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Gillian Martin MSP  
Convener, Health, Social Care and Sport Committee  
By email: HSCS.committee@Parliament.Scot

19 December 2022

Dear Gillian

Thank you for your letter dated 23 November 2022 regarding the National Care Service (Scotland) Bill and concerns that have been raised with the Committee about the implications of the National Care Service (NCS) for terms and conditions and pensions for the workforce and on the inclusion of Fair Work within the Bill.

As you note in your letter, the details of specific arrangements for service delivery within the NCS will be developed through co-design and engagement with our stakeholders and partners. It is absolutely our intention to involve COSLA, local authorities and the trade unions as well as social care workers in taking the decisions about how services are delivered within the NCS, including those which have implications for the workforce and any potential transfers of staff.

As the Committee is aware, it is by no means a foregone conclusion that local authority staff, for example, will need to transfer their employment. The Scottish Government wants Local Government to continue in its role as a direct provider of social care services. This includes continuing to hold and invest in assets and employ staff directly and it remains the Scottish Government's position that new local care boards will work collaboratively and in partnership with the NHS, local authorities, third and independent sectors to improve support locally and nationally. Our intention is that staffing decisions will be taken locally as the care boards are established. Once the structure and governance of care boards and their localities have been decided, decisions about the employment of local government staff can be made. At this stage discussions are continuing and ultimately each Local Authority will want to consider the role they want to play. However, an ability to transfer assets, and staff, is necessary to support the transfer of accountability. That may at some point require the ability for the transfer of LG assets and staff. It would therefore be remiss not to include powers to do so on the face of the Bill.

I am providing further details in response to each of your questions below.

- 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?**

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In this context, it may be helpful to say that the Bill only gives Scottish Ministers powers to transfer staff from local authorities to care boards or to the Scottish Government part of the NCS, and subsequently between care boards and the Scottish Government.

In relation to staff of private and third sector social care providers the new local care boards will determine at a local level how specific social care support and services should be provided. The standard TUPE (The Transfer of Undertakings (Protection Employment) Regulations 2006) process will apply where there is a relevant transfer. This means that where there is a change of provider for that service there may be transfer of staff. This includes where the decision is made to provide a previously outsourced service in house. In these instances the transfer of staff will be worked out on a contract basis between the incumbent provider, contract owner and new provider, just as happens under the current system.

That stability of staff and continuity of care is important for people who access support, and we are committed to ensuring the NCS builds on, and facilitates the continuation of, existing good practice which already exists locally. As part of achieving this, we are committed to promoting and supporting fair working practices to ensure people who work in social care are valued for the important work they do.

The Bill does however, enable Ministers to ask for Court authorisation to intervene in a third party contract for social care through the Courts if there is a risk to people's care provision in specific situations and where contractual remedies have been exhausted, or urgent action is required to protect and ensure those who access social care support continue to receive the care and support that they require. This would mean that, if the court sanctions the application, care boards (on behalf of Scottish Ministers) will be able to take over direct provision of services as a provider of last resort.

## **2. If so, could you provide more detail on how that is intended to work in practice?**

As clarified above, once the structure and governance of care boards and their localities have been decided, discussions can begin with local authorities about their role and the employment of their staff. However, we are always willing to enter into earlier discussions if local authorities would find that helpful.

## **3. Can the Minister provide clarity on whether the Scottish Government has previously exercised the powers under section 101 of the Local Government Act 2003, to issue directions to local authorities setting requirements for staff being transferred in or out of local government employment in which circumstances, and with what outcome?**

Scottish Ministers have not used powers under section 101 of the Local Government Act 2003 to require specific pension protection in circumstances where staff have been transferred into or out of local government employment. It would of course be open to them to issue guidance but this isn't necessary as there is a statutory duty under section 52 of the Local Government in Scotland Act 2003 on local authorities to have regard to any guidance issued to them by Scottish Ministers regarding contractual matters. Scottish Ministers have issued this guidance. It reflects TUPE and COSOP and thus includes pensions provision. It is available on gov.scot [Contracting: statutory guidance for local authorities - gov.scot \(www.gov.scot\)](https://www.gov.scot/Topics/consultations/contracting-guidance) By way of comparison, the UK Government and the Welsh Government have each issued directions to their relevant authorities (as a group, rather than individual

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cases) under section 101 of the Local Government Act 2003. The preference in Scotland has been to utilise statutory guidance, rather than directions, in such matters.

#### **4. Can the Minister clarify if the Scottish Government has put in place an equivalent guarantee to the Fair Deal 2013?**

As noted above, no decisions have been taken about potential transfers of staff and the NCS. Thorough consideration will be given to all options regarding pensions and stakeholders including the trade unions will be consulted before any decisions are taken.

#### **5. Can the Minister set out in more detail how fair work principles will be embedded in the Bill?**

Fair Work was a key part of the Independent Review of Adult Social Care and work to implement the Fair Work Convention's specific recommendations, to which the review referred, has already begun.

The Bill already states as part of its principles that the NCS will be an exemplar of Fair Work and, as such the NCS will seek to embed the five dimensions of Fair Work as defined by the Convention. Along with partnership work to improve entry routes into the sector and career progression, work is underway with key stakeholders to develop longer term and sustainable improvements for the social care workforce, relating to pay, better terms and conditions, the introduction of sectoral bargaining, improved training and development opportunities, better recognition and representation – particularly in respect of trade unions, and more rewarding roles.

We expect that the fair work measures described above will help to support the long running recruitment and retention challenges in the sector, and attract new people to the sector to ensure the sustainability of services in the future.

#### **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?**

Employment rights and industrial relations are a reserved matter in the terms of the Scotland Act 1998.

The Bill sets out the very clear intent through the principles of the NCS to ensure that it will be an exemplar of fair work practices. The Bill provides for the Scottish Ministers (in relation to any NCS services they provide) and care boards to put in place strategic plans, which must include an ethical commissioning strategy, being a strategy for ensuring that arrangements for service provision best reflect the principles of the NCS, including the principle that the NCS is to be an exemplar in its approach to fair work.

The recommendations set out by the Fair Work Convention, following their report and recommendations on adult social care, are already being taken forward through the Fair Work in Social Care Implementation Group. Actions delivered through this activity, such as the two pay uplifts delivered in December 2020 and April 2021, as well as ongoing work on Terms and Conditions, Sectoral Bargaining and Effective Voice, will be embedded within the operating model of the NCS.

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**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?**

If it is agreed that staff would transfer to the NCS, following discussions with local authorities, TUPE would apply, as set out in section 31(4) of the Bill. The Scottish Government would engage with recognised trade unions in line with TUPE / COSOP (Cabinet Office Statement of Practice 2013).

**8. If so, can the Minister set out its plans for such consultation and engagement, including timescales?**

TUPE / COSOP principles will apply if the delivery of services is transferred from local authorities to care boards. If that is the case, the TUPE process would be followed including engagement with relevant employers and recognised trade unions. Engagement at a strategic level would be through COSLA.

As made clear above, decisions on whether any staff transfers will take place will depend on discussions with local authorities once the structure and governance of care boards and their localities have been decided, therefore no timings can be given at this stage.

**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?**

If it is agreed that staff would transfer to the NCS, following discussions with local authorities, TUPE would apply, as set out in section 31(4) of the Bill. The Scottish Government would engage with recognised trade unions in line with TUPE / COSOP (Cabinet Office Statement of Practice 2013).

As made clear above, decisions on whether any staff transfers will take place will depend on discussions with local authorities once the structure and governance of care boards and their localities have been decided, therefore no timings can be given at this stage.

**10. Would an individual employee's pension arrangements be affected by any such transfer?**

TUPE / COSOP principles will apply if decisions are made to transfer functions and activities to care boards.

We are actively considering pensions implications. and will look to engage with the wider sector, including LGPS SAB (Local Government Pension Scheme Stakeholder Advisory Board), in due course. Thorough consideration will be given to all options regarding pensions and stakeholders. TUPE principles place requirements on both sides to consult with trade unions "in good time" and we would ensure that such consultation takes place. Our intention will be to avoid any detriment to staff, including in relation to pensions.

**11. Would an individual's pay and conditions be affected by any such transfer?**

TUPE / COSOP principles will apply if decisions are made to transfer delivery of services to care boards. Therefore, terms and conditions would need to be suitable and meet the requirements for pensions, severance and alignment with Public Sector Pay Policy. TUPE principles place requirements on both sides to consult with trade unions "in good time" and we would ensure that such consultation takes place.

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Yours sincerely,



Kevin Stewart

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