12IO(1) – HIS: ministerial guidance on staffing functions)**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: guidance**

**Parliamentary procedure: not applicable**

***Provision***

25. Section 12IO(1) of the 1978 Act, to be inserted by section 5A(2) of the Bill give the Scottish Ministers a power to issue guidance about the operation of sections 12IH to 12IN. It places a corresponding obligation on HIS, every Health Board, every relevant Special Health Board and the Agency, to have regard to this guidance in implementing the relevant duties. Section 12IO(2) states that Scottish Ministers must consult the persons listed in paragraph (b) to (j) of section 12IK(3) before issuing such guidance. Any guidance issued, must be published.

***Reason for taking power***

26. It is considered helpful for Ministers to issue guidance as a resource to those implementing staffing methods under the Bill which can set out best practice, examples, case studies, and take into account a wide range of possible practical scenarios and circumstances. Guidance is considered appropriate in these circumstances, where the content is operational and practical in nature. The level of detail that is required in the guidance is beyond that which would normally be contained in primary or subordinate legislation.

**PART 3 – STAFFING IN CARE SERVICES**

**Section 10 – Functions of SCSWIS in relation to staffing methods (insertion of section 82BA(4) – review and redevelopment of staffing methods)**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: direction**

**Parliamentary procedure: not applicable**

***Provision***

27. Section 82BA(4) of the 2010 Act, to be inserted by section 10 of the Bill, contains a power enabling Scottish Ministers to direct SCSWIS to develop a revised staffing method for use in relation to a particular kind of care service specified in the direction.

***Reason for taking power***

28. Although no staffing method has been developed under section 82A or made mandatory under section 82B, this power offers clarity that should a staffing method be developed and its use be made mandatory, Scottish Ministers are able to direct SCSWIS to revise the method, should that be necessary. The power taken here is narrow. It allows Scottish Ministers to direct SCSWIS to revise a staffing method already in operation. This is an appropriate balance of scrutiny and the best use of Parliamentary time. Given the nature of the provision it is considered that a power of direction is appropriate and fits with similar provision for Scottish Ministers to direct SCSWIS under in section 44(2)(a) of the 2010 Act.

*This document relates to the Health and Care (Staffing) (Scotland) Bill as amended at Stage 2  
(SP Bill 31A)*

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