

Health and Care (Staffing) (Scotland) Bill

Policy Memorandum

Introduction

1. As required under Rule 9.3.3 of the Parliament’s Standing Orders, this Policy Memorandum is published to accompany the Health and Care (Staffing) (Scotland) Bill (“the Bill”) introduced in the Scottish Parliament on 23 May 2018.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 31-EN);
- a Financial Memorandum (SP Bill 31-FM);
- statements on legislative competence by the Presiding Officer and the Scottish Government (SP 31–LC).

3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government’s policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

Policy objectives of the Bill

4. The aim of the Bill is to provide a statutory basis for the provision of appropriate staffing in health and care service settings, thereby enabling safe and high quality care and improved outcomes for service users. Provision of high quality care requires the right people, in the right place, with the right skills at the right time to ensure the best health and care outcomes for service users and people experiencing care.

5. The policy intention of the Scottish Ministers is to enable a rigorous, evidence-based approach to decision making relating to

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staffing requirements that ensures safe and effective staffing, takes account of service users' health and care needs and professional judgement, and promotes a safe environment for service users and staff.

6. The provisions in the Bill will enable further improvements in workforce planning by strengthening and enhancing arrangements already in place to support transparency in staffing and employment practice across Scotland; and will support consideration of service delivery models and service redesign.

7. The provisions in the Bill will support an open and honest culture with the aim that all staff are engaged in relevant processes and informed about decisions relating to staffing requirements and feel safe to raise any concerns about staffing levels.

8. As integration of health and social care progresses, as set out in paragraphs 17 and 18, it is more important to facilitate multi-disciplinary and multi-agency working across a range of professionals and staff groups. It is also important to ensure that robust evidence is available to support decisions about staffing requirements if and when services are redesigned across multi-disciplinary or multi-agency teams.

9. To support and enable the Scottish Government's ambition to deliver integrated workforce planning and appropriate staffing across health and care services, the provisions of the Bill will span the health and care service landscape in an appropriate and proportionate way.

10. This Bill builds on existing measures to ensure safe and high quality care and to support and sustain the health and care workforce and takes a further important step by creating a coherent legislative framework regarding appropriate staffing across health and care services.

11. The legislation is not intended to set out or prescribe minimum staffing levels or fixed ratios; this would be at odds with the Scottish Government's established policy approach and could potentially undermine innovation in service provision. Rather, the legislation will support local decision-making, flexibility and the ability to redesign and innovate across multi-disciplinary and multi-agency settings.

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12. It is also not the intention of the Scottish Government to prescribe approaches to workload and workforce planning, in terms of development of the tools for the care sector on the face of the Bill. The ambition is to enable the further development of suitable approaches by and for the sector where this is considered appropriate and in collaboration with the sector. If and when a tool is developed, the methodology agreed during the tool development process will be prescribed by the Scottish Ministers to ensure consistent application across the sector.

13. Meeting the objectives of this Bill will provide assurance, including for staff and service users, that appropriate staffing is in place to enable the provision of safe and high quality care, irrespective of health or care service setting.

Background

14. The Programme for Government 2017/18¹ “A Nation with Ambition” committed to introduce a safe staffing bill during the 2017/18 Parliamentary year to “deliver on the commitment to enshrine in law the principles of safe staffing in the NHS, starting with the nursing and midwifery workforce planning tools”. The Programme stated that “The Bill will ensure nationally agreed, evidence based workload and workforce planning tools are applied, and ensure key principles relating to professional judgement, local context and quality measures underpin workload and workforce planning.” This puts the Scottish Government’s innovative, evidence based and professional-led approach to nursing and midwifery workload tools and methodology on a statutory footing.

Wider Policy in Health and Social Care

15. The Health and Social Care Delivery Plan² details the programme and ambition to further enhance health and social care services, enhanced services that can only be delivered by a skilled workforce with the correct mix of skills and experience. It recognised that a more consistent approach to workforce planning will help deliver

¹ <https://beta.gov.scot/publications/nation-ambition-governments-programme-scotland-2017-18/>

² <https://beta.gov.scot/publications/health-social-care-delivery-plan/>

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better and further enhanced services and outcomes for the people of Scotland.

16. The Scottish Government published the Health and Social Care Standards³ in June 2017, which set out what the public should expect when using care or social work services in Scotland. The Standards seek to provide better outcomes for everyone, to ensure that individuals are treated with respect and dignity, and that the basic human rights we are all entitled to are upheld. The objectives of the Standards are to drive improvement, promote flexibility and encourage innovation in how people are cared for and supported. All services and support organisations, whether registered or not, should use the Standards as a guideline for how to achieve high quality care. From 1 April 2018, the Health and Social Care Standards are taken into account by the Care Inspectorate and other scrutiny bodies in relation to their inspections and registration of care services.

17. The Public Bodies (Joint Working) (Scotland) Act 2014⁴ provides the framework which will support improvement of the quality and consistency of health and social care services through the integration of health and social care in Scotland.

18. As the arrangements for the integration of health and social care embed across Scotland, the emergence of local multi-disciplinary teams comprising staff from both health and social care backgrounds is becoming more widespread. The Scottish Government considers that it is therefore important that approaches to staffing, including the development of workload tools, enable seamless, joined up services, support - rather than constrain - service innovation and redesign and ensure an evidence-based approach can be taken when considering staffing requirements.

Workload and workforce planning

19. To manage their workforce effectively, organisations need to have up to date information on the numbers of people they employ to carry out different tasks, what skills the workforce has, where there are gaps and what skills and staff will be needed to deliver future

³ <http://www.gov.scot/Publications/2017/06/1327>

⁴ <http://www.legislation.gov.uk/asp/2014/9/contents/enacted>

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services and priorities; and they must then plan and manage their workforce and make any necessary changes to meet their organisational objectives.

20. As a subset of workforce planning, it is necessary to understand the workforce required to ensure that the right staff, with the right skills, are in the right place at the right time, based on assessment of the workload required to provide care. It is the Scottish Government's intention to facilitate this, as well as building on, and strengthening, the existing approaches in health and care services which are described in later sections of this Memorandum.

21. A range of approaches to workload and workforce planning and staffing have been taken across health and care service settings. The background section below describes the position in health, including the evidence base built up through the development of a methodology and suite of workload and workforce planning tools in nursing and midwifery and emergency medicine settings. The section then goes on to explore the background and context in which care services address staffing requirements and sets this within the context of integrated health and social care settings.

22. Following publication of the Health and Social Care Delivery Plan the Scottish Government, working with partners, has developed an initial national health and social care workforce plan, published in three parts, in order to develop a whole system approach to workforce planning and support organisations that provide health and social care services to identify, develop and put in place the workforce they need to deliver safe and sustainable high-quality services to Scotland's people. Part 1⁵ was published in June 2017; Part 2⁶ in November 2017; Part 3⁷ on 30 April 2018.

⁵ <http://www.gov.scot/Publications/2017/06/1354>

⁶ <http://www.gov.scot/Publications/2017/12/2984>

⁷ <https://beta.gov.scot/publications/national-health-social-care-workforce-plan-part-3-improving-workforce/documents/00534821.pdf?inline=true>

Current position in Health

23. The link between safe and sustainable staffing levels and the delivery of high quality care is well established. For example, there is growing research evidence detailing the clear link between nursing and midwifery staffing and patient outcomes (including mortality and morbidity rates, patient safety, patient experience and other quality of care measures); staff experience and morale; and the efficiency of care delivery.^{8 9 10 11} This relationship was reinforced in the Vale of Leven Hospital Inquiry Report (2014)¹² which made specific recommendations regarding nurse staffing and skill mix. A key theme from this and other high profile reports regarding the quality of health care is the importance of organisations taking a systematic and responsive approach to determining staffing levels to ensure high quality care.

24. The importance of encouraging staff to speak freely about any concerns they may have, and the important contribution this makes to patient safety has also been recognised in the Freedom to Speak up Report¹³ which made a number of recommendations aimed at creating an open and honest reporting culture. Many of the recommended actions outlined in that report are already in place or being developed in NHS Scotland. There are a range of mechanisms in place to raise concerns, including discussion with line managers, clinical risk management and incident reporting systems.

25. It is currently the duty of every Health Board to workforce plan and to provide high quality care. This legislation introduces duties and guiding principles that will further ensure staffing levels are

⁸ [http://www.journalofnursingstudies.com/article/S0020-7489\(06\)00244-6/abstract?cc=y](http://www.journalofnursingstudies.com/article/S0020-7489(06)00244-6/abstract?cc=y)

⁹ <http://www.rwjf.org/en/library/articles-and-news/2014/04/building-the-case-for-more-highly-educated-nurses.html>

¹⁰ <http://www.safestaffing.org.uk/downloads/hospital-nurse-staffing-and-patient-mortality-nurse-burnout-and-job-dissatisfaction>

¹¹ <http://www.safestaffing.org.uk/downloads/nurse-staffing-and-inpatient-hospital-mortality>

¹² <http://www.valeoflevenhospitalinquiry.org/Report/j156505.pdf>

¹³ http://freedomtospeakup.org.uk/wp-content/uploads/2014/07/F2SU_web.pdf

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appropriate for patients' care requirements, no matter what their location or specialty area.

Evidence base for nursing and midwifery workload and workforce planning

26. As part of wider measures to ensure a sustainable health workforce, the Scottish Government's Health and Social Care Directorates have been working with NHS Scotland for a number of years on the development of a suite of ground-breaking nursing and midwifery workload and workforce planning tools to be used as part of a wider methodology to aid staffing decisions. These tools are endorsed by the Scottish Executive Nurse Directors (SEND) and professional bodies. Application of the tools and methodology helps support Health Boards to make more informed decisions regarding staffing required to meet service users' needs and also to ensure the most efficient and effective use of the nursing and midwifery resource within clinical areas. The tools and methodology have been mandated for use in Health Boards since 2013 following on from Chief Executive Letter (2011) 32¹⁴ where the use of the tools was initially recommended. Systems and processes are in place to allow collation of data nationally, and an education and training pack has been developed for professional leaders.¹⁵

27. The tools and methodology stem from an audit '*Planned Ward Nursing – Legacy or Design*' by Audit Scotland, published in 2002¹⁶. This report recommended a consistent approach to workforce planning that included consideration of quality measures. As a result SEND commissioned a Nursing and Midwifery Workload Workforce Planning review which reported in 2004¹⁷. This report made 20

¹⁴http://www.isdscotland.org/Health-Topics/Workforce/Nursing-and-Midwifery/NMWWP/_docs/CEL2011_32.pdf

¹⁵http://www.isdscotland.org/Health-Topics/Workforce/Nursing-and-Midwifery/NMWWP/_docs/nursing_midwifery_workforce_toolkit.pdf

¹⁶ http://www.audit-scotland.gov.uk/docs/health/2006/nr_070125_ward_nursing_followup_km.pdf

¹⁷http://www.isdscotland.org/Health-Topics/Workforce/Nursing-and-Midwifery/NMWWP/_docs/0013466.NMWWPP%20Project%202004.pdf

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recommendations including the need to have a consistent and systematic approach across Scotland, to measure nursing and midwifery workload and calculate staffing levels required for that workload. A national programme of work, the Nursing and Midwifery Workload and Workforce Planning Programme (NMWWPP) was then established in 2004. Research has also shown that while workforce and workload measurement tools offer useful assistance in planning nursing and midwifery workforce requirements, there is no perfect tool which can provide definitive staff requirements on its own, (Arthur and James 1994, Carr-Hill and Jenkins-Clarke 1995, Hughes 1999).^{18 19} However, the evidence suggests that application of validated workforce tools with the addition of a consistent professional judgement approach improved sensitivity of outcome. The workload tools and methodology developed by the NMWWPP takes this into account.

28. There is a standard operating procedure which describes in detail the steps that must be followed to ensure the development of an evidence-based, statistically reliable and credible workload tool which also ensures appropriate stakeholder involvement in development of the tool. Included in this standard operating procedure is the requirement for regular review of each validated tool to ensure they remain contemporary. There is currently a suite of 11 specialty specific staffing tools which cover the vast majority of nursing and midwifery service areas, and includes one multi-disciplinary tool for Emergency Medicine.²⁰

29. The existing nursing and midwifery workload tools and methodology support evidence-based decision making and risk assessment in relation to setting nurse and midwife staffing establishments in a variety of service settings. The tools use rigorous statistical analysis to calculate the average whole time equivalent recommended for the current workload. They have been tested

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[Determining_nurse_staffing_levels_a_critical_review_of_the_literature](#)

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[Measurement_systems_in_principle_and_in_practice_The_example_of_nursing_workload](#)

²⁰ <http://www.isdscotland.org/Health-Topics/Workforce/Nursing-and-Midwifery/NMWWPP/Tools/>

extensively across NHS Scotland before being confirmed as fit for purpose. In addition to the output from application of the tools, the methodology requires application of a professional judgement tool, which enables staff providing care to assess staffing requirements based on their professional opinion of the workload at that specific time, and the local context in which the service is operating and measures and indicators of quality to be taken into account to inform decisions regarding nursing and midwifery staffing requirements. This process is referred to as the 'triangulation' process.

30. The frequency and application of the tools and methodology is dependent on the clinical area and service type based on professional recommendations from a specialty specific workforce tool reference group; however, every service should apply the tool and methodology annually as a minimum to inform decisions regarding staffing requirements which support provision of high quality care. The tools and methodology can also be used for scenario planning to project future staffing requirements - for instance, for new builds and significant service redesign.

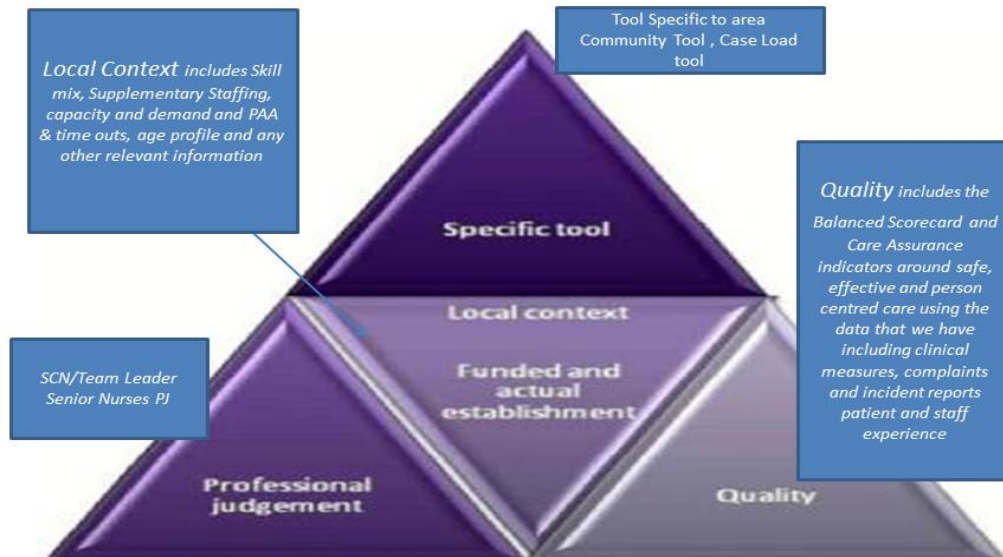
31. These workload tools assume a predicted absence allowance of 22.5%. This allows for 14.5% annual leave, 4% sickness/absence, 2% continuous professional development, 1% maternity leave and 1.5% other. The planned leave elements should be distributed evenly throughout the year when planning staff rosters and unplanned elements monitored, managed where appropriate and escalated as necessary to ensure appropriate availability of staff throughout the year to maintain quality care.

32. The NMWWPP has developed a range of resources relating to application of specialty specific tools, professional judgement tool and other information that should be considered in their current triangulation process when making decisions about staffing requirements²¹. The diagram below is an illustration of the current triangulation process.

²¹ <http://www.isdscotland.org/Health-Topics/Workforce/Nursing-and-Midwifery/NMWWP/>

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Triangulated Approach



33. Although it has been mandatory for Health Boards to utilise the tools and methodology since 2013, there are inconsistencies in the way in which tools are applied and the extent to which the existing methodology is utilised to make informed decisions about staffing requirements. Therefore, the Scottish Government considers that there is benefit for placing the methodology and tools on a statutory footing to ensure more consistent application cross Health Board areas and ensure that approaches are further embedded at an organisational level.

Risk assessment in relation to nursing and midwifery staffing decisions

34. In addition to the triangulation process, risk assessment is also key to making decisions about staffing requirements, both on a day to day basis and on a budget planning basis. This risk assessment should be undertaken by a variety of professional nursing and midwifery leaders and undertaken in a range of different ways, for example through:

- daily review of workload and available nurse and midwifery staffing resource at ward /team level;

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- daily review of safety, quality and risk management at a hospital / community level;
- review of all available evidence to set staffing budgets at ward, specialty, Integrated Joint Board and Health Board levels;
- review of staffing requirements when redesigning or commissioning new services;
- projecting future staffing requirements for professional groups at a local or organisational level to inform national workforce planning, in collaboration with the Scottish Government and other partners.

35. In making professional assessments on a Health Board wide basis a professional risk assessment, escalation and prioritisation process should be in place when planning staffing budgets.

36. Professional risk assessment of short term staffing requirements may require a variety of mitigating factors to be put in place to ensure safety is maintained, for example, redeployment of staff from one area to another or the use of supplementary staffing to address short term gaps.

37. Supplementary staffing is described as staffing resource utilised from staff working more than their contracted hours in the form of excess hours or overtime and bank and agency nurses. Due to variation in activity and other external factors it is acknowledged that there may be a requirement for some supplementary staffing to maintain safe staffing levels and skills on an on-going basis in the clinical environment to deliver patient care²². However, there is also evidence suggesting the increasing use of supplementary staffing is not an effective use of resources and may have a detrimental impact upon the quality of care delivered²³. This evidence would suggest that

²²https://www.researchgate.net/publication/320371651_Flexible_nurse_staffing_in_hospital_wards_the_effects_on_costs_and_patient_outcomes

²³ <https://www.nursingtimes.net/roles/nurse-managers/effects-of-flexible-staffing-on-patient-outcomes-and-healthcare-costs/7024003.article>

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minimising the need for supplementary staffing would enhance both quality and effective use of resources.

38. The Scottish Government remains committed to reducing the use of and spend on agency staff, and has taken action to address this, with further development of the Staff Bank Network including establishing Regional Staff Banks. There is also ongoing work in this area: a dedicated team based in NHS National Services Scotland is working directly with Health Boards and taking forward various workstreams to help reduce spend on and use of agency staff. This work is directed by a governance group that is chaired by the Chief Executive of NHS Education for Scotland. The Bill will provide an additional opportunity to augment this work.

39. It has been acknowledged that despite record NHS staffing and significant increases in the numbers of nurses and midwives working in NHS Scotland, there are difficulties in recruiting nurses and midwives to vacancies in some Health Boards. The Scottish Government in partnership with key stakeholders is already taking a number of steps to ensure a sustainable and capable nursing and midwifery workforce, including higher numbers of staff; strengthened student intake planning and a commitment to create 2,600 additional nursing and midwifery training places; a clear strategy for nursing and midwifery education; a refreshed vision for nursing in Scotland; and work to transform nursing roles to meet the current and future needs of Scotland's health and social care system.

40. While the application of tools and methodology will not directly address these challenges, it is anticipated that robust application of them will provide a more evidence-based approach to inform Health Board projections on future staffing requirements, which in turn will impact on decisions relating to future student nurse and midwife requirements.

Monitoring and Enforcement

41. Healthcare Improvement Scotland (HIS) provides public assurance about the quality and safety of healthcare. It does this through development of evidence-based advice, guidance and standards, provision of support for continuous improvement and through scrutiny of services. HIS has been commissioned by the

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Scottish Government to develop nursing/midwifery specific quality measures for the Excellence in Care Programme. This will provide a framework on which to measure and continuously improve quality in nursing and midwifery providing valuable quality information to support staffing decisions and identifying evidence of the impact of nursing and midwifery staffing on the quality of care. It is anticipated that HIS will take on the responsibility for the development of future staffing tools for health care settings.

42. From 1 April 2018, the Health and Social Care Standards will be taken into account by Healthcare Improvement Scotland and other scrutiny bodies in relation to their inspections and registration of health services.

Existing Governance Processes in Health

43. Currently if staff have concerns about staffing levels or decisions made about staffing, statutory Staff Governance processes provide a framework for these concerns to be raised and addressed.

44. It is the responsibility of every Health Board to ensure staffing levels are appropriate for the care requirements of patients in their care. This Bill is effectively making it an explicit statutory duty.

Approaches to nursing and midwifery staffing requirements in England and Wales

45. Safe staffing is an issue that has been considered elsewhere in the UK. In 2013, both the Francis Report on care quality at Mid Staffordshire NHS Foundation Trust²⁴ and the Berwick Review²⁵ raised the issue of staffing levels, with the Francis Report explicitly stating that inadequate staffing levels at Mid Staffordshire NHS Foundation Trust led to the poor quality of care experienced.

46. In Wales, safe staffing has been legislated for by the Nurse Staffing Levels (Wales) Act 2016. The Welsh legislation only applies

²⁴ <https://www.gov.uk/government/publications/report-of-the-mid-staffordshire-nhs-foundation-trust-public-inquiry>

²⁵ <https://www.gov.uk/government/publications/berwick-review-into-patient-safety>

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to nursing staff and only to acute medical and surgical wards in acute settings.

47. Staffing levels in England are not set out in law, nor does England have mandated workload planning tools that are used consistently across the NHS. The responsibility for 'safe staffing' in NHS England sits with NHS Improvement, which has recently published a number of improvement resources related to staffing across a number of specialties, including adult inpatients, maternity, neonates, learning difficulties, district nursing and mental health. The UK Government has not given a commitment to enshrine safe staffing in law.

Current position in Care Services

48. Care service providers must currently comply with a requirement to ensure appropriate numbers of staff. Regulation 15 of the Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011 (S.S.I. 2011/210) ("the 2011 Regulations") requires providers to ensure appropriate numbers of suitably qualified and competent staff for the health, welfare and safety of service users.

49. Part 2 of the National Health and Social Care Workforce Plan acknowledges some of the distinct challenges for workforce planning in the care sector; and outlines specific areas within this context that have been identified as initial priorities for action, including the need to improve the evidence base for workforce planning, the need to further engage partners across the sector in planning activity and the need for staffing tools that are developed with the sector, for the sector.

50. A Why Research²⁶ study suggested that employers across different sectors use a variety of approaches in undertaking their workforce planning, including case management tools, Indicator of Relative Need (IoRN), the NHS Scotland six-step methodology and guidance such as that provided by Scottish Social Services Council (SSSC). The study suggested that these are used particularly for identifying training and skill needs, however relatively few of the respondents' organisations use formal planning tools for workforce planning purposes. There was some support from this study for the

²⁶ <http://www.gov.scot/Resource/0051/00512889.pdf>

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development of suitable robust tools, alongside acknowledgement of the inherent difficulties in developing tools for the complex landscape of social care.

51. One of the priorities for action identified in the development of Part 2 was the development of improved workforce planning tools for the care sector that can be applied in the context of integration, changing models of care and an increasingly multi-disciplinary workforce. This priority was addressed through Recommendation 4, which seeks the development and co-production of improved workforce planning tools for the sector for use, where appropriate, by partners in workforce planning at different levels in order to support the delivery of high quality care.

52. Part 2 of the National Health and Social Care Workforce Plan, states that Workforce planning tools developed for the sector should aim to:

- be built on robust information;
- accommodate the third and independent sectors, as major employers;
- complement existing practices and be adaptable for local needs;
- be flexible enough to be used in settings of different size and type;
- add value to workforce planning activity, for example by supporting joint role development or coordinated approaches to recruitment, training and development;
- be accompanied by training on the tool being made available; and
- support alignment with associated financial and commissioning plans.

Governance – Care Services

53. Unlike the health sector there is not a single employer in care services but multiple employers. All of these employers are responsible for planning, managing and supporting their staff and ensuring compliance with good employment practice and staff

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governance. In doing this they are supported by the work of the Care Inspectorate. The Care Inspectorate's formal name is 'Social Care and Social Work Improvement Scotland' (SCSWIS), and it is this formal legal name that is used in the Bill. 'Care Inspectorate' is the informal, more commonly used name, and is used throughout this Policy Memorandum since it is more widely recognised than SCSWIS.

Regulation of care services

54. The Care Inspectorate is the independent regulator of care and social work services across Scotland, formed under the Public Services Reform (Scotland) Act 2010.²⁷ Its function is to regulate a range of care services. It undertakes strategic inspection of local authority social work services and scrutiny of care services.

55. In addition to ensuring that registered care services comply with the relevant legislation the Care Inspectorate focuses on supporting continual improvement, working with services, offering advice, guidance and sharing good practice, in order that services provide high quality of care and support. Inspections of care services take place at a frequency set by the Scottish Ministers and are currently graded across four themes: care and support, environment, staffing, and management and leadership.

56. The Scottish Government recognises that there are significant recruitment challenges facing the care service sector, across a range of staff groups including the availability of registered nurses and we are taking a number of steps with partners to address that. These include the Living Wage and the Programme for Government commitment to create an estimated 2,600 additional nursing and midwifery training places over the parliamentary term and other measures to promote the attractiveness of careers in the care sector and strengthen recruitment and retention.

Consultation

57. The Scottish Government has undertaken two consultations on proposals for the Health and Care (Staffing) (Scotland) Bill. The first

²⁷ <http://www.legislation.gov.uk/asp/2010/8/section/15>

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consultation²⁸, which ran from 12 April to 5 July 2017 sought views on the proposals to enshrine safe staffing in law, starting with the nursing and midwifery workload and workforce planning tools as set out in the Scottish Government's 2016 Programme for Government.

58. The first consultation paper proposed the introduction of legislation that would require organisations providing health and care services to:

- Apply nationally agreed, evidence-based workload and workforce planning methodologies and tools;
- Ensure that key principles - notably consideration of professional judgement, local context and quality measures - underpin workload and workforce planning and inform staffing decisions;
- Monitor and report on how they have done this and provide assurance regarding safe and effective staffing.

59. The proposals were intended to:

- Strengthen and enhance arrangements already in place to support continuous improvements and transparency in workforce planning and employment practice across Scotland;
- Enable consideration of service delivery models and service redesign to ensure Scotland's health and social care services meet the needs of the people they serve;
- Provide assurance - including for patients and staff - that safe and effective staffing is in place to enable the provision of high quality care;
- Actively foster an open and honest culture where all staff feels safe to raise concerns regarding safe and effective staffing.

60. The proposals set out in the first consultation document focussed intentionally on the application of evidence-based approaches to nursing and midwifery workload and workforce

²⁸ <https://beta.gov.scot/publications/safe-effective-staffing-health-social-care/>

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planning as there is already a methodology and suite of planning tools that are mandated for use in Health Scotland as part of Local Delivery Planning. However, the consultation proposed that this approach could be extended to other staff groups and care settings when methodologies are developed.

61. In addition to the consultation a series of stakeholder engagement events were hosted across Scotland. An independent analysis of the consultation and engagement event responses²⁹ was published by the Scottish Government on 15 January 2018.

62. The majority of respondents (90%) agreed that requirements should extend across health and social care settings to reflect the importance of an integrated approach to planning and delivery services. There was, however, a divergence of views in responses with some Health and Social Care Partnerships and some public bodies considering that it was not necessary to expand to care settings as the current statutory frameworks were sufficient to ensure safe staffing in this sector. Respondents emphasised the importance of ensuring that legislation reflects the context of health and social care integration, whilst also highlighting the specific context and requirements of care services. A risk was also identified that resources could be diverted from areas not included in legislation to those that were. This would not support a whole system approach and the need to extend beyond nursing and midwifery to the wider multi-disciplinary or multi-agency team was a frequently raised theme.

63. A clear majority (88%) agreed that the requirements should be applicable in settings and for staff groups where a nationally agreed framework, methodology and tools exist. The proposal to extend the requirement to apply the approach to other settings and/or staff groups in the future was supported by the majority of both individuals and organisational respondents.

64. Responses highlighted that a focus on achieving better outcomes for service users should be at the heart of the legislation; that workload and workforce planning tools are only one of the components required to achieve high quality care and improved outcomes; and suggested setting out further guiding principles on safe

²⁹ <http://www.gov.scot/Publications/2017/12/5851>

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and effective staffing in the Bill. In terms of how the proposed requirements should apply or operate within the context of the integration of health and social care, the three most frequently raised issues were:

- The majority of current tools do not take into account multi-disciplinary or multi-agency working;
- The need for a whole-systems approach to workforce planning capturing the collective contribution of partners;
- That consideration is needed regarding the role, responsibilities and functions of the Integrated Joint Boards (IJBs).

65. A Strategic Programme Board provided input from stakeholders across health and care services on the strategic direction and development of this legislation, and a Bill Reference Group was also established to provide advice, expertise and support as the legislation was developed.

66. The Scottish Government considered the findings of the initial consultation with the Strategic Programme Board and Bill Reference Group, and considered both the implications of and opportunities presented by other important wider developments since the initial consultation was undertaken, notably the publication of Part 2 of the National Health and Social Care Workforce Plan.

67. These discussions and wider developments informed a refreshed set of legislative proposals which were published in a discussion document on 22 January 2018. A short secondary consultation ran for four weeks to 20 February 2018, supported by a series of public engagement events. This asked for respondents' views on refreshed legislative proposals, in particular on detailed proposals for care services which took account of the themes from the initial consultation and subsequent engagement with stakeholders.

68. The majority of those responding to the second consultation thought that it was important to have a coherent legislative framework across health and social care to underpin workforce planning and appropriate staffing in health and care services.

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69. A summary of the responses to specific questions is noted below:

- 88% of individuals and 85% of organisations thought it was important to have a coherent legislative framework across health and care services to underpin workforce planning and appropriate staffing in health and care services.
- 95% of individuals and 93% of organisations agreed that there should be guiding principles for workforce planning to provide Health Boards and care service providers with a foundation on which to base their staffing considerations.
- 78% of individuals and 71% of organisations agreed with the proposed role for the Care Inspectorate in leading work, with care service providers, to develop workforce planning tools for application in specified settings, where there is an identified need. 17% of organisations disagreed with the proposed role for the Care Inspectorate, citing a conflict of interests for the Care Inspectorate, a need for joint work with health and care services and a need for the sector to lead.

70. The consultation asked respondents if social work should be included within the scope of this legislation. While there is currently no proposal to include social work, this could have been considered for inclusion at a later stage. Responses to this were mixed: 83% of individuals and only 54% of organisations agreed that social work should be included within the scope of the legislation, therefore it has not been included.

71. Other than those opposed to the inclusion of care services completely, no responses have identified care settings where the development of a tool or methodology is not relevant but many have suggested some areas are not a priority. However, some have cautioned that in their view, use of a workforce planning tool or methodology may not be consistent with the flexible approaches to services and staffing required for delivery of Self-Directed Support.

72. The common themes from the second consultation include:

- There should be flexibility in the use, development and review of tools to avoid stifling innovation and creativity in workforce planning;

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- Tools and methodologies should work across health and care services, taking a whole system approach;
- Any tool should be focused on improved outcomes for service users;
- Recognised challenges faced by Health Boards and care providers in recruiting and retaining staff.

73. The Bill provisions have been informed and shaped by Part 2 of the National Health and Social Care Workforce plan; key themes from the two public consultations; subsequent engagement with stakeholders. Recognising the importance of ensuring the right people, in the right place, at the right time to deliver sustainable and high quality services with improved outcomes for service users, irrespective of health or care setting, the legislation will span the health and care services landscape. In taking this broader approach it will ensure appropriate staffing to deliver safe and high quality care, whatever the setting.

Legal Context

74. Under sections 12H and 12I of the National Health Service (Scotland) Act 1978³⁰ (“the 1978 Act”) NHS Boards in Scotland have a duty to put and keep in place arrangements for the purposes of monitoring and improving the quality of health care which they provide to individuals, and to put and keep in place arrangements for the purposes of improving the management of the officers employed by it, monitoring such management and workforce planning. The National Workforce Planning Framework³¹ and the National Workforce Planning Framework 2005 Guidance³² established how the requirement for NHS Scotland to workforce plan should be met.

75. Revised workforce planning guidance issued in 2011³³ sets out the six step methodology to integration workforce planning and is

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<http://www.legislation.gov.uk/ukpga/1978/29/part/I/crossheading/quality>

³¹ <http://www.gov.scot/Publications/2005/08/30112522/25230>

³² http://www.sehd.scot.nhs.uk/mels/HDL2005_52.pdf

³³ http://www.sehd.scot.nhs.uk/mels/CEL2011_32.pdf

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applied across the whole NHS Scotland workforce. In summary the six steps are:

- Step 1 – defining the plan
- Step 2 – service change – what you want to do?
- Step 3 – defining the required workforce – what you need to achieve this?
- Step 4 – workforce capability – what do you have at present?
- Step 5 – action plan – what needs to happen to deliver the change required?
- Step 6 – implementation and monitoring.

76. Integration Joint Boards (IJBs) are not currently employers themselves; as such Health Boards and local authorities must put in place a workforce development/organisational development plan for the workforce providing services and ensure arrangements are in place to develop and support staff in the delivery of those integration functions.

77. The Integration Planning Principles in the Public Bodies (Joint Working) (Scotland) Act 2014 are the lens through which all integration activity should be focused to achieve the national health and wellbeing outcomes.³⁴ They set the ethos for delivering a radically different way of working and inform how services should be planned and delivered in the future.

78. Care service providers must comply with a specific legal requirement to ensure appropriate numbers of staff: Regulation 15 of the 2011 Regulations requires providers to ensure appropriate numbers of suitably qualified and competent staff for the health, welfare and safety of service users.³⁵ Providers are also required to ensure that persons employed in the provisions of care service receive training appropriate to the work they are to perform, and suitable assistance, including time off work for the purposes of obtaining further qualifications appropriate to such work.

³⁴ <http://www.legislation.gov.uk/asp/2014/9/section/4>

³⁵ <http://www.legislation.gov.uk/ssi/2011/210/regulation/15/made>

Overview of the Bill's Provisions

79. The Scottish Government recognises the work that has gone into ensuring the health and social care workforce is able to deliver high quality, person centred care. The National Workforce Plans, in Parts 1, 2 and 3, outlined priorities for action, including the need to improve the evidence base for workforce planning, the need to further engage partners across the sector in planning activity and the need for workforce planning tools that are developed with the care sector, for the care sector. This Bill focuses on an aspect of workforce planning – it is not workforce planning in its entirety – and aims to ensure health and social care providers are able to ensure sufficient numbers of suitably qualified staff are available to deliver health and care services.

80. The Bill creates a coherent overall legislative framework for appropriate staffing across the health and care services landscape by setting out a requirement on Health Boards and organisations providing care services (those care services registered with and inspected by the Care Inspectorate) to consider staffing requirements according to a set of principles.

81. This approach to the legislation has been informed by a number of factors including:

- recommendations from Part 2 of the National Health and Social Care Workforce plan;
- key themes from the two public consultations;
- subsequent engagement with stakeholders; and
- the core policy imperative of ensuring the right people in the right place at the right time to deliver sustainable high quality services with improved outcomes for service users, irrespective of health or care setting.

82. To enable integrated workforce planning, the legislation spans the health and care services landscape. In taking this broader approach the Bill seeks to ensure that there will be appropriate staffing to deliver high quality care, whatever the setting.

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83. Additionally, for specific health care settings, where a staffing tool and methodology is available the Bill sets out how Health Boards must apply, monitor and report on how they use the tool and methodology when making decision about staffing requirements. The Bill permits the creation of new tools in health settings.

84. On the care side, the Bill sets out a mechanism to develop tools and a methodology for care homes for adults, in the first instance. The legislation does **not** seek to prescribe an approach to workload or workforce planning on the face of the Bill in care service settings, but rather to enable the development of suitable approaches for different settings in the future.

85. The Care Inspectorate will be given the ability to decide locally with care service providers if and where new tools are required. If there is an identified need for tools and/or methodologies in care service settings other than care homes for adults then Ministers can be requested to use a regulation-making power to include these settings in the legislation.

86. The Bill has 14 sections (including a number of sections inserted into the National Health Service (Scotland) Act 1978 by section 4). The Bill contains provisions in the following main areas:

- guiding principles which Health Boards and care service providers must have regard to when carrying out their duties to ensure appropriate staffing;
- duties for Health Boards and care services to ensure the provision of appropriate numbers of suitably qualified and competent staff, as well as a duty to consider the guiding principles and the need for appropriate staffing arrangements when commissioning health care from other providers;
- a duty on Health Boards to follow a common staffing method and use staffing level tools in specified settings;
- duties for Health Boards to provide staff with information about the use of the methodology and the staffing decisions reached, to encourage staff to submit views about the use of the methodology and to train staff in the use of the tools and methodology;

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- a duty on Health Boards to report on the duties contained in the Bill. Otherwise, compliance and potential sanctions related to the duties in the Bill will rely on existing mechanisms.
- the ability for the Scottish Ministers to issue guidance to Health Boards setting out further detail around the duties contained within the Bill;
- a function for the Care Inspectorate to lead the development and validation of methodologies and workload and workforce planning tools in collaboration with the sector to be used in care home for adult settings where necessary;
- a regulation-making power for the Scottish Ministers to require the use of any tools or methodologies developed by the Care Inspectorate in collaboration with the sector;
- a regulation-making power for the Scottish Ministers to expand to include other care settings in the future;
- the ability for the Scottish Ministers to issue guidance to care service providers setting out further detail around the duties contained within the Bill; and
- a duty on commissioning authorities to have regard to the duties and principles placed on care service providers when commissioning the provision of care services.

87. Requirements on Health Boards will be linked to the planning and provision of healthcare services, so where those services (i.e. functions) are delegated to an Integration Authority as per the requirements of the Public Bodies (Joint Working) (Scotland) Act 2014 – whether an Integrated Joint Board, Health Board or local authority – then that body must also comply with them when planning and delivering those services. It is section 25 of the 2014 Act that has the effect of making the requirements flow through to Integration Authorities.

88. The Scottish Government will support the legislation with detailed guidance for Health Boards and care service providers covering appropriate use of tools and common staffing method, as well as application of the general appropriate staffing duty and principles.

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89. Accountability for the compliance with the general duty, principles and tools and methods will sit with organisations, not individuals. Health Boards and care service providers progress in meeting requirements will be monitored through existing local and national reporting and regulatory mechanisms and HIS and the Care Inspectorate scrutiny processes. The Care Inspectorate currently assesses staffing levels for all care service providers it registers and inspects and this function would continue.

90. A summary diagram of the Bill's provisions and its connections with the previous legislative framework and the wider policy context is presented at **Annex A**.

Bill objectives and key provisions

Duty to ensure appropriate staffing

91. The Bill places a general duty to ensure appropriate staffing on Health Boards (section 121A) and care service providers (section 6). This requires them to ensure suitably qualified and competent individuals are working in such numbers as are appropriate for the health, wellbeing and safety of service users, and for the provision of high quality care. These general duties on Health Boards and care service providers will not impose minimum staffing requirements or fixed staffing ratios: this would be at odds with our established policy approach in Scotland and could potentially undermine innovation in service provision. Rather the legislation will maintain local decision making and flexibility and support the ability to redesign and innovate.

92. Within existing legislative frameworks Health Boards are subject to a duty to put and keep in place arrangements to workforce plan, contained in section 121(c) of the 1978 Act. Care service providers must comply with a more specific requirement to ensure appropriate numbers of staff via the 2011 Regulations as mentioned above in paragraph 49. The intention of this Bill is to create a coherent overall legislative framework for appropriate staffing across the health and care services landscape by setting out a requirement on Health Boards and organisations providing care services (those care services registered with and inspected by the Care Inspectorate) to consider staffing requirements according to a set of guiding principles. This recognises the need for innovative approaches to workforce planning which support multi-disciplinary and multi-agency working.

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93. For Health Boards, this general duty to ensure appropriate staffing would be required in addition to a Health Board's existing duty in the 1978 Act, to put and keep in place arrangements for the purposes of workforce planning. The duty to workforce plan contained in 12I(c) will still exist and the general appropriate staffing duty in the Bill sets out more specific requirements – effectively 'levelling up' requirements on Health Boards to broadly mirror existing requirements on care service providers, making more explicit the requirements around the staffing element of workforce planning. This general appropriate staffing duty will apply to Health Boards in relation to all their employees who deliver care, including but not limited to nurses, midwives, doctors, allied health professionals. In addition, where Health Boards commission services, consideration should be given to whether the provider of that service has appropriate staffing. The intention of applying this general duty to all employees providing care is to ensure that one staff group is not protected to the detriment of other staff groups. Even if there is not currently a tool or methodology for a particular staff group Health Boards will still have to ensure appropriate levels of staffing for that group.

94. Where care is provided by a service commissioned by a Health Board, for example where an operation or procedure is delivered in an independent health care setting on behalf of a Health Board, then the commissioning Health Board would be required to consider staffing arrangements in that service before commissioning services. The general duty will also apply to Health Boards for the provision of Primary Care Services including General Practice. For directly employed primary care staff including directly employed General Practitioners the duty will be carried out as for all other employed staff. The majority of General Practitioners are not employed by Health Boards, but are independent contractors who have contractual agreements with territorial Health Boards to provide sufficient and safe healthcare to the patients on their lists as defined by regulations.^{36 37} These contractual agreements will provide Health Boards with assurance that they are complying with the general duty in this Bill when commissioning General Practitioner services.

³⁶ <http://www.legislation.gov.uk/ssi/2018/66/contents/made>

³⁷ <http://www.legislation.gov.uk/ssi/2018/67/contents/made>

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95. For care service providers, Regulation 15 of the 2011 Regulations currently places a duty on care service providers, having regard to the size and nature of the care service, the statement of aims and objectives and the number and needs of service users, to ensure appropriate numbers of suitably qualified and competent staff are in place to ensure the welfare and safety of service users. Care service providers are those described in Schedule 12 of the Public Services Reform (Scotland) Act 2010 who are required to register with the Care Inspectorate and covers support services, care home services, school care accommodation services, nurse agencies, child care agency, secure accommodation services, offender accommodation services, adoption services, fostering services, adult placement services, child minding, day care of children, and housing support services.³⁸

96. For care service providers the general appropriate staffing duty will essentially **maintain but replace and restate** the existing requirement placed on care service providers through Regulation 15 of the 2011 Regulations, moving this requirement from secondary to primary legislation.

97. There are currently significant challenges in recruitment in both health and care service settings. This legislation will not, in itself, address these challenges and should be viewed in conjunction with other measures that we are taking to support and sustain the health and care workforce. However, by taking an evidence-based approach to workload and workforce planning that takes account of identified risks this legislation will not penalise organisations for factors beyond their control.

Part 1: Guiding principles for staffing

98. The guiding principles establish the objectives of the policy within the legislative framework and set out considerations providers must take account of when making decisions about staffing. The guiding principles have been developed to ensure that decisions made as a result of this legislation are aligned with wider health and social care policy. The principles in this legislation combine outcome focus,

³⁸ <http://www.legislation.gov.uk/asp/2010/8/schedule/12>

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transparency in decision making for service users and staff and value the importance of staff wellbeing.

99. The general duty and guiding principles will apply to Health Boards, the Common Services Agency and Special Health Boards with a clinical facing role, and all care service providers. They will be required to take them into account in carrying out their general duty regardless of whether a tool and/or defined methodology is available. Health Boards will be required to have regard to the guiding principles when commissioning care from other providers. Commissioning authorities will be required to have regard to the guiding principles and the duties placed on care providers when commissioning care services.

100. The inclusion of guiding principles is in response to views expressed in the initial consultation that enshrining the nursing and midwifery workload and workforce planning process alone would be insufficient, given the recognised importance of improved outcomes for people by ensuring the right people, in the right place, at the right time to deliver high quality care, irrespective of setting or staff group.

101. The principles are also intended to ensure equity and parity in decision making regarding staffing requirements across all staff groups. This will mitigate the risk highlighted by the initial consultation that resources may be diverted away from staff groups and settings not covered by existing workload and staffing tools.

102. The importance of maintaining existing principles was highlighted in the consultation. The principles in this Bill are consistent with, and aligned to, the objectives of current legislative and non-legislative frameworks that exist across health and care services. In particular, the Health and Social Care Standards, the principles set out in the Public Bodies (Joint Working (Scotland) Act 2014³⁹, and the NHS Quality Strategy⁴⁰ staff governance standards and healthcare quality strategy. They ensure that the relevant aspects of current policies or frameworks are taken into account in a balanced way when making decisions regarding staffing requirements.

³⁹ <http://www.legislation.gov.uk/asp/2014/9/section/4>

⁴⁰ <http://www.gov.scot/Publications/2010/05/10102307/0>

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103. The guiding principles of health and care staffing are to provide safe and high quality services and that staffing for health care and care services is arranged while:

- taking account of the particular needs, abilities, characteristics and circumstances of different service users;
- respecting the dignity and rights of service users;
- taking account of the views of staff and service users;
- ensuring the wellbeing of staff;
- being open with staff and service users about decisions on staffing, and
- allocating staff efficiently and effectively.

104. The Health and Social Care Standards, the principles set out in the Public Bodies (Joint Working (Scotland) Act 2014, and the NHS Quality Strategy still continue to apply.

Part 2: Staffing in the National Health Service

105. It is currently the duty of every Health Board to workforce plan and to provide high quality care. This legislation introduces duties and guiding principles that will further ensure staffing levels are appropriate for the care requirements of patients in their care, no matter what their location or specialty area.

106. For settings where a speciality specific staffing tool currently exists, the Bill will make it explicit that Health Boards are expected to:

- Apply an evidence-based common staffing method, which includes the use of speciality specific staffing tools;
- Ensure that consideration of the output from the staffing tool, professional judgement tool, local context and quality measures underpin and inform decisions about staffing requirements;
- Ensure a consistent approach to identification and mitigation of risk, consider appropriate clinical advice and consider redesign opportunities;
- Ensure staff are appropriately trained to apply the common staffing method and tools, are engaged in the process and

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have information relating to staffing decisions fed back to them;

- Monitor and report on how they have done this and provide assurance regarding safe and effective staffing.

107. It is important that having used the common staffing method described above that appropriate escalation and prioritisation processes are in place to support effective decision making. Although these processes are not explicitly articulated in the Bill it is anticipated that existing governance structures within Health Boards will be used to support escalation of identified risk, review of mitigating factors and prioritisation of investment, where required, on a Health Board-wide basis. This will be clarified in guidance.

108. The diagram below illustrates the common staffing method and identifies which aspects relate to the existing triangulation process and the additional duties under this Bill.



109. The particular duties set out in this Bill to follow the common staffing method apply to those areas specified in the Bill, and regulations can amend those areas covered. Since the use of a speciality specific staffing tool is a key part of the common staffing

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method, the duty to follow the common staffing method in the first instance will only be applicable to nursing and midwifery services and to medical services in emergency care settings, as these are the 11 speciality areas where staffing tools currently exist.

110. The Bill will also be able to accommodate the development of new speciality specific staffing tools in the future. Ministers will have a regulation-making power allowing the requirement to use the common staffing method, including the use of staffing tools, to be extended to other staff groups and other settings in the future as new staffing tools are developed. Providing this flexibility in the Bill ensures that existing staffing tools can be continually improved and adapted, and new staffing tools can be developed as innovative approaches and service redesign emerge. It is anticipated that future speciality specific staffing tools may take a more multi-disciplinary / multi-agency approach rather than applying to single staff groups, such as nurses and midwives.

111. As the recommended whole time equivalent (WTE) staffing requirement outputs from the specialty specific staffing tools are based on an average workload for that specialty across Scotland, it is extremely important that the local context in which the clinical areas is operating is taken into account. This context could include environmental factors, service delivery models or other factors which may justifiably impact on the number of staff the particular clinical area requires. For example in a small service the tool may suggest 1 WTE is required for the workload, however for safety reasons it is likely that 2 WTEs would require to be on shift.

112. The professional judgement tool is run at the same time as the specialty specific tools. This enables clinical staff to identify staffing requirements based on their own professional knowledge and understanding of the area and to identify justifiable addition or reduction from current staffing for the workload during the time that the tools are run. This information is then used to generate a WTE number of staff.

113. As described in paragraph 23 earlier, the link between safe and sustainable staffing levels and the delivery of high quality care is well established. It is therefore vitally important to ensure that measures of quality are included in the process when identifying staffing

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requirements. Nursing and Midwifery specific quality measures are currently being developed by Healthcare Improvement Scotland under the Excellence in Care Programme across all nursing and midwifery families. These measures will be used provide a framework on which to measure and continuously improve quality in nursing and midwifery care and will provide valuable information for the quality dimension of the methodology. As multi-disciplinary tools, and tools covering other staff groups, are developed in the future, appropriate quality measures will be developed and used in the same way as the Excellence in Care measures will be used alongside the existing nursing and midwifery staffing tools.

114. To ensure that staff understand the staffing decisions made, Health Boards and, as appropriate, Integration Authorities will have to take account of staff views in relation to staffing and provide staff with information about the use of the methodology and the staffing decisions reached.

115. The specialty specific tool outputs are based on an average workload for that specialty. By applying them on a regular basis and by using the wider method described above, NHS Boards can make informed decisions to set the budget for staffing in the clinical area. It is important to acknowledge that there is variation in level of care and staffing requirement on a day to day basis. It is therefore necessary to apply professional judgement daily to assess risk and ensure safety is maintained.

116. Having followed the steps in the methodology described above and having identified any risks and mitigating factors it is important that senior clinical advice is sought from the most appropriate professional leader when making staffing decisions. This advice will be sought in a number of ways and from a variety of leaders dependent on the decisions being made on a day to day or on a budget planning basis. The basis on which senior professional advice should be sought will be defined in guidance.

117. Professional advice is required:

- on a daily basis when making decisions on a ward, team, hospital and community wide basis;

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- when setting staffing budgets at ward, specialty, Integrated Joint Board and Health Board levels; and
- when commissioning new or redesigning existing services when projecting staffing requirements at a national level.

118. Professional risk assessment of short term staffing requirements may require a variety of mitigating factors to be put in place to ensure safety is maintained, for example through the redeployment of staff from one area to another or the use of supplementary staffing to support short term gaps.

119. As described previously, supplementary staffing is an inefficient way to plan staffing, and although it is acknowledged that there will be an on-going requirement for some supplementary staffing it is anticipated that as a result of application of the robust approach to planning staff resource requirements described in the Bill the need for supplementary staffing will reduce significantly. This will contribute to wider policy work currently on-going to reduce nurse agency spend.

120. Risk assessment for budget planning will require assessment of all available information from the methodology, a consistent assessment of risk and identification of mitigating factors on a Health Board wide basis in order for senior clinical advice to be given to the Health Board / IJB on assessed risk, extent to which the risk is mitigated and prioritisation of investment where required.

121. Senior clinical advice will be provided to Health Boards and IJBs on staffing requirements when commissioning new services or redesigning existing services and any risks associated with the evidence on which assumptions about staffing requirements are made.

122. Using the methodology and tools will require Health Boards to consider all aspects of the methodology including the use of supplementary staffing to ensure they are using their resources in the best possible way to achieve high quality care. The methodology will support Health Boards to plan and use staff and, where required, redesign services to ensure existing safety and quality measures continue to be met.

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123. Although effective use of tools and methodology as required by this legislation may identify staffing deficit in current funded establishments, supplementary and agency staff are frequently used currently to ensure safety is maintained. This is an ineffective use of funding and the use of the tools and methodology can support diversion of this spend into funded establishment and as a result in some cases reduce overall staffing costs for Health Boards.

124. Health Boards and, as appropriate, Integration Authorities will be required to report on the requirements of the Bill. In practice, this reporting will be done through existing annual reporting mechanisms. Healthcare Improvement Scotland (HIS) provides public assurance about the quality and safety of healthcare through development of evidence-based advice, guidance and standards, provision of support for continuous improvement and through scrutiny of services. The HIS Quality of Care Framework will include a workforce dimension which will measure the extent to which NHS Boards can evidence that they meet the requirements of this Bill.

125. The methodology described in this Bill will also provide valuable information about the impact of nursing and midwifery staffing levels on the quality of care provided.

126. The Scottish Ministers will be able to issue guidance to Health Boards and Integration Authorities setting out further detail around the requirements contained within the Bill.

Part 3: Staffing in Care Services

127. Regulation 15 of the Social Care and Social Work Improvement (Scotland) Regulations 2011⁴¹ states that it is currently the responsibility of every provider of care services to ensure that at all times suitably qualified and competent persons are working in the care service in such numbers as are appropriate for the health, welfare and safety of service users. Providers are also required to ensure that their employees receive appropriate training to carry out their work and suitable assistance including, where appropriate, time off work for further training.

⁴¹ <http://www.legislation.gov.uk/ssi/2011/210/regulation/15/made>

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128. Responses to the initial consultation highlighted the existing mechanisms and approaches in care services and the importance of maintaining these while ensuring the legislation does not create a situation where a “siloed” approach is taken, as a result of putting in place mechanisms that only work for health and not care services. The purpose of including care services in the legislation is to enable the sector to build on and strengthen existing mechanisms by placing Regulation 15 into primary legislation and creating a cohesive legislative framework across health and care settings. By having parity in the legislation the expectation is that the legislation will allow, and support, innovative approaches to workload and workforce planning which take into account the roles of the range of staff groups employed across multiple organisations in the delivery of care.

129. The intention is that this legislation enables and supports the implementation of a key recommendation in Part 2 of the National Health and Social Care Workforce Plan. The ambition is to enable the further development of suitable approaches by and for the sector where this is considered appropriate.

130. The Bill builds on existing legislative functions by providing:

- A power for the Care Inspectorate to work in consultation with the care sector to develop staffing methods. Initially this will only be for care homes for adults;
- A regulation-making power for the Scottish Ministers to enable the Care Inspectorate’s power to be extended to other care settings in the future, if the need arises;
- A regulation-making power for the Scottish Ministers to require the use of any staffing methods developed by the Care Inspectorate;
- The ability for Scottish Ministers to issue guidance to care service providers setting out further detail around the duties contained within the Bill.

131. Overall, responses to the consultation favoured having a coherent legislative framework across health and social care to underpin workforce planning and appropriate staffing in health and social care. The majority of those responding agreed with a proposed role for the Care Inspectorate in leading this work with the social care

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sector, to develop workforce planning tools for application in specific settings, where there is an identified need. However, there was some divergence with some respondents stating, for example, that work should be led by the care service sector. This has been reflected in the legislation by requiring the Care Inspectorate to collaborate with the sector.

132. Whilst the focus of this legislation is about improving the provision of high quality care across health and care settings, it will not be prescriptive or restrictive in terms of detailing specific methodologies and practices for the care sector. It will not, for example, prescribe that validated workload and workforce tools used by Health Boards should also be applied within a care setting. The intention is that any approach developed would support identification of appropriate staffing to meet the needs and aspirations of service users and maintain a focus on achieving positive outcomes.

133. The Bill gives a new statutory function to the Care Inspectorate to work with the relevant sector to examine if a tool was appropriate, taking into account identified need, and appropriate evidence. If there is agreement on the position it would be for the Care Inspectorate to then facilitate the development and validation of a tool, in collaboration with the sector, before bringing it to the Scottish Ministers to have its use placed in regulations. Throughout this process the Care Inspectorate would be required to work collaboratively with commissioning authorities, providers, recipients of services, partnership organisations, trade unions and professional bodies.

134. It is the Scottish Government's intention that care homes for older people would be the first care setting for which a tool is developed, building on existing work on a dependency tool for use in care homes. Given the timescale experienced in developing a tool in health settings and the importance of ensuring that the process of developing a tool suits the care settings and does not simply impose a process developed in health settings, the Scottish Government anticipates that there will only be one tool developed in the next five years within the care setting.

135. Focusing on care homes for adults in the first instance acknowledges uncertainties raised during recent engagement on the workability of the policy approach in other settings. This will provide an

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opportunity to test out and evaluate an appropriate approach and its impact on quality of care and people's experiences, and will assist the Care Inspectorate and the Scottish Ministers in considering whether this scope should be extended in future.

136. In Health Boards, the Nursing and Midwifery Workload and Workforce Planning Programme (NMWWPP) has taken an evidence-based approach to workload and workforce planning. The ground-breaking approach, tools and methodologies have been developed over a number of years with investment of considerable time and resource. It is recognised that similar effort and investment will be needed for the development of approaches suitable for specific care settings.

137. The Scottish Government considers that it will be essential to work with stakeholders to provide reassurance that any and all staffing tools developed for the care sector will only be applicable for, and to, the care sector to reflect the unique demands and pressures of that sector. The development and validation of any tools will be done in collaboration with professionals in that setting.

138. Applying the legislation within care settings to enable more effective workload and workforce planning will, therefore, require significant engagement with key stakeholders to better understand the different context and requirements of the care sector. It is essential, therefore, that the legislation is flexible enough to reflect the diverse needs and requirements of the care sector.

Alternative approaches considered

139. Since the Scottish Government developed the proposals outlined in the 2017 Programme for Government to "*enshrine in law the principles of safe staffing in the NHS, starting with the nursing and midwifery workforce planning tools*" considerable consultation and engagement has been carried out with partner organisations and stakeholders. The development of proposals has also taken into account the Health and Social Care Delivery Plan and the development and publication of parts 1 and 2 of the Health and Social Care Workforce Plan. A number of approaches were considered.

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Non-legislative or use of existing legislative powers

140. Without legislation the existing suite of nursing and midwifery workload and workforce planning tools use would continue to be mandated. Consideration would be given to ensuring greater application and consistency across the country. Although the use of nursing and midwifery workload and workforce planning tools has been mandated for use in health boards since 2013, there is evidence from the national Scottish Standard Time System (SSTS) platform that indicates their application is incomplete for all tools across the majority of health board areas.

141. The mandate did not include the requirement to apply the results, analyse or risk assess the impact that the application of the tools and triangulation process has had on decisions relating to staffing levels, develop work-plans or provide the assurance that there is safe and effective staffing. We would need to identify other ways to ensure this became part of the process, possibly through a further mandate or guidance.

142. As health boards may not be required to undertake some of the additional steps in the methodology, such as informing staff of decisions and considering staff and patient views, the ability to ensure and assure safe staffing provision may be hindered. We would have to explore other ways of requiring health boards to do this as well as mechanisms to require them to report on their use of the tools. This may not enable the level of innovation which the opportunities offered by integration allow, especially in relation to multi-disciplinary tools.

143. If the legislation does not go ahead the recommendation set out in Part 2 of the National Health and Social Care Workforce Plan to co-produce workforce planning tools for the social services sector could be progressed. The Care Inspectorate would continue to consider at registration and inspection the existing requirement in regulations for care service providers to ensure appropriate numbers of suitably qualified staff for the provision of high quality care.

144. Existing regulation making powers in section 78 of the Public Services Reform (Scotland) Act 2010 may provide an alternative mechanism to introduce requirements to use specified workload and

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workforce planning tools for care services if any were developed in the future.

145. However in following this route there would be limited or no opportunity to provide greater coherence across the health and care landscape in relation to statutory requirements regarding appropriate staffing a factor which attracted broad support during the recent consultation.

Introduce new primary legislation

146. The key aims of placing the existing tools and methodology on a statutory basis include providing assurance, for both staff and service users, that appropriate staffing is in place to enable the provision of high quality care. The legislation will be a driver for the improvements required to the current application of the staffing tools and methodology by Health Boards. Lastly, setting out an improved methodology in legislation which includes reporting and monitoring will ensure consistency and transparency in how the tools and methodology are used across Health Boards to identify staffing requirements. For these reasons, the conclusion was reached that primary legislation was the most appropriate route to ensure the outcome required. The provisions within the Bill reinforce consistent application of the existing tools and methodology and add the dimensions of staff engagement, senior clinical advice, and identification and mitigation of risk at all levels of the decision making process.

147. Given the decision to enshrine the use of nursing and midwifery tools and methodology in primary legislation and feedback from the consultation and engagement with stakeholders, particularly on the importance of ensuring the intentions of this Bill are aligned with integration of health and social care and multidisciplinary and multi-agency working the Scottish Government considered a range of legislative options. Broadly the key choices were whether the Bill:

1. Enshrines a workload and workforce planning process alone or enshrines a more general staffing duty and supporting principles in addition to more detailed requirements where a tool and methodology exist;
2. Focuses on nursing and midwifery only or spans wider staff groups; or

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3. Focuses only on NHS settings, or spans health and social care settings.

148. In relation to the proposed approach to include social care services, a secondary choice was whether:

4. The legislation should allow for the development of tools and/or methodologies in all types of care settings or focus on a subset e.g. care homes for adults.

149. In reaching the decision about the proposed approach, a range of factors were considered including their effectiveness in supporting and enabling the Scottish Government's ambition to deliver integrated workforce planning and appropriate staffing across health and care, potential financial implications, stakeholder views and evidence of the impact of using the current workload and workforce planning tools and methodology. The considerations for each of the four choices are outlined below.

1. Enshrine workload planning process alone or enshrines a more general safe staffing duty and supporting principles in addition to more detailed requirements where a tool and methodology exists.

150. Concerns were raised in the initial consultation that enshrining a workforce and workload planning process alone, i.e. a requirement to use validated tools, would not necessarily achieve the stated outcomes of ensuring safe high quality care. The importance of ensuring transparent decision making that takes account of identified risk and professional advice was also raised in the consultation.

151. The provision of a general staffing duty, which applies in instances where there is not a validated tool, addresses concerns about diversion of resources from areas where there is no tool. The addition of supporting principles establish the objectives of the policy within the legislative framework, setting out the aims that Health Boards must take account of when undertaking their general duty. Importantly, this will provide for the public assurance that the goal of sufficient staff to ensure safe and high quality care across all health care settings is at the heart of the Bill.

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152. There are more specific duties where a tool is available. These require not only application of the tool and methodology currently mandated in Chief Executive Letter 32, but also require the addition of risk identification, mitigation, escalation and prioritisation, staff engagement, and senior clinical professional advice provides assurance and transparency in decision making.

153. In order to ensure that workload tools remain contemporary and can provide evidence of workload in multi-disciplinary and multi-agency teams regulation-making powers have been included which would enable additional tools to be added to the existing list, including those developed on a multi-disciplinary and multi-agency basis.

2. Focus on nursing and midwifery only or span wider staff groups

154. Consideration was given to the significant concerns raised in the initial consultation that an unintended consequence of applying the legislation to only nursing and midwifery could be that resources would be diverted from other staff groups if gaps in nursing and midwifery staffing were identified. The importance of ensuring that tools could be developed across multi-disciplinary and multi-agency teams was also identified in the consultation.

155. The decision to not just enshrine the process of using the current tools and methodology, but to create a general staffing duty under which there would be more detailed requirements for areas in which a tool and methodology exists, impacts on the decision whether to focus only on nurses and midwives or wider staff groups. A tool is developed by and for a specific staff group in a specific clinical setting: the detailed requirements relating to the use of tools and methodology therefore focus only on staff groups and settings where there is a tool and methodology. Ministers will be given a power to update the settings to which this requirement applies to as and when new tools are developed.

156. The general duty which sits above the detailed requirements to use a tool and methodology will be applied to wider staff groups where there is not currently a tool. The decision was taken to include wider staff groups within this duty for two reasons.

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157. Firstly, given the stakeholder feedback that to focus the legislation on one group of staff may divert resources from other staff groups, applying a general duty to all staff groups will require Health Boards to take into account the impact of staffing decisions across all staff and prevent diversion of resources to one staff group. Secondly, many stakeholders highlighted the importance of multidisciplinary working and the opportunity to develop multidisciplinary tools in the future. Therefore creating a general duty which would apply to all staff groups the Bill provides a framework for the use of such tools, should they be developed, in the future.

3. Focus only on NHS settings, or span health and social care settings

158. Concerns were expressed in the first consultation that, if the Bill were to focus only on NHS settings, this would promote a ‘siloes’ approach at odds with policy to support and strengthen integrated workforce planning across health and social care.

159. Some social care bodies were also worried that a focus on NHS settings could skew resourcing decisions and lead to an under-resourcing of social care with a concern that Integration Authorities will have to prioritise resources to nursing and midwifery over the rest of the health and social care workforce. A second consultation proposed inclusion of social care in the legislation by creating a general duty for staff planning which would apply across health and social care, with the Care Inspectorate being given a role to facilitate the development of tools by the sector should there be a need to do so.

160. Providing a coherent legislative framework in the form of a general duty and guiding principles will ensure that staffing decisions across health and care settings are made according to common objectives. In addition Part 2 of the National Health and Care Workforce Plan included a commitment for the Scottish Government and COSLA to progress and co-produce social care and multi-disciplinary workforce planning tools that support the delivery of high quality care that reflects the new health and social care standards, and enable service redesign and new models of care. As integration of health and social care proceeds, having a coherent framework will allow for the development of tools which can be used for teams of staff working across health and social care providers.

4. Allow for the development of tools and/or methodologies in all types of care settings or focus on a subset

161. Unlike in health settings, where tools are in operation in nursing and midwifery, social care settings have not yet generated a body of evidence upon which to build a tool and test a methodology. There are however, some examples of a systematic approach to identifying care needs within a client group for care homes which could provide a foundation on which development of a workload planning tool/methodology could be based.

162. Experience of timescales from commencing work to achieving a fully validated workload tool for health settings suggests that the process can take between three and seven years. This is dependent on the size and complexity of the service, availability of an evidence base and time taken to gain consensus from stakeholders. It will be important to ensure the methodology for developing a tool in the care sector is designed collaboratively with the sector to ensure it meets the needs of care services. This experience along with the importance of ensuring the process of developing a tool is fit for purpose in the care setting suggest it is unlikely that work would extend beyond care home settings in the next five years.

163. Scottish Ministers therefore decided that the Care Inspectorate would be given a function to explore, with the sector, the development of a workload and workforce planning tool and methodology for care homes for adults, in the first instance, building on existing work on a dependency tool for use in care homes. Should there be a need identified for tools and methodologies in settings other than care homes Scottish Ministers would have the power to extend this function of the Care Inspectorate to lead such work, in close partnership with the sector.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

164. The public sector equality duty requires public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between different people when carrying out their activities. An Equality Impact Assessment (EQIA) has been conducted in order to ascertain the impact of the Bill on equality groups. The EQIA has confirmed that the provisions of the Bill will not directly or indirectly discriminate on the basis of age, disability, gender, gender re-assignment, sexual orientation or race and belief.

165. The Bill is intended to apply equally to those affected by its provisions. The decision in the first instance to limit the Bill's application to care homes for older people is not aimed at excluding children or other vulnerable groups. Instead it is to implement a phased approach ensuring the testing of the concept and application in care in line with evidence and practice, which if applicable will be extended elsewhere through powers within the Bill. The EQIA will be published to coincide with the introduction of the Bill.

Human rights

166. The Scottish Government considers that the Bill complies with the European Convention on Human Rights (ECHR) and United Nations Convention on the Rights of the Child (UNCRC), and moreover supports a rights-based approach to policy, by recognising that safe staffing is not purely about ensuring the safety of people experiencing care and support but also the safety and wellbeing of staff and, where applicable, visitors.

Island communities

167. The Bill will apply to all communities across Scotland; the Scottish Government has not identified any specific differential impacts on island communities. None of the three Island Councils (Orkney, Shetland and Comhairle nan Eilean Siar) have raised any particular concerns on this issue with the Scottish Government.

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Local government

168. The provisions in the Bill will apply to organisations providing health and care services, and to organisations providing services on behalf of IJBs. Local authorities within COSLA were consulted individually and collectively as the policy was developed. The Scottish Government will continue to engage and have constructive dialogue with COSLA throughout the Bill's parliamentary passage to better understand any potential impact that the legislation might have on local authorities, in terms of discharging their current duties and any financial implications that there may be.

Sustainable development

169. Complying with the guiding principles and staffing tools and methodology will ensure that the focus is on the delivery of effective patient care through the availability of the proper staff, with the right balance of skills rather than focusing on staff numbers. This will ensure that the provision of care is both sustainable in terms of delivery and realistic in terms of using evidence-based tools and methodology in staffing.

Strategic Environmental Assessment

170. It is unlikely that the provisions within the Bill will have an effect on the environment. A pre-screening report was undertaken and submitted to the SEA Gateway in September 2017 seeking views on whether the duties in the Bill would have a significant environmental effect and whether a SEA is required. It was advised that a Strategic Environmental Assessment was not necessary and that the proposals are therefore deemed to be exempt from strategic environmental assessment under section 7(1) of the Environmental Assessment (Scotland) Act 2005.

Business and Regulatory Impact Assessment

171. A partial Business and Regulatory Impact Assessment (BRIA) was published with the first consultation paper. A full BRIA has been carried out and will be published to coincide with the introduction of the Bill. The costs and benefits of the proposed legislation have been analysed and included in the BRIA document. It concluded that the Bill's provisions are not expected to have any additional financial impact on Health Boards, given the current requirement for Health

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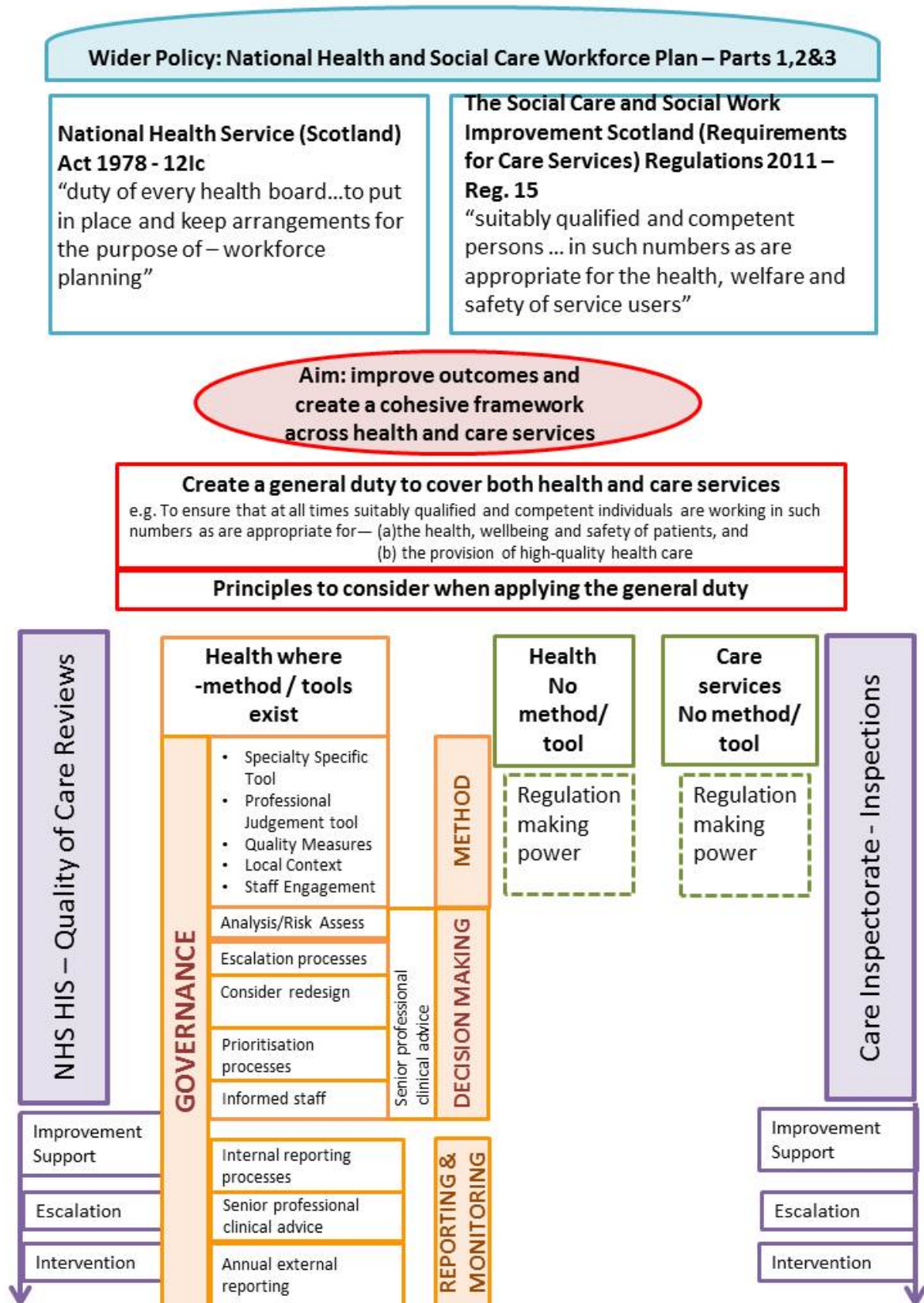
Boards to apply current staffing tools when determining staffing requirements.

172. The provisions of the legislation will enable the Care Inspectorate, through its inspection methodologies and practices, to ensure that care service providers can provide evidence of applying the guiding principles when making staffing decisions and in use of any staffing tools and method which may be developed in the future. As there is currently no staffing tool validated for use in the care sector, it is not possible to accurately predict the financial impact. The Financial Memorandum which accompanies the Bill sets out the estimated cost in relation to tool and methodology development similar to the way to those developed by the NMWWPP. However it should be noted that there is no requirement to develop a tool in this way.

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Annex A Diagrammatic Representation Of Bill And Wider Policy

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Policy Memorandum

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