

# Written submission from Scottish Care, 13 May 2025

## Health, Social Care and Sport Committee Employment Rights Bill supplementary Legislative Consent Memorandum (LCM)

### Purpose

To respond to the Scottish Parliament's (Health, Social Care and Sport Committee) request for submissions regarding the [Legislative Consent Memorandum](#) (LCM) (December 2024) and [Supplementary LCM](#) (April 2025) for the [UK Parliament's Employment Rights Bill](#).

### Background

On 16 April 2025, Scottish Care was invited to provide its views on the Scottish Government's LCMs for the UK Parliament's Employment Rights Bill. To aid the Health, Social Care and Sport's Committee's scrutiny of the LCMs, Scottish Care provides its views on both the original and supplementary LCMs, relating to:

- The protection of workers involved in public sector outsourcing and associated definition of a 'relevant outsourcing contract', contained within the original LCM.
- plans to establish and negotiate legally binding agreements in the social care sector, contained within the supplementary LCM.
- whether or not the Committee should recommend that the Scottish Parliament should approve the supplementary LCM.

### About Scottish Care

Scottish Care is the representative body of over 350 private, not for profit and charitable provider organisations (the independent sector) organisations delivering residential care, nursing care, day care, care at home and housing support services. These organisations deliver a wide range of registered services for older people and those with long term conditions, learning disabilities, physical disabilities, dementia or mental health challenges.

Scottish Care's Workforce Matters workstream is the workforce planning and development arm of Scottish Care, committed to maximising the potential of the independent sector social care workforce. Scottish Care has compiled this response through this workstream, based on engagement with our [Strategic Workforce Group](#), wider membership, and other member organisations.

We thank the Committee for the opportunity to provide this response and affirm our willingness to provide further information during the Bill process if required.

## **Protection of workers involved in public sector outsourcing and associated definition of a ‘relevant outsourcing contract’:**

The original LCM and subsequent amendments address the issue of protecting workers involved in public sector outsourcing. This part of the Bill, initially in Clause 25 and now Clause 27 (incorporating amendments Gov 59-64), aims to prevent the emergence of a 'two-tier workforce' where ex-public sector employees and private sector employees work on different terms and conditions.

The provisions involve inserting a new Part 5A into the Procurement Act 2023, which confers powers on Ministers of the Crown, Scottish Ministers, and Welsh Ministers to make regulations and publish a code of practice to ensure equal treatment of different groups of workers.

This is significant because employment and industrial relations are generally reserved to the UK Parliament, while public procurement is devolved to the Scottish Parliament. The provisions in the Bill that confer powers on Scottish Ministers alter their executive competence, which is why a Legislative Consent Memorandum is required.

The UK Government intends for these powers to be used to reinstate a non-binding 'Two-Tier Code' that was in place between 2005 and 2010.

The Scottish Government welcomes this intention, stating it is consistent with its approach to using public procurement to drive up fair work standards, including mandating payment of the real Living Wage in public contracts. The proposed amendments would require contracting authorities to promote fair work standards further in outsourced services, ensuring all workers in the supply chain are treated no less favourably than their public sector counterparts.

Scottish Care shares the position of the Scottish Government in welcoming the intention to address the two-tier workforce issue in outsourcing contracts. However, we reiterate that Fair Work requires fair commissioning and procurement. Without appropriate levels of funding via public contracts, this objective will fail.

Scottish Care continues to highlight that the ability of independent sector care providers to deliver fair work in the context of delivering commissioned services is dependent on a fair rate. The sector is bound by tight funding and commissioning constraints which set pay rates for workers, don't allow for differentials and don't recognise the wider care workforce beyond those in direct care roles. The absence of this sufficient rate will remain a key barrier to the implementation of improved terms and conditions. Therefore, unless Fair Work is addressed as a funding and commissioning issue as part of wider scale sector reform, it won't achieve the fundamental shift in workforce value. In addition, it needs to be recognised that workforce costs already comprise the majority of expenditure for care providers – with no margin from which to draw additional funds.

We concur with the Scottish Government that the powers may have financial implications for contractors and public authorities. We emphasise the significant

impact these financial implications will also have on independent providers of adult social care and their ability to deliver fair work commitments and quality care. Scotland also has a significant rate of publicly funded care provided through the private sector. For example, as of 31 May 2024, 62% of long stay residents within private care home are in receipt of public funding.

The necessity of public funds through commissioning and procurement agreements to maintain the viability of independent adult social care services, ensures that the receipt of funds commensurate to the true cost of care is critical to the implementation of the proposed legislation. Currently, constrained public funding and contracting mechanisms afford no scope for additional cost absorption (as evidenced with [increased National Insurance contributions](#)). Without a fit-for-purpose procurement agreement in this regard, independent providers will be further required to utilise the use of the self-funder market, with increased costs passed to those accessing care and support.

Scottish Care therefore shares the Scottish Government's calls for an impact assessment in relation to these measures, conducted in consultation with independent adult social care providers. No impact assessment has been produced by the UK Government.

The speed of the Bill's introduction has meant no broad consultation on these specific proposals, and it is anticipated that consultation and stakeholder engagement would occur before the powers are exercised. Scottish Care offers our assistance in this regard, utilising the expertise of our members in enabling fair work practices within the independent adult social care sector.

Finally, key to addressing the 'two-tier' workforce' is the shared responsibility over accountability and reporting procedures. Commissioning and procurement bodies must share responsibility with independent service providers for achieving parity in terms and conditions across sectors, including the public reporting of relevant data within annual reporting mechanisms to ensure oversight and address disparity. As such, devolved competency to align the Bill's aims and pre-existing Scottish Government legislation and infrastructure (notably the Procurement Reform (Scotland) Act 2014 and Public Bodies (Joint Working) (Scotland) Act 2014) would be welcomed.

## **Plans to establish and negotiate legally binding agreements in the social care sector:**

The supplementary LCM focuses on the provisions regarding Social Care Negotiating Bodies, included in Chapter 2 of Part 3 of the Bill.

The policy objective is to introduce negotiated agreements in the social care sector by creating a framework for establishing and implementing a legally binding agreement. This agreement, negotiated by a "negotiating body" of employer and worker representatives, can set out matters related to pay and other terms for social care workers.

Amendments tabled on 5 March 2025 specifically make provision for social care negotiating bodies for Scotland and Wales, with the objective to enable Scottish Ministers to create a social care negotiating body in Scotland.

Clause 36 extends these provisions to Scotland, granting Scottish Ministers power to make regulations establishing a Social Care Negotiating Body for Scotland (Negotiating Body), albeit requiring agreement from the Secretary of State for certain regulations.

Clause 37 provides regulatory power for Scottish Ministers regarding the Negotiating Body's establishment, including membership (which must include representatives from trade unions and employers).

Clause 38 clarifies that the Negotiating Body's remit includes matters related to the remuneration, terms and conditions, or any other employment matter of relevant social care workers.

The Scottish Government welcomes the intention to address the lack of a negotiated and bargaining financial remuneration mechanism in social care, stating this is consistent with their fair work approach. They view this as a significant development for employment terms and conditions, limited previously by employment matters being reserved.

Scottish Care notes that engagement has occurred with the Fair Work in Social Care Group, which includes trade unions and social care providers. While generally supportive of a Social Care Negotiating Body for Scotland, the group raised concerns about its flexibility and scope whilst acknowledging the benefits of the legislative underpin provided by the Bill.

Scottish Care recommends that the Scottish Parliament recognise and adopt the work of the Fair Work in Social Care Group, which has been working to establish a constitution for the Scottish Social Care Joint Council (SSCJC), the proposed negotiating group for social care in Scotland. This group is tripartite, including government representatives, which is an important distinction from the terms laid out in the UK Bill.

In relation to Clause 38, it is essential that decisions made under this clause and definitions of workers take into account the implications for staff pay differentials. For instance in many care home settings, particularly smaller ones, it is common for all staff—regardless of role—to engage directly with residents and their families. As such, although the formal definition may centre on 'social care workers,' the responsibilities and expectations placed on other staff may overlap significantly. This has implications for both equity and workforce cohesion. Where additional duties or expectations are placed on staff beyond the formally defined group, appropriate recognition and remuneration must follow. Moreover, in smaller care homes, it is often both practical and beneficial for all staff to be trained to support residents directly. Recognising this in workforce planning and funding decisions will help ensure fairness and operational resilience across the sector.

Similar to the outsourcing provisions, there are no direct financial implications from these provisions but there will be implications from exercising the powers, which need future consideration. The UK Government has not produced an impact assessment. Scottish Care believes the Scottish Government needs to produce annual impact assessments (including an Equalities, Poverty, and Human Rights Impact Assessment (EQIA), a Business Resilience Impact Assessment (BRIA), and an Island and Mainland Rural Communities Impact Assessment (IMRCIA)) in line with agreed settlements, in order to ensure the sector's sustainability. If the Scottish Government has a role in the joint council, this could be dealt with proactively.

Development of any guidance or codes of practice under Clause 46 should be done in consultation with sector stakeholders, including care providers, and will require impact assessments and an appeals process.

## **Wider context**

Recent UK Government proposals to remove the Health and Care Worker visa route have been [strongly condemned by Scottish Care](#). We have warned that it will severely impact the sustainability of social care services in Scotland, particularly in rural and island areas where international recruitment has been essential.

The proposed visa changes will significantly reduce the available labour force for Scotland's social care sector, exacerbating existing shortages and simultaneously increase the need for domestic investment. With reduced access to overseas workers, greater funding will be required to attract, train, and retain a homegrown workforce, in keeping with the needs outlined throughout the submission.

In order for the Employment Rights Bill's successful implementation—including fair pay and improved conditions—it will require significant enhanced investment and compatibility with the Scottish context. This is now more urgent given the workforce constraints imposed by UK immigration policy. The recent and proposed immigration changes evidence a lack of contextual assessment and represent a clear example of a UK-wide policy decision taken without adequate consideration of Scotland's demographic, geographic, and sector-specific needs. This should not be replicated through the Employment Rights Bill and its implications for the social care workforce.

## **Recommendation on approving the supplementary LCM**

The Scottish Government recommends that legislative consent be given to the supplementary LCM.

Scottish Care shares the position of the Scottish Government in welcoming the intention of the UK Government's Employment Rights Bill to address the issue of two-tier workforces and the lack of a negotiated remuneration mechanism in social care.

However, as noted above, Scottish Care reiterates its concerns regarding the necessity of fair commissioning and procurement funding for the successful implementation of fair work standards and this legislation. The financial implications

for independent providers and the need for impact assessments are key points which need further consideration.

Providing these issues are sufficiently addressed through both UK and Scottish legislative instruments, Scottish Care welcomes the recommendation to deliver legislative consent to the Scottish Government. Ensuring fair work for those employed in various adult social care sectors is dependent on the ongoing involvement of workers and employers in direct negotiations and policy development. For commissioned social care providers and their workforces, having a negotiating body in Scotland would represent a positive development in increasing sectoral engagement regarding terms and conditions for this workforce. Moreover, ensuring there is legislative competence for Scottish Ministers is essential to ensuring that agreed action can be delivered speedily, to support the workforce of commissioned services in a timely manner.