

Delegated Powers and Law Reform Committee

8th Meeting, 2024 (Session 6), Tuesday, 5th March 2024

Instrument Correspondence

Packaging Waste (Data Reporting) (Scotland) Amendment Regulations 2024 (SSI 2024/42)

On Thursday 22nd February 2024, the Committee asked the Scottish Government:

SSIDM provides that an explanatory note should help an SSI to be understood by someone unfamiliar with that area of law, and that it should be proportionate to the length and complexity of the instrument.

This instrument makes 9 pages of amendments to the principal regulations, The Packaging Waste (Data Reporting) (Scotland) Regulations 2023 and is accompanied by an explanatory note of only one substantive paragraph. Further, the policy note states that the instrument is required to amend the regulations in response to the decision to postpone the implementation of Scotland's Deposit Return Scheme to October 2025, but there is no reference in the explanatory note to those provisions which make amendments on account of that decision.

1. Please explain why you consider that this explanatory note helps the user to understand the SSI, and why you consider it to be proportionate to the length and complexity of the instrument?
2. Please also explain whether you think it is sufficiently clear from the explanatory note which amendments to the Principal Regulations relate to the decision to postpone the implementation of Scotland's Deposit Return Scheme to October 2025.

Please confirm whether any corrective action is proposed, and if so, what action and when.

On Tuesday 27th February 2024, the Scottish Government responded:

1. The explanatory note attempts to set out the operative effect of the instrument in as clear and simple a fashion as possible for the user without going into the technical details underlying each provision or provisions. With consideration to the general guidance that an explanatory note not be more than a page, the Scottish Government had been of the view that the length of this explanatory note was proportionate to instrument's length and complexity. We consider, upon reflection, that it would be helpful to provide further detail to the reader in relation to the provisions and the technical detail underlying those provisions in order to aid in the understanding of the instrument.

2. The policy decision to postpone the implementation of Scotland's Deposit Return Scheme to October 2025 underlies the reasoning for the amendment to definition of "exempt packaging" in regulation 11. We consider, upon reflection, that the explanatory note could indicate the amended definition related to the delay of the scheme and provide further explanation as to the amendment itself.

By way of corrective action, the Scottish Government proposes to amend the explanatory note by way of correction slip at the earliest opportunity.

National Health Service (Common Staffing Method) (Scotland) Regulations 2024 (SSI 2024/43)

On Thursday 22nd February 2024, the Committee asked the Scottish Government:

Can you explain why it is appropriate that the Professional Judgement Tool and various Staffing Level Tools specified in the instrument are not publicly available?

Please confirm whether any corrective action is proposed, and if so, what action and when.

On Tuesday 27th February 2024, the Scottish Government responded:

There is a need, as a matter of policy, for the 10 staffing level tools and the professional judgement tool prescribed in the National Health Service (Common Staffing Method) (Scotland) Regulations 2024 (2024 Regulations) to remain accessible only to those granted access. We hope you find the following explanation helpful as to why, from a policy perspective, this is necessary.

As explained in the explanatory note, the staffing level tools and the professional judgement tool can be opened and used solely by those who have been granted access ("registered users") via an IT platform currently hosted by the Scottish Standard Time System ("SSTS")- a system used within the NHS. Registered users can access the IT platform at <https://workforce.mhs.scot.nhs.uk/eyou/Authentication/Login.aspx>. Those who require to access the tools are determined through local governance arrangements. The SSTS platform is a secure system that, in addition to the tools, hosts staff rosters, absence and working hours, other HR information and is used to pay employees. It can therefore only be accessed from an NHS account and, for security reasons (including in relation to the security of personal data), it would not be possible or desirable to provide access to that system to members of the public. To make the tools publicly available, they would therefore need to be transferred to a different format, such as an Excel spreadsheet. We explain below why use of such a publicly available format would not be appropriate.

Under the Health and Care (Staffing) (Scotland) Act 2019 (2019 Act), Healthcare Improvement Scotland (HIS) must monitor and develop staffing tools. If HIS considers a tool is no longer effective it can then recommend revocation or replacement to the Scottish Ministers. HIS may develop and recommend to the Scottish Ministers either new or revised tools. HIS must also monitor compliance of Health Boards, relevant Special Health Boards and NHS National Services Scotland

(NHS NSS) with their duties under the 2019 Act- including the duty under section 12IJ of the National Health Service (Scotland) Act 1978 to use the common staffing method (which includes the use of staffing level and professional judgement tools), as well as monitor and review the effectiveness of the common staffing method and the way in which Health Boards, relevant Special Health Boards and NHS NSS are using the common staffing method.

The 2024 Regulations prescribe the specific version of each tool that must be used. Where a replacement version of a tool is recommended by HIS, the 2019 Act requires that the new version is prescribed in regulations. This means that the current tool will always be clearly identified in regulations. This ensures that those required to use a prescribed tool can easily locate, and have certainty that they are using, the correct tool.

By restricting access to registered users on the SSTS platform, HIS and by default the Scottish Ministers, can be assured that only the current version of the tool is available and being used. If the tools were publicly available in a format such as Excel, they could be downloaded and saved locally, at which point use of the current prescribed tool is no longer ensured. Downloading a copy of an Excel version of a tool, and saving this locally opens a significant risk that previous versions, rather than the current version prescribed in regulations, could be used. There is an additional risk that errors could appear in local versions- for example in the calculations which form the basis of the tool in question. This would compromise the integrity of that tool (and the intention of the 2019 Act to ensure that specific tools are prescribed) in particular because data or outputs from an out of date version of a tool may not generate the same results as the current prescribed version of that same tool. Any subsequent decisions made by Health Boards and / or the Scottish Government, as required by the 2019 Act, on the basis of the outputs of an out of date tool could similarly then be compromised.

HIS will rely on the ability to consider data available on the use of the tools on the SSTS platform to monitor compliance with the 2019 Act duties. Use of locally saved versions of tools would compromise this data and HIS's ability to monitor compliance.

Finally, all registered users have to undergo training on how to run the specific tools that they need to use, including on collecting and inputting data and interpretation of the results. This ensures that there is consistency across the Health Boards, Special Health Boards and NHS NSS as well as different health specialisms on how the tools are applied, and that comparisons across areas can be made with confidence. Without the process of registering individual users and granting access only to specific tools, there runs the risk that users of the tools have not undergone sufficient training and could be applying them incorrectly, again compromising the data outputs and subsequent decisions and onward reporting made on staffing.

For the reasons set out above, no corrective action is proposed.

National Health Service (Common Staffing Method) (Scotland) Regulations 2024 (SSI 2024/43)

On 23 February 2024, the Committee received the following correspondence from the Royal College of Nursing:

Ahead of the Committee's consideration of the above regulations (SSI 2024/43), I am writing to share RCN Scotland's concerns regarding the calculators that sit within some of the key staffing level tools used in the Common Staffing Method. We are also disappointed that the way these regulations are drafted makes it harder to correct the errors identified in these staffing level tools.

The Health and Care (Staffing) (Scotland) Act 2019 places duties on NHS boards to use the Common Staffing Method in all areas where there are workforce and workload planning tools set out in legislation, which is what this SSI achieves. This means the approved tools are used alongside other considerations - such as vacancies, skill mix, patient need, clinical advice and staff feedback – to set the establishment i.e. how many staff are required in a particular clinical setting to provide safe and effective care.

Last year we became aware of the details of some of the calculators that sit within key staffing level tools for nursing. We believe these calculators are flawed and fundamentally undermine the effectiveness of these tools in allowing services to plan the number, and skill mix, of staff needed to provide safe and effective care. Essentially, the tools are understating the required nursing staffing levels and establishments are being set that are lower than what is required to actually fill staffing rosters safely. Those responsible for staffing in a clinical area (for example a Senior Charge Nurse) are then unable to fill their nursing rosters because the establishment for that area isn't high enough. The evidence is clear this is driving increased bank and agency spending, as clinical leaders try to fill their rosters, and, in many cases, leading to unsafe staffing levels.

Since early September 2023 there have been several meetings between RCN Scotland, Health Improvement Scotland (HIS) - who are responsible for maintaining workforce tools and developing new ones - and CNO Directorate to discuss our concerns which are detailed further below.

Professional Judgement (PJ) Tool

The PJ Tool is based on users' professional opinion on how many staff are needed to carry out the workload required. The PJ Tool is set up to allow nurses and midwives to record information about the number of staff, in their professional opinion, required to undertake the workload activities in a clinical setting per shift over a particular time i.e. two weeks.

The PJ tool automatically includes a 22.5% Predicted Absence Allowance for nursing and midwifery staff (to cover annual leave, maternity leave, sickness absence etc.). There is also a deduction for unpaid breaks. The calculator of the PJ tool then uses the information inserted to calculate a required whole time equivalent (WTE) to staff that particular service.

However, the current tool does not capture any shift overlap and the need for staff to handover between shifts. As highlighted above, the tool also automatically removes time for unpaid breaks. Our position is that the time removed for breaks exceeds the current unpaid break allowance and should not be removed at all, as having a break is a legal requirement and therefore should be considered as part of the workload.

The combination of not capturing shift overlap and removing time for breaks, results in the PJ tool calculating the required WTE substantially below that which is required.

The following example illustrates this point. A senior charge nurse uses their professional judgment to conclude that a clinical area requires 5 nurses per shift over 24 hours and inputs this into the PJ tool. The current version of the PJ tool will state that the required WTE establishment is 25.5. However, the required WTE establishment should be 29.75 if calculated on hours worked, i.e. including breaks and handover time. This is a difference in the establishment of 4.25 WTE nurses; a substantial difference.

HIS concedes that in critical care settings the calculation should include handover time and breaks and the workforce calculator in this setting reflects this position. HIS has responded positively to our feedback by providing a workaround for the PJ tool that will capture staffing requirements as part of shift handover and slightly reduces the amount of time removed for breaks. However, this still leaves the calculation below that which HIS determine is required for critical care areas. Our position is that the calculator to determine staffing in all care settings should be the same as critical care, with no time removed for breaks.

Adult Inpatient Tool

The current Adult Inpatient Staffing Level Tool calculations are derived from observation studies that categorise nursing staff time into direct care, indirect care, associated workload and personal time. The tool removes a percentage of time that was observed for personal time i.e. time that was observed as unoccupied and breaks as these are regarded as 'unproductive time'. 'Unproductive time' is defined as an activity that makes no contribution to the service and is therefore removed from the calculation as no care is being provided.

This approach is unreasonable as time for a break is a legal requirement and to be able to have a break the member of staff must be on shift and present. The RCN's view is that this time should be included in nursing workload calculations.

Further, the observation studies that form the basis for the calculations are carried out over 24 hours. However, to facilitate patients' sleep, it is to be expected that the level of direct and indirect care will be reduced overnight. This would therefore result in a higher percentage of time being considered unproductive. Removing this time from the calculation does not take into account that a critical level of staffing is required to maintain patient safety overnight.

In response to the RCN's concerns HIS has agreed to establish an expert advisory group to review the current Adult Inpatient Staffing Level Tool with a view to recommending any changes to ministers in October 2024. However, the current Mental Health and Learning Disability staffing level tool is being reviewed at the moment. Observational studies are planned to take place soon and currently time for paid and unpaid breaks, toilet time etc. is being considered personal/unproductive time and will potentially be removed from the calculation.

On the specific point regarding the removal of unpaid breaks from both the PJ tool and the staffing level tool, HIS have confirmed that they are not in a position to recommend the inclusion of unpaid breaks without a Policy Directive.

We believe that the issues outlined above, within both the PJ tool and staffing level tools, are resulting in lower than required establishment calculations and is having a negative impact on nurses' ability to provide safe, effective, high-quality care and on their own wellbeing.

Required next steps

As highlighted above, since we became aware of these issues, we have had several meetings with HIS and CNO Directorate to discuss our concerns. While there has been progress with HIS and Scottish government accepting that there are flaws within the existing tools, and they have committed to continue to work with stakeholders, these have not yet been corrected. We are therefore calling for Scottish government and HIS to set out a clear timeline on how these issues are going to be addressed. Given that these fundamental flaws within the staffing tools' calculators are contributing to an unsafe environment for patients and nursing staff, they need to be addressed urgently.

We also have concerns around the ongoing funding, from Scottish Government, to HIS to support the Healthcare Staffing Programme and to meet their duties within the 2019 Act. Similarly, we are also concerned about the funding that Care Inspectorate requires to meet their duties within the legislation.

SSI schedule

Regulation 3 and the schedule prescribe the staffing level tool to determine appropriate staffing levels for each kind of health care provision listed in column 1 of the table.

Column 2, which lists the staffing level tools, includes which version of the tool should be used.

We believe it would be preferable for the regulations to refer to the tools by name and not by version. This would negate the need to update the regulations each time the tools are changed or updated. As we outline above, the current tools are not fit for purpose and require to be updated to be truly effective. Requiring the regulations to be updated, with the associated parliamentary process, every time there's a need to change or update a tool is not a responsive approach.

This is frustrating as this issue could have easily been avoided if the Scottish government had laid the draft SSI with some time to spare, instead of at the last moment ahead of 1 April 2024. Due to the importance of implementing the provisions within the 2019 Act on 1 April, we are not calling for this SSI to be annulled. But as we are approaching 5 years since the Act was passed, it is extremely frustrating to find ourselves in a position where there is insufficient time to ensure the SSI doesn't lead to unintended consequences as outlined above.

I hope this information supports the Committee's consideration of these regulations. We will continue to work positively with Scottish government and HIS as this groundbreaking legislation moves forward.

Please don't hesitate to get in touch if you'd like any further information.