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For attention of Gillian Martin MSP
Convener, Health, Social Care and Sport Committee

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23 February 2023

Dear Gillian

UNISON Scotland's Regional Secretary, Tracey Dalling, gave evidence to the Health, Social Care and Sport Committee on 15 November to assist with scrutiny of the National Care Service (Scotland) Bill.

UNISON notes the Committee's subsequent letter of 23 November directing questions on workforce matters to the Minister, Kevin Stewart, and the Minister's written response to these, dated 19 December.

I write concerning the pensions implications of the Bill a matter of crucial importance to our members. I would like to make the Committee aware of:

- UNISON's views on the Minister's response;
- UNISON's briefing, '[Staff Pensions and the National Care Service](#)' (also attached) which outlines the legal complexity and uncertainty around this.

If the bill is passed, local councils will no longer have any statutory responsibility to provide or arrange for the provision of social services. They will have no responsibility to continue to employ social services staff, and if they choose to do so, it will be in the role of a contractor. Care Boards will assume the previous role of councils in arranging for the provision of social services in local areas via procurement.

The impact on the pensions of any local authority staff who transfer (the Financial Memorandum estimates potentially up to 75,000) will depend on who they transfer to – whether that is the NCS/Care Board, or a third sector or private organisation, and the mechanisms used to do this. The complexities of this are explored further in our briefing.

Transfers of council staff - Section 52 Statutory Guidance

The assurances the Minister gives about the pensions of council staff transferred mean next to nothing.

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Section 52 and the associated Statutory Guidance *only relate to contracting by local authorities*. In the NCS, Care Boards will be the contracting body. Councils will have had all statutory responsibility to provide these services removed by the Bill. The scheme envisaged by the bill is not one where local authorities are outsourcing services they are statutorily responsible for ensuring are delivered – but one where responsibility for service provision has been removed from councils, and they will only be providing the services if it is successful in winning contracts from the care board. Indeed Section 41 of the Bill on procurement permits Care Boards to exclude Local Authorities (and Health Boards) from even bidding for contracts to provide services.

Currently, contracting regulations say councils must ensure outsourced staff can keep their existing pension scheme or a broadly comparable one. ***It is not clear at all that Care Boards will be subject to the same duties.*** The Minister says he intends to apply Section 52 duties, but the wording of the Bill in fact leaves this open. There is no guarantee on the face of the bill that pensions will be properly safeguarded in NCS/Care Board contracting.

The same applies to other assurances given about the transfer of staff between local councils and the NCS/Care Boards. The Minister states that “*TUPE/COSOP¹ principles will apply if decisions are made to transfer functions and activities to Care Boards.*” However, the Bill itself (Section 31(4)) makes **no reference** to CoSOP - only TUPE – and no specific guarantee about the pensions provisions within CoSOP, set out in the appendix “Fair Deal for Staff Pensions”.

In other words, there remains a risk that only TUPE protection will be available to staff pensions, and this would devastate them.

NHS Staff Pensions

This disastrous situation is exactly the one the NCS Bill creates for NHS staff who transfer. This is hidden from view, because the Bill appears to exclude the transfer of NHS staff to the NCS. However, that is not what it seems.

Section 31(2) of the NCS Bill excludes the transfer to the NCS of staff employed by an NHS Board (or Special Health Board). However, the Bill permits Ministers to transfer any health function to the NCS. Care Boards will then become responsible for the provision of that health function in line with their procurement strategies.

The Committee should be aware that if an NHS service subsequently transfers, as part of NCS/Care board contracting, then staff who transfer with the service will have to rely on TUPE protection. Staff who are in the NHS Pension Scheme will receive only minimum protection and a much inferior ‘money purchase’ scheme. And if they do not transfer with their service, they may be left as NHS employees but effectively redundant.

The Minister states, “*We are actively considering pension implications...*”

UNISON is aware the Scottish Government have awarded a contract for expert advice on the pensions implications of the bill. However, we believe this contract was awarded several months **after** the Bill was introduced, and the expert advice will not be received until **after** the Stage 1 vote. This is a shabby way to treat a workforce and hardly compliant with the Government’s commitments to equalities or combatting poverty.

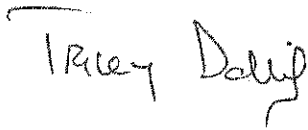
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¹ CoSOP is a UK Cabinet Office Code and covers the transfer of functions *between public authorities*, a context in which TUPE does not apply.

The Minister states his intention is *"to avoid any detriment to staff, including in relation to pensions."* In the absence of any expert advice, a guarantee of 'no detriment' is one the Government cannot make.

In our view it is unacceptable and unethical for MSPs to be asked to vote on the Bill in March without knowing what the implications will be for staff pensions.

Yours sincerely

A handwritten signature in black ink that reads "Tracey Dalling". The signature is written in a cursive style with a horizontal line above the first few letters.

TRACEY DALLING
Regional Secretary, UNISON Scotland

STAFF PENSIONS AND THE NATIONAL CARE SERVICE

Introduction

The creation of the National Care Service (NCS) is a fundamental reorganisation of a service vital to the people of Scotland. In terms of the workforce, over 200,000 workers may be affected¹, contracting arrangements will be changed for third-sector staff, and up to 75,000 may transfer out of local authority employment². This will not only affect employees, but also the £58 billion Local Government Pension Scheme.

UNISON's analysis below identifies significant risks to workforce pensions, employers finances, and pension fund stability resulting from the current proposals.

The importance of a good pension

Good pensions are of huge importance in social care. They are vital to prevent poverty in retirement the dependency on state support for social care workers, who are often only paid the Scottish Living Wage. They are also a key employment benefit for council staff and an aid to recruitment in a sector that has major staffing shortages³.

Staff employed by councils (or the NHS) enjoy a quality "Defined Benefit" pension scheme. But for other employers, the minimum pension requirement is only an inferior "Defined Contribution" scheme with minimal (8%) contributions⁴. This is far less than the level of contributions (25%-plus) needed to avoid poverty in retirement⁵.

The uncertainty for staff pensions created by the NCS

The National Care Service (NCS) Bill is expected to complete its substantive legislative journey around March 2023. Given this, it is concerning that Ministers say "No decisions have been taken about potential transfers of staff and the NCS".⁶ They have said "Thorough consideration will be given to all options regarding pensions". We understand that Ministers are tendering for a 6-month contract to provide expert advice on this issue, but no contract advert or information has appeared in the public domain. This leaves 75,000 staff in limbo about the future of their pensions, and MSPs in the position of considering legislation without knowing what the implications of it will be on staff.

¹ <https://data.sssc.uk.com/images/WDR/WDR2021.pdf>

² www.parliament.scot/-/media/files/legislation/bills/s6-bills/national-care-service-scotland-bill/introduced/financial-memorandum-accessible.pdf

³ www.careinspectorate.com/images/documents/6905/Staff%20vacancies%202021.pdf

⁴ www.thepensionsregulator.gov.uk/en/employers/new-employers/im-an-employer-who-has-to-provide-a-pension/choose-a-pension-scheme/understanding-your-costs/making-contributions-to-your-pension-scheme-

⁵ www.pensionqualitymark.org.uk

⁶ www.parliament.scot/-/media/files/committees/health-social-care-and-sport-committee/correspondence/2022/minister-mwsc-ncs-workforce.pdf

It is not only care workers who face uncertainty. The Scottish Local Government Pension Scheme (LGPS) comprises 11 funds who administer £58 billion of assets from the pensions scheme. A substantial change in current or future pension arrangements could undermine the stability of these funds and potentially impact the Scottish economy, at a time of existing financial uncertainty.

This lack of clarity is a fundamental problem. If the current plans for the NCS are incompatible with securing a good future pension for care workers in a way which safeguards the stability of the pension funds, then it may not be possible to correct this with secondary legislation. The whole NCS Bill may need to be revisited.

Staff transfers and the creation of the NCS

It is currently unclear how council- or NHS-employed staff will transfer to new employers as part of these proposals. This means it is hard to understand if pensions will be properly safeguarded.

Generally, if a service transfers to a new organisation, then staff also transfer under the TUPE regulations⁷. Employment law is a reserved matter, and TUPE applies across the UK.

In strict legal terms, TUPE only applies to “economic entities”, which means “administrative functions of public authorities” can be a grey area. A UK Cabinet Office Code⁸ (“CoSOP”) fills this gap, and requires that the “principles of TUPE should be followed” notwithstanding. CoSOP is not law, was issued after the Scottish Government was inaugurated, and Scottish Ministers do not appear to have adopted it in general. In the case of the NCS, correspondence from Ministers suggests that they intend to apply its principles (though excluding pensions provisions!). Welcome though this assurance is, only an Employment Tribunal can legally determine the status and employer of a worker, and the wording of the NCS Bill⁹ leaves many questions unanswered as to whether it will put these intentions into effect.

The NCS Bill (Section 31(4)) states that TUPE (not CoSOP) will apply to transfers. However simply asserting this in a piece of devolved legislation seems unlikely to guarantee the same interpretation by the courts of a piece of UK legislation. When the Health and Social Care was integrated by the 2014 Act, staff were transferred between councils and health boards by legislation¹⁰, not relying on TUPE.

Section 31(1) of the NCS Bill gives Scottish Ministers the power to “transfer individuals from the employment of the original function holder into the employment of the new function holder” and asserts that TUPE will apply to this. A new ‘function holder’ is not defined in the Bill, nor is it discussed in the explanatory notes¹¹. It is unclear whether this relates to the body which is given the responsibility for a function (a Care Board) or an organisation contracted to deliver services related to that function (for example, a charity, council or an NHS board).

If ‘function holder’ relates to a Care Board, then it appears to cover staff transferring from employment of a Council to a Care Board. This is strange as other documents imply that it is not intended for Care Boards, generally, to employ front-line care staff.

⁷www.legislation.gov.uk/uksi/2006/246/regulation/3/made

⁸www.gov.uk/government/publications/staff-transfers-in-the-public-sector

⁹www.parliament.scot/-/media/files/legislation/bills/s6-bills/national-care-service-scotland-bill/introduced/bill-as-introduced.pdf

¹⁰www.legislation.gov.uk/asp/2014/9/section/21/enacted

¹¹www.parliament.scot/-/media/files/legislation/bills/s6-bills/national-care-service-scotland-bill/introduced/explanatory-notes-accessible.pdf

It is also unclear if all staff supporting those services (policy, strategy, administrative, financial, facilities) can or will be included, and how this will be determined. These staff may, by virtue of law, also transfer under TUPE even if their transfer is not decided by Ministers.

If 'function holder' relates to contractors, then the regulations will need to be enormously detailed to potentially cover every transfer of specific council staff to a specific new contract issues by a Care Board. The same concerns apply regarding support staff.

Section 31(2) of the NCS Bill excludes staff employed by a Health Board (or Special Health Board) from this Ministerial power. However, by law (TUPE), if a service transfers from the NHS to another employer, then the associated workforce will transfer with it. This implies that NHS staff affected by service changes will not benefit from the protections included in the Bill. If their service transfers out of the NHS, they will have to rely on TUPE protection (if it applies). If they do not transfer with their service, they may be left as NHS employees but effectively redundant without any work.

The NCS and pensions of council employees

The impact on the pensions of staff transferring out of local authority employment will depend on who they transfer to, and the mechanism used to do this. As described above, it unclear whether they would transfer to the NCS nationally, a Care Board, or to a third-sector organisation, and if TUPE, CoSOP or some other mechanism will be used.

The extant risk is that only TUPE protection will be available to staff pensions, and this would devastate them.

Ministers have indicated that they may apply CoSOP, and if the "Fair Deal for Staff Pensions"¹² appendix were to also be included then this would give outsourced workers the right to remain in their existing pension scheme. It is deeply concerning that Ministers have specifically avoided giving this commitment, because other protections are far inferior.

If a service, and the associated workers, transfers under TUPE then most terms and conditions of workers are protected at the point of transfer. TUPE itself specifically excludes workplace pensions¹³, however subsequent regulations do provide limited protection¹⁴. Where employees were in a workplace pension, the new employer must match employee contributions into a stakeholder pension scheme up to 6% (or offer an equivalent alternative).

In Scotland, local authorities are covered by overarching guidance on contracting¹⁵, and are expected to ensure transferred out staff retain access to their current pension scheme (usually the LGPS) or a broadly comparable pension scheme. New joiners to the outsourced workforce should be offered the same pension, or one where the employer matched contributions up to 6%. This applies to current care contracts issues by councils, but would not apply in future.

The NCS and pensions of NHS employees

The NCS Bill states that Ministers may not transfer NHS staff by statute. However, the legal imperative of TUPE may mean they are transferred automatically if their service is outsourced.

¹² www.gov.uk/government/publications/fair-deal-guidance

¹³ www.legislation.gov.uk/ukxi/2006/246/regulation/10/made

¹⁴ www.legislation.gov.uk/ukxi/2005/649

¹⁵ www.gov.scot/publications/statutory-guidance-local-authorities-contracting

Should this happen, then staff would have no continuing right to remain members of the NHS pension scheme.

NCS and pensions of third-sector staff

The intention is for the Care Boards to issue contracts for care, instead of local authorities. Currently, council commissioning is governed by legislation¹⁶ and landmark statutory guidance for local authorities sets out how to approach this in the context of “Best Value”. The “Section 52” guidance¹⁷ sets out detailed and specific expectations in contracting, including on pensions, and goes well beyond the general aspirations of “Fair Work”. The NCS Bill includes an “Ethical Commissioning Strategy”, but there is no indication if it will contain similar detailed safeguards on pensions. Therefore, the position of pensions for ex-council and third-sector staff is unclear once the current safeguards are removed.

In relation to pensions, “Section 52” requires (s.5.1 j):

“Transferred employees to a contractor's workforce should have access to the same or broadly comparable pension arrangement to those available to them at transfer.”

In addition, it goes on to say:

“Staff who are recruited for or allocated to that part of the contracted service provider's workforce dealing with the local authority contract(s) will be offered a choice of pensions provision broadly comparable to transferees.”

It also requires, for example, that “changes to the terms and conditions of transferred employees should only be achieved by agreement between employer and trades unions” and “no two-tier workforce situations arise as a result of contracted-out services where staff transfer.” It's principles “emphasise the need for effective communication and consultation between local authorities and the relevant trades unions when considering prospective changes of service provider” and “make clear the expectation ... to demonstrate a constructive approach to employee relations, including the involvement of appropriate trades unions”.

To re-emphasise, beyond warm words, there is no information on what specific requirements Care Boards will have to abide by in their future commissioning.

NCS staff

The Financial Memorandum to the NCS Bill estimates that 500-700 staff will be required to run the NCS (in the civil service, National Social Work Agency, and Care Boards) after it has been established, and many of these will initially be involved in its establishment. Some may transfer in from local authorities, by Ministerial decision or TUPE. It is unclear what the conditions of employment will be. Part 6 of Schedule 2 gives Care Boards the power to employ staff, “appointed on such terms and conditions as the Scottish Ministers determine”, including their pensions. However, there is no information regarding what this provision will be.

¹⁶www.legislation.gov.uk/asp/2003/1/section/52

¹⁷ www.gov.scot/publications/statutory-guidance-local-authorities-contracting/

Potential impact of NCS pension proposals on financial stability

Most of the focus so far has been on the impact on workers, but unless watertight pension security is assured for current and future care staff, then the £58 billion LGPS funds and the whole of Scottish local government finance could be destabilised.

To give an indication of the scale of this, the Scottish LGPS has 251,356 active members¹⁸ - most council staff are in the LGPS. If 75,000 members were withdrawn this represents 30% of the contributing membership.

This issue does not merely affect 75,000 staff who may transfer as part of the NCS establishment. Some third-sector care staff are in the LGPS as well, and many more may transfer to the sector. Third-sector organisations have been at the forefront of seeking more flexibility to exit the LGPS – known as “cessation” – to cut their staffing costs. The LGPS regulations were amended as recently as June 2022 to make it easier for care employers to leave the LGPS, and ongoing cost pressures are likely to mean these employers will continue to seek to leave the LGPS.

The latest information on the social care sector is that 47% of care services have got vacancies¹⁹ and only 75.5% of workers have been in post for a year or more.²⁰ Even if existing social care workers can stay in the LGPS, if new starters in third-sector employers are not encouraged to join (or the LGPS used as the “auto-enrolment” pension scheme) then it will not be long before there is a major drop in LGPS pension scheme membership, and consequential financial impacts on the funds.

Pension Funds plan their finances over decades, and a major upheaval would trigger a review of actuarial investment assumptions. This would have an unpredictable impact on contribution rates from both employers and employees, and on investment strategies.

HM Treasury rules²¹ also require public sector pension schemes (including the LGPS and NHSPS) to become more or less generous depending on the cost of employee benefits. There is a risk that the “cost collar” of the scheme may be breached, leading to substantial changes in scheme benefits and contribution rates. The recent “McCloud/Sargeant” case²² also highlighted the impact that financial uncertainty can have on funds.

There are additional risks to employers, and potentially the Scottish Government, depending on the strategy used in relation to deficits in the pension funds. When staff transferred as part of previous Health and Social Care Integration (see appendix A), the pensions debt did not transfer to the new employer. This resulted in the previous employer (Highland Council) retaining multi-million pound liabilities after the related staff had transferred. In any other staff transfer, the related debt liability would transfer along with the staff. In addition, the Scottish Government covers the LGPS pension payments for these staff now employed by NHS Highland.

The NCS represents a substantially greater movement of staff than in the Highland case. If staff are transferred out of local authorities and but any liability for past pensions remains with the councils, then their financial position will be significantly worsened. If the liability transfers with the staff (as appears to be the case in the NCS Bill), then Care Boards will be immediately saddled

¹⁸ <https://lgpsab.scot/annual-report-20-21>

¹⁹ www.careinspectorate.com/images/documents/6905/Staff%20vacancies%202021.pdf

²⁰ <https://data.sssc.uk.com/images/WDR/WDR2021.pdf>

²¹ <https://researchbriefings.files.parliament.uk/documents/SN06971/SN06971.pdf>

²² www.judiciary.uk/wp-content/uploads/2018/12/lord-chancellor-v-mcloud-and-ors-judgment.pdf

with major debts. It is unclear what this will mean for their financial solvency. For staff who are outsourced to the third sector, this debt will follow to these providers.

Point 28 of the NCS Finance Memorandum says that “it is assumed the transfer of services itself has no effect”. This is an unsafe assumption in terms of the Local Government Pension Scheme. Each employer in a pension fund will typically have their pension contribution rate actuarially calculated on a triennial basis. The Financial Memorandum to the NCS Bill estimates that this will be 20.9% for NCS staff. However, no analysis is provided for this. Perhaps more significantly, care contracts will be let to third sector providers which may have a poorer financial risk profile to councils, which are backed by the state. The workforce profile is likely to be different as well. These and other factors may significantly affect the level of employer pension contributions that these organisations have to make.

For further information please contact

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Appendix A

Experience of staff transfers in Highland

When Health and Social Care Integration was introduced in the mid-2010s, areas had the options of adopting a “Body Corporate” model (delegating powers to an Integrated Joint Board – “IJB”) or a “Lead Agency” model, where the Health Board and Local Authority delegate functions between each other. 31 Local Authorities adopted the “IJB” approach, and Highland went for the “Lead Agency” model.

Under the “IJB” approach, staff retained their current employer and new staff were usually recruited on the prevailing terms and conditions of their service, or sometimes given an option of NHS or Local Government terms and conditions. There were no significant issues regarding pensions.

However, the “Lead Agency” approach has been much more complex, and raises questions for a National Care Service model. The legislation was clear that no existing deficit in the pension scheme would transfer to a new employer, even if staff did²³.

In Highland, about 1,400 staff who worked in adult social care (home carers etc) were transferred from Highland Council to NHS Highland, and 200 staff (occupational therapists, community nurses etc) who worked in childrens’ social care were transferred the other way. They were transferred by regulation, not TUPE.

Council staff who transferred to the NHS could remain in the Local Government Pension Scheme (LGPS) by virtue of NHS Highland becoming an “admitted body” to the Highland (LGPS) Pension Fund. NHS Staff who transferred from the NHS to Highland Council could remain in the NHS Pension Scheme (NHSPS) by virtue of the council becoming a “Directions Body”. Both employers and employees contributions vary according to the scheme which members are part of. Around 5% of members of the in the Highland (LGPS) Pension Fund are employed by NHS Highland.

New starters were recruited on the new employers standard terms and conditions (including pensions), but (unusually) starters with current membership of the NHSPS or LGPS are permitted

²³ www.legislation.gov.uk/asp/2014/9/section/21/enacted

to retain it. Overall, this two-tier workforce is reportedly complex and raises equal pay and other concerns.

The NHSPS is an 'unfunded' pension scheme, meaning that pension contributions are paid to the state, and the state pays pensions from general taxation. The LGPS is a 'funded' scheme, meaning that pension contributions are retained and invested, and pensions are paid by this fund. The LGPS is split into 11 funds across Scotland.

NHS Highland pays employer contributions for staff in the LGPS as part of their normal operating costs. However, as a funded scheme the value of the assets of the LGPS ("Highland Pension Fund") fluctuates. These are assessed by actuarial valuations, but can be over £10m a year, having a significant effect on an employer's balance sheet.

At the point of transfer (2012), Highland Council took on the whole past deficit (£20.217m) relating to staff who transferred to NHS Highland. Under a normal outsourcing, this liability would have transferred with the staff. Therefore, this represents an additional debt that the council has taken on, without the 'assets' (the workers) whose contributions might otherwise have helped pay it off.

In addition, NHS Highland accounts refer to a steadily accumulating 'realised deficit' relating to LGPS payments for its staff, which is "covered by funding from Scottish government". This is now (from Accounts 2021/22) £37.395m after 8 years. The accounting practices used by NHS Highland for reporting their LGPS pension asset / debt have been adjusted after external audit review²⁴.

NHS Highland currently has an asset of £4.756 million, reflecting the current net actuarial valuation of its nominal assets in the fund. However, this varies (as do the value of investments) and has previously been a substantial deficit.

²⁴ www.audit-scotland.gov.uk/uploads/docs/report/2020/aar_1920_nhs_highland.pdf