



The Scottish Parliament
Pàrlamaid na h-Alba

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23 November 2022

Dear Minister,

National Care Service (Scotland) Bill

On 15 November, the Health, Social Care and Sport Committee took oral evidence on the Bill from a panel of representatives from trade unions that represent the social care workforce. At that session, witnesses raised several issues in relation to which we are writing to you to seek further clarity, in advance of your attendance to give evidence on the Bill at the Committee's meeting on 20 December 2022.

Transfer of staff

The Bill proposes that regional care boards will be established to commission or deliver care services in local areas. According to paragraph 48 of the [Policy Memorandum](#), the care board would commission health services from the NHS so that these would continue to be delivered by the NHS. Under these provisions, for care services delivered by local authorities, care boards could choose to commission local authorities to continue to provide them, or staff could be transferred to care boards to deliver them directly.

The Committee understands that the Scottish Government's intention is that the details of specific arrangements for service delivery would follow the co-design process and would be set out in secondary legislation.

- 1. Given the wide range of services that care boards could be involved with, can the Minister provide clarity on whether, in addition to public sector staff, private and charity providers might be affected by transfers of staff, and how individual's employment contracts would be impacted, if at all?**
- 2. If so, could you provide more detail on how that is intended to work in practice?**

The Committee understands that a key protection for staff who are transferred from one employer to another is provided by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

We are aware that all transfers, especially those involving public sector functions, are covered by TUPE. However, section 31 of the Bill lays out Scottish Ministers' powers in relation to the transfer of staff. Section 31(3) states that transfers effected using this power would be covered by TUPE.

We understand the TUPE 2006 Regulations do not apply to most occupational pension rights. The Transfer of Employment (Pension Protection) Regulations 2005, set out minimum entitlements, depending on what sort of pension the person being transferred had with their original employer.

Under section 101 of the Local Government Act 2003, Scottish Ministers have powers to issue directions to local authorities setting requirements for staff being transferred in or out of local government employment. This could be used to require specific pension protection.

- 3. Can the Minister provide clarity on whether the Scottish Government has previously exercised this power, in which circumstances, and with what outcome?**

Separately, section 102 of the Local Government Act 2003 requires Scottish Ministers to use their powers under Section 101 to provide additional pension protection to local authority staff who are transferred out in a TUPE-protected transfer (covering any further TUPE transfers). This sets out that staff must have pension rights which are at least the same as (or broadly equivalent to) those provided before the transfer.

The UK Government provides a guarantee to staff transferred out of central government and the NHS in relation to pensions called [Fair Deal 2013](#). We understand that this is primarily delivered by allowing transferred out staff to continue membership of their public sector pension scheme.

The Committee notes the UK Government Cabinet Office's [Statement of practice on staff transfers](#) (2013). This covers transfers within the public sector as well as transfers out of the public sector, although it is not directly applicable to the Scottish Government or local authorities.

In terms of pension protection for transfers within the public sector, paragraph 19 of the statement of practice says:

“Departments must therefore ensure that legislation effecting transfers of functions between public sector bodies makes provision for staff to transfer and on a basis that follows the principles of TUPE along with appropriate arrangements to protect occupational pension, redundancy and severance terms.”

The Committee notes that in Section 1(g) of the Bill, [fair work](#) would be a core principle of the National Care Service. The Committee understands that the Scottish Government’s intention is that this should operate to ensure good practice when transferring staff.

At the session on 15 November, Roz Foyer (STUC) stated:

“Our fear is that the sort of commissioning system that is being set up will neither address nor take forward fair work and collective bargaining issues in a way that gives us any surety, and that it will address neither the fact that profiteers are still sucking profits out of our care system nor the issue of local accountability.”

- 4. Can the Minister clarify if the Scottish Government has put in place an equivalent guarantee to the Fair Deal 2013?**
- 5. Can the Minister set out in more detail how fair work principles will be embedded in the Bill?**
- 6. Can the Minister provide more detail on the rationale as to why the Bill does not contain more detail in relation to fair work, given the extensive work already undertaken as part of the Fair Work Convention?**

Practical application

The Committee notes that the development of a National Care Service is likely to involve transfer of local authority staff to care boards.

In its submission to the Committee’s call for views, UNISON expressed concern regarding the impact on local government of the transfer of staff. During the session on 15 November, Tracey Dalling (UNISON) further emphasised:

“Our fear is that 75,000 staff will end up working for care boards, or will be contracted to other employers on a hired-out basis to deliver social care for a care board, and that we will see one TUPE transfer leading to another TUPE transfer leading to another.”

“At no point does a worker take their pension with them. TUPE does not cover pensions—it covers just the bare terms and conditions, which will be eroded over time. There has been no formal consultation of Unison over the transfer of 75,000 staff to care boards.”

- 7. Does the Scottish Government plan to engage and consult with trade unions on the transfer of staff, and specifically in relation to a possible TUPE process?**

8. If so, can the Minister set out its plans for such consultation and engagement, including timescales?
9. If not, can the Minister provide more detail on the decision-making process it intends to follow in relation to this and the rationale behind it?
10. Would an individual employee's pension arrangements be affected by any such transfer?
11. Would an individual's pay and conditions be affected by any such transfer?

Deadline for response

To enable these matters to be further explored when you are due to give oral evidence to the Committee on the Bill, I would be grateful to receive a response to these questions by **Wednesday 7 December 2022**. I look forward to hearing from you.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Gillian Martin'.

Gillian Martin MSP
Convener, Health, Social Care and Sport Committee